Governor recommends level funding for courts in 2013 budget

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**BY LEE ANN CONSTANTINE**

In late January, Gov. Deval L. Patrick filed his budget recommendations for fiscal 2013. Recognizing the tremendous cuts already endured by the court system, Patrick recommends level funding for the courts and grants transferability among Trial Court accounts.

Further, Patrick recommends removing the Probation Department from the auspices of the court and seeks to place it with parole under the Executive Office of Public Safety.

Additionally, in a repeat of his stance last year on restructuring the Committee for Public Counsel Services, Patrick proposes to further expand the use of public attorneys instead of state contracting with private counsel. Additionally, he recommends enhanced efforts on indigency verification.

Also, Patrick allocates $12 million for the Massachusetts Legal Assistance Corporation, a $1.5 million bump from fiscal 2012 funding levels.

The budget he led marks the beginning of a long and arduous process. In April, the House is expected to debate and pass its version of the budget. The Senate will follow suit in May with its version.

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**When the law school bubble finally bursts**

The law economy in the Commonwealth of Massachusetts annually suffers the introduction of 2,500 newly minted lawyers competing for approximately 720 identifiable paying jobs. Those new lawyers come to the commonwealth from nine law schools resident in the state1 and another seven law schools resident in the contiguous New England states.2

With the exception of three law schools that tend to place their graduates in large national law firms, federal government agencies and academic positions,3 most graduates of the New England law schools direct their job searches to the Commonwealth of Massachusetts. The math is both incontrovertible and depressing. Each year, these 16 law schools churn out more than 1,200 graduates who will not have jobs as practicing lawyers when they pass the bar and likely will never have satisfactory careers as full-time practicing lawyers able to financially support themselves and a family.

The Massachusetts Bar Association is actively engaged in the evaluation of the facts and circumstances that animate this problem. Led by Chairs Michael Hunter; and MassINC Research Director Benjamin Forrester, among others.

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**MBA hosts Gateway Cities forum at UMass**

**BY TRICIA M. OLIVER**

Members of the legal community, elected officials and other community leaders convened at the University of Massachusetts School of Law in Dartmouth on Jan. 26. Leading voices on Massachusetts’ Gateway Cities served as featured forum panelists, including Rep. Antonio Cabral (D-New Bedford) and Sen. Benjamin Downing (D-Pittsfield), chairs of the Gateway Cities Caucus; Executive Office of Housing and Economic Development Undersecretary for Business Development Michael Hunter; and MassINC Research Director Benjamin Forrester, among others.

Much of the discussion focused on the New Bedford community, a designated Gateway City. Common themes were the need for improving educational attainment in gateway communities and collaboration.

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**LEGISLATIVE NEWS**

**Governor recommends level funding for courts in 2013 budget**

BY LEE ANN CONSTANTINE

Governor recommends level funding for courts in 2013 budget

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**When the law school bubble finally bursts**

THE LAW ECONOMY IN THE COMMONWEALTH OF MASSACHUSETTS ANNUALLY SUFFERS THE INTRODUCTION OF 2,500 NEWLY MINTED LAWYERS COMPETING FOR APPROXIMATELY 720 IDENTIFIABLE PAYING JOBS. THOSE NEW LAWYERS COME TO THE COMMONWEALTH FROM NINE LAW SCHOOLS RESIDENT IN THE STATE AND ANOTHER SEVEN LAW SCHOOLS RESIDENT IN THE CONTIGUOUS NEW ENGLAND STATES. WITH THE EXCEPTION OF THREE LAW SCHOOLS THAT TEND TO PLACE THEIR GRADUATES IN LARGE NATIONAL LAW FIRMS, FEDERAL GOVERNMENT AGENCIES AND ACADEMIC POSITIONS, MOST GRADUATES OF THE NEW ENGLAND LAW SCHOOLS DIRECT THEIR JOB SEARCHES TO THE COMMONWEALTH OF MASSACHUSETTS. THE MATH IS BOTH INCONTESTIBLE AND DEPRESSING. EACH YEAR, THESE 16 LAW SCHOOLS CHURN OUT MORE THAN 1,200 GRADUATES WHO WILL NOT HAVE JOBS AS PRACTICING LAWYERS WHEN THEY PASS THE BAR AND LIKELY WILL NEVER HAVE SATISFACTORY CAREERS AS FULL-TIME PRACTICING LAWYERS ABLE TO FINANCIALLY SUPPORT THEMSELVES AND A FAMILY.

THE MASSACHUSETTS BAR ASSOCIATION IS ACTIVELY ENGAGED IN THE EVALUATION OF THE FACTS AND CIRCUMSTANCES THAT ANIMATE THIS PROBLEM. LED BY CHAIRS...
President’s Message
Continued from page 1
Eric Parker and Rhada Natarajan, the Task Force on Law, the Economy and Underemployment, comprises outstanding individuals from a wide variety of backgrounds:
• Hon. David Ricciardone, Massachusetts Superior Court, Boston;
• Heather Engman, Esq., Thornton & Norcross, Boston;
• Kyle R. Guelcher, Esq., Law Office of Kyle Guelcher, Springfield;
• John R. Koss, Esq., Mintz Levin, Boston;
• Marc A. Moccia, Esq., Suffolk Law School 2011 graduate, Boston;
• James L. Murphy, Esq., Mulchin & Radman, Boston;
• Lynn Sari Musto, Esq., Massachusetts Appeals Court, Boston;
• Elizabeth O’Connell, prelaw advisor, Wellesley College, Wellesley;
• Doreen M. Rachal, Esq., Bingham McCutchen, Boston;
• Paul Edward White, Esq., Sugarman, Rogers, Barshak & Cohen, Boston; and
• Marc Z. Zweckebenbaum, Esq., Marc Z Legal Staffing, Boston.

In addition, the deans of Suffolk, Boston College, Northeastern and Northeastern have appointed faculty members to serve as liaisons to the task force. The task force will present an interim, informational report to the House of Delegates in March. It will publish its final report and present any proposed resolutions (and perhaps draft legislation) at the May House of Delegates meeting. The work is extraordinarily important to our profession and we owe a debt of gratitude to the task force members.

But, like all matters related to the economy, forces beyond the direct control of the involved players are at work as we ponder the problems of the law economy. And professor William D. Henderson of Indiana University’s Maurer School of Law addressed at least one set of forces that is bound to have an impact.

Professor Henderson’s data is sickening.

“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 31 percent found employment in private law firms.”

We know from information developed by our task force that individual debt for law school alone can reach as high as $200,000.

Professor Henderson looked at the problem from the source of those borrowed funds; viz., the federal government. (You can read that term as “we the taxpayers.”)

“Direct federal loans have become the lifeblood of graduate education, and they shift law schools financially from the structural changes affecting the profession. The bills are now coming due for many young lawyers, and their inability to pay will likely be the scrutiny of lawmakers already moaning about government spending.” Warnings about the reliance on federal dollars to underpin law school financial structures have been issued by knowledgeable people for many years, according to Dean Phoebe A. Haddon of the University of Maryland School of Law.

But now, in the face of unemploy law school graduates who cannot repay their loans, Henderson poses the rhetorical question: “Should the U.S. government, through the Department of Education direct-lending program, continue to increase the amount of direct aid to graduate schools?”

Why indeed, as the funding crisis of our state courts so clearly demonstrates, when tax dollars are declining and legislators contort dire choices among many worthy programs (and specifically ones directed at homeland security and “wadowns and orphans”) less important programs are eliminated or cut short.

Terminating federal funding of law school tuitions will result in many law schools closing their doors. Professor Henderson posits one outcome that many in our profession would welcome: “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.”

That would work.

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Stumping for the MBA: Gateway Cities opportunities; Hampshire County news

GATEWAY CITIES UPDATE

By Robert L. Holloway Jr.

The MBA’s initial Gateway Cities forum held at UMass Law School in North Dartmouth on Jan. 26, ably organized by Margaret Xifaris and Fran Ford, confirmed that there are numerous existing opportunities for lawyers to get involved — now. The majority of forum participants, representing New Bedford and environs, echoed a common theme: mentoring is a crucial element in improving the quality of life and opportunities for the residents. Education, of course, also was deemed crucial.

But a more nuanced and expansive approach to education and training, as suggested by several of the forum participants, views mentoring as being not just for typical school-age individuals, but also, adults seeking to return to school, for typical school-age individuals, but also, adults seeking to return to school, frequently without a support system to assist them in doing so.

As an example, a single parent, who dealt with a pregnancy as a teenager and as an adult in her 20s, wants to better deal with a pregnancy as a teenager and assist them in doing so. An empathetic and supportive adult mentor can make all the difference.

There is a profound lack of time and opportunities for the residents. Education, of course, also was deemed crucial.

But a more nuanced and expansive approach to education and training, as suggested by several of the forum participants, views mentoring as being not just for typical school-age individuals, but also, adults seeking to return to school, frequently without a support system to assist them in doing so.

As an example, a single parent, who dealt with a pregnancy as a teenager and as an adult in her 20s, wants to better deal with a pregnancy as a teenager and assist them in doing so. An empathetic and supportive adult mentor can make all the difference.

The 15-year-old with a spotty record and guidance, can benefit from a mentor providing encouragement and other assistance in seeing to it that this youngster continues with school and gets a diploma. Urban school attendance rates are shockingly low, with correspondingly high dropout rates. Speaker after speaker echoed the theme that a little bit of mentoring help can go a long way in enhancing the prospects for appropriate education, training, employment and, ultimately, responsible, satisfying adulthood.

Opportunities already existing are abundant. For example, take a look at the SMILES mentoring program in New Bedford. This program works to keep youngsters in school, matching appropriate adult community members with youngsters. Similar programs no doubt exist in communities near you. Programs like these are wonderful opportunities for volunteerism.

Thinking more expansively about our role as lawyers in the society of which we are just a part is what the Gateway Cities initiative is really about. If the initial forum at UMass Law School is any indication, I am confident that there is much that we lawyers, individually and collectively, can do by thinking globally and acting locally, as the shopworn phrase goes. Stay tuned for more information as the Gateway Cities initiative progresses.

News from Hampshire County

As a representative of the MBA, I was privileged to attend the Hampshire County Bar Association’s 16th Annual Appreciation Reception & Contribution to Justice Award Ceremony at the Hotel Northampton on Feb. 2, 2012. The event was organized under the leadership of Hampshire County Bar President Leslie McLellan Brown. The award recipient was Diane “Dee” Grzeskowicz, the operations supervisor for the Hampshire Probate & Family Court. Grzeskowicz, by all accounts, is a superb example of what it means to be a dedicated public servant.

Speaker after speaker echoed the theme of her hard work, her expertise, her untiring good nature, her sense of humor, and ultimately, her ability to serve the public — lawyers and litigants alike — in a climate of declining resources for our courts.

Among the speakers I was pleased to hear was former MBA Family Law Section Council chair and Hampshire Probate & Family Court Judge Linda S. Fidnick, who did a masterful job praising Grzeskowicz. When she accepted the award, Grzeskowicz came across as the humble, dedicated public servant described by Judge Fidnick and others.

As I drove home that evening from Northampton to Topsfield, I reflected on our collective good fortune in having a court employee like Grzeskowicz, a county bar president like Leslie McLellan Brown, and a judge like Linda Fidnick.

While the event specifically was to honor Grzeskowicz, it had broader meaning. It is heartening and encouraging that we have court employees, judges and lawyers like these working together to do what our system is about: providing justice for all of us. It was an honor for me, as an MBA representative, to be at this event.

COMING ATTRACTIONS

It is my hope — scheduling logistics permitting — to attend many county and other bar association events throughout the commonwealth, in order to find out what you are thinking, and, in turn, to share when appropriate, some of my own views.

We have been experiencing many changes in our profession during the past 25 years or so, some of which have had a substantial impact on the way we practice law and how we interact with each other. We need to face up to these changes, adapt to them and take appropriate positions and action when necessary. Doing so will require good communication, among other things. I hope to hear from as many of you as wish to be heard. The MBA is, after all, your organization.
Lawyers seek millions more in legal aid funds at Walk to Hill

BY JENNIFER ROSINSKI

Hundreds of lawyers from across Massachusetts converged on the Statehouse Jan. 26 to implore their legislators for $14.5 million in civil legal aid funding in the fiscal 2013 budget.

The Massachusetts Legal Assistance Corporation called for a $5 million increase over the $9.5 million appropriated last year, though $1 million was added later as part of a supplemental budget to bring the fiscal 2012 total to $10.5 million.

The 13th annual Walk to the Hill for Civil Legal Aid featured a surprise visit from Lt. Gov. Tim Murray, who told a standing-room-only crowd in the Great Hall of Flags that he is confident the governor will sign a supplemental budget to increase MLAC’s funding this current fiscal year “because he believes in what you do.”

“You represent people who have been disenfranchised . . . You make sure they are heard,” Murray said. “Thank you for your advocacy.”

In the past four years alone, MLAC has seen its funding from the Interest on Lawyers’ Trust Accounts drop from $17 million to just over $3 million. At a time when the number of Massachusetts residents qualifying for civil legal aid has jumped 11 percent, to just under 1 million people, MLAC has reduced its staff attorneys by 34 percent.

“The free lunch from IOLTA is gone,” Supreme Judicial Court Associate Justice Ralph D. Gants said. “The legal problems of the poor have not dwindled. They, too, have grown.”

Gants said there is no way to ask for less than a $5 million increase, which he considers a “sound investment” for the commonwealth. “Legal services ensure the promise of justice for all is more than just a promise,” he said.

MBA President Richard P. Campbell commended the governor for stepping up and recommending $12 million for MLAC for fiscal 2013, but said it’s not enough.

“Legal service organizations throughout the state are being pushed to their breaking point as they are faced with drastic cuts in IOLTA funds and an ever-increasing need for services,” he said. “The sad truth is that the resources fall short of the need for legal aid.”

Increased funding is critical to restore service levels and prevent further cuts to legal aid programs, as they have been struggling to meet demand due to a 78 percent decrease in revenue since fiscal 2008 in IOLTA funding.

“Thousands of low-income Massachusetts residents with critical problems . . . have to be turned away when they seek legal aid,” Boston Bar Association President Lisa C. Goodheart said.

Without the help of Greater Boston Legal Services, Remon Jourdan of Randolph would never have been able to fix a discrepancy between MassHealth and his doctor that left his personal care attendants without pay for one month. Jourdan, who has been confined to a wheelchair since a car accident 10 years ago, said GBLS was able to convince MassHealth to retroactively pay his attendants.

“It was like a weight lifted from my shoulders,” Jourdan said. “I know it might not seem like a big case, but for me it was huge.”

The event was sponsored by the MBA, Equal Justice Coalition and Boston Bar Association, and co-sponsored by 30 county and specialty bar associations.

From left to right: Marybeth Hopkins, president of the Bar Association of Norfolk County; Veronica Kane, president of the Massachusetts Association of Women Lawyers; Richard P. Campbell, president of the MBA; Lisa C. Goodheart, president of the Boston Bar Association; Mansuha Bhutta, president of the South Asian Bar Association of Greater Boston; Christopher S. Pitt, president of the Real Estate Bar Association; Lucinda Rivera, president of the Massachusetts Association of Hispanic Attorneys; and Lisa Wilson, co-chair of the Massachusetts Lesbian, Gay, Bisexual, Transgender and Queer Bar Association.

PHOTOS BY JEFF THIEBAUTH

Hundreds of lawyers attending a Statehouse rally for civil legal aid heard Supreme Judicial Court Associate Justice Ralph D. Gants state that increased funding is a “sound investment” for the state. From left to right: MBA Vice President Jeffrey Catelano, MBA President Richard P. Campbell, Gants and Boston Bar Association President Lisa C. Goodheart.

Photos by Jeff Thiebaught
Middle East meets West

Joseph McDonough nurtures acceptance of rule of law education

BY CHRISTINA P. O’NEILL

When Boston attorney Joseph B. McDonough ran through the basics of electronic contract law at the Sultan Qaboos University Law College in Oman in 2009, his fourth-year law students gave him quizzical looks. “I was really teaching my students contracts for the first time,” he says. “I realized that they didn’t have the foundation that [Western] students have in contracts.”

“It was a great subject, because commerce knows no borders.”

JOSEPH B. MCDONOUGH

That knowledge gap is something that McDonough, who has 25 years of teaching experience, is bridging, not only in Oman, but throughout his career. His experience in international law has led to his appointment as a partner in the Abu Dhabi office of Holland & Knight LLP. The firm is expanding that office, which opened four years ago, due to the region’s rapid growth in energy, construction, transportation, finance and international arbitration. The Abu Dhabi office currently has 10 employees — half of them from the U.S. and half from the Middle East.

He has lived in the Middle East for the past few years. He has recently been selected to coordinate judicial reform and education programs for the supreme courts of Oman, Bahrain, Nepal and Yemen, all of which have large Muslim populations. “After preaching and advocating for three years, the opportunity with Holland & Knight will allow me to practice what I preach,” he says.

In his new post, he will work with younger attorneys from the region, many of whom have attended Western law schools. He will be charged with bringing them from the status of younger associates, arranging mentors for them, and getting them to work as a team, using critical thinking skills.

COMMERCE WITHOUT BORDERS

The adoption of uniform commercial standards, while necessary to make the country more attractive to business investment and development, is a delicate dance of diplomacy – the choreography of which McDonough is familiar.

Over three decades, Oman’s economic departments and its Ministry of Legal Affairs have been codifying its commercial law to conform more closely to global commerce standards, but the country’s legal educational system hadn’t kept up. [23]
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LEGAL NEWS

News from the Courts

FEDERAL

Sorokin named U.S. District Court chief magistrate judge


Sorokin, who was appointed to the court on April 11, 2005, presides over the Court Assisted Recovery Evaluator for the District of Massachusetts, which promotes the development and maintenance of sober, employed, law-abiding felons under the supervision of the court.

He has served as a faculty member on numerous educational programs sponsored by the U.S. District Court, the U.S. Court of Appeals for the First Circuit, the Federal Judicial Center, the Federal Bar Association and the Boston Bar Association. In 2009, the Boston Bar Association awarded him its Citation of Judicial Excellence.


He joined Mintz Levin (1992-94), then became an assistant attorney general (1994-97), where he represented indigent defendants in federal criminal prosecutions until his appointment.

STATE


The Supreme Judicial Court and its Executive Committee on Massachusetts Evidence Law announced the release of the 2012 edition of the Massachusetts Guide to Evidence on Oct. 26. The SJC justices recommend use of the guide by the bench, bar and public.

SJC Chief Justice Roderick L. Ireland commented: “I commend the members of the executive committee for their continued commitment to excellence by updating and expanding the Massachusetts Guide to Evidence to reflect new legal developments.

The guide is an outstanding and practical research tool that has quickly become a highly respected and well-used source of information for attorneys and judges. The SJC justices highly endorse the guide.”

The 2012 edition reflects developments in Massachusetts evidence law that occurred between Jan. 1, 2011 and Dec. 31, 2011. It includes dozens of new opinions issued in 2011 by the SJC, Appeals Court and the U.S. Supreme Court, as well as new sections addressing industry and safety standards, electronic or digital, consciousness of guilt or liability, and missing witness.

In addition, the committee revised the introductory note to Article VIII to address several opinions issued by the U.S. Supreme Court and the SJC that discuss the confrontation clause and hearsay in criminal cases.

The SJC established a 17-member advisory committee in 2006 to prepare a Massachusetts Guide to Evidence at the request of the Massachusetts Bar Association, Boston Bar Association and Massachusetts Academy of Trial Attorneys. Appeals Court Judge Marc K宛如itz is the editor-in-chief of the guide and chairs the executive committee, which includes: Hon. David A. Lowy (editor), Appeals Court Clerk Joseph F. Stanton (reporter), Hon. Mark S. Coven, SJC Senior Attorney Barbara F. Henderson, New England Law | Boston professor Philip K. Hamilton, attorney Elizabeth N. Mulvey, and Appeals Court Law Clerks Emily Hamrock and Lydia Edwards.

SJC urges judicial evaluation responses

The Supreme Judicial Court is asking attorneys to evaluate the performance of Trial Court judges. The evaluations, which were sent in late February, will help the SJC’s Judicial Performance Evaluation program enhance the quality of the judicial branch. Crucial to this effort is the full participation of the bar.

The SJC notes that a large response is more helpful in evaluating performance, and its evaluation program is the best opportunity for attorneys to offer their opinions of the members of the judiciary. The deadline for responses is April 12.

Suffolk County judges in the Boston Municipal, District, Juvenile, Housing and Probate and Family courts will be evaluated starting Feb. 22 by attorneys, court employees and jurors.

Attorneys who have appeared in these courts in the last two years, according to court records, will receive questionnaires. Attorneys will receive an e-mail asking them to log into the website to complete the evaluation electronically. As required by statute, the electronic system keeps the evaluations confidential and anonymous.

If an attorney’s e-mail is not in the system, a paper questionnaire is mailed.

The evaluation results will be transmitted to the judge, the chief justice of each involved court department, the supervisor of the Justice of the Supreme Judicial Court, and the chief justice for administration and management.

BABA to co-host Advocacy Day

MBA President Richard P. Campbell has announced the members of the 2012 MBA Nominating Committee. The committee is charged with reviewing the nominations submitted for consideration for MBA officer positions for the 2012-13 association year, which begins Sept. 1, 2012.

DENISE SQUILLANTE, CHAIR

She is the MBA’s immediate past president and a family law and corporate law practitioner in Fall River. A co-chair of the joint MBA/Boston Bar Association Alimony Task Force, Squillante also served on a legislative task force that drafted major alimony reform legislation enacted in 2011. She is a former president of the Fall River and New England bar associations, is a Massachusetts Bar Foundation Fellow and a Massachusetts Bar Association House of Delegates. She also received the MBA’s Pro Bono Publico Award.

VALERIE A. YARASHUS

An MBA past president and a principal with Meehan, Boyle, Black and Bogdanow P.C., she co-founded the MBA Monthly Leadership Roundtables, spearheaded the MBA Diversity Task Force from 2005 to 2007 and is a past president of the Massachusetts Academy of Trial Attorneys. Awarded the prestigious Wiedemann-Hyslop “Citizen of Excellence” from the American Association for Justice, she was named to Massachusetts Lawyers Weekly’s Hall of Fame for Up and Coming Lawyers.

EDWARD W. MCINTYRE

An MBA past president and a solo practitioner in Clinton, he is a U.S. Army veteran, sat on the MBA President’s Task Force on Judicial Evaluations and the MBA’s ABA Nominating Committee. Chair of MBA Judicial Performance Evaluation Standing Committee since 2004, McIntyre is a former recipient of the MBA’s Community Service Award and is a Massachusetts Bar Foundation Fellow and trustee.
From left to right: UMass School of Law Dean Michael G. Hillman shares a word with panel moderators Francis A. Ford and Margaret D. Xifaras prior to the Jan. 26 event.

Son, Benjamin Downing is flanked by Undersecretary for Business Development Michael Hunter (left) and Rep. Antonio Cabral (D-New Bedford).

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Divorce Basics: A View from the Bench and Bar

Thursday, March 1, 1-3:30 p.m.
MBA, 20 West St., Boston

Faculty:
Colvin, Hilsinger, Esq., program chair; Todd Weil, MBA, Boston; Ronn Mauro, Mark Petrille, Mediation Practice and Family Court
Cambridge; Elizabeth Miller, Esq., Mediator & 
Cheney, PC, Boston; Ross Versholes, Esq., maker
Southfield & Versholes, Newton

Sponsoring section/division: Family Law, Young Lawyers Division

FACULTY SPOTLIGHT
Marc C. Laredo, Esq.
Laredo & Smith LLP, Boston

Program chair, “It’s Confidential — Privilege Law in Massachusetts”

Laredo brings his strategic legal approach to business litigation, general business law and employment law matters. He represents clients in a wide array of business disputes, including commercial contract cases, disputes in closely held corporations, business torts, executive employment and non-competition litigation, government investigations, commercial real estate matters and construction cases. In addition, Laredo serves as counsel to closely held businesses, advising them on issues such as the initial formation and maintenance of the business entity, contracts and employment matters, as well as crisis situations.

Early in his career, Laredo served as an Assistant Attorney General in the Criminal Bureau of the Massachusetts Attorney General’s Office.

Laredo is a member of the Editorial Board of the Massachusetts Law Review and serves as its Book Review Editor. He is the author of The Attorney-Client Privilege in the Business Context and Shareholder Unions and Shadow Corporations in Massachusetts, both published by the Massachusetts Law Review. Also, Laredo reaches at numerous continuing legal education programs. He is a graduate of Cornell University and the University of Pennsylvania Law School.

How to Conduct an Open Meeting Law Training
Wednesday, March 21, 9-11 a.m.
MBA, 20 West St., Boston

Faculty:
Jonathan Schamic, Esq., program chair
Assistant Attorney General, Division of Open Government, Attorney General’s Office

Sponsoring section: Public Law

Conveying Real Estate Under the New MUPC
Thursday, March 29, 9-11 a.m.
MBA, 20 West St., Boston

Program chair: Elizabeth Burns, Esq., CARC, Wellesley

Sponsoring sections: Probate Law, Property Law

Don’t miss this MBA co-sponsored event ...

2012 Massachusetts Conference on Bullying

Bullying and the Law: Policies, Programs and Best Practices
Sponsored by the Massachusetts Bar Association, the Massachusetts Commission on GLBT Youth and School Climate Consulting Services
Friday, March 16, 8 a.m.—11:30 p.m.
Harvard Law School
Austin North Conference Room, 1-03 Massachusetts Ave., Cambridge

Keynote speakers: Dean B. Spigner, Esq., Washington; Tim & Aaron PLC, Huntington, IN;

Conference presenters: Richard K. Haskins, Esq., principal, Cole & Cole; Rights for Rights and Safe Schools Consulting, Boston; Paul Pattee, PhD, assistant professor, College of Education and Human Development, Boston University; Jeff Fairbanks, M.A., PhD, founding director, Massachusetts Department of Elementary and Secondary Education’s Safe Schools Program for Gay, Lesbian, Bisexual and Transgender Students; Randy Rice, M.S., M.A., executive director, Partnership for Excellence in Mental Health; Elizabeth Hein, Esq., adjunct professor, Northeastern University, and adjunct professor, Suffolk University

Register by Thursday, March 1 by contacting Nolly Gastineau at (617) 544-6452 or Nolly@SchoolClimateConsulting.org

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

REAL-TIME Webcast available for purchase at www.MassBar.org/OnDemand

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MASSACHUSETTS LAWYERS JOURNAL | MARCH 2012
**Bar News**

**MBA leaders meet with Lt. Gov. Murray**

MBA President Richard P. Campbell and fellow officers met with Lt. Gov. Timothy P. Murray at the Statehouse on Jan. 31. Among the topics covered were court funding, the MBA's Gateway Cities initiative, medical malpractice legislation and the recent expansion of the Committee for Public Counsel Services.

MBA Chief Operating Officer and Chief Legal Counsel Martin W. Healy and MBA Legislative Activities Manager Lee Ann Constantine also attended the meeting.

**Free YLD Speed Networking event pairs new, experienced lawyers**

More than 40 Massachusetts Bar Association attorneys and members of the legal community participated in the Young Lawyers Division’s Speed Networking event and reception on Feb. 9 at the MBA's Boston office. The program, which paired newer attorneys with experienced mentors, provided participants with an opportunity to gain insight into and information about various legal practices.

Volunteer Spotlight

**James E. Harvey Jr.**

Massachusetts Association Bar members who have found the MBA’s *Traps for the Unwary* helpful in their practice have attorney James E. Harvey Jr. to thank. Although Harvey is not one to willingly accept praise for the labor-intensive latest edition, he put hundreds of hours into the recently released sixth edition and spearheaded the comprehensive project that took more than a year to complete.

“*Traps* is for the conscientious lawyer who takes an issue or accepts a case outside his or her usual expertise, and doesn’t know where the landmines are. Over a hundred lawyers have contributed ideas that we’ve used, and we’ve been doing this for over 20 years, so *Traps* has become a clearinghouse for those hazards,” he said.

Harvey had the idea to produce the initial version of MBA’s *Traps for the Unwary* in 1987. According to Harvey, this was at a time when the economy was similar to today’s and many attorneys were accepting cases that they typically wouldn’t have.

Highly involved with the MBA’s Young Lawyers Division (YLD) at the time, Harvey brought five ideas to include in a “traps” guide to Steven Hoffman, the then-Civil Litigation Section chair. “Come to find out, Steve had 10 more ideas,” said Harvey. The first version of *Traps for the Unwary* was published in 1988.

Through his work with the MBA’s YLD, Civil Litigation Section, Insurance Committee, House of Delegates, and Nominating Committee, Harvey was highly involved in the MBA until 1996, when his law partner unexpectedly passed away. His MBA volunteer commitments diminished due to firm commitments.

Now a well-established attorney managing a very busy practice at O’Malley & Harvey LLP in Boston, he remains an MBA member and every few years takes on the responsibility with colleague Kevin G. Kenneally of LeClairRyan’s Boston office of editing and expanding the next version of *Traps for the Unwary*.

Now that the 6th edition of *Traps* is in the hands of MBA members, Harvey’s discretionary time is split between playing golf and volunteering for his church (St. Joseph’s in Belmont). His favorite golf opponent is his 90-year-old father — a former scratch handicap — who still manages to beat Harvey during their weekly games when the weather’s right.

When he’s not lucky enough to be playing golf, Harvey enjoys his career in the law and seems to thrive on the demands of the profession. “Being an attorney is a hard job, but if you didn’t love it, it really isn’t a job I love,” he said.

Much of Harvey’s family share that passion, as they too are in the legal profession. His uncle was a judge, while two of his four siblings are attorneys. Harvey’s wife, Mary, is also an attorney and practices insurance defense.

**2012-13 Nominating Committee**

Continued from page 15

**Thomas J. Barbar**

An attorney with Robinson & DONOVAN PC, she has been recognized as a Massachusetts Super Lawyer “Top 50 Women Attorneys.” A member of the Massachusetts, Hampden County, Women’s and Federal bar associations, Pelletier is also a fellow in the International Association of Defense Counsel and a Life Fellow of the Massachusetts Bar Foundation. She has also volunteered as a judge in the MBA’s Mock Trial program.

**Michelle E. Schaffer**

A shareholder at Davis, Malm & D’Agostine PC, Johnson was a co-chair of the Individual Rights & Responsibilities Section. He is a past president of the Massachusetts Bar Foundation, where he a trustee and an MBF Oliver Wendell Holmes Life Fellow. A member of the Massachusetts IOLTA Committee and Supreme Judicial Court Law Clerks’ Society, he has served as director of the Lawyers Committee for Civil Rights Under Law for more than 30 years.
Member Appreciation Reception

The Massachusetts Bar Association hosted its second 2011-12 association year Member Appreciation Reception on Jan. 26 at Lombardo’s in Randolph.

More than 50 members enjoyed hors d’oeuvres while networking, after the “How to Start and Run a Successful Solo or Small-Firm Practice” Conference.

From left to right: Rory J. Gill, Law Office of Rory J. Gill, Jamaica Plain; Alan J. Klevan, Klevan & Klevan LLP, Wellesley; Kathryn Vesco Chelini, Milford; Brian C. Olson, Squillace & Associates PC, Boston; and David A. Klein, Norfolk.

PHOTOS BY JEFF THIEBAUTH

Campbell wins ABA support for U.S. magistrate judge resolution

MBA President Richard P. Campbell addressed the American Bar Association’s House of Delegates on Feb. 6 at the ABA mid-year meeting in New Orleans.

Campbell was successful in his bid for the ABA delegates to adopt a resolution that supports the provisions of Title 28, U.S.C. § 636 (c).

The provisions grant U.S. magistrate judges the power, by request of either party, to conduct any and all proceedings in a jury or non-jury civil matter in federal court. It also orders the entry of judgments in the case as being consistent with and not violating Article III of the Constitution.

“The resolution addresses an access to justice issue,” said Campbell, who said that in the last decade alone, magistrate judges disposed of more than 10,000 civil cases per year under § 636 (c).

The MBA’s House of Delegates approved the same resolution on January 19, 2012.

PHOTOS BY DENISE SQUILLANTE

Campbell makes the case for a resolution regarding U.S. magistrate judges at the American Bar Association’s House of Delegates on Feb. 6.
MBF honors Judge William G. Young at annual meeting

The Massachusetts Bar Foundation honored U.S. District Court Judge William G. Young with its Great Friend of Justice Award at its annual meeting, which was held Jan. 25 at the Social Law Library in the John Adams Courthouse.

“Judge Young’s unwavering commitment to the rule of law in our society, to the absolute importance of trial by jury, and to the preservation of individual rights in our justice system exemplifies the values the MBF Great Friend of Justice Award recognizes.”

In his keynote address, Young inspired attendees, from left to right: Faye B. Rachlin, Community Legal Aid; Jonathan L. Mannina, Community Legal Aid; Joyce B. Tyrrell, Mass. IOLTA Committee; Sheila C. Casey, Neighborhood Legal Services; and A. Gerry Rappaport, Aserkoff & Gelles, to do all that those in the legal community, but for the nation’s general public.

2012 MBF officers, trustees announced

At its annual meeting Jan. 25, the Massachusetts Bar Foundation’s Board of Fellows unananimously elected its 2012 leadership, following the recommendations of the Nominating Committee, which was chaired by Francis A. Ford and included Steven L. Wollman and Craig E. Stewart, all of whom are past presidents.

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Newly elected MBF President Jerry Cohen of Burns & Levinson LLP (right) presents U.S. District Court Judge William G. Young with the MBF’s 2012 Great Friend of Justice Award.
DENISE SQUILLANTE

THURSDAY, MARCH 1
Divorce Basics: A View from the Bench and Bar
4:30–7 p.m.
MBA, 20 West St., Boston

WEDNESDAY, MARCH 7
Law Practice Management Section Educational Series: Marketing Madness: Ethical Marketing
12:30–1:30 p.m.
MBA, 20 West St., Boston

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

FRIDAY, MARCH 9
Tiered Community Mentoring Program: Adams Courthouse tour, SJC hearings observation
8:30 a.m.–noon
Supreme Judicial Court, One Pemberton Square, Boston

MBF IOLTA Grants Program applications due
MBA, 20 West St., Boston

FRIDAY, MARCH 16
2012 Massachusetts Conference on Bullying (co-sponsored by MBA)
8 a.m.–3:30 p.m.
Harvard Law School, 1563 Mass. Ave., Cambridge

MBF Legal Intern Fellowship Program applications due
MBA, 20 West St., Boston

MONDAY, MARCH 19
Court Advocacy Day
11 a.m.
Statehouse, Boston

Mock Trial Final Four Competition
1 p.m.
John Joseph Moakley U.S. Courthouse, One Courthouse Way, Boston

Mock Trial Final Four Competition
1 p.m.
Worcester Superior Court, 225 Main St., Worcester

THURSDAY, MAY 31
MBA Annual Dinner
Reception: 5:30 p.m.
Dinner: 7 p.m.

TUESDAY, MARCH 20
Responding to Disaster — FEMA Eligibility, Reimbursement
Noon–2 p.m.
MBA, 20 West St., Boston

WEDNESDAY, MARCH 21
Open Meeting Law
9 a.m.–11 a.m.
MBA, 20 West St., Boston

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 MBA Mock Trial Championship
10 a.m.–12:30 p.m.
Great Hall, Faneuil Hall, Boston

THURSDAY, MARCH 29
Conveying Real Estate under the New Uniform Probate Code
9–11 a.m.
MBA, 20 West St., Boston

It’s Confidential — Privilege Law in Massachusetts
9–11 a.m.
MBA, 20 West St., Boston

THURSDAY, MARCH 30
Taking on the Anti-Bullying Law from All Angles
11 a.m.–1 p.m.
MBA, 20 West St., Boston

FOR MORE INFORMATION, VISIT MASSBAR.ORG/EVENTS/CALENDAR
Mock Trial semi-finals, finals in March

BY ANDREA S. BURKE

High school students will compete in the semifinal and final elimination rounds of the 2012 Mock Trial Program at the end of March. This is the 27th year of the Massachusetts Bar Association Mock Trial competition.

This year’s civil case explores the level of responsibility of schools and teachers have in preventing and addressing cyber-bullying among students.

“School bullying has grown in substantial importance, attention in the media, and the recent anti-bullying legislation shows that people in Massachusetts want to use the law as one way to tackle this difficult problem,” said attorney Joshua A. McGuire, chair of the MBA’s Mock Trial Committee.

The semifinal elimination round will be held March 19 with simultaneous trials at the John Joseph Moakley U.S. Courthouse in Boston and Worcester Superior Court. Each of the four teams in this round will have already competed in at least five trials.

“(Teams) have seen the case from both sides, and had the opportunity to refine their arguments and presentations,” McGuire said. “The quality of the thinking and advocacy at this level is very high, and yet new challenges emerge in every round of the tournament.”

Two finalists will advance to the state championship on March 23 in the Great Hall of Boston’s Faneuil Hall. 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, first organized in 1985, places high school teams from 16 regions across the state in a simulated courtroom situation where they take on the roles of plaintiff attorneys, defense attorneys and witnesses. More than 100 high school students across the state participated in the 2012 Mock Trial Program, which began with preliminary trials at the end of January. Local attorneys serve as team coaches and judges in the preliminary rounds.

The Mock Trial Program is made possible by a grant from Brown Rudnick through its Center for the Public Interest in Boston, which has contributed $25,000 per year to the program since 1998.
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The improvement standard and observation status: Two barriers to Medicare coverage

BY ALICIA BERS

According to the statute, Medicare provides coverage for care that is “reasonable and necessary.” The real-world application of this standard, however, can become complicated. This article highlights two areas where Medicare’s purpose has been thwarted by policies that inappropriately deny coverage to beneficiaries. One of the policies—denied the “improvement standard” by advocates—has been deeply ingrained in the medical system for decades, whereas the other—“observation status” in hospitals—has come to the fore more recently.

IMPROVEMENT STANDARD

Many people who work with elders or people with disabilities have had the experience of a skilled nursing facility or home health agency informing them that a person’s Medicare coverage will be terminated because the patient has “plateaued” or is a “chronic” and “maintenance only” or simply not improving. It can happen, for example, to a patient in a physical therapy setting who is re-learning to walk or to a patient in a home health setting who requires ongoing wound care.

These coverage terminations are often devastating to the patient and his or her family, who have been relying on services to slow the course of a disease or maintain functioning. Some people cannot even access coverage in the first place because an agency will not accept a patient who is “chronic” or not able to improve. Many of those affected have pre-existing conditions, such as multiple sclerosis, Alzheimer’s disease, Parkinson’s disease or ALS.

The restoration potential of a patient is not the deciding factor in determining whether skilled services are needed. Even if it is recovery or medical improvement is not possible, a patient may need skilled services to prevent further deterioration or preserve current capabilities.

Further, the regulations regarding skilled services specifically recognize that there are cases in which maintenance therapy must be provided by skilled personnel.

Medicare recently clarified its home health regulations to emphasize that skilled care can include services to maintain a person’s condition, and that no informal rules, including those that require restoration potential, should be used to deny care.

But despite these directives, denials for patients who “plateau” or are “chronic” remain commonplace.

The improvement standard imposes a rule of thumb that operates as an allegorical condition for coverage. Many patients do not appeal coverage terminations because, based on what medical personnel have told them about the improvement standard, they think they cannot succeed.

And it is often the practice of Medicare contractors that conduct coverage determinations and lower-level administrative appeals to apply the improvement standard and deny coverage.

While beneficiaries who appeal up to the administrative law judge (ALJ) level have a better chance of success, such lengthy appeals are difficult to pursue, especially without representation, and beneficiaries generally must incur liability for the cost of services provided while their appeal is pending. Providers continue to apply the improvement standard because that is how they have been trained and how they see Medicare handling submitted claims.

There has been some litigation on the improvement standard resulting in decisions favorable to beneficiaries. U.S. v. Bowen prohibited the use of arbitrary rules of thumb and mandated that each patient’s unique medical condition be assessed to determine whether skilled physical therapy services are required. More recently, courts in Pennsylvania and Vermont held that Medicare had inappropriately applied an improvement or stability standard to individual beneficiaries.

The Department of Health and Human Services did not appeal these decisions, so they are not binding outside the states in which they were brought.

The state’s anti-bullying law and students with disabilities: Legal requirements and practical applications

BY ALISIA ST. FLORIAN

The Massachusetts Anti-Bullying Law, M.G.L. c. 71, s. 37O, went into effect on May 3, 2010. This article will examine the language of the statute and its practical application through the Individualized Education Program (IEP) Team process. Additionally, the Office for Civil Rights (OCR) has advised that insuring a student’s right to a private and appropriate education may implicate civil rights laws, which will require school districts to respond in a more global way, investigating whether a hostile environment exists in the school.

This article will also consider steps schools districts can and should take to avoid potential liability within the context of bullying as it relates to students with disabilities.

Finally, some observations from the field will be shared. Specifically, how special education teams should handle situations when both the victim and the aggressor are students with disabilities, and how to address the situation when a bullying investigation does not substantiate allegations of bullying, but the victim’s perception of being bullied impacts his ability to access his education and make effective progress.

On this last point, a description of a real scenario that an IEP Team recently encountered: At a team meeting for a ninth-grade student with special disabilities who had alleged bullying by a disabled peer, the following question was posed by the parent: Why not simply remove the alleged bully from the inclusion classes that her daughter attended so that the two students would not be together during the day? Sounds simple enough, but here’s the rub: the alleged bully was a student with Asperger’s Syndrome also a special education student at an educational surrogate parent for the child and a consulting educational advocate for the juvenile courts and an educational surrogate parent for the Department of Education.

The school’s investigation found that the bully made harassing statements to the victim as a result of provocation by the victim who, by reason of her disability, often made impulsive remarks to students that were perceived as socially inappropriate. To further complicate matters, the school was unable to substantiate the extent of bullying described by the victim, and it was suggested that the victim perceived greater bullying than was actually occurring.

Thus, at least two options were raised: 1) how to address the situation where both students are on IEPs; and 2) how to address impugning the victim’s reaction to the alleged bullying appeared disproportionate to the actual acts of bullying. Add to this that the team needed to be careful to maintain both students’ confidentiality, what ensued was a system that, from the parents’ perspective, a rather unsatisfactory discussion about how her daughter’s needs and safety could be met by the school.

The team’s eventual response followed, but first a review of the law: Section 7 and 8 of Chapter 92 of the Acts of 2010 (An Act Relative to Bullying in Schools), amending M.G.L. c. 71B, s. 3, reads as follows:

Section 7: Whenever the evaluation of the Individualized Education Program team indicates that the child has a disability that affects social skills development or that the child is vulnerable to bullying, harassment or teasing because of the child’s disability, the Individualized Education Program (IEP) team shall add the skills and precautions needed to avoid and respond to bullying, harassment or teasing.

Section 8: Whenever an evaluation indicates that a child has a disability on the autism spectrum, which includes autistic disorder, Asperger’s disorder, pervasive developmental disorder not otherwise specified, childhood disintegrative disorder, or Rett’s Syndrome, as defined in the most recent edition of the Diagnostic and Statistical Manual of the American Psychiatric Association, the Individualized Education Program (IEP) team, as defined by regulations of the department, shall consider and shall specifically address the following: the verbal and nonverbal communication needs of the child; the need to develop social interaction skills and problem-solving skills; and the precautions needed to avoid and respond to bullying, harassment or teasing.
**MEDICARE COVERAGE**

Continued from page 17

However, in January 2011, the Center for Medicare Advocacy and Vermont Legal Aid filed a national class action lawsuit against the secretary of Health and Human Services to end the improvement standard at a fixed nation-wide level of 15%.

**v. Sebelius** was filed in the District of Vermont on behalf of several individual plaintiffs and organizational plaintiffs, including the National Multiple Sclerosis Society, the Alzheimer’s Association and Paralyzed Veterans of America. The plaintiffs challenge the secretary’s continued use of the improvement standard as a policy that results in the illogical termination, reduction or denial of Medicare coverage to thousands of beneficiaries. In October 2011, the court largely denied the government’s motion to dismiss. The motion for class certification is pending. As this case proceeds, the goal is to eliminate this unlawful rule of thumb and ensure that each Medicare beneficiary receives coverage based on his or her unique condition and individual needs as required by law.

**OBSERVATION STATUS**

Another more recent barrier to Medicare coverage in hospitals and skilled nursing facilities is the observation status during hospitalization. For Medicare to cover a stay in a skilled nursing facility, it is required that the stay be covered by the Medicare hospita lization benefit. Medicare Advantage plans do not require a hospital stay to cover a stay in a skilled nursing facility, and they were formally classified as being on observation status or receiving “observation services” for the cost of the stay. Observations are said in part of the way we medicare has paid for medical services for patients who were classified as being on observation status for three days or more. Observations are nowhere allowed in the Medicare Payment Advisory Commission’s InterQual criteria published by the Massachusetts Health Foundation.

“Observation services” are not found in Medicare policy. What hospitals tend to do is to order a patient that is classified as an inpatient or outpatient are the “InterQual” criteria published by McKesson Corp. These criteria are pro-

MARCH 2012

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Image 36x98 to 203x236

President Jerry Cohen.

MBF Immediate Past President Joseph P. J. Vrabel (right), presents the presidential gavel to 2012 MBF President Jerry Cohen.

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**MF**

MFB Annual Meeting

Continued from page 13

Citing a troubling decrease in trial by jury, particularly in the federal courts on civil claims, the MFB was challenged to find a way to embolden to seek out ways to keep this vital aspect of democracy alive. He said, “[T]here is here to be a place where these words that we often hear the judicial system to be fair and impartial — where these words have actual meaning, and justice is done.”

In addition to honoring Young, the MFB inducted 14 new Late members into the MFB Society of Fellows, all of whom successfully completed generous pledges to advance the MBF’s mission of increasing access to justice. Before closing the meeting, Cohen stated that the MFB’s message is one that seeks to serve the structure and scope of legal services and urged outreach by the MFB Fellows to identify new sources of funding and ways to use to the effects of the drastic cuts in interest on Lawyers Trust Accounts (IOLTA) and other funding sources in the future to amplify and continue their efforts. Cohen told the lawyers and judges present, “In addition to teaching today’s truth of the legal system, as urged by Judge Young, we can also preach a vision built on the right time spent in observation status to count toward the three-day stay requirement has been introduced in both the House of Representatives and the Senate. A congressional briefing sponsored by the Center for Medicare Advocacy, AARP, the Alzheimer’s Association and the National Multiple Sclerosis Society, among others, was held on October 11, 2011.

In November 2011, the Center for Medicare Advocacy and the National Senior Citizens Law Center filed a national class action lawsuit against the Secretary of Health and Human Services that seeks to end Medicare’s practice of depriving beneficiaries of Part A, inpatient coverage of their hospital stay by allowing (and, in fact, implying) pre-hospitalization observation status.

ADVANTAGE program who receive their coverage through private companies.

The problem also arises for beneficiaries enrolled in the Medicare Advantage program who receive their coverage through private companies.

The only provision in the Medicare statutes that requires improvement is specifically for Medicare’s “medically necessary” admission.”

In 2011, the MBF IOLTA Fund, which seeks to end Medicare’s practice of depriving beneficiaries of Part A, inpatient coverage of their hospital stay by allowing (and, in fact, implying) pre-hospitalization observation status, has been made permanent by the Tax Relief and Health Care Act of 2009. The Medicare Payment Advisory Commission, which will probably be decided in the next few months.

Dealing with Medicare denials caused by either the improvement standard or observation status can be very difficult. While there are no quick fixes at the moment, beneficiaries are advised to seek help from advocates. They can also ask their claims representatives to refer them to the support of a treating physician.

The website of the Center for Medicare Advocacy contains self-help packets for open ended Medicare claims and Paralyzed Veterans of America.

For more information, go to www.masslawfoundation.org.
CONTINUED FROM PAGE 16

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The first step in ensuring compliance with these provisions is meaningful evaluation. Without data, a team cannot address a student’s vulnerability to bullying effectively. Massachusetts special education regulations require an initial evaluation to include an “an assessment of the student’s attention skills, participation behaviors, communication skills, memory, and social relations with groups, peers, and adults.” The Individuals with Disabilities Education Act (IDEA) regulations include a similar provision.

The anti-bullying law mandates that IEP teams address bullying for all students identified on the autism spectrum. Autism Spectrum Disorder (ASD) runs on a continuum and is generally defined as “a group of developmental disabilities that can cause significant social, communication, and behavioral challenges.” Research shows that students on the Autism Spectrum are three times more likely to be bullied than their non-disabled peers.

Students with ASD tend to be both excluded by peers and to exclude themselves from social interactions, creating further isolation. Furthermore, their behavior is often viewed as “odd” by their peers, making them easy targets for bullies. They may be less likely to report incidents of bullying to school staff because their social cognition problems can lead them to assume that others are already aware of what has happened or because they simply do not understand that they are actually being bullied (particularly with more subtle forms of bullying).

While the anti-bullying law carves out a mandate to address bullying with students with ASD, it also requires IEP teams to consider the issue of bullying for students whose disabilities make them vulnerable to bullying. Research has shown that students diagnosed with learning disabilities (LD) and/or attention-deficit/hyperactivity disorder (ADHD) are more likely to either be the aggressor or the victim of bullying than typically developing peers. “Characteristics of LD that include difficulties with language, attention, information processing, and problems with interpreting social cues may be interfering with the development of well-adjusted social relationships with peers.”

Therefore, rather than focusing on the diagnosis itself, IEP teams should consider the individual student and identify whether the student displays deficits or weaknesses that make him or her vulnerable to either being a victim or aggressor of bullying. If the team, upon review of evaluation reports, teacher and parent reports and other available information, makes the determination that the student is vulnerable to bullying, the next question is how to address that through the IEP.

The Massachusetts Department of Elementary and Secondary Education (DESE) has provided guidance to IEP teams about accommodations and services which can be added to a student’s IEP to address these vulnerabilities. Examples include: providing additional supports during those unstructured times of day, such as lunch and recess, when incidents of bullying are more likely to occur; designating a “safe” contact person within the school that the student can go to immediately when he or she feels that bullying has occurred; providing counseling; participation in a social skills group; and providing a functional behavioral assessment and behavior intervention plan.

IEP teams should take a “think-outside-the-box” approach to addressing bullying through the IEP and should tailor the accommodations and services so that they are appropriate to the age and circumstances of the particular student. This can be especially important if the student’s disabilities make it difficult for him or her to identify bullying in the first place.

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If discovered, “a school must take prompt and effective steps reasonably calculated to end the harassment, eliminate any hostile environment and its effects, and prevent the harassment from recurring. These duties are a school’s responsibility even if the misconduct also is covered by an anti-bullying policy, and regardless of whether a student has complained, asked the school to take action, or identified the harassment as a form of discrimination.”

To ensure compliance with civil rights laws in the context of bullying, school districts should adopt a practice of investigating the conduct in question, not just for the purpose of determining whether bullying has occurred, but also to examine whether a hostile environment is created within the school community. OCR has said that interventions should include, depending upon the nature of the incident, staff training and measures to ensure that further acts do not occur.

One practical way of putting staff and administration, as well as students and parents, on notice of the dual requirement to address bullying and possible related discrimination is to cross refer- ence the school’s anti-bullying policy with its anti-discrimination policy in its staff and student handbooks.

School districts may be liable for bullying under civil rights laws. The legal analysis is whether the bullying is sufficiently serious and pervasive to cause a hostile environment, whether the school has actual or constructive notice of the bullying, and whether the school failed to respond appropriate- ly. Courts have looked to whether the school district demonstrated “deliberate indifference” or “bad faith or gross negligence.”
The court noted that “The MTCA provides a waiver of sovereign immunity in limited circumstances. Section 10(j), however, retains sovereign immunity for ‘any claim based on an act or failure to act to prevent or diminish the harmful consequences of a condition or situation, including the negligent or tortious conduct of a third person, which is not originally caused by the public employee.’” 10

While litigation on this issue is in its infancy, there is at least one Superior Court case that dismissed students’ claims of negligence and infliction of emotional distress in the context of bullying. While litigation on this issue is in question, as well as the larger issue of whether the bullying is creating a hostile environment for students who are members of a protected class, school districts will be on their way to protecting themselves from potential liability and, most importantly, helping to create an atmosphere of tolerance where bullying does not occur on the first place.

Accordingly, the MTCA bars the Parsons’ claims for negligence, negligent infliction of emotional distress and loss of consortium.11,12

Where clearly a school district is responsible to react quickly and effectively to allegations of bullying, efforts to prevent bullying in the first place should be the ultimate goal. For students with disabilities who are vulnerable to bullying, the focus is on the IEP team and the ability to gather necessary data to make thoughtful decisions about how to provide students with necessary services to address their vulnerabilities.

By addressing the bullying incident in question, as well as the larger issue of whether the bullying is creating a hostile environment for students who are members of a protected class, school districts will be on their way to protecting themselves from potential liability and, most importantly, helping to create an atmosphere of tolerance where bullying does not occur on the first place.

The court noted that “This is precisely the type of failure to prevent harm by a third person for which § 10(j) provides governmental immunity. Accordingly, the MTCA bars the Parsons’ claims for negligence, negligent infliction of emotional distress and loss of consortium.” 10

In the end, this team set up a plan, having first completed a functional behavioral assessment of the student/victim, that involved: daily check-ins with the student, a designated point person that the student/victim could go to at any time of the school day when he felt unsafe and/or needed to check-in with an adult; a change in lunch schedule so that the two students would not be together during this unstructured time of the day; and consent from the parent for the school district to communicate with the student’s private therapist.

While the parents’ request to separate the students in their academic classes was denied because the placement of those students had been made by their respective IEP teams, steps were taken to address the allegations of bullying. While far from perfect, the team devised a plan, to be carefully monitored, that both the school district and the family could agree to.

To summarize, the anti-bullying law mandates addressing vulnerability to bullying for students with disabilities. The importance of following school policy and using the team meeting as a forum to think critically about how to address the issue is paramount. Issues of confidentiality and maintaining parent trust through the process are challenges that teams will face. In the end, a district will be judged by its response to allegations of bullying and the efforts that it undertakes to create a safe educational environment for all of its students.

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McDonough nurtures acceptance of rule of law in Oman

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When McDonough joined the SQU faculty in 2009 as the first Westerner to serve as an adjunct law professor in commercial law, he had developed expertise in practicing or teaching electronic commerce, and the country’s judiciary was concerned that they would be asked to reevaluate business law, particularly in the Middle East, and which tends to be vague in commercial areas, with Western law.

McDonough had been involved in a formerly novel Shariah law program until 2004, when it began a commercial track reflecting global standards. Upon his arrival, McDonough constructed a course pattern around the Uniform Electronic Transactions Law, passed in Oman in 2008, collaborating with Dr. Hussain Said Al Ghafri, of the Oman Information Technology Authority, and utilizing course materials from the U.S. Commerce Department’s Commercial Law Development Program. James Filpi, now senior counsel with the International Trade Law Development Program (CLDP) in the Office of the General Counsel of the U.S. Department of Commerce, had helped McDonough’s, and formerly worked for Goodwin Procter in its Washington, D.C. office.

“I was a great subject, because commerce knows no borders,” McDonough says.

BOOKS ON THE GROUND

McDonough developed an interest in foreign countries early on. Recreational travel was part of his family life, dating from the time he was too young to accompany his older siblings. A childhood injury that sidelined him for a year turned him into an avid reader, and he got on his list of reading anything about travel. In addition to the three years he has so far spent in the Middle East, he has also worked in China and several Eastern European countries, under the auspices of the American Bar Association and the U.S. State Department of Commerce.

He is the former executive director of the Massachusetts Judges Conference, where he initiated its international outreach program. It has involved more than 700 judges and lawyers from 14 developing countries. He developed and traveled on U.S. State Department programs to Russia and other three large countries, primarily regarding IP rights protection, advocacy and training.

As a visiting fellow with the McCook Graduate School of Policy Studies Center for Democracy and Development, he worked on program development for the 1998 inaugural Constitutional Court at the Supreme People’s Court of the People’s Republic of China, organized and participated in the State Department-sponsored Most Court (Rule of Law) Training Program in Beijing and Western China, and coordinated judicial education and consultancy projects in six former communist Central European countries.

“I took a much stronger interest in the Middle East after 9-11, as I felt strongly that the U.S. needed a strong civilian presence teaching and consulting on rule of law. Books on the ground, not just boots on the ground, I explored opportunities in the Middle East – North Africa region.”

JOSEPH B. MCONOUGH

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Students got to discuss the problem and to find the right place in the statute to address it. They would come to class with a case solution McDonough would review their argument on their ability to find all the issues and reason through the answers — the “on the other hand” method, which led one student to tell him he had too many hands.

In 2010, McDonough was given three months to develop a curriculum design for a new law school. The institution had to be accepted by the Ministry of Higher Education, it had to use best practices, and utilize U.S. law schools as models. Sohar University Law School started admitting last year. Its five-year program builds up English and research skills in the first year, followed by four years of an undergraduate law program. “I made a lot of friends. I learned a lot, too;” he says. “It was really a two-way street.”

RESPECTING DIFFERENCES

Fitchburg District Court Judge Judith Elliott Zide accompanied McDonough to Oman when the latter served as project director for ABA Rule of Law Initiative for the Middle East and North Africa, prior to leading the presidency at SQU. Zide says McDonough has built a network not only of lawyers and judges, but of young people, and built an infrastructure of volunteer organizations, which were able to advocate for particular issues.

“Joe had a tremendous influence on their understanding of the American legal system and how it supports democratic values,” Zide says. “Every person I met, including the ambassador and people at the embassy, had very high regard for Joe’s ability to accomplish the mission set by the State Department when it tunds rule of law initiatives in countries like Oman. People like him and respect him. He’s intuitive in knowing how not to overreach. He doesn’t put people off or challenge the existing ideas. He really challenge them to think in different ways.”

“I’ve worked in other countries, and I did understand that you had to do your homework and understand the differences,” McDonough says. “It’s about respecting people. If you go in with a Lord Jim mindset, you are destined to fail.”

The U.S. approach to the level of details of electronic commerce may be more advanced than Shariah law, but it’s not necessarily superior, just different, and the differences aren’t as wide as originally presumed. The key to bridging the two cultures is to understand how different cultures value things, he says.

Family comes first, and Islam’s holy day is Friday, rather than Sunday. When a customer turns down a Sunday appointment in order to attend church, or demurs to spend time with family, “they completely understand, they respect you

for valuing your family and religion, and things can move at a different pace. Being able to understand and respect those ideas without their process is part of that respect,” McDonough says.

He developed a network of contacts including some students, NGO workers, teachers, judges and sometimes, taxi drivers. “This is what I would do while working in U.S. politics before things went wrong when I was younger. Some professionals in the field like polls and statistical research. I like people and to hear their stories, and to learn what they believe and why.” Sitting down with friends over tea “has given me more insight than I could ever get reading a book or doing research.”

RULE OF LAW

“Oman is a great opportunity because it’s small. It has a very homogeneous society,” says Zide. “It’s very nationalistic. The primary value there is to be an Omani, then to be a Muslim. And to be a judge in Oman.”

Omani judges take the bench at a relatively young age, holding the equivalent of a bachelor of law degree, and don’t earn the equivalent of a master’s. “Some judges did not go to a law school, since they had a bachelor of law degree, they must leave the country.”

Upon 40 years ago, they had no formal [legal] education at all in anything commerce, said Zide. “Oman has then the found themselves on the bench, presented with the need to understand commerce and big contract work. The role of a judge is in their educational experience, but most are very sincere and bright and they desire to learn.”

The Sultan of Oman, commercial leaders and investors had long called for judges to adopt the new globalized standards. Judges and older attorneys chose their profession based on their interest in Shariah, not specific categories of law, and judges sometimes didn’t follow the reform statutes. Instead, they would rule in favor of the party they felt was more moral. Some expressed concern that they would have to abandon Shariah law and use Western law.

Religious and political leaders pushed back, stating that the standards had been vetted by Shariah experts and it was not the proper function of a judge to ignore religious law. Said Zide, “it’s about being a judge to the people, not the religion.”

“Joe, to me, this went to the very heart of the rule of law.”

With the transition, McDonough and his team developed mini-booklets and checklists, and brought U.S. judges such as Zide and Associate Justice Sydney Hanlon, who now serves on the Massachusetts Appeals Court, to advise on their implementation.

Hanlon recalls a training visit in December 2010 “The issue of judge training is the same across cultural lines,” she says. “What do you do if you’re teaching someone something they don’t want to hear?” Training is different if it’s an update on a law everybody wants, or if you are introducing people to a whole new way of doing things.

While McDonough has a respect for cultural differences, Zide says, he doesn’t flinch from asking direct questions, such as “how do you conduct a divorce?”

At first, no one wanted to respond. It was a breakthrough when someone said “soon.” Zide comments, “I’ve been around long enough to know that ‘soon’ can be an hour, next year or whenever Allah deems appropriate. Then you can get into a discussion as to when the crucial point for different judges.”

“We take it more seriously,” Zide says. “Joe’s smart enough to know to engage in this in a way that doesn’t offend.”

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