Senate Ways and Means releases budget proposal

BY LEE ANN CONSTANTINE

On May 16, the Senate Ways and Means Committee released its $32.2 billion fiscal year 2013 budget proposal. Included in the proposal was $561.8 million in funding for the Massachusetts Trial Court, $1.8 million more than the budget proposed by the House. The Senate budget also included full transferability for the newly appointed court administrator.

Additionally, the Massachusetts Legal Assistance Corporation was funded at $11 million, $3.5 million below MLAC’s requested amount necessary to restore critical legal services for low-income citizens. Sen. Cynthia Stone Crem (D-Newton), senate chair of the Joint Committee on the Judiciary, filed an amendment to add $3.5 million to MLAC’s budget.

The Committee for Public Counsel Services account was filed at $162.4 million by the Senate, compared to $162.2 by the House. Both branches have refrained from further expanding the ratio of staff counsel to assigned private counsel.

At the time of print, the Senate was poised to begin debate on the bad.
MBA leaders take part in ABA Day in Washington

Massachusetts Bar Association Vice President Marsha V. Kazarian and Chief Legal Counsel and Chief Operating Officer Martin W. Healy participated in American Bar Association Day in Washington, D.C., on April 18.

ABA Day gathers bar leaders from across the country to lobby their congressionals on issues of importance to the organized bar. The MBA has participated in ABA Day since its inception more than 15 years ago. In addition to meeting with members of the Massachusetts congressional delegation, Keynote Speaker Martin W. Healy attended a meeting at the White House with Cynthia Hogan, chief counsel to Vice President Joseph R. Biden Jr.; and MBA Vice President Marsha V. Kazarian attended the White House meeting to discuss the Federal Violence Against Women Act.

From left to right: MBA CDO and Chief Legal Counsel Martin W. Healy; Cynthia C. Hogan, counsel to U.S. Vice President Joseph R. Biden Jr.; and MBA Vice President Marsha V. Kazarian attended the White House meeting to discuss the Federal Violence Against Women Act.

WASHINGTON

ABA Day in Washington

From left to right: MBA CDO and Chief Legal Counsel Martin W. Healy; Cynthia C. Hogan, counsel to U.S. Vice President Joseph R. Biden Jr.; and MBA Vice President Marsha V. Kazarian attended the White House meeting to discuss the Federal Violence Against Women Act.
VIEWPOINT

The true cost of paper:
Rainmaker to RainforestMaker

BY JEFFREY S. GLASSMAN

If you ask any lawyer how much paper they use each year, the most common answer is, “I am not exactly sure, but it is a lot.” The reality is that lawyers are going through an estimated ten times more paper than the average office worker, resulting in millions of trees being destroyed each year. Even with modern technology leading firms towards a paperless office, many lawyers, including myself, have had a challenging time abandoning paper altogether.

My firm has always recycled and then converted to 100 percent recycled paper about five years ago. Even with these steps, however, it did not seem to be enough, because legal cases still produced reams of paper from third-party sources and opposing counsel. It was this realization that made me grasp my firm’s negative impact on the environment, but it also sparked an inspirational ideal that all lawyers could practice.

The core principle of the initiative was to achieve a sensible balance. Lawyers who originate substantial business are known as “rainmakers,” but most rainmakers produce legal fees without offsetting any of their firm’s negative impact on the environment. Believing it was possible to do both, I founded RainforestMaker in 2007. The idea for lawyers was an initiative called LATTE or Lawyers Accountable To The Earth. This was an invitation for all lawyers to simply replant the trees they used.

RainforestMaker received its first significant contribution from Greenberg Traurig LLP, which planted more than 2,000 trees in a vital biological corridor in Costa Rica. Last year, in Las Gaviotas, Colombia, my firm planted 16,000 trees in the memory of a 16-year-old girl we represented who was a shining star and passed before her time.

To date, RainforestMaker has planted more than 30,000 trees internationally, and now we have started to plant trees here in our own backyard of Boston. Our first project was a great success and was done in partnership with the Boston Natural Areas Network. Together with arborists, lawyers, teachers and neighborhood.
In its decision, the SJC noted:

Although the public has the right to be physically present in a court room, there is no constitutional right to bring cameras into or to make audio or video recordings of court room proceedings. Nixon v. Warner Communications, Inc., 435 U.S. 589, 610 (1978). However, if a court chooses in its discretion to allow recording, the person or entity making it has the same First Amendment freedom to disseminate the information it records as any other member of the print media or public, and the court is limited by the prior restraint doctrine in its ability to restrain the publication of the recording.

Live streaming video

At the forefront of the issue—and the reason for the SJC’s ruling—is OpenCourt, a pilot project run by Boston’s National Public Radio news station WBUR, which wants to educate the public about what really goes on in courtrooms by live streaming video footage of regular court proceedings at Quincy District Court. The live footage video, along with its archives, can be found on OpenCourt’s website, www.opencourt.org.

“The ultimate goal, at its most basic, is to reconnect the public with the courts,” said John Davidow, OpenCourt’s executive producer. “WBUR’s executive editor, "The founders imagined that justice would be done in public. Very few people understand or have knowledge of what goes on in the courtrooms."

OpenCourt’s live stream averages about 100 concurrent viewers at any given time, and viewers can also see how many people are also watching the live stream. Even though this pilot project is still in its infancy, it’s hoped that support for it, and its popu-

The justices of the Supreme Judicial Court announced on March 2 the approval of SJC Rule 1:19 governing “Electronic Access to the Courts,” effective July 1, 2012. After the new rule has been in opera-
tion for a year, the Court will review it to determine whether further revisions are needed.

SJC approves new rule governing media, electronic access to courts

The rule requires to clerk magis-
trates conducting public proceed-

ings.

As in the original rule, covert pho-
tography, recording or transmi-
sion is prohibited; a judge retains the right to limit or suspend elec-
tronic coverage if it would create a harmful consequence; and the media are required to make arrangements for sharing of video and still photographs. The new rule provides that minors and sexual assault victims may not be photographed without the consent of the judge. It continues the cur-
rent restrictions on recording or photographing voir dire hearings concerning jurors or prospective jurors, side-bar conferences, conferences between counsel and cli-

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tography of jurors and prospective

juries. The rule applies to clerk magis-
trates conducting public proceed-

ings.

In addition to one video and one still camera, a second mechani-
cally silent video camera is al-

lowed for use by media other than broadcast television and still pho-
tographers.

Motions to suppress may be elec-
tronically recorded.

If news media ask to record multi-
ple cases in a session on the same day, a judge may reasonably re-
strict the number of cases that are recorded to prevent undue admin-
istrative burdens on the court.

• News media are defined as those who are regularly engaged in the reporting and publishing of news or information about matters of public interest. This would in-
clude citizen journalists who meet this standard.

• News media are allowed to use laptop computers and other elec-
tronic communications devices inside courtrooms if they are not disruptive to the proceedings.

• Those seeking to cover the courts using the permitted technology are required to register with the Public Information Officer of the Supreme Judicial Court, confirm that they meet the definition of news media, and agree to follow the provisions of Rule 1:19. A judge has the discretion to permit electronic access by a person who had not registered.

Punitive damages are a deterrent, and a punishment, for an insurance compa-
ny’s bad faith and its unfair and deceptive claims settlement practices. These public policy decisions by the Massachusetts Legislature were discussed in the recent Massachusetts Supreme Judicial Court decision Rhodes, et al. v. AIG Domestic Claims, Inc., et al., 461 Mass. 480 (2012). The court found violations of the Con-
sumer Protection statute. Pursuant to the statute, the court ordered the jury award doubled.

Since the case involved a truck rear-
ending a car, there was no issue concern-
ing liability. The passenger was severely injured. The jury awarded damages for her lifelong care in the amount of $9.5 million, and, with interest, it amounted to $11.3 million. Decision: the amount should be doubled, the SJC stated that “[w]e recognize that $22,000,000 in $93A damages is an enormous sum, but the language and history of the 1989 amendment to c.93A leave no reason but to calculate the double damages award against AIGD based upon the amount of the underlying tort judgment.”

The court went on to say that “[t]he Legislature may wish to include more than a single, but less than double, dam-
gages; or developing a special measure of punitive damages to be applied in unfair claim settlement practice cases brought under c.176D, section 3(9), and c.93A that is different from the measure used in other types of 93A actions.”

It is as if the SJC was apologizing or embarrassed by its decision. This impres-
sion is unfortunate. It undermines the very public policy principles that gave rise to consumer protection statutes. The Legis-
aturer understood the unequal bargaining power between multinational insurance company and an individual claimant. The statute encompassed the rightly held view that monetary sanctions are the only way to change the unlawful behavior of an ins-
urance company.

As to the appropriate amount of pun-
itive damages to be awarded, the $22 million in the Rhodes v. AIG case is not typical. It should not be used as the cri-
teria or as an example of a fair punitive sanction. Rhodes is a catastrophic injury case with lifelong medical care and lost earning capacity. The more typical cases are those that are the bread and butter of personal injury practice. The parties are usually negotiating cases that are between $100,000 and $500,000. These types of cases are the ones that cumulatively save insurance companies millions of dollars each year when they refuse to settle them, even though liability has become reason-
ably clear.

It occurred against a jury verdict for $100,000, the doubling of the jury award would amount to a punitive damage award of $200,000. If one obtained a jury award of $250,000, and it was doubled in punitive damages to the $500,000, punitive damages, especially since sessions are held when proceedings at Quincy District Court, in particular, but in terms of understanding what happens in courtrooms. And the high-profile cases that are broadcast live don’t necessarily reflect what really goes on during proceedings.

“OpenCourt serves an educational function in terms of understanding what happens in the courts. Those seeking to cover the courts using the permitted technology are required to register with the Public Information Officer of the Supreme Judicial Court, confirm that they meet the definition of news media, and agree to follow the provisions of Rule 1:19. A judge has the discretion to permit electronic access by a person who had not registered.

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Senate tackles health care reform

BY LEE ANN CONSTANTINE

The Senate tackled a long-awaited health care reform measure last month which aims to contain health care costs in Massachusetts. The Massachusetts Bar Association with the Massachusetts Academy of Trial Attorneys, were vocal players in the debate in a few areas of the bill.

In a historic effort, the MBA, MATA and Massachusetts Medical Society proposed language, which was included in the Senate bill, pertaining to so-called apology and written notice laws.

Additionally, both the MBA and MATA were successful in efforts to amend the Senate bill, removing provisions requiring expert witnesses to be engaged in the practice of medicine at the time of the alleged wrongdoing; be board certified in the same specialty as the defendant, and a provision that would lower the interest rate in medical malpractice cases.

The House is set to begin debate on its health care reform bill in early June. The formal portion of the legislative session concludes on July 31, 2012.

News from the Courts

SJC CALLS FOR ADAMS PRO BONO PUBLICO AWARD NOMINATIONS

To recognize outstanding commitment to volunteer legal services for the poor and disadvantaged, the Supreme Judicial Court’s Standing Committee on Pro Bono Legal Services is seeking nominations for the 2012 Adams Pro Bono Publico Awards.

The deadline for nominations is Saturday, June 30.

The awards will be presented in a ceremony at the John Adams Courthouse on Oct. 24 in conjunction with the American Bar Association’s recognition of National Pro Bono Week.

AWARD CRITERIA

Awardees will be selected from those who have excelled in providing volunteer services in one or more of the following ways:

1. Volunteer participation in an activity or pro bono program which resulted in satisfying previously unmet needs, or in extending services to underserved segments of the population;

2. Successfully litigated pro bono cases that favorably affected the provision of other services to the poor; and/or

3. Successfully achieved legislation that contributed substantially to legal services to the poor.

NOMINATION GUIDELINES

Nominations should be submitted to:

Robert C. Sacco, Esq.
The 2012 Adams Pro Bono Publico Awards
C/o Lyon & Fitzpatrick LLP
14 Bobala Road, Fourth Floor
Holyoke, MA 01040

Contact Crystal Barnes at (413) 536-4000, ext. 122 or cbarnes@lyonfitzpatrick.com with questions.

Nominations submitted in 2011 remain active for consideration in the 2012 awards program provided that the nominating party submits a letter restating the intent to nominate the candidate and updating the narrative with any relevant information. Eligibility for the awards has been expanded this year to include law schools and law students.

MBA ON DEMAND

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SJC hosts annual meeting with bar leadership

**BY TRICIA M. OLIVER**

On April 23, the Supreme Judicial Court and Trial Court leaders hosted 50 leaders of statewide, county and local bar associations to provide updates on funding and the long range strategic planning process.

Supreme Judicial Court Chief Justice Roderick L. Ireland welcomed the bar leaders and thanked them for their continued support of the judiciary’s efforts to obtain needed resources and enhance the delivery of justice. He highlighted the leadership of the Massachusetts Bar Association and the Boston Bar Association on the issue of court funding.

At the meeting, Robert L. Holloway Jr., president-elect of the MBA, and Lisa C. Goodheart, president of the Boston Bar Association, shared personal experiences on ways court understaffing has affected them and urged their colleagues to take action this week during the House budget debate.

Chief Justice for Administration & Management Robert A. Mulligan provided an overview of the status of Trial Court funding for Fiscal Year 2013. He outlined operational challenges in providing security and full public access at many court divisions as a result of staffing shortages. He thanked bar leaders for their assistance through the fiscal crisis and asked them to advocate on behalf of the courts as the FY13 budget process continues in the Legislature.

“E-mail legislators with what you see,” Mulligan said. Newly appointed Court Administrator Harry Spence also addressed the bar leaders.

Shifting focus, Supreme Judicial Court Associate Justice Robert J. Cordy updated the group on the recently launched court strategic planning process. He indicated that input from the bar will be important in assessing the current state of the courts and identifying a realistic future vision. He encouraged meeting participants to engage their members in providing input throughout the process.

“This is not a time to back away from the challenges that lie ahead,” Cordy said. Cordy explained that Cynthia Robinson-Markey, the legal counsel to the chief justice of the Boston Municipal Court, was serving as the court’s project manager.

**Campbell featured at UMass Boston luncheon**

Massachusetts Bar Association President Richard P. Campbell was featured at an April 25 luncheon as part of the University of Massachusetts Boston’s “Someone to be Proud of” series. The event featured a sit-down dinner at the UMass Club in Boston, during which Campbell answered questions about his road to his current success as a trial lawyer.

In his introduction, UMass Boston Chancellor J. Keith Motley described Campbell as “a luminary in a highly competitive field.” Motley added, “We’re so proud of him.”

Campbell shared — with the intimate crowd of about 60 — stories from his modest upbringing in Medford, attending UMass Boston in its former Park Square location, the beginnings of his law career, and his current roles as founder and chairman of Campbell, Campbell, Edwards & Conroy PC and family patriarch with three grown children and grandchildren.

Campbell was prompted by interviewer Glenn Mangurian, an area businessman who organizes the luncheon series. Campbell described himself as an “okay student” in high school and recounted the tumultuous times of the late 1960s when he was seeking his undergraduate degree. “College years back then were different, especially in the city,” said Campbell, who later served for a year with the U.S. Army Reserve before attending Boston College Law School.

He spoke of his first job as a lawyer in New Jersey as a young husband with small children. He highlighted his most memorable cases, shared what it was like to serve as a trustee of the University of Massachusetts and offered his viewpoint on his role as the president of the MBA.

“It is an enormous honor, a huge honor to represent lawyers in the commonwealth. It’s as good as it gets,” he said, “except for being a grandfather.”

Following his speech, Campbell spoke to several UMass Boston students in attendance, fielding questions related to their studies and career paths.

University of Massachusetts President Robert L. Caret; Massachusetts Bar Association President and luncheon honoree Richard P. Campbell; UMass Boston Chancellor J. Keith Motley; and UMass Boston College of Management Dean Phillip Quaglieri.
Are you on the path to financial independence?

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Request your complimentary copy of "Essex Street Answers," our insightful guide to wealth management that answers some of life’s most challenging questions.
The MBA hosted its second Gateway Cities forum at the Worcester Trial Court on April 30.

“We are here tonight to answer the question of ‘How can Massachusetts Bar attorneys assist with the Gateway Cities in Central Massachusetts,’” said MBA President-elect Robert L. Holloway Jr. before introducing the event’s panel.

All leaders who have long worked with the issues affecting the state’s Gateway Cities, panelists included:

- Lt. Gov. Timothy P. Murray
- Massachusetts Secretary of Education S. Paul Reville
- Michael F. Collins, MD, chancellor of University of Massachusetts Medical School and senior vice president for Health Sciences for UMass
- Massachusetts Sen. Harriette L. Chandler (D-Worcester)
- Massachusetts Sen. Michael O. Moore (D-Millbury)
- Benjamin Forman, research director, MassINC
- Craig L. Blais, president, Worcester Business Development Corporation

Sharing the sentiment of panelists to follow him, Lt. Gov. Murray posed the question of “How do we bring time, attention and money to his initiative?” Murray explained that all of the 24 communities that the Patrick-Murray Administration have identified as Gateway Cities play a critical role in local and regional economies. These communities “continue to play an historic role,” he said.

Murray pointed to education, infrastructure, housing, economic development and arts and culture as the aspects needing attention to improve the livelihood of the Gateway communities.

MassINC Research Director Benjamin Forman commended both Murray and Reville on their attention to this issue. Forman tailored a portion of his presentation to Worcester specifically, pointing out that Worcester, when compared to other Gateway Cities, “has really stood out in increasing the share of its residents with a college education.” He did note that for the cities collectively, “We need to have a bigger and bolder” conversation about educational resources.

Forman also pointed to Worcester’s City Square project as a “great example of a city bringing all its resources to bear.” Following brief presentations from the other panelists, the remainder of the event was devoted to a question-and-answer session.

The April 30 event followed the success of the MBA’s debut forum in Dartmouth earlier this year. Worcester attorney Francis A. Ford moderated the event. Ford and Margaret Xifaras chair the MBA’s Gateway Cities initiative.

From left to right: Massachusetts Secretary of Education S. Paul Reville and Michael F. Collins, MD, chancellor of University of Massachusetts Medical School and senior vice president for Health Sciences for UMass.

From left to right: Massachusetts Sen. Harriette L. Chandler (D-Worcester) and Massachusetts Sen. Michael O. Moore (D-Millbury).


An attorney at the Children’s Law Center of Massachusetts helped a 21-year-old gain custody of her 16- and 12-year-old siblings (already involved in the juvenile court system) when their sole caregiver died of cancer.

The CLCM attorney worked to help her secure food stamps, SSI survivor benefits, MassHealth, Section 8 voucher and housing, fuel assistance and other social services to help the young family survive. The attorney went above and beyond his legal role to help the young woman with budgeting, taxes and financial management.

Thanks to the CLCM, the young family remains together, not split up within the foster care system, and is doing well.
FOURTH ANNUAL Networking Summer Social

Join us for this FREE networking event on the beautiful Boston waterfront — a great opportunity to create invaluable relationships within the legal community while relaxing and mingling with MBA members and friends.

Hors d’oeuvres will be served. Cash bar available.

Bring interested colleagues. Non-MBA members are also welcome.

R.S.V.P. online at www.MassBar.org/Social or call (617) 338-0530.
Health Law Conference
Tuesday, June 26, 9 a.m.–2 p.m.
MBA, 20 West St., Boston
Registration and continental breakfast will begin at 8:30 a.m.

Conference topics include:
• A discussion on physician apology;
• Healthcare needs of children with autism; and
• Finch v. Commonwealth Health Insurance Connector Authority

Sponsoring section: Health Law Section

Faculty:
• Stephen M. Faxon, Esq., conference co-chair
• Foster & Eldridge, Cambridge
• J. Michael Scully, Esq., conference co-chair
• Bulkley, Richardson & Gelinas LLP, Springfield
• Jeffrey Catasus, Esq.
• Todd & Wendt LLP, Boston
• Ashley Hagen, Esq.
• Commonwealth Health Insurance Connector Authority, Boston
• Claire McGregor, Esq.
• Law Office of Claire McGregor, Medford
• Lorraine Saunders-Wong, Esq.
• Health Law Advocates Inc., Boston
• Mary Schorer, RN, JD, Covenant Health Systems

Featuring Keynote Speaker
PROF. WENDY MARINER
Edward R. Utley Professor of Health Law, Bioethics & Human Rights
Boston University School of Public Health

Mariner combines teaching and research on patient rights, risk regulation, health reform, health insurance and ERISA, and has published more than 100 articles in the legal, medical and health policy literature. She is faculty director of the JD-MPH dual degree program. She also serves as co-director of the Boston University Clinical and Translational Science Institute’s Division on Regulatory Knowledge and Research Ethics and is chair of the Boston University Faculty Council.

Life Cycle of a Business
Part 4: Mergers and Acquisitions and Bankruptcy

Wednesday, June 6, 5–7 p.m.
MBA, 20 West St., Boston

Faculty:
• Matthew S. Furman, Esq., program co-chair
• Tarlow, Breed, Hart & Rodgers PC, Boston
• Jeffrey Barlow-Price, Esq.
• program co-chair
• Fenner & Nicholson, PC, Newburyport
• Eric Bower, Esq., Foley Hoag LLP, Boston
• Francis C. Morrow, Esq., Morrow, Wilson & Zafiropoulos LLP, Braintree
• David A. Parke, Esq., Bulkley, Richardson & Gelinas LLP, Springfield


Sponsoring section/division: Business Law, Young Lawyers

Tax Implications of Divorce, Taxation of Litigation

Thursday, June 7, 4:30–6 p.m.
MBA, 20 West St., Boston

Faculty:
• Susan Leahy, Esq., program chair
• Law Offices of Susan Leahy, Boston
• Tracey S. Barnett, Esq., Vacovec, Mayotte & Singer LLP, Newton
• Stephen A. Colella, Esq., DiCicco, Gulman & Company LLP, Woburn
• Susan Leahy, Esq., program chair
• Law Offices of Susan Leahy, Boston
• Tonya S. James, Esq., Vacovec, Mayotte & Singer LLP, Newton


Sponsoring section/division: Taxation Law, Young Lawyers

Tax Issues Related to Entities and Real Estate

Thursday, June 21, 4:30–6 p.m.
MBA, 20 West St., Boston

Faculty:
• Susan Leahy, Esq., program chair
• Law Offices of Susan Leahy, Boston
• Christopher A. Canley, Esq., Foley Hoag LLP, Boston
• Bryan MacCormack, Esq., MacCormack Law Firm, PC, Boston
• Lisa M. Reis, Esq., Bulkley, Richardson & Gelinas LLP, Springfield


Sponsoring section/division: Taxation Law, Young Lawyers

APPED AT-A-GlANCE
JUNE CONTINUING LEGAL EDUCATION PROGRAMS BY PRACTICE AREA

MASSACHUSETTS LAWYERS JOURNAL | JUNE 2012

REGISTER ONLINE AT WWW.MASSBAR.ORG/CLE OR CALL (617) 338-0530.
For the first time, the Massachusetts Bar Association’s Immigration Law Section held an all-day training conference. The May 9 conference offered attendees the opportunity to attend four panel discussions, which included experts who spoke on the effects of criminal conduct on immigration proceedings.

Jeannie Kain and Jennifer Klein — both lawyers with the Committee for Public Counsel Services’ Immigration Impact Unit — chaired the program, which provided experienced immigration law practitioners, as well as criminal defense attorneys, with the opportunity to learn more about how immigration concerns can impact representations.

“This program was very effective in bringing the criminal and immigration bars together,” Kain said. “We made a concerted effort to make sure the programming catered to both the experienced immigration lawyer and those defense attorneys who dabble.”

General Practice, Solo & Small-Firm Conference focuses on preparing for the future

The Second Annual General Practice, Solo & Small-Firm Symposium was held May 10 at Lombardo’s in Randolph. At the afternoon symposium, attendees were provided with practical tips on how to strengthen their business plans and embrace advances in technology, while also participate in a working lunch and networking reception.

Symposium panelists discussed a variety of topics, including the effects of cloud computing on law practices, innovative business models for the modern legal world, ethical issues surrounding contingent fee agreements and client management, and helpful networking techniques. Additionally, a panel of active and retired judges provided a heuristic analysis of alternative dispute resolution.


Got Paper?

Lawyers use 10 times more paper than the average office worker. A lawyer may go through an average of 24 trees each year. There are more than a million lawyers in the United States.

LATTE - LAWYERS ACCOUNTABLE TO THE EARTH

This spring, RainforestMaker and LATTE will be planting trees at several sites in the Boston area. To learn more and support local tree plantings, visit rainforestmaker.org/latte or email jeff@rainforestmaker.org.

Replant The Trees You Use

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Symposium panelists discussed a variety of topics, including the effects of cloud computing on law practices, innovative business models for the modern legal world, ethical issues surrounding contingent fee agreements and client management, and helpful networking techniques. Additionally, a panel of active and retired judges provided a heuristic analysis of alternative dispute resolution.


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Lawyers use 10 times more paper than the average office worker. A lawyer may go through an average of 24 trees each year. There are more than a million lawyers in the United States.
Mentoring Program celebrates successful third year

Mentors will play a large role in your career success. That was the message from three keynote speakers at an April 26 event celebrating the completion of the third year of the MBA’s Tiered Community Mentoring Program. The wrap-up event was held at the John J. Moakley U.S. District Courthouse in Boston.

The event featured Carmen M. Ortiz, the U.S. attorney for the District of Massachusetts; Massachusetts U.S. Marshal John Gibbons; and U.S. District Court of Massachusetts Judge Denise J. Casper.

"Dare to dream … if you don’t have dreams, you can’t make things happen,” said Ortiz, who shared that it was mentors who helped convince her to apply for her current position. “Surround yourself with people who encourage you, who believe in you as you make decisions along the way.”

Massachusetts U.S. Marshal John Gibbons and U.S. District Court of Massachusetts District Judge Denise J. Casper also made remarks.

The program, the idea of Norfolk Probate and Family Court First Justice Angela M. Ordoñez, matches 10 practicing lawyers with more than two dozen students from high school, college and law school. The program was honored with the 2011 ABA Partnership Award from the American Bar Association because of its commitment to diversity.

A total of $1,500 in scholarships were also awarded to students of Suffolk University Law School, Roxbury Community College and New Mission High School.
alize it has become more expensive to ignore the law in Massachusetts than to obey it. If one multiplies these medium-size cases over the course of a year or five years, the insurers will lose too much money. They will be exposed to too many potential punitive damage awards for them to maintain a “stonewalling” business model.

The public policy behind c.93A and 176D has just become effective. Neither the Court nor the Legislature should now eviscerate the law’s ability to protect consumers. As a result of the Rhodes decision, Massachusetts courts are no longer paper tigers when asked to enforce the state’s consumer protection laws.
get proposal. Following the Senate debate, each branch will appoint three members to a joint conference committee to reconcile the two budgets. The conference committee will produce one final conference budget to be sent to both branches for an up-or-down vote without further debate. The governor may approve the budget in part by making a number of vetoes to the document. Fiscal 2013 begins on July 1, 2012. Look for further status updates on the state budget, and any applicable calls to action, in the July issue of Massachusetts Lawyers Journal.
The SJC invites cameras into courtrooms

Massachusetts state courts have, with certain exceptions, allowed cameras in their courtrooms for some time, and shortly before issuing its Burns decision, the SJC issued on March 2, Rule 1:19 governing "Electronic Access to the Courts," effective July 1, 2012, laying out the guidelines for broader media access (see related story, page 14). Federal courts have been more restrictive. Underway is a three-year pilot program testing videotaping in 14 federal courts, including the District of Massachusetts, but there are significant differences between the federal program and OpenCourt's model. The federal program:

- Doesn't allow live streaming; rather, video footage will be archived and posted online later.
- Allows only civil matters to be filmed.
- Sessions are recorded by court employ-ees, not the media.
- The judge and both parties must give consent to be filmed. With OpenCourt, judges alone decide whether a live video feed will be allowed.

Indeed, consent is one of the thorniest issues with cameras in courtrooms and live streaming, raising concerns about the right to privacy against First Amendment rights. Denise Squillante, the MBA's immediate past president, frequently appears in probate and family court, where she thinks a person's right to privacy outweighs the public interest in some cases.

"That's what I'm hoping for is an accurate balance between the public's right to know and a person's right to privacy," Squillante said. "Because when you're in those courtrooms day in and day out, in those trenches, you really see some serious, sensitive issues that can have implications on those individuals forever."

Airing these issues on the Internet can have a ripple effect, first showing up on OpenCourt or a court's website, but later on social networking sites, resulting in unintended consequences for those involved. "That's what I'm afraid of," Squillante said. "Years ago, we did not have the mechanisms to communicate and spread information the way that we do today.

The SJC's recent ruling has made Squillante more fearful than ever that having cam-eras in the courtrooms will have unintended results. Although OpenCourt has a policy of not publishing the names of minors in its recordings, the SJC decided it would be unconstitu-tional to mandate a redaction of minors' names in these cases.

Davidow, who was pleased with the de-cision, said "WBUR is a responsible news organization and never had [any] intention of posting that material, but it was the court's role to act as the editorial voice of any news organization." The SJC wrote:

We conclude that any order restricting OpenCourt's ability to publish — by "streaming live" over the Internet, publicly archiving on the Web site or otherwise — existing audio and video recordings of court room proceedings represents a form of prior restraint on the freedoms of the press and speech protected by the First Amendment and art. 16 of the Massachusetts Declarations of Rights, as amended by art. 77 of the Amendments to the Massachusetts Constitute-nts. Such an order may be upheld only if it is the least restrictive, reason-able measure necessary to protect a compelling governmental interest.

I think the court’s decision was affirming of the practices and efforts that OpenCourt has made with all of the vari-ous stakeholders, both at the Quincy District Court level as well as with the state's judi-ciary committee," Davidow said. "It made us feel like we had a lot of due diligence along the way."

Squillante believes there is still a long way to go before the correct balance will be reached. "I think we need to re-look at the public records law and have a determination of what sessions should be closed or not. There's going to be some unintended results from this [and] implications for all of that are huge." Squillante's fears of allowing too much access have not been ignored. While she still isn't satisfied with the current system of determining what's appropriate for the cameras and what the future may bring, certain measures have been taken to ensure particular events don't get airtime. Those include events involving minors and victims of sexual assault. Other restrictions include broadcasting an individual's testimony and motion to suppress hearings.

"I think within the federal judiciary overall, there are different views on whether there should be cameras in the courtroom," said the Hon. Denise Jefferson Casper, of the U.S. District Court of Massachusetts. "I think this [pilot program] may show what the experiences are and whether people think that cameras have an adverse effect in any way."

This isn't the first time the federal courts have tried to put cameras in its courtrooms. A three-year pilot program was implement-ed in 1991 that permitted electronic media coverage of civil proceedings. At the end of the trial period, the Judicial Conference didn't approve the use of cameras for either civil or criminal proceedings, citing the "intimating effect of cameras on some wit-nesses and jurors."

Do cameras make the system better?

Even though the 1991 pilot program didn't lead to cameras in federal court-rooms, some argue that cameras will lead to a better understanding of and more confi-dence in the judicial system. Retired U.S. District Court Judge Nancy Gertner is one of them.

Gertner, who is also an OpenCourt ad visory board member and professor at Harvard Law School, doesn't feel there is a need for any more experiments at the federal level or that the argument that technology in the courtroom will be obtrusive is valid.

After having cameras in Massachusetts courts and other courts around the country for so many years, she said, "We know that's not true. And to the extent it does affect the participants, it makes people better judges, better lawyers, more carefully prepared." Gertner says she felt the same when she was a defense lawyer.

"I tried cases that were covered by the media," Gertner said. "I would go home each evening and watch the preceding day's video on Court TV. [I] could critique my performance, better understand how the de-fense was playing, etc. It was a plus on all sides.

"I hope that we allow cameras in the federal courts to the same extent that they are in the state court," Gertner added. "And if there are issues with respect to victims or jurors, they can be separately addressed. "The bottom line is 'public' has a different meaning today. It doesn't mean access to courts if you wait in line and happen to get a seat and sit in the proceeding. 'Public,' in all aspects, has to mean video and audio and the Internet."

Jackson, who was pleased with the de-cision, said "The rule is a great step forward. It's a good decision. It's a good step forward. It's positive. It allows cameras. It's a good day for transparency. It's a good day for the courts. It's a good day for the public. It's a good day for the mass media. It's a good day for the state. It's a good day for all of us. It's a good day for the future."
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EXCELLENCE IN THE LAW
Continued from page 1

judge in 2006. He is also a member of the Judicial Conference of the United States, having previously served on its committees on Criminal Law, the Federal Rules of Criminal Procedure, and Codes of Conduct.

Wolf delivered acceptance remarks that highlighted his great appreciation of America’s judicial system following his speaking engagements and other interactions with judicial colleagues around the globe. Wolf — due to leave for Russia the next day to conference with judicial colleagues there — shared that although he has “had to make some decisions I dreaded making,” he was free and safe to make those as an American judge without the risk of harmful consequences.

Wolf has been invited to speak on American democracy and human rights issues in Egypt, Cyprus, Turkey, the Czech Republic, Slovakia, Hungary and China. Wolf is a graduate of Yale College and Harvard Law School.

Cullen has written for The Boston Globe since 1985, and served as a local, national and foreign correspondent before becoming a columnist in 2007. His columns highlighted the suicide of a 15-year-old girl who had been bullied by schoolmates helped win the top award from the Dart Center for Journalism and Trauma at Columbia University in 2011.

Cullen has had several stints on the Globe’s Spotlight Team, including the 1988 team that exposed the mobster James “Whitey” Bulger as an FBI informant and the team that won the Pulitzer Prize for Public Service in 2003 for exposing the cover-up of sexual abuse of minors by Roman Catholic priests.

“We in our business can only push and point at the truth, but what all of you do can change culture,” said Cullen after receiving his honor.

The event also saluted the 2012 Up & Coming Lawyers, as well as the recipients of this year’s other Excellence in the Law awards for diversity, pro bono, marketing, firm administration and operations.

For a list of award recipients, visit www.masslaw.com.
years, Cullen has brought to his readers the circumstances of bad behavior, such as Phoebe Prince’s heart-wrenching suicide following repetitive bullying by her schoolmates and the willful blindness of school administrators. He also exposed the risk of injury and death that would likely follow from the politically motivated application to the United States District Court for access to Boston College’s Oral History Project interviews of former IRA leaders. But go back to that same corrupt FBI. Agent Thomas Daly “warned” (we now should say threatened) Cullen, who was then part of The Boston Globe’s investigative team looking into the Winter Hill gang, that he might be “clipped” by Bulger if disclosures were published. Cullen had to move his family to a hotel for protection, but the story was published nonetheless.

Kevin Cullen has spent his entire career speaking truth to power. He is a model of courage and integrity. He is a person of consummate honor and integrity. To say that she manifests grace under fire does not do her justice.

THE LEGISLATOR OF THE YEAR

The bar advocated for serious court reform, including the retention of a professional administrator, for many decades. Much credit goes to past presidents Paul Sugarman, Leo Boyle and others who studied the judiciary, identified necessary improvements and presented a comprehensive plan of action. Nonetheless, success depended on a legislator who stuck with the Massachusetts Bar Association, battled against entrenched interest groups, and delivered last summer long-awaited court reform. Every lawyer in the commonwealth should raise a glass to Speaker of the House Robert DeLeo. Without him, court reform would still be an idea.

THE ANNUAL DINNER KEYNOTE SPEAKER

Giving a keynote address to the state bar association, as with a university, is an honor. This year, however, the honor was bestowed on the Massachusetts Bar Association. Victoria Kennedy, legal scholar, accomplished practicing attorney, and renowned philanthropist, took time from her frenetic schedule to speak to our members and her colleagues at the bar. Kennedy is a person of consummate honor and integrity. To say that she

Calendar of Events

FRIDAY, JUNE 1

Health Law Legal Chat Series: Session IV Noon –1 p.m.
MBA, 20 West St., Boston

WEDNESDAY, JUNE 6

Law Practice Management Section Educational Series: Cloud Computing 12:30 –1:30 p.m.
MBA, 20 West St., Boston
Lifestyle of a Business Part 4: Mergers & Acquisitions & Bankruptcy: 5–7 p.m.
MBA, 20 West St., Boston
MBA Monthly Dial-A-Lawyer Program 5:30–7:30 p.m.
Statewide dial-in #: (617) 338–0610

THURSDAY, JUNE 7

Tax Practice Series: Tax Implications of Divorce, Taxation of Litigation Proceeds and Spoofing Issues on Tax Returns 4:30–6 p.m.
MBA, 20 West St., Boston

WEDNESDAY, JUNE 13

Latest in the Law: Business and Bankruptcy Update 4–7 p.m.
MBA, 20 West St., Boston

THURSDAY, JUNE 14

Latest in the Law: Labor & Employment Update 5–7 p.m.
MBA, 20 West St., Boston

FRIDAY, JUNE 15

Health Law Legal Chat Series: Session V Noon –1 p.m.
MBA, 20 West St., Boston

WEDNESDAY, JUNE 20

Law Practice Management Section Educational Series: Top 10 Practice Management Tips 12:30 –1:30 p.m.
MBA, 20 West St., Boston

THURSDAY, JUNE 21

Tax Practice Series: Tax Issues Related to Entities and Real Estate 4:30–6 p.m.
MBA, 20 West St., Boston

FRIDAY, JUNE 22

Health Law Legal Chat Series: Session VI Noon –1 p.m.
MBA, 20 West St., Boston

WEDNESDAY, JULY 11

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

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Ninth Circuit en banc decision creates circuit split with first circuit that affects employer claims against employees under the Computer Fraud and Abuse Act

BY BRIAN P. BIALAS

The U.S. District Court for the District of Massachusetts has noted that employers are increasingly using the federal Computer Fraud and Abuse Act (CFAA) “to sue former employees and their new companies who seek a competitive edge through wrongful use of information from the former employer’s computer system.”

But in April, the U.S. Court of Appeals for the Ninth Circuit made such employer lawsuits more difficult in that circuit by issuing its en banc decision in United States v. Nosal. In Nosal, the Ninth Circuit determined that an employee does not “exceed[] authorized access” to information in a computer under the CFAA when he or she violates an employer’s computer use restrictions.

In contrast, the First Circuit concluded more than a decade ago in EF Cultural Travel BV v. Esolpica, Inc. that contractual restrictions can serve as the basis for a CFAA violation. This circuit split affects the ability of employers to maintain lawsuits under the CFAA against former employees who were authorized to access their employer’s confidential information but took that information to competitors.

I. THE CFAA

The CFAA provides for both criminal and civil liability (if certain conditions are met1) when a person commits various acts involving a computer and “exceeds authorized access” or acts “without authorization” in the process.2 The provision under review in both Nosal and Esolpica was 18 U.S.C. § 1030(a)(4), which imposes liability on someone who “knowingly and with the intent to defraud, accesses a protected computer without authorization, or exceeds authorized access, and by means of such conduct furthers the intended fraud and obtains anything of value.”

The CFAA defines “exceeds authorized access” as “to access a computer with authorization and to use such access to obtain or alter information in the computer that the accessor is not entitled to so obtain or alter.”3 “Without authorization” is not defined. Both the Ninth Circuit and the First Circuit focused their respective analyses on the statutory definitions of these terms.

A. The Ninth Circuit

In its decision, the Ninth Circuit focused on the definition of “without authorization” and noted that the Seventh Circuit interpreted it to mean “accessing a protected computer without authorization or exceeding authorized access.”4

The Ninth Circuit, however, reasoned that “without authorization” is “not defined, judicial interpretations of ‘exceeds authorized access’ necessarily affect the meaning of ‘without authorization’ as well.”5

The Ninth Circuit stated that “‘without authorization’ means ‘accessing a protected computer without authorization or exceeding authorized access,’ not simply ‘accessing unauthorized information’ or ‘without authorization’ in the sense that information for the benefit of competitors is obtained through wrongful use of information.”6

The Ninth Circuit, therefore, concluded that “without authorization” means “accessing a protected computer without authorization or exceeding authorized access.”7

B. The First Circuit

By contrast, the First Circuit concluded that “without authorization” means “accessing a protected computer without authorization or exceeding authorized access.”8

The First Circuit also found that the Ninth Circuit’s interpretation of the term “without authorization” was incorrect. It noted that the Ninth Circuit’s interpretation was based on a circuit precedent that had been overruled by the Supreme Court.

II. THE NINTH CIRCUIT: LIMITING THE CFAA TO “HACKING”

In Nosal, the defendant Nosal worked for an executive search firm and convinced several employees shortly before he left to start a competing business with him. He asked the employees to use their log-in credentials to download confidential information from the firm’s computers and to send the information to him. The employees were permitted to access the information by their employer, but were forbidden from disclosing it. Nosal was indicted for aiding and abetting the employees in “exceed[ing] their authorized access” in violation of 18 U.S.C. § 1030(a)(4). The charge was dismissed by the district court, and the government appealed.

The Ninth Circuit reversed a district court decision and affirmed the government’s right to seek relief under the CFAA.

The Ninth Circuit focused its analysis on the term “without authorization.” It noted that the term “accessing” was used in the statute “in the same sense as the ordinary dictionary meaning of the word ‘access.’” The Ninth Circuit therefore concluded that “without authorization” means “accessing a protected computer without authorization or exceeding authorized access.”

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Counseling the board of directors of a Massachusetts nonprofit corporation

BY DAVID A. PARKE

An attorney who counsels the board of directors of a Massachusetts nonprofit corporation must be mindful of some special considerations that apply to a nonprofit board. This article will review the responsibilities of directors of a Massachusetts nonprofit corporation.

The directors of a nonprofit corporation perform functions that are similar to those performed by the directors of a business corporation. These include setting strategic goals, hiring and evaluating the chief executive officer, approving budgets and considering significant transactions involving the corporation.

However, unlike a business corporation, the board of a nonprofit corporation must act to achieve a specific charitable or other nonprofit mission. If the corporation is a public charity, the directors are essentially trustees of the corporation's assets, charged with properly applying those assets for the corporation's specific charitable purpose. If the corporation has been recognized by the IRS as tax exempt, the board must not allow any activities to occur that would expose the organization to tax penalties or loss of its exempt status.

Because nonprofit boards are often structured to satisfy a development role, or to represent the community in which the corporation operates, nonprofit boards tend to be larger and more diverse than business corporation boards. Unlike boards of business corporations, nonprofit boards typically consist of volunteer directors. Because of these differences, counsel has an especially important role in helping the board carry out its responsibilities in accordance with law.

DUTIES OF THE DIRECTORS

The duties of directors of a Massachusetts nonprofit corporation are well established. A director must act in good faith, and exercise fiduciary duties of care and loyalty. The relevant part of the Massachusetts nonprofit corporation statute, M.G.L. Ch. 180, Sec. 6C, states that a “director… shall perform his duties as such… in good faith and in a manner he reasonably believes to be in the best interest of the corporation, and with such care, the director must act in a manner reasonably believed to be in the best interests of the corporation.”

Where there are other statutory and common law provisions that are applicable to management of a charity under Massachusetts law, M.G.L. Ch. 180A addresses the management of funds of a charitable corporation. The Massachusetts nonprofit corporation statute, M.G.L. Ch. 180, requires involvement of the Massachusetts Attorney General before a public charity makes certain dispositions of assets or dissolves.

The board of a charity is limited in its power to change the charitable purposes of the corporation. As discussed below, the board is also limited in its power to delegate control over the charity's assets.

The requirement that a director act in good faith means that a director must act in an honest manner. A director is not acting in good faith if the director relies on third party information in approving any action, where the director has knowledge that would cause such reliance to be unwarranted. Failure of a director to make a reasonable inquiry into facts that support the director’s decision on a matter may also constitute lack of good faith. Failure to act in good faith can have significant consequences including jeopardizing the director’s right to indemnity by the corporation or coverage under any directors and officers liability insurance maintained by the corporation.

In exercising the director’s duty of care, the director must perform adequate due diligence as to any matter under consideration by the board. The Massachusetts nonprofit corporation statute permits a director to rely, under appropriate circumstances, on reports and recommendations from others. A director may rely on information from an officer or employee whom the director reasonably believes to be reliable as to the matter presented; from attorneys, accountants or other professionals as to matters that the director believes are within such person's professional competence; and from committees of the board as to matters delegated to the committee which the director reasonably believes merits confidence.

The "business judgment rule" may be available to protect a director from honest mistakes or errors in judgment. While the business judgment rule is applied with respect to business corporations in Massachusetts, it is not clear to what extent the business judgment rule would apply to directors of a Massachusetts nonprofit corporation. Under the business judgment rule, courts defer to decisions of the directors, who are presumed to have acted in the best interests of the corporation. Where the business judgment rule applies, a plaintiff must challenge the good faith or the investigative process of the board.

To comply with the duty of loyalty, a director must act in a manner reasonably believed to be in the best interests of the corporation. This means that a director may not improperly benefit from transactions with the corporation, may not divert opportunities that belong to the corporation, and must keep confidential private information learned as a board member.

The director’s compliance with his or her duty of loyalty will be vigorously scrutinized by the courts when a director acts as to a matter in which he or she has a conflict of interest.
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text and a broader interpretation “would transform the CFCA from a anti-hacking statute into an expansive misappropriation statute,” which the court would not presume Congress intended absent clearer language. A broader construction “would expand its scope far beyond computer hacking to criminalize any unauthorized use of information obtained from a computer.”

What is more, because § 1030(a)(2)(C) punishes a person who merely “exceeds authorized access” and “obtains information from any protected computer” without intent to defraud, a broader interpretation “makes every violation of a private computer policy a federal crime.” The court construed the statute narrowly “so that Congress will not unintentionally turn ordinary citizens into criminals” and concluded that “‘exceeds authorized access’ to the CFCA is limited to violations of re-strictions on access to information, and not restrictions on its use.” Because Nosal’s coworkers had permission to access the information, Nosal was off the hook.

The dissent, citing the Expolorica decision among others, noted that none of the other circuits to consider the meaning of “exceeds authorized access” read the statute the same way.

III. THE FIRST CIRCUIT: BREACH OF CONFIDENTIALITY AGREEMENT PROVES EXCESSIVE ACCESS

The First Circuit in Expolorica reviewed the district court’s issuance of a preliminary injunction against defendant Expolorica and several of its employees pursuant to § 1030(a)(4) of the CFCA. In Expolorica, an employee of Expolorica and a former employee of the plaintiff, EFF Cultural Travel BV (EFF), revealed EFF proprietary information to Zefery, a company employed by defendant Expolorica, in violation of its confidentiality agreement with EFF. Zefery then used that information to create a computer program that “scrapped” EFF’s public website of pricing information, thus allowing Expolorica to undercut EFF’s prices.

The court ruled that the district court’s decision was not clearly erroneous because “whatever authorization Expolorica had to navigate around EFF’s site (even in a competitive vein),” if EFF’s allegations were proven, EFF likely would prove that Expolorica “exceeded that authorization by using proprietary information and know-how to Zefery to create the scraper.”

In fact, “[p]ractically speaking, if proven, Expolorica’s wholesale use of EFF’s travel codes to facilitate gathering EFF’s prices from its website reeks of use—and, indeed, abuse—of proprietary information that goes beyond any authorized use of EFF’s website.” Although decided in a different factual and procedural context than Nosal, as one judge in the District of Massachusetts noted, the First Circuit in Expolorica “advocated a broader reading” of the CFCA than the Ninth Circuit.

IV. CONCLUSION: ON TO THE SUPREME COURT?

The Nosal decision’s statement that a CFCA violation is limited to violations of restrictions on access to information, not use, when read with Expolorica’s competing conclusion that a CFCA violation may be based on the abuse of proprietary information, crystallizes the CFCA circuit split for Supreme Court review.

Violations of employers’ contractual and computer use policies cannot be used to show a CFCA violation in the Ninth Circuit, but they can in the First Circuit.

Assuming the government seeks certiorari, a decision by the Supreme Court not to review the Nosal case will have an immediate impact on employer decisions on where to file CFAA claims against former employees who may have taken confidential information. In fact, the Nosal decision adds yet another hurdle for employers filing lawsuits in California (part of the Ninth Circuit) in addition to the un-enforceability of non-competition agreements as a matter of policy in that state.

The circuit split is even more important because of the location of important industries: Silicon Valley and Massachusetts (part of the First Circuit) are high-tech hubs where many companies rely on highly sensitive information to stay ahead of the competition. If the Supreme Court chooses not to review Nosal, more employers will file CFCA cases outside of the Ninth Circuit.

MOLONEY

Continued from page 38

state a reason when one is required. Fur-ther, Rule 2(d) as stated in the Uniform Summary Process guide requires that the Plaintiff state the reason(s) for eviction on the Summons and Complaint with sufficient particularity and completeness be-ing that it enables a defendant to understand the facts underlying those reasons.

Sometimes the landlord is attempting to evict the tenant for grounds that were not previously stated in the notice to quit. In this case, the landlord is confined to the grounds assigned in his notice to quit. It is extremely important for the landlord to be certain that the reason for the eviction is the same reason expressed in the notice to quit U.S.P.R. 2(d). In Massachusetts, some landlords are going about serving the tenants in the wrong way. It has been common practice for many landlords to serve the tenant with a 14-day notice to quit concurrent with a 30-day notice to quit. This practice is improper. It has long been the law in this Commonwealth that a landlord “may not blow hot and blow cold, and must choose one position and stick with it, whereby tenants are entitled under state law to unequivocal notices from their landlords.”

By sending these two notices to quit simultaneously, or within days apart, a landlord sends a mixed message to the tenant about the status of his or her tenancy, the timing of its termination, and whether there were steps he or she could take to reinstate the tenancy. In this in-

stance, the two notices cannot be read consistently with one another, as they deprive the tenant of his or her statutory cure rights to reinstate the tenancy. As the landlord’s notice indicates, he will pro-ceed with eviction based on the first no-tice, even if tenant pays the outstanding rent by the curative deadlines. This prac-tice should be discouraged by landlords, and thus challenged by tenants.

When a tenant or the tenant’s attorney effectively argues one of these procedural motions to dismiss, the adjudication will not be on the merits, thereby leaving the landlord to re-commence suit. Thus the tenant’s only value is one of a transactional time of delay, given that the landlord must start the summary process anew.

Many times in a summary process case, the tenant’s greatest gift and desire is to be given more time in order to find suitable housing accommodations. There-fore, utilizing these procedural defenses as a tenant’s attorney is a valuable tool, and is in the best interests of your client. Accordingly, the gift of time is also very important to both the landlord and the landlord’s attorney. Mastering these rules will effectively avoid refiling out forms and wasting precious time.
important that a nonprofit corporation, especially one that is a public charity, adopt and implement a conflict of interest policy. Where a director has an interest in a transaction under consideration by the board, that interest must be disclosed to the board. The interested director may not participate in the consideration by the board of the proposed transaction.

WHO MAY ASSERT CLAIMS

There are some immunities and other protections available to volunteer directors of a Massachusetts nonprofit charitable corporation. However, failure of a director to properly comply with his or her duties can still lead to individual exposure, and to costly and embarrassing consequences to the nonprofit corporation. Claims may be asserted by the Attorney General, the corporation, or those acting in place of the corporation, and government agencies such as the Internal Revenue Service. The Massachusetts Attorney General is charged with enforcing the due application of funds given or appropriated to a public charity. The Attorney General has broad power to challenge and seek appropriate remedies when the board fails in its duties. The Attorney General has, in recent years, taken action to address executive severance arrangements, compensation to outside directors, and appropriate remedies when the board fails in its duties to address executive severance arrangements.

RECOMMENDATIONS

Because of limitations on resources and volunteer time, it can be challenging for smaller nonprofit corporations to be aware of, adopt and follow all the best governance practices that are being reported. The following are some basic things that counsel can do to ensure that the nonprofit corporation is moving in the right direction:

1. Be sure the board has a sufficient number of independent directors

Having independent directors becomes critically important when the corporation must address related party transactions, and other conflict of interest situations.

2. Be sure that the board includes directors with the appropriate expertise

In this regard, the board should include directors who have financial management experience, who understand financial statements and budgets, and who can interact effectively with the corporation’s financial officers. Depending on the size of the nonprofit corporation, board expertise in other areas will be necessary.

3. Observe corporate formalities

For any proposed matter that must be acted upon by the board, counsel must consider what notice is required for a meeting of the directors, how the meeting should be called and notice properly given, how directors may participate in the meeting, and what are the quorum and approval requirements for board action. For certain extraordinary or extraordinary action approval of the members of the corporation may be needed. In some cases, the board should meet in executive session or in the absence of a specific director with a conflicting interest. Minutes should be taken and should carefully and accurately reflect the matters considered and actions taken. When there is a potential conflict of interest by a board member, the minutes should reflect how the conflict was handled.

4. Carefully consider the limits on what may be delegated or approved by the board

There are limits under Massachusetts law on the power of the directors of a charity to delegate their authority to others. The Massachusetts Supreme Judicial Court has held that the power of an officer of a charitable corporation to bind the corporation, without approval by the directors, must be more strictly construed than in the case of a business corporation. The board of a nonprofit corporation may not freely delegate authority to bind a substantial part of the corporation’s assets, or to transfer management of the charity’s assets to another authority.

What this means is that the board, rather than the officers, should consider and approve significant transactions involving the corporation; the board should approve the relevant terms rather than delegating authority to an officer to do so; and the board should be aware of its limited authority when confronted with any proposed transaction involving a transfer of management of a significant part of the charity’s assets.

5. Make sure the board is adequately prepared to make its decisions

Decisions about executive compensation, deployment of significant corporate assets, investment of corporate funds, and entry into ventures with other organizations may require a more developed record for the board. The board should not act unless it has made any effort to avoid having adequate information, and in appropriate cases, advice regarding standards that govern its decision making. For example, the presence of a chief executive officer’s compensation are often made under a compensation policy pursuant to which data regarding comparable compensation of similarly situated executives is made available. It may be appropriate to have a report and recommendation from a committee that has been charged to review issues on a particular matter on which the board is asked to act.

6. Diligently follow the conflict of interest policy

This is an area where directors and the corporation have special exposure. It is not uncommon for volunteer board members to have relationships that from time to time may create a conflict with the corporation. A nonprofit corporation must adopt a conflict of interest policy, and once adopted, follow it carefully. This includes obtaining regular disclosures from board members and officers regarding potentially conflicting relationships.

With respect to any specific transaction under consideration, a director must disclose any conflicting interest and permit the board to determine, without participation by the affected director, whether there is a conflict and whether the transaction is fair and appropriate.

Minutes should be kept that reflect the procedures followed and actions taken by the board.

7. Be prepared to guide the board when controversies arise

There are some immunities and other protections available to volunteer directors of a Massachusetts nonprofit charitable corporation. However, failure of a director to properly comply with his or her duties can still lead to individual exposure, and to costly and embarrassing consequences to the nonprofit corporation. Members of the board must make difficult decisions. Counsel should be available to guide the board with respect to its governance, management, and assist where internal investigations must be conducted. Counsel can be particularly helpful in advising where special litigation or other investigative committees should be formed, and how board and committee management should be conducted, especially where there is succession in management and where an individual’s expertise on the board, and adoption of important policy. Where a director has an interest in a transaction under consideration by the board, that interest must be disclosed to the board. The interested director may not participate in the consideration by the board of the proposed transaction.

Bylaws are the rules of the game. Each nonprofit corporation should have its own bylaw that defines what it does, for whom, and how. The nonprofit corporation statute contemplates that a nonprofit corporation will have members who elect the directors. In many nonprofit corporations, the board of directors is the same body that has the power of the members. In a nonprofit setting, where most or all of the members or directors can be volunteers, preservation of confidentiality and protection of the corporation from loss and the board should be aware of its limited authority when confronted with any proposed transaction involving a transfer of management of a significant part of the charity’s assets.

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