

MASSACHUSETTS LAWYERS JOURNAL



WWW.MASSBAR.ORG

VOLUME 19 | NUMBER 6 | FEBRUARY 2012

Billboard, YouTube campaign to raise court funding awareness

MBA President Campbell calls effort 'a clear indication of how dire the circumstances have gotten'

BY TRICIA M. OLIVER

As Massachusetts begins its state budget process for fiscal 2013, the Massachusetts Bar Association has launched a high-profile awareness campaign on the effects of underfunded courts. The statewide ef-

fort is geared toward the commonwealth's general public.

"Understandably, the average citizen may not appreciate the irreplaceable role courts play in their security, livelihood and freedoms," MBA President Richard P. Campbell said. "This significant communication will attempt to change that."

Through a billboard campaign that began the week of Jan. 15, the association is aiming to grab the average citizen's attention to reinforce that court funding does impact him or her. The MBA's message is showcased on billboards in Greater Boston, along I-93 in Dorchester and Medford; in Worcester along I-290; and in Fall

River along Rt. 24.

The billboard message directs passersby to the MBA website, www.massbar.org. Included on the MBA's site will be informational materials on court funding, as well as resources citizens and members of the legal community can reference when reaching out to their respective ➤8

PRESIDENT'S VIEW
RICHARD P. CAMPBELL



Imminent threat to the rule of law

Former Chief Justice Margaret Marshall, reflecting on her early years as a citizen in South Africa, uses a metaphor to explain the importance of the rule of law. "When you are breathing oxygen, you don't notice it; when you cut off the supply, you will notice it very quickly."

Professor "Mo" Cunningham, the renowned scholar and chairman of the Political Science Department at the University of Massachusetts Boston (and a former Suffolk County assistant district attorney), paraphrasing President Abraham Lincoln's comments at a time when the rule of law was crumbling, instructs us that "our political religion must respect the law" and our judicial system or "society will come crumbling down."

With dysfunctional courts, he warns, "we are going to reach that point." And, serving as the apostle of the obvious, Cunningham tells us that "there is a point where you just can't tighten your belt any longer, we're at it right now."

For most of us, the American judicial system has been one of the few constants throughout our lives. Courts and the judges who sit in them have been models of stability, equanimity and scholarship. When political leaders like Arkansas Gov. Orval Faubus prohibited African-American children from entering Central High School in Little Rock or Mississippi Gov. Ross Barnett and the trustees of the University of Mississippi blocked James Meredith from matriculating, our courts and judges righted those wrongs.

When captains of industry, like the CEOs of WorldCom, Enron, Tyco and Global Crossing, crossed the boundary of proper business conduct and ➤2

'Who else is going to do it?'

Advocate Harvey Silverglate on keeping institutions honest



PHOTO BY MERRILL SHEA

Silverglate in his home office in Cambridge.

BY KRISTIN CANTU

At the age of 69, Harvey Silverglate has realized he can no longer operate nonstop. Silverglate recently confided to his research assistant that he now needs five hours of sleep each night instead of four.

Needing little sleep seems to be a secret of some of the very successful. Other members of this exclusive club include President Barack Obama, former President Bill Clinton and former British Prime Minister Margaret Thatcher. But Silverglate, who admits that he works too much, doesn't credit his success to his sleep habits, but to his work ethic, which has taken Silverglate far.

A renowned attorney for more than 50 years, he is also a revered author and a champion for the civil rights of college students, a cause that led him to open a non-profit that focuses on the issue.

A KID FROM BROOKLYN

Silverglate's work ethic can be credited in large part to his upbringing as a first-generation Jewish son in an immigrant family from Poland and Russia. Silverglate's family lived in Brooklyn, New York until he was 11, when they moved to New Jersey.

Even though he moved over ➤6

HOD discusses mandatory CLE, foreclosure mediation

BY JENNIFER ROSINSKI

A lively discussion on the practitioner's views of mandatory minimum CLE and debate over draft legislation requiring mandatory mediation prior to foreclosures were among the topics deliberated at the Massachusetts Bar Association's Jan. 19 House of Delegates meeting at UMass Medical School in Worcester.

MBA President Richard P. Campbell welcomed all to the medical school, which he described as "a really interesting institution." UMass Medical School Vice Chancellor James Leary provided remarks and introduced a video that revealed the campus' accomplishments.

The first topic of the meeting, fittingly, was improving health care quality as it relates to medical errors. "As a patient advocate, I am always open to listen-

ing to means to address this crisis," said MBA Vice President Jeffrey N. Catalano, who specializes in medical malpractice. Dr. Alan Woodward, an emergency physician, consultant and former president of the Massachusetts Medical Society, presented a detailed PowerPoint presentation on the subject of transforming medical liability and improving patient safety in Massachusetts.

HOD voted to support in principle ➤9

VIEWPOINT

How long will law school bubble last if grads can't pay bills?
➤3



LEGAL NEWS

New courts in Taunton, Salem open
➤8

VIEWPOINT

Stumping for our Gateway Cities
➤4

SEE PAGE 2 FOR A COMPLETE LISTING OF THIS ISSUE'S CONTENTS.

PRESIDENT'S MESSAGE*Continued from page 1*

engaged in criminality, our courts and judges removed them from their corporate suites and provided alternate, supervised housing for them. Revolutionaries, like Raymond Luc Levasseur, could not destroy our system of justice by detonating bombs in our courthouses; the business of the courts continued without fear. The day-to-day enforcement of criminal and civil laws has always gone forth quietly, surely and swiftly, promoting great predictability to our lives.

Most of us never step back and ask ourselves what "the rule of law" means; and few of us, if any, ever consider it at risk. But what would happen if the rule of law in this country simply failed?

What would the evil, violent people in our midst do if there were no courts? Would they take advantage? Would we be safe in our homes and communities? How about the captains of industry? Would they cheat and steal from us? Could we trust our landlords or bankers? Would our children and incomes be secure from estranged spouses?

The foundation of the rule of law in the Commonwealth of Massachusetts is full, adequate public financial support for the courts. But the truth of the matter is the public (and our elected officials) do not properly support the courts. As a result, the law economy is crumbling all about us. Courts are closing; judges are retiring early; support staff are laid off or just not replaced.

The most important point for all stakeholders to note as they ponder the decline in the law economy is the erosion in the rule of law, and with it, the decline in the quality of life in the commonwealth.

Images from Syria, Libya and Somalia show us the ugly face of lawlessness. Murder is common in Ciudad Juarez, barely across the Texas border. Kidnapping for ransoms are now said to be common in southern Arizona.

Professor Cunningham points out to us that the citizens of the commonwealth interact with the courts much more than the other two branches of government, and warns that, if the courts fall apart, even the best of our citizens will lose faith in our system. Lack of respect for

the rule of law, he says, presents "a great danger to society."

By underfunding the justice system, we put at risk the way in which we live our lives, and with it, our hopes and dreams for ourselves and our children and grandchildren.

"Without courts, no justice — no freedom. That's what it comes down to," says Bill Robinson, president of the American Bar Association. "And it's true," says Denise Squillante, immediate past president of the Massachusetts Bar Association.

By the time this edition of *Lawyers Journal* is published, Gov. Deval Patrick should have released his proposed FY2013 budget. The House of Representatives, and then the Senate, begin their budget debates in April and May, respectively. You can make a difference by contacting your state senators and representatives and demanding a fully funded judicial system. This may be the most important public service you will ever render in your career. Your family, friends, neighbors and communities need you. Get on it. ■

MASSACHUSETTS LAWYERS JOURNAL

Volume 19 / No. 6 / February 2012

EDITOR: Bill Archambeault**CONTRIBUTING WRITERS:** Jennifer Rosinski, Kelsey Sadoff**SENIOR DESIGN MANAGER:** N. Elyse Lindahl**DIRECTOR OF MEDIA AND COMMUNICATIONS:** Tricia M. Oliver**CHIEF OPERATING OFFICER / CHIEF LEGAL COUNSEL:** Martin W. Healy, Esq.**LEGAL EDITOR:** Martin W. Healy, Esq.**LEGISLATIVE ACTIVITIES MANAGER:** Lee Ann Constantine**PRESIDENT:** Richard P. Campbell, Esq.**PRESIDENT-ELECT:** Robert L. Holloway Jr., Esq.**VICE PRESIDENT:** Jeffrey N. Catalano, Esq.**VICE PRESIDENT:** Marsha V. Kazarosian, Esq.**TREASURER:** Douglas K. Sheff, Esq.**SECRETARY:** Robert W. Harnais, Esq.

© 2012 Massachusetts Bar Association

Materials may not be reproduced without permission.

Lawyers Journal (ISSN 1524-1823) is published 12 times a year, by the Massachusetts Bar Association, 20 West St, Boston, MA 02111-1204. Periodicals postage paid at Boston, MA 02205. Postmaster: send address changes to *Lawyers Journal*, 20 West St., Boston, MA 02111-1204.

Subscription rate for members is \$20, which is included in the dues. U.S. subscription rate to non-members is \$30. Single copies are \$3.

Telephone numbers: editorial (617) 338-0676; general MBA (617) 338-0500.

E-mail address: lawjournal@massbar.org.

Readers are invited to express their opinions as letters to the editor and op-ed commentaries. All submissions are subject to editing for length and content. Submit letters and commentaries to: Editor, *Lawyers Journal*, at the address given above or via e-mail to lawjournal@massbar.org, or fax to (617) 542-7947.



A publication of the Massachusetts Bar Association

INSIDE THIS ISSUE**MASSACHUSETTS LAWYERS JOURNAL****ON THE COVER****BILLBOARD, YOUTUBE CAMPAIGN TO RAISE COURT FUNDING AWARENESS****PRESIDENT'S VIEW:**

Imminent threat to the rule of law

WHO ELSE IS GOING TO DO IT?

Advocate Harvey Silverglate on keeping institutions honest

HOD DISCUSSES MANDATORY CLE, FORECLOSURE MEDIATION**VIEWPOINT****LAW SCHOOL BUBBLE: HOW LONG WILL IT LAST IF GRADS CAN'T PAY BILLS?**

►3

STUMPING FOR OUR GATEWAY CITIES

►4

REP. CABRAL, SEN. DOWNING AMONG SPEAKERS AT JAN. 26 FORUM ON GATEWAY CITIES

►4

OCCUPY BOSTON: A LEGAL ANALYSIS

►4

UMASS MEDICAL AT FOREFRONT OF EMERGING TECHNOLOGY

►5

LEGAL NEWS**NEWS FROM THE COURTS**

►8

JUSTICE DEPT. ADVERTISING ATTORNEY VACANCIES

►8

BAR NEWS**MORE HOUSE OF DELEGATES NEWS**

►9

CLE AT-A-GLANCE

►10

MEMBER SPOTLIGHT

►11

STUDENTS TACKLE CYBER-BULLYING CASE FOR MBA MOCK TRIAL

►12

MBA SEEKS 2012-13 OFFICER, DELEGATE NOMINATIONS

►12

EXPERTS & RESOURCES

►11, 12, 13, 14, 19

FEATURED MEMBER BENEFIT

►13

CALENDAR OF EVENTS

►14

SECTION REVIEW**CIVIL LITIGATION**

The beginning of the end of Chapter 93A claims against Massachusetts and its subdivisions

►15

Taking exception: The universal demand requirement and close corporations

►15

LAW PRACTICE MANAGEMENT

Considerations in creating, maintaining a paperless office

►16

Generating leads with the "right" questions

►16

PUBLIC LAW

Natural disaster recovery: Lessons learned on the local level

►17

THE WARREN GROUP

Real Estate & Financial Information Since 1872

TIMOTHY M. WARREN, Chairman**TIMOTHY M. WARREN JR.**, CEO and Publisher**DAVID B. LOVINS**, President and COO**CUSTOM PUBLICATIONS****EDITOR:** Christina P. O'Neill**ASSOCIATE EDITOR:** Cassidy Norton Murphy**CREATIVE SERVICES****CREATIVE DIRECTOR:** John Bottini**SENIOR GRAPHIC DESIGNER:** Scott Ellison**GRAPHIC DESIGNER:** Nate Silva**GRAPHIC DESIGNER:** Christina Briggs**GRAPHIC DESIGNER:** Ellie Aliabadi**PUBLISHING GROUP SALES & MARKETING****PUBLICATIONS GROUP SALES MANAGER:** George Chateauneuf**NEWSPAPERS****ADVERTISING ACCOUNT MANAGER:** Mark J. Schultz**ADVERTISING, MARKETING & EVENTS COORDINATOR:**

Emily Torres

EVENTS**DIRECTOR OF EVENTS:** Sarah Warren**TELEPHONE NUMBERS:****ADVERTISING** (617) 896-5344**EDITORIAL** (617) 896-5353**EVENTS** (617) 338-5314

More than 150,000 tax liens, *lis pendens* and petitions to foreclose have been filed in Massachusetts since 2009.

Be the first to know about delinquencies. Take immediate action.

Keeping an eye out for delinquencies can be difficult. Red Flag Alerts deliver the information you need in an actionable format.

Red Flag Alerts combine new tax lien filings with *lis pendens* and petition filings. They contain more detailed information than you get from other sources. Important things like owner-occupancy status, property and owner address, an automated value model for the property in question and more.

Essential, timely Red Flag Alerts delivered to you automatically.

**DATA SOLUTIONS**

Turning Information Into Opportunities

617-896-5392 datasolutions@thewarren-group.com

VIEWPOINT

Law school bubble: How long will it last if grads can't pay bills?

*Reprinted with the permission
of the ABA Journal.*

**BY WILLIAM D. HENDERSON
AND RACHEL M. ZAHORSKY**

For Andrea, a past decision to ensure her future in law has left her in a stressed and distressful present. Concerned over how it might affect her job prospects, she would not allow use of her real name. And there is reason for concern: She's been laid off twice since her 2009 law school graduation, including from a position where she earned \$20 an hour at a small firm practicing as a licensed attorney. For the 29-year-old, who's supported herself since college, the financial repercussions of law school may amount to the worst investment of her life, despite a degree from a second-tier school and a résumé that boasts a position on law review and coveted summer associate positions.

"I deferred my loans because of economic hardship the first time," says Andrea, who borrowed nearly \$110,000 to finance her education. "After that," she falters, "they might be in forbearance ... accruing interest ... I just don't know."

Andrea's situation is far from unique. In 2010, 85 percent of law graduates from ABA-accredited schools boasted an average debt load of \$98,500, according to data collected from law schools by *U.S. News & World Report*. At 29 schools, that amount exceeded \$120,000. In contrast, only 68 percent of those grads reported employment in positions that require a JD nine months after commencement. Less than 51 percent found employment in private law firms.

The influx of so many law school graduates — 44,258 in 2010 alone, according to the ABA — into a declining job market creates serious repercussions that will reverberate for decades to come.

Moreover, lawyer salaries vary greatly across the country, with the top 35 legal markets sucking up 75 percent of the payroll (see "What America's Lawyers Earn," *ABA Journal*, March 2011). And the number of law office jobs in private practice peaked at 1.23 million in 2004 ("Paradigm Shift," July 2011).

Heavy loans now threaten to consume the future earnings and livelihood of the nation's young lawyers. Yet, even as the legal market contracts, more than 87,900 potential candidates vied for 60,000 seats at 200 ABA-approved law schools in 2011, according to the Law School Admission Council.

More than 78,900 have applied for 2012 spots, according to preliminary LSAC counts in November.

Youthful overoptimism, bleak job prospects for college grads and the entry of several more universities and for-profit businesses into the legal education business are some of the root causes for the supply-and-demand imbalance in entry-level lawyers.

Very few critics, however, have examined the part played by the federal government through its student loan policies in creating a law school bubble that may be on the verge of bursting — one strikingly similar to the mortgage crisis that cratered the economy in 2008.

Direct federal loans have become the lifeblood of graduate education, and they shelter law schools financially from the

WILLIAM D. HENDERSON is director of the Center on the Global Legal Profession and a professor of law and Nolan Faculty Fellow at Indiana University's Maurer School of Law.

RACHEL M. ZAHORSKY is a lawyer and a legal affairs writer for the *ABA Journal*.

structural changes affecting the profession. The bills are now coming due for many young lawyers, and their inability to pay will likely bring the scrutiny of lawmakers already moaning about government spending.

BUCKS BACK BOOKS

As student groups continue to lobby the federal government for increased transparency, the lawmakers are bound to ask a very simple question: Why should the U.S. government, through the Department of Education direct-lending program, continue to make billions of dollars of loans to law students when structural changes in the legal market suggest that a large portion will lack the earning power to repay those loans?

The answer to this question has potentially grave implications for legal education. Law schools — many for the first time ever — will become vulnerable to significant cuts in the amount of money available to students as Congress tries to hold the line on additional deficit spending.

"There were people warning about this 10 years ago, but a lot of people were not paying attention to it," says Phoebe A. Haddon, dean of the University of Maryland School of Law. "But debt wasn't as great

as it is now, and the likelihood that people could repay tuition was built on a different financial structure of law firms."

Haddon adds, "I've seen a 20 percent increase in the amount of debt that our students have experienced in the last several years, and it's mind-boggling to me how that can continue without a better response of how to support legal education in the future."

Since the GI Bill, America has operated on the principle that higher education always delivers a return on investment. As such, Congress created a host of programs during the Great Society era of the 1960s to expand access to colleges and universities.

Law students, along with medical and dental students, are treated generously as future professionals and able to borrow, with virtually no cap, significantly more money than undergrads. America's law students borrowed at least \$3.7 billion in 2010 to pay for their legal educations. Although the majority of the funds came from the Education Department, the patchwork of mechanisms that serve higher education as a whole make it difficult to regulate how much is being lent and to whom.

For several decades, most higher education loans were made by private lenders with the federal government providing guarantees against loss — and, in some cases, interest rate subsidies. Any remaining student expenses were met by private lenders without the benefit of federal guarantees.

When U.S. credit markets seized in 2008, there was worry that there would be insufficient federal or private ►►►

WE SEE WHAT OTHERS ...



DENNIS J. CALCAGNO, ESQ.

617.328.8888

WWW.NORTHEASTMEDIATION.COM

Case Evaluation | Full Neutral Panel



...MISS!

VIEWPOINT

Stumping for our Gateway Cities

BY ROBERT L. HOLLOWAY JR.

INTRODUCTION

MBA President Dick Campbell has asked me to write from time to time on MBA initiatives. As Dick told those assembled at a recent House of Delegates meeting at UMass-Amherst, when I was an undergraduate at Amherst College, I was a reporter for the college newspaper, covering sports and other events. When I was a junior, the editor asked me to write a weekly column. He told me I had free rein to write on any topic, with one caveat: he would name the column. When I had my cup of coffee with Amherst College football, one of my teammates dubbed me "Stump." That handle stuck.

To this day, many, including nieces and nephews, call me that. So, the editor of the Amherst College newspaper named the column, "On the Stump." For those of you bent on verification, you can check the archives of the Amherst College "Student."

President Campbell, wiser than my college editor, has given me some specific direction regarding column topics. One of the major MBA initiatives, which will be ongoing, we hope, is to find ways to utilize the skills and talents of the legal profession, working with others, to help to revitalize our so-called "Gateway Cities."

When people talk, somewhat casually, I believe, about our unemployment rate in Massachusetts — currently in the 7 percent range, a bit better than the national rate — such talk overlooks the fact that our Gateway Cities have unemployment rates considerably higher. Those unemployment rates have been higher, persistently so, for many years.

Our Gateway Cities, the places where earlier immigrants settled to live and work, are now the places where many of our current immigrants have settled. Many blather about an "immigration problem." What, in any meaningful way, is being done? This is where, I submit, lawyers can and should come in.

LAWYERS AS VOLUNTEER ANALYZERS, ORGANIZERS, PROBLEMS SOLVERS

Our profession has a proud tradition of volunteerism. Pick any one of our 351 cities and towns in this commonwealth. Examine the makeup of the leadership and active participants in a wide variety of organizations. You quickly will conclude that lawyers are prime movers as volunteers. How can we harness our tradition of volunteer service to tackle the problems of our Gateway Cities?

I presume no wisdom regarding the ultimate answer to that question, but suggest that the skills we lawyers use each and every day in representing our clients are skills that can assist in tackling and solving problems in our Gateway Cities.

SOME INITIAL SUGGESTIONS

While there are some existing initiatives, notably those of MassINC, regarding the challenges in our Gateway Cities, there is an untapped talent pool within our legal profession that could be directed toward facing those challenges.

Start with our historic commitment as a profession to volunteerism and service to our communities. Add to that commitment the large number of unemployed or underemployed lawyers in Massachusetts. How can we put them to work, addressing the challenges of chronic unemployment in our Gateway Cities? The irony in this opportunity is exhilarating.

We have bright, energetic new admittees to our profession, looking to utilize the legal education they have worked very hard and spent considerable monies to obtain. Why not harness that resource as a kind of legal, urban Peace Corps, to attack the problems of the Gateway Cities? We even might consider public funding for this urban Peace Corps,

for positions designed to deal with, for example, the multitudinous problems faced by our immigrant population.

Rep. Cabral, Sen. Downing among speakers at Jan. 26 MBA forum on Gateway Cities

BY TRICIA M. OLIVER

The MBA hosted an informational forum on Gateway Cities on Jan. 26 at UMass School of Law in Dartmouth.

The evening event opened with a meet-and-greet reception, which led to an informational forum. Bar, community and legislative leaders who have long worked with the issues impacting the state's Gateway Cities shared their insight. The final leg of the evening focused on pinpointing ways in which the legal community can help address such issues.

Some of the evening's featured speakers included MBA President-elect Robert L. Holloway Jr.; UMass School of Law Dean Michael G. Hillinger; Rep. Antonio Cabral (D-New Bedford) and Sen. Benjamin Downing (D-Pittsfield), chairs of the Gateway Cities Caucus; representatives from MassINC and UMass Dartmouth's

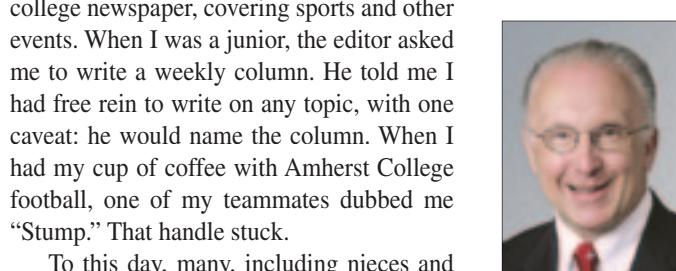
Urban Initiative; as well as other leading voices on the academic, economic and cultural aspects impacting Gateway Cities.

MBA President Richard P. Campbell identified a Gateway Cities initiative as one of his priorities for the 2011-12 association year. He named Margaret D. Xifaras, who practices in New Bedford, and Francis A. Ford, who practices in Worcester, to lead this important effort.

Xifaras and Ford moderated the Jan. 26 forum.

Massachusetts' Gateway Cities are those mid-sized cities whose residents are experiencing significantly higher rates of unemployment and a stalemate in social, economic and civic innovation. Some examples are Brockton, Fall River, Lawrence, New Bedford, Springfield and Worcester.

Look for complete coverage of the event in the March issue of *Massachusetts Lawyers Journal*.



ROBERT L.
HOLLOWAY JR.

our clients are skills that can assist in tackling and solving problems in our Gateway Cities.

in coming to this country. Both sides wanted a better life, and this place offered that opportunity. That is still the case, I believe, and, more important, ought to be the case.

INITIAL CONCLUSION

Our Gateway Cities present large challenges. MBA President Campbell wisely has counseled that we should not shrink from difficult problems. Indeed, history teaches that our profession has shown repeatedly the ability to solve such problems.

I urge each and every one of you to think about these problems and potential ways of addressing them. The current political, economic and media landscape has made it all too easy for too many to lapse into combinations and permutations of sloganeering, jingoism and separatism. It is long overdue for us to start developing concrete, positive solutions.

This is a challenge for all of us as lawyers. The MBA's preliminary task force on our Gateway Cities is working on a call for action. When the call comes, I hope you will answer it. ■

Robert L. Holloway Jr. is president-elect of the Massachusetts Bar Association.

Occupy Boston: A legal analysis

BY MICHELLE KEITH

After 72 days of dwelling between the crossroad of criminal trespass and expression of free speech, the people of Occupy Boston peacefully removed their tents from Dewey Square. On Dec. 10, 2011, at 5 a.m., without the use of batons, pepper spray or riot gear, hundreds of police swept everything clear. Some protestors refused to leave and were arrested, their belongings thrown away. Most withdrew without adieu, for this is a movement that is far from finished. Most importantly, rule of law in our society balanced the equities and demanded respect for the individual.

On Nov. 16, 2011, the Superior Court of Massachusetts granted a temporary restraining order preventing the city of Boston "from any police action which would remove the individuals, tents, and personal belongings of the Occupy Boston protesters from Dewey Square, absent emergency circumstances including but not limited to medical circumstances, fire, or outbreak of violence, at any time before this court has decided the mo-

tion for a preliminary injunction brought by these plaintiffs."

On Dec. 7, 2011, after full briefing of the legal issues, the court vacated the temporary restraining order and denied the motion for a preliminary injunction to prevent removal. While the federal courts have established that the First Amendment protects 24-hour protests in public parks — such as Dewey



MICHELLE KEITH

Square — as expressive conduct, regulations such as park use guidelines or fire, building, sanitary and health codes are constitutional time, place and manner restrictions.

It is within the law, as expressive First Amendment conduct, to set up tents, sleep overnight, eat and govern at public parks. However, it is not within the law to take possession of a site effectively excluding other members of the public from accessing or using a public park in any other manner. Here, 100 to 150 people took up residence in tents

"set cheek-to-jowl with stakes, guy ropes and space for three walkways. One walkway consist[ed] of wooden pallets and plywood and [ran] down the center of the encampment. There [were] two cross walkways. The site [did not] appear to be handicap accessible."

Nor is it within the law to disregard content-neutral park use guidelines. Here, guidelines such as a ban on sleeping overnight and a requirement to obtain a permit before erecting tents were narrowly tailored to further the park's substantial interest to "offer [unobstructed public access to] beautiful, well-cared for spaces."

Likewise, it is not lawful to disregard fire, building, sanitary and health codes in the name of free speech. One merely needs to recall the great tragedy of Boston's Coconut Grove fire to understand the important government interest regulated by such codes. Here, the fire marshal's "opinion about the use of flammable tarps on tents, his observations regarding smoking and automotive batteries and the photograph of the jack-o-lantern were chilling." By his testimony alone, the city of Boston "met its burden of justification for regulating the expressive activities of setting up tents and sleeping overnight."

Alternatives for expression abound and, no doubt, the people of Occupy Boston will continue to avail themselves of those alternatives to promote their message that "a more just, democratic, and economically egalitarian society, responsive to the people rather than the corporations, is possible."

As long as there are people who are dedicated to preserving the rule of law, their objective is possible. However, as MBA President Richard P. Campbell has observed, "Massachusetts lawyers face another important challenge to the rule of law. It may not be tied as directly to violence and mayhem, but it is nonetheless under attack. Courthouses are closing and those that continue to operate have diminished hours of operation. Court staffs are suffering layoffs, furloughs and pay freezes. Judges are leaving the bench at alarming rates."

Imagine, for a moment, what would have happened to the protestors without the rule of law. Please let your senators and representatives know that you support full funding of our courts. ■

Michelle Keith served as a 2011 Law Fellow to the justices of Massachusetts Superior Court and is presently working on her master's degree at the University of London, specializing in International Human Rights.

VIEWPOINT

UMass Medical at forefront of emerging technology

**BY MICHAEL F. COLLINS,
MD, FACP**

The University of Massachusetts Medical School was proud to host the Massachusetts Bar Association House of Delegates at our Worcester campus last month. The meeting took place steps from the very spot where the Albert Sherman Center — a state-of-the-art, 500,000-square-foot research and academic center — is rising on our campus. In scope, the building, which will open later this year, is impressive, but what *truly* stands out about this super-structure is what it signifies: the future of the life sciences research and development economy in Massachusetts and beyond.

The reason that the Sherman Center is so important to the future of biotechnology and the state's economy is simple: we are at a moment like no other when it comes to reaping the benefits of a generation of biomedical research. The faculty that will work and teach in the Sherman Center will do so using tools and technologies that have finally begun to bridge that gulf between laboratory discoveries and therapies for patients.

The first sequencing of the human genome took 10 years and cost \$1 billion; today, human genomes can be sequenced in days for a few thousand dollars. Fifteen years ago, the phrase "RNA interference" didn't exist; today, that Nobel Prize-winning discovery by a UMass Medical School scientist is the founda-

tion for an entire industry aimed at bringing new therapeutics to the marketplace. Biomedical research is coming of age, and one only has to look inside the Sherman Center to see how different the world now looks.

Inside, you will see the RNA Therapeutics Institute, co-directed by our Nobel Laureate Craig Mello, where researchers will be studying ways of using our own genetic code to turn off disease-causing genes. You will find scientists in the Center for Stem Cell Biology and Regenerative Medicine developing therapies based on reprogramming cells in order to grow new ones. The Gene Therapy Center has already introduced clinical trials for diseases like prostate cancer. And working side by

side with these renowned scientists will be experts in bioinformatics and genomics, clinical trial design and translational medicine, many in our new Department of Quantitative Health Sciences, where we work to develop and test tools for improving patient outcomes from both cutting-edge treatments and well-established therapies.

All of this will happen with one of our most precious resources — our students — "embedded" in the Sherman Center in new learning communities. Here, they will work closely with each



MICHAEL F. COLLINS

MICHAEL F. COLLINS is chancellor of the University of Massachusetts Medical School and senior vice president for the health sciences, University of Massachusetts.

other and with faculty in a new collaborative model of medical education that reinforces our leadership in this important mission.

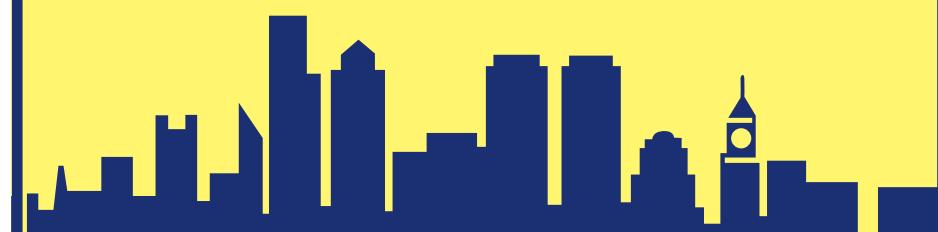
The benefits to the commonwealth

will be as impressive as the building itself: new discoveries will mean new investments in biotechnology and pharmaceutical research, in new technologies and new infrastructure. Biomedical science — already the cornerstone of the new Massachusetts economy — will continue to lead Massachusetts and the nation, and at the University of Massachusetts Medical School, we're proud to be at the center of this effort. ■

OFFICE SPACE

BOSTON MILK STREET

Shared office spaces available,
2nd floor, prices range from
\$625. To \$975. Walk to MBTA,



**Fairfield Realty
#(617) 262-1470**

Attention Personal Injury Attorneys!

**When your client needs cash now...
The choice is EMPIRE!**

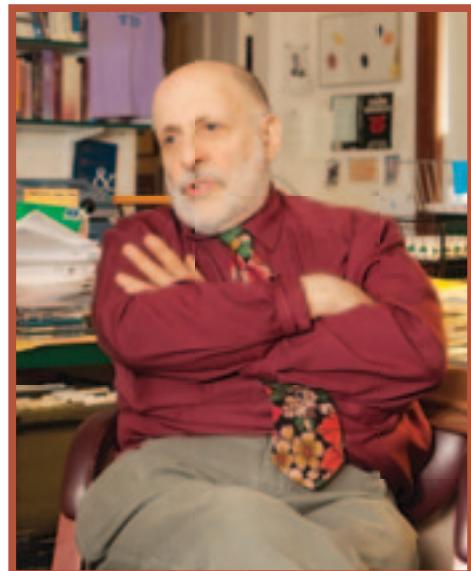
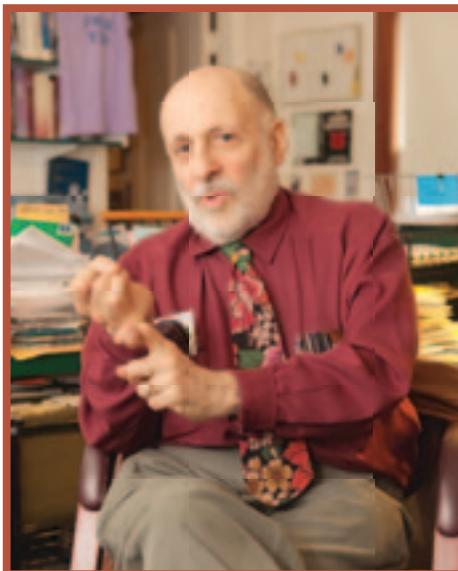
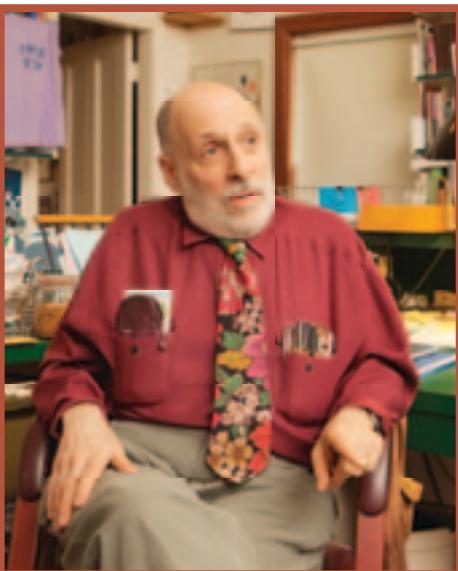
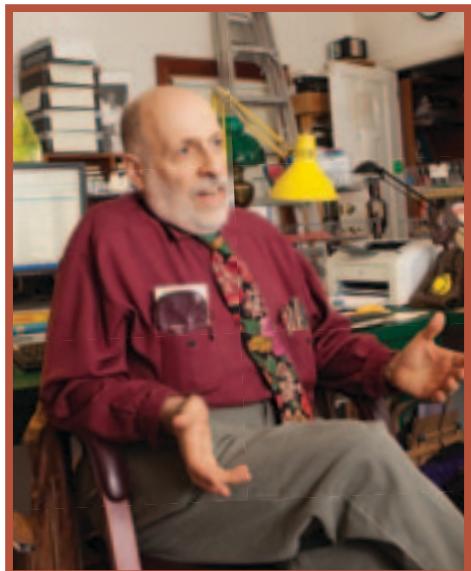


Cash Now for Plaintiffs™

- ✓ Buys you the time to develop a more powerful case
- ✓ Helps clients with urgent cash needs
- ✓ Strengthens relationships
- ✓ Underwritten by experts
- ✓ Fast turnaround time
- ✓ We are available 24/7
- ✓ We're from Massachusetts!

LITIGATION FINANCING

EMPIRE SETTLEMENT FUNDING
877.227.4458



PHOTOS BY MERRILL SHEA

Silvergate takes time to speak with *Lawyers Journal*.

Harvey Silvergate: Reflections on an accidental legal career

SILVERGATE

Continued from page 1

state lines, he admits his Brooklyn influence runs deep. "I kind of developed a New Yorker's attitude toward the world, which is skeptical of authority and very skeptical of authority gone mad. I consider myself a Brooklyn boy."

Silvergate, the first in his family to attend college, originally intended to become a doctor, as his parents aspired for him.

He entered Princeton on a full scholarship as a pre-med student. However, his career goals soon changed after spending a summer interning at a bank in France. During those three months abroad, he learned he "was not as concerned with the problems that germs cause as [much as] with the problems that people cause."

THE RELUCTANT PRACTITIONER

It was at that point he decided to go to law school, but not to become a lawyer. Silvergate wanted to be a journalist, "a legally sophisticated reporter," as he calls it.

Silvergate attended Harvard Law School, and there met Alan Dershowitz, who convinced Silvergate to try working for a law firm. Dershowitz set Silvergate up with a job at the now-defunct Boston firm, Crane, Inker & Oteri.

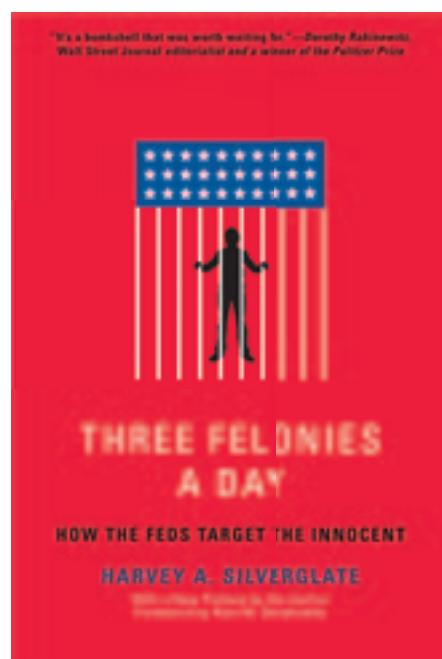
Still intent on having a writing ca-

"The only other group in society that's dedicated to trying to keep institutions honest is the press. And the press often can't get into these institutions, but lawyers can."

HARVEY SILVERGATE

reer, Silvergate didn't think he would be at the firm very long. He just wanted some practice experience before becoming a legal reporter. Despite his original intentions, Silvergate ended up loving the law, and stayed with the firm after graduation.

But his yearning to write never went away. "I had this bug still up in my head [that] I really should be writing about legal matters like I intended," Silvergate said. "So, I started writing columns for *The Boston Phoenix*." His nearly 40-year career at the *Phoenix* makes him the paper's oldest living contributing



The cover of Silvergate's second book.

writer, he said.

He's also one of the paper's most widely read contributors, according to Peter Kadzis, executive editor for *The Boston Phoenix*. "The response to his articles is always strong," Kadzis said. "Harvey's written on a broad range of public policy issues, but the common denominator is always justice and constitutionality."

"I think that there's a driving force in Harvey's life, and that is justice," Kadzis added. "I would say I've never met anyone [like him], and his commitment to the United States Constitution is rabbinical in its intensity."

Silvergate's writing career goes beyond local publications. His writing can also be found in *The Wall Street Journal*, *The New York Times* and regularly on Forbes.com.

PROJECTS AND CASES PROVED TO BE REFLECTIVE OF PASSIONS

He has also authored two books. The first, *The Shadow University: The Betrayal of Liberty on America's Campuses*, which he co-authored with Alan Charles Kors, tackles the subject of free speech and equality of rights on the nation's college campuses. His second book, *Three Felonies a Day: How the Feds Target the Innocent*, tells the stories of American citizens who have been the targets of federal prosecutions even though they believe they did nothing wrong.

Silvergate's two books reflect what many will say is his life's work: corruption in both American higher education institutions and criminal law.

His passion for freedom on American college campuses led to the creation of the nonprofit organization, Founda-

tion for Individual Rights in Education, with co-author Kors.

Will Creely, attorney and director of legal and public advocacy at FIRE, said Silvergate talks a lot about the need to change the culture on college campuses. "What I think Harvey means by that is to implant a sense, or reinvigorate a sense, in both students and faculty ... in a modern liberal democracy ... that can be wide ranging and expansive."

In the 12 years since its inception,

"I think if you live your life worrying about legacy, you tend to be too focused on pleasing people and having people approve of what you do."

HARVEY SILVERGATE

FIRE has won hundreds of public victories, Creely said. These victories include changing codes on campuses and securing just results for students and faculty who have found themselves censored, silenced and kicked off campus.

"It's an incredible feat, frankly, that he's been defending student rights for over 40 years now in addition to all [the] other work he does," Creely said. "I really admire that he's a tireless advocate."

Silvergate's other big passion, criminal law, is what led him to write his most recent book, *Three Felonies a Day*. He is also a longtime member of the American Civil Liberties Union. His involvement with the ACLU of Massachusetts includes serving as a member of its board of directors for 30 years and two terms as its board president in the mid-1980s.

"Harvey's really one of the heroes of the civil liberties movement," said Carol Rose, executive director of ACLU of Massachusetts. "He brings his brilliant legal mind together with his analytical writing ability."

Being able to combine his experiences as a civil liberties and constitutional law expert, and being able to write about it and translate the principles of civil rights and civil liberties for a lay audience to understand, is a "rare combination," Rose added.

"I think there's an obligation of people who work in our institutions to keep them honest," Silvergate said about his advocacy roles. "Who else is going to do it? The only other group in society that's dedicated to trying to keep institutions honest is the press. And the press often can't get into these institutions, but lawyers can."

While Silvergate's role as a lawyer

has seen him covering a variety of cases, from selective service to students' rights to white collar crimes, he admits that there are certain kinds he favors.

"I'll take any criminal case," Silvergate said, "but my favorite cases are the federal cases where I sit there and say to my client, 'What did you do that got you into this?' And the client says, 'I don't know. I have no idea what I did wrong.'"

These are the sorts of cases he now handles at the Boston law firm Zalkind, Rodriguez, Lunt & Duncan, where Silvergate works of counsel. David Duncan, a partner at the firm, said he often uses Silvergate as a sounding board when he works on student discipline cases, an area where Silvergate's been a "groundbreaker."

"I think he's generally perceived as a brilliant strategist," Duncan said, "and as someone who will invariably stand up for free speech and against authority. He looks at problems and thinks about them in a way that most lawyers don't or can't."

Silvergate often gets calls from lawyers around the country seeking advice. "The reason people call me is because I have taken a very different view of federal criminal prosecutions. I suggest there are ways to defend these cases that are non-traditional."

A DISTASTE FOR CONVENTIONAL APPROACHES, THEORY

Non-traditional is just one of the terms Norman Zalkind, partner at Zalkind, Rodriguez, Lunt & Duncan, would use to describe Silvergate. Zalkind first met Silvergate during the late 1960s in the basement of the Suffolk Superior Court building in police lock-up. Silvergate mistook Zalkind as a defendant arrested during an anti-war demonstration at the Statehouse.

Despite the mix-up, Silvergate and Zalkind soon became partners, opening up their own firm. The two handled cases such as the Harvard University takeover and the Pentagon Papers.

"He's different from most lawyers," Zalkind said. "He's just creative. He thinks out of the box. Sometimes the ideas go nowhere and sometimes they go right to the heart of things."

It was at Zalkind & Silvergate's law firm where Silvergate first met Nancy Gertner, a retired U.S. District Court judge and now a professor at Harvard Law School. Gertner and Silvergate eventually began their own law firm, where they practiced together for 17 years.

Silvergate's is "a voice that is absolutely invaluable," Gertner said. "He's someone who is enormously" ➤9



Are you on the road to retirement?

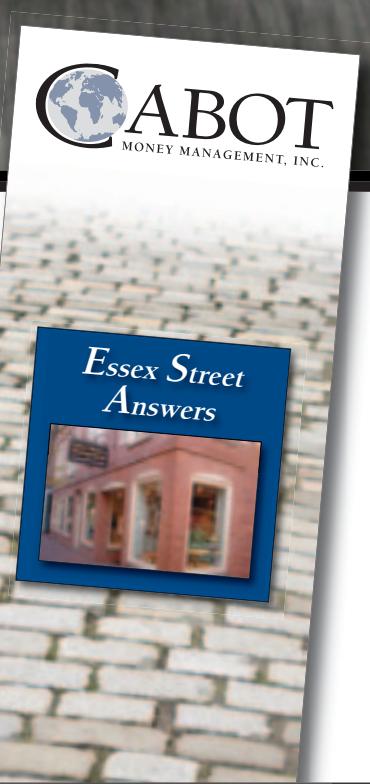
Visit Essex Street.

From our brick-and-mortar storefront on the cobblestone streets of historic Salem, Massachusetts, we set out to travel to the world in search of new opportunities to help secure your future.

Discover the value of highly personalized service and our global investment strategy.

We invite you to call us at 800-888-6468,
visit eCabot.com
...or come visit us on Essex Street.

Request your complimentary copy of "Essex Street Answers," our insightful guide to wealth management that answers some of life's most challenging questions.



LEGAL NEWS

Justice Dept. advertising attorney vacancies

The U.S. Department of Justice — the world's largest law office, with more than 10,000 attorneys nationwide — has numerous openings for attorneys.

Interested applicants are encouraged to apply, but due to temporary funding restrictions, the department may not be able to fill all of the currently advertised positions.

To learn more about the U.S. Department of Justice and its legal careers, as well as the current openings, go to www.justice.gov/careers/legal.

In addition, more than 1,800 volunteer legal interns serve in DOJ components and U.S. attorneys' offices throughout the country every year.

Law students interested in a DOJ volunteer internship should go to www.justice.gov/careers/legal/volunteer-intern.html. ■

BAR NEWS

Court funding campaign: elevating awareness

Continued from page 1

legislators on this important issue.

As part of the informational online package, public service announcement-style videos can be viewed. The videos highlight the negative impact of inadequate court funding through the perspective of judicial leadership, attorneys, academic leaders and court staff.

"We've never done this before," Campbell said. "The fact that the MBA has committed to elevating awareness in this fashion is a clear indication of how dire the circumstances have gotten in the court room atmosphere and operations."

The campaign has already garnered much attention. Following the first wave of promotion on this high-profile, public awareness campaign, media coverage has included pieces on/in boston.com; *State House News Service*; MassINC's *CommonWealth* magazine; WBUR-FM; the American Bar Association's *ABAJournal*; *Massachusetts Lawyers Weekly*'s blog, *The Docket*; *Banker & Tradesman*; and Worcester's *Telegram & Gazette*.

In addition, news of the campaign has



Underfunded courts do affect you.

Find out how: www.MassBar.org



The message showcased on billboards in Greater Boston, Worcester and Springfield.

received considerable attention on social media, especially Twitter. Members are encouraged to follow @massbar for the latest tweets on the topic or to join the conversation.

Campbell said he realizes that the campaign won't reach every citizen of the commonwealth, but he is eager to take the MBA's communication and advocacy efforts to the next level to better convey why Massachusetts should properly fund its third branch of government.

In addition to the billboards and YouTube videos, the MBA will work to continue to share word of the campaign through comprehensive outreach to mem-

bership and the larger legal and legislative communities, as well as other key community and opinion leaders.

Gov. Deval L. Patrick released his version of the fiscal 2013 budget on January 25, while both the House and Senate will begin their budget debates in April and May respectively.

For more information, go to www.massbar.org. ■

Don't forget to check us out online at www.massbar.org

LEGAL NEWS

News from the Courts

SJC APPOINTS AMBROSINO EXECUTIVE DIRECTOR

The Supreme Judicial Court appointed Thomas G. Ambrosino, the former mayor of Revere, as its executive director, effective Jan. 11.

Ambrosino implements the policies set by the SJC's justices and directs the daily administration of the Court. He also assists the justices in implementing recent court management reforms.

Ambrosino has management, legal, financial and personnel experience. As mayor of Revere from 2000 to the end of 2011, he improved the city's fiscal health by raising its bond rating and increasing reserves, implementing a major capital improvement campaign, and negotiating and concluding multiple municipal collective bargaining agreements. He was a sole practitioner in Revere and a litigation associate at Palmer & Dodge in Boston.

A native and current resident of Revere, he graduated *cum laude* from Harvard Law School and *summa cum laude* from Boston University.

His civic work since 2008 includes serving on the executive committee of the Metropolitan Area Planning Council and the board of the Massachusetts After-school Partnership, a nonprofit advocate for afterschool opportunities for public school children.

"Tom has outstanding skills and an impressive history in building broad-based support among diverse constituents. The justices look forward to working with him in the challenging years ahead," said SJC Chief Justice Roderick L. Ireland.

Ambrosino succeeds Clifford Allen, the reporter of decisions for the appellate courts.

TAUNTON TRIAL COURT OPENS

The Massachusetts Trial Court opened the 146,000-square-foot building Taunton Trial Court at a special event for employees, local officials and area residents on Dec. 16. Lt. Gov. Timothy Murray and Supreme Judicial Court Justice Robert Cordy were among the speakers in the program hosted by Chief Justice for Administration & Management Robert A. Mulligan.

Taunton District Court, Bristol County Juvenile Court and Probate and Family Court, and Southeast Housing Court began operations in the new court building in June. The courthouse features eight courtrooms, modern information technology and digital recording capability, handicapped access, secure detention areas, a jury pool and the district attorney's office.

The building was designed by Leers Weinzapfel and constructed by Daniel O'Connell's Sons under the direction of the Massachusetts Division of Capital Asset Management and the Massachusetts Trial Court.

RUANE JUDICIAL CENTER OPENS IN SALEM

A 195,000 square-foot, state-of-the-art J. Michael Ruane Judicial Center opened Dec. 12 with a phased-in relocation of the Essex County Superior Court, Salem District Court, Essex County Juvenile Court and Northeast Housing Court. The Essex County District Attorney's Office is also in the building. The Essex County Law Library was scheduled to open in January in the historic, former First Baptist Church building of the complex.

The new courthouse features 11 courtrooms, modern information technology and digital recording capability, handicapped accessibility and secure detention areas. The judicial center was designed by



The new Taunton Trial Court.

PHOTO COURTESY OF THE ADMINISTRATIVE OFFICE OF THE TRIAL COURT

Goody Clancy Architects and constructed by Daniel O'Connell's Sons under the direction of the Massachusetts Division of Capital Asset Management and the Massachusetts Trial Court.

SJC ENDORSES JUDICIAL HIRING TASK FORCE'S FINAL REPORT

The Supreme Judicial Court announced on Jan. 5 that it had endorsed the recommendations in the final report of the Task Force on Hiring in the Judicial Branch, which made "recommendations designed to ensure a fair system with transparent procedures in which the qualifications of an applicant are the sole criterion in hiring and promotion."

The 10-member task force, which was formed Nov. 18, 2010, was chaired by Scott Harshbarger, former Massachusetts attorney general. It recommended a full commitment from the top down to merit-based hiring and promotion throughout the court system, based on seven well-known elements designed to recruit and cultivate a talented, high-quality workforce.

To achieve success, the task force emphasizes the need for continuous training

and performance reviews and a supportive culture in which all employees are united in common goals and an understanding of the system's mission and shared values.

"A well trained, highly motivated work force is critical to fulfilling our constitutional mission," said SJC Chief Justice Roderick L. Ireland. "The timing of their work perfectly complements our efforts to recruit a court administrator and to engage in an intensive strategic planning initiative aimed at identifying and assessing the court system's capital, technological and human resources needs of the future."

For the final report or more information about the task force, go to the Jan. 5 listing at www.mass.gov/courts/press/prguide.html.

The task force's first two reports focused on hiring and promotion in the Probation Department and the critical situation that led the court to create the task force. The subsequent reports dealt with hiring and promotion of court officers, administrative personnel and employees of the offices of the appointed and elected clerks, registers and land court recorder. ■

For more information about Massachusetts courts, go to www.mass.gov/courts.

BAR NEWS



MBA President Dick Campbell addresses the delegates.

HOD

Continued from page 1

a report of the Foreclosure Task Force presented by Robert Cannon, which outlined draft legislation to create a mandatory mediation procedure prior to foreclosure on residential properties in Massachusetts. The task force originally presented the matter to HOD in November, but it was tabled. The legislation calls for face-to-face mediation within 90 days, said Cannon, who described the process as creating predictability.

Real Estate Bar Association of Massachusetts President Christopher S. Pitt reported that REBA does not support the bill as drafted, but does not oppose mediation in principle. MBA Civil Litigation Section Chair Raymond P. Ausrotas said the section also does not support the legislation as drafted.

A vote of approval by HOD was given to a resolution that grants U.S. magistrate judges the power to conduct any and all proceedings in a jury or non-jury civil matter in federal court and authorizes the MBA to bring it before the American Bar Association at its midyear meeting in February.

HOD voted unanimously to express opposition to provisions contained in the National Defense Authorization Act for fiscal 2012 that concern detention, interrogation and prosecution of suspected terrorists. MBA member Michael Mone Jr., son of MBA Past President Michael Mone, presented the matter to HOD. HOD also voted to bring this matter before the ABA.

The MBA's Mandatory Minimum CLE

Task Force, co-chaired by MBA Vice President Marsha V. Kazarosian and Christopher A. Kenney, a region 10, Worcester County delegate, provided an overview of its report. The seven-member task force, created in September, met with and sought input from MBA members, affiliated bars, MCLE, the Board of Bar Overseers and Minnesota Continuing legal Education. "The message was Massachusetts lawyers are a very self-motivated group," Kazarosian said. "Many are not against CLE, just the mandatory aspect of it."

Catalano, who sits on the Supreme Judicial Court's Working Group on Professionalism, said the SJC has discussed making CLE mandatory for young lawyers, and that the scope may be broadened. Campbell suggested the task force should now develop a plan that outlines how mandatory CLE should operate in Massachusetts, so that the bar is not blind-sided if it in fact becomes a true possibility.

MBA Treasurer Douglas K. Sheff gave a positive MBA financial report, noting the MBA is operating with a profit in the first quarter of its fiscal year, new members have increased 10 percent over the same time period last year and CLE has grossed more than anticipated, in part due to the success of the MUPC series.

Catalano informed HOD that he is now forming a committee to decide how to distribute funds collected for the Oliver Wendell Holmes Jr. Scholarship, which was created with money raised above the amount needed for last year's Centennial Celebration. ■

SILVERGLATE

Continued from page 6

creative and works really, really hard, and really will think about the unorthodox and try to do the unorthodox."

One of Gertner's fondest memories of Silverglate occurred when he encouraged her to take the Susan Saxe case, in which a Vietnam anti-war demonstrator was accused of killing a police officer.

"When people talk about mentors, I don't think that there's a way for describing how extraordinary that push was for me," Gertner said. "It made an enormous difference in my career. I'm not sure that any other male lawyer at the time, then or now, would have easily made that decision."

Silverglate is known for not shying away from controversy, and his current views on the legal system are no different.

Working to preserve the U.S. Constitution during a "War on Terror ... is the greatest challenge of our age," he said. "To preserve a republic in the face of the warriors who tell us [that] we cannot afford to have free institutions in an era where other people are looking to terrorize us ... I think that's the main challenge."

PERCEPTIONS OF SILVERGLATE'S INFLUENCE, LEGACY

Silverglate, who often lectures students about campus rights, civil liberties and criminal law, "encourages young law students to fight to preserve what's best and what's marvelous about the civilization that we've constructed around the rule of law and the Constitution," he said.

Silverglate's research assistant, Daniel Schwartz, said, "To say Har-

MORE HOUSE OF DELEGATES NEWS

Vice Chancellor Leary addresses MBA delegates

On hand to provide welcome remarks to MBA's HOD at its Jan. 19 meeting was UMass Medical School Vice Chancellor James B. Leary, Esq. (see Viewpoint, page 3).

Leary explained that UMMS is approximately 40 years old and founded with a dual mission — to provide affordable, high-quality medical education to Massachusetts residents, and increase the number of primary care physicians practicing in underserved areas of the state.

Today, UMMS is ranked eighth in primary care among the nation's 133 medical schools by *U.S. News & World Report*; and it is 17th in affordability out of the 133 (measured by total cost of tuition, fees and health insurance), according to the Association of American

Medical Colleges.

"We are by far the most affordable medical school in the Northeast," said Leary, who also noted UMMS' ranking of 31 for competitively awarded National Institutes of Health research grants.

In addition, Leary reported that only 4 percent of the UMMS budget comes from a state appropriation with the other 96 percent derived primarily from revenues from entrepreneurial ventures, such as Commonwealth Medicine, Mass Biologics Labs, grant funded research, and licensing fees.

For more information on UMass Medical School, visit www.umassmed.edu. ■

personal attention from faculty and staff.

UMass Lowell enjoys its ranking from *U.S. News & World Report* as a top 200 research university. Also, *Forbes* ranks the university as one of the top 650 undergraduate institutions.

Of the more than 75,000 living alumni, nearly 44,000 are Massachusetts residents. One such alumnus is the current chancellor, Martin Meehan. Meehan is the second chancellor of UMass Lowell and the 14th leader of its predecessor schools founded in the 1890s. ■



Massachusetts Medical Society President Lynda Young, MD; MBA Vice President Jeffrey N. Catalano; MMS Past President Alan C. Woodward; and MMS Vice President and General Counsel Charles Alagero.

vey has been an influence on what I'm doing would be one of the great understatements."

"Harvey brings a perspective to everything," said Silverglate's intern, Stephen Henrick. "I feel like he's really committed to his ideals, and I respect that in a lawyer."

"I'm delighted that so many of the law students I've helped train have gone onto useful careers," said Silverglate, who keeps in touch with many of them.

What's up next for Silverglate? The probability of a third book is pretty high, he said, even though he "vowed" to never write another book because of the toll it takes on his law practice.

The tentative title is *Acts of God*, which will focus on cases in which prosecutors have suppressed exculpatory evidence and "it was by the most bizarre fluke that years later the excul-

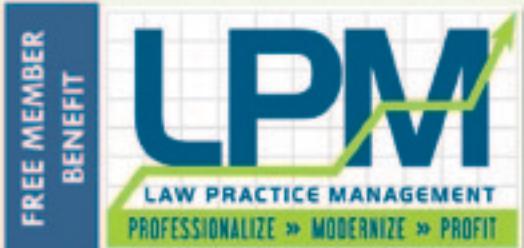
pative evidence came out and freed" the convicted, he said. "There are a disturbing number of these cases and I decided to collect them and write about them in order to point out how crazy our current system is ... how easy it is for prosecutors to suppress evidence and get away with it for life."

With a lifetime full of life-changing work to look back on, Silverglate doesn't seem to particularly care about the legal legacy he'll leave behind one day. "I don't put my stock in that," he said. "I think if you live your life worrying about legacy, you tend to be too focused on pleasing people and having people approve of what you do."

He added: "I want my friends to remember me as a good friend and my son to remember me as a good father, which I think I was. And if I predecease my wife, as a good husband and friend." ■

MBA CLE AT-A-GLANCE

FEBRUARY CONTINUING LEGAL EDUCATION PROGRAMS BY PRACTICE AREA



Ethics and Practice Management Series



All programs 12:30–1:30 p.m.

MBA, 20 West St., Boston

Going Paperless

Scanning Technologies, Software Programs and Electronic File Management

Wednesday, February 15

Marketing Madness

Ethical Marketing

Wednesday, March 7

Developing a Marketing Plan

Wednesday, March 21

When Clients Complain

Wednesday, April 4

Social Media and Blogging

Wednesday, April 18

CIVIL LITIGATION

Fundamentals of a Civil Jury Trial: Courtroom Conduct and Procedures

Wednesday, Feb. 29, 4–7 p.m.

Mass. School of Law, 500 Federal St., Andover

Program chair:

Bruce Medoff, Esq.
Smith & Brink PC, Braintree

Faculty:

Hon. Allen G. Swan
Ipswich District Court

John D. Curran, Esq.
Smith & Brink PC, Braintree

(Additional faculty to be announced.)

Sponsoring sections/division: Civil Litigation, General Practice, Solo & Small-Firm, Young Lawyers Division

Co-sponsor: Massachusetts School of Law

Don't miss these MBA co-sponsored events ...

Uniform Commercial Code (UCC) Conference

Sponsored by the Massachusetts Bar Association and New England Law | Boston's Center for Business Law

Thursday, Feb. 16, 12:30–5:30 p.m.

New England Law | Boston, 154 Stuart St., Boston

Panelists: Jean Braucher, Esq., Roger C. Henderson Professor of Law, University of Arizona James E. Rogers College of Law; Neil B. Cohen, Esq., Jeffrey D. Forchelli Professor of Law, Brooklyn Law School; Thomas A. Cox, Esq., Portland, ME; William H. Henning, Esq., Distinguished Professor of Law, University of Alabama School of Law; Ingrid Michelsen Hillinger, Esq., Professor of Law, Boston College Law School; Maureen A. O'Rourke, Esq., dean, Boston University School of Law; David J. Reier, Esq., partner, Corporate Dept., Posternak Blankstein & Lund LLP, Boston; Edwin E. Smith, Esq., partner and co-chair, Financial Services Area, Bingham McCutchen, Boston

Register by Monday, Feb. 6 at Abigail Adams at
Abigail.P.Adams@NESL.edu or call (617) 455-5705.

Visit www.MassBar.org/Events for a full schedule and additional registration and conference information.



FACULTY SPOTLIGHT

Bruce Medoff, Esq.

Smith & Brink PC, Braintree

Program chair, "Fundamentals of a Civil Jury Trial: Courtroom Conduct and Procedures"

Medoff is a shareholder and officer of Smith & Brink PC in Braintree, specializing in civil litigation in state and federal courts throughout the country. He has focused his practice on insurance defense, special investigations issues and bad faith claims while continuing his practice of criminal defense, appellate advocacy and general civil litigation, including commercial litigation and debt collection. Medoff has engaged in a wide range of insurance defense work, including motor vehicle collisions, landlord/tenant, premises liability and arson. He has prosecuted numerous civil R.I.C.O. actions on behalf of insurers in Federal Court.

A member of the Massachusetts Bar Association, Medoff is a frequent lecturer for MBA CLE programs. He is an instructor and guest lecturer for the Massachusetts Firefighting Academy, speaking on topics such as trial tactics, preparing for and conducting depositions and chain of custody and spoliation of evidence issues. Medoff is the author of several publications as well as numerous articles for such publications as *The National Law Journal*, *Attorneys Weekly* magazine and *Massachusetts Lawyers Weekly*. Also, he has lectured extensively on insurance defense and legal issues.

Medoff is a member of the board of directors and former coach for the Newton Youth Soccer Association, former member of the board of directors and coach for the Newton South Little League and an instructor for the Commonwealth of Massachusetts Division of Fisheries and Wildlife's Angler Education Program. He received his B.A. from the University of Massachusetts and his J.D. from Boston University School of Law.



MUPC DEMYSTIFIED

An In-Depth Series on the New Massachusetts Uniform Probate Code

Featuring opening remarks by
Probate and Family Court Chief Justice Paula M. Carey.

PART V: Estate Planning Under the MUPC Drafting Wills and Trusts

Tuesday, Feb. 7, Noon–4 p.m., MBA, 20 West St., Boston



Recorded versions of Parts I–IV available for purchase at www.MassBar.org/OnDemand.



PROBATE AND FAMILY COURT,
CHIEF JUSTICE PAULA M. CAREY

PROGRAM CO-CHAIRS



MARK A. LEAHY, ESQ.
WHITTUM & LEAHY
HINGHAM



JANICE C. NIGRO, ESQ.
NIGRO, PETTIPET & LUCAS
WAKEFIELD

ARE YOU READY? MUPC BASICS

An Overview of the New
Massachusetts Uniform Probate Code

Friday, Feb. 10, 9 a.m.–5 p.m.
Mass. School of Law, Andover

Register at: www.MassBar.org/MUPC



2012 Massachusetts Conference on Bullying

Bullying and the Law: Policies, Programs and Best Practices

Sponsored by the Massachusetts Bar Association, the Massachusetts Commission on GLBT Youth, and School Climate Consulting Services

Friday, March 16, 8 a.m.–3:30 p.m., Harvard Law School
Austin North Conference Room, 1563 Massachusetts Ave., Cambridge

Keynote Speaker: Dean B. Eggert, Esq., Weddington, Starr & Peters PLLC, Manchester, NH

Conference Presenters: Richard W. Cole, Esq., principal, Cole Civil Rights and Safe Schools Consulting, Boston; Paul Poteat, Ph.D., assistant professor, Department of Counseling, Developmental and Educational Psychology, Boston College; Jeff Perrotti, M.A., C.A.S., founding director, Massachusetts Dept. of Elementary and Secondary Education's Safe Schools Program for Gay, Lesbian, Bisexual and Transgender Students; Randy Ross, M.S., M.A., Equity and Diversity Specialist, New England Equity Assistance Center, The Education Alliance, Brown University

Register by Thursday, March 1 by contacting Molly Gosline at
(603) 505-6652 or Molly@School-Climate-Consulting.org

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

BAR NEWS**Member Spotlight****MBA PRESIDENT CAMPBELL JOINS UMASS BUILDING AUTHORITY**

Massachusetts Bar Association President Richard P. Campbell, the founding shareholder of Campbell Trial Lawyers in Boston, was appointed in December to the University of Massachusetts Building Authority, which is responsible for generating funds to build facilities such as student dormitories, dining facilities and parking garages.

Gov. Deval Patrick, who named Campbell to the Building Authority, had appointed Campbell to the UMass Board of Trustees in September. Also, in January 2011, Campbell was named to UMass Boston's Board of Visitors, which advises the chancellor and university leadership on strategic issues, such as instruction and research, finance, facilities, philanthropy, student enrollment and retention, marketing, community engagement, and global development. UMass Boston's Board of Visitors has an additional advisory role in the university's strategic planning.

Campbell primarily represents national and international corporations in complex cases, including multi-district litigation, class actions, aviation, toxic tort and products liability disputes. He also represents clients in commercial disputes, including contests over the control of closely held corporations. He is a Fellow of the American College of Trial Lawyers.

FIVE PEABODY & ARNOLD PARTNERS NAMED 'LAWYERS OF THE YEAR'

Best Lawyers, an independent legal ranking publication, named five partners at Peabody & Arnold LLP "lawyers of the year."



HARVEY WEINER

Harvey Weiner, chairman of Peabody & Arnold's Litigation Department was named the 2012 Boston Insurance Lawyer of the Year. Partner George A. Berman, who received the same designation in 2011, was named Boston Legal Malpractice Lawyer of the Year for 2012.

Weiner is a member of the Board of Trustees of the Massachusetts Bar Foundation.



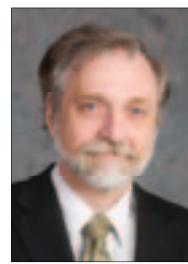
GEORGE A. BERMAN



MICHAEL J. STONE



MICHAEL P. DUFFY



ALLEN DAVID

dation (Brandeis Fellow) and a member of the Massachusetts IOLTA Committee. He is a past president of the Boston Inn of Court and the Massachusetts Associate of Town Counsel and City Solicitors. Berman is a past chairman of the Board of Bar Overseers.

Other Peabody & Arnold partners recognized were Allen N. David and Michael J. Stone for legal malpractice and Michael P. Duffy for insurance law.

Peabody & Arnold LLP was given a "First Tier" ranking in Massachusetts for its insurance and legal malpractice practices and was again nationally recognized in insurance law.

Peabody & Arnold has handled the defense of hundreds of legal malpractice cases and litigates insurance coverage issues all over the United States.

CLIFFORD NAMED TO MATA BOARD OF GOVERNORS

Scott J. Clifford, of Hanover-based Epstein, Lipsey & Clifford PC, has been named to the Board of Governors of the Massachusetts Academy of Trial Attorneys (MATA).

Clifford will assist in governing MATA, whose mission it is to preserve the American jury system, protect the health and safety of Massachusetts' families, improve the quality of legal representation through education, and educate the public about consumer issues.

"It is a privilege to serve on this prestigious board," he said. "The core of the Massachusetts Academy of Trial Attorneys is to uphold the honor and integrity of the legal profession, and it is an honor to serve on its Board of Governors."

A graduate of New England School of Law, he practices in the area of civil litigation, with a focus on construction and corporate litigation. He is a participating member in a number of organizations, including the MBA, Boston Bar Association, American Bar Association, Real Estate Bar Association and the Association of Trial Attorneys of America. ■



SCOTT CLIFFORD

EXPERTS&RESOURCES**MASSACHUSETTS LAWYERS JOURNAL****ADR****MDRS. Prompt and professional dispute resolution for your clients.**

A professional panel of skillful and experienced mediators and arbitrators.
Attorney Brian R. Jerome, Founder
Hearings throughout Massachusetts



MASSACHUSETTS DISPUTE RESOLUTION SERVICES
800-536-5520
www.mdrs.com

ADR**"Choose the Best Alternative"™ in mediation.**

Visit our website
for more information:
www.fitzgeraldresolution.com



Fitzgerald
DISPUTE RESOLUTION LLC

Warren Fitzgerald
TEL: 617.241.4299
wf@fitzgeraldresolution.com

ADR**HON. BEVERLY W. BOORSTEIN (RET.)**
DISPUTE RESOLUTION**Can we talk!**

I will sit down with clients and attorneys in a private, easily accessible location.

I bring 45 years as a practicing attorney and respected judge to the table.

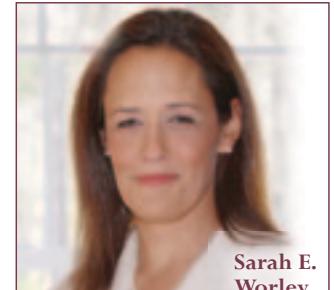
Case evaluations, mediation, arbitration and master's hearings.

"Let's Reason Together"

TEL (617) 964-8744
www.beverlyboorstein.com

ADR**Where conflict meets resolution.**

Sarah E. Worley,
Conflict Resolution, P.C.



Sarah E. Worley

14 Beacon Street,
Suite 610
Boston,
Mass., 02108

45 Bristol Drive
South Easton,
Mass., 02375

617-419-1900
www.worleyconflictresolution.com

APPRAISALS

ALLIED APPRAISAL ASSOCIATES

REAL ESTATE VALUATION CONSULTANTS
WWW.ALLIEDAPPRaisal.COM

Commercial ♦ Industrial ♦ Residential

COURT TESTED EXPERT WITNESSES

JOHN T. PECULIS
PRESIDENT

Reliable and Unbiased Value Opinions by Industry Leading Specialists Since 1979

Main Office:
108 Shrewsbury Street Suite 201
Worcester, MA 01604
Ph: (508) 755-2500 x 21
Fax: (866) 368-5577

BBB
ACCREDITED BUSINESS

AVIATION LAW**AVIATION LAW**

ANTHONY TARRICONE,
concentrating in cases involving serious personal injuries and wrongful death resulting from the

operation, design, and maintenance of all types of aircraft. Twenty-five years experience in aviation cases including airline, commercial and general aviation.

Kreindler & Kreindler LLP

277 Dartmouth St.
Boston, MA 02116
Tel (617) 424-9100
Fax (617) 424-9120
E-mail: atarricone@kreindler.com
www.kreindler.com

For all your **advertising needs** in the *Massachusetts Lawyers Journal*, contact Mark Schultz.

(617) 896-5323

mschultz@thewarrengroup.com

MASSACHUSETTS LAWYERS
WWW.MASSBAR.ORG

Ben T. Clements: A Massachusetts experience in political policy and politics

BY KELSEY SADOF

Staring out across the Bay State, Ben T. Clements' new office offers a view of the Boston skyline from his little girl's playroom. Devil's Path, the path leading back to his mother's home in the Berkshires, is scattered across the floor of Clements' office, the phone, which features three unique ringtones—Devil's Path and two other local "crazy" ringtones, sits on his desk. "I have been lucky to be in client legal committees for the last 15 years," says Clements, who founded his firm, Clements & Peculis LLP, with his father, John T. Clements, in 1979. "I have held leadership positions in the public sector and I have been involved in politics from one to the other and I have been involved in both worlds," he says.

Clements, who Patrick J. Leahy's late father, Patrick J. Clements, was a private legal practitioner in Massachusetts, began his legal career in 1979. After clerkships with the Massachusetts Superior Court and the U.S. Court of Appeals for the First Circuit, Clements began his legal career with the Massachusetts House of Representatives before serving as an aide to the late Rep. Edward M. Kennedy. Clements began his legal career with the Massachusetts House of Representatives before serving as an aide to the late Rep. Edward M. Kennedy.

Criminal legislation, REBA appear November HOD m

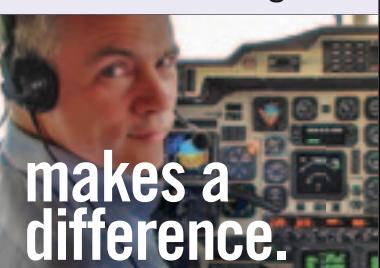
CONTINUED ON PAGE 12

EXPERTS & RESOURCES

CONTINUED FROM PAGE 11

AVIATION LAW

Experience and technical training



makes a difference.

John T. O'Connell is a Commercial Pilot with Land and Sea ratings who has been litigating commercial and general aviation crash cases for the past 30 years. He is licensed in MA, CO, FL and multiple federal jurisdictions including as a patent attorney at the USPTO.

O'Connell & Associates, LLC
470 Atlantic Avenue, Boston, MA 02210
(617) 996-2500 | www.oapc.com
email: oconnell@oapc.com

COURT REPORTING

Stop Wasting Billable Time!

Court Reporting
Depositions, Arbitrations, Hearings

Legal Dictation
You Dictate, We Type, Your Print

VideoConferencing
You Call, We set-up – DVD Available

CATUOGNO
COURT REPORTING
WWW.CATUOGNO.COM

(888) 228-8646 

DISABILITY INS. CLAIMS

LONG TERM DISABILITY (ERISA) APPEALS



If you or a client has been denied long-term disability benefits, or had benefits terminated, Attorney Susan Sachs has the specialized knowledge and experience to handle the appeal. In most instances, the claim will be governed by federal statute, the Employee Retirement Income Security Act (ERISA). ERISA pre-empts almost all state laws. Ms. Sachs specializes in the initial, mandatory administrative appeal process and has a high success rate. But if administrative appeal is unsuccessful, ERISA allows for further appeal by filing a lawsuit in U.S. District Court, which has exclusive jurisdiction. She is also experienced and successful at this level. Fee arrangements are flexible. The initial consultation is gratis.

Susan Sachs
attysusansachs@gmail.com
(413) 732-0035

BRAIN INJURY

Would You Know A HEAD INJURY If You Saw One?

Most People Wouldn't.®

Law Office of Kenneth I. Kolpan, P.C.

175 Federal Street,
Suite 1425,
Boston MA, 02110
617-426-2558



For info on brain injury litigation, visit www.kolpan.com or send email to ken@kolpan.com



COURT REPORTING

App for that

Q I'm boarding a plane. How can I check my depo calendar?

A O&L Mobile from O'Brien & Levine.

You will *app*solutely love it!

O'BRIEN & LEVINE
Court Reporting Services
Making Your Case

Worldwide Coverage / 617.399.0130
www.court-reporting.com

DISABILITY INS. CLAIMS

Can Your Clients Collect Disability Insurance Benefits?

DELL & SCHAEFER
Since 1979
LAW FIRM

Assisting Claimants With:

- Individual & Group Disability Policies
- Application For Disability Benefits
- Monthly Claim Handling
- Erisa Appeals
- Claim Denials / Lawsuits / Appeals
- Lump-Sum Policy Buyouts



CALL FOR A FREE REVIEW OF YOUR DISABILITY POLICY
FREE PHONE CONSULTATION
800-269-5148
NATIONWIDE REPRESENTATION
► REFERRAL FEES PAID ▶
diAttorney.com

BAR NEWS



FILE PHOTO

Students compete in the 2011 MBA Mock Trial state championship at Faneuil Hall in Boston.

Students tackle cyber-bullying case for '12 MBA Mock Trial

More than 1,500 students across the state are turning their classrooms into courtrooms to assume the roles of both lawyers and witnesses during this year's 27th annual Mock Trial Program presented by the Massachusetts Bar Association.

First organized in 1985, the 2012 Mock Trial Program started on Jan. 23 with preliminary trials, and runs through March 23. The program places high school teams from 16 regions across the state in a simulated courtroom.

Student competitors at more than 100 schools across the commonwealth are expected to participate in the 2012 Mock Trial Program. In addition, more than 100 lawyers across the state will volunteer as coaches and judges.

This year's civil case explores the level of legal responsibility that high school teachers bear in identifying and preventing

cyber-bullying among students. This timely topic illustrates the challenging intersection between law and social policy.

Out of the more than 100 teams of students, four will ultimately advance to the semifinal elimination round and face off during trials held simultaneously on March 19 in Boston and Worcester.

The two finalists will compete in the state championship on March 23 in the Great Hall of Faneuil Hall in Boston. In 2011, The Pioneer Valley Performing Arts Charter Public School of South Hadley won the state championship and placed 31st in the national tournament.

The Mock Trial Program is administered by the MBA, and made possible by the international law firm of Brown Rudnick LLP through its Center for the Public Interest in Boston, which has contributed \$25,000 per year to the program since 1998. ■

MBA seeks nominations for 2012-13 officer, delegate positions

SUBMIT NOMINATIONS TO MBA BY FRIDAY, FEB. 24

The Massachusetts Bar Association is currently accepting nominations for officer and delegate positions for the 2012-13 membership year. Nominees must submit a letter of intent and a current resume to MBA Secretary Robert W. Harnais by 5 p.m. on Friday, Feb. 24, 2012 to be eligible.

To submit a nomination, mail or hand deliver the information to:

Massachusetts Bar Association

Attn: Robert W. Harnais,
MBA Secretary
20 West St., Boston, MA 02111

If you have any questions about the nomination process, call MBA Chief Operating Officer Martin W. Healy at (617) 988-4777. ■

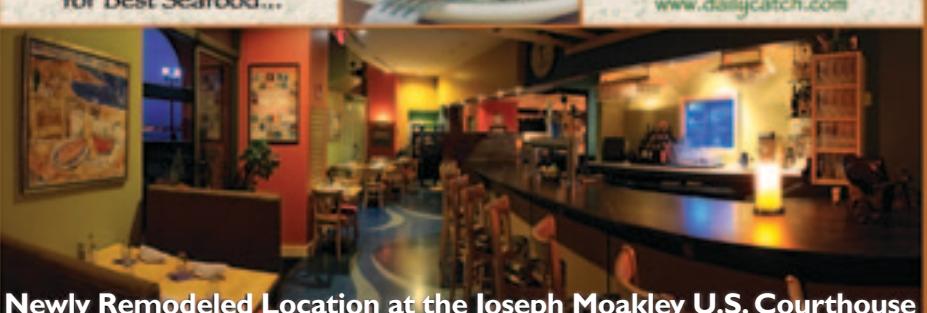


The Daily Catch - North End
129 Harrison Ave., Boston, MA
The Original in Boston's North End
617-523-8507

The Daily Catch - Brookline
199 Harvard St., Brookline, MA
JFK, Copley in Brookline
617-739-4700

The Daily Catch - Seaport
One Northern Ave., Boston, MA
Joseph Moakley U.S. Courthouse
Seaport District Pier Five
617-772-4400

Make Reservations Online: www.dailycatch.com



Newly Remodeled Location at the Joseph Moakley U.S. Courthouse

CONTINUED ON PAGE 13

**FEATURED MEMBER BENEFIT:**

Catuogno Court Reporting & StenTel Transcription

Established in 1966, Catuogno Court Reporting & StenTel Transcription is a legal support services company that offers MBA members a special rate on services, including court reporting, video depositions, videoconferencing, encrypted e-mail service and legal dictation and transcription.

With five locations throughout the area (Boston, Worcester, Chelmsford, Springfield and Providence) the Catuogno offices provide more than 40 spacious conference rooms for depositions, client meetings, arbitrations, mediations and videoconferencing around the world.

Use your MBA membership card to take advantage of the following discounts to reduce costs and increase your bottom line, **by taking 10 percent off**

these services:

- Court reporting and depositions
- Videography
- Videoconferencing (over 10,000 connecting sites) DVD available
- Legal dictation and transcription (letters, summaries, etc.)
- Recorded witness statement transcription
- Encrypted e-mail service

Become a member of The Lawyer's Conference Centers and save 20 percent on your next service.

To take advantage of your special MBA membership discount, visit www.catuogno.us or call (888) 228-8646.

**Valid MBA membership is required.*

A Sixty Year Tradition of Representing the Seriously Injured



TEAM APPROACH
CUTTING EDGE ADVOCACY
SUPERIOR RESULTS

SHEFF LAW OFFICES, P.C.

Ten Tremont Street, Boston, MA 02108
617-227-7000 www.shefflaw.com

Integrity • Compassion • Excellence



MBA ON DEMAND

An innovative approach to Continuing Legal Education and other association offerings

WWW.MASSBAR.ORG/ONDEMAND

EXPERTS&RESOURCES

CONTINUED FROM PAGE 12**E-DISCOVERY**

If you think e-discovery is too expensive, chances are you are not conducting it correctly.



We conduct e-discovery from the perspective of the litigator, not just the technician.

Evidox Corporation
207 South Street, Boston MA 02111
617-654-9060
www.Evidox.com

EXPERT WITNESS

DICK ALBERT
Meteorologist
CONSULTING AND EXPERT WITNESS SERVICES



Realbert44@gmail.com
TEL: 617-834-5615

IRS/DOR REPRESENTATION***We speak IRS & DOR. Fluently.***

For more than 14 years, Matthew J. Previte CPA PC has worked exclusively to resolve IRS and state tax problems for individuals and businesses. So law firms like yours don't have to.



By referring us your clients in trouble with the IRS or DOR, you avoid the huge learning curve involved in handling these cases, which destroys profitability and increases the risk of malpractice.

Most importantly, your clients get a locally-based expert here in Massachusetts who will provide one-on-one personal attention. In addition, they will never have to meet or speak with the IRS or DOR. We do it for them while you continue taking care of their legal needs.

Visit www.taxproblemsrus.com for video and written testimonials.

Clients receive a free initial consultation. Call 508-655-1500.

Matthew J. Previte, CPA PC - Natick, MA
Tel. (508) 655-1500 email: info@taxproblemsrus.com

INVESTIGATORS

SIMMONS AGENCY, INC.

Civil and Criminal Investigations
ESTABLISHED 1935



- Asset locations
- Backgrounds
- Due diligence
 - Probate
- Proxy fights
- Surveillance

190 High Street
Boston, MA 02110
Tel (617) 523-2288
simmons.agency@comcast.net
www.simmonsagency.com

YOUR AD NEEDS TO BE HERE.

For all your advertising needs in the *Massachusetts Lawyers Journal*, contact Mark Schultz.
(617) 896-5323
mschultz@thewarrengroup.com

CONTINUED ON PAGE 14

EXPERTS & RESOURCES

CONTINUED FROM PAGE 13

LAWYER ASSISTANCE



Your law practice advisor.

Assisting Massachusetts attorneys in establishing and institutionalizing professional office practices and procedures to increase their ability to deliver high-quality legal services, strengthen client relationships, and enhance their quality of life.

FREE ■ CONFIDENTIAL ■ PRACTICAL SOLUTIONS



Law Office Management Assistance Program

888.545.6627 | 31 MILK STREET, SUITE 815, BOSTON, MA 02109
INFO@MASSLOMAP.ORG | WWW.MASSLOMAP.ORG

FUNDED BY LAWYERS CONCERNED FOR LAWYERS, INC.

LAWYER ASSISTANCE

NEVER AGAIN WILL A LAWYER HAVE TO SAY THERE WAS NOWHERE TO TURN.

617-482-9600 | WWW.LCLMA.ORG



FOR THE ISSUES OF LIFE IN LAW

MEDICAL

Experienced Forensic Toxicologist

- Analysis of Results of Blood, Urine & Hair Drug Tests;
- Cocaine/ Narcotics Issues;
- Possession vs. Personal Use
- Dram Shop & Vehicular Homicide



References Available

Medical & Law School Teaching Experience – Excellent Communicator

**David M. Benjamin, Ph.D.
617-969-1393**

Email: medlaw@doctorbenjamin.com
Website: www.doctorbenjamin.com

SURETY BONDS

A.A.DORITY
SURETY BONDS
Since 1899

Office: 617-523-2935

Fax: 617-523-1707

www.aadorty.com

A.A. DORITY
COMPANY, INC.
262 Washington St. • Suite 99
Boston, MA 02108

CONTINUED ON PAGE 19

Calendar of Events

Thursday, Feb. 9

Tiered Community Mentoring Program

10 a.m.-noon
Roxbury Community College, 1234 Columbus Ave., Roxbury Crossing

Young Lawyer Speed Networking

5:30-8 p.m.
MBA, 20 West St., Boston

Friday, Feb. 10

MUPC Basics: An Overview of the New Massachusetts Uniform Probate Code

9 a.m.-5 p.m.
Massachusetts School of Law, 500 Federal St., Andover

Wednesday, Feb. 15

Law Practice Management Section Educational Series: Going Paperless

12:30-1:30 p.m.
MBA, 20 West St., Boston

Thursday, Feb. 16

Uniform Commercial Code Conference (co-sponsored by MBA)

12:30-5:30 p.m.
New England Law | Boston, 154 Stuart St., Boston

Wednesday, Feb. 29

Fundamentals of a Civil Jury Trial: Courtroom Conduct and Procedures

4-7 p.m.
Massachusetts School of Law, 500 Federal St., Andover

Thursday, March 1

Divorce Basics: A View from the Bench and Bar

4:30-7 p.m.
MBA, 20 West St., Boston

Wednesday, March 7

Law Practice Management Section Educational Series: Marketing Madness/Ethical Marketing

12:30-1:30 p.m.
MBA, 20 West St., Boston

MBA Monthly Dial-A-Lawyer Program

5:30-7:30 p.m.
Statewide dial-in #: (617) 338-0610

THE MUPC DEMYSTIFIED: AN IN-DEPTH SERIES ON THE NEW PROBATE CODE

Tuesday, Feb. 7

Part V: Estate Planning under the MUPC Drafting Wills and Trusts
Noon-4 p.m.
MBA, 20 West St., Boston

Friday, March 9

Tiered Community Mentoring Program — tour of Adams Courthouse and observing SJC hearings
8:30 a.m.-noon
Supreme Judicial Court, One Pemberton Square, Boston

Wednesday, March 21

Law Practice Management Section Educational Series: Marketing Madness Developing a Marketing Plan
12:30-1:30 p.m.
MBA, 20 West St., Boston

Thursday, March 22

MBA House of Delegates Meeting
12:30-4:30 p.m.
UMass Lowell Inn and Conference Center, 50 Warren St., Lowell,

Friday, March 23

27th Annual Mock Trial Program Finals
10-12:30 p.m.
Great Hall, Faneuil Hall, Boston

Thursday, March 29

Real Estate Transactions and the MUPC
9-11 a.m.
MBA, 20 West St., Boston

It's Confidential — Privilege Law in Massachusetts
4-7 p.m.
MBA, 20 West St., Boston



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

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

join the conversation

www.MassBar.org



www.Twitter.com/MassBar



www.MassBar.org/LinkedIn



www.Facebook.com/MassBarAssociation



CIVIL LITIGATION

The beginning of the end of Chapter 93A claims against Massachusetts and its subdivisions

BY RICHARD M. DOHONEY

For decades, plaintiffs have sought to charge Massachusetts public entities with violations of the Regulation of Business Practice and Consumer Protection Act (the act)¹ and obtain the enhanced damages, including multiple damages and attorneys' fees, provided under the act.

In so doing, plaintiffs have relied upon the statutory definition of a "person" as "natural persons, corporations, trusts, partnerships, incorporated or unincorporated associations, and any other legal entity,"² and argued that public entities, such as the commonwealth itself, fit within this definition. The sweepingly broad definition of a "person" against whom suit may be brought has created confusion and invited much litigation against the commonwealth and its subdivisions.

Despite the significant volume of such claims against the commonwealth and its subdivisions, the question of whether the private causes of action created by the act are barred by the doctrine of sovereign immunity has evaded definitive review, until recently.

In February 2011, in *Max-Planck-Gesellschaft Zur Forderung Der Wissenschaften E.V. v. Whitehead Institute for*

Biomedical Research,³ the Hon. Patti B. Saris, of the U.S. District Court for the District of Massachusetts, expressly ruled that Chapter 93A claims brought by inventors claiming improper licensing of intellectual property rights against the University of Massachusetts were barred by the doctrine of sovereign immunity. This ruling was the first instance where a court affirmatively acknowledged that the doctrine of sovereign immunity bars Chapter 93A claims.

In the decades preceding the *Max-Planck-Gesellschaft* decision, the ambiguity in the law had been perpetuated by a number of decisions that, while ruling in favor of public entities on factual findings that the defendant was not engaged in trade or commerce, appear to acknowledge that public entities may be "persons" as defined by the act.⁴ Courts in other cases discussed the ambiguity but failed to directly rule on it.⁵

The Appeals Court, in *M. O'Connor Contracting, Inc. v. City of Brockton*, noted that "(w)hether a governmental entity is ever amenable to suit under c. 93A remains an open issue."⁶ The court acknowledged that the act "contains no explicit indication that governmental entities are to be liable under its provisions,"⁷ but also recognized that public entities have standing to bring claims under the act, and opined that this

RICHARD M. DOHONEY

is a partner in the Berkshire County-based law firm of DeRosa Dohoney LLP. He concentrates in civil litigation and frequently represents plaintiffs and municipalities in litigation involving contracting disputes, eminent domain and zoning matters. He is a member of the MBA's Civil Litigation Section Council.



fact would support a finding that they are also liable under the act.⁸

But, like the preceding cases, the court then put aside the question of whether Chapter 93A may be read as waiving governmental immunity in any circumstances, and ruled on other grounds. That same year, 2004, the Supreme Judicial Court expressly acknowledged that the issue of whether public entities are persons amenable to suit under Chapter 93A has evaded review, stating that "no case has presented us with an occasion to decide whether a municipality may in some circumstances be 'amenable to the provisions' of G.L. c. 93A."⁹

The *Max-Planck-Gesellschaft* case required the U.S. District Court to grapple

with the issue head on because the facts there clearly established that the defendant, the University of Massachusetts, was engaged in trade and commerce. More specifically, the claims against the University of Massachusetts involved contracts entered into "solely for profit" and did not fit any of the traditional governmental roles.¹⁰ Thus, this unique set of facts required, at long last, a critical analysis of the application of the doctrine of sovereign immunity to Chapter 93A claims.

The court recognized that under well-established Massachusetts law, waiver of sovereign immunity requires either an express legislative waiver or a finding that such a waiver is necessarily implied from the terms of the statute.¹¹ It then noted that Chapter 93A contains no explicit waiver of sovereign immunity, and opined that an implied waiver must be "very clear."¹² The court then acknowledged that in general, Massachusetts statutes that use the term "person" do not encompass governmental entities, and found that the Massachusetts Legislature has explicitly defined "person" to include the commonwealth in other statutory enactments.¹³

Moreover, the court's decision affirmatively states that the Legislatures' use of the term "any other legal entity" is not a sufficient basis to support a finding that ►19

CIVIL LITIGATION

Taking exception: The universal demand requirement and close corporations

BY MICHAEL L. MASON

INTRODUCTION

The current law governing corporations, Massachusetts General Laws Chapter 156D, significantly altered the longstanding prerequisites to filing a derivative suit by instituting a "universal demand" requirement and eliminating the longstanding futility exception.

While this change appears to have been intended to protect the interests of the corporation, it does not serve that goal in cases involving so-called "close corporations." By subjecting aggrieved minority shareholders in close corporations to the demand requirement and lengthy waiting period, Chapter 156D presents a significant risk that these shareholders will lose the opportunity to obtain meaningful relief.

The concerns that underlie the universal demand requirement are not as compelling in cases involving close corporations, and those concerns are likely to be outweighed by the harm that will befall shareholders and the corporation where the universal demand requirement is enforced. The Legislature should amend Chapter 156D to permit an exception to the universal demand requirement for close corporations where a demand would be futile.

CHARACTERISTICS OF CLOSE CORPORATIONS

A closely-held or "close" corporation is one that has (1) a small number of stockholders, (2) no ready market for corporate stock and (3) substantial stockholder participation.¹ Although such an entity bears the corporate form and is treated as a corporation in all meaningful respects, a close corporation is distinguished from a traditional corporation.

"[T]he close corporation bears striking resemblance to a partnership. Commentators and courts have noted that the close corporation is often little more than an 'incorporated' or 'chartered' partnership."² "In essence ... the enterprise remains one in which ownership is limited to the original parties or transferees of their stock to whom the other stockholders have agreed, in which ownership and management are in the same hands, and in which the owners are quite dependent on one another for the success of the enterprise."³ More than 90 percent of businesses are closely-held.⁴

One of the distinguishing features of a close corporation is the vulnerability of the minority shareholder. Unlike a passive shareholder who realizes a return on his or her investment through dividends or

MICHAEL L. MASON

is an associate at Bennett & Belfort PC, where he practices in business and employment litigation.



THE UNIVERSAL DEMAND REQUIREMENT UNDER CHAPTER 156D

Chapter 156D was enacted on July 1, 2004.⁷ The statute was drafted by the Task Force on the Revision of the Massachusetts Business Corporation Law, and was based on the American Bar Association's Model Business Corporation Act.⁸ Chapter 156D replaced and modified many provisions of Chapter 156B. Among the changes to existing law is the procedure applicable to derivative proceedings.

Under Chapter 156D, a derivative proceeding may not be commenced until a written demand has been made and the prescribed waiting period has expired.⁹ The applicable waiting period is 90 days, unless the demand has been submitted to shareholder vote, where the period is 120 days.¹⁰

The derivative claimant may proceed with a claim once he or she is notified of the corporation's rejection, and there is also an exception to the waiting period where "irreparable injury to the corporation would result by waiting" for the period to expire.¹¹

The "demand-required" rule is intended to provide the corporation "the opportunity to take over" the derivative claim and to "allow the directors the chance to occupy their normal status as conductors of the corporation's affairs."¹² ►20

LAW PRACTICE MANAGEMENT

Considerations in creating, maintaining a paperless office

BY CYNTHIA E.
MACCAUSLAND

Running and maintaining a paperless law office may seem like a daunting task. However, there are many potential benefits of getting rid of the paper in your law practice, including increased workflow efficiency, environmental benefits and cost savings. Unconvinced? Is the thought of running into court without a banker's box of client documents giving you goose bumps?

I often speak with attorneys regarding my experiences in running a paperless office and I hear many of the same concerns or doubts repeated. "How could I possibly scan the volume of documents I receive on a daily or weekly basis?" "How will I ever find the document I need?" "What if I arrive for a hearing and I am missing something?" "What about security?" "Isn't my current system of manila folders and binders good enough?" "Why change now?"

Lawyers have been cramming client documents, correspondence and pleadings into expandable folders and binders since the dawn of humanity, and many lawyers may very well carry on this practice for the foreseeable future. But running a law practice in the traditional way has downsides as well (i.e., beyond the massive piles of paper that need to be brought in and out of various courtrooms, offices and elevators). Have you ever lost a file deep in the corner of your associate's office? Have you ever spent an hour riffling through a file looking for a pleading? What if there was a fire or flood in your office?

A well-planned and organized paperless office can alleviate all of these issues while adding little to no additional time to document workflow and providing all sorts of unexpected advantages.

HAVING THE RIGHT TECHNOLOGY SHOULD BE YOUR FIRST CONSIDERATION

Having the "right" technology is essential in setting up and maintaining a paperless office. In particular, a good desktop scanner will enable designated team members to convert mountains of correspondence, discovery, pleadings and other documents to an electronic format.

When choosing a scanner, consider how much scanning you are going to be doing. If you're in a document-heavy practice, you will need something with good horsepower that is capable of batch scanning larger numbers of pages at one time and with reasonable speed. Fujitsu, Kodak and HP all manufacture top-of-the-line scanners. For the best bargains (i.e., products that do all/most of what you need, for a reasonable price), try Brother or Lexmark.

In choosing a scanner, it is also important to consider what software is included with the device. Look for a scanner that comes bundled with PDF conversion software. PDF conversion software offers the ability to convert in and out of various document formats. Having the ability to create PDF files is important.

Once you have converted a document into a PDF format, you have a file that will look the same across all platforms. The creation of a PDF document can also

CYNTHIA E. MACCAUSLAND
practices family law and is active in the Women's Bar Association (Public Relations Committee), Boston Bar Association (Family Law Section, LRS Standing Committee, Active Duty Military Committee) and Massachusetts Bar Association (Law Practice Management Section Council). She also serves on the Juvenile Bar Association board.

remove metadata from the prior form (i.e., information about the creation of the document that you might not want to share with others, including any edits that have been made, who created the original document, etc.).

PDF conversion systems can be used to create fillable forms. PDF conversion systems feature attorney-useful tools, as well, like Bates stamping, the ability to establish password protection for documents, and the ability to apply underlying encryption. (This is very important, especially in Massachusetts, where the new state data privacy regulations require encryption for specific sets of sensitive data being sent wirelessly or saved to portable electronic devices.)

STORAGE AND SECURITY ARE JUST AS IMPORTANT AS YOUR TECHNOLOGY

The storage and security of your newly formatted and digitized documents constitutes the second consideration in setting up your paperless office. Web-based storage or Cloud tools allow firms to access storage space, programs

and data that reside on servers that are remotely located. Most practitioners already, though unwittingly, rely upon web-based or cloud storage for e-mail, contact and calendar management. Various providers also offer solutions that are targeted toward the storage and exchange of documents.

There are a number of advantages to storing your documents in the cloud. These include: reduced reliance on in-house IT support; the elimination of server costs (you do not need to spend as much on office computers if your data is being stored remotely); built-in backup management; reduced energy consumption; and the ability to access documents and information from multiple devices and locations.

There are also many benefits surrounding security and data control when you keep your data in the cloud. In particular, hardware is located in secure locations, with excellent environmental controls and mobile access (which means sensitive data need not be stored on local computers or laptops). Before sending sensitive data to the cloud, however, attorneys should examine license agreements thoroughly, and should be certain that the firm can access its data anytime and that offsite backups of data are regularly scheduled, or ongoing.

FOCUS ON YOUR WORK FLOW ONCE YOU HAVE FIGURED OUT TECHNOLOGY, STORAGE AND SECURITY

Work flow and protocol are the third consideration for establishing and maintaining a paperless law office. ➤20

LAW PRACTICE MANAGEMENT

Generating leads with the "right" questions

BY STEPHEN E. SECKLER

The important thing is not to stop questioning. Curiosity has its own reason for existing ... Never lose a holy curiosity.

—Albert Einstein

We are all familiar with the image of the fast talking and overly gregarious used car salesman. It is a stereotype that lawyers generally want to avoid emulating at all costs. Most of us became attorneys because, on some level, we wanted to steer clear of business.

Selling, however, is a very important skill if you want to succeed in private practice. Competition for legal work has never been greater.

The good news is that selling legal services is not like selling used cars. Clients hire lawyers they trust. Since building that trust generally happens over time, smooth talking and high pressure tactics are unlikely to be effective in convincing an individual to retain you as their lawyer.

Instead, you must invest time and effort in building your relationships with target clients or with referral sources.

MARKET LIKE YOU COUNSEL

Put another way, success in legal sales requires good lawyering skills. If you are good at asking probing questions and listening carefully to the answers, then you can be very successful in building your practice.

An experienced lawyer understands

the value of asking probing questions and attentive listening. It is only through this give-and-take that an attorney can properly assess a client's situation. Likewise, using these good counseling skills can help you reveal legal needs that a prospect may have, or other ways that you can further your relationship.

THE MECHANICS OF GOOD LISTENING

Being a good listener is not a passive role. Rather, a good listener is someone who uses active listening skills. It is insufficient to keep quiet and let the other person do all the talking. It is only through some sort of feedback that the other party knows you are taking it all in and not simply daydreaming about your upcoming vacation.

There are a number of verbal and non-verbal clues that tell someone you are actively listening to him or her. Try to get the other individual to speak 80 percent of the time. If you are meeting face-to-face, body language can send the right signals. Good eye contact and nodding one's head periodically can demonstrate a real interest in the other person (in contrast, looking at your smartphone conveys the opposite). Paraphrasing what the individual has said and asking clarifying questions also demonstrates active listening.

THE RIGHT QUESTIONS

While listening is a key skill in relationship building, learning how to ask probing questions is equally important.

STEPHEN E. SECKLER, president of Seckler Legal Consulting and Coaching (www.seckler.com), is vice chair of the MBA's Law Practice Management Section. Previously, he was managing director of BCG Attorney Search's Boston office. He writes www.counseltocounsel.com, one of the American Bar Association Journal's Blawg100 in 2007 and 2008. He can be contacted at legal@seckler.com.

If you come to a meeting armed with the "right" questions, you will find it much easier to get the other person you are meeting to open up.

So what are some of the types of questions that you should be asking when you meet with clients, prospective clients and potential referral sources? What are the categories of questions that will give you clues about the ways that you can be helpful (and build trust, and ultimately build the relationship)?

DO SOME ADVANCED RESEARCH

One of the tenets of being a good listener is to ask a lot of open-ended questions. On the one hand, this is all you really need to know about asking questions. You can simply ask: "What's keeping you up at night?" "What are you working on

these days?" or "What do you do for fun when you are not working?" Each of these questions is bound to elicit some clues about the business problems that the individual is facing and about their personal interests.

While "What's keeping you up at night?" may generate some leads for you (by uncovering legal issues that need attention), as a marketing tool, asking this question may come across as cliché. Even worse, this particular question hints of intellectual laziness. It may convey a sense that you have no idea what this individual is up against and you have not bothered to do any homework to find out.

Sometimes, there is not much that you can find out in advance of meeting a prospect. But you won't know until you do some research. If you were introduced to the individual by a mutual contact, find out what your contact knows about the person and their company.

Read the press releases on their company's website (if there are any). Find and read their profile on LinkedIn. Do a Google search to see if their company has been mentioned by other mainstream or alternative media sources. Review court dockets to see whether they or their company has been involved in litigation in recent years. Find out something that is happening in their industry or profession and get their reaction. If you have done work in the past for the individual, review your notes so that you can inquire about the outcome of the project.

Overall, make sure you learn ➤19

PUBLIC LAW

Natural disaster recovery: Lessons learned on the local level

BY EDWARD M. PIKULA

On June 1, 2011, from approximately 4 p.m. to 10 p.m., severe thunderstorms and tornadoes touched down in Western Massachusetts, leaving a 39-mile path of destruction across nine local communities in Hampden and Worcester counties.¹

The National Weather Service estimated the most significant tornado to be an EF 3 (winds between 135 and 165 miles an hour on the Enhanced Fujita Scale), with a maximum wind speed of about 160 m.p.h. and a maximum width of half a mile. The tornadoes destroyed homes, businesses and school buildings, as well as thousands of trees. Hundreds of people were injured, and there were four fatalities.²

Individuals, businesses, nonprofits and government property owners hardest hit by the storms will be awarded federal aid. The Federal Emergency Management Agency (FEMA) will provide aid in the form of reimbursement for much of the storm-related infrastructure damage, debris removal and emergency response costs incurred by local communities, eligible private nonprofit organizations and state agencies.

From this event and its aftermath, an attorney can learn how little they know about the applicable law concerning natural disasters. Getting up to speed is the first order of business.

This article is intended to provide an outline overview of the law as to public assistance to local governments and private nonprofits. This article does not address issues related to assistance for individu-

als. While tornadoes are not a common occurrence in Massachusetts, other natural disasters, such as hurricanes and blizzards, are a more common occurrence, often just as deadly, and likely to require legal advice to local government clients.

STATUTORY AND REGULATORY AUTHORITY

Public assistance (PA) is authorized by the Robert T. Stafford Disaster Relief and Emergency Assistance Act, applicable regulations and policies.³ Under section 406 of the act, FEMA will pay 75 percent of the eligible cost of permanent restorative work and for emergency work under section 403 and section 407 of the act.

The federal cost share may be increased from 75 percent to not more than 90 percent of the eligible cost of permanent work whenever a disaster is so extraordinary that actual federal obligations under the act, excluding FEMA administrative cost, meet or exceed a qualifying threshold under the regulations.⁴

ELIGIBILITY

To be eligible for public assistance, the applicant's facilities, and the work to be performed at those facilities, all must satisfy particular eligibility requirements in order to qualify for disaster relief.

Under applicable law, the *applicant* is the basis for eligibility. The applicant must be eligible for the *facility* to be eligible. The facility must be eligible for the *work* to be eligible. The work must be eligible for the *cost* to be eligible. Each is discussed in this memo.

EDWARD M. PIKULA, the city solicitor for Springfield, is vice chair of the Massachusetts Bar Association's Public Law Section Council. He is also on the executive council for the City Solicitors and Town Counsel Association.



sewage treatment plants; airports; irrigation channels; schools; buildings; bridges and culverts; and utilities.

Eligible work

Work performed on an eligible facility must: be required as the result of a major disaster event; be located within a designated disaster area; and be the legal responsibility of an eligible applicant.

FEMA will not provide assistance when another federal agency has specific authority to restore or repair facilities damaged by a major disaster; for example, where federal highway funds may be available. If negligence by another party results in damages, assistance may be provided on the condition that the applicant agrees to cooperate with FEMA in all efforts to recover the cost of such assistance from the negligent party.⁵

No assistance is provided for damages caused by an applicant's own negligence through failure to take reasonable protective measures.⁶

All work requires documentation showing compliance with act requirements, as well as compliance with other federal laws protecting endangered species, historical interests and other special requirements, including: floodplain management, environmental assessments, hazard mitigation, protection of wetlands and insurance.⁷

Work is broken down by FEMA into several categories as either "emergency" or "permanent."

- Emergency work includes⁸:
- Category A: Debris removal, ►18

MASSACHUSETTS BAR ASSOCIATION

Raising awareness on underfunded courts.



Find out more: www.MassBar.org

PUBLIC LAW

Continued from page 17

such as: clearance of trees, woody debris; certain building wreckage; damaged/destroyed building contents; sand, mud, silt and gravel; vehicles; and other disaster-related material deposited on public property and, in very limited cases, private property.

- Category B: Emergency protective measures taken before, during and after a disaster to eliminate/reduce an immediate threat to life, public health or safety, or to eliminate/reduce an immediate threat of significant damage to improved public and private property through cost-effective measures.

Permanent work includes:

- Category C: Repair of roads, bridges and associated features, such as shoulders, ditches, culverts, lighting and signs;
- Category D: Repair of water facilities, including drainage channels, pumping facilities and some irrigation facilities. Repair of levees, dams and flood control channels fall under Category D, but the eligibility of these facilities is restricted;
- Category E: Repair or replacement of buildings, including their contents and systems; heavy equipment; and vehicles;
- Category F: Utility repair of water treatment and delivery systems; power generation facilities and distribution facilities; sewage collection and treatment facilities; and communications;
- Category G: Repair and restoration of parks, playgrounds, pools, cemeteries, mass transit facilities and beaches. This category is also used for any work or facility that cannot be characterized adequately by Categories A-F.

Eligible costs⁹

Costs directly tied to the performance of work, including labor, materials, equipment and contracts awarded for the performance of eligible work are eligible.

Costs must be: reasonable and necessary to accomplish the work; compliant with federal, state and local requirements for procurement; reduced by all applicable credits, such as insurance proceeds and salvage values.

A cost is "reasonable" if, in its nature and amount, it does not exceed that which would be incurred by a prudent person under the circumstances prevailing at the time the decision was made to incur the cost.

Reasonable costs can be established through: the use of historical documen-

tation for similar work; average costs for similar work in the area; published unit costs from national cost estimating databases; and FEMA cost codes.

Applicants must adhere to all federal, state and local procurement requirements. Funding from two federal sources to repair disaster damage is considered a duplication of benefits. A state disaster assistance program is not considered a duplication of federal funding. Insurance proceeds, donated grants from banks, private organizations, trust funds and contingency funds must be evaluated individually to determine whether they constitute a duplication of benefits.

Contracts will normally be competitively bid unless one of the following instances apply: the item is available only from a single source; the awarding agency authorizes noncompetitive proposals; after solicitation of a number of sources, competition is determined inadequate; or the contract will eliminate or reduce an immediate threat to life, public health or safety.

A "statutory administrative allowance" is provided to lessen the financial impact of administering the disaster recovery effort, including preparation of the project worksheet, related field inspections, project applications, final inspection reports and final audits.

Necessary costs of requesting, obtaining and administering federal disaster assistance are covered by this allowance. No other administrative costs are eligible. Good fiscal management and record keeping are essential to controlling the indirect costs associated with FEMA-reimbursed projects.

PROCESS OVERVIEW

The PA program is implemented through a number of steps summarized here, but described in detail in FEMA publications on the websites previously cited. It begins with a preliminary damage assessment (PDA),¹⁰ as well as an immediate needs funding (INF) analysis¹¹ and the identification of need for expedited payments.¹² A PDA is performed to document the impact and magnitude of the disaster on individuals, families, businesses and public property, and to gather information for disaster management purposes. FEMA, the state and an applicant representative participate in this effort.

The information gathered during the PDA process is used to determine whether federal assistance should be requested by the governor and forms the basis for the disaster declaration.

Applicant's briefing

This is conducted by a representative of the state for potential public assistance applicants after an emergency or major disaster has been declared, and addresses application procedures, administrative

requirements, funding and program eligibility criteria. Each applicant should send representatives from management, public works, finance and legal.¹³

Request for public assistance

This is the applicant's official notification to FEMA of the intent to apply for public assistance. The request for public assistance is available online at the PA forms library. Typically, the request form is submitted at the applicant's briefing. If an applicant is unable to submit the request at the briefing, the applicant must submit the form within 30 days of the date of designation of the area (county, parish, etc.) for public assistance.¹⁴ An applicant need not wait until all damage is identified before requesting assistance.

Assignment of the public assistance coordination (PAC) crew leader

Once the request has been forwarded to FEMA, the PAC crew leader is assigned to the applicant. The PAC crew leader serves as the applicant's customer service representative on PA program matters, and manages the processing of the applicant's projects.

Kickoff meeting¹⁵

This differs from the applicant's briefing conducted by the state at the onset of disaster operations, and is conducted by the PAC crew leader and designed to provide a much more detailed review of the PA program and the applicant's needs. The PAC crew leader also discusses insurance, hazard mitigation opportunities and compliance with environmental and historic preservation laws, including floodplain management issues, that could potentially affect the type and amount of assistance available and the documentation needed.

Project formulation

This is the process of identifying the eligible scope of work and estimating the costs associated with that scope of work for each project. A "project" is a "logical method of performing work required as a result of the declared event." The applicant is responsible for identifying all work that is required as a result of the disaster.¹⁶

The project worksheet (PW)

An applicant has 60 days following the first substantive meeting, which is usually the kickoff meeting with FEMA, to identify and report damaged facilities to FEMA. The PW is the primary form used to document the location, damage description and dimensions, scope of work and cost estimate for each project. It is the basis for the grant.¹⁷ The project worksheet and other FEMA forms are available online at www.fema.gov/government/grant/pa/forms.shtml.

¹ The nine communities included Southbridge, West Springfield, Agawam, Springfield, Brimfield, Monson, Wilbraham, Sturbridge and Westfield.

² See MEMA Reports, vol. 10, Issue 6 (July 5, 2011), which can be found at www.mass.gov/eopps/docs/mema/mema-reports/mema-reports-10-6.pdf.

³ The act can be found at 42 U.S.C. §§ 5121–5205. Regulations are published in Title 44 of the Code of Federal Regulations (44 CFR) Part 206 to implement the statute. Policies are written to apply the statute and regulations to specific situations and provide clarification on a range of issues. The FEMA Public Assistance Policy Reference Manual can be found online at www.fema.gov/government/grant/pa/9500toc.shtml. FEMA has also developed a series of standard operating procedures (SOPs) that provide guidance for FEMA, the state and applicants on the processes discussed in

this chapter. SOPs are available at www.fema.gov/government/grant/pa/sop.shtml.

⁴ The federal regulation as to cost sharing, found at 44 C.F.R. § 206.47, sets a qualifying threshold of \$100 per capita of state population, adjusted annually for inflation using the Consumer Price Index for All Urban Consumers published annually by the Department of Labor for increased federal cost share and may even recommend up to one hundred percent (100 percent) federal funding for emergency work for a limited period in the initial days of the disaster irrespective of the per capita impact.

⁵ See 44 CFR 206.223. Work must also be completed within deadlines to be eligible for reimbursement. The initial deadlines are established according to the type of work performed: Debris removal: six months; Emergency protective measures: six months; Permanent repair work: 18 months. See 44 CFR 206.204. Time

extensions may be granted for extenuating circumstances. For debris removal and emergency work, an additional six months may be granted by the state. For permanent restoration work, an additional 30 months may be granted by the state. See 44 CFR 206.202.

⁶ See 44 CFR 206.223.

⁷ See Section 316 of the Stafford Act (Protection of Environment) 42 U.S.C. §5159; 44 CFR Part 10 (Environmental Considerations), 40 CFR Parts 1500–1508 (NEPA Regulations), Environmental Policy Memoranda, FEMA Policy 9560.1, dated Aug. 17, 1999, Public Assistance Guide, FEMA 322, pages 128–130 (www.fema.gov/government/grant/pa/pag07_t.shtml). See also 36 CFR 800 (Protection of Historic Properties) Section 106 of the National Historic Preservation Act Model Programmatic Agreement – Historic Review, FEMA Policy 9560.3, dated May 29, 2002, Public Assistance Guide, FEMA

322, pages 130–131.

⁸ See Public Assistance Guide, FEMA 322, pages 66–87.

⁹ See Office of Management and Budget Circulars A-21, A-87, Attachment A.C.2 and A-122, Public Assistance Guide, FEMA 322, pages 40–41, 51.

¹⁰ 44 CFR §206.202(d)(ii). See also Public Assistance Guide, FEMA 322, pages 89, 90, 94, 96, 107 and 111.

¹¹ Public Assistance Guide, FEMA 322, pages 90–91.

¹² Section 407(e) of the Stafford Act, (42 U.S.C. § 5173). Public Assistance Guide, FEMA 322, pages 90–91.

¹³ Public Assistance Guide, FEMA 322, pages 64, 91–92.

¹⁴ 44 CFR §206.202(c). Public Assistance Guide, FEMA 322, pages 92, 93.

¹⁵ Public Assistance Guide, FEMA 322, pages 89, 90, 94, 96, 107 and 111.

¹⁶ See Definitions listed in 44 CFR §

Identifying the damaged facility and description of damage on the PW

The exact location of the damaged facility or area must be identified. Damage sustained as a direct result of the disaster event should be differentiated from pre-existing or non-disaster related damage. The specific cause of damage must relate to the incident for which the disaster was declared. It is important to completely describe the cause of damage because it can affect eligibility determinations.

Scope of work

This must be completely described and correspond directly to the cause of damage. The work should be specified as an action with quantifiable (length, width, depth, capacity) and descriptive (brick, wood, asphalt, timber deck bridge) terms. The scope of work should not be described only as "restore to pre-disaster design." If part of the work is completed prior to project approval, the work that has been completed should be distinguished from the work remaining.

If additional damage to the facility is found after the PW is completed, it is necessary to document that damage, show how the damage is disaster-related, and request a re-inspection by FEMA.

Cost estimate

FEMA may grant funds on the basis of actual costs or on estimates of work to be completed. The three primary methods for determining costs are: time and materials; unit cost; and contracts. FEMA uses a methodology called the cost estimating format (CEF) for large projects to better estimate the total cost of large projects. There are tables online which depict the hierarchy of preferred pricing, with actual costs for the eligible completed work favored first and R.S. means cost data favored least. (Go to www.fema.gov/government/grant/pa/resources and select from among the cost estimating format resources.)

Validation

The applicant may prepare PWs for small projects. Large projects are developed by the project specialist, working with the applicant, and are submitted directly to the PAC crew leader for review and processing.¹⁸

Improved projects

When performing permanent restoration work on a damaged facility, an applicant may decide to use the opportunity to make improvements to the facility while still restoring its pre-disaster function and at least its pre-disaster capacity. For example, the applicant may decide to lay asphalt on a gravel road or replace

►19

206.201.

¹⁷ See 44 CFR § 206.202(d). Public Assistance Guide, FEMA 322, pages 96–97 Public Assistance Applicant Handbook, FEMA 323, pages 17–33.

¹⁸ Refer to FEMA Policy 9570.6, Standard Operating Procedures on Validation of Small Projects, and Public Assistance Guide, FEMA 322, pages 96, 106–108.

¹⁹ 44 CFR §206.203(d)(1) Public Assistance Guide, FEMA 322, pages 79, 110–111.

²⁰ Section 406 (c) of the Stafford Act, (42 U.S.C. § 5173). Public Assistance Guide, FEMA 322, pages 79, 111–112, 134.

²¹ 44 CFR §13.50. Office of Management and Budget Circular A-110 Public Assistance (PA) Program Grants Administration Post Award Monitoring and Closeout Processes, FEMA Policy 8610.8, dated Aug. 29, 2006, Public Assistance Guide, FEMA 322, page 114.

GENERATING LEADS*Continued from page 16*

enough so that you can come up with some questions that sound like you are informed about the prospect (at least about things you could have easily learned through their website or through a Google search).

Personal interests and affiliations should also be explored. If you discover that you have any common interests, that you have attended any of the same schools, that you live in the same town or that you belong to any of the same political, religious, cultural or athletic organizations, those can become the basis of very strong ties.

The specific questions you ask will depend on who you are trying to cultivate

and what you find out. If you tap your own sense of curiosity, marketing in this way can actually be fun. Don't wing it, though. Be prepared and, over time, you will see the fruits of your relationships building. In the meantime, here are some examples and further guidelines to help you get ready for your next networking meeting:

- In a conversation with a real estate developer: "We are hearing that multifamily residential development is one active area in construction. What are you hearing? Are you planning to get involved in any of these projects?"
- In a conversation with a therapist: "I heard an interesting story about the growing use of music therapy to treat speech loss. Are you seeing art and music therapy being used more

with children whose parents are going through a divorce?"

- In a conversation with a client you represented in an employment discrimination case: "What has been going on at work since we settled your case? Are you getting the responsibility and assignments that you wanted in your new job? Have you been able to keep up with any of your former colleagues?"
- In a conversation with a contact who was written about in the *Boston Business Journal*: "I saw that nice article about you in the BBJ. I didn't realize that you grew up Ann Arbor, Michigan. That's where I grew up. Which high school did you attend?"
- In a conversation with a small business person: "I saw on your web-

site that you have plans to expand to more locations in 2012. Have you secured financing yet for the expansion?"

GENERAL AREAS FOR FOLLOW-UP

If you made a referral, ask the contact about their experience with that professional. Ask the contact to tell you what questions you should ask your other contacts (i.e., that might elicit a need for their services.) Ask the individual if they would like you to send them an article on a subject you discussed when you met; or if they would be interested in hosting a free client seminar on the subject. Find out if they are interested in presenting a seminar or in co-authoring an article that is targeted to your mutual clientele. ■

PUBLIC LAW*Continued from page 18*

a firehouse that originally had two bays with one that has three. Projects that incorporate such improvements are called improved projects.¹⁹

Funding for such projects is limited to the federal share of the costs that would be associated with repairing or replacing the damaged facility to its pre-disaster design, or to the actual costs of completing the improved project, whichever is less.

Alternate projects

An applicant may determine that the public welfare would not be best served by restoring a damaged facility or its function. In this event, the applicant may use the PA grant for that facility for other eligible purposes. (See FEMA Policy 9525.13, alternate projects.)

The alternate project must serve the same general area that was being served by the originally funded project. The original facility must be rendered safe and secure, sold or demolished. If an applicant opts to keep a damaged facility for a later or another use, it will not be eligible for FEMA funding in a subsequent disaster unless it is repaired to meet codes and standards, and mitigation measures that would have been approved are applied.²⁰

Administrative appeals

(See 44 CFR §206.206)

The appeals process is the opportunity

for applicants to request reconsideration of FEMA determinations regarding application for or the provision of assistance. There are two levels of appeal.

The first-level appeal is to the regional administrator. Massachusetts is in Region 1, and the address is:

Federal Emergency Mgmt. Agency
99 High St., 6th floor
Boston, MA 02110
(617) 956-7506

The second-level appeal is to FEMA headquarters. According to the website:

W. Craig Fugate, administrator
Federal Emergency Mgmt. Agency
500 C Street S.W.
Washington, D.C. 20472
(800) 621-FEMA (3362)

An online appeals database containing FEMA responses to applicant appeals for assistance is available at: www.fema.gov/appeals.

CLOSEOUT

The PA program is considered closed when FEMA assures that all of the grants awarded under the PA program for a given disaster meet the statutory and regulatory requirements governing the program. FEMA may conduct an audit of the program during or after grant closure. After an audit, FEMA can request reimbursement of previously disbursed grant funds.²¹ ■

CHAPTER 93A*Continued from page 15*

the Legislature intended to waive sovereign immunity in Chapter 93A.¹⁴

In reaching its decision, the court applied the test set forth in *Todino v. Town of Wellfleet*¹⁵ and *Bates v. Director of Office of Campaign and Political Finance*¹⁶ that implied waiver can only be found where it is necessarily implied by the statute and without such implication the statute would be rendered ineffective. The court concluded that exempting the commonwealth and its municipalities from liability under Chapter 93A would not render the act "ineffective," and thus held that sovereign immunity was not waived by Chapter 93A.¹⁷

While the *Max-Planck-Gesellschaft* decision stands as a trial court decision that will not be reviewed on appeal, it provides important guidance on an issue that has long evaded substantive review. Moreover, it stands as a call to the Legislature to clarify the language of the act to either affirmatively exempt public entities or to explicitly include public entities within the ambit of the term "person."

Doing the former would put an end

to plaintiffs' pursuit of attorneys fees and double or treble damages against the commonwealth and its subdivisions and relieve taxpayers of the costly burden of defending Chapter 93A claims. ■

- 1) MASS. GEN. LAWS c. 93A (2011).
- 2) MASS. GEN. LAWS c. 93A § 1 (2011).
- 3) No. 09-CV-11116-PBS, 2011 WL 487828 (D. Mass. Feb. 7, 2011).
- 4) See, e.g., Park Drive Towing, Inc. v. City of Revere, 442 Mass. 80, 86 (2004); All Seasons Services, Inc. v. Comm'r of Health and Hospitals of Bos., 416 Mass. 269, 271 (1993); Morton v. Town of Hanover, 43 Mass. App. Ct. 197, 206 (1997).
- 5) See, e.g., M. O'Connor Contracting, Inc. v. City Of Brockton, 61 Mass.App.Ct. 278, 284 (2004).
- 6) *Id.* at n.8.
- 7) *Id.*
- 8) *Id.*
- 9) *Park Drive Towing*, 442 Mass. at 86.
- 10) *Max-Planck-Gesellschaft*, 2011 WL 487828, at *11.
- 11) *Id.*, at *12.
- 12) *Id.*
- 13) *Id.*
- 14) *Id.* at *13.
- 15) 448 Mass. 234, 238 (2007).
- 16) 436 Mass. 144, 174 (2002).
- 17) *Max-Planck-Gesellschaft*, 2011 WL 487828, at *13.

EXPERTS & RESOURCES**CONTINUED FROM PAGE 14****PERSONAL INJURY****EXPERIENCE ... RESULTS**

PERSONAL INJURY AND MEDICAL MALPRACTICE REFERRALS WELCOMED

BREAKSTONE | WHITE | GLUCK

2 CENTER PLAZA, SUITE 530, BOSTON, MA 02108
(617) 723-7676 | WWW.BWGLAW.COM

TAX ATTORNEY

LOOKING FOR
AN EXPERIENCED
TAX ATTORNEY
FOR YOUR CLIENTS?

RICK STONE LAW

CHAIR - MA BAR ASSN.
STATE TAX PRACTICE GROUP
VICE CHAIR - MA BAR ASSN.
TAXATION SECTION
SERVING MA BAR ASSN.
MEMBERS AND THEIR CLIENTS
STATE, FEDERAL, AND
INTERNATIONAL TAX MATTERS

PLANNING
AUDITS
APPEALS
LITIGATION

SALES & USE TAX
CORPORATE INCOME/
EXCISE TAX
MULTISTATE TAXATION

(617) 848 - 9360
(888) 483 - 5884
WWW.RICKSTONELAW.COM
RICK@RICKSTONELAW.COM

TRUST ADMINISTRATION

Trust Administration
for Minors and
Disabled Adults



Attorney Milne brings 25 years of experience as a nationally recognized trial attorney and trustee to a practice dedicated to trust administration and serving as a fiduciary for children and adults who are disabled.

- Over 50M in assets as Trustee
- Funds held at Morgan Stanley Smith Barney LLP at substantially discounted financial advisory fees for both large and very small trusts
- Complete transparency: duplicate monthly statements and annual accountings
- Committed to utilizing trust resources to maximize quality of life of trust beneficiary.

www.childtrust.com
(508) 785-8300 | chris.milne@childtrust.com

TAKING EXCEPTION

Continued from page 15

Recent decisions have recognized the absolute nature of the demand requirement under Chapter 156D, and the SJC has unequivocally stated that any derivative claim that is commenced after the rejection of a demand will be dismissed where “the shareholders or an appropriate group ‘has determined in good faith after conducting a reasonable inquiry ... that the maintenance of the derivative proceeding is not in the best interests of the corporation.’”¹³

The rules governing derivative claims under Chapter 156D implicitly make a number of structural and operational assumptions about the nature of corporate ownership and governance. These assumptions are at odds with the structure and operation of many close corporations in practice, in that they tilt the balance away from the rights and expectations of shareholders toward protecting the corporation from bad-faith or wasteful derivative suits. As a result, Chapter 156D significantly complicates the litigation of derivative claims involving close corporations and, perversely, may place these entities at greater peril.

The procedures and prerequisites to filing a derivative claim under Chapter 156D assume that the board of directors is distinct from the shareholders. It is also implicit that there are at least some disinterested shareholders who are able to conduct an inquiry into the allegations. The relatively lengthy timeframe reflects an understanding that a board or the shareholders will be dispersed, and that it will take time for them to coordinate and deliberate on the matter.

The current system also assumes that there is not likely to be any immediate or substantial risk to shareholders caused by delay. The overarching goal of this universal demand requirement is to protect the corporation from needlessly wasting resources on litigation. It reflects the position that the board of directors is able to dispassionately consider the aggrieved

party’s claim and, if warranted, provide a remedy. Indeed, the only exception to the demand requirement occurs where “irreparable harm” is threatened to the corporation itself.

These assumptions are directly at odds with how most close corporations are composed and governed. Many of the procedures outlined in Chapter 156D are not practical within small close corporations, which may have no directors or officers other than the shareholders themselves. It is highly possible that there will be no shareholders or directors who are disinterested in a potential derivative claim, and because the outcome of such a claim promises to have a sizeable and direct impact on their finances, all shareholders in a close corporation will have a stake in its outcome.

Furthermore, given the small number of shareholders and the likelihood that they are in frequent contact (if not close geographic proximity), there is no practical need for the extended timeframes provided to deliberate under Chapter 156D. These timeframes are also problematic, given the vulnerability of the aggrieved minority shareholder. Because he or she likely relies upon the corporation for his or her livelihood, the longer the waiting period, the greater the risk that the shareholder will suffer an irretrievable loss.

THE FUTILITY EXCEPTION IN PRACTICE

Under prior law, an exception to the demand requirement existed where “a majority of directors are alleged to have participated in wrongdoing, or are otherwise interested.”¹⁴

As the SJC explained in *Harchen v. Brown*, a director or officer is “interested” where, among other things, he or she is a party to the conduct, has a relationship with a party to the conduct that would reasonably be expected to affect his or her judgment, or has a “material pecuniary interest” in the conduct.¹⁵ In these circumstances, the aggrieved shareholder was excused from making a demand due to futility.

The futility exception came into play frequently in close corporation derivative suits.¹⁶ In close corporations, there is a greater likelihood that directors, shareholders and officers will be interested in the conduct at issue. If they are not alleged to be participants in the conduct, they will almost certainly have a significant pecuniary interest in the conduct, given the relationship between the corporation’s finances and their own.

The futility exception was an important tool for aggrieved shareholders because it provided a means to initiate suit and seek relief without having to wait for the inevitable rejection or lack of response. Because aggrieved shareholders were able to bypass the demand requirement, they could “stop the bleeding” and protect the corporate assets (and their own) before it was too late. In a close corporation, where shareholders are few and depend heavily on the corporation for their livelihood, any wrongful act that impacts the corporate funds has a proportionate and direct impact on other shareholders.

REVIVING THE FUTILITY EXCEPTION

While current law eliminates the futility exception, it does provide an exception to the 90- or 120-day waiting period where “irreparable injury” to the corporation would result. Indeed, the drafters of Chapter 156D explicitly recognized the need for the application of the irreparable-injury exception to be applied under certain circumstances.

Comment 3 to Section 7.42 stated that “[i]n applying the irreparable injury exception to the 90 or 120-day waiting period, the standard to be applied is intended to be the same as that governing the entry of a preliminary injunction. Other factors may also be considered such as the possible expiration of the statute of limitations ...”¹⁷

However, this exception is of little benefit for an aggrieved shareholder in a close corporation, and invoking it comes at a significant risk. Under Chapter 156D,

¹ See *Donahue v. Rodd Electrotypes Co. of New England, Inc.*, 367 Mass. 578, 586 (1975).

² *Id.*

³ *Id.* at 587.

⁴ JANE MALONIS, ENCYCLOPEDIA OF BUSINESS (Jane Malonis ed., 2d ed. 1999)

⁵ See *Wilkes v. Springside Nursing Home, Inc.*, 370 Mass. 842 (1976).

⁶ *Brodie v. Jordan*, 447 Mass. 866, 870 (2006).

⁷ See MASS. GEN. LAWS c. 156D (2011); *Halebian v. Berv*, 457 Mass. 620, 624 (2010).

⁸ *Halebian*, 457 Mass. at 625.

⁹ See MASS. GEN. LAWS c. 156D § 7.42.

¹⁰ *Id.*

¹¹ *Id.*

¹² See MASS. GEN. LAWS c. 156D § 7.42 (Comment 4), citing *Lewis v. Graves*, 701 F.2d 245, 247-248 (2d Cir. 1983).

¹³ *Halebian*, 457 Mass. at 626, citing MASS. GEN. LAWS c. 156D § 7.44(a).

¹⁴ *Harchen v. Brown*, 431 Mass. 838, 844 (2000).

¹⁵ See *id.* at 843 n.5 (adopting definition from 1 ALI PRINCIPLES OF CORPORATE GOVERNANCE:

ANALYSIS AND RECOMMENDATIONS §§ 1.15 and 1.23 (1994)).

¹⁶ See, e.g., *Aiello v. Aiello*, 447 Mass. 388, 396 n.18 (2006) citing *Harchen*, 431 Mass. at 842-44.

¹⁷ MASS. GEN. LAWS c. 156D § 7.42 (Comment 3).

¹⁸ MASS. GEN. LAWS c. 156D § 14.30(2)(i).

the Superior Court may dissolve a corporation upon a petition filed by shareholders holding at least 40 percent of the total voting shares where there is deadlock, the shareholders are unable to break the deadlock, and “irreparable injury to the corporation is threatened or being suffered.”¹⁸

Therefore, by alleging that irreparable injury would result from waiting for the demand response period to expire, a shareholder raises the specter of dissolving the corporation at a time when his or her actual aim may very well be to save the corporation.

Furthermore, because the primary determining factor provided by the statute is injury to the corporation, rather than the integrity of the directors’ decision-making process, courts may reject derivative claims by shareholders where, despite the magnitude of the harm to an injured minority shareholder, the corporation nonetheless shows signs of solvency. The current system, therefore, requires the formality of a demand and, at minimum, a 90-day waiting period, even in cases where wrongful conduct is ongoing and a demand is obviously futile.

The Legislature should amend Chapter 156D to permit a futility exception for pre-suit demands in cases involving close corporations. While there is a benefit generally to providing the corporation itself an opportunity to review and, if appropriate, take over a claim — as well as limiting unscrupulous or unmeritorious shareholders’ ability to launch a corporation into litigation — these concerns are outweighed by the rights and interests of minority shareholders in close corporations.

These individuals are often vulnerable, highly dependent on the corporation for their own well-being, and have rights that, without ready access to the courts, may not be able to be enforced in a timely or effective manner.

Reinstating the futility exception for this class of corporations would recognize the fact that close corporations are not structured, and often do not operate, as other corporations do. The availability of a futility exception would permit aggrieved minority shareholders to obtain meaningful relief, enforce the bargain that shareholders in close corporations make with one another, and keep these corporations viable in circumstances where delay would likely only cause greater harm. ■

Many thanks to David E. Belfort, Eric R. LeBlanc and Raymond Ausrotas for their valuable input and editing.

PAPERLESS OFFICE

Continued from page 16

Once you start scanning documents regularly, the next logical step is to ask where they might go. Directory structure is the organization of files into a hierarchy of folders. An office or firm considering

moving to a paperless office may consider using their existing filing system as a foundation. A solid directory structure will use clear naming conventions for folders and subfolders, descriptive titles in documents and pre-fixed dates for consistent organization.

For example, client folders may be organized by year. From there, at the remaining subfolders and subfiles, the following convention may be used:

Folders: 2010 01 01 Rusty Lambert
Files: 2010 01 14 Motion to Dismiss for Insufficiency of Process

This system defaults to chronological order, meaning that if you open a particular client folder, you will be greeted by a chronological recitation of the case history merely by naming your files in a certain way.

After settling on a system for naming conventions, draft and follow office protocols and procedures for document workflow. Decide who will be responsible for scanning, who will be responsible for filing, how various team members, attorneys, etc. will be notified that a particular piece of correspondence has been received and scanned and how the original paper documents will be either stored or disposed of. Some practices may choose to retain paper documents for the duration

of a particular matter or the documents may be shredded.

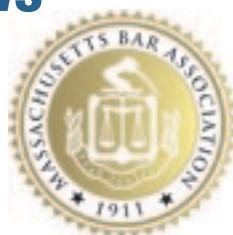
Convinced? Skeptical, but just a little curious? Want to try, but not sure where to start? Start slow with one file and experiment.

One final challenge to all those entrenched traditionalists who actually made it through this article: Locate the last order in your most active client file, send the most recent batch of financial discovery for review to the new associate and review yesterday’s mail, all from the cozy convenience of your home office.

Think you can complete those tasks in less time and more efficiently than your paperless colleagues? A paperless law office will allow for you to accomplish more work in less time and with more efficiency and more flexibility. But make sure to set aside enough time to learn how to use your new technology. Make sure to figure out a good system for keeping track of all your data before you jump in with both feet. But once you have everything up and running, there is no going back. ■

MBA member benefit:
Daily legal headlines
Find the latest legal news
at www.MassBar.org.

Updated every day, view headlines related to state and federal laws, the legal profession and the MBA at www.MassBar.org.



Member Benefit From



Trust
your transactions
to the only
merchant account
recommended by over
60
bar associations!

The Easiest Way to Get Paid!

- ✓ Increase business and control cash flow.
- ✓ Avoid commingling client funds.
- ✓ Save up to 25% off standard fees.
- ✓ Accept credit cards for retainers.

The process is simple. Begin accepting payments today.

Call 866.376.0950 or visit affinandscape.com/massbar

AffiniPay is a registered ISO/MSP of Harris, N.A., Chicago, IL

Are You
PCI Compliant?
Let us help.



Ask about our solution
for PCI Compliance.
www.PCICentral.com

LAWPAY

CREDIT CARD PROCESSING

866.376.0950

affinandscape.com/massbar

FREE MEMBER BENEFITS



Ethics and Practice Management Series

All programs 12:30–1:30 p.m.
MBA, 20 West St., Boston



Real-time Webcasts.

Rules You Need to Know

Contingent Fee Rules, File Retention Policies and IOLTA Management
Wednesday, Feb. 1

Marketing Madness

Ethical Marketing
Wednesday, March 7

Developing a Marketing Plan
Wednesday, March 21



Missed previous programs? View them online at MassBar.org/OnDemand.

New Year's Resolutions

Facing Ethical Quandaries and Dealing with Traps for the Unwary
Recorded: Wednesday, Jan. 4

Going Paperless

Scanning Technologies, Software Programs and Electronic File Management
Wednesday, Feb. 15

When Clients Complain

Wednesday, April 4

Social Media and Blogging

Wednesday, April 18

How to Build a Technology Plan for Your Firm

The Top 10 Technology Tips You Can't Afford to Miss
Recorded: Wednesday, Jan. 18

For more information, visit www.MassBar.org/OnDemand.

MARK YOUR CALENDARS



SPEED NETWORKING RECEPTION

THURSDAY, FEB. 9, 6–8 P.M.
MBA, 20 WEST ST. BOSTON



www.MassBar.org

LAW SCHOOL BUBBLE

Continued from page 3

loan funds to meet the financing needs of all students enrolled in U.S. colleges and universities. So the Education Department, under the authority of a new federal law passed in the spring of 2008, began buying up the federally guaranteed loans, making them direct loans from the U.S. government.

In 2010 Congress passed the Student Aid and Fiscal Responsibility Act, part of President Barack Obama's final health care overhaul, which ended federally guaranteed student loans and replaced them with direct loans made through the Education Department. In effect, by converting the loan guarantees into an income-producing asset, the federal budget was reduced by \$61 billion over 10 years.

Some of that savings was earmarked for additional educational grants and funding for community colleges. But some was allocated to help fund the national health care plan, hence its inclusion as part of the health care bill.

In the short term, the student loan overhaul may have been brilliant political maneuvering. But in the longer term, if a large portion of students don't repay their full loans, the perceived benefits of interest income on direct federal student loans will become an enormous financial liability. And there are good reasons to believe this might happen.

THE GOVERNMENTAL GAMBLE

The Education Department does not make lending decisions based on credit scores, at least for Stafford loans, the primary funding mechanism for both undergraduate and professional schools. Nor does it conduct a rigorous analysis on how graduation from particular institutions affects an individual's income or earning power. The protections for the U.S. Treasury are largely on the back end: Changes to the federal bankruptcy code over the last 15 years have made it extremely difficult to discharge student debt.

But sheltering loans from bankruptcy does not guarantee that the government will receive steady repayment, as several layers of loss apply.

Though the latest loan default rates are far below the 22.4 percent peak in 1990, according to Education Department figures, they have been rising since 2003. While direct-lending program budget projections seem to preclude any possibility of loss, future budgets based on historical default rates can be upended as the legal market constricts. The default rates could be higher than the historical average as anticipated gains in earning power fail to materialize and lost jobs do not come back. Likewise, the Congressional Budget Office may have underestimated the extent to which students will be eligible for the federal Income-Based Repayment plan, a relatively new innovation. IBR caps student loan repayment at 15 percent of adjusted gross income. Extensive use of that plan would both reduce revenues and create a shortfall in program funding for new loans. With approximately \$200 billion in student loans each year, and high amounts projected in years to come, a 10 percent shortfall in repayments under IBR could amount to \$20 billion to \$30 billion lost.

By failing to make rigorous, realistic actuarial assumptions in deciding who to lend

money to and how much to lend, the federal government avoids politically uncomfortable trade-offs. Everyone can go to college. And if you can get accepted into law school, the government will finance that, too.

But as the economist Herbert Stein once said, "If something cannot go on forever, it won't." The federal government's gamble that higher education will continue to result in higher personal incomes eerily echoes Wall Street's risky assumption that historical patterns in real estate values would carry forward forever and enable many sliced-and-diced mortgage-backed securities to attain AAA ratings.

While it may be politic, even patriotic, to assume that the higher-education-equals-higher-income equation is fact, for investors it remains, at best, aspirational. Since 2008, private investment in nearly any market has been reluctant. The capitalists aren't taking this education-equals-high income bet; if they did, the terms they would demand would likely change the choices that student borrowers are now making.

Unless the government's actuarial assumptions on student loan repayments turn out to be correct, federal funding of higher education is on a collision course with the federal deficit.

Optimistic assumptions of future growth and earning power, however, are completely at odds with the financial landscape that has given rise to the so-called scamblogger movement and some recent lawsuits by graduates alleging their schools committed fraud and other deceptive practices regarding portrayals of job prospects.

COUNTING THE DISCOUNTS

The cost of legal education is more complicated than tuition, books and living expenses. Although published tuition is usually very high (Harvard's 2010-11 rate was \$47,600), more than half of all enrolled students receive some sort of discount.

The vast majority of these discounts come in the form of merit-based scholarships based on undergraduate grades and LSAT scores. Merit scholarships are not guaranteed over the three years of schooling. Recent news media coverage has noted that scholarships based on beating the law-class grade curve can leave many students without scholarships and several semesters left to complete degrees, often paid for by more federal loans.

And while some scholarships are financed through law school endowments, most are cross-subsidies by incoming students: Student A pays full tuition — largely financed through loans — so that student B can receive a discount.

The cross-subsidy is fueled by competition among schools to maximize prestige as measured by *U.S. News* rankings. The credentials of entering classes represent a significant component of the ranking formula — a combined 22.5 percent, as described by *U.S. News*.

Because of this system of variable tuition, some students graduate with little or no debt. A much larger group graduates with considerable debt.

For law students who have not defaulted on prior federal student loans, the first \$20,500 per year in loan funding is typically a federal Stafford loan at an annual interest rate of 6.8 percent. Because the yearly cost of law school attendance often far exceeds \$20,500, a large proportion of students take out federal Direct PLUS loans, which carry a 7.9 percent yearly interest rate plus a 4 percent one-time charge at the time of disbursal. The only limit imposed is the cost of attendance minus any other financial assistance.

Students who choose the highest-ranked school to accept them tend to be the biggest borrowers because their LSAT scores and undergraduate GPAs are more likely

For all your advertising needs contact Mark Schultz.
(617) 896-5323
mschultz@thewarrengroup.com

to be below the school's median statistics. As a result, these students get less merit scholarship aid, which pushes their cost of attendance to \$40,000-\$65,000 per year. After three years, the cumulative debt is \$120,000-\$195,000, with a blended interest rate of roughly 7.3 percent.

Assuming a total debt of \$150,000 (the amount currently carried by several thousand law graduates), the total monthly payment is \$1,743.46 a month for 10 years, according to the Education Department's repayment calculator. For law graduates who opt for the 25-year graduated payment plan, which starts at about \$930 a month and increases over time, that amortizes to \$357,229, more than double the original amount.

According to NALP, the association for legal career professionals, the median starting salary for a lawyer who graduated from law school in 2010 is \$63,000. For a recent, unmarried law school graduate making \$63,000 and getting single-digit-percent annual pay increases, the chasm between income and prospective repayment is impractical for both the student and the government.

This combination of high debt and moderate income makes this all-too-typical law graduate eligible for the federal government's income-based repayment program. According to FinAid's IBR calculator, used by many law school financial aid counselors, the student will make monthly payments of \$584 the first year and \$1,605 in year 25. After 25 years, the loan is forgiven. At that time, more than half of the principal, \$76,000, will not have been repaid, along with \$26,000 in capitalized interest.

The government write-down for this student is about \$103,000, which may be offset by an eventual tax payment: Under the current Internal Revenue Code, the law school grad would have \$103,000 in imputed in-

come for the debt forgiveness. Of course, the government would have to collect it from someone near enough to retirement to be eligible for membership in AARP.

Surveying the current landscape for law jobs, income-based repayment is surely the fate that awaits many current and future law school grads. And their unpaid loan balances reduce the federal funds available for future student loans.

ENDGAME

Given the likelihood of some form of curb in federal student lending, there are gut-wrenching times ahead for law schools — even those that continue to enjoy a surplus of applicants. Until we get to that point, however, the lawyer production machine will continue to churn out more lawyers.

For those trying to get through this fiscal year, a government write-down of student debt may seem far away and speculative. Within a few years, however, the government will gain more experience on the IBR program, permitting a more accurate calculation of what its loan assets are really worth.

All the while, the stakes are growing larger. The volume of direct loans to students is estimated to increase from \$489 billion in 2009 to \$1.8 trillion in 2020, according to the Office of Management and Budget. Between 2 and 4 percent — \$36 billion to \$72 billion — will be for law school graduates.

Besides rising defaults and heavy use of income-based repayment, federal student lending is vulnerable to other attacks. Although IBR may be viewed as a boon to law students, law school graduates may view it differently — 15 percent of their monthly income paid over more than half of their career span is a severe burden, especially if the sought-after gains in earning power fail

to materialize.

For federal education loans, law students are grouped together with doctors and dentists, even as the U.S. Bureau of Labor Statistics acknowledges a shortage of those professionals and a growing glut of lawyers. Further, the bureau projects that these shortages and surpluses will continue over the next decade.

Does the right hand of government know what the left hand is doing? If too many law school graduates are forced to invoke IBR, the Education Department will eventually have to justify writing checks to law schools.

Mark Grunewald, interim dean of the law school at Washington and Lee University, thinks any blanket restrictions on federal student lending would be disastrous and unfair. "There are real differences among prospective law students' economic circumstances, and new blanket restrictions on lending could hurt those most in need of financial support," he says. "It's also unclear what the legal employment market might look like after a general economic recovery. Market forces may ultimately prove to be a better corrective."

Still, scrutiny by the scamblogger movement and legal and mainstream media may speed up the process. One plausible outcome has the Education Department using its accreditation authority to force law schools to demonstrate, as a condition of receiving federal loan money, a minimum threshold of employability and income upon graduation.

As today's prospective law students survey their options, they see few career paths that are affordable and intellectually challenging, and that offer secure economic returns and the potential to be socially meaningful. Based on the other alternatives, many still argue that a law degree is as good a bet as any. This may be true.

But the more vexing question is why a gambling metaphor now seems so apt for legal education.

Six figures of debt, a heavy interest burden and poor job prospects — this is no way to begin a legal career. Some graduates will no doubt hang their own shingles and build successful practices, but many others will start practicing law without proper capital or mentorship. This is dangerous territory for the profession. Dating back to the 1950s, research on lawyers has shown a strong link between lawyer misconduct and the economic stress of too many lawyers chasing too little, unsophisticated legal work.

The easy credit that feeds legal education will eventually exact costs that go beyond recent law school graduates. Andrea is one who knows that personally.

"The face of the law profession has changed. Even the ones who don't have jobs think it will bounce back and be the same, but it won't. This is a totally different game.

"The last few years were the hardest of my life. I've essentially lost my dream. ... It's like I've failed at everything. If I'd known what would happen, I would have gone another way. I would have stayed at my firm, became a paralegal. I wouldn't have taken on this debt. I don't have anything or anyone else to fall back on."

The U.S. legal profession is in the midst of a broad structural transformation. Meeting the challenge to compete in a global economy requires a higher-education policy that honestly addresses issues of access, cost containment and national interest.

Legal education may soon provide an object lesson of what happens when we do nothing: Bad things happen when lawyers and law professors stick their heads in the sand. The republic may be in need of some world-class lawyerly judgment. And maybe soon. ■

*No ordinary
insurance agency ...*

INSURANCE

*... Designed by
Lawyers for Lawyers*



**Professional
Health
Life
Disability
Personal Auto
Umbrella**

With claims against practitioners on the rise, you need comprehensive coverage to protect your practice.

The MBA Insurance Agency offers one of the broadest malpractice coverages in Massachusetts.

The MBAIA has created a policy to meet your specific practice needs by our no one-size-fits-all pricing. Get a tailored insurance policy with competitive rates, low financing, experienced and knowledgeable staff and a malpractice hotline through the MBA's insurance carrier.

Get the protection you need.

*Contact the
MBA Insurance Agency today.*

www.MassBarInsurance.com



Boston (617) 338-0581 • Springfield (413) 788-7878

E-mail: Insurance@MassBar.org

TO FIND THE RIGHT CLIENTS YOU NEED THE RIGHT MAGNET.

BETTER VISIBILITY BY DESIGN.

LexisNexis® Web Visibility Solutions.

A more magnetic website will attract more customers and be your firm's greatest lead generator. LexisNexis knows what it takes to get it there. LexisNexis Web Visibility Solutions deliver websites that combine superior website design with search engine optimization to deliver real results. With our unparalleled knowledge of the legal industry, no one is better positioned to help you build your business and make the most of your marketing dollars by drawing in more potential customers.



TO FIND OUT HOW WE CAN HELP YOU GROW, VISIT US AT
lexisnexis.com/webvisibility4
or call 1-877-273-6794

 LexisNexis® | Martindale-Hubbell®