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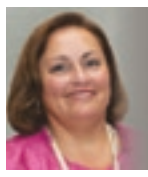
A look back and ahead



PRESIDENT'S VIEW
DENISE SQUILLANTE

I recollect the last 11 months with a sense of pride. The MBA has accomplished much and been front and center on the issues with the highest relevance to the Massachusetts legal community.

It has been a privilege to be at the helm for this year's worth of progress and impact. Many accomplishments were possible thanks to the support and collaboration of MBA volunteers, including my talented and collaborative fellow officers. I could not have done it without them. Thanks also go to the tireless work and support of the MBA staff.

The MBA centennial anniversary was an opportunity for all of us to reflect on and celebrate the many ways in which our association served as a professional and societal force over the last 10 decades. Thank you to all members for sharing in your association's celebration of its century of service to the public, the profession and the rule of law.

Today, we continue to reap the benefits of our founding members — including the likes of Louis Brandeis and Oliver Wendell Holmes. Such luminaries helped establish and begin an organization that chose "*fiat justitia*" (let justice be done) as its motto and opened its membership to attorneys from all ethnic, religious and social backgrounds. ➤ 4

MBA President Denise Squillante applauds as Supreme Court Justice Stephen G. Breyer takes the stage to deliver the Centennial Ball's keynote address.

Chief justices warn 2012 budget will force layoffs, court closings

BY BILL ARCHAMBEAULT

The state's court leaders warned that the recently approved $24.2 million cut to the court system budget is "devastating" and will force layoffs and court closings.

The dire message also included an unusual request that Gov. Deval Patrick stop appointing judges or clerk magistrates for fiscal 2012 — except in emergencies — claiming that the shortage of support staff is already "critical," and that for every judge or clerk magistrate appointed, three more staff members will need to be cut.

HON. RODERICK L. IRELAND

HON. ROBERT A. MULLIGAN

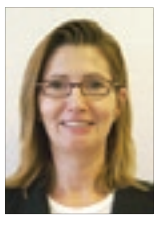
"We make this request for a moratorium on appointments with great reluctance and regret," the seven justices of the Supreme Judicial Court wrote to Patrick. "The people of Massachusetts deserve better. But the fiscal jeopardy into which the operation of the Trial Courts has been placed demands extraordinary action. We ask your cooperation in that action."

SJC Chief Justice Roderick L. Ireland and Chief Justice for Administration and Management Robert A. Mulligan issued a joint statement July 12 decrying the fiscal 2012 budget that Patrick had signed the day before, which includes $519.9 million in court funding.

However, court officials say, the courts budget includes revenue collection projections that are "not obtainable," which would actually mean total court funding of $509 million. That amount would mean a nearly 16 percent cut, or $96 million total, since the beginning of fiscal 2009. A total of 1,115 positions have been lost since a hiring freeze was enacted by court leaders.

"In sum, the Fiscal Year 2012 budget will impact significantly the quality of justice in our courts and jeopardize the right of every person, guaranteed ➤2

HEALTH LAW:



Case provides guidance for equal protection arguments
➤14

SUFFOLK V. DCAM:

Recent SJC decision addresses attorney-client privilege
➤15

INSURANCE PROTECTION:

Insurance protection: Make sure it follows you
➤19

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2012 BUDGET

Continued from page 1

by the Massachusetts Constitution, to have recourse to the courts and obtain civil and criminal justice 'completely and without denial, promptly and without delay,'" Ireland and Mulligan wrote in their joint statement. "We look forward to engaging in continued discussions with the Governor and legislative leadership to avert these impacts."

GOV. DEVAL PATRICK

Preventing additional layoffs and court closings would require about $32 million in funding, Mulligan said. State House News Service reported that Mulligan has met with legislators to discuss the situation. If legislators wanted, additional money could be added in a supplemental budget in the fall.

"Our court leaders have been extremely creative and innovative in handling the onslaught of budget challenges," said Martin W. Healy, the Massachusetts Bar Association's chief operating officer and chief legal counsel.

MARTIN W. HEALY

"Judges and frontline staff have been on call answering the bell for many months, and the system is straining. Dwindling state budgetary funds appear to be the forecast for the next few fiscal cycles. There are only so many things the court can do before it's faced with the difficult task of layoffs and court closings," Healy said. "We are hopeful that the Legislature is able to provide some relief in the coming months through the use of a supplemental budget appropriation."

To illustrate the severity of the impact, the joint statement included a list of 11 of the state's 101 courthouses that would be "relocated" and "consolidated," noting that planning was underway.

The courthouse consolidation plan would move:

- Berkshire Juvenile Court to Northern Berkshire District Court (North Adams)
- Charlestown Division of the Boston Municipal Court to the Boston Municipal Court
- Framingham Juvenile Court to Marlborough District Court
- Gloucester District Court to Salem District Court
- Hingham District Court to Brockton District Court
- Leominster District Court to Clinton District Court / Fitchburg District Court
- New Bedford Housing Court to New Bedford District Court or to Fall River Durfee Courthouse
- Norfolk Juvenile Court (Dedham) to Brookline District Court
  - Brookline District Court criminal matters to Dedham District Court; civil matters to Newton District Court
- Wareham District Court to Plymouth District Court
- Westborough District Court to Worcester District Court
- Westfield District Court to Holyoke District Court /Chicopee District Court / So. Berkshire District Court ■

Calendar of Events

Thursday, Aug. 11

Immigration Law Essentials
2-6 p.m.
MBA, 20 West St., Boston

Tuesday, Aug. 16

District Court Survival Guide — Criminal Practice
4-6:30 p.m.
MBA, 20 West St., Boston

Wednesday, Aug. 17

Effective Legal Writing Strategies
4-7 p.m.
MBA, 20 West St., Boston

Thursday, Aug. 18

Third Annual Summer Social
5:30-7:30 p.m.
Tia's, 200 Atlantic Ave., Boston

Tuesday, Aug. 23

How to Handle a Residential Real Estate Closing
4-7 p.m.
MBA, 20 West St., Boston

Wednesday, Sept. 7

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

Tuesday, Sept. 20

Frequently Asked Questions About Employing Foreign Nationals
4-7 p.m.
MBA, 20 West St., Boston

Wednesday, Sept. 21

Removal: Are We There Yet?
4-7 p.m.
MBA, 20 West St., Boston

Monday, Sept. 26

Special Education Law and Autism
4-6 p.m.
MBA, 20 West St., Boston

Tuesday, Sept. 27

Massachusetts Bar Foundation Boston Grantee Reception
5-7 p.m.
Burns & Levinson LLP, 125 Summer St., Boston

Thursday, Oct. 13

Massachusetts Bar Foundation Springfield Grantee Reception
4:30-6:30pm
Bulkley, Richardson & Gelinas LLP, 1500 Main St., Springfield

Real-time webcast available for purchase through MBA On Demand at www.massbar.org/ondemand.

FOR MORE INFORMATION, VISIT WWW.MASSBAR.ORG/EVENTS/CALENDAR

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MASSACHUSETTS LAWYERS JOURNAL

MASSACHUSETTS LAWYERS JOURNAL

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A publication of the Massachusetts Bar Association

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BAR NEWS

Shakespeare and the Law explores rule of law's limitations

More than 20 judges from the Massachusetts Superior Court, Appeals Court, Supreme Judicial Court and U.S. District Court participated in a staged reading and discussion of Shakespeare's *The Merchant of Venice* at the Cutler Majestic Theatre in Boston on June 21.

The event, part of the Federalist Society and Commonwealth Shakespeare Company's Shakespeare and the Law series, and co-sponsored by the Massachusetts Bar Association, drew more than 300 people. The event began with a special tribute to retiring judges Judith A. Cowin, John C. Cratsley, Wendie I. Gershengorn, Nancy Gertner, Margaret R. Hinkle and Stephen E. Neel, and featured performances by Appeals Court Judges Andrew R. Grainger and Gabrielle R. Wolohojian as Shylock and Portia.

"Shakespeare and the Law has become a signature event in the Boston legal community," said event producer and moderator Daniel Kelly, a partner with McCarter & English LLP in Boston and chair of the Boston Lawyers Division of the Federalist Society. "Four hundred years later, Shakespeare's plays provide a unique opportunity for people of all political persuasions and backgrounds to discuss issues, both universal and particular, that confront lawmakers, lawyers and judges."

In addition to a staged reading, the program included a pointed debate on the meaning and limitations of the rule of law and how equity and mercy should inform a judge's decision in civil and criminal matters. ■

Event producer and moderator Daniel Kelly introduces the evening's program, with cast members, from left to right: Judges George A. O'Toole, Judith Cowin, Gabrielle Wolohojian, Andrew Grainger, Scott Kafker, John Cratsley, Peter Rubin and Linda Giles.

From left to right, standing: Judges Frances McIntyre, Andrew Grainger, James McHugh, Linda Giles (obscured) and Carol Ball. Seated: Judges Nathaniel M. Gorton, George A. O'Toole, Judith Cowin (obscured) and Gabrielle Wolohojian read a scene from The Merchant of Venice.

PHOTOS BY ANDREW BRILLIANT/BRILLIANTPICTURES INC.

During the question-and-answer session, Judges Gabrielle Wolohojian, Andrew Grainger and Scott Kafker demonstrate their views.

BAR NEWS

Judges lead *Voir Dire* forum

Five Superior Court judges and state and national experts led a Bench-Bar *Voir Dire* Forum on June 22 to evaluate the merits of different approaches being used for jury selection. The program was held June 22 at Massachusetts Continuing Legal Education's Boston office at 10 Winter Place.

The highlight of the program was a panel discussion of judges and lawyers who evaluated a recent electronic survey of the entire Superior Court bench regarding current approaches to jury selection and *voir dire*.

In addition to the panel, the forum featured presentations by commentators from the National Center for State Courts, who spoke about their research and perspectives on jury selection and *voir dire* from across the country.

The forum was sponsored by the Judicial Administration Section.

The faculty included Superior Court Judges Peter M. Lauriat (program chair), Elizabeth M. Fahey, Kenneth J. Fishman, Geraldine S. Hines and Robert C. Rufo, as well as the Hon. Gregory E. Mize, National Center for State Courts, Arlington, VA; Richard P. Campbell, Esq., Campbell, Campbell, Edwards & Conroy, Charlestown; Paula L. Hannaford-Agor, National Center for State Courts, Williamsburg, VA; and Elizabeth N. Mulvey, Esq., Crowe & Mulvey LLP. ■

MBA President-elect Richard P. Campbell, left, makes a point during the discussion. At right is Superior Court Judge Robert C. Rufo.

PHOTO BY MERRILL SHEA

PRESIDENT'S MESSAGE

Continued from page 1

The strength from such inclusion has been extraordinary throughout our history. This past year was no different. Thanks to the rich diversity in geography, practice area and background, members once again came together to accomplish exponentially more than they could alone.

Although the last year was mostly focused on the centennial celebration, there was still room for much progress to be made with MBA legislative activities, major events, education, public and community services and recognizing exemplary attorneys who are positively impacting their respective communities throughout the state.

ON THE HILL — AN EYE ON ALIMONY, COURT REFORM AND FUNDING

Alimony, court reform and court funding took center stage in our legislative efforts. As we entered a new legislative session, all three topics required much of our attention and garnered much of the media's. The Alimony Reform Act of 2011 was passed in both the House and Senate in July. At press time, minor technical differences in the bills passed by both branches before heading to Gov. Deval Patrick's desk.

The MBA is in strong support of this comprehensive reform, which adds more predictability to alimony rewards. Since 2003, I have been working with the MBA, and more recently with the Legislature, to advance such reform. As a family law practitioner for nearly 30 years and someone who has been intimately involved in this emotionally charged topic on behalf of my clients, I am delighted to not only be involved in the drafting of this legislation, but to see it move closer to becoming law.

As Gov. Patrick signed the state's fiscal 2012 budget, inadequate court funding remains and continues to impact the daily operations of the court system, negatively affecting the public it serves. Each day, 42,000 citizens look to our courts for justice. Those individuals will now experience even further delays and injustice with continually diminishing resources unable to support the demand.

The House and Senate wisely enacted court reform legislation that professionalizes trial court administration and better aligns Massachusetts with other innovative court systems in the country. Keeping with recommendations from several court management studies over the last 20 years — many led or supported by the MBA — the reform bill urges the appointment of a non-judicial professional to manage the courts' business operations

The bill prudently calls for the creation of a chief justice of the Trial Court to work alongside a professional administrator as a way to delineate the judicial from the administrative duties associated with the complex Trial Court. At press time, the bill was awaiting action by the governor.

An MBA delegation met in April with legislators in Washington, D.C., for the American Bar Association's annual Lobby Day. From left to right: MBA Legislative Activities Manager Lee Ann Constantine, MBA COO and Chief Legal Counsel Martin W. Healy, U.S. Rep. John F. Tierney, MBA President Denise Squillante and MBA President-elect Richard P. Campbell.

PHOTO COURTESY OF ERIC FULLERTON, BOSTON BAR ASSOCIATION

The House of Representatives passed alimony reform legislation on July 20. Attending the session were, from left to right: BBA Family Law Co-Chair Kelly Leighton, MBA President Denise Squillante, David Lee of Lee & Levine, Mass Alimony Reform President Steve Hitner, and Rachel Biscardi of the Women's Bar Association.

At her president's reception on Sept. 16, 2010, Squillante (right) speaks with Appeals Court Chief Justice Phillip Rapoza (left) and MBA President-elect Richard P. Campbell (center).

Also, the MBA endorsed and testified in support of a workplace safety "right to know" bill that was the subject of a joint hearing on June 9. We are hopeful that it becomes law soon so that employers will be mandated to give employees basic information about their legal rights.

I have found my work on legislation, alongside MBA Chief Operating Officer and Chief Legal Counsel Martin W. Healy and Legislative Activities Manager Lee Ann Constantine, to be among the most rewarding during my tenure as MBA president. The MBA's presence and testimony provide an important perspective for legislators as they vote on bills that affect or shape the future of the legal profession and the livelihood of those we serve.

DISTRIBUTING RECOGNITION AND ENERGIZING VOLUNTEERS

In addition to serving as a resource for our colleagues at the Statehouse, the MBA also selects a lawmaker to honor each year. This year, I had the high privilege of honoring Sen. Joan Menard.

Bestowing Sen. Menard with the MBA Legislator of the Year Award was one of my first duties as president. Since then, I have been pleased to honor deserving colleagues from the bench and bar across the state. These professionals continue to go above and beyond the call of duty to use their expertise to improve our practice or better their hometown communities. This has been a delightful aspect of my presidency and one of many that I will look back on fondly.

Although I was able to publicly recognize many of our colleagues with honors throughout the year, the less visible work being done quietly by our committed members deserves mention as well. Collectively, you all have worked tirelessly to advance the mission of the organization.

Results were plentiful. We set up a Joint Foreclosure Task Force; formed a Construction Law Committee; began developing training materials for the proper use of peremptory challenges during jury selection; collaborated on the 12th Annual Walk to the Hill for Civil Legal Aid; joined arms with MassINC to present the "A New Path for Probation" forum event; hosted a statewide discussion to preserve bar advocates; collaborated with our colleagues in health care to launch the MBA Pro Bono Prescription program; continued to build our inventory of online educational programs through MBA On Demand; offered legal assistance to those affected by the devastating tornadoes in Western and Central Massachusetts; joined high school classrooms to discuss the First Amendment and the Internet with students in Fall River, Springfield and Worcester; and lent the attorney's perspective to the debate of cameras in the courtroom, just to name a few.

I also recently announced the MBA Mentoring Circles Program, which will provide resources and mentoring relationships to all participating members of the MBA and county bar associations. It's a perfect way for members to give back and help others learn and grow from their shared experiences. The first groups will be forming in late August. Particular thanks go to MBA Director of Membership and Programs Lisa A. Ferrara for her leadership on this initiative and the assistance she has always given me.

CELEBRATING A MILESTONE

In May, we presented our Centennial Conference and Ball. Thanks to all of you who participated in our cornerstone event and those who joined as sponsors of the historic celebration. With delight, we welcomed U.S. Supreme Court Associate Justice Stephen Breyer as the keynote speaker at the Centennial Ball.

The evening also featured the presentation of the Chief Justice Edward F. Hennessey Award to U.S. District Court Judge Nancy Gertner. Both esteemed members of the federal bench offered their insight, wisdom and humor to the crowd of nearly 1,000 attendees. The event was a remarkable culmination of our yearlong celebration, and personally, a highlight of my involvement with the Massachusetts Bar Association.

I trust many of you share my awe in realizing how much the MBA has accomplished in its first century, as well as my interest in seeing how its next 10 decades will unfold. Quite admirably, the MBA remains on the path to continue to serve the public, the profession and the rule of law in its next 100 years of history and beyond. ■

MBA CLE AT-A-GLANCE

AUGUST CONTINUING LEGAL EDUCATION PROGRAMS BY PRACTICE AREA

CIVIL LITIGATION

Trial Practice Luncheon Roundtable Series

— LUNCH INCLUDED —

Tuesday, Aug. 9, noon–2 p.m.
MBA, 20 West St., Boston

Faculty:

Jeffrey N. Catalano, Esq., program chair
Todd & Weld LLP, Boston

Hon. Andrew M. D'Angelo
Stoughton District Court


JEFFREY N. CATALANO

Sponsoring sections/division:

Business Law, Civil Litigation, Criminal Justice, General Practice, Solo and Small-Firm, Young Lawyers Division

District Court Survival Guide

Part II: Criminal Practice

Tuesday, Aug. 16, 4–6:30 p.m.
MBA, 20 West St., Boston

Faculty:

Amy Cashore Mariani, Esq., program chair
Fitzhugh & Mariani LLP, Boston

Hon. Robert A. Cornetta
Superior Court

Martin F. Kane II, Esq.
McGrath & Kane Inc., Boston

Raymond Sayeg Jr.
Denner Pellegrino LLP, Boston


AMY CASHORE MARIANI

Sponsoring sections/division:

Civil Litigation, Criminal Justice, General Practice, Solo & Small-Firm, Young Lawyers Division

Effective Legal Writing Strategies

Wednesday, Aug. 17, 4–7 p.m.
MBA, 20 West St., Boston

Faculty:

Thomas P. Gorman, Esq., program chair
Sherin and Lodgen LLP, Boston

**Additional faculty to be announced.*


THOMAS P. GORMAN

Sponsoring sections/division:

Civil Litigation, General Practice, Solo & Small-Firm, Young Lawyers Division

FAMILY LAW

Basics of Divorce Practice

Thursday, Aug. 4, 4–7 p.m.
MBA, 20 West St., Boston

Faculty:

Deborah M. Faenza, Esq., program co-chair
Ryan & Faenza, Walpole

Susan A. Huettner, Esq., program co-chair
Law Office of Susan A. Huettner PC, Sandwich


DEBORAH M. FAENZA


SUSAN A. HUETTNER

Sponsoring sections/division:

Family Law, General Practice, Solo & Small-Firm, Young Lawyers Division

FACULTY SPOTLIGHT

Joseph P. Curran, Esq.

Curran & Berger LLC, Northampton

Program chair: "Immigration Law Essentials"

Curran has been exclusively involved in all aspects of immigration and nationality law since 1985. He has served as counsel to numerous individuals, major corporations, universities and research institutions, specializing in immigration issues impacting on business and family-based sponsorship in the New England area. Curran currently serves on the Massachusetts Bar Association Bar's Immigration Law Section Council, and chairs its Immigration Essentials Program. He is also a member of the American Health Lawyers Association, the Labor and Employment Substantive Law Committee and AILA's Healthcare Committee.

Curran has been an active member of the American Immigration Lawyers Association since 1985, and frequently lectures on immigration law to business groups, health care facilities and academic institutions in the New England area. As a member of the American Immigration Lawyers Association Health Care Professional / Physician Committee, Curran works closely with U.S. congressmen and senators regarding legislative and regulatory policy, and works to address the needs of international health care workers.

Curran regularly volunteers his time to support the immigration assistance programs of charitable organizations in his community. He has been featured in major Western Massachusetts newspapers for his efforts in immigration law.

Prior to entering the field of immigration, he worked on the U.S. Senate Judiciary Committee, writing speeches, drafting legislation and conducting research on Constitutional Law and Civil Rights legislation.

IMMIGRATION LAW

Immigration Law Essentials

Thursday, Aug. 11, 2–6 p.m.
MBA, 20 West St., Boston

Faculty:

Joseph P. Curran, Esq., program chair
Curran & Berger LLC, Northampton

Lawrence Gatei, Esq.
Immigration and Business Law Group LLP, Waltham

Megan Kludt, Esq.
Curran & Berger LLC, Northampton

Gerald C. Rovner, Esq.
Law Office of Gerald C. Rovner, Boston

**Additional faculty to be announced.*

Sponsoring sections/division:

Access to Justice, Criminal Justice, Family Law, General Practice, Solo & Small-Firm, Labor & Employment Law, Immigration Law, Individual Rights & Responsibilities, Young Lawyers Division

PROPERTY LAW

How to Handle a Residential Real Estate Closing

Tuesday, Aug. 23, 4–7 p.m.
MBA, 20 West St., Boston

Faculty:

Joe Boynton, Esq., program co-chair
Attorney at Law, Worcester

Michael G. Gatlin, Esq., program co-chair
Law Office of Michael G. Gatlin, Framingham

Kevin M. David, Esq.
Webster First Federal Credit Union, Webster

**Additional faculty to be announced.*


JOE BOYNTON

Sponsoring sections/division: *General Practice, Solo & Small-Firm, Property Law, Young Lawyers Division*

SAVE THE DATE

21st Annual

Family Law Conference

Course #: FLA12

Friday, Oct. 28–Saturday, Oct. 29
Chatham Bars Inn, Chatham

Denotes real-time Webcast available for purchase at www.MassBar.org/OnDemand.

REGISTER ONLINE AT WWW.MASSBAR.ORG OR CALL (617) 338-0530.

MBA CENTENNIAL

Presidential profiles

In the last decade, MBA presidents continued to work on a number of projects and causes that had long concerned the organization and the legal profession, including substantive court management reform, professional civility, championing judicial independence and the proper funding of the courts through difficult financial periods.

Longtime efforts like the passage of decades-in-the-making Uniform Probate Code were finally met with success, while newer efforts like David W. White's (2007-08) sentencing reform were undertaken. White also introduced the MBA's first green effort, a profession-wide challenge for lawyers to improve their environmental practices with the MBA Eco-Challenge, which concentrated on reducing practitioners' use of electricity and paper.

Presidents also oversaw the emergence and evolution of online efforts at the MBA. From posting print publications like *Lawyers Journal* and the *Massachusetts Law Review* online to the creation of the weekly electronic newsletter, *e-Journal*. And as the decade drew to a close, the MBA embraced the emergence of social networking sites such as Facebook, LinkedIn and Twitter.

Also, after two decades of diversification of MBA leadership, the MBA still had room for two more firsts: the election of its first openly gay president with Mark D Mason (2006-07), who was later appointed a district court judge; and Valerie A. Yarashus (2009-10) passed the gavel to Denise Squillante (2010-11), the first time women had served consecutive terms. In addition to ushering in a new decade, Squillante also saw the close of the MBA's first century by presiding over its centennial celebration during her term. ■

PRESIDENTS FROM 2000 TO PRESENT


JEFFREY L. MCCORMICK
1999-2000


EDWARD P. RYAN JR.
2000-01

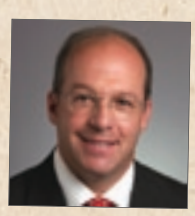

CAROL A.G. DIMENTO
2001-02


JOSEPH P.J. VRABEL
2002-03


RICHARD C. VAN NOSTRAND
2003-04


KATHLEEN M. O'DONNELL
2004-05


WARREN F. FITZGERALD
2005-06


MARK D MASON
2006-07


DAVID W. WHITE JR.
2007-08


EDWARD W. MCINTYRE
2008-09


VALERIE A. YARASHUS
2009-10


DENISE SQUILLANTE
2010-2011

The Massachusetts Bar Association, which was formed in 1910 and incorporated in 1911, celebrates its centennial anniversary with a number of events this year. As part of that observance, Lawyers Journal and e-Journal will highlight past presidents, interesting MBA trivia and list upcoming centennial events. Information compiled by Bill Archambeault.

CENTENNIAL TIMELINE, 2000s

2001: In response to the 9/11 tragedy, the MBA establishes a Victims' Relief Fund; hosts a Dial-A-Lawyer event for victims' families and friends; develops a *pro bono* initiative to assist victims' families with legal matters and works with U.S. Sen. Edward Kennedy's office to coordinate and participate in an event to help families with legal, financial, health and other needs.

2002: After the SJC accepted direct appellate review in *Goodridge v. Dept. of Public Health*, the MBA files an *amicus* brief arguing that excluding same-sex couples from marriage violates equal protection under the Massachusetts Constitution.

2003: The MBA works tirelessly to obtain adequate funding for Massachusetts courts, which were crippled with a near $60 million deficit in fiscal years 2002 and 2003. On March 18, it holds a lobby day for court and CPCS-assigned private counsel funding.

2004: The MBA reiterates its support for increased pay for bar advocates.

2004: The MBA's House of Delegates debates and rejects the proposition that the country cannot be both safe and free, passing the resolution contesting the U.S.A. Patriot Act and related federal executive orders, and endorsing the protection of civil rights and liberties.

2005: Gov. Mitt Romney proposes legislation to reinstate the death penalty for the most "heinous" crimes. The MBA maintains its position against the death penalty and cites the catastrophic effect its implementation would have on the court system.

2006: The Young Lawyers Section is elevated to the Young Lawyers Division.

2006: The MBA issues "Report of Attorney Financial Responsibility Disclosure Task Force" and "Debt Collection/Small Claims Task Force Report."

2007: The MBA is honored with the American Bar Association's Harrison Tweed Award for long-standing commitment to funding and provision of quality legal services to the poor in Massachusetts, in both criminal and civil matters.

2007: The MBA forms a Drug Policy Task Force.

2007: The MBA launches its Lawyers Eco-Challenge with the goal of lawyers and law firms reducing their ecological impacts.

2007: The MBA holds its first Legal Technology Expo, highlighting the latest advancements to aid in law practice management.

2008: The Legislature enacts the MBA-sponsored Uniform Probate Code after more than 20 years of discussion and debate.

2009: The MBA issues the Drug Policy Task Force's "The Failure of the War on Drugs" report.

2010: The MBA issues the "Crisis in Court Funding Task Force" report, showcasing the devastating impact of the economic downturn on everyday uses of the courts.

2010: Following years of advocacy by the MBA and other groups, the Legislature passes a bill that reforms mandatory sentencing laws and Criminal Offender Record Information.

2010: The MBA Governance Committee, led by Past President Warren Fitzgerald, wins HOD approval to extensive bylaw changes that further clarify Executive Management Board and House of Delegate roles and create a chief operating officer position. Longtime General Counsel Martin W. Healy is named the MBA's first COO and chief legal counsel. ■

MBA Did you know?

As early MBA responsibilities like grievance hearings were delegated to organizations such as the Board of Bar Overseers, the MBA turned its efforts toward improving the impact of the law on the public.

The new MBA Legal Fee Arbitration Board allowed lawyers and clients to resolve fee arguments without resorting to the courts or to BBO grievance procedures. ■

BAR NEWS

Member Spotlight

FINNEGAN NAMED TO MSIC, CSTCA BOARDS

John D. Finnegan, of counsel at Tarlow, Breed, Hart & Rodgers PC in Boston, was recently appointed to two statewide boards.


JOHN D. FINNEGAN

Finnegan joins the Massachusetts Credit Union Share Insurance Corp. (MSIC) board of directors and was re-elected to the executive board of the City Solicitors and Town Counsel Association of Massachusetts (CSTCA).

MSIC, which provides excess deposit insurance to credit unions throughout Massachusetts, insures nearly $1 billion of credit union members' deposits for 76 state-chartered and 22 federally chartered credit unions in the state. As a director, Finnegan will assist in setting the general direction and control of the affairs of the corporation.

The CSTCA is the oldest and largest bar association in Massachusetts dedicated to the practice of municipal law. CSTCA members provide legal services to cities and towns or otherwise devote a substantial portion of their practice to the advancement of municipal law. The executive board of the CSTCA generally controls the conduct of the association's affairs.

Finnegan, a member of his firm's litigation group, concentrates his practice on creditors' rights in bankruptcy, business litigation, tax lien foreclosures, construction litigation and real estate litigation. He represents banking and financial services companies, as well as individuals, and serves as special counsel to a number of Massachusetts municipalities. Finnegan, who was named a Massachusetts Rising Star for 2005 through 2010 by *Boston* magazine, earned his bachelor's degree from the University of Massachusetts and his J.D. from Suffolk University Law School.

PAST-PRESIDENT BUDD APPOINTED CHAIRMAN OF AAA BOARD

Wayne A. Budd, a past-president of the Massachusetts Bar Association (1979-80), was elected to a two-year term as chairman of motor club AAA's national board of directors in April.


WAYNE A. BUDD

Budd was first elected to the board of directors of AAA Massachusetts in 1982, and has served on the regional board (consolidated as AAA Southern New England in 1997) since. He joined the national board in 2005 and became vice chairman in 2009.

The national board of directors is the governing body of the 48 AAA clubs in the United States and Canada, which totals more than 52 million members. The board meets a half-dozen times a year to determine the direction of the 48-member federation.

Budd is a senior counsel in Goodwin Procter LLP's Litigation Department, where he specializes in business and commercial litigation. Previously, he was an associate attorney general of the United States, and the U.S. attorney for the District of Massachusetts, serving as the state's chief federal prosecutor and representing the federal government in all matters involving civil litigation. ■

Reminder: Renew your MBA membership by mail or online

The MBA reminds you that the 2010-11 membership year is drawing to a close, and membership renewal notices for the 2011-12 year were recently distributed. As in years past, the MBA offers members two renewal options:

- **BY MAIL:** Renew your MBA membership through the mail with a check or credit card payment. You should have received your dues renewal form in the mail in mid-July.
- **ONLINE:** You should have received a renewal notice via e-mail in mid-July with instructions on how to renew your membership online. If you would like to renew now, go to www.massbar.org/membership/join-renew-online. We understand how valuable your time is and are happy to offer you this time-saving, green alternative.

As always, thank you for your continued support of the MBA.

If you have any questions, please contact MBA Member Services at (617) 338-0530 or by e-mail at membership@massbar.org. ■

COURT HOLLAND & KNIGHT

Powerful witness preparation

BY DAN SMALL

Not so long ago, persuading lay people that they needed extensive preparation before testifying in a legal proceeding was a battle. Many confident, articulate executives were convinced they could just "go in and tell my story," and they were insulted by the notion that they needed some lawyer to prepare them. Too many experienced lawyers didn't push back.

Then came an explosion of high-profile lawsuits and investigations, and with them a parade of highly successful executives who proved to be very bad witnesses. Bill Gates, Martha Stewart, Scooter Libby, Dennis Kozlowski, Kenneth Lay — the list goes on. Now, people faced with the prospect of being a witness may wonder if there is some reason this happened, and if it could happen to them. The answers are "Yes" and "Yes."

It happened because clients failed to understand that they were entering a different and dangerous world. In this world, it's not just about experience and intelligence. It's about preparation, and understanding the audience, the rules and the "core themes" of the case. Even executives who have spent years mastering the corporate world must nonetheless understand it takes commitment, time and effort. This article offers tips to help you better prepare your clients.

Several years ago, the TV series *The West Wing* had a series of episodes about a scandal in the White House. The president had multiple sclerosis and he and his advisers did not disclose it. The news has now broken, and an investigation has been launched into whether top aides broke the law in covering this up. The president's press secretary, C.J., has been subpoenaed to testify and has been called to meet with the White House counsel to prepare.

C.J. is intelligent and talkative. She is clearly nervous and angry about the situation — and takes it out on counsel by being sarcastic, uncooperative and not eager to take advice. Counsel is trying to make her understand the need to prepare. Then, in mid-conversation, he stops, and there is roughly the following exchange:

DAN SMALL

COUNSEL: Do you know what time it is?
C.J.: Sure, it's 4:30.
COUNSEL: You've got to get out of the habit of doing that!
C.J.: Doing what?
COUNSEL: Answering more than was asked!
(Pause)
Do you know what time it is?
(Long pause)
C.J.: Yes.
COUNSEL: Now we're making progress. We'll take a break and meet again later today.

If you teach your witness nothing else, teach him or her the answer to the question, "Do you know what time it is?" because the right answer is the difference between a conversation and testimony. In a conversation, the answer "yes," the accurate answer, the precise answer, is a bad one. That's not what the questioner meant. That's not where the conversation is flowing. In the unnatural and precise testimony environment, it's the right answer. That is a core difference between a normal conversation and testimony.

Testimony is not a conversation. It has its own language and its own rhythm. Question, pause, answer, stop. Guessing, interrupting and volunteering are inappropriate and dangerous in this narrow and artificial world, where every word is taken down under oath and may be picked apart.

In this world, the questioner appears to be in control. It's an illusion, but even the most accomplished witness can fall victim to it. The witness has the right and the responsibility to take control. In meetings or other interactions, most people know the way to take control is not by shouting the loudest, but by utilizing some clearly established techniques or rules. So it is with testimony. Here are 10 rules.

1. TAKE YOUR TIME

This is, amazingly, the most important rule, and the one from which everything else follows. Slow it down, think it through and control the pace. Lawyers want rapid-fire Q&A, but if the lawyer makes a mistake, no one cares. If the witness makes a mistake, it is, "The Gift That Keeps On Giving." From the very first question, slow it down.

2. REMEMBER YOU ARE MAKING A RECORD

You are dictating the first and final draft of a very important document, with no rewind button and no second draft, so think about your language. Certain words can take on special meanings. Learn what they are in your case, remembering words can have different meanings to different people. There will be only one transcript.

3. TELL THE TRUTH

This seems obvious, but truth in a witness environment is a very narrow concept. It's what you saw, heard or did. Everything else is a guess.

4. BE RELENTLESSLY POLITE

This will feel personal. They're attacking you. But remember that a witness who is angry or defensive isn't thinking clearly and isn't controlling the language or the pace. Lawyers know that. A few garbage questions, and off we go! It's a scam. Don't fall for it. Kill them with kindness. Be relentlessly polite, positive and focused.

5. DON'T ANSWER A QUESTION YOU DON'T UNDERSTAND

Is it vague language, strange phrasing or distorted assumptions? Is it just too long to be clear? It doesn't matter *why* the witness doesn't understand a question. Don't answer it. Just say, "Please rephrase the question." ➤22

IMMIGRATION TOCCI, GOSS & LEE

H-1B program is all about the numbers

BY ELIZABETH GOSS

The U.S. Department of Labor's Bureau of Labor Statistics predicts that professional and related occupations will provide more jobs — 5 million — than any other occupational group between 2006 and 2016, with computer, math, engineering and life science occupations comprising the majority of these positions.

The National Science Board, the governing body of the National Science Foundation (www.nsf.gov/nsb/) also concluded that, as a result of retirees in science and engineering over the next two decades, a decrease in graduates from these programs and/or immigrants coming to perform services in these critical areas will worsen the anticipated skilled worker shortage.

This fact — in combination with the National Science Foundation's finding that more than 50 percent of masters' degrees and Ph.D.s issued by U.S. colleges and universities are granted to foreign-born persons — places immigration squarely in the mix of factors contributing to the continued success and competitiveness of our economy. At this critical moment, then, the question is: Can the American workforce keep up with corporate demand for science, technology, engineering and mathematics (STEM) professionals without a more rational approach to our skilled worker visa programs?

A Harvard Business School study (December 2008) found that immigrants comprised nearly half of all scientists and engineers in the United States with a doctorate and accounted for 67 percent of the increase in the U.S. science and engineering workforce between 1995 and 2006. As our nation grapples with comprehensive immigration reform, the core debate, as always, centers on border security and a solution for the current 12 to 15 million undocumented persons living in America.

Moreover, as a result of a lagging economy, the public debate is often sidetracked by unfounded fears of foreign workers taking U.S. jobs, fears that ignore the reality of job creation and innovation that go hand in hand with an influx of highly skilled workers.[1]

Indeed, it is at this most critical juncture in our economic recovery that the United States should be expanding options for highly skilled foreign professionals to come to America to study, research, innovate and work. Implementing immigration reform to expand the number of skilled foreign professionals arriving at our door is essential to the continued success of American companies in the global economy.

The H-1B visa (specialty occupation) category created by The Immigration Act of 1990 (Public Law 101-649), since amended by the American Competitiveness and Workforce Improvement Act of 1998 (Public Law 105-277) and the American Competitiveness in the Twenty-First Century Act of 2000 (Public Law 106-313) ("AC 21"), has always been subject to a quota limit.

During the boom years in the late 1990s, the quota, known as the H-1B cap, was increased to keep up with economic demand for highly skilled workers; however, this temporary increase has since reverted back to the original 65,000 limit. Congress has exhibited little political will to create a permanent bump in this figure.

The annual H-1B cap has been met every year since 2000, preventing thousands of foreign graduates and professionals from entering the U.S. workforce. Although Congress has refused corporate America's pleas for an increase in the H-1B hard cap and has ignored economic data showing that foreign temporary professionals actually create more jobs for U.S. workers than they take away, AC21 created an additional 20,000 H-1B visas for foreign nationals who have earned a master's degree or higher from a U.S. institution.

In addition, this legislation provided quota exemptions for institutions of higher education and certain affiliated institutions, including teaching hospitals, nonprofit research and government research institutions.

With immigration reform languishing in Congress, some relief from quota limitations has come in the form of regulatory changes to the F-1 student visa category. Most students, with the exception of English-language and some non-degree programs, benefit from one year of optional practical training (work authorization) after graduation or program completion.

The 2008 Interim Final Rule (IFR *73 FR 18944)* F-1 regulatory changes provided for granting an additional 17 months of work authorization to students who have completed degrees in the STEM field as long as they are employed by a company enrolled in the government's E-Verify System (employment verification system completed in conjunction with a new hire I-9).

There is a cost for many companies when making the determination to enter this program to obtain the benefit of this STEM extension. Unfortunately, although E-Verify is open to all companies, for many corporations, the unfettered access to certain employment records authorized by a signed memorandum of understanding required to enroll in this program is a deciding factor in whether or not to enter this program and obtain the employee benefit of the ➤23

PRACTICE MANAGEMENT ATTORNEYS MASTER CLASS

Billing profitably and ethically

Build better client communications and increase revenues 10-25 percent

BY DUSTIN A. COLE

The issue of billings isn't just about revenue. It's also about professional integrity, communications and client trust. Billings are one of the most important avenues of client communication; inaccurate, vague and/or delayed billings can cost more than yesterday's time. It can result in lost trust and future business.

At the same time, it has been estimated that attorneys fail to bill from 10-25 percent of their legitimate billable hours due to bad recording habits, disorganization, being overwhelmed and poor team management. That's a painfully large part of anyone's revenues to lose, especially when it represents legitimate work done and time expended.

Here are eight ways attorneys lose legitimate billable hours and fail to communicate effectively with clients, with solutions on how to bill more effectively.

PROBLEM 1: THE PERIODIC 'RECONSTRUCTION'

Reconstructing hours at the end of the day may lose you 5 to 10 percent. Waiting a week can lose as much as 15-25 percent.

It is virtually impossible to accurately reconstruct work done more than a day ago. The big pieces may get recorded, but most of the smaller pieces — momentary conversations, e-mail responses and impromptu meetings — will be lost, even though each was legitimate client work. From the ethical side, trying to reconstruct work done more than a few days ago is an exercise in fiction writing — imprecise and possibly erroneous.

SOLUTION 1: TRACK YOUR TIME CONCURRENTLY

The most obvious solution is generally the most hated. But is it more enjoyable to not get paid for 10-25 percent of your work? Is a 10-25 percent increase in revenues worth a change of habits?

Reduce the struggle by obtaining a separate dictation machine just for recording time. Carry it with you at all times. Dictation is less intrusive and more explanatory than software or writing time sheets, and can be done anywhere — in the car, on the train, at home — helping you capture more time.

PROBLEM 2: THE GOOD CLIENT COURTESY

"It was just a two-minute call, she's a good client, I won't nickel and dime her." How many calls do you not record in a given month? How many of them contained important information or valuable client interaction?

SOLUTION 2: RECORD IT — ALWAYS

Record everything you did, without judgment — and decide only once — at pre-bill — what to bill or comp. Ethically, professionally and financially, recording everything is the only choice. That way, the client has full information on your work for them — and sees what you have decided not to charge them for.

PROBLEM 3: THE INTERRUPTION

How many times have you hung up the phone and were immediately attacked by a team member with a question, or dashed out of your office late for a meeting? Such interruptions cause you to fail to record your time — and often it's lost forever.

SOLUTION 3: KEEP YOUR DOOR CLOSED

Train your team to honor it, and to hold non-urgent questions for regular daily meetings or specified open-door times. Designate non-call times and have your assistant take messages, facilitate or pass on calls to your team. Then designate a call-return time, instead of returning calls on the fly. No matter how rushed, always take the 30 seconds needed to dictate time.

PROBLEM 4: THE 'I WAS IN LALA LAND'

You've worked for four hours, but you've been unfocused and unproductive. So you write down three. Or two. After all, "I didn't get much accomplished, so I can't very well bill for it!"

SOLUTION 4: RECORD IT ALL WITHOUT JUDGMENT

A certain amount of unproductive wandering around is often necessary. Your brain is processing unconsciously even when you're not very conscious. Three hours of "wandering around" often leads to one flash of inspiration. So write it all down and save that judgment for the pre-bill stage.

PROBLEM 5: THE 'WORK IN PROGRESS' BLACK HOLE

Many lawyers just don't get around to billing some clients, especially when there has been little progress, or it's a "D" client. So the bill waits a few months and accumulates — and the client's recollection of calls, meetings and so on get dimmer.

SOLUTION 5: BILL MONTHLY, UNLESS THE CLIENT SAYS NOT TO

Remember that billings are a crucial part of client communications — possibly THE crucial part. It's the basic report to the client on your activity for them, and what you're charging. Delaying your billing is obfuscation, since you've done work that obligates the client to pay, but you haven't given them the ➤22

TECHNOLOGY SMOOTHSTONE IP COMMUNICATIONS

Managed network vs. managed router

What the carriers aren't telling Mass. law firms

BY JAMES WHITEMORE

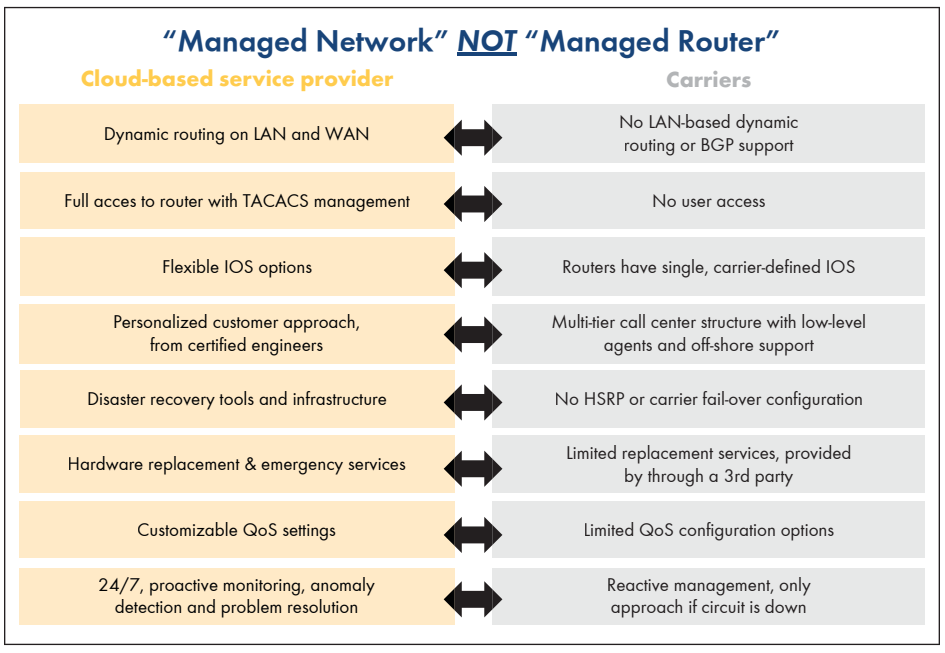
Today's typical law firm network has been built piecemeal over several years, resulting in a lack of an overarching architecture plan. This makes it extremely difficult and time consuming to manage.

As law firms in Massachusetts look to move more of their applications to the cloud, they're finding that their networks simply aren't prepared to handle the increase in network traffic. And not just in terms of bandwidth, but also in their ability to prioritize the heavier volume and different types of traffic.


JAMES WHITEMORE

So how did it come to this? One reason is firms' reliance on traditional telecom carriers and their service delivery. Often, carriers will make the initial sale by promising law firms a managed router — where the carriers control and remotely make adjustments to the router as they see fit.

But in today's world of MPLS (multiprotocol label switching) networks, designed to transport both voice and data with variable Quality of Service (QoS), just having the router being managed isn't enough.



SOURCE: SMOOTHSTONE IP COMMUNICATIONS

Law firms not only give up a lot of control, but they also lose the ability to customize their networks to fit their needs. That's why, in order to ensure top performance of enterprise voice, video, data and cloud applications, firms need a managed network.

MANAGED NETWORK, MANAGED ROUTER ... WHAT'S THE DIFFERENCE?

Today, carriers simply provide a network service, and very little else. For instance, they do not provide the proactive monitoring and support services — including security monitoring — that many enterprises seek today for their networks. Carriers will mostly wait until circuits are down to start any measures to remedy service issues — meaning law firms run the risk of losing significant network availability while circuits are being repaired.

In addition, carriers only provide a router with inflexible single IOS (Internetwork Operating System) standards that allow little custom configuration — something that is crucial for keeping up with the dynamic evolution of today's cloud-based business applications. And since much of the equipment is on-premise, the firm is responsible for the cost of hardware upgrades and replacements.

On the other hand, with a cloud-based managed network approach, law firms can prioritize and manage the performance of critical business applications from the router. This can enhance a firm's efficiency, execution and agility by allowing it to be much more involved in the overall network strategy — including how to design, manage and monitor the network, as opposed to just focusing on pushing packets through the pipe.

Let's look at some of the top benefits that a cloud-based managed network approach provides to customers today:

FULLY CUSTOMIZABLE QOS. With the emergence of MPLS, law firms can now easily incorporate voice, video and data onto a converged network. This makes it more important than ever to prioritize the QoS for each application to meet their specific business needs. This way, last night's ESPN highlights aren't interrupting voice traffic or Salesforce.com access, for example.

PERSONALIZED CUSTOMER APPROACH FROM CERTIFIED ENGINEERS. Law firms are relying on cloud-based managed service providers today because they have the certified network design engineers answering their calls that can minimize the technical, implementation and investment risks — risks that they would face if they tried to design the network themselves, or if they tried to get a carrier to adapt their services to the company's network design. This managed service approach also includes constant proactive monitoring, so problems are often identified and ➤21

JUVENILE LAW KERSTEIN, COREN & LICHTENSTEIN LLP

The schoolyard lawyer

Reflections on the Massachusetts anti-bullying law

BY KATHERINE MEINELT

It has been just over a year since Gov. Deval Patrick enacted the state law on bullying, making Massachusetts the 42nd state to pass such a law.[1] The law quickly became known as one of the strictest anti-bullying laws in the country, and the 2010-11 school year was the first test run for school districts, charter schools, non-public schools, approved private day or residential schools and collaborative schools across the state.

Looking back over the past year, it is appropriate timing to reflect on the various legal implications that the law has created for all those involved — schools, students and their respective parents.

BRIEF SUMMARY OF THE LAW

The law defines bullying as unwelcome and repeated "written, verbal or electronic expression or a physical act or gesture or any combination thereof, directed at a victim that (1) causes physical or emotional harm to the victim or damage to the victim's property, (2) places the victim in reasonable fear of harm to himself or of damage to his property; (3) creates a hostile environment at school for the victim; (4) infringes on the rights of the victim at school; or (5) materially and substantially disrupts the education process or the orderly operation of a school."[2]


KATHERINE MEINELT

In addition, bullying includes cyberbullying, which is defined as "bullying through the use of technology or any electronic communication."[3] The law sets forth many different means of cyberbullying, but the most common uses for students are text messages, e-mails, phone calls or social media websites such as Facebook or MySpace. The main difference between bullying and cyberbullying is that bullying requires that the prohibited behavior be repeated, whereas cyberbullying only requires a single instance.[4]

The law rightfully offers additional protections for students with disabilities because they are more susceptible to being "targets" of bullying.[5] The law has two requirements for students with disabilities, both of which must occur simultaneously: (1) there must be a school-wide response to prevent student bullying of students with disabilities; and (2) the disabled student's Individualized Education Program (IEP) must "address the skills and proficiencies needed to avoid and respond to bullying, harassment or teasing."[6]

For students with disabilities, reasonable fear of harm is individually determined for each student regardless of their disability.[7] Therefore, the law protects students whose disability causes them to be in fear even if other students would perceive the act or behavior in a different way.

The law places great emphasis on the schools' role in responding to bullying. Initially, it required all school districts to formulate and implement a bullying prevention and intervention plan in their schools by Dec. 31, 2010.[8] Shortly after the law was passed, the Department of Elementary and Secondary Education provided a model plan for all districts statewide to use as a guideline and resource when creating their own plans.[9] School districts, with input from teachers, school staff, students, parents, law enforcement and community representatives, were then expected to implement a plan for each school.[10]

Under the law, school districts are accountable for the implementation and enforcement of their plan.[11] Consequently, districts are held to a higher standard and are required to report to the Department of Elementary and Secondary Education. The main responsibilities for the schools are the reporting procedures and the investigation procedures, which place greater liability on employees to promptly recognize and identify a problem. Because all employees must report suspicions of bullying, similar to instances of suspected abuse and neglect, neither the employee nor school system has any discretion but must report all suspected incidents of bullying.[12]

POTENTIAL LEGAL ISSUES

Although the purpose of the law is to prevent bullying in schools, it creates various potential legal issues for all those involved. These issues not only affect the schools but extend to the persons accused of bullying, their victims and the respective parents.

THE VICTIM

There are several issues that arise for victims of bullying. First and foremost, the law is meant to protect victims of bullying, and every school has policies and procedures in place that they must follow. However, the law does not create a private right of action for victims and their families.[13]

Therefore, even though the law requires schools to establish and follow their district's plan, victims may not use this as a cause of action against schools which fail to do so. There may be other legal claims available, however, such as failure to exercise reasonable care, negligence, ➤22

ELDER LAW LAW OFFICE OF ALBERT GORDON

Trust law versus Medicaid law

BY ALBERT GORDON

Even a trust written more than 20 years ago might not protect your assets if you should require nursing home benefits today.

On March 28, 1989, "John Smith" (a pseudonym) had a trust document drafted naming himself as the trustee. He signed the document and acknowledged $10 placed into the trust. More funds were added to the trust over the years. The right to amend the trust is his alone, and is not shared with any other person, his guardian or his attorney-in-fact.

Upon his death, any funds in the trust were to be set aside as a separate trust, termed the residuary trust. His wife, "Sally," and his son "Larry" (from a previous marriage) were named successor trustees. If Sally survived him, any funds in the trust were to be paid to her on at least a quarterly basis during her lifetime.

Additionally, the trustee had the option to pay such sums from principal as deemed necessary to maintain her health and comfort, considering her income from all sources known to the trustee. Upon Sally's death, his son, as successor trustee, would become the sole trustee.

John Smith died outside the five-year lookback period. His wife, Sally, became incapacitated and entered a nursing home on Aug.18, 2010. Her daughter and power of attorney "Mary Smith," who was not a residual beneficiary of the trust, applied to MassHealth to obtain payment for nursing home services. On Sept. 1, 2010, MassHealth denied the application due to excess assets, most of which was the principal remaining in the trust. The MassHealth agency declared the trust to be a Medicaid qualifying trust and countable as an asset (semantically speaking, a Medicaid qualifying trust should be called a Medicaid disqualifying trust).

This case was referred to me on Sept. 14, 2010, and I informed Mary, the power of attorney, to fax a request for a hearing to the local MassHealth office based on the denial notice. Practice note: This applies to hardship requests. Regular appeals are sent to the Board of Hearings office in Quincy.

While a denied applicant has 30 days to request a fair hearing under normal circumstances, a request for hardship appeal must be submitted within 15 days of the date of the denial. The denied applicant has 30 days to request a fair hearing based on the denial of a hardship application. However, hardship applications are routinely denied by the agency.

I filed a request for a fair hearing with the Board of Hearings based on Sally's lack of access to trust principal. This is to follow procedural time limits, since the hardship issue wouldn't be answered prior to the 9/30/2010 deadline for filing a regular appeal based on the 9/1/2010 notice. If I didn't prevail at the regular appeal, I would have the opportunity to appeal the hardship issue, and by that time, the nursing home may have sent out a notice to discharge (a requirement of a hardship appeal) to my client, Sally.

The hearing was held on Dec. 10, 2010. The MEC didn't act on the hardship appeal, since they maintained a decision would not be made on a hardship appeal until the other appeal issue had been decided.

My argument is based on lack of access to the trust principal, not upon the countable status of the trust.

Larry Smith, the trustee, hired a law firm experienced in trust litigation to defend his position of not paying any trust principal on Sally's behalf. I had several conversations with the attorney involved, and he sent two letters stating the trustee's position. Both letters were entered into evidence at the Dec. 10 hearing.

At the hearing, we provided evidence that Sally has no funds to mount a legal action to gain access to trust principal. The trustee has access to trust funds to defend against an action and has made it clear that he will defend the trust. From the questions asked by the hearing office, it was clear that the hearing officer understood Sally's dilemma of having no means to bring an action against the trustee.

Yet on March 11, 2011, the hearing officer made a decision against my client based upon *Cohen V. Commissioner of the Division of Medical Assistance,* 423 Mass. 399, 413 1996).

I contacted the MassHealth representative by telephone to determine what action was necessary to have the hardship appeal acted upon now that we had an appeal decision. Unable to get a definitive answer, I sent the representative a letter requesting a decision to preserve my client's rights. I subsequently received a denial of the hardship request and have filed a request for an appeal.

Meanwhile, the nursing home engaged an attorney to explore the feasibility of bringing an action against the trustee since the facility was owed a substantial amount of money. The nursing home issued a notice of discharge, which I appealed. At the hearing on June 17, 2011, I introduced evidence preventing the nursing home from discharging my client.

To avoid a nightmare scenario such as this, proposed legislation (House Bill 2086 and Senate Bill 0490) have been introduced to establish criteria to be used by MassHealth to determine whether a penalty for a transfer of assets would constitute an undue hardship to an applicant. On July 19, 2011, I testified in favor of the above bills in front of the Massachusetts Joint House-Senate Committee on Health Care Financing.

One of the current requirements for a hardship waiver is that the nursing home must issue a discharge notice. Since I blocked the nursing home from discharging my client at one appeal hearing prior to the hearing on the hardship issue, does this mean we will lose the hardship appeal because there is no pending discharge action by the nursing home? Will the nursing home have to issue another discharge action which I will appeal to protect my client? The current regulations cause harm to the elderly residents of Massachusetts.

This legislation would create a ➤23

FOR YOUR PRACTICE HEALTH LAW

The useful but overlooked Massachusetts Equal Rights Amendment

Justice for all: New life for the Massachusetts Equal Rights Amendment

BY LORIANNE SAINSBURY-WONG, BENJAMIN WILSON AND ALYSSA VANGELI

I. INTRODUCTION

Massachusetts practitioners may increasingly find themselves struggling to understand the boundaries of state equal protection law. Specifically, civil litigators and health law practitioners have a particular interest in monitoring the increasing fiscal pressure behind state and local governments nationwide that cut costs by restricting eligibility for public programs and reducing benefits.[1]

When considering challenges to such cuts based on equal protection law, 14th Amendment claims and their respective Section 1983 attorneys' fees are feasible, together with state-based constitutional claims. Although few cases directly discuss Massachusetts equal protection law, a recent decision by the Supreme Judicial Court, *Finch v. Commonwealth Health Ins. Connector Authority,*[2] provides general guidance for practitioners who may find themselves arguing an interpretation of state equal protection law.

II. THE DILEMMA OF ENUMERATION IN THE EQUAL RIGHTS AMENDMENT

The Equal Rights Amendment (ERA) of the Massachusetts Constitution provides that "all people are born free and equal."[3] This language — *all people* — reflects the principles and ideals of the drafters of the state constitution for whom the concepts of equality and equal opportunities were paramount.[4]

In 1976, "all men" was replaced by "all people," and the following language was added: "[e]quality under the law shall not be denied or abridged because of sex, race, color, creed or national origin.[5] Of these five enumerated classifications, sex alone did not already receive strict scrutiny under 14th Amendment case law — receiving only heightened, or intermediate, review under federal law.[6] The commonwealth thus elevated gender to a suspect classification, safeguarded by the highest form of judicial scrutiny.

SJC opinions rendered shortly after the ratification of the ERA further indicate that the sole effect of the amendment was to expand equal protection with respect to gender discrimination. For example, in *Opinion of the Justices to the Senate*,[7] the Court reasoned that via the enumeration in the ERA, Massachusetts residents had "expressed their intention" that the strict scrutiny standard be applied to state classifications based on gender.[8] Likewise, in *Commonwealth v. King*,[9] the SJC held that:

LORIANNE SAINSBURY-WONG

> The classifications set forth in art. 106 … with the exception of sex, are within the extensive protection of the Fourteenth Amendment to the United States Constitution and are subjected to the strictest judicial scrutiny … . Therefore, we conclude that the people of Massachusetts view sex discrimination with the same vigorous disapproval as they view racial, ethnic, and religious discrimination[10]

Commonwealth v. King, 374 Mass. 5 (1977). Similarly, in *Opinion of Justices to House of Representatives*,[11] the SJC reasoned that, while lesser judicial review would suffice under the 14th Amendment, a proposed act barring girls from contact sports could not "survive the close scrutiny to which a statutory classification based solely on the basis of sex must be subjected" under the Massachusetts Constitution.[12]

The SJC has long held that the Massachusetts Constitution provides at least the same level of equal protection as the U.S. Constitution. Simultaneously, Massachusetts may certainly provide more expansive equal protection than exists under the 14th Amendment, and "state courts are absolutely free to interpret state constitutional provisions to accord greater protection to individual rights than do similar provisions of the United States Constitution."[13]

In fact, the SJC has never reduced the equal protection rights afforded by the Massachusetts Constitution to find the Declaration of Rights less protective than the federal Constitution.[14] Such a step is unwarranted by the public record before, during and after the day the ERA was enacted. Before the vote on the ERA, the SJC had declared that the principles of equal protection under the Massachusetts Constitution were at least co-extensive with the equal protection clause of the 14th Amendment as interpreted by the U.S. Supreme Court.[15]

BENJAMIN WILSON

Following the enactment of the ERA, Massachusetts courts continued to hold that state case law does not apply a more deferential standard of review under the Declaration of Rights than is required by federal law.[16] In striking down state laws that denied the privileges of marriage to same-sex couples, for instance, the SJC in *Goodridge v. Dep't of Pub. Health* confirmed that "'[a]bsolute equality before the law is a fundamental principle of our own Constitution.'"[17]

The *Goodridge* court underscored that the safeguards of equality and liberty in the Massachusetts Constitution signify more than mere "'freedom from' unwarranted government intrusion"; they protect the "'freedom to' partake in benefits created by the state for the common good."[18] "The Massachusetts Constitution affirms the dignity and equality of all individuals. It forbids the creation of second-class citizens."[19]

Goodridge is hardly alone in a broad application of equal protection by the Massachusetts SJC under the Massachusetts Constitution beyond that under the U.S. Constitution and the 14th Amendment. In *Moe v. Secretary of Administration & Finance*,[20] the SJC ruled that a state statute restricting state reimbursement for Medicaid abortions to those cases in which the procedure was necessary to prevent the death of the mother violated the Massachusetts Constitution, despite the U.S. Supreme Court previously upholding substantially similar laws under the Fifth and 14th Amendments applying a rational basis standard.[21] The consistent state-based body of jurisprudence establishes that equal protection under the Massachusetts Constitution requires, at a minimum, the same degree of protection as found under the U.S. Constitution and the 14th Amendment.[22]

Thus, the enumerated classes — namely, sex, race, color, creed and national origin — of the ERA raise a question as to whether the enumeration is exhaustive. Until recently, government practitioners could plausibly argue that, at least for the purposes of state equal protection law, the only suspect classifications are the five enumerated ones.

ALYSSA VANGELI

In *Finch*, however, the SJC confirmed that state equal protection law recognizes suspect classifications beyond the contours of the ERA enumeration, and that enumeration merely delineates those classifications that are automatically considered suspect.[23] The general contours of state-based equal protection must include the now well-established principle that under the Declaration of Rights, courts must apply strict scrutiny to laws that discriminate against "discrete and insular minorities."[24]

III. *FINCH* CONTINUES A TRADITION OF ROBUST STATE EQUAL PROTECTION LAW

The SJC's recent decision in *Finch* makes clear that the enumeration provided in the ERA did not contract equal protection law. Rather, the enumeration provides a set of classifications that are always automatically considered suspect and subject to strict scrutiny. Other classifications might also be considered suspect and subjected to heightened scrutiny. For those classes, however, further constitutional analysis is required. On May 6, 2011, the SJC issued a decision, substantially clarifying the state of Massachusetts's equal protection law. The court explains:

> Effectively, [the ERA] removes the first step — determination of whether a classification is suspect — from equal protection analysis and mandates strict scrutiny of the enumerated classifications. Because [the ERA] acts to channel the discretion of the courts ➤17

FOR YOUR PRACTICE INSURANCE PROTECTION

What's up with the attorney-client privilege?

Recent developments in the wake of *Suffolk Construction v. DCAM*

BY CHRISTOPHER J. PETRINI AND HEATHER W. KINGSBURY

In July of 2007, the Supreme Judicial Court (SJC) decided the seminal case of *Suffolk Construction Co., Inc. v. Division of Capital Asset Management*.[1] In this decision, the SJC unequivocally affirmed the existence of the attorney-client privilege protecting communications between public sector clients, including cities and towns, and their counsel.

This article will: (1) summarize the *Suffolk Construction* decision and how it is important to municipal officials; (2) address recent developments in court and state agency interpretations of *Suffolk Construction*, particularly as it relates to the Open Meeting Law; and (3) discuss the need for future decisions by the Office of the Attorney General and the courts that gives full meaning, vitality and effect to the right of public bodies to engage to engage in confidential legal conversations with their counsel, a right intended to be secured by *Suffolk Construction.*

I. THE *SUFFOLK CONSTRUCTION* DECISION AND ITS IMPACT ON MUNICIPAL OFFICIALS

Suffolk Construction involved litigation between Suffolk Construction Company and the Division of Capital Asset Management (DCAM), during which Suffolk Construction made two public records requests to DCAM for documents related to a public construction project. Although DCAM produced approximately 500,000 pages of documents, it sought to withhold certain documents on the basis that the attorney-client privilege protected them from disclosure.

Relying on *General Electric Co. v. Department of Environmental Protection*,[2] in which the SJC declined to find an implied exemption in the Public Records Law, codified at G.L. c. 4, sec. 7 cl. 26 and at G.L. c. 66, sec. 10, for information protected by the attorney work-product doctrine, Suffolk claimed that DCAM was required to provide the documents because the attorney-client privilege also is not an explicit exemption set forth in the Public Records Law.

In its decision, the SJC noted that the attorney-client privilege dates at least from the age of Shakespeare and "is the oldest of the privileges for confidential communications known to the common law.[3] The Court affirmed that the attorney-client privilege extends to communications between governmental lawyers and their clients. The Court further held that nothing in the Public Records Law precludes a public entity from claiming the attorney-client privilege for communications between government attorneys and their public clients. In reaching its decision, the Court held on page 449 as follows:

> [T]he attorney-client privilege is a fundamental component of the administration of justice. Today, its social utility is virtually unchallenged. Nothing in the language or history of the public records law, or in our prior decisions, leads us to conclude that the Legislature intended the public records law to abrogate the privilege for those subject to the statute.

Suffolk Construction has given considerable solace to municipalities and public agencies that the advice given by their attorneys will not be subject to disclosure pursuant to public records requests. However, the decision left some confusion in the context of the Open Meeting Law, especially since the law was rewritten effective July 1, 2010. Namely, *Suffolk Construction* brought clarity to the question of whether the attorney-client privilege extends to written communications between governmental lawyers and their clients but did not explicitly address the question of whether the privilege also protects oral communications between multi-member public bodies and their counsel.

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Despite the fact that *Suffolk Construction* did not address oral communications between public clients and their counsel, it is undisputed that the decision serves as a clarion call that emphatically reaffirms the existence of the attorney-client privilege between public bodies and their counsel. In view of the longstanding and fundamental nature of the attorney-client privilege, public lawyers should be free to give candid and objective advice to their clients — whether in writing, which is already allowed by *Suffolk Construction*, or orally at executive sessions — unimpaired by the risk that such advice will be disclosed to their clients' adversaries.

Without such protection, the social utility and benefits intended by the attorney-client privilege will not be secured in the public context in the same manner as it is in the private context. Dissimilar treatment of the attorney-client privilege in the private and public contexts would be inimical to the holding of *Suffolk Construction*, which intended to secure the same rights to public clients as those enjoyed by the private clients.

Support for a properly robust interpretation of *Suffolk Construction* also may be found in the distinction the SJC drew between its holding in *Suffolk Construction* and its decision in *District Attorney for the Plymouth Dist. v. Selectmen of Middleborough*.[4] In that case, the Court "rejected the contention of the defendant selectmen that they could shut down an ongoing open meeting in order to hold a closed session with the town attorney for reasons the selectmen acknowledged to fall outside the express statutory exemptions in the open meetings law for closed executive sessions."[5]

The SJC noted that even in *Middleborough*. it had presumed the existence of the attorney-client privilege for public officials and further instructed "[t]hat the Legislature intended certain discussions between public officials and their counsel to take place in the open does not imply that no communication between the public counsel and the public client can ever be confidential." *Id*. The *Suffolk Construction* Court's distinction of *Middleborough* calls into question the continued vitality of that decision, particularly where it is well-settled in the private setting that the attorney-client privilege protects oral communications between clients and their attorneys.[6]

II. RECENT COURT AND AGENCY INTERPRETATIONS OF *SUFFOLK CONSTRUCTION*

A. COURT INTERPRETATIONS

In April of 2011, the SJC relied on its holding in *Suffolk Construction* in determining that documents ordered to be kept confidential under a judicial protective order are not subject to disclosure under the Public Records Law.[7] In *Fremont Investment*, the Court held that the Public Records Law does not override a judicial order protecting from disclosure certain documents the Office of the Attorney General obtained from an investment and loan company in the course of an enforcement action, and the Court further refused to allow a prospective intervenor to obtain such documents from the attorney general through a public records request.[8]

In so holding, the Court reiterated the *Suffolk Construction* Court's guidance that where a statute, such as the Public Records Law, is "silen[t] on a matter of common law of fundamental and longstanding importance to the administration of justice," it does *not* abrogate that fundamental principle of common law.[9] The Court found that this principle applies equally to the attorney-client privilege as well as judicial protective orders, which operate to protect documents from disclosure notwithstanding the lack of an explicit exemption in the Public Records Law.

This recent decision is a resounding affirmation of the concept that a fundamental right under the common law (such as the attorney-client privilege) remains intact where the Legislature does not specifically address the matter in related legislation. Since the SJC has now found a second common law basis for exemption from the Public Records Law despite the lack of explicit statutory exception, one might expect that the same tenet would extend to the application of common law exceptions to the new Open Meeting Law. The common law doctrine makes no distinction between written and oral communications for purposes of obtaining legal advice; both are protected.

However, we have yet to see whether the Court's holding in *Middleborough* will be wholly overturned in light of *Suffolk Construction*, and the attorney general unfortunately has failed to fully protect the attorney-client privilege as it relates to meetings of public bodies.

B. ATTORNEY GENERAL INTERPRETATIONS

Unfortunately, the Office of the Attorney General, the agency charged with interpretation and enforcement of the new Open Meeting Law codified in G.L. c. 30A, §§18-25, has taken an improperly narrow view of the applicability of the attorney-client privilege and has held that it does not serve as a basis for entering executive session unless the meeting with counsel relates to one of the exemptions specifically enumerated in the Open Meeting Law.

For instance, in a Dec. 17, 2010, decision concerning an alleged violation of the Open Meeting Law, the attorney general held that such a violation did occur when the offending public body received legal advice from counsel in executive session to the extent that such advice was not related to a specifically enumerated exemption.[10] Citing the *Middleborough* case, the attorney general stated that "[w]hile a public body may meet in executive session to communicate with counsel, it may do so only for one of the enumerated purposes for executive session" and that such a meeting with counsel "does not allow the Board free reign to discuss substantive and important issues appropriately left for discussion during open session."

Additionally, the Attorney General's Open Meeting Law Guide, updated as of March 24, 2011, advises that "a public body's discussions with its counsel do not automatically fall under [the litigation exemption] or any other Purpose for holding an executive session."

III. NEED FOR JUDICIAL INTERPRETATION AND CLARIFICATION

The attorney general's stance is contrary to the SJC's direction in *Suffolk Construction* regarding the status and continued vitality of the common law attorney-client privilege. The SJC in *Suffolk Construction* clearly indicated that a statute that is silent as to a fundamental common law right such as the attorney-client privilege does not automatically override the privilege. Access to municipal counsel in a protected context encourages complete and honest discussion and therefore serves the public interest and furthers interests of social utility.[11]

While not every communication with legal counsel is protected, communications concerning legal advice should be entitled to the privilege. The *Suffolk Construction* Court acknowledged the ability of government officials and their counsel to distinguish between privileged and unprivileged communications.

The attorney general appears to have less confidence in the ability of municipal officials to limit executive session discussions with counsel to matters entitled to the privilege, as the 2010 enforcement decision may be read to prohibit any private discussions between a quorum of a public body and its attorney unless the discussion relates to topic that is independently appropriate for executive session, such as pending litigation or real estate negotiations. This view poses challenges for public bodies in reconciling the Open Meeting Law with the Public Records Law, especially in light of the Open ➤17

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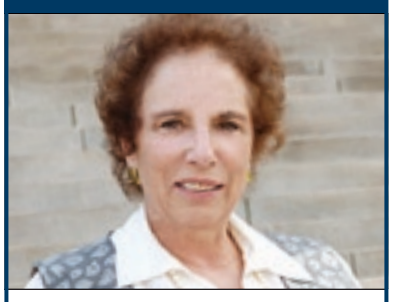

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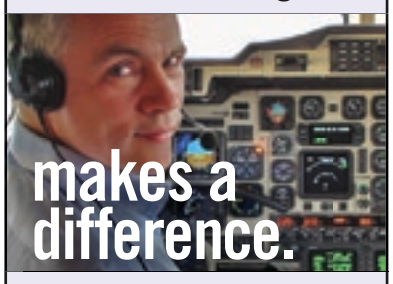

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EQUAL RIGHTS AMENDMENT

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> with respect to the enumerated classes, the policy considerations that ordinarily illuminate equal protection analysis are not relevant to interpretation … If a class is not addressed by [the ERA] it does not follow that strict scrutiny is inappropriate but merely that there is no express constitutional mandate that such scrutiny be applied.[25]

In this way, the SJC has reconciled the ERA's curious enumeration with its clear goal of establishing gender as a suspect classification. While the enumeration provides an exclusive list of classifications always deemed suspect, discrimination based on other classifications may also be deemed to warrant strict scrutiny upon further constitutional analysis.[26]

IV. CONCLUSION

The Declaration of Rights is, without exaggeration, the last bastion for Massachusetts residents who seek protected class status. From the *Quock Walker* cases challenging slavery in 1783, to *Goodridge*, the Massachusetts courts have led the way in protecting individual rights. Taking it as a statement of general principles, in view of the evils it was intended to remedy, the ERA must apply to discrimination against certain unenumerated classes deserving of heightened protection.

This does not mean, however, that any state-based classification would be subjected to strict scrutiny if a discrete and insular minority is targeted.[27] Classifications that do not infringe "fundamental personal rights" are not subject to strict scrutiny unless they are "inherently suspect."[28] Instead, "experience, not abstract logic, must be the primary guide" in determining which classifications violate equal protection.[29] Further, a group's "political powerlessness" is a relevant consideration — though not itself sufficient to justify strict scrutiny.[30]

Finch clears the way for advocates to proceed with equal protection claims under the Massachusetts Constitution, even if the discrimination alleged is not based on one of the enumerated classifications. Existing precedent informs the legal practitioner that the ERA is not only coextensive with the 14th Amendment, but also can be a source of added consumer protections and claims. Legal practitioners should consider the usefulness of the ERA and its application to non-enumerated protected classifications for civil class action lawsuits. ■

1) U.S. Gov't Accountability Office, GAO-10-899, Fiscal Pressures Could Have Implications for Future Delivery of Intergovernmental Programs 1–3 (2010).
2) Finch v. Commonwealth Health Ins. Connector Auth., 459 Mass. 655 (2011).
3) Mass. Const. art. CVI.
4) Originally, Article I read: "[a]ll *men* are born free and equal."
5) *Id.* at art. CVI.
6) *E.g.* United States v. Virginia, 518 U.S. 515 (1996); J.E.B. v. Alabama ex rel. T.B., 511 U.S. 127 (1994); Mississippi University for Women v. Hogan, 458 U.S. 718 (1982); Craig v. Boren, 429 U.S. 190 (1976).
7) Opinion of the Justices to the Senate, 373 Mass. 883 (1977).
8) *Id.* at 886-87 ("With the exception of sex, [the Article 106] classifications have long been afforded extensive protection under the 14th Amendment to the Constitution of the United States. Race, color and national origin have been designated suspect classifications and as such have been subject to the strictest judicial scrutiny. Governmental action which apportions benefits or burdens according to such suspect categorizations is constitutionally permissible only if it furthers a demonstrably compelling interest and limits its impact as narrowly as possible consistent with the legitimate purpose served").
9) Commonwealth v. King, 374 Mass. 5 (1977).
10) *Id.* at 21 (*citing* Loving v. Virginia, 388 U.S. 1 (1967) (race as a suspect classification); Graham v. Richardson, 403 U.S. 365 (1971) (alienage as a suspect classification); Oyama v. California, 332 U.S. 633 (1948) (national origin as a suspect classification); Wisconsin v. Yoder, 406 U.S. 205, 214 (1972) (religious distinction affecting fundamental First Amendment rights)).
11) Opinion of Justices to House of Representatives, 374 Mass. 836 (1977).
12) *Id.* at 839–40, 842.
13) Goodridge v. Dep't of Pub. Health, 440 Mass. 309, 328 (2003) (quoting from Arizona v. Evans, 514 U.S. 1, 8 (1995)); Planned Parenthood League of Mass. v. Attorney Gen., 424 Mass. 586, 590 (1997).
14) See, e.g., Commonwealth v. King, 374 Mass. at 21 ("The classifications set forth in art. 106 … , with the exception of sex, are within the extensive protection of the 14th Amendment … and are subjected to the strictest judicial scrutiny"); Goodridge, 440 Mass. at 313 ("The Massachusetts Constitution is, if anything, more protective of individual liberty and equality than the Federal Constitution … ."); Moe, 382 Mass. at 651 ("We think our Declaration of Rights affords a greater degree of protection to the right asserted here than does the Federal Constitution … .").
15) Opinion of the Justices, 363 Mass. 899, 908-09 (1973) ("The guaranties contained in [Articles 1 and 10 of the Declaration of Rights] are at least as great as those guaranties provided in the equal protection clause of the Federal Constitution.").
16) Zayre Corp. v. Attorney General, 372 Mass. 423, 433 n.22 (1977) (the federal decisions may reflect a standard of review less restrictive than that required by the Massachusetts Declaration of Rights)
17) Goodridge, 440 Mass. at 329.
18) *Id.* at 329.
19) *Id.* at 312.
20) Moe v. Sec'y of Admin. & Fin., 382 Mass. 629 (1981)
21) See *id.* at 650. recognition of "a woman's freedom of choice" and held that such freedom did not "carr[y] with it a constitutional entitlement to the financial resources to avail herself of the full range of protected choices," Harris v. McRae, 448 U.S. 297, 316 (1980), this Court went further in applying the values of Massachusetts, holding that "when a State decides to alleviate some of the hardships of poverty by providing medical care," it "may not use criteria which discriminatorily burden the exercise of a fundamental right." Moe, 382 Mass. at 652 (internal quotation marks omitted).
22) See also, e.g., Corning Glass Works v. Ann & Hope, Inc. of Danvers, 363 Mass. 409, 416 (1973) (stating that this Court "is not bound by federal decisions, which in some respects are less restrictive than our Declaration of Rights"). Compare also McDuffy v. Sec'y, 415 Mass. 545, 606 (1993) (holding that the commonwealth has a duty under the Massachusetts Constitution "to provide an education for all its children, rich and poor, in every city and town of the Commonwealth at the public school level"), with San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 35 (1973).
23) *See* infra Part III.
24) United States v. Carolene Products Co., 304 U.S. 144, 152-153, n. 4 (1938)
25) Finch, 459 Mass. at 664 (2011).
26) *Id.*
27) Rules that treat discrete and insular groups lacking political power differently from others are not inherently suspect in all circumstances. Harlfinger v. Martin, 435 Mass. 38, 50, (2001) (minors); Longval v. Superior Court Dept. of the Trial Court, 434 Mass. 718, 723 (2001) (prisoners); accord, e.g., Gregory, 501 U.S. 470 ("age is not a suspect classification under the Equal Protection Clause"); Zipkin v. Heckler, 790 F.2d 16, 18 (2d Cir. 1986) ("incarcerated felons are not a suspect classification").
28) Paro, 373 Mass. at 649
29) City of Cleburne, Texas v. Cleburne Living Center, 473 U.S. 432, 472 n.24 (1985) (Marshall, J., concurring in the judgment in part and dissenting in part).
30) *Id.* (citation omitted).

ATTORNEY-CLIENT PRIVILEGE

Continued from page 15

Meeting Law's express recognition of the attorney-client privilege as it relates to the written records of meetings of public bodies.

Moreover, the new Open Meeting Law is not entirely silent on the topic of the attorney-client privilege and, in fact, contains two explicit provisions recognizing the privilege, both found in G.L. c. 30A, §22(f). Section 22(f), which provides in part as follows:

> When the purpose for which a valid executive session was held has been served, the minutes, preparatory materials and documents and exhibits of the session shall be disclosed **unless the attorney-client privilege or 1 or more exemptions under [the Public Records Law]** apply to withhold these records, or any portion thereof, from disclosure. For purposes of this subsection, if any executive session is held pursuant to clause (2) or (3) of subsections (a) of section 21, then the minutes, preparatory materials and documents and exhibits used at the session may be withheld from disclosure to the public in their entirety, unless and until such time as a litigating, negotiating or bargaining position is no longer jeopardized by such disclosure, at which time they shall be disclosed **unless the attorney-client privilege or 1 or more of the exemptions under [the Public Records Law]** apply to withhold these records, or any portion thereof, from disclosure (emphasis supplied).

In two separate instances in Section 22(f), the Legislature recognized the attorney-client privilege as a separate and independent basis for protecting from disclosure the minutes, preparatory materials, documents and exhibits of an executive session even after the purpose of the executive session has been served, and even if one or more explicit statutory exemptions do not apply.

Accordingly, it stands to reason that if the attorney-client privilege allows a public body to withhold the minutes of an executive session from disclosure, the discussions summarized in those minutes (namely, receipt of oral advice from counsel even if not related to a specific statutory exemption) must have been entitled to the privilege in the first instance. The statutory language contained in Section 22(f) broadly recognizes the privilege as a basis for withholding executive session minutes and does not impose the additional requirement that privileged discussions must be related to an enumerated purpose of executive session in order to be withheld.

Generally accepted principles of statutory construction require the various provisions of a statute to be harmonized, recognizing that the Legislature would not intend one provision of a statute to contradict another.[12] Thus, the remainder of the new Open Meeting Law must be harmonized with the two specific provisions containing affirmative references to the attorney-client privilege. The attorney general's truncated and unduly narrow interpretation of the privilege creates confusion and conflicts with both the statutory language as well as the SJC's guidance in *Suffolk Construction*.

CONCLUSION

We call upon the legislators, the courts, and the attorney general to properly implement the robust protections intended for the attorney-client privilege, as so particularly described in *Suffolk Construction,* for all public agencies and political subdivisions, including the 351 cities and towns within the Commonwealth of Massachusetts.

The attorney-client privilege is a fundamental common law right of the utmost importance to municipal officials, who should be encouraged to discuss legal matters candidly with their counsel without fear of disclosure to opposing parties. Recognition of the attorney-client privilege in the context of the Open Meeting Law would serve the public interest in promoting public body access to legal advice, and not creating two separate classes of legal clients, one in the private sector entitled to confidential legal advice and one in the public sector stripped of that right. ■

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1) 449 Mass. 444 (2007).
2) 429 Mass. 798 (1999).
3) Suffolk Construction Co. v. Division of Capital Asset Management, 449 Mass. 444, 448-49 (2007), *citing* Upjohn Co. v. United States, 449 U.S. 383, 389 (1991).
4) 395 Mass. 629 (1985).
5) *Suffolk Construction*, 449 Mass. at 459.
6) *See, e.g.,* Neitlich v. Peterson, 15 Mass. App. Ct. 622, 624 (1983).
7) Commonwealth v. Fremont Investment & Loan, 459 Mass. 209 (2011).
8) *Id.*
9) *Id.* at 216.
10) Attorney General, OML 2010-6.
11) *Suffolk Construction*, 449 Mass. at 460.
12) In re Birchall, 454 Mass. 837, 849 (2009).

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FOR YOUR PRACTICE INSURANCE PROTECTION

The tail, wagging or otherwise, that cannot be ignored

BY RICHARD R. EURICH

The simple beauty of a claims-made policy — captured in its title, description and coverage provided — conceals an equally simple, but not at all beautiful, danger. This is because, as noted by the Supreme Judicial Court, "[t]he purpose of a claims-made policy is to minimize the time between the insured event [the claim asserting the alleged negligent act or omission] and the payment [by the insurer]."[1]

Accordingly, coverage exists under a claims-made policy if, but only if, the claim against the insured is first made during the policy period. Depending upon the particular policy, there may also be an additional requirement that the allegedly negligent act, error or omission giving rise to the claim occurred after the retroactive date stated in the policy. That aspect and its various ramifications are matters that, perhaps, can be explored in another article.

Today's exploration is limited to the fact that, as simply and honestly stated, the coverage provided in a claims-made policy ends when the policy ends. Most attorneys at least implicitly acknowledge that reality by ensuring that, as one policy expires, it is succeeded by a renewal or successor policy. This guarantees, at least for the period of the successor policy, continuing claims-made coverage.

But as Mark Twain once said, "It ain't what you don't know that gets you into trouble. It's what you know for sure that just ain't so." What is frequently overlooked by attorneys is the potentially pernicious effect brought about by the sometimes quite substantial interlude between the commission, or alleged commission, of a negligent act and the eventual first assertion of the claim stemming from that commission. The tail, an attorney's potential exposure to a claim, whether justified or not, can continue for an indeterminate period of time after the alleged action giving rise to the claim.[2]

The applicable statute of limitations for malpractice actions against attorneys is "three years next after the cause of action accrues."[3] However, the action does not accrue until the misrepresentation or error is discovered or reasonably should have been discovered by the claimant.[4]

Additionally, limitations periods are tolled by a claimant's minority or incapacity caused by mental illness,[5] or by an allegation that the defendant fraudulently concealed the cause of action from the knowledge of the clamant.[6] Specifically as to attorneys, the limitations period for commencing suit can be tolled by the doctrine of continuing representation. Because a client has a right to place confidence in his attorney's ability and good faith, he consequently does not have to be concerned with the accrual of a cause of action against the attorney until the attorney's employment as attorney is terminated.[7]

Nor does "that sleep of death" contemplated by Hamlet deliver surcease. A legal malpractice cause of action survives an attorney's death,[8] permitting suit to be filed against the estate of a deceased attorney. Should it be the potential claimant who dies, his executor or administrator is entitled to file an action against the attorney "at any time within the period within which the deceased might have brought the action or within two years after his giving bond for the discharge of his trust … ."[9]

That statute further states, ominously, that an action "may be commenced by the executor or administrator within three years from the date when the executor or administrator [not the decedent on whose behalf he makes the malpractice claim] knew, or in the exercise of reasonable diligence, should have known of the factual basis for a cause of action."[10]

The simple point, and the simple danger, of all this is that the risk of a claim being asserted — and the attendant necessity of incurring what could be substantial defense fees in repelling the claim — can and will continue long after a claims-made policy comes to an end. Attorneys, who by nature, custom, tradition and their own practice, exert considerable effort and caution to protect their clients, should exercise the same caution and prudence in their own behalf.


RICHARD R. EURICH

However, many automatically, perhaps wishfully, assume that retirement, bringing their practice to an end, transferring to a new legal practice in association, or even disability or death, means that they can also safely dispense with insurance protection. Proceeding on that assumption is short-sighted and economically perilous. It deprives them of both indemnity and defense (sometimes more colorfully described as "litigation insurance")[11] coverages for claims that are subsequently made during and in the vacuum they have carelessly created.

This danger also confronts attorneys who, anticipating going into practice with a different set of attorneys or law firm, liquidate or dissolve their current law practices. Although the legal enterprises or law firm they join may indeed have its own professional liability policy, such policies customarily only provide coverage for claims made with respect to actions, conduct or omissions allegedly committed in the service of the legal enterprise or law firm, the named insured. They do not extend coverage for claims arising from acts or conduct occurring prior to the attorney's signing on with the new group of attorneys or law firm.

Some insurers will provide, if requested by the named insured, so-called "prior acts" coverage. Such policies are relatively rare, and the willingness of law firms to request such coverage, necessitating an additional premium payment for exposures for which they cannot be held responsible, even rarer.

Most professional liability policies contain provisions which enable an attorney to obtain coverage for this tail exposure. The basic underlying purpose of the provisions is to permit the attorney to purchase coverage that will protect him from claims made against him, subsequent to the ending of the policy, for acts or conduct that occurred prior to the ending of the policy.

Generally, such provisions provide "extended reporting period" coverage. They do not create or set up a new policy. Rather, they will treat a claim first made during the extended reporting period as having been made during the now ended period of the policy.

Specific extended reporting period provisions vary, depending upon the policy. Here the admonition that appears on the first page of virtually all claims-made policies, that the insured should "review this policy carefully," becomes most important and definitely should not be ignored.

Extended reporting period tail coverage can be purchased for a limited period of time, or indefinitely, for an unlimited period, the number of years selected by the attorney determining the amount of the premium charge.

In terms of value and peace of mind, the unlimited period of coverage should be purchased, even though the premium charged for the unlimited extended reporting period may be as much as 225 percent of the premium charge for the expiring policy.

That may seem like a large sum, but since the protection being purchased is perpetual, since an extended reporting period for only one year after the policy has come to an end customarily costs 100 percent of the premium of the expiring policy, and since defense litigation costs incurred in resisting malpractice claims continue to ascend, the advantages of purchasing the unlimited extended reporting period are many.

The decision to purchase the extended reporting period coverage usually must be made within 60 days after the expiration of the policy, and payment of the required premium, in full, is necessary. Generally speaking, most policies state that the limits of liability for the extended reporting period chosen will be the full limits of the policy pursuant to which the extended reporting period is purchased.

The attorney must be aware, however, that these limits will not be replenished or reinstated with each new year of the extended reporting period. Rather, the limits, whatever they are, are for the entirety of the extended reporting period and will be reduced by any defense or indemnity payment that the insurer makes.

Some few policies — among them the Lawyers Professional Liability Policy issued through the MBA Insurance Agency under the Lawyers Professional Liability Claims Made Insurance Program sponsored and provided by the Massachusetts Bar Association to its members — permit, in certain circumstances, extended reporting period coverage, at no premium charge, for an insured attorney who, for whatever reason, including death or disability, ceases the practice of law *during* the policy period.

Also, in a few policies (again, the Lawyers Professional Liability Policy issued through the MBA Insurance Agency is one of these) an attorney, other than a sole proprietor, who is insured under the policy covering the law firm, association or group of attorneys with which he is employed, is entitled to purchase an "individual tail policy" upon leaving, for whatever reason. This is an actual policy, issued only to the departing attorney, which will cover him for claims that might be made against him for acts or conduct in which he engaged while employed by the entity from which he is leaving. The attorney must pay a premium to obtain this individual tail policy.

There is no obligation on the individual attorney to purchase this individual tail policy. There may well be no need for him to purchase it, if the firm from which he is leaving is one which he believes is likely to continue in existence far into the future and which, during that future existence, will continue to purchase liability insurance coverage. Even though he has left the firm, that individual attorney will still qualify as an insured under that firm's policy for any claim that might be made against him for acts or services he rendered while employed by the firm.

However, if the attorney has any concern about the longevity of the firm from which he is departing, or about that firm's likelihood or intention to continue purchasing professional liability coverage in the ensuing years, he has the option to purchase the individual tail policy.

An attorney's current policy may not have, or may not have favorable, extended reporting period or individual tail policy provisions. If that is the case, individual standalone policies are available, primarily in the surplus lines market, which will provide coverage in the same general manner for an attorney's tail exposure. The premium charged for such policies is usually high.

Very careful attention must be directed to the proposed policy's insuring agreement, definitions, exclusions, conditions and policy period sections, especially since the forms and provisions used in these surplus lines policies are not reviewed, approved or regulated by the Division of Insurance.

Exactly what extended reporting period, individual tail policy or other tail coverages might be available to an attorney who is retiring, ceasing practice or in any other way changing or modifying his law affiliation or practice, will necessarily depend upon the particular policy then insuring him, as well as the insurance market in general. He must carefully review and consider the choices provided to him by his policy and consult, either with his insurance broker or with an informed professional knowledgeable about such policies and their coverages, to address any doubts or questions he might have.

It is imperative, however, that he conduct that review, analysis and consultation. He definitely should not elect to forego coverage in the future for claims that might result from his past actions and conduct.

In some rare, non-litigious and utopian universe, ignorance may well be bliss. But that aphorism provides no comfort or protection in today's litigious climate. As observed in another context by the noble and worthy fool in *As You Like It,* "thereby hangs the tale." ■

Richard R. Eurich is a senior partner at Morrison Mahoney LLP, primarily concentrating in insurance policy interpretation, coverage, bad faith and extra-contractual liability litigation and issues. He is chairman of the MBA Insurance Committee, and is an instructor and frequent speaker on insurance law and insurance-related topics.

1) Chas. T. Main, Inc. v. Fireman's Fund Ins. Co., 406 Mass. 862, 865 (1990).
2) *See e.g.,* Hendrickson v. Sears, 365 Mass. 83, 91 (1974) (passage of 10 years between alleged negligent certification of title and commencement of action).
3) M.G.L., c. 260, §4.
4) *Hendrickson* 365 Mass. at 91 (1974).
5) M.G.L., c. 260, §7.
6) M.G.L., c. 260, §12.
7) *See* Murphy v. Smith, 411 Mass. 133, 136-138 (1991).
8) McStowe v. Bornstein, 377 Mass. 804, 808 (1979).
9) M.G.L., c. 260, §10.
10) *Id.*
11) Hanover Ins. Co. v. Golden, 436 Mass. 584, 587 (2002), *quoting* Rubenstein v. Royal Ins. Co., 429 Mass. 355, 358 (1999).

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WHITEMORE

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fixed before companies even know they happened, rather than enduring multiple calls and playing the escalation game that carriers can put customers through.

REMOTE ROUTER MONITORING AND ACTIVITY LOGGING (TACACS). Just because a managed network is fully managed by the service provider doesn't mean a law firm has to give up control over its routers. Under a managed network framework, firms can feel free to make any changes they feel are necessary without fear. The service provider's Terminal Access Controller Access-Control System (TACACS) keeps logs of any router activity and they can easily revert routers back to a previous setting in case a mistake is made.

A COHESIVE NETWORK APPROACH. A managed network provider will leverage the power of multiple Tier 1 providers under one cohesive network, but to the customer it functions as one network, significantly reducing the time and cost of managing multiple vendors. In addition, to address business continuity concerns, multiple networks are used with multiple failover options, providing greater redundancy and survivability. A cohesive network approach enables a managed network service provider to leverage the power of the underlying infrastructures to ensure the best delivery of service to the customer.

AUTOMATIC QOS TAGGING. Managed network providers first consult with the customer on how its data needs to be tagged and which applications need to be prioritized — all based on business needs. In most cases, law firms are running applications over their networks that aren't prioritized or tagged at all. By setting up an automatic QoS configuration based on business rules, firms take the guesswork out of prioritizing traffic.

A managed network provider will also tag global domestic Internet and general Internet traffic differently as it comes into the network. Rules can also be set up on routers and switches that only allow certain types of traffic to flow through those devices. For instance, international traffic most likely doesn't need to be on the routers, so it can be blocked, providing a huge security benefit against unwanted intrusions from spammers and malware originating from sources overseas.

MULTIPLE DIRECT PEERING. A managed network provider uses multiple direct peering arrangements to identify the optimal Internet connection available across all of its Tier 1 providers at that time. They can also provide QoS through an MPLS network directly into cloud-based apps such as SalesForce.com and NetSuite via private peering connections for better performance.

NETWORK MONITORING AND SUPPORT. The protection provided through network monitoring and support services is crucial in today's legal world. Managed network providers give law firms unprecedented visibility into their network all the way to the application level, where they benefit from historic trending analysis relative to network performance through enterprise-class monitoring tools. In addition, application QoS tagging is shown on the network layer to confirm that traffic is being properly marked, prioritized and delivered across the network for the highest performance levels.

The continued emergence of a cloud-based approach to doing business can provide significant benefits, but it also creates significant challenges for law firms today. Firms looking to gain an edge in a competitive landscape are finding they can get rid of ad hoc, carrier-based networks and routers, and instead turn to a cloud-based, fully managed network that will save them time and money, and result in better overall performance. ■

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EXPERTS&RESOURCES

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intentional or negligent infliction of emotional distress, negligent hiring or supervision, breach of contract and various criminal charges.

Another issue is the limitations on the school's obligation to become involved. Currently, the scope of a school's authority under the law only requires the school to intervene if the prohibited behavior takes place on school grounds, on property adjacent to school grounds, during a school sponsored event or through the use of technology owned or leased by the school.[14] If the behavior occurs elsewhere, the school is only required to get involved if the bullying "creates a hostile environment at school for the victim, infringes on the rights of the victim at school or materially and substantially disrupts the education process or the orderly operation of a school."[15]

This means schools are not required to intervene and protect the victim in certain situations. These limitations are potentially problematic because bullying can take place anywhere, potentially leaving the burden of identification and notification on the victim and/or their parents. In addition, if a victim does not act outwardly different at school, it will be difficult for school staff to ascertain or suspect that an incident of bullying has occurred and consequently intervene. It seems that this would leave many victims unprotected, which is exactly what the law is trying to prevent.

THE 'BULLY'

One concern for the accused aggressor is the vagueness and lack of uniformity when discussing the disciplinary measures. Given that the law does not set forth strict guidelines that schools must follow and yet seems to leave discipline in the hands of schools,[16] it is likely there will be a lack of consistency across the state, from school to school within districts, and even possibly within the same school. Even though the flexibility of the law allows administrators to handle matters on a case-by-case basis, this lack of uniformity risks precluding parents and school officials from effectively identifying and preventing such behavior going forward.

In addition, if there is a lack of uniformity across the state, schools and courts will struggle to establish meaningful precedent. In order to prevent this from happening, it might have been appropriate for the state to have mandated disciplinary actions for various levels of offenses so schools are not left to determine appropriate measures on an individual, subjective basis.

In addition, the law was enacted intending to set guidelines for schools to follow to ensure that all students are protected from bullying. With this, the burden is placed on schools to act quickly in investigating the incident and punishing the aggressor. However, one of the recurring issues our office has seen over the past year has been the fact that the word "bully" was overused by school staff, students and parents.

In some instances, any action at all was considered bullying and the student was automatically labeled as a bully. Schools now are required to have procedures they must follow, and if done correctly, protect the victim, punish the aggressor and ultimately put a stop to the behavior. However, as this past year has shown, that does not always happen. It is important to remember that the law works both ways, and students unfairly labeled as the bully have rights as well.

FINAL THOUGHTS

We are fortunate to live and work in a state that is dedicated to putting an end to bullying in our schools. Although this law creates various potential legal issues for all those involved, it brings us closer to creating a safe environment for every child in every school district across the state. ■

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1) G.L. ch. 71, §370
2) G.L. ch. 71, §370(a)
3) G.L. ch. 71, §370(a)
4) G.L. ch. 71, §370(a)
5) G.L. ch. 71B, §3
6) G.L. ch. 71B, §3
7) G.L. ch. 71B, §3
8) G.L. ch. 71, §370(d)
9) G.L. ch. 71, §370(j)
10) G.L. ch. 71, §370(j)
11) G.L. ch. 71, §370(d)
12) G.L. ch. 71, §370(g)
13) G.L. ch. 71, §370(i)
14) G.L. ch. 71, §370(b)
15) G.L. ch. 71, §370(a)
16) G.L. ch. 71, §370(d)(v)

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courtesy of telling them. Essentially, it's not an option to delay these reports unless the client specifically directs you to.

Prompt billings help assure prompt payment because the client is more likely to remember recent activity and less likely to question items. Anything less than monthly billing means the loss of the time value of money (you're playing banker for your client) and sets you up for the next problem area.

PROBLEM 6: THE FIRST WRITE-OFF

The vague, reconstructed or delayed bill is sent. The angry client calls with questions, so you trim the bill a bit to placate them — but really to compensate for your poor billing practices.

SOLUTION 6:

See Solution 5.

PROBLEM 7: THE SECOND WRITE-OFF

The unhappy "D" client negotiates your bill down again and still doesn't pay. You call them again to ask for payment, and end up trimming the bill even more.

Side note: At this point, you'd do well to ask yourself a question. Was that a "D" client in the beginning, or was it an "A" who went downhill due to poor communication — such as billing practices?

SOLUTION 7:

See Solution 5, but also re-examine your client intake process. Are you accepting "D" clients? Or are your communications and client service creating "D" clients?

PROBLEM 8: THE FINAL WRITE-OFF

That "D" client who has consumed more unbillable time arguing about billing finally refuses to pay.

Should you sue for fees? Never, unless the amount is huge. If you do consider it, remember to add in the dollar, time and psychological costs of defending an unfounded grievance or malpractice claim, because both are the refuge of the "D" client.

SOLUTION 8:

None, except to review solutions 1-7 for next time.

CONCLUSION: IT TAKES A PERSPECTIVE SHIFT

For most attorneys, poor billing practices are actually a symptom of other problems: poor client selection, poor office procedures, office disorganization, poor team management and attorney overwhelm. Focusing on these areas can produce significant results.

But the larger solution is a shift in perspective. You must stop tracking billable hours and start tracking time.

That's right. Record everything. Don't make those moment-to-moment value judgments about billable or not billable. Simply record all of your time, and then make only ONE judgment each month about how much to bill.

And how to decide how much to bill? Stop thinking in terms of the time you put in, and start thinking of the value you delivered. Look at the total dollars, and ask yourself, "Was I worth that this month? If so, bill it undiluted. If you still feel the need to write down some time, show it on your bill, then deduct a courtesy discount, and let your client know the consideration you're giving them.

Either way, remember that providing your client with a full accounting of your work for them is an essential professional obligation.

N.B.: If you also record everything non-billable — admin, marketing, personal — for a week or two, you'll learn more than you wanted to know about your work habits and time wasters. The awareness will have you operating a bit more efficiently.

The law — and the billable hour — are merciless taskmasters. But you can reduce the misery by making sure you get paid for all of the hard work you do, and by making sure your billings are communicating effectively to your clients. ■

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SMALL
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6. IF YOU DON'T REMEMBER, SAY SO

Answer clearly. Just say, "I don't recall," and stop. Don't try too hard, and don't change your answer just because the question is asked over and over.

7. DO NOT GUESS

Much of what makes a good conversationalist and an intelligent, intuitive person involves guessing. But guessing is inappropriate and dangerous for a witness. That includes hypothetical questions.

8. DO NOT VOLUNTEER

"Question, pause, answer, stop." A witness must become comfortable with the silence of waiting for the next question.

9. BE CAREFUL WITH DOCUMENTS

Documents are just written versions of what someone believed. Treat them mechanically. There is a simple, unvarying three-step protocol witnesses should follow: If you are asked a question that relates in any way to a document: (1) Ask to see the document. Don't allow anyone to draw you into a debate with a document that is not in front of you. You can't win. (2) Read it. There are three issues with any document: credibility, language and context. You cannot carefully consider each of them unless you read it. Read all of it, slowly and carefully. (3) Ask for the question again. It's basic fairness. They've read the documents and picked out one little piece to ask about. Now that you've read it, the question will be clearer (and you may get a better question).

10. USE YOUR COUNSEL

Listen to everything that is said, understand what objections mean for you, ask questions when you can and take breaks before you need them.

Most of these rules are difficult to master. They are contrary to what we're used to, and often counterintuitive. But if they are practiced, they can impose a degree of discipline and control on the process that makes it significantly more fair and productive.

Witness preparation is an important part of the litigation process. It involves a careful review of the audience, the rules and the core themes. It should also include extensive and realistic practice testimony. Learning how to testify is like learning to ride a bicycle: You can't do it just by talking about it. It might require some trauma and a few bruises. To master this strange world, you need to enter into it, and then review what you've done.

The legal profession too often has failed clients by not preparing them for the challenges of being a witness, sometimes with disastrous consequences. The damage can go beyond one case and reverberate for years to come.

Anyone in any business in America today is either in the litigation business too, or eventually will be. You and your clients need to accept that and understand the process in order to manage it. An investment in witness preparation can be an extraordinarily productive one financially and, as one executive I've prepared has commented, it also will help you — and your clients — sleep better at night. ■

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rebuttable presumption establishing that the applicant would be granted a waiver of the ineligibility period if certain criteria are met. The criteria in the legislation specify that the denial of MassHealth would create a risk of serious harm to the individual, that the assets are irretrievable from the recipient and that there is no affordable alternative care available for the individual. If the individual meets all of the criteria, a waiver will be granted unless the agency presents convincing evidence to the contrary. Hopefully, this will level the playing field and applicants will no longer be punished for situations beyond their control.

The above case material is from a seminar I gave on behalf of the Massachusetts Bar Association's Probate Section Council in Boston this past April to other attorneys as a fact pattern. The names have been changed, as this is an ongoing case. First the above case was presented, followed by suggested trust language to prevent this nightmare case in the future.

This type of trust language was fine when it was written, but the law changed. A properly drafted irrevocable trust will still protect your assets if completed more than five years prior to a person entering a nursing home, but attorneys have to keep up with changes in the law and revise their trust language to best advise their clients. If your client has an existing trust, please check the language carefully. ■

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STEM extension.

Under the current system, the government has the ability to expand the number of qualifying STEM fields without any additional regulation. The most recent update included many additional fields, which is a critical step forward, but there are still a variety of majors that should be considered for addition.[2]

Ultimately, expansion of this program is highly beneficial to the economic interests of the United States, as it provides options for extension of student work authorization. Further, the additional time allotted in the F-1 student category staggers the influx of H-1B applications submitted in any one year, providing some relief from H-1B quota usage. One benefit of this approach is that it does not require any additional legislative action.

The creation of an exemption for students who graduate from U.S. institutions with STEM field degrees at any level, or for students who graduate with a master's degree or higher in one of the STEM fields, may also provide quota relief. The above examples would require Congress to act, however, and the likelihood of congressional action is bleak.

There are several other viable options for quota relief that would not require congressional action and could be instituted by the United States Citizenship and Immigration Service (CIS) immediately.

First, CIS could ban quota-exempt employers from using cap numbers. Quota exemption is an elected status. As a result, there are problematic instances where a beneficiary may request a quota number to ensure future employment and status options, or where human error results in the request of a quota number when not necessary, or fear of filing, paying a fee and government misinterpretation of the relationship qualification for quota exemption.

One critical area of potential quota relief that is particularly crucial to Massachusetts' research and health care industry is CIS's definition of "affiliated" or "related to" an institution of higher education. Over the last year, the California Service Center (CSC), the sole service center with jurisdiction over quota-exempt institution filings, has demonstrated some confusion over which employers qualify for cap exemption by requesting proof of board control or specific agreements more in line with corporate documents. In addition, this exemption has never allowed for "gray area employers" to obtain the cap exemptions.

In March 2011, CIS issued interim guidance clarifying that any institution that received cap exemption since 2006 would continue to receive cap exemption for the moment. Since that time, CIS has been reviewing its position on the definitions of the term "affiliated." There has been much advocacy by hospitals, nonprofit agencies, education and research institutions for the use of a broad, realistic definition of "affiliated" or "related."

CIS policy guidance is in the works. Many have argued that usage of any affiliation recognized by any other body of law (for example, the EPA, Medicare) should count for cap exemption. This change would allow many private hospitals to be eligible for cap exemption.

In addition, if CIS maintains its traditional exemption for individuals working for a for-profit entity at an exempt institution, additional numbers can be saved here as well.

With baby boomer retirement and increased world competition, the demand for highly skilled workers is on the rise and the United States is increasingly challenged to find better ways to attract and retain the best and the brightest. The H-1B quota exemptions and other mechanisms as described above should be utilized to provide temporary relief of arbitrary quota limits until Congress gets it house in order and acts.

However, until there is some action either by legislation, regulation or official guidance, the question remains: Can America keep up with the growing demand for science, technology, engineering and math-related professionals required in the next decade? The answer is yes, but not alone and not without the help of the next generation of immigrant professionals. ■

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1) In 2008, Bill Gates testified before Congress that for every H-1B position requested, Microsoft added another four employees to support that worker. In a March 2008 report, the National Foundation for American policy found that for every sponsored H-1B worker, an additional 7.5 workers were hired.

2) http://content.govdelivery.com/bulletins/gd/USDHSICE-7434c