Billboard, YouTube campaign to raise court funding awareness

**MBP 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 effort 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 I-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 representatives.

**‘Who else is going to do it?’**

Advocate Harvey Silverglate on keeping institutions honest

**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 the seven hours he had needed for most of his career.

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. 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 nonprofit 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 Jew 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 30 times and graduated from 12 different schools, Silverglate continued to thrive and succeed.

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 listening to means to address this crisis,” said MBA Vice President Jeffery 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.
PRESIDENT'S MESSAGE

Continued from page 1

engaged in criminality, our courts and judges removed them from their corpo-
rate suites and provided alternate, supervi-
sed housing for them. Revolutionaries, like Raymond Luc Levasseur, could not
destroy our system of justice by detonat-
ing bombs in our courthouses; the busi-
ness of the courts continued without fear.

The day-to-day enforcement of criminal
and civil laws has always gone forth qui-
tely, 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?

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 understanding 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.

“Wealth without courts, no — 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 Pat-
rick should have released his proposed
FY2013 budget. The House of Repre-
sentatives, 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.

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CHRISTMAS NEWS: Federal 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 detonat-
ing bombs in our courthouses; the busi-
ness of the courts continued without fear.

President and COO

Tricia M. Oliver

LA WY ER S JO UR NA L

NEWS

COVER

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

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 disheartening 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 resume 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 school 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 78,000 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 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 in supporting the legal education business. Federal loans were made by private lenders without the benefit of federal guarantees. Any remaining student loans contra loss — and, in some cases, interest rate subsidies. Any remaining student expenses were met by private lenders without the benefit of federal guarantees.

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 potential 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. Had- don, 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 financing...
Stumping for our Gateway Cities

By ROBERT L. HOLLOWAY JR.

Introduction
MBA President Dick Campbell has asked me to write a column 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 toes and nephews, read with the editors of Amherst College newspaper 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, is where I submit, lawyers can and should harness that resource as a kind of legal, exhilarating.

LAWYERS AS VOLUNTEER ACTIVISTS, ORGANIZERS, PROBLEMS SOLVERS

Our profession has a proud tradition of voluntarism. Pick any one of our 351 cities and towns in this Commonwealth, and you will find 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 voluntarism and service to our communities. Add to that commitment the large number of unemployed and 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 tackle the problems of the Gateway Cities? We even might consider public funding for this urban Peace Corps, ‘set cheek-to-jowl with stakes, guy ropes and space for three walkways. One walkway consisted of wooden planks 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 expressive activities of setting up tents and sleeping overnight.”

Likewise, it is not lawful 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 obtain “unsubstantiated public access to beautiful, well-cared for spaces.”

Many of the lessons learned during the Occupy Boston protests, or the Occupy Wall Street movement, might apply to our Gateway Cities. The current political, economic and media landscape has made it all too easy for too many to lapse into combative and pernicious sloganeering, jingoism and vituperation. It is too large a govenor 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.

Alternatives for expression abound and, no doubt, the people of Occupy Boston will work hard to make sure our society recognizes that our freedoms have not always been laudable. Nevertheless, we have been a welcoming nation, a place where people have come to make better lives for themselves and their families.

From a personal perspective, it is not lost on me that my mother (now 92) was a first-generation immigrant from a very small village in Romania (which, also not lost on me, are little changed for what they were when my grandparents left those villages in the early 1900s). My father’s family also were immigrants, having come over on the Mayflower, nearly 300 years earlier.

There was little substantive difference in the motivations of the two sides of my family 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 Country’s history of dealing with difficult problems. Indeed, history teaches that our profession has shown repeatedly the ability to solve such problems.

I urge each 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 combative and pernicious sloganeering, jingoism and vituperation. It is too large a govenor for us to start developing concrete, positive solutions.

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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 policemen swept every inch of Dewey Square, absent emergency circumstances including the last four of a number of related charges, trespass, fire, or outbreak of violence, at any time before this court has decided the motion 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 Square — as expressive core-protected activities 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 overnights and govern public parks. However, it is not within the law to take possession of a site effectively excluding other members of the public from access and use of a public park in any other manner. Here, 100 to 150 people took up residence in tents for positions designed to deal with, for example, the multidimensional problems faced by our immigrant population.

We have seen in recent years many instances of exploitation of immigration population (the “notorious” unauthorized practice of law is an example). Despite these economic problems, you should not be afraid to consider public funding for appropriate and productive new initiatives.

Our country’s history of dealing with many waves of immigration has not always been laudable. Nevertheless, we have been a welcoming nation, a place where people have come to make better lives for themselves and their families.

For those of you bent on verification, you can check the archives of the Amherst College “Student.” For those of you with others, to help to revitalize our so-called "Gateway Cities." Our country’s history of dealing with many waves of immigration has not always been laudable. Nevertheless, we have been a welcoming nation, a place where people have come to make better lives for themselves and their families.

Our current political, economic and media landscape has made it all too easy for too many to lapse into combative and pernicious sloganeering, jingoism and vituperation. It is too large a govenor for us to start developing concrete, positive solutions.

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

Alternatives for expression abound and, no doubt, the people of Occupy Boston will work hard to make sure our society recognizes 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 as serious in its direct impact as the rest of the country, but it is nonetheless under attack. Court houses are closing and those that continue to operate have diminished hours of operation and are suffering layoffs, furloughs and pay freezes. Judges are leaving the bench at alarming rates.”

Looking to 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 the Massachusetts Superior Court and is presently working toward a master’s degree in Law in London, specializing in International Human Rights.
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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 foundation 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 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. ■
Harvey Silverglate: Reflections on an accidental legal career

SILVERGLATE
Continued from page 1

Harvey Silverglate
The cover of Silverglate’s second book.

state lines, he admits his Brooklyn influ-
ence 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 con-
sider myself a Brooklyn boy.”

Silverglate, the first in his family to
attend college, originally intended to be-
come a doctor, as his parents aspired for
him.

He entered Princeton on a full schol-
arship 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 con-
cerned 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 law-
yer. Silverglate wanted to be a journalist,
“a legally sophisticated reporter,” as he
calls it.

Silverglate attended Harvard Law
School, and there met Alan Dershowitz,
who convinced Silverglate to try work-

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Still intent on having a writing ca-

reer, Silverglate didn’t think he would
be at the firm very long. He just wanted
some practice experience before becom-
ing a legal reporter. Despite his original
intentions, Silverglate 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 le-
gal matters like I intended,” Silverglate
said.

“What I think Harvey means by that
is implanto a sense, or reinvigorate a
sense, in both students and faculty … in
a modern liberal democracy … that can
be wide ranging and expansive.”

“I think there’s an obligation of people
to try to keep institutions honest.
That 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
adore that he’s a tireless advocate.”

Silverglate’s second big, crimi-
nal law, was what he wrote 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 the board of direc-
tors for 90 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 Mas-

sachusetts. “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,” Silverglate said about his
advocacy roles. “Who else is going to do it?
The only other group in society that’s ded-
icated to trying to keep institutions honest
is the press. And the press often can’t get
into these institutions, but lawyers can.”

Silverglate’s two books reflect what
many will say is his life’s work: corrup-
tion in both American higher education
institutions and criminal law.

“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
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 writing on a broad range of
public policy issues, but the common
denominator is always justice and con-
stitutionality.

“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 any-
one [like him], and his commitment to
the United States Constitution is rabbi-
nical in its intensity.”

Silverglate’s writing career goes be-
yond local publications. His writing can
also be found in The Wall Street Journal,
The New York Times and regularly on

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 Cam-
puses, which he co-authored with Alan
Charles Kors, tackles the subject of free
speech and equality of rights on the na-
tion’s college campuses. His second
book, Three Felonies a Day: How the
Feds Target the Innocent, tells the sto-
ries of American citizens who have been
the targets of federal prosecutions even
though they believe they did nothing
wrong.

Silverglate’s two books reflect what
many will say is his life’s work: corrup-
tion in both American higher education
institutions and criminal law.

His passion for freedom on Ameri-

can 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
Silverglate 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 Silverglate
FIRE has won hundreds of public vic-
tories, 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
adore that he’s a tireless advocate.”

Silverglate’s other big passion, crimi-
nal 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 the board of direc-
tors for 90 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 Mas-

sachusetts. “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,” Silverglate said about his
advocacy roles. “Who else is going to do it?
The only other group in society that’s ded-
icated to trying to keep institutions honest
is the press. And the press often can’t get
into these institutions, but lawyers can.”

While Silverglate’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,” Silver-
glate 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 Sil-
verglate works of counsel. David Dun-
can, a partner at the firm, said he often
uses Silverglate as a sounding board
when he works on student discipline
cases, an area where Silverglate’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
can.”

Silverglate often gets calls from law-
yers 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
tools Norman Zalkind, partner at Zal-
kind, Rodriguez, Lunt & Duncan, would
use to describe Silverglate. Zalkind first
met Silverglate during the late 1980s in
the basement of the Suffolk Superior
Court building in police lock-up. Silver-
glate mistook Zalkind as a defendant ar-
rested during an anti-war demonstration
at the Statehouse.

Despite the mix-up, Silverglate and
Zalkind soon became partners, opening
up their own firm. The two handled cas-
es such as the Harvard University take-
over 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 & Silverglate’s law
firm where Silverglate first met Nancy
Gertner, a retired U.S. District Court judge
and now a professor at Harvard Law School.
Gertner and Sil-
verglate eventually began their own law

firm, where they practiced together for
17 years.

“Harvey’s as ‘a voice that is ab-
solutely invaluable,” Gertner said.

“He’s someone who is enormously
>
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News from the Courts

SJC APPOINTS AMBROSINO EXECUTIVE DIRECTOR

The Supreme Judicial Court appoint- ed Thomas G. Ambrosino, the former mayor of Revere, as its executive direc- tor, 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 re- cent 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 col- lective bargaining agreements. He was a sole practitioner in Revere and a litigation associate at Palmer & Dodge in Boston.

A native and current resident of Re- vere, he graduated cum laude from Har- vard 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 constitu- ents. The justices look forward to work- ing with him in the challenging years ahead,” said SJC Chief Justice Roderick L. Ireland. “The timing is perfect: the SJC’s work force is critical to ful- filling our system’s mission and shared values. The 10-member task force, which was focused on hiring and promotion in the Pro- bation Department and the critical situa- tion that led the court to create the task force, announced on Jan. 5 that it had endorsed the recom- mendations 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 reorganization of the probation department’s hiring and promotion policies, including the creation of a formal recruitment and selection process, and the creation of a new position of judicial services director.

The court also announced the creation of a new position of judicial services director, which will be responsible for recruiting and selecting probation officers. The director will be responsible for overseeing the probation department’s recruitment and selection process, and will be appointed by the chief justice of the court.
HOD
Continued from page 1
a report of the Foreclosure Task Force pre- sented by Robert Cannon, which outlined draft legislation to create a mandatory med iation 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 Can non, who described the process as creating mistrust.

Real Estate Bar Association of Massa chusetts President Christopher S. Pitt re ported that the REBA does not support the bill as drafted, but does not oppose mediation in principle. MBA Civil Litigation Section Chair Raymond P. Auseutas said the sec tion also does not support the legislation as drafted.

A vote of approval by HOD was given to a resolution that grants U.S. magistrates 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 Associa tion at its midyear meeting in February.

HOD voted unanimously to express opposition to provisions contained in the National Defense Authorization Act for fis cal 2012 that concern detention, interroga tion and prosecuted of suspected terrorists.

MBA member Michael Mone Jr., son of MBA Past President Michael Mone, pre- sented 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 Presi dent Marsha V. Kazazosan 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 Massachusetts Continuing Legal Education. "The message was Massachusetts lawyers are a very self- motivated group," Kazazosan said. "Many are not against CLE, just the mandatory aspect of it."

Chair, who sits on the Supreme Ju dicial Court’s Working Group on Profes sionalism, said the SJC has discussed mak ing CLE mandatory for young lawyers, and that the scope may be broadened. Camp bell suggested the task force should now develop a plan that outlines how mandatory CLE should operate in Massachusetts, so that the bar is not blinded 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.

Working to preserve the U.S. Consti tution during a “War on Terror … as 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 look ing to terrorize us … I think that is the main challenge.”

PERCEPTIONS OF SILVERGATE’S INFUENCE, LEGACY
Silvergate, who often lectures stu dents 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 civ ilization that we’ve constructed around the rule of law and the Constitution,” he said.

Silvergate’s research assistant, Daniel Schwartz, said, “To say Har- vey has been an influence on what I’m doing would be one of the great understatements.”

“Harvey brings a perspective to ev erything,” said Silvergate’s intern, Ste phen 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 Silver gate, who keeps in touch with many of the Viewpoint, page 3)." "We are by far the most affordable medical school in the Northeast," said Leary, who also noted UMMS’ rank ing of 51 for competitively awarded National Institutes of Health research grants.

In addition, Leary reported that only 4 percent of the UMMS bud get comes from a state appropriation with the other 96 percent derived primarily from revenues from en trepreneurial ventures, such as Com monwealth Medicine, Mass Biologics Labs, grant funded research, and licens ing fees.

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

Next HOD meeting at UMass Lowell campus
The MBA HOD will meet next on March 22 at UMass Lowell.

UMass Lowell is a comprehensive, national research university. The cam pus offers its 15,000 students bachelor’s, master’s and doctoral degrees in engi neering, education, fine arts, health and environment, humanities, liberal arts, management, sciences and social sci ences. UMass Lowell delivers educa tional programs, hands-on learning and personal attention from faculty and staff.

UMass Lowell enjoys its rank ing 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 Massachu setts residents. One such alumna is the current chancellor, Martin Mee han. 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 Alagoza.

SILVERGATE
Continued from page 6
creative and works really, really hard, and really will think about the unortho dox and try to do the unorthodox.”

One of Gertner’s fondest memo ries of Silvergate occurred when he encouraged her to take the Susan Saxe case, in which a Vietnam anti-war demonstrator was accused of killing a po lice 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.

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

Silvergate, who often lectures stu dents 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 civil ization that we’ve constructed around the rule of law and the Constitution,” he said.

Silvergate’s research assistant, Daniel Schwartz, said, “To say Har-
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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

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 admiralty. 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 past director 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, Awareness 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 co-chair for the Newton Youth Soccer Association. Former member of the board of directors and co-chair for the Newton Sixth Street 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

PAST: Estate Planning Under the MUPC Drafting Will and Trusts
Tuesday, Feb. 7, Noon - 4 p.m., MBA, 20 West St., Boston

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

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
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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, 12:30-5:10 p.m.
New England Law | Boston, 154 Stuart St., Boston

Paralegals: Jean Bouchard, Esq., Roger C. Henderson Professor of Law, University of Arizona. James E. Rogers College of Law; Noël Cohen, Esq., Jeffrey B. Forthudd Professor of Law, Massachusetts Law School; Thomas A. O’Connor, Esq., Portland, ME; William H. Manning, Esq., Babson College Professor of Law, University of Alabama School of Law; Elizabeth Nathan-Hillier, Esq., Partner at Law, Boston College Law School; Roxana A. Glueck, Esq., Boston College University School of Law; David J. Rhode, Esq., partner, Corporate Dept., Putnam, Brewster & Ullman LLP, Boston; Glenn C. Shaw, Esq., partner at Law, "Business" section of the Boston Bar, Boston.

Register by Monday, Feb. 6 at Abigail Adams
Abigail.Padna@NEIL.org or call (617) 485-5705.
Visit www.MassBar.org/Events for a full schedule and additional registration and conference information.

2012 Massachusetts Conference on Bullying
Bullying and the Law: Policies, Programs and Best Practices
Sponsored by the Massachusetts Bar Association, Massachusetts Commission on the Status of Women, and School Climate Consulting Services
Friday, March 16, 1-3:30 p.m., Harvard Law School
Austin North Conference Room, 1561 Massachusetts Ave, Cambridge

Keynote Speaker: Brian J. Spector, Esq., WCBS-FM, Stars & Stripes, LLC, Marblehead, MA
Conference Presenters: Robert M. Cole, Esq., principal, Cole Civil Rights and School Consulting, Boston; Peter Holliday, PhD, assistant professor, Department of Counseling, Developmental and Educational Psychology, Boston College; Jeff Ferrini, M.A., C.A.S., founding director, Massachusetts Department of Education’s Safe Schools Program for Gay, Lesbian, Bisexual and Transgender Students, Headliner Media, M.A., Equity and Diversity Specialist, New England Equity Assistance Center, The Education Alliance, Boston University.

Register by Thursday, March 1 by contacting Melody Goodwin at (617) 545-6651 or Melody@SchoolClimateConsulting.org

REGISTER ONLINE AT WWW.MASSBAR.ORG OR CALL (617) 338-6530
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.

“I view this as an opportunity to use my experience in advising clients and universities on a variety of issues, including 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

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John 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.

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CONTINUED FROM PAGE 11

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 seminal 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.

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.

CONTINUED ON PAGE 13
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MASSBAR.ORG/EVENTS/CALENDAR

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**Calendar of Events**

**Thursday, Feb. 9**

**Tiered Community Mentoring Program**
10 a.m.–noon
Rudyard Community College, 1234 Columbus Ave., Randolph 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.–1 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

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**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
11 a.m.–1 p.m.
MBA, 20 West St., Boston

**Friday, March 9**

**Tiered Community Mentoring Program — tour of Adams Courthouse and observing SJC hearings**
9–11 a.m.
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

**February 2012**
The beginning of the end of Chapter 93A claims against Massachusetts and its subdivisions

CIVIL LITIGATION

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) 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, incipient or unincorporated associations, and any other legal entity,” and argued that public entities, such as the commonwealth itself, fit within this definition. The sweeping 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 Zentrum Fuer Wissenschaften E.V. v. Whitehead Institute for Biomedical Research,3 the Hon. Patti B. Sute, of the U.S. District Court for the Distric 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. Courts in other cases discussed the ambiguity but failed to directly rule on it.4

The Appeals Court, in M. O’Connor Construction Corp. v. Board of Bd.5 the court acknowledged that the act “contains no explicit indication that governmental entities are to be liable under its provisions,”6 but also recognized that public entities have standing to bring claims under the act, and opined that this fact would support a finding that they are also liable under no act.

But, like the preceding cases, the court then put aside the question of whether Chapter 93A may be read as waiving government 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 municipal entity may in some circumstances be ‘amenable to the provisions’ of G.L. c. 93A.”7

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.8 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.9 It then noted that Chapter 93A contains no explicit waiver of sovereign immunity, and opined that an implied waiver must be “very clear.”10 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 statutes.11

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...
Running and maintaining a paperless law office may be 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 and 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 cramping 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 near 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 quickly in the corner of your associate’s office? Have you ever accidentally converted 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 less work, no additional cost 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 is what will allow the 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 so that the ability to create PDF files is important. Once you have converted a document into PDF format, you have a file that will look the same across all platforms. The creation of a PDF document can also 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.).

**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 rely on web-based or cloud storage for email, contact and calendar management. Various lawyers also have Clouds that are targeted toward the storage and exchange of documents.

There are a number of advantages to storing your documents on 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 space as the cloud 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 anywhere.

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

Once you have considered establishing and maintaining a paperless office, the third consideration is generating leads and prospects.

**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 active listening to the other person (in contrast, look down 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. 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. The one thing 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 an inquisitive nature. 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 covered by other mainstream or alternative media sources. Review court dockets to see whether their company 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 your homework, you should have some notes or new ideas that you can inquire about the outcome of the project.

Overall, make sure you learn what is needed to do any homework to find out.

**THE RIGHT QUESTIONS**

While listening is a key skill in relationship building, learning how to ask probing questions is equally important.
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 115 and 160 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 law as to public assistance 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.

Eligible applicants

There are four types: 1) state agencies; 2) local government entities; 3) private nonprofit (PNP) organizations, or institutions that own or operate facilities open to the general public and providing certain emergency, medical, custodial care and other essential governmental services; and 4) federally recognized Indian tribes.

Eligible facility

Any building, works, system or equipment built or manufactured, or any improved and maintained natural feature that is owned by an eligible public or private nonprofit (PNP) applicant, with certain exceptions.

The facility must: be the responsibility of an eligible applicant; be located in a designated disaster area; be not under the specific authority of another federal agency; and be in active use at the time of the disaster. Examples of eligible public facilities include: roads (non-federal aid); 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, hazardous 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.

Find out more: www.MassBar.org
such as, clearance of trees, woody debris, certain building wreckage, dam-egged/destroyed building contents; sand, mud, silt and gravel; vehicles; and other debris or materials deposited on public property and, in very limited cases, private property.

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

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 facili-eties, including drainage channels, pumping facilities and some irrag-ation facilities. Repair of levees, dams and other reservoir channels fall under Category D, but the eligibility of these facilities is restricted.

• Category E: Repair or replacement of power, gas, water, sewer, sanitary and storm drains; electric and telecommunication systems; and heavy equipment; and vehicles;

• Category F: Utility repair of water treatment and delivery systems; pow-er generation facilities and distribution facili-ties; sewage collection and treatment facilities; and communica-tions;

• 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 Cate-gories A-F.

13) The nine communities included Southbridge, Wilbraham, Sturbridge, Ware, Springfield, Brimfield, Monson, Wilbraham, Sturbridge and Westfield.

14) See 44 C.F.R., Part 206, Title 6, Section 6.5, Subsection (c). The maximum period of time during which beneficiary (or its representative) may be granted by the state. For permanent restoration work, an additional 30 months may be granted by the state. See 44 C.F.R. 206.223.

15) See Section 316 of the Stafford Act.


17) See also 36 CFR 800 (Protection of Environment) 42 U.S.C. 90, 94, 96, 107 and 111.

18) See 44 C.F.R. 206.223.

19) See Section 407(e) of the Stafford Act, (42 U.S.C. 5155); 449 Part 10 (Environmental information); 44 CFR Parts 1500- 1020 (NEPA Regulations), Environmental Protection, FEMA Policy 5660.1, dated Aug. 18, 1999; 44 CFR 900- 919 (Historical Preservation); 44 CFR 350 Sections 90-91.


21) See 44 C.F.R. 206.223.

22) See also 36 CFR 800 (Protection of Environment) 42 U.S.C. 90, 94, 96, 107 and 111.

23) See 44 C.F.R. 206.223. This states a list of ineligible projects. The following projects are considered ineligible: (1) any project for which there is not a state emergency or disaster; (2) any project involving the repair of any federal building; (3) any project for which federal funding is not available for the work; and (4) any project that is not determined to be an eligible project under Section 206.223 of this part.

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32) All other administrative costs are eligible. No other administrative costs are eligible.

33) Cost is “reasonable” if, in its na-ture and dimension, scope of work and other disaster-related material requirements, funding and program eligi-bility criteria. Each applicant should send representatives from management, public works, finance and legal.

34) Request for public assistance

This is the applicant’s official notifi-cation to FEMA of the disaster considered for public assistance. The request for public assistance is available online at the PA forms library. Typically, the request form is designed to address gaps, prejudices, problems, etc. If an applicant is unable to submit the re-quest at the briefing, the applicant must present the form within the stated deadlines of the PA program. 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 meeting

This differs from the applicant’s brief-ing conducted by the federal disaster as-sistance are covered by this allowance. No other administrative costs are eligible.

Cost estimate

FEMA may grant funds on the basis of actual costs or on estimates of damage to be completed. The three primary methods for determining costs are: time and materi-als, unit cost, and contracts. FEMA uses a methodology called the cost estimation format (CEF) for large projects to better estimate the total cost of large projects. There are tables online which depict the damage assessment and pricing, with ac-curat costs for the eligible completed work favored first and R.S. means cost data fa-vored least. (Go to www.fema.gov/gov-ernment/grant/ra/resources and select from among the cost estimating format resources.)

Validation

The applicant may prepare PWs for small projects. Large projects are devel-oped and reviewed by FEMA in coopera-tion with the applicant, and are submitted directly to the PAC crew leader for review and processing.

Improved projects

PWA may perform permanent restora-tion work on a damaged facility, an appli-cant may decide to use the opportunity to make improvements to the facility while the PW work is being done.


See 36 CFR 800.1 (Environmen-tal information); 44 CFR Parts 1500-1020 (NEPA Regulations), Environmental Protec-tion, FEMA Policy 5660.1, dated Aug. 18, 1999; 44 CFR 900-919 (Historical Preservation); 44 CFR 350 Sections 90-91.


generating leads

Continued from page 16

enough so that you can come up with some combinations that sounded 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, these 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 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 responsibilities 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 BBB. 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 website 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.98 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 HMA funding in a subsequent disaster unless it is repaired to meet codes and standards, and mitigation measures that would have been approved are applied.28

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) 956-7306

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 meeting 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.

chapter 93a

Continued from page 15

the Legislature intended to waive sovereign immunity in Chapter 93A.10

In reaching its decision, the court applied the test set forth in Tolido v. Town of Westfield92 and Bates v. Director of Office of Campaign and Political Finance,93 which 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.10

Because the Massachusetts Legislature decision stands as a trial court decision that will not be reviewed on appeal, it provides important guidance on an issue that has long eluded 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.11

1) MASS. GEN. LAWS c. 93A (2011).
2) MASS. GEN. LAWS c. 93A §5 (2011).
6) Id. at n.8.
7) Id.
8) Id.
9) Park Drive Towing, 442 Mass. at 86.
11) Id. at ‘12
12) We.
13) Id.

Chapter 93a

Continued from page 15

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

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8) Id.
9) Park Drive Towing, 442 Mass. at 86.
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12) We.
13) Id.
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 demand requirement has been satisfied.”

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 requirements to filing a derivative claim under Chapter 156D assume that the board of directors is distinct from the shareholders. It is also implicitly 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 delay. Under prior law, an exception to the futility requirement was an irreparable injury. The SJC has held that an exception to the 90- or 120-day waiting period where “irreparable injury” to the corporation is threatened or being suffered 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.

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.” As the SJC explained in Harren v. Brown, 431 Mass. at 842-44, “[i]n applying the irreparable injury exception to the 90 or 120-day waiting period where ‘irreparable injury’ to the corporation is threatened or being suffered, 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 to be considered is the same as that governing the entry of a preliminary injunction. Other factors may, however, be considered such as the possible expiration of the statute of limitations…”

The futility exception was an important tool for aggrieved shareholders because it provided an opportunity 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

When current law eliminates the futility exception, it eliminates an important tool for aggrieved shareholders. The availability of a 90-day waiting period to close corporations. While there is a benefit generally providing the corporation itself an opportunity to review and, if appropriate, take over the matter. However, even in circumstances where limiting unscrupulous or unmeritorious shareholders 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. The right to bring a claim in a close corporation is threatened or being suffered would likely only cause greater harm.

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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 plan to reduce health care costs and increase health care availability, 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 healthcare plan, hence its inclusion as part of the health care bill.

In the short term, the student loan overhang 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 Education Department does not make lending decisions based on credit scores, at least for Stafford loans, the primary funding mechanism for both undergraduate and graduate students. 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 programs through law school endowments 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 default. For the eligible for the federal Income-Based Repayment plan, a relatively new innovation, IBR caps student loan repayment at 15 percent of adjusted gross income. Excessive use of that plan would both reduce revenue 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 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 disbursement. 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 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 your education.

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 historically consistent real estate values would continue forward forever and enable many sliced-and-diced mortgage-backed securities to attain AAA ratings.

While it may be polite, even patrician, to assume that the higher-education-equals-higher-income equation is fact, if investors demand, 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 subprime 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 $47,000), 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 federal loans. And while some scholarships are financial aid, the vast majority of these discounts are cross-subsidies by incoming students: Student A pays full tuition largely from parents and friends; Student B receives some sort of 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 22.9 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 average 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 disbursement. 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...
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 in imputed income 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 graduates. And their unpaid loan balances reduce the federal funds available for future student loans.

ENDGAME
evven the likelihood of some form of curtailment 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, scrutinized 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 assure economic returns and the potential to be sociably 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, unenlightened 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 it will think it 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 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 any thing 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 objective 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
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