DeLeo announces bold court reform plan

BY BILL ARCHAMBEAULT

House Speaker Robert A. DeLeo wants to transform the management of the state’s courts by hiring a professional business administrator — not a judge — to handle all of its business aspects.

DeLeo announced his plan at a Boston Chamber of Commerce forum on March 15, where he also stated his preference to keep the scandal-ridden Probation Department under the authority of the courts. Gov. Deval Patrick wants to place it under executive branch control.

“After having spoken with [Supreme Judicial Court Chief] Justice [Roderick L.] Ireland and others … I believe that the functions of Probation are properly within the judiciary and so, should remain there. As the Harshbarger Report found, ‘Probation officers act as trusted advisors to the judge … helping to design and impose probationary conditions that are most likely to help the offender avoid both incarceration and re-offense.’ This makes sense to me.”

DeLeo’s speech also addressed municipal employee health.

A look ahead toward ABA lobbying event in D.C.

Later this month, I look forward to returning to Washington, D.C., to participate in the American Bar Association’s Lobby Day. This year, I am especially honored to represent the commonwealth as the MBA president in the many congressional meetings that take place over this three-day event.

SJC’s Judge Gants leads crowd at annual Walk to the Hill

BY CHRISTINA P. O’NEILL

Supreme Judicial Court Associate Justice Ralph D. Gants joined more than 500 people in calling for adequate legal aid funding at the Walk to the Hill for Civil Legal Aid on Feb. 22 at the Statehouse’s Great Hall of Flags.

The annual event calls on legislators to provide justice for all. Advocates have been encouraged by Gov. Deval Patrick’s decision, in the midst of ongoing economic difficulties, to recommend level funding of $9.5 million for Massachusetts Legal Assistance Corporation.

The aftermath of the state’s Probation Department patronage scandal has fueled debate over which branch of government should manage the troubled agency. On Feb. 17, members of the judicial, legislative and executive branches discussed that issue in front of an overflow crowd at Suffolk University Law School.

“A New Path for Probation” drew more than 175 attendees to the Boston law school, with people lining the walls to listen in on the discussion. The event was presented by MassINC, the publisher of Commonwealth magazine, sponsored by the Massachusetts Bar Association and hosted by Suffolk University Law School’s Rappaport Center for Law and Public Service.

The panel, which was

A Q&A with Ron Corbett, Probation commissioner

BY TRICIA M. OLIVER

Ronald P. Corbett Jr., Ed.D., is matter-of-factly looking beyond the troubles of the Massachusetts Probation Department to restore its former practices, when the department was nationally recognized as an innovative leader. No stranger to the legal community or state government, commissioner Corbett is swiftly applying his management know-how to get the fraud-riddled department back on track in the interest of public safety.

Corbett, a former deputy commissioner of the department in the 1990s, was named interim commissioner to serve a two-year term, in January. This transition involved a move from serving as executive director of the Supreme Judicial Court — a position he held since 1998, when he lost the bid for commissioner to John F.

A discussion about best practices, moving past the hiring scandal and who should oversee the agency
Continued from page 1

and MBA Legislative Activities Manager Lee Constantine, who serves as the state captain for the Massachusetts ABA delegation.

This event enforces the theory of strength in numbers. To be joined by bar leaders throughout the country the lobbying the nation’s lawmakers on issues of keen importance to the citizens of the country all at one time is awe inspiring. In past years, we’ve made headway on critical pieces of legislation.

For example, most recently, through our work with the ABA, we were successful in lobbying to not have the Red Flags Rule apply to the legal profession. This year, the Massachusetts delegates and I will address Legal Services Corporation funding, federal judicial vacancies and state court funding throughout our meetings with congressional leaders.

While the ABA continues to fight for funding LSC at $420 million, this is a very difficult budget cycle. It remains to be seen whether Congress will vote for level LSC funding. During our visit, we will remind Senators Kerry and Brown of the critical funding consequences should this level of funding not be granted. Our lobbying efforts will be consistent with written testimony submitted to the Committee on Appropriations’ Subcommittee on Commerce, Justice, Science and Related Agencies by ABA President Stephen N. Zack in mid-March.

Meanwhile, the mounting vacancies on the judicial bench become increasingly worrying. According to a Feb. 7, 2011, Washington Post article, “Since Obama took office, federal judicial vacancies have risen steadily as dozens of judges have left without being replaced by the president’s nominees.” Experts blame Republican delaying tactics, slow White House nominations and a dysfunctional Senate confirmation system.

As reported in the Feb. 7 Post, “There are now 101 vacancies among the nation’s 857 district and circuit judgeships, with 46 classified as judicial emergencies in which courts are struggling to keep up with the workload. At least 15 more vacancies are expected this year, according to the administrative office of the U.S. Courts. When Obama took office in 2009, 54 judgments were open.”

And, as always, the ABA will have much to share with those on Capitol Hill regarding the dire impact the lack of adequate state court funding is having on citizens of the commonwealth. We will echo the sentiments that we have consistently shared with our legislators on Beacon Hill with our congressional leaders on Capitol Hill.

I look forward to not only offering the Massachusetts legal community’s viewpoint on these important topics, but for the opportunity to thank our congressional leaders for their support and advocacy on these important topics and others over the past year and into the future.

CORRECTION: In the President’s View in the March issue, Land Court Chief Justice Karyn F. Scheier, was inadvertently omitted from the list of the Trial Court’s women chief justices.

Volunteers needed to offer legal advice to veterans

Veterans and their families will have access to free legal advice on April 27 as part of the Massachusetts Bar Association’s Dial-A-Lawyer program. Veterans and their families can call the program from 5:30 to 7:30 p.m. to discuss legal issues they have, such as access to benefits, family issues, employment concerns and landlord/tenant matters.

The program is provided at no charge as a public service of the MBA. Attorneys participating in the Veterans Dial-A-Lawyer program are either past participants of the other three veteran-specific Dial-A-Lawyer programs or past participants of the monthly Dial-A-Lawyer program, which takes place on the first Wednesday of every month. To volunteer for this or future programs, call (617) 338-0556 or e-mail LRS@MassBar.org.

This program is offered as a public service of the Massachusetts Bar Association with the financial support of the Massachusetts Bar Foundation. The MBA acknowledges its partnership with the Massachusetts Department of Veterans’ Services and thanks it for its important role in the success of the program.

MBA now accepting nominations for ABA delegate positions

The American Bar Association Nominating Committee, which is chaired by MBA Past President Kay H. Hodge, is accepting resumes of those interested in serving as Massachusetts Bar Association representatives to the ABA House of Delegates.

The terms of three MBA representatives to the ABA House of Delegates will expire in August. Candidates must be a member in good standing with both the MBA and ABA and submit their letter of interest and current resume to MBA Executive Director Gwen Landford at GLandford@MassBar.org. by April 22, 2011.

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Speaking truth to power

By Richard P. Campbell

Lawyer John Adams was a descendant of zealously religious Puritans who fled England in order "to establish a refuge for godliness, a city upon a hill." Adams reportedly looked upon his ancestors as "bearers of freedom" and the cause of freedom as having a "holy urgency." Adams taught us that "fear is the foundation of most governments" and that "liberty cannot be preserved without general knowledge among the people."

With common knowledge of the truth about their circumstances, the people would overcome fear of a hostile government. Adams wrote: "The Revolution was effected before the war commenced. The Revolution was in the minds and hearts of the people; a change in their religious sentiments, of their duties and obligations … This radical change in the principles, opinions, sentiments, and affections of the people was the real … Revolution." In the Middle East today, the ubiquitous "revolution" began in the hearts and minds of these predominantly religious people as their views, sentiments and affections melded together in search of freedom and equity. Long-serving despots in the Middle East, fairly described as "country owners," literally converted to their own account the natural resources and finances of the state. Their citizens were reduced to subservience, living day to day without safety, security or predictability in their personal and commercial dealings. Safety, security and predictability are, of course, the hallmarks of the rule of law. These country owners make their populations cower through fear and brutality and hold on to power by keeping them ignorant of the truth. But, modern technology in the form of handheld cellular telephones, Internet connectivity and social networks brought truth to ordinary citizens, opening the floodgates of knowledge. While Adams might credit Facebook and Twitter with facilitating the distribution of knowledge, he would also hold up the lawyers of the Middle Eastern countries as soldiers of freedom. Lawyers armed only with conviction in the righteousness of their cause for individual rights and justice placed themselves in harm's way in Egypt, Tunisia, Libya and Bahrain. The images coming from the Middle East speak volumes about the courage of our professional colleagues. On Feb. 11, 2011, lawyers dressed in their formal black robes marched on Cairo's Presidential Abdeen Palace to "symbolically cordon the president" according to lawyer Mostafa Hamdy. Lawyer Abdel-Qawy Ashmawy told the Daily News Egypt that he protested because he wanted "a state of law and constitution." Ashmawy complained that the government "ignored the orders and verdicts of the Supreme Administrative Court and the Supreme … Revolution."
Supporters packed the Statehouse’s Hall of Flags to listen to speakers at this year’s walk to the Hill for Civil Legal Aid.

By April 15, comments should be directed to: The Standing Advisory Committee on the Rules of Criminal Procedure, c/o Senior Attorney Barbara Berenson, Supreme Judicial Court, John Adams Courthouse, One Pemberton Square, Boston, MA 02108. Or e-mail Barbara Berenson at barbara.berenson@sjc.state.ma.us.

Go to www.Mass.gov/Courts/SJC/Comment-crimproc-R7-041511.html to review the Standing Advisory Committee’s report and dissenting statements.

SJC seeks comments on proposed amendments to Rules of Civil Procedure

The Judicial Nominating Committee seeks applications for two positions: one at the Appeals Court and one at the Land Court. The application deadline for the Appeals Court vacancy is Friday, April 15, and the application deadline for the Land Court vacancy is Friday, April 8.

For more information, go to www.mass.gov, click on Gov. Deval Patrick’s icon on the top left, then click on the Judicial Nominating Commission item under “Our Team” on the left.

The Supreme Judicial Court’s Standing Advisory Committee on the Rules of Criminal Procedure invites comments on proposed amendments dealing with discovery of electronically stored information. The committee solicits and welcomes comments from the bar prior to presenting its recommendation to the SJC’s Rules Committee.

By May 13, comments should be directed to: Christine Burak, Supreme Judicial Court, John Adams Courthouse, One Pemberton Square, Boston, MA 02108, or e-mail Burak at Christine.Burak@SJC.state.ma.us.


SJC issues annual report for fiscal 2010

Supreme Judicial Court Chief Justice Roderick L. Ireland has forwarded the Fiscal Year 2010 Annual Report on the state of the Massachusetts Court System to Gov. Deval Patrick, Senate President Theres e Murray and House Speaker Robert A. DeLeo, pursuant to G.L. ch. 211B, § 9.

“My colleagues across the Massachusetts court system have achieved an impressive array of accomplishments amid these challenging times,” Ireland noted in his transmittal letter. “I am very proud of their achievements, which are highlighted in this report.”

Chief Justice for Administration & Management Robert A. Mulligan said, “On behalf of the departmental chief justices, I extend our highest regard and appreciation for the dedication of judges, clerks, probation and other court staff to ensure the delivery of justice across the state. The annual report summarizes many noteworthy accomplishments that reflect significant personal and professional commitment in very difficult circumstances.”


To review Massachusetts court guidelines and reports, go to www.mass.gov/courts.

An attorney from MLAC has so far kept them in the home. Along the way, their mortgage lender went bankrupt and they had to re-file loan modification papers a second time. The family’s economic situation has improved considerably, but they now await federal help.

“When we needed help, the federal government was there for us,” said Robert Sable, executive director of Greater Boston Legal Services and a member of the Walk to the Hill committee. “We’re proud to support the Walk to the Hill because it’s a unique event that brings together people from all walks of life to advocate for justice.”

Visit the website of the Walk to the Hill to learn more about how to get involved.

Massachusetts Legislature Journal | April 2011
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‘A New Path for Probation’ forum discusses options

PROBATION
Continued from page 1

moderated by Commonwealth Publisher Greg Torres, featured:
- Chief Justice for Administration and Management Robert A. Mulligan
- Massachusetts Public Safety Secretary Mary Beth Heffernan
- Sen. Cynthia Stone Creem, co-chair of the Joint Committee on the Judiciary and a member of the Probation Reform Working Group; and
- John Larivee, CEO of Community Resources for Justice.

A number of judges, legislators, officials and representatives of the legal community also sat in the audience.

MBA President Denise Squillante, in her introductory remarks, noted that “The MBA supports the preservation of the Probation Dept. as a part of the judiciary.”

Former Massachusetts Attorney General L. Scott Harshbarger, who chairs the SJC’s Task Force on Hiring in the Judicial Branch, was unable to attend but provided a video in which he lamented that the once-proud department had deliberately become “a fundamentally corrupt agency.”

Mulligan argued that the judiciary should continue to oversee the agency, noting that veteran court officer Ronald Corbett Jr. has achieved “extraordinary” results since being appointed acting commissioner. “It’s a new day in Probation,” Mulligan said.

Heffernan also praised Corbett’s leadership, but argued that Gov. Deval Patrick’s plans to bring the Probation Department under the authority of the executive branch would improve public safety, provide better oversight and transparency and save money. She noted that Patrick had developed his proposal years ago, before the agency’s problems became public.

“It’s a disgrace that we didn’t even know how many people were on probation,” she said.

Larivee noted that other states have successful probation departments regardless of whether they’re run by the judiciary or the executive branch. “The argument about where it ought to be ought to come last,” he said, adding that the priority should be deciding what kind of agency it should be. “It can work in either location, but it depends on how it’s run.”

Creem said she was not speaking for the Legislature, but noted that putting both agencies under the same authority raises other concerns, alluding to the recent dismissal of several Parole Board members over a controversial decision.

“We’ve got a lot of problems in both departments that we’ve got to look at, and in the criminal justice system as a whole,” she said.

Video highlights of the forum can be found at www.MassInc.org/Events/2011/02/A-New-Path-for-Probation.aspx.

SJC issues statement outlining action steps on Probation Dept.

The Supreme Judicial Court issued a statement on Feb. 24 outlining the actions to be taken by the Trial Court regarding the hiring and promotion practices of the Massachusetts Probation Department.

The justices reviewed the comprehensive reports on the hiring and promotion practices of the Probation Department recently issued by the SJC’s task force under attorney Scott Harshbarger’s leadership and by the executive and legislative branches’ Probation Reform Working Group.

They noted the two groups agree in large part on measures that will “ensure a fair system with transparent procedures in which the qualifications of an applicant are the sole criterion in hiring and promotion” in the Probation Department, and the justices “fully embrace and support these recommendations.”

Visit www.mass.gov/courts/ to read the SJC’s full statement.

PROBATION
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Experts & Resources

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FOR THE ISSUES OF LIFE IN LAW

continued on page 13
By Tricia M. Oliver

Top 100 Individuals who have influenced the Law Office of Eneida Román in Boston, was recently honored with a “Top Lawyers Under Forty” Award by the Hispanic National Bar Association. The award recognizes HNBA members under 40 who have distinguished themselves as young Hispanic lawyers in the upper echelon of the legal profession nationwide.

HNBA honored Román and four other national recipients at its Mid-Year Conference on March 12 in New Orleans. Her practice is focused in the areas of immigration, family, real estate, business law, and alternative dispute resolution. Román serves on the Family Law Section Council and its Education Sub Committee. She serves on the Family Law Section Committee to better level the playing field for all participating attorneys in the group. As well, she is a founding member of the Workers’ Injury Law & Advocacy Group, as well as other occupational safety professionals to analyze and make recommendations to advance safety in workplaces pending before the Joint Committee on Labor, Health and Workforce Development.

The Massachusetts Bar Association recently presented three attorneys with the MBA Centennial Award, an honor created to recognize outstanding individuals who have influenced the Hispanic community in Massachusetts.

Walter A. Costello, Boston Attorney Letitia Davis, Sc.D., ed.M. (Dr.) Zimmerman, and Jennifer Comer, executive Director of Peabody & Arnold LLP, were honored with the Centennial Awards.

Costello is a past president of the Essex County Bar Association and currently serves on MATA’s and Essex County Bar Association’s boards of directors.

Kazarosian was a longtime Haverhill attorney who established the “law-free lunch” for local school teachers in the 1960s and successfully fought an injunction that caused a two-year suspension of the construction of Merrimack Valley Hospital. He served as a commissioner of the Massachusetts Heart Association and the Friends of the Haverhill Public Library, was director of the Northern Essex County Association for Retarded Citizens, and a member of the Armenian, Haverhill, Massachusetts and Essex County bar associations and the Massachusetts Academy of Trial Attorneys. He served in the U.S. Army during World War II.

Murphy practices employment law at Rubin and Rudnick LLP where he counsels businesses, drafts employment agreements and litigates employment claims. An active MBA member, Murphy currently sits on the MBA Executive Management Board, House of Delegates and the Social Media Policy Sub-Committee, among other groups. Murphy is also a member of the Women’s Bar Association of Massachusetts and serves on the Finance Commission for the Town of Westwood.

The awards will continue to be given throughout 2011 to persons of extraordinary achievement who materially advanced the rule of law, enhanced the integrity of lawyers, judges or the legal profession, engaged or is engaging in important legal scholarship, or protected the democratic principles upon which our country is founded.

Ingle named Marlborough Chamber’s Business Person of the Year

Attorney Tracey A. L. Ingle, of Ingle PC in Southborough, was honored as the 2010 Business Person of the Year by the Marlborough Regional Chamber of Commerce (MRCC) at its Annual Business Awards Dinner on March 3.

Ingle was commended for high business standards, active participation and support of charitable programs, dedication to improving the quality of life in the greater Marlborough area.

MBF welcomes new fellows

The Massachusetts Bar Foundation’s Society of Fellows comprises individual attorneys and judges from across the state who support the delivery of legal aid programs to the poor in Massachusetts. The MBF was pleased to welcome the following individuals to its Society of Fellows during the past year.

LOUIS D. BRANDEIS FELLOWS

- William M. Cowan, Esq., Office of the Governor
- Monica Pastorik, Esq., Law Office of Monica Pastorik
- Jeffrey D. Woolf, Esq., Board of Bar Overseers

FOUNDATION FELLOWS

- Kevin G. Diamond, Esq., Stone & Diamond LLP
- Hon. Judith Faber, Retired, Massachusetts Superior Court
- Robert T. Gill, Esq., Peabody & Arnold LLP
- George L. Goodridge III, Esq., Curran, Camp, Gates Gruvin & Goodridge LLP
- Marguerite T. Grant, Esq., Milford County District Attorney’s Office
- Calvin J. Heinle, Esq., Todd & Weld LLP
- Kimberly A. Hogan, Esq., Halstead & Associates
- Robert L. Holloway Jr., Esq., MacLean, Dolan, Doherty, Adell & Morse
- Dennis M. Lindgren, Esq., Pierce & Mandell PC
- Thomas O. Mioriarty, Esq., Marcus, Erico, Emper & Brooks PC
- Gail P. O’li, Esq., O’li & Associates PC
- Edmund Polubinski Jr., Esq., Peabody & Arnold LLP

MBF announces Law Firm & Corporate Partners Program

The Massachusetts Bar Foundation has launched the Law Firm & Corporate Partners Program, which comprises Massachusetts law firms and corporations that give back to the community by supporting the charitable efforts of the MBF. The MBF is proud to announce its charter program partners.

SILVER PARTNERS
- Davis, Malm & D’Agostine PC
- LeClair Ryan

BRONZE PARTNERS
- Cosgrove, Eisenberg & Kiley PC
- Legal Talk Network
- Massachusetts Bar Association

MBF welcomes new fellows

- Philip B. Rachlin, Esq., Legal Assistance Corp. of Central Massachusetts
- Rosanna Sattler, Esq., Posterman, Blankstein & Lund LLP
- Paige Scott Reed, Esq., Price Liver, Glancy & Ty LLP
- Kevin Sullivan Jr., Esq., WilmerHale
- Walter B. Sullivan, Esq., Sullivan & Sullivan PC

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BRONZE PARTNERS
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- Massachusetts Bar Association
An informal bench-bar panel discussion featuring many of the state’s top judges will be a highlight of this year’s Centennial Conference.

The panel, “Hail to the Chiefs,” will address important bench-bar topics and serve as the wrap-up to the first day of conference programming at the Boston Sheraton Hotel on May 18. From 6 to 8 p.m., attendees will have an opportunity to interact with distinguished members of the bench-bar panel, including:

- Associate Justice Ralph D. Gants, Supreme Judicial Court
- Chief Justice Lynda M. Connolly, District Court
- Chief Justice Michael F. Edgerton, Juvenile Court
- Chief Justice Charles R. Johnson, Boston Municipal Court
- Chief Justice Steven D. Pierce, Probate and Family Court
- Chief Justice Philip Rapoza, Superior Court
- Chief Justice Barbara J. Rouse, Superior Court
- Chief Justice Karyn F. Scheier, Land Court.

The following Q&A provides highlights from interviews with Probation Department spokespeople.

### CORBETT Q&A

Continued from page 1

O’Brien, around whom the department’s record of success was built, explained his role with Probation, the Harvard-educated Corbett has taught at University of Massachusetts Lowell since 1979 and is currently an adjunct professor in the Department of Criminal Justice there.

Corbett served as a guest speaker at the February meeting of the MBA’s Criminal Justice Section Council only weeks after being named commissioner. Following that meeting, he sat down with MBA Director of Media and Communications Tricia M. Oliver to provide further insight. The following Q&A provides highlights from my interview.

**LAWYERS JOURNAL:** What does it feel like to return and now lead a department that is very different from the time you left?

**CORBETT:** It’s a homecoming of sorts. During my previous 26 years at the Probation Department, I developed a strong bond with the department and its folks. About 70 percent of the staff are the same, so I am in familiar territory. I previously served as deputy commissioner, so I am used to many of the administrative issues. The difference is that, now, as commissioner, the buck stops with me. If you are the agency head, it falls to you to make the complex calls, the tough ones. I’m also getting used to the new duty of acting as spokesperson.

**LAWYERS JOURNAL:** When you were part of the department initially, it was heralded as a national model. What were the components or characteristics that provided that stellar reputation?

**CORBETT:** There was a big push in the 1990s for community-based supervision and participation with clergy, police and others. Projects such as our “Operation Night Light” were recognized nationally. Officers who were doing the work were great innovators. We were developing a new model for phonetreatment in which branch of government the Probation Department resides?

**CORBETT:** I strongly believe that, in Massachusetts, it should be in the judicial branch. Beyond that, the most important piece is, “How do you look after the offender?” You can look across the nation and see success in both branches [executive and judiciary] — the key variance is how the department is administered and led.

**LAWYERS JOURNAL:** Would the close collaboration exist between probation officers and judges if the department were to move to the executive branch?

**CORBETT:** I don’t think that close collaboration is likely to survive such a move. We gain a lot by having all the members of the courthouse team working for the same entity.

**LAWYERS JOURNAL:** You’ve said those who are cut out to serve as probation officers should ideally have a strong mind and big heart. Why is that combination so important in probation?

**CORBETT:** When I was asked at a meeting of probation officers, “Are we supposed to be cops or social workers?” I answered with another question — “How many of you are parents to teenagers?” I asked those that raised their hands, “Would you say you were a cop or social worker?” One of those that raised his hand said, “At different times, I was both.” Bingo — the combination of both is necessary. Probation officers need to set and enforce clear boundaries (that is, they must be strong-minded) but also need to promote rehabilitation and connect offenders with the services they need to make life changes (that is, they must be big-hearted). One-handed probation doesn’t work. We are not the police, but we have a strong law enforcement responsibility. Most Americans are willing to give offenders a break if they warrant it, but most are not willing to give them a free ride. We purchase the moral authority to do treatment in the currency of enforcement and strict accountability. If we do not meet our enforcement responsibilities, we lose credibility on the treatment piece.

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MBA members can earn up to a 7.5 percent premium credit on Massachusetts professional liability insurance offered by CNA through the MBA Insurance Agency. You can earn a 5 percent premium credit by attending the Building a Solid Foundation: Managing Practice Risk session plus one other Substantive Law Track session. If more than one-third of your firm’s attorneys attend, you can earn up to a 7.5 percent premium credit.

This offer is valid for new and renewed lawyers’ professional liability insurance policies, effective dates from Aug. 1, 2011, to July 31, 2012. This offer may not be combined with any other malpractice prevention/CLE premium credits.

### VIEWPOINT

Continued from page 3

Constitutional Court regarding elections.

In Libya, the protests began when government authorities arrested Fathi Terbl, a human rights lawyer, outside the Benghazi courthouse on Feb. 15, 2011. The top floor of that same courthouse later became the center of the opposition movement. Indeed, when freed, Terbl operated a live, online stream he called Free Libya Radio from the roof of the courthouse.

In Tripoli, some 200 lawyers and jurists staged a sit-in at the courthouse, surrounded by armed security forces. Libya’s justice minister resigned in protest over the use of excessive force against demonstrators. And lawyer Amal Baga- gis told the Guardian: “We started just as lawyers looking for our rights and now we are revolutionaries. And we don’t know how to manage. We want to have our own face. For 42 years we have this kind of barbarism. We now want to live.”

Adams, relying on religious tenets, spoke to the principle of just insurrection. Lawyers in the Middle East, also relying on their religious beliefs, likely would agree.

Here, in lawyer Adams’s commonwealth, we admire our colleagues in the Middle East for their courage to speak truth to power and for their demand for freedom and the rule of law.

Richard P. Campbell is president of the Massachusetts Bar Association and the managing partner of Campbell, Edwards & Carew PC.

• At 13.
• John Adams, Thoughts on Government, 1776.
• www.thedailynewsegypt.com/egypt/thousands-of-lawyers-join-protests-in-support-of-detained-activists.4
• www.gardian.co.uk/uk/2011/05/06/million-babylonian-jewel-claimed-gold.
• citing to New Jonathan Mabry, A Discourse Concerning Un- limited Submission Against Resistance To The Higher Powers, Jan. 30, 1750.
Presidential profiles:

In 1960s, MBA presidents launch lasting changes

The 1960s was, in many ways, a transformative decade, not just for the Massachusetts Bar Association, but for the legal profession in Massachusetts. Some of the initiatives from nearly a half-century ago include: the expanded availability of continuing education; greater legal input in the legislative process; policing of the profession; and the creation of the Massachusetts Bar Foundation.

Massachusetts Bar Association President Gerald P. Walsh (1959-60) set the stage by suggesting the MBA create a newsletter and expand the organization’s annual continuing legal education program to a year-round, statewide effort. He would not see his plans come to fruition, however, he died shortly after stepping down in 1960 due to illness.

Harold Horvitz (1960-62) started to put Walsh’s ideas into effect in 1960, including starting the monthly MBA Newsletter, which would later become Lawyers Journal.

Walsh’s intention to improve continuing education, which the MBA started offering at its 1942 Annual Meeting — was followed through by presidents Horvitz and Laurence H. Lougee (1962-63). Richard Milinsek, who had previously introduced CLE at Hampden County, was hired to run the MBA’s program, and by the fall of 1962, programs were offered in New Bedford, Pittsfield, Springfield and Worcester.

Horvitz would also, along with Committee on Legislation Chairman Livingston Hall, convince the Board of Delegates on Sept. 20, 1960, to hire a “legislative agent” to keep the MBA apprised of the Legislature’s activity as it happened, rather than simply weigh in after legislation was passed.

After Hall became president (1963-64), he helped create the Massachusetts Bar Foundation in the spring of 1965, modeling it on the American Bar Foundation. He also oversaw the launch of the Young Lawyers Section, for attorneys under 36, following the introduction of the Junior Bar.

Hall’s term was capped, at the June 1964 Annual Meeting, with another breakthrough: the creation of the Clients’ Security Fund, which provided compensation to the victims of dishonest lawyers, duties now handled by the state’s Clients’ Security Board. (The fund was set in motion by Horvitz in 1961, when he appointed Pittsfield attorney Lincoln S. Cain to investigate whether it would be viable.)

President Walter H. McLoughlin Sr. (1964-66) eventually succeeded in convincing the Supreme Judicial Court chief justice to allow depositions to be used as a discovery tool in litigation, a position that had been advocated by the MBA’s Committee on Administration of Justice in 1962.

McLoughlin, who had been involved in many of the MBA’s initiatives before becoming president in 1964, also advocated the purchase of a permanent headquarters for the MBA two decades before it would find its permanent home at 20 West St. in Boston.

One of McLoughlin’s other major efforts was the unification of the bar after decades of discussion. The debate over mandating membership in the state bar association, with annual dues, would not be settled until 1974, when the SJC settled on a compromise that created the Board of Bar Overseers.

CENTENNIAL TIMELINE: 1960s

1960: Harold Horvitz is elected president of the MBA.
1962: Laurence H. Lougee is elected president of the MBA.
1963: For the first time, through the coordinated dissemination of materials through a network of local associations, cohesive continuing legal education is available to every member of the bar.
1963: With an expanded committee base and a greater number of active members, the MBA is able to address issues it was less than successful in just a few years prior, including the administration of justice, which would become the dominant and defining vision of the association through the mid-1960s.
1963: Livingston Hall, professor at Harvard Law School, is elected president of the MBA.
1963: In December, the Young Lawyers Section is formed to develop the young leadership of the association and assist bar members under the age of 36 gain experience and network.
1964: At the annual meeting in June, the association votes to establish a client security fund, providing compensation to clients for monetary losses caused by dishonest acts of members of the bar in the first bar association in the country to do so, and leads to the creation of the state’s Clients’ Security Board.
1964: Walter McLoughlin Sr. is elected president of the MBA.
1964: Unification of the various state bar associations into one organization, a sensitive and deeply personal topic that had been discussed for the next 10 years.
1965: An organizational meeting on May 13 begins the process of establishing the Massachusetts Bar Foundation, dedicated to supporting the bar association and students of law.
1966: Paul A. Tamburello is elected president of the MBA.
1966: Father Robert F. Drinan, former dean of the Boston College Law School, receives the Gold Award at the MBA Annual Meeting in recognition of his devotion to public service, his work in the area of civil rights, and his expertise on the relationship between church and state. The award was also a recognition of the Committee on Administration of Justice — created, implemented and directed by Drinan — as one of the most productive and important committees in the association’s history. Drinan later served five terms in Congress.
1967: The headquarters of the MBA move from Ricker’s Hall, near Scollay Square, to One Center Plaza.
1967: Tamburello leads a delegation of doctors and dignitaries on a tour of Bridgewater State Hospital, the state’s only institution for the mentally insane. The deplorable conditions witnessed by journalists and a documentary crew received national attention. Tamburello pledges the assistance of the 6,000 members of the bar association to those confined because they lacked legal aid. He personally took on the case of the first inmate represented by the bar, who had been unlawfully detained for 53 years.
1968: Phillip L. Sisk is elected president of the MBA.
1970: After Tamburello’s discovery at Bridgewater and the subsequent work by MBA members and the attorney general’s office, a complete revision and reform of the state’s laws regarding mental illness is completed. The new code is heralded as one of the most comprehensive statutory overhauls in modern history and as a national model of how to humanely protect the interests of the mentally ill.

* The MBA adopted “sections” in the mid-1970s to encourage more involvement by sorting members into areas of substantive law. Up until that point, committees and subcommittees were difficult for new members to join. The section model today enables members to enjoy special programs and events focused on their practice area, in addition to association-wide services and events.
* In the early 20th century, aspiring lawyers qualified for the bar by clerking with or shadowing practicing attorneys. However, the growth in importance of law schools changed the focus of lawyers to the mindset of the profession and away from strict memorization of the law. MBA President Mayo Shattuck aimed to close the gap between theory and practice by offering refresher courses for returning WWII veterans through the MBA’s annual Massachusetts Law Institute.
Hahn is dedicated to working with families in his practice in Newton and is also of counsel to Magula & Bloom LLP in Boston. He specializes in representing children and people with disabilities in a range of matters — from special education and student discipline, to delinquency and criminal matters, to DCF investigations and appeals.

Hahn is an active member of the Massachusetts Bar Association and has served as chair of its Juvenile & Child Welfare Section Council for the past two years. He regularly speaks at seminars and conferences on issues related to education and the justice system, including the Asperger’s Association of New England, the Federation for Children with Special Needs, Massachusetts Continuing Legal Education and the MBA.

Before entering the legal profession, Hahn served as a judicial law clerk in the Massachusetts Juvenile Court and was also a science teacher.

Hahn received his law degree cum laude from Boston University School of Law and his B.A. cum laude from Harvard College.
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EXPERTS & RESOURCES

CONTINUED FROM PAGE 8

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CALENDAR OF EVENTS

Friday, April 1
(OPENS TO INVITED GUESTS/SCHOOLS/PUBLIC)
Mock Trial state championship
10 a.m., Great Hall, Faneuil Hall Market Place, Boston

Monday, April 4 – Friday, April 8

Member Appreciation Week
In celebration of our loyal members, the MBA is hosting a Member Appreciation Week from Monday, April 4 through Friday, April 8.Mark your calendars and look for details on exclusive events, giveaways and raffles just for MBA members via the MBA’s Web site, Lawyers e-Journal and e-mail communications.

Monday, April 4
MBA Section/Division Open House
5:30-7:30 p.m., MBA, 20 West St., Boston

Tuesday, April 5
Immigration Law Section Council open meeting on the first anniversary of Padilla v. Kentucky
4-6 p.m., MBA, 20 West St., Boston

Wednesday, April 6
Representing the OUI Client
4-7 p.m., Plymouth Trial Court, 52 Oliver St., Plymouth

Wednesday, April 6
YLD Panel Discussion: Hanging A Shingle with a Focus on Traps for the Unwary
4-7 p.m., University of Massachusetts School of Law-Dartmouth, 333 Faunce Corner Road, North Dartmouth

MBA Monthly Dial-A-Lawyer Program
5:30-7:30 p.m., Statewide dial-in #: (617) 338-0610

Thursday, April 7
Final Directives: Medical and Legal Perspectives on Death and Dying
3-7 p.m., MBA, 20 West St., Boston

Friday, April 8
ABA Business Law Section Spring Meeting
Marriott Copley Place, 110 Huntington Ave., Boston

THURSDAY, APRIL 7

AssisiRe Productive Technology (ART): Current Trends, Practices and Procedures
4-7 p.m., MBA, 20 West St., Boston

THURSDAY, APRIL 21

Building Your Million-Dollar Practice in the New Economy
2-6 p.m., MBA, 20 West St., Boston

FRIDAY, APRIL 22

Take Control of Your Time, Your Technology and Your Profits
9 a.m.-1 p.m., MBA, 20 West St., Boston

WEDNESDAY, APRIL 27

Veterans Dial-A-Lawyer Program
5:30-7:30 p.m., Statewide dial-in #: (617) 338-0610

THURSDAY, APRIL 28

(not open to the public)
Tiered Community Mentoring
Wrap-Up Program
10 a.m.-12:30 p.m., John Joseph Moakley U.S. Courthouse, One Courthouse Way, Boston

WEDNESDAY, MAY 4

MBA Monthly Dial-A-Lawyer Program
5:30-7:30 p.m., Statewide dial-in #: (617) 338-0610

THURSDAY, MAY 5

Attacking and Defending Premarital and Marital Agreements — Things You Should Know
4-7 p.m., MBA, 20 West St., Boston

TUESDAY, MAY 10

Advanced Deposition Skills — Effective Techniques for Taking and Defending Key Depositions for Trial
4-7 p.m., MBA, 20 West St., Boston

WEDNESDAY, MAY 18 — THURSDAY, MAY 19

MBA Centennial Conference and Ball
Sharyan Hotel, 39 Dalton St., Boston

WEDNESDAY, MAY 25

MBA Western Massachusetts Dial-A-Lawyer Program
3:30-7:30 p.m., Statewide dial-in #: (413) 782-1659

For more information, visit www.massbar.org/events/calendar.
Attorneys who represent family businesses must be knowledgeable about corporate governance, but they also have to know the players involved — law firms and senior partners of the firm. Sometimes, family businesses will have to deal with a situation that sometimes requires a hardline approach.

“A good lawyer for a family business has to be sensitive to issues in the family,” says Robert McLaughlin Sr., managing partner and senior partner of Gilman, McLaughlin & Hanrahan LLP. “It should be someone who is aware of family dynamics, and who can play a role as a problem solver, and who can think about what’s going to develop.” A family-business advisor should not be a specialist, but a generalist, “which is a vanishing animal in the practice of law,” he says.

McLaughlin’s resume includes representing three independent directors in the aftermath of the Mormon family’s year-long legal battles, as well as dozens of lesser-known but no less contentious cases. Not surprisingly, the issues of insiders versus outsiders, control and compensation are at the top of the list of cases he has handled.

In addition to the sensitivity to family issues that have to do with cold, hard calculation — and on occasion, stepping back. “Lawyers make this mistake — they are introduced to [the business] by one of the partners,” McLaughlin says. “As possible conflicts develop, as a lawyer, you have to remember that your obligation is to the business. You can’t be on the side of the person who brought you in.” And ultimately, the family lawyer has to know when to call a time-out and advise individual members in a dispute that they each need their time.

“The founder of a family business dies and the wife takes over the business. The attorney representing the business had a long-term relationship with the founder. The business fails on hard times, and its banks want the widow to sign a personal guaranty. It’s in the interest of the company that she sign, but not in her interest in the marriage. The wife, battling her own business, fails, and the bank seeks repayment from her. The attorney for the business should have advised the widow the she should seek independent counsel.

Or, this one: a company decides to raise money by issuing stock. A family member wants to be in. The lawyer for the business should recommend to this family member that they seek independent counsel.

He recommends drafting an engagement letter outlining who the client is and the nature of the engagement. The letter should include a description of the nature of the legal service for both the company and individual members, and should recognize the potential for conflict. It should include wording about what steps the attorney or firm will take in the event that conflict arises.

INSIDERS, OUTSIDERS AND EXIT PLANS

A common problem in second-generation family businesses are conflicts between siblings who want to stay involved in the business and those who don’t. “Often, the second generation takes the credit for the founder’s efforts, and outside siblings think they share equally,” McLaughlin says.

Siblings that lead to legal discord are disputes about compensation and about levels of involvement in the business. In pass-through business, partners inculcate tax liabilities whether they get distributions or not. The inside family members may want to keep the distribution in the company to grow the business. “You get this inherent conflict where those on the outside want their distribution, at least enough to pay the tax, and hopefully receive some BOL,” he says.

Additionally, in the course of estate planning, shares in the company given to grandchildren may push them into tax brackets that are unattractive to them. McLaughlin says. “The problem is, there isn’t a market for buying the grandchild’s stock.” He advises that it’s good to have a circuit breaker to let a family know when no one wants to be part of the business to get out.

David Kleinbors at Gilman, McLaughlin & Hanrahan LLP observes the challenge of ambiguity setting up a family-owned company. In businesses where everyone gets along, they see no need to update the value of the stock. “A safety agreement should be that unless value has been set within the last 24 months, the old value is void,” he says. One preventive measure is to have the option to sell the stock at a discount off book value.

Family business should build their legal planning the possibility that future partners might be at loggerheads some day. Say that two partners started a business, but now the second generation doesn’t get along. Having a buyout clause avoids the need to dissolve the business to get out. McLaughlin warns, however, that valuation is not an exact science. A superstar performer, for example, should not have to pay a buyout premium to an underperformer who wants to exit.

Things get more complicated when family members divorce in businesses in which marital assets are the majority of the business. McLaughlin notes. A founder may not want a former-in-law owning a big chunk of the business. Premarital agreements that exclude inherited family assets take the business out of consideration as a division of marital assets.

FITTING CLIENT TO COUNSEL

Family businesses can be divided into two types, says Richard Narva, founder and senior advisor at Narva & Company. In the family-managed model, the owner-managers seek to transfer role and operations responsibility from the first generation to the second. While some of these businesses can be quite successful, they also tend to be “lifestyle” companies — “You work hard, you work long hours, you try to do well, and at the end of every year, you decapitalize the company to finance the family’s lifestyle,” he says. “It’s not often a strategic decision; it’s simply an intuitive judgment made by the major breadwinner in the business to improve the family lifestyle.”

Family-managed businesses rarely use legal help in a proactive way; they use it only when needed. These companies are not attractive market to an institutional law firm, he says — they are served by very small firms.

INCOME-CONTROL BUILDING

Family-owned companies have an advantage in that they do not have to pay taxes. “Family-friendly business structures allow the business to get out.” McLaughlin says.

Talvachia says, “They are going to confide in you personal issues as well as business issues.” Some of these personal issues have the potential to negatively impact the business. “You have to be vigilant because you can’t expect the client to be.”

“Lawyers should minimize the potential for conflicts. If you see a conflict, recommend they seek independent counsel.”

In the practice of law, “it is estimated that 30% of disputes between family members in matters that do not concern family businesses are conflicts between siblings. When family dynamics are added on, “you can’t ignore it,” he says. Not too late, however. Things get more complicated when family members divorce in businesses in which marital assets are the majority of the business. McLaughlin notes. A founder may not want a former-in-law owning a big chunk of the business. Premarital agreements that exclude inherited family assets take the business out of consideration as a division of marital assets.

Fitting client to counsel

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The type of lawyer who can avoid this situation is one with the skills to take on a leadership role—a skill that’s often learned outside of law school, Narva says. An attorney can advise a client on whether to take on the LLC model or the corporate model—a “first-year associate can do that,” he says. The real issue is integrating tax and estate advice for the shareholder control of the Trial Court Department to “a professional, citizen-court administrator with substantial expertise in finance and management.”

Those duties—facilities management, personnel management, accounting, capital planning, information technology—would be best handled, he said, by “a person trained not as a lawyer but instead, in the disciplines of business and management.”

The separation of authority would allow the chief justices to focus on running their courts, DeLeo said. Currently, Chief Justice for Administration and Management Robert A. Mulligan oversees both the legal and business duties of the Trial Court Department.

“In separating the judicial and business functions of the court, the chief justices of each of the court departments will properly maintain responsibility for all other core judicial functions, such as monitoring caseload, assigning judges, judicial training, and judicial discipline,” DeLeo said.

In a press release, the MBA applauded DeLeo’s “thoughtful, bold and decisive approach,” saying it addresses more than $50 off a full conference pass.

The MBA’s Centennial Conference will also feature three concurrent Continuing Legal Education tracks on both days, the annual Access to Justice Awards Luncheon on May 18, and the Centennial Ball on May 19. The ball will feature a keynote address from U.S. Supreme Court Associate Justice Stephen G. Breyer and a special MBA Hennessey Award presentation to retiring U.S. District Court Judge Nancy Gertner.

Look for the full program and conference events schedule in future issues of Lawyers Journal, Lawyers e-Journal and in e-mail communication.
The Hutchinson decision clarifies approach to fee awards in the First Circuit

BY STEVIN J. SCHWARTZ AND J. PATERSON RAé

In 2001, the U.S. Supreme Court reversed a long-standing rule that allowed attorneys’ fees in civil rights cases where the lawsuit was a “catalyst” for remedial actions, even if there was no court order or decision on liability. See Backhounn v. Carey Home v. West Virginia Dep't of Health and Human Resources.1 The Court held that a plaintiff had to obtain a “judicially sanctioned change in the legal relationship of the parties”2 in order to be considered a prevailing party and obtain fees. The Backhounn Court identified two, non-exclusive examples of situations that would satisfy the new prevailing party test: judgments on the merits and formal court-ordered consent decrees. Voluntary changes in conduct by the defendant and private settlement agreements over which the court did not retain enforcement authority would not suffice.3

Most of the circuits interpreted the decision liberally, and awarded fees in a variety of situations where there was no formal consent decree, provided that the settlement is endorsed by the court and is permissibly institutionalized in nursing facilities. The amended complaint sought to compel the commonwealth to develop rehabilitative services in integrated community settings for class members, based upon claims under the Americans with Disabilities Act and the Medicaid Act.

At the outset, the defendants vigorously contested all aspects of the case, including venue, class certification, procedural motions and discovery. After losing all of these issues, the defendants proposed a settlement agreement. Following six months of intensive negotiations, the parties signed a comprehensive settlement agreement. THE SETTLEMENT

The agreement requires the defendants to create an entirely new community service system for persons with brain injuries, including new integrated services, new rights, new procedural protections, new quality safeguards, new monitoring programs and new data collection methods. The agreement also provided that, to become effective, it had to be approved by the district court after a fairness hearing. After a careful review of the fairness hearing pursuant to Fed. R. Civ. Pro. 23(e), and after a 90-day cooling-off period to the court enjoining enforcement authority, the court could dismiss the case only when it deter-

mines that the defendants have complied with the agreement.

At the conclusion of the fairness hearing, the court invited the parties to submit a proposed order approving the agreement. The plaintiffs wanted the order to explicitly state that the court retains enforcement jurisdiction. The defendants opposed this provision and requested, instead, that the order make clear that the agreement was not a consent decree. In the end, the court entered an order approving the agreement, “noting that the parties agree that the agreement does not constitute a consent decree, and that the court will retain jurisdiction over the case... and that judgment will not enter pending compliance with the terms of the Comprehensive Settlement Agreement.”

THE DISTRICT COURT’S FEE DECISION

The plaintiffs filed a motion for an award of attorney’s fees. They supported their motion with lengthy affidavits from co-counsel, fee experts, brain injury ex-

perts and experienced private and public interest attorneys in the Boston area, as well as detailed time records for all counsel. The defendants opposed the motion, arguing that the plaintiffs were not prev-

ailing parties under Backhounn, as applied by the First Circuit in Arnot, and thus were not entitled to any fees.

In the alternative, the defendants as-

serted that the plaintiffs were not entitled to their requested fees, both because the time they expended was not compensable and because their requested rates were too high. Other than a two-page published billing survey, the defendants did not in-
clude any evidence in their opposition.

On Feb. 8, 2010, the district court is-

sued its decision. After a careful review of Backhounn and Arnot, the lower court concluded that there was sufficient judi-

cial approval and oversight of the agree-

ment to satisfy the judicial imputum requirement, and, therefore, the plaintiffs were entitled to fees. Reading the agreement and its approval order together, the district court held that (1) the label of the agreement, and the fact that it was not a consent decree, was not de-

terminative of prevailing party status.

Portability and the estate tax: Why portability should not replace lifetime transfer tax planning

BY BRIAN T. LIBERIS

On Dec. 17, 2010, the Tax Relief, Unemployment Reauthorization and Job Creation Act of 2010 (TRA) was enacted into law.1 The TRA includes a number of provisions that will have a significant impact on estate tax planning, including an increase of the estate tax exclusion amount to $5 million and a decrease of the maximum tax rate to 35 percent.2 One of the more surprising aspects of the TRA, however, was the inclusion of a provi-
sion allowing “portability” of a deceased spouse’s unused exclusion amount.

The portability provision provides that if a decedent’s estate is less than his or her remaining estate tax exclusion, any un-

used exclusion amount can be allocated to

the decedent’s surviving spouse: “The surviving spouse can then apply this exemption to his or her own estate and lifetime gifts, in addition to his or her own estate and gift tax exemption.”3 For example, if a husband dies with an adjustable taxable estate of $5 million and leaves all his assets to wife, those as-

sets qualify for the marital deduction. The decedent’s $5 million exemption (which went unused because his entire estate qualified for the marital deduction) can then be allocated to the surviving spouse, who could die with a $10 million estate without being subject to the estate tax.

In order for the deceased spouse’s un-

used exclusion amount to be effectively applied to the surviving spouse, the dece-

dent’s executor must affirmatively make an election on a timely filed estate tax re-

turn.4 Note, however, that unlike the sur-

viving spouse’s own $5 million exclusion, the deceased spouse’s unused exclusion amount is not indexed for inflation.5

Traditionally, married taxpayers had to plan in order to ensure that each spouse’s exclusion amount would not be “wasted” upon the death of the first spouse to die. As noted in the above example, a bequest of all assets to a surviving spouse would qualify for the marital deduction (and would thus result in no tax upon the death of the first spouse to die), but the deceased taxpayer’s exclusion amount would go unused, and that unused amount could not be applied to the surviving spouse’s estate.

Upon the death of the surviving, or his or her individual exclusion amount could be applied against the adjusted gross income of the remaining survivor. In this way, taxpayers could rely on revocable trusts that, upon death, divide their estates into two shares: one share that is funded with assets...
IRS authorizes paying whistleblowers

**BY KEVIN DIAMOND**

**HISTORY**

The Tax Relief and Health Care Act of 2006 (the act) enacted significant changes in the Internal Revenue Service award program for whistleblowers. The IRS shall pay awards for information that substantially contributes to the collection of taxes, penalties and interest.

The IRS has long held the authority to pay awards to whistleblowers. In fact, the origins of the whistleblower legislation relate back to the Civil War and the False Claims Act. The big difference was the old law, as now seen in 26 USC 7672(a), allowed the secretary of the Treasury to pay such amount as he deemed necessary "for detecting and bringing to trial and punishment person guilty of violating the internal revenue law or conniving at the same time," while whistleblowers were paid at the discretion of the secretary of the Treasury.

The implementation of 26 USC 7672(b) made a fundamental change to the IRS informant awards program. The key change in the law was the addition of this section under which awards are no longer discretionary. The new law says that whistleblowers "shall receive 15 percent to 30 percent of the collected proceeds." In addition, the amendment gave the whistleblower certain rights of appeal. That appeal is limited to the U.S. Tax Court. Finally, the legislation required the IRS to establish a Whistleblower Office reporting to the commissioner of the IRS to implement the law.

The primary purpose of the act is to encourage people with knowledge of significant tax non-compliance to provide that information to the IRS. Many individuals who apply for this reward often claim to have insider knowledge of the transactions upon which they are reporting.

**TECHNICAL REQUIREMENTS**

A whistleblower must meet several conditions to qualify for the award program. Generally speaking, the information must:

- Relate to a tax noncompliance matter in which the tax, penalties, interest, additions to tax and additions to amounts in dispute must exceed $2 million; and
- Relate to a taxpayer whose gross income exceeds $200,000 for at least one of the tax years in question.

If the information meets the above conditions and substantially contributes to a decision to take administrative or judicial action that results in the collection of tax, penalties and interest, then the IRS will pay an award of at least 15 percent but not more than 30 percent of the collected proceeds resulting from administrative or judicial actions, or from any settlement in response to an administrative or judicial action.

**LIMITATIONS**

The maximum award can decrease to 10 percent for cases where it is determined that the information was disclosed in certain public information sources. Or, the reward may also be reduced if the IRS determines that the whistleblower planned and initiated the actions that led to the underpayment of tax.

**TYPES OF TAX FRAUD**

The types of fraud can vary greatly from each of the three types of groups: the individual taxpayer; the corporate taxpayers; and abusive or fraudulent tax professionals.

Below are some examples of each type of fraud:

- **INDIVIDUAL TAXPayers:**
  - Claims false deductions or expenses;
  - Keep tax records in a safe place;
  - Fails to keep required business records;
  - Fails to report income or failing to report income; or
  - Pays tax on a timely basis.

- **CORPORATE TAXPayers:**
  - Keeps two sets of books of accounting records;
  - Intentionally declares false income or knowingly changes the income;
  - Makes overstatement of the deduction amount;
  - Uses business dealings by using false names;
  - Declares false amounts income and expenditure in the books of accounting records;
  - Transfers or conceals his/her assets or income;
  - Hides income in offshore accounts;
  - Records personal expenditure as business expenditures; or
  - Intentionally does not file the tax returns.

- **ABUSIVE TAX PROFESSIONALS WHO:**
  - Claim they can obtain larger refunds than other preparers;
  - Base their fee on a percentage of the amount of the refund;
  - Advocate the use of abusive "offshore accounts" as a means for not having to report income; or
  - Advocate the use of abusive "tax shelters" to avoid taxes and create wealth that will be represented as legitimate losses to offset against taxable income.

**WHAT TO DO IF I HAVE TAX FRAUD TO REPORT**

If you know of or suspect significant tax fraud, your best option is to find the services of a competent attorney. The tax attorney will be of great value.

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**KEVIN DIAMOND** is a licensed attorney and CPA in Massachusetts with a national tax fraud practice. He has spent years working on issues related to tax fraud as a forensic CPA, state authorities, fraud investigator and federal bank fraud investigator. Diamond accepts referrals from other counsel. For more information, see www.KevinDiamond.com.

**TA XATION LAW**

**Tax Relief, Unemployment Insurance Reauthorization and Job Creation Act of 2010**

**BY LISA M. RICO**

On Dec. 16, 2010, Congress passed — and on Dec. 17, 2010, the president signed into law — the Tax Relief, Unemployment Insurance Reauthorization and Job Creation Act of 2010 (the act). The act extends the so-called "Bush-era tax cuts" until the end of December 2012. The act affects various areas of federal taxes, including but not limited to income, transfer and payroll taxes. Unfortunately, all of the provisions of this new tax law are only effective for two years.

In the transfer tax area, the act extends the reduction of the federal individual income tax brackets to 15 percent, 25 percent, 28 percent, 33 percent and 35 percent, which was enacted as part of the Economic Growth and Tax Reconciliation Act of 2001 (EGTRRA), as well as for providing a $125,000 dollar limit and $500,000 investment for tax years beginning in 2010 and 2011, as well as for providing for a $125,000 dollar limit and $500,000 investment for tax years beginning in 2012, but sunsetting after Dec. 31, 2012.

In the business income tax area, the act extends the maximum long-term capital gains rate and qualified dividends rate at 15 percent. The one-year (2010) repeal of the personal exemption phase-out and personal exemption deduction limitations have been extended through 2012. The act extends the alternative minimum tax (AMT) phase, as well as extends through 2011 the provision that excludes from gross income (up to $100,000 per taxpayer, per year) distributions from an IRA made to a charity.

In the business income tax area, the act increases 50 percent bonus depreciation to 100 percent for qualified investments made after Sept. 8, 2010, and before Jan. 1, 2012, and continues 50 percent bonus depreciation for qualified property placed in service after Dec. 31, 2011 and before Jan. 1, 2013.

The act also makes 2010 Small Business Jobs Act increased 179 dollar and investment limits to $550,000 and $2 million for tax years beginning in 2010 and 2011, as well as providing for a $250,000 dollar limit and $500,000 investment for tax years beginning in 2012, but sunsetting after Dec. 31, 2012.

(both amounts indexed for inflation).

In the payroll tax area, an employee’s Social Security portion (OASDI) of the FICA will be reduced to 4.2 percent from 6.2 percent for years beginning in 2011 and 2012, as well as for providing a $125,000 dollar limit and $500,000 investment for tax years beginning in 2012, but sunsetting after Dec. 31, 2012.
(2) the approval of the agreement by the court was the critical factor that altered the legal relationship between the parties, since without the court’s approval, the agreement would be null and void; (3) the court had carefully considered the merits of the plaintiffs’ claims in determining that the agreement was fair, adequate, and reasonable at the fairness hearing; (4) the provisions of the agreement create binding obligations that can only be modified by the court, through all available equitable remedies, including contempt; and (6) the court retains jurisdiction over the agreement to ensure its enforcement and determine compliance.

Finally, the district court determined, in an exercise of its discretion, that the time expended by the plaintiffs’ counsel was well documented and reasonable in light of the litigation activity, the negotiation process and the success obtained. It also found that the hourly rates were more than reasonable, were considerably lower than the market rates of the plaintiffs’ private attorneys, and were consistent with hourly rates recently awarded to many of the same counsel and the same firms. The district court awarded the plaintiffs the full amount of their requested fees and costs.

THE FIRST CIRCUIT DECISION

The First Circuit issued its decision on Feb. 17, 2011, affirming the district court’s decision in all respects. Judge Selya, writing for the panel, first addressed the preliminary issue of determining whether the defendants’ efforts to get the court to “look exclusively at the approval order” and ignore the agreement as “too cramped a reading of Aronov” and “myopic,” the court reemphasized that “judicial imprumatur can only be determined by determining the content of the court’s order against the entire context before the court.”1

The court then turned to the three-part test for judicial imprumatur it had set forth in Aronov. Largely following the plaintiffs’ arguments and the district court’s analysis, the court noted that the agreement specifically required court approval before it become operative, the plaintiffs claimed that first prong of the test was met. Because the court engaged in a searching assessment of the merits in order to determine if the court was the critical factor that altered the legal relationship between the parties, the court did not abuse its discretion in finding that as a result of the term necessary judicial imprimatur to satisfy the court that the agreement was fair, adequate, and reasonable at the fairness hearing.

Noting that the district court order, as well as the agreement, explicitly provided that the district court retains jurisdiction to hear and adjudicate noncompliance issues, the court easily concluded that this final prong of the inquiry was satisfied.

The First Circuit then addressed the defendants’ argument that the fee application was premature because the case was ongoing and no final judgment had entered. Relying on the precedents, such as the entry of a final judgment, the court instead chose to “focus on function and effect.” Finding that as a result of the entry of the agreement, the litigation had reached a significant plateau and was no longer currently being litigated, the court concluded that the agreement was fair, adequate, and reasonable at the fairness hearing.

The appeals court quickly disposed of the defendants’ challenge to the reasonableness of the award, stating: “In light of the supporting documentation provided by the plaintiffs and the Commonwealth’s failure to produce or point to contradictory evidence, we conclude that the district court did not abuse its discretion in fashioning a fee award premised on the suggested rates.”

CONCLUSION

The First Circuit decision in Hutchinson v. Medicare & Medicaid Services, 623 F.3d 49, upholds the district court’s approach to determining prevailing party status in cases resolved by settlement and offers substantial guidance to courts in assessing the fairness of settlement and the reasonableness of awarding prevailing party status.

In cases that are not class actions, counsel needs to be sensitive to this requirement and structure the settlement in a way that ensures sufficient court review and approval. As Aronov made clear, the court’s approval of a settlement without any indication that the court undertook an assessment of the merits will not suffice. Ensuring ongoing court jurisdiction to enforce the terms of the agreement is also essential. While obtaining fees for cases that settle will continue to pose challenges for plaintiffs’ counsel, the First Circuit decision does provide a path to follow to establish prevailing party status in such circumstances.

With respect to challenges to the amount of fees, Hutchinson v. Medicare & Medicaid Services, 623 F.3d 49, provides an indication of the importance of carefully documenting both the time reasonably expended and the reasonableness of rates required. It made clear that defendants challenging fee awards must marshal evidence, not just argument, to rebut the plaintiffs’ documentation.

2 Id. at 603.
3 Id. at 604 n.7, 605.
4 See, e.g., Roberson v. Giuliani, 334 F.3d 70, 81 (2d Cir. 2003); Cassidy v. Immigration & Naturalization Service, 429 F.3d 884, 895 (9th Cir. 2005); Truesdell v. Philadelphia Housing Authority, 290 F.3d 105 (3d Cir. 2002).
6 The courts of appeals have held that “a settlement agreement is a contract made by the parties for the purpose of settling their dispute. A settlement agreement is also essential. While obtaining fees for cases that settle will continue to pose challenges for plaintiffs’ counsel, the First Circuit decision does provide a path to follow to establish prevailing party status in such circumstances.

With respect to challenges to the amount of fees, Hutchinson v. Medicare & Medicaid Services, 623 F.3d 49, provides an indication of the importance of carefully documenting both the time reasonably expended and the reasonableness of rates required. It made clear that defendants challenging fee awards must marshal evidence, not just argument, to rebut the plaintiffs’ documentation.
While portability undoubtedly provides an excellent “fallback” option for married taxpayers who fail to plan their estates, it should not take the place of proper estate planning and should not replace the A/B trust arrangement that has been relied on for years prior to the enactment of TRA. In addition to the myriad of non-tax reasons (probate avoidance, beneficiary creditor protection), there are several purely tax reasons for the new TRA portability provision.

For example, Massachusetts allows the equivalent of a $1 million estate tax exemption, with no portability.8 A married couple with an estate of $2 million that properly implements an A/B trust arrangement can avoid estate tax entirely. This couple would have the equivalent of a $1 million estate tax exemption, for the unused exclusion amount that has been, and likely will remain, unused and unirclaimed. Subject to the estate tax rates and the dollar amount of each exemption, the A/B planning, rather than a reliance on the portability provisions of the TRA.

And finally, implementing a lifetime estate plan rather than relying on portability provides certainty in an area that has been, and likely will remain, unpredictable and in flux. For the time being, the estate tax provisions, including portability, included in the estate and gift tax return is not filed, or if the executor wishes to file a tax return with a lesser amount, the estate tax would have to file a return. Filling an estate tax return that is not required will result in additional costs to the estate, although such costs would likely not be significant for Massachusetts decedents, as a state return would be required in any event for estates greater than $1 million.

Furthermore, it is likely, in an abundance of caution, that an estate will not be filed in order to make an election even in estates of decedents who properly implemented an A/B plan during their lifetime. What is really troubling, however, is having to rely on post-mortem action to pass on the remaining exclusion amount to the surviving spouse. Instead of planning during life to ensure that both exemptions are maximized.

So, for what reason, a timely estate tax return is not filed, or if the executor mistakenly fails to make the election to allow the unused exclusion amount to pass to the surviving spouse, rather than planning during life to ensure that both exemptions are maximized.

Nevertheless, those assets, upon sale, will be tax-inefficient if the decedent re-ceived the step-up in basis that has been, and likely will remain, unirclaimed and void.

And, for whatever reason, a timely estate tax return is not filed, or if the executor mistakenly fails to make the election to allow the unused exclusion amount to pass to the surviving spouse, this exclusion would be wasted. This problem would be avoided with proper lifetime planning, rather than a reliance on the portability provisions of the TRA.

In addition to the act of transferring assets to a credit shelter trust, the assets in the credit shelter trust will pass to the surviving spouse, subsequent appreciation in the surviving spouse’s estate will be subject to the estate tax. This problem is compounded by the fact that, unlike the surviving spouse’s exemption, the first spouse’s exemption amount is not indexed for inflation.

Take the example of a married couple with a combined $10 million estate ($5 million per spouse). Absent adequate estate planning, upon the death of the first spouse, his or her entire estate will pass to the surviving spouse. Assuming no appreciation in the surviving spouse’s estate, the first spouse’s unused exemption amount is not indexed for inflation.

Thus, it makes the most sense to plan accordingly with a well-drafted estate plan rather than relying on portability in an effort to reduce federal estate taxes.

TAX TREATMENTS OF INFORMANT AWARDS

IRS awards can lead the whistleblower to very significant returns. At the minimum requirement of $2 million, recovery at 15 percent would total $300,000. However, the maximum amount could equal $600,000. The range of an award under IRC Section 762(b) is for a recovery of $10 million to be paid to the first $5 million to $3 million.

The act also introduces a new estate planning tool in the gift and estate tax area — portability. Portability allows a deceased’s unused exemption amount to be transferred to the surviving spouse. Specifically, for estates of decedents dying after 2010, the decedent’s executor is permitted to transfer the decedent’s unused exemption amount to the decedent’s surviving spouse.

In addition, implementing a lifetime estate plan rather than relying on portability provides certainty in an area that has been, and likely will remain, unpredictable and in flux. For the time being, the estate tax provisions, including portability, included in the act (www.jct.gov/publications.html?func=startdown&id=3716). And, please visit the Taxation of Estates webpage at www.Massbar.org/Mem- ber-groups/Sections/Taxation-law for additional information about the new
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