Fantasy, Facts, Craft and Professionalism

I recently had occasion to watch the Wes Anderson film, “Moonrise Kingdom.” I am a fan of movies generally, even bad ones. “Moonrise Kingdom” is a very good one. I am fascinated by the craft involved and always interested in what motivates writers and directors of films to create what they create. The late idiosyncratic New Yorker film critic, Pauline Kael, was a fan of Wes Anderson – and vice versa – and she was an even bigger fan of Bill Murray. Those of you familiar with Wes Anderson’s work know that a Wes Anderson film without Bill Murray is like an ice cream truck without ice cream.

“Moonrise Kingdom” is a fantasy revolving around two twelve year olds who plan an “escape” from their current environs to elsewhere. Part of the problem for them, as well as part of the charm of the film, is that their escape is to another part of a rather small island, where they set up camp and ultimately are discovered, indeed rather quickly. The film being a fantasy, to describe it further would not do it justice, and I do not want to spoil it for those of you who have not seen it.

As a fan of films I watch them first, without having read any reviews. Having drawn my own conclusions, I then read critics I have found credible. In that regard, I commend to your attention Roger Ebert’s review of the film.

As fantasy, “Moonrise Kingdom” is, nevertheless, instructive. First, it is a very well-crafted, well-cast and well-acted film. You do not want to miss any part of it, and you do not want it to end.

Bill Murray plays the father of the female escapee. He and his wife, the female escapee’s mother, played by Frances McDormand, are both lawyers (you do wonder what there is for lawyers to do on this small island where the only people you see are the characters in the film). There are a few “lawyer” scenes, which you will enjoy.

Edward Norton plays a scoutmaster, who observes, when the youngsters are getting in and there hasn’t been much relief … good times will hopefully be coming.” Spence noted the further delays experienced due to pro se litigants. “A confused self-represented litigant is a delay in the process,” he said. In an attempt to ease such delays, Spence

Bar and court leaders talk funding with legislators in Salem

Leaders of the Massachusetts Bar Association, Boston Bar Association and Trial Court coordinated an informational meeting with Essex County legislators at the Salem District Court on Monday, Jan. 7. The gathering was an opportunity to depict the local impact experienced from court funding cuts.

Following introductory remarks from bar leaders and Trial Court Administrator Harry Spence, clerks, judges and others based in the Salem courthouse spoke to the reality of understaffed departments.

MBA President Robert L. Holloway Jr. and BBA President James D. Smeal spoke to the need for adequate funding of the courts, as the third branch of government. “The MBA and BBA have been working mightily to make sure that happens,” said Holloway.

Spence described the court staffing of 6,300 personnel as “simply not enough” given the workload. That theme was reinforced by other court leaders who shared their perspective.

Salem District Court Clerk Brian Lawlor said, “The wave is continually coming in and there hasn’t been much relief … good times will hopefully be coming.”

MBA Director of Policy and Operations Lyn Ann Constantine; MBA President Robert L. Holloway Jr.; Sen. Joan Lovely; and Trial Court Administrator Harry Spence.

Bears of the Light

Lowell’s Gallagher & Cavanaugh LLP

BY CHRISTINA P. O’NEILL

A historic renovation appears to have yielded some unexpected dividends for Gallagher & Cavanaugh LLP, a Lowell law firm with deep city roots.

The firm’s purchase and renovation of a two-story brick building at 22 Shattuck St., formerly owned by the Lowell Gas Light Co., has created a living legacy space that has quickly become an attractive meeting venue for outsiders.

“I do think that the setting matters,” says firm principal and co-founder Michael Gallagher. “We hoped to create attractive, functional spaces that are respectful of the building’s and company’s history, but we also wanted an office that clients and others would feel warm and welcoming.

While those with local ties seem to appreciate the effort to preserve the building’s structural history, he notes that the responses of visitors new to the city have been especially interesting. In the spring of 2012, he recalls, he conducted about 30 interviews of applicants for a senior lawyer’s position in Lowell. Most of the applicants were from out of town.

To a person, they commented on how much they liked the feel and visuals of the cobblestoned streets and 19th century brick facades as they walked to our building and also how much they enjoyed the reinforcement and celebration of that history through the images on our walls,” as well as the interior appointments and fixtures.

While it’s difficult to quantify how much of the firm’s client base has a Lowell connection, he says, “we’re fortunate to have client relationships with many of the major local businesses and non-profits, as well as lots of involved and active members of this community, but we also have longstanding business contacts from outside the area. Whenever we can, we seek to get those out-of-the-area contacts to Lowell so that we can show them how much this city has to offer.”

CONTEST AND MEMORY

Gallagher & Cavanaugh bought the Italianate building in the summer of 2011, when the law firm’s lease on rented space in the renovated Boot Mills building nearby was due to expire. The firm, seeing good prospects for down...
cial Services.” Harvey Keitel, in a cameo role, plays a higher ranking scout officer. Some of the casting is against type, which adds to the overall craft of the film.

I have talked about craft before. Craft is essential to our professionalism. For example, trial lawyers with good instincts regarding when to object and when not to still have to have a good command of the rules of evidence. (I recall the actor, Arthur Hill, as television’s Owen Marshall, attorney, who rose to object in one episode, and the judge inquired as to the basis for his objection. Marshall’s reply, in substance: “It hurts my client’s case.”)

Craft also includes, I believe, the right attitude. In some recent meetings with some of our judges, I was told that lack of civility in our courts is still a problem. In particular, the lack of civility and lack of respect includes not just lawyers’ behavior toward each other but also behavior toward the court. Such behavior is bad attitude, bad craft, unprofessional and unacceptable. Equally important, it is unpersuasive to a tribunal and thus counter to the interests of the client.

All of us need to promote craft. Fundamentally, that means proper preparation and proper behavior. It means always treating each other with dignity and respect. By doing so, we enhance public respect for our profession. Our behavior drives perceptions, and perceptions drive reality.

Craft and civility were on display at a recent meeting of the bar, court leaders and legal legislators at the Salem District Court. This informal meeting was part of the MBA’s ongoing court funding advocacy efforts. A productive group discussion centered on the needs of the court system, with specific examples provided by a number of court people, from their particular vantage points.

Trial Court Administrator Harry Spence gave an informative and realistic overview of the court system and status. The comments, stories and examples provided by a number of court people, from their particular vantage points provide the needed perspective.

PreSIDENT’S VIeW

All of us need to promote the importance of craft and professionalism. All of us need to advocate, to all who will listen, for our court system. The MBA promotes professionalism and advocates for the court system. Join us in that effort and get others to do so. I encourage all of us to demonstrate the same kind of commitment to our profession that is evident in the craft of filmmaker Wes Anderson in his delightful fantasy, “Moonrise Kingdom.”
The case for mandatory immunization of hospital medical staff

BY JOSEPHINE C. BABIARZ

The current flu epidemic, with the attendant state of the health economy, reminds us of the critical role of hospitals and staff in protecting public health. News reports describe the overwhelming hospital resources, from the numbers seeking emergency assistance and the reduced hospital staff, who are themselves suffering from the flu. These developments shed even more glaring light on recent protests reported in the media, by hospital nurses refusing mandatory immunization as well as wearing protective masks as a barrier to disease transmission. Hospital administrators must continue to enforce the immunization policy; it is a significant and appropriate measure to protect patients, the public and in fact, other staff, from the risk of nosocomial infection, which is nosocomial infection, which is nosocomial infection, which is...
News from the Courts

First deputy named acting probation commissioner

Chief Justice of the Trial Court Robert A. Mulligan and Court Administrator Harry Spence have appointed Ellen G. Slaney to serve as the acting commissioner of probation on an interim basis until a permanent commissioner is named in the spring. Slaney has served as the first deputy for Acting Commissioner Ronald P. Corbett Jr., who retires this week after a two-year term as acting commissioner during which he initiated management reforms to restore professionalism and effectiveness to the state’s probation service.

Slaney was appointed as a probation officer in Roxbury in 1974 and became the assistant chief probation officer there for the Juvenile Court in 1986. She was named chief probation officer for the Wrentham District Court in 1990 and regional supervisor in 1997, prior to her appointment as first deputy commissioner in 2011. Slaney holds a B.A from the University of Connecticut and an M.S. from Simmons College School of Social Work.

Recent management initiatives led by the commissioner’s office included introduction of performance management metrics and accountability, a new, validated risk/need classification instrument, merit-based hiring and promotions utilizing best practices and enhanced partnerships with criminal justice agencies.

Last fall, the Trial Court retained Isaacson Miller, a nationally-recognized firm, to lead the search for a new commissioner of probation. Mulligan and Spence expect to make an appointment this spring.

Probate and Family Court announces Internet access to publicly available estate and administration cases

The Probate and Family Court is pleased to announce publicly available estate and administration cases are now accessible via the Internet. Access is secured through eAccess and the website address is www.masscourts.org. Searches can be done by case number, case name or case type and can be filtered by various means. Electronic access to all publicly available case types of the Probate and Family Court continues to be available at each of the 14 divisions of the Probate and Family Court and at most Registry of Deeds sites.

NOTE: Only those estate and administration cases that were created in, or converted to, electronic format will be available on the Internet.

Appeals Court Pilot Program continuations

The Supreme Judicial Court has approved continuation of Appeals Court pilot program requiring appellants to file docketing statements in civil cases until Dec. 31, 2015, effective Jan. 1, 2013. The SJC has also approved continuation of Appeals Court pilot program requiring appellants to file docketing statements in criminal cases until Dec. 31, 2015, effective Jan. 1, 2013.

Amendments to SJC Rule 3:12


SJC approves Rule 3:16: Practicing with Professionalism Course for New Lawyers


Amendments to Superior Court Rule 9A (b) (5) (ii) and (iv) and Rule 30B

The SJC has approved changes to Superior Court Rule 9A (b) (5) (ii) and (iv) and new Superior Court Rule 30B on Certification of Expert Disclosures effective Jan. 1, 2013. Visit www.mass.gov/courts/sjc/docs/Rules/rules-9A-30B.pdf to view the notice of change.

Supreme Judicial Court

amendments to superior court rule 9A (b) (5) (ii) and (iv) and rule 30B

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Save the date

Massachusetts Bar Association Annual Dinner 2013

Thursday, May 9 • Westin Boston Waterfront
Reception 5:30 p.m. • Dinner 7 p.m.

www.massbar.org/Ad13 • (617) 338-0543
Secretary Goldstein featured as keynote at Labor & Employment open meeting

The work of the Joint Task Force on the Underground Economy and Employee Misclassification, the investigation of the $418 million Marriott Copley Place renovation that led to wage and hour fines, and the possibility of legislation expanding the investigation and subsequent enforcement actions pointed out a few problems with the current law. The state lacks the recourses and legal reach to go after companies registered out of state even if they are violating Massachusetts laws. In addition, Goldstein said, it takes “a million hoops” to publicly name companies that are violating Department of Unemployment Assistance regulations. Lastly, current law does not allow Massachusetts to hold a general contractor liable for violations that come as a result of decisions made by sub contractors. “What do you do when the only employer on record is an individual with a cell phone in California?” Goldstein said the task force is in its preliminary stage of discussing possible legislation changes to deal with issues that arose out of the Marriott case.

MBA to co-sponsor Feb. 21 UCC conference

The Massachusetts Bar Association is co-sponsoring “International Commercial Transactions” on Thursday, Feb. 21 at New England Law | Boston. The law school’s Business Law Center is hosting this free, afternoon conference, beginning at 12:45 p.m. Interested attorneys should call (617) 584-1908 or e-mail SalesFinanceConference@gmail.com to register.

Two panel discussions will be followed by a networking social hour, beginning at 5:15 p.m. The first panel discussion will consider current issues arising from transnational sales of goods. The panel will be moderated by Professor Curtis Nyquist, New England School of Law. He has taught Contracts and Uniform Commercial Code courses for more than thirty years and has written extensively on contract and commercial law topics.

The second panel, moderated by Professor Ingrid Hillinger of Boston College Law School, will focus on financing across the borders. Hillinger has taught commercial law courses and bankruptcy for many years and has published extensively in these areas.

In addition to the MBA, co-sponsors include the Uniform Commercial Code Reporter - Digest and the New England Law | Boston Center for International Law and Policy.
Chief Justice of the Massachusetts Appeals Court Phillip Rapoza has been selected as the international reserve judge for the Supreme Court Chamber of the United Nations-backed Cambodian War Crimes Tribunal, formerly known as the Extraordinary Chambers in the Courts of Cambodia. The ECCC was established to conduct trials, and bring to justice, those most responsible for the human rights violations in Cambodia under the 1975 to 1979 Khmer Rouge regime.

Rapoza was nominated by UN Secretary-General Ban Ki-Moon and was approved by the Cambodian Supreme Council of Magistracy. Rapoza’s responsibilities include potentially attending appellate arguments, as well as filling in vacancies on the Supreme Court Chamber.

“I am honored by both the secretary-general’s nomination and the approval of my appointment by the Cambodian authorities. The work of the ECCC is historic in nature and it is humbling to be involved in this important undertaking,” Rapoza said.

Rapoza received a B.A. magna cum laude from Yale College and a J.D. from Cornell Law School. He was appointed to the Massachusetts Appeal Courts 1998 and was appointed the court’s chief justice in 2006. He is a member of the Executive Committee of the U.S. Council of Chief Judges of the State Courts of Appeals and is also a life fellow of the Massachusetts Bar Foundation, the philanthropic partner of the Massachusetts Bar Association.

Prior to being appointed chief justice, Rapoza worked for the UN in East Timor as chief international judge on the Special Panels for Serious Crimes. In 2002, the Portuguese government awarded him the rank of commander in the Order of Prince Henry the Navigator for his international work, and in 2007, he received the Municipal Medal of Merit from the town of Lagos in the Azores, as well as the Brazilian Medal of International Merit. In 2009, Rapoza received the Alexander George Teitz Memorial Award from the Touro Synagogue Foundation for his commitment to ethnic tolerance and religious freedom.

In addition, Rapoza received the MBA President’s Award in 2011. The President’s Award is given to individuals who have made a significant contribution to the work of the MBA, to the preservation of MBA values, to the success of MBA initiatives and to the promotion of MBA leadership role within the legal community in Massachusetts.

Member Spotlight Continued on page 10
Calendar of Events

MONDAY, FEB. 4
11th Annual Western Massachusetts Bankruptcy Conference 4-7 p.m.
Western New England University School of Law, 1215 Wilbraham Road, Springfield

WEDNESDAY, FEB. 6
MBA Monthly Dial-A-Lawyer Program 5:30-7:30 p.m.
Statewide dial-in #: (617) 338-0610

THURSDAY, FEB. 7
Conducting arbitration hearings, Considering, Preparing and Perfecting Closing Arguments 5-7 p.m.
MBA, 20 West St., Boston

FRIDAY, FEB. 8
Tiered Community Mentoring Program Speed Networking 9:30-noon
Roxbury Community College, 1234 Columbus Ave., Roxbury

Legal Chat: H1-B Principles Noon-1 p.m.
Note: there is no on-site attendance for Legal Chats.

MONDAY, FEB. 11
A Free Legal Help Call-In Program 5-7 p.m.
Dial-in #: 617-328-8888

TUESDAY, FEB. 12
Considering, Preparing and Conducting Arbitration Hearings 4-7 p.m.
Western New England University School of Law, 1215 Wilbraham Road, Springfield

THURSDAY, FEB. 14
Court Advocacy Day 11 a.m.–1 p.m.
Massachusetts State House, Grand Staircase, Boston

FRIDAY, FEB. 15
Legal Chat: Conflict Management and Negotiation Noon-1 p.m.
MBA, 20 West St., Boston
Note: there is no on-site attendance for Legal Chats.

TUESDAY, FEB. 19
Lifestyle of a Business Part III 5-7 p.m.
MBA, 20 West St., Boston

THURSDAY, FEB. 21
MBA co-sponsors program: Uniform Commercial Code Conference Noon-6:30 p.m.
New England Law | Boston (Cherry Room), 154 Stuart St., Boston

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MANDATING FLU IMMUNIZATION
Continued from page 3

seems best; and that the execution of such a law against one who objects to vaccination, no matter for what reason, is nothing short of an assault upon his person." 1d At 26. The United States Supreme Court, however, upheld Jacobson’s criminal conviction, ruling that “in every well-ordered society charged with the duty of conserving the safety of its members the rights of the individual in respect of his liberty may at times, under the pressure of great dangers, be subjected to such restraint, to be enforced by reasonable regulations, as the safety of the general public may demand.” The court warned, however, that “the police power of a State...may be exerted in such circumstances or by regulations so arbitrary and oppressive in particular cases as to justify the interference of the courts to prevent wrong and oppression.” 2

Jacobson set the stage for over a century of legal wrangling pitting the state’s use of its police power in securing the public health against an individual’s right to privacy, bodily integrity and to make informed medical decisions. 3 Health care providers considering the implementation of a mandatory immunization program should be guided by the development of the constitutional balance with which courts often struggle. This historical balance depends on factors such as the actual threat posed by the disease, the efficacy of the vaccine, the extent of the impact of the mandate on constitutional rights.

Mandatory vaccination programs against a deadly disease (such as smallpox) or one designed to completely eradicate a contagious, dangerous disease (polio, measles) have been upheld as reasonable exercises of the state police power. Even the eradication of contagious, serious illnesses (chicken pox) have been upheld as a justified use of police power. The state’s police power, however, has not in modern times, been wielded in a situation in which the disease is not deadly and the immunization program is not designed to eradicate the disease. In the guiding light of these general principles, employers should eschew policies mandating influenza immunization of HCP. Such policies are an unwarranted infringement upon workers’ rights when the intrusiveness of such a policy is viewed in light of their limited efficacy and available alternatives. 4

EFFICACY ISSUES AND EFFECTIVE ALTERNATIVES

Influenza immunization programs are not designed to eradicate influenza viruses, influenza vaccinations offer, at best, short term protection against very few of the myriad known (and ever evolving) virus strains. Vaccine efficacy is, moreover, known only after the fact. The vaccination “cocktail” is premised upon an educated guess by World Health Organization experts which influenza strains will be most prevalent in the northern hemisphere during the upcoming flu season. In years when the vaccine and circulating viruses are not well matched, there will be decreased vaccine benefit. The CDC’s Morbidity and Mortality Weekly Report for Jan. 11, 2013 indicate a 62 percent estimated vaccine effectiveness this season. Estimated vaccine effectiveness was 55 percent for the 2011-12 flu season and 60 percent for the 2010-11 flu season. In addition to limited efficacy, an employer should consider alternative effective measures that do not force employees to choose between their privacy and bodily integrity rights and their jobs. For example, in early January 2013, UMass Memorial Medical Center implemented a policy banning visits from children under 16 years of age, since children are at high risk for carrying the virus due to the ease with which contagions pass in schools and other youth settings. Since senior citizens face a higher probability of developing pneumonia and other life-threatening flu complications, some skilled nursing facilities catering to primarily elderly populations, such as Marian Manor in South Boston, have altogether barred visitors (with some limited exceptions). Neither UMass nor Marian Manor mandate staff vaccination.

Significantly, the CDC’s Advisory Committee on Immunization Practices does not recommend mandatory immunization policies, instead encouraging employers to establish voluntary workplace immunization policies. The CDC offers a 15-page brochure, available on its website, with detailed workplace strategies for encouraging immunization. 5 The United States Occupational Safety and Health Administration offers similar guidance for employers, but does not encourage mandatory immunization of workers.

THE MIDDLE PATH

Employers should use caution when considering implementing a mandatory immunization policy. Such mandates open the door to a host of potential legal issues. Mandatory immunization policies have been deemed to be the subject of collective bargaining in unionized workplaces. Failure to include or properly administer carve-outs for religious, moral and/or medical objections may expose private employers to privacy violation actions and may open the door to new public policy exceptions to the “at-will” employment doctrine. Public employers may also, of course, face constitutional challenges.

From a practical workplace management and environment perspective, forcing employees to annually subject themselves to an injection they may sincerely oppose instills resentment and damages morale. Mandatory immunization policies also unnecessarily burden administrators who will be required to carefully monitor compliance, determine exemptions in a case-by-case basis and meet or out discipline for non-compliance. A flu shot mandate may actually be more effective at driving talented medical professionals away from an employer than preventing the flu virus from spreading among the general public.

A health care provider is better advised to invest its valuable and limited resources in voluntary flu vaccination programs. Joining government authorities in educating workers and the public—particularly caretakers of school-aged children, seniors and those with medical conditions that may prove fatal if complicated by influenza — would prove more beneficial to society. Voluntary workplace programs and compliance will foster cohesiveness and ultimately improve morale. Most significantly, however, implementation of voluntary, rather than mandatory immunization policies, will prove more effective in limiting the spread of the Influenza virus without impairing worker rights or growing industries needed a continuous lighting supply that obviated the need for candles or kerosene.

The low energy light was ensured that most of the historic elements were still intact when the law firm purchased the building. Firm Principal Michael Gallagher credits Ann Cavanaugh, Richard Cava- naugh’s wife, as being the catalyst for the effort. General contractor Delphi Construction Inc., architect Jay R. Ma- son, AJA, LEED AP and Stewart Design Group played a part, as did Murray Plumbing and Heating and R&R Elec- trical Services Ltd., Inc.

BEVERLY S. BAGLEY, OSB

Continued from page 1
town, wanted to create its own stakehold- ing. Gallagher says he had always thought of the building as the home of the Revolving Museum, a nonprofit art- istic venue, the most recent previous occu- pancant, which had formerly taken up the first floor for many years. But the real story turned out to be the building’s first owner, the Lowell Gas Light Co., which built it in 1859 and owned it until 1948 (see sidebar). Thousands of Lowell fam- ilies have parents and grandparents who worked for the gas company.

After the purchase, a round-the- clock, top to bottom renovation took two months, and included a complete revamp of the electrical and HVAC sys- tems and the from-scratch installation of a sprinkler system, all while adhering to historic-preservation-sensitive renova- tion measures.

Partnering with architect Jay Mason, principal of Architectural Consulting Services, and designer Cathleen Stewart, principal of the Stewart Design Group, the team transformed the space to strict specifications. The interior paint color is consistent with the mid-1800s Victo- rian Italianate style, and the walls and arches hold replicas of authentic gas light sconces, now powered by gas.

The back dock was refurnished for outdoor meetings.

The front hall, decorated for the holidays.

The conference room, under construction.

The finished conference room.

A TESTAMENT TO INDUSTRIAL HERITAGE

The Lowell Gas Light building was deemed garish when it was built, because its curved walls and dormers were a departure from the convention- ally-square building design then preva- lent. The Lowell Gas Light Company was one of the first municipal gas-pro- duction companies to be chartered in the United States, in 1847, along with Chicago and Detroit. It introduced commercial gas lighting in 1850 and residential gas lighting in 1852. Its for- tunes took off after the Civil War, when
exposing the employer to legal actions and practical complexity and cost. ■

1. CDC Influenza Update. Summary of Weekly Influenza, week ending Jan 5, 2013.
2. In fact, the regulation is the subject of a legal challenge. In December 2012 the SEIU Healthcare Employees Union District 1199 filed suit in the U.S. District Court for the District of Rhode Island challenging the legality of the regulation. The suit is in a motion to dismiss, which motion is pending.
3. In September 2009 the New York State Department of Health implemented an emergency rule mandating influenza vaccination of health care workers and contained no opt-out provision. Two worker groups filed suit and, on Oct. 14, 2009, the New York Supreme Court issued a temporary restraining order halting implementation of the rule. Gov. David Paterson suspended the regulation on Oct. 22, 2009, stating that the case had been rendered moot by a national vaccine shortage. In January 2012, Colorado’s Board of Health issued a regulation requiring health care facilities across the state to achieve a 90 percent flu vaccination rate by the 2014-2015 flu season, which may force Colorado health-care employers to mandate vaccination for all HCPs.
5. Such termination threats are not idle and are taking place with greater frequency on the pediatrician’s desk. For example, in January 2013, Indiana University Health St. Vincent Hospital fired all employees who failed to comply with its immunization mandate.
6. Those refusing smallpox immunization faced the choice of either moving from Cambridge or paying a $5 fine.
8. Since religious objections to vaccinations have been a recognized opt-out strategy (the King’s Daughters, for example, accommodate workers who object to influenza vaccination) and the General翊Bank has been a recognized opt-out (depending on the state’s regulatory scheme), religious objections to the flu vaccine should be accommodated. Medical objections to the vaccine include those who have severe egg allergies (the vaccine may contain small amounts of egg protein) have been diagnosed with Guillain-Barre Syndrome or who have had adverse reactions to prior flu vaccines.
toolkit_seasonal_ ih_vaccine
distribution_and_employees.pdf”
10. John F. Toci is vice chair of the MBA’s Labor & Employment Section. He is a partner of Toci, Goss & Lee PC in Boston, where he manages the employment counselling and litigation practice. Amy Doherty is an associate in the firm, where she concentrates on advising the medical staff and the public at large. Her practice focuses on advising clients in the areas of executive compensation and benefits, as well as litigation prevention.

THE CASE FOR MANDATORY IMMUNIZATION

Continued from page 3

ready in the hospital. These findings provide more than adequate support for the guidelines found in the State Operations Manual. This manual, published by Centers for Medicare and Medicaid Services, governs facilities receiving Medicare and Medicaid funds. CMS, through the manual, requires hospital administrators to evaluate staff for immunization status for designated infectious diseases, develop policies to screen staff for infections likely to cause significant infectious diseases or other risks, and also to develop policies stating when infected staff are restricted from providing direct patient care or required to remain away from the facility entirely. Since absences can disrupt patient care, preventative measures including immunization, become more important.

The Commonwealth has clearly articulated policies on vaccination of healthcare personnel. The Massachusetts regulations require that personnel be vaccinated, whether working in hospitals, clinics, or long-term care facilities. Massachusetts hospitals are required to provide or arrange for vaccination at no cost to any personnel, as noted above. There are allowed exceptions to the vaccine, where it is medically contraindicated, is against the individual’s religious beliefs, or if the individual declines the vaccine, and in the case of refusal, the individual must acknowledge in writing the consequences of such refusal. The mandate does not violate individual sovereignty, but does require a hospital to take appropriate alternate measures to protect staff, patients and the public.

Operating within the inoculation guidelines, medical staff is the group most qualified to assess the benefits and risks of any particular medication, including vaccines, for either the public at large or for any specific individual. All medication approved by the FDA is accompanied by the required labeling which is written for the prescribing practitioner, not the patient. Labels contain at a minimum, the risks, benefits, contraindications, and all other relevant information which guide the prescriber in determining whether or not a product is appropriate for a patient. For those administering the medication, and not prescribing the label still has value, because it alerts the nurse or pharmacist administering the dose to potential risks and side effects.

All medical practitioners are expected to report to FDA any irregularities in the medication container, its color, and any adverse event or problem experienced by the patient for follow up.

The progress made in fighting infectious diseases, the on-going challenges in protecting hospitalized patients from adventitious diseases and the continuing quest for improvement in the US health care system require nothing less than universal and aggressive health care standards for medical professionals. These requirements are, in the author’s opinion, among the most appropriate means to protect patients, medical staff and the public at large.

1. 105CMR 130.315(E).
4. See 105 CMR Secs 130.140 and 130.150 respectively.
5. 105 CMR 130.250.49.

Josephine Babiarz is a member of the MBA’s Health Law Section Council. She is solely responsible for the views expressed in this article.
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Your clients come to you for legal protection. Attorney Clare McGorrian can help. Attorney McGorrian has successfully handled a variety of legal matters, including Social Security disability cases, and court levels. She also offers representation in health insurance matters, including federal employee benefits law and health insurance laws, health care matters, and family law cases. She also counsels clients before a variety of government agencies, including the Social Security Administration and the Appeals Council.

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BAR NEWS

More than 1,500 students will participate in Mock Trial Program

BY JENNIFER ROSINSKI

More than 1,500 students across the state are turning their classrooms into courtrooms to assume the roles of both lawyers and witnesses during this year’s 28th annual Mock Trial Program presented by the Massachusetts Bar Association.

First organized in 1985, the Mock Trial Program started in January and runs through March 20. The program places high school teams from 16 regions across the state in a simulated courtroom.

Student competitors at more than 130 schools across the commonwealth are expected to participate in the 2013 Mock Trial Program. In addition, more than 100 lawyers across the state will volunteer as coaches and judges.

In this year’s criminal case, the prosecution alleges the defendant poisoned and killed his great-aunt by tampering with her medication. The defense claims the great-aunt either died of a natural heart attack or was murdered by either her live-in caretaker or another relative upset about her reduction of their inheritance.

Out of the more than 130 teams of students, four will ultimately advance to the semi-final elimination round and face off during trials held simultaneously on March 18 in Boston and Worcester. The two finalists will then advance to the state championship, to be held on March 20 in the Great Hall of Faneuil Hall in Boston. In 2012, The Pioneer Valley Performing Arts Charter Public School of South Hadley won the state championship, its second in a row, and competed in the national tournament.

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

Get started on My Bar Access: it’s as easy as 1, 2, 3

MBA members are encouraged to set up their profiles on My Bar Access to begin using the association’s latest online member benefit to enhance online interaction with peers.

The Massachusetts Bar Association in December launched this online community exclusive to MBA members, replacing the former Section/Division section of the MBA website. The growing number of members who have taken simple steps to set up profiles and use the tools have provided positive feedback on the ease of using My Bar Access.

Discussions (also known as listservs) and blogs are the most popular features among current users, but MBA members can also benefit from using resource libraries and announcements to share practical information.

To streamline the process getting started on My Bar Access, member profiles can be populated by pulling in work experience and biographical information from individuals’ LinkedIn profiles.

The following simple steps can instantly connect users with fellow members at http://access.massbar.org:

1. Login and agree to terms: Sign in using your MBA user name and password and sign the Code of Conduct.
2. Create your profile and settings: Include your bio and photo and customize the frequency and format of your notifications (your profile info from LinkedIn may be pulled over).
3. Start connecting: Post blogs, discussions (listservs) or upload a resource library entry for your section(s).

Helpful materials, including “Getting Started on My Bar Access” and “How to Use My Bar Access,” which are posted in the Resource Center and in various areas throughout the site, can help users with questions. Following a review of those resources, members who need further help should contact the My Bar Access Help Desk by emailing mybaraccess@massbar.org.
The Walkable City

Lowell's downtown was built with an eye to plan. The 19th century commercial architecture is of classical design and proportion. Red brick and cobblestones are its signature materials. The streets are wide enough to give a sense of space but human-scale enough to give pedestrians a sense of proximity and comfort. The canal system that powered 19th century textile mills is still intact, complemented by a network of trolley tracks which come into frequent use during the many cultural events to which Lowell is host.

The city has capitalized on downtown's walkability with such events as the annual Lowell Folk Festival, a free performance venue which captures and holds an audience of 200,000 for three days on the last weekend of July. Its national park, canal-boat tours and museums, as well as the 3,200-seat Lowell Auditorium, enhance a planned urban community which has encouraged a specific outreach to artists to relocate to Lowell. Commuter rail provides a 40-minute ride to Boston's North Station, and for those who must drive, the intersections of Interstates 495 and 93 and Route 3 are close by.

The city has long been an ethnic melting pot, beginning with Irish and French-Canadian immigrants who worked in the textile mills. The most recent ethnic group to arrive is Cambodian; the city's website provides a list of supporting community organizations, including a Community Development Corporation specifically serving Cambodians. Long-time visitors have “discovered” Asian-owned businesses, which have grown and evolved from hole-in-the-wall operations to established enterprises — without having to move out of town. They exist cheek by jowl with classic Lowell landmarks such as the Owl Diner, proof positive that Lowell has successfully avoided the fern-bar syndrome and kept its diversity.

The past is prologue

The setting communicates that “people have been here before,” says Gallagher, who believes that history should not be confined to museums, but should breathe life and context into today's activities.

Officers of the firm have taken on the mantle of tour guide for prospective visitors and meeting holders. Michael Gallagher clearly takes pleasure in bringing visitors through. But the tour is not just about architecture. It's about people and economics.

On the walls in the front hall are newspaper ads, one of which seeks $500,000 in investment in the nascent gas light company — serious money back then. A blazing warhead proclamation, “We have COKE!” refers to the carbonized coal product that produced gas for local use, before the advent of natural gas, piped in from around the country.

A chance to make a difference

Lowell has a strong academic and nonprofit presence. But the nonprofit community does not have the resources to support renovation of historic buildings. Gallagher expresses the hope that more investors will follow his firm's lead and make thoughtful, informed investments in downtown buildings, now that a recovering market is creating a new wave of buying opportunities.

If you and/or your colleagues underwent an extensive office space renovation or practice law in a historic or otherwise interesting structure, Lawyers Journal staff would like to learn more. E-mail information or photographs to lawjournal@massbar.org.

FAMILY LAW

Divorce Basics: A View from the Bench and Bar
Wednesday, Feb. 6, 4–7 p.m.
Plymouth Probate & Family Court, Plymouth

Faculty:
Christina Knoepf, Esq., program chair
Michael J. Pires, LLC, Duxbury
Hon. Catherine Sabatini
Plymouth Probate & Family Court, Plymouth
Deborah Fッツ, Esq.
Ryan & Foran, Marlboro
Cynthia E. Gates
Ass't Judicial Case Manager, Plymouth
Susan A. Huettner, Esq.
Law Office of Susan A. Huettner, Sandwich

Sponsoring section/division: Family Law, Young Lawyers

IMMIGRATION LAW

LEGAL CHAT

H-1B Principles
Friday, Feb. 8, noon–1 p.m.
*NOTE: There is no on-site attendance for this series.

Faculty:
Alan M. Pampanin, Esq.
Pampanin Law Office, Cambridge

Sponsoring section: Immigration

BUSINESS LAW

Lifecyle of a Business:
Part III: Employment and Business Litigation Matters
Tuesday, Feb. 19, 5–7 p.m.
MBA, 20 West St., Boston

Faculty:
Matthew S. Furman, Esq., program co-chair
Turfow, Bredy, Hurt & Rodgers PC, Boston
Kelly Koonenbe-Price, Esq., program co-chair
Finnerman & NIcholson, PC, Newburyport
Hon. Stephen E. Hillman (ret.), MA
Jams, Boston
Mark S. Furman, Esq.
Turfow, Bredy, Hurt & Rodgers PC, Boston
Tamar R. Kaplan, Esq.
Davis, Mallin & D'Agostino PC, Boston

Sponsoring section: Business Law

CIVIL LITIGATION

Considering, Preparing and Conducting Mediation and Arbitration Hearings
Tuesday, Feb. 12, 4–7 p.m.
Western New England University School of Law
Springfield

Faculty:
Robert H. Astor, Esq., program chair
Robert H. Astor Attorney at Law, Springfield
John P. DiBartolo, Esq.
Law Office of John P. DiBartolo, Easthampton
L. Jeffrey Merhun, Esq.
Doherty, Wallace, Pflabery & Murphy PC, Springfield

Sponsoring section/division: Civil Litigation, Young Lawyers

LAW PRACTICE MANAGEMENT

LEGAL CHAT

Conflict Management and Negotiation
Friday, Feb. 15, noon–1 p.m.
*NOTE: There is no on-site attendance for this series.

Faculty:
Susan Lettermann White, Esq.
Lawyers Leaders & Teams, Braintree

Sponsoring section: Law Practice Management

FACULTY SPOTLIGHT

ROBERT H. ASTOR, ESQ.
ROBERT H. ASTOR, ATTORNEY AT LAW, SPRINGFIELD

Program chair: “Considering, Preparing and Conducting Mediation and Arbitration Hearings”

Astor is an AV-rated attorney with offices in Springfield and Northampton, who has been practicing for 33 years in the areas of personal injury, medical malpractice and criminal defense in the state and federal courts of western Massachusetts. He also has a significant alternative dispute resolution practice, serving as a mediator and arbitrator for plaintiff firms, defense firms and insurance carriers in the areas of personal injury, medical malpractice and high-exposure insurance claims. Astor has served on seminar panels for Massachusetts Continuing Legal Education, the Massachusetts Committee for Public Counsel Service/Children and Family Law and the Massachusetts Bar Association on topics including, screening and handling medical malpractice claims, handling motor vehicle accident claims, criminal practice forums, and she direct and cross-examination of medical experts.”

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SAVE THE DATE

The MUPC Revisited
Thursday, Feb. 28, noon–4 p.m.
MBA, 20 West St., Boston

Register at MassBar.org/BankruptcyLaw
or (617) 338-0530.
Continued from page 1

announced the roll out of court service centers, a pilot initiative to better address the needs of pro se litigants.

Spence ended the speaking portion of the gathering by thanking the attending legislators for their work on appropriating FY13 funds to the court, explaining that because of their support, the courts will not have to reinforce the years-long hiring freeze.

Legislators in attendance at the meeting included Representatives John D. Keenan (D-Salem), Lori A. Ehrlich (D-Marblehead), Theodore C. Speliotes (D-Danvers), Jerald A. Parisella (D-Beverly) and Senators Kathleen O’Connor Ives (D-Newburyport) and Joan Lovely (D-Salem).
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By Michael F. KilKelly

On Aug. 7, 2012, Gov. Deval Patrick signed into law Chapter 240 of the Acts of 2012, reforming the Child in Need of Services statute. An overhaul of the 38-year old CHINS program was supported and worked on by advocates for nearly seven years. While the drafter of the new law intended that the new system be called “ENGAGE,” for “families and children engaged in services,” that term is not contained in the actual statute, but only in the title of the act signed by the governor. The new law refers to the subject of an application as being a “child requiring assistance.” This is the term being used by the Juvenile Court to refer to the law, or “CRA” for short. The label “child in need of services,” or “CHINS,” is no longer being used, as it was felt that the term had come to be a stigmatizing label for children involved with the court system.

The new law has two main features: The implementation of a discovery process for families needing assistance, and changes in the procedures when children are brought to court.

The major changes in the legal procedures include the banning of the use of shackles or other restraints, and the banning of the use of police station or court-house lockups. For the first time in Massachusetts, a whole category of court cases will be expanded. The right to counsel for children and parents is expanded. Many timeframes have been shortened or specified for the first time. The act provides for significant changes in the procedures for warrants. Instead of being held on bail, the new law provides that children can be ordered into the temporary custody of the Department of Children and Families, and that CRA law also mandates that a conference be held with the family and its service provider. This court can hold a dispositional hearing.

The new CRA statute also made a major change in the processing of all interlocutory appeals to the Juvenile Court and the juvenile court to the departments that are included in c. 231 s. 118, providing for interlocutory appeals to be filed with the same justice of the Appeals Court.

In terms of the provision of services to children, the new law seeks to divert children from the legal process, where appropriate, and direct them to behavioral, medical and mental health treatment, as well as other behavioral and preventative services such as mentoring, family and parent support, and after-school and out-of-school opportunities. In order to begin the process, the new act establishes procedures that would be phased in throughout the state over the next three years, subject to appropriation.

The reform of the CHINS law was intended by the drafter of the legislation to break down barriers between the juvenile court, parents, and the community, and create a second access point for children to receive necessary services. Over three years, the law creates a statewide network of community-based programs and services, including direct access to mental health and substance abuse counseling. The law hopes to steer children away from the court system and refocus on prevention rather than punishment.

The new law also creates a standardized data collection system to evaluate outcomes and ensure that the commonwealth and children appropriately benefit from the new system. Data will be collected both within the court system and within the new service delivery system.

The CRA law also encourages school districts to implement formal truancy prevention programs, to be regulated by the Department of Elementary and Secondary Education.

A formal advisory board is also created by the new law, which will oversee the implementation of the service delivery system.

One of the goals of the new statute is to focus on the entire family and pro-

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The work-product doctrine after McCarthy v. Slade Associates

By Euphides Dalmarian

Attorneys generally like to think of their work product as being sacrosanct and immune from discovery. Although the work-product doctrine, as codified in Mass. R. Civ. P. 26(b) (3), provides only qualified protection for materials prepared in anticipation of litigation or trial, there are relatively few decisions ordering the disclosure of a lawyer’s file work product. This is, in part, because courts have been instructed that protecting work product “enhance[s] the vitality of an adversary system of litigation by insulating counsel’s work from intrusions, interferences, or borrowings by others.”

The recent decision by the Supreme Judicial Court in McCarthy v. Slade Associates, Inc., 463 Mass. 181 (2012), however, is a sobering reminder of the work-product doctrine’s limits. In this opinion, the SJC held that because plaintiff invoked the discovery rule in response to the defendants’ statute of limitations and other defenses, the defendants were entitled to discover attorney and other work product concerning the plaintiff’s first attorney and, one of her law firms first learned that plaintiff’s causes of action had accrued. As a result, not surprisingly, the SJC concluded that McCarthy’s alleged other law firm’s filing records and several categories of written work product, one of the firm’s lawyers was also ordered to answer written questions under oath about the scope of his firm’s work for plaintiff.

This is an important decision that promises to alter future declaratory disputes over the content of work product.

BACKGROUND FACTS AND PROCEDURAL HISTORY

In 1990, Regan McCarthy purchased a vacant, land-locked parcel of land in Truro, on Cape Cod, at a foreclosure sale. Based on the description in the foreclosure sale notice, McCarthy believed that the parcel abutted a property that she had vacationed on for years. She engaged an attorney to assist her with the acquisition, and the attorney hired a title examiner to conduct a title search. McCarthy also retained a surveyor to provide an opinion on the parcel’s boundaries.

To finance the purchase, McCarthy obtained a mortgage from the bank that foreclosed on the property, and the bank issued a foreclosure deed. McCarthy never built anything on the land that she thought that she had acquired.

In 2003 and 2004, McCarthy retained a different attorney to advise her about whether she could obtain access to a public way from her land-locked parcel. The attorney advised McCarthy to seek a declaratory judgment regarding the boundary line, and sought to enjoin the abutters from obtaining access to the land that she believed she owned.

On Dec. 27, 2005, the abutters in the Land Court action produced a report which established that McCarthy did not own the property that she thought she had purchased in 1990. The report stated that McCarthy had purchased a different parcel, which was located entirely within the Cape Cod National Seashore, and could not be developed. McCarthy believed that this was the first time that she learned that she did not own the property at issue.

SUPERIOR COURT LITIGATIONS

McCarthy subsequently filed three separate Land Court actions against the abutters who had sold her the parcel, and the various lawyers and other professionals that she had retained between 1990 and 2003. She asserted claims for breach of contract, professional negligence, negligent misrepresentation, and violations of G.L. c. 93A. In 2006, the plaintiff the surveyor that had issued an opinion in 1990 regarding the parcel’s alleged boundaries. Then, in January 2008, she sued the lawyer who represented her in the 1990 transaction. Also in January 2008, she sued the bank that had foreclosed on the property, as well as the lawyer she engaged in 2003 to investigate obtaining access to a public way. She did not sue B&L.

The three actions were ultimately consolidated. The various defendants moved to dismiss the complaints on statute of limitations grounds, contending that McCarthy was on notice of her claims had accrued as early as 1990, but in any event beyond the applicable three-year limitations period for tort claims and the four-year limitations period for c. 93A claims. The trial court denied the motions to dismiss, ruling that McCarthy had adequately invoked the discovery rule by pleading facts that plausibly suggested that her rights were first accrued in late January 2005, when the defendants “in the Land Court litigation furnished her with a report evincing the defect.

THE TRIAL COURT’S DISCOVERY ORDERS

The defendants sought to test McCa rthy’s invocation of the discovery rule. They requested that B&L produce large amounts of documentation from the Land Court action, including time sheets, correspondence between McCarthy and her attorney, land surveys, title abstracts, and title examiner reports, and any and all documents concerning the property at issue. B&L produced some documents relating to the Land Court action, and withheld other documents as protected by the attorney-client privilege and work-product doctrine. A B&L attorney was deposed, but declined to answer certain questions on privilege and work-product grounds. Defendants moved to compel B&L to produce the withheld documents and to answer proposed written questions.

The trial court granted defendants’ motions in part. It found that the documents and information sought by defendants was relevant to the pivotal question of whether the defendants owed McCarthy any duty of care and thereby putting at issue the date when her claims had accrued. It also ordered a B&L attorney to answer seven questions in writing, including identifying the date and substance of communications between McCarthy and B&L regarding any concerns that she or B&L may have had about the location of the property. McCarthy appealed the orders, as did the defendants who had sought broader relief. The SJC overturned the appeals on its own motion. THERE WAS NO ATISSUE WAIVER

The SJC first addressed whether McCarthy had an implied right of personal privacy by invoking the discovery rule. Citing its decision in Darius v. Boston, 433 Mass. 274 (2001), the court re-affirmed that an at-issue waiver was theoretically possible where there has been an “inject[ion] of [certain claims or defenses into a case],” and that the waiver is not improper “if it does not work to a party’s disadvantage.”

The SJC continued: "Continued on next page"
THE WORK-PRODUCT DOCTRINE

Continued from page 16

ever, that a party claiming an at-issue waiver must show that “the privileged information sought to be discovered is not available from any other [non-privileged] source.”19

The SJC held that the defendants had not established an at-issue waiver because they had not exhausted discovery of potential non-privileged sources of the information that they were seeking. In particular, the court stated that defendants had not yet “conducted discovery of documents and materials that are not covered by the attorney-client privilege, but qualify as work product protected under the work product doctrine.”20 Put another way, the SJC ruled that an at-issue waiver of the attorney-client privilege will not be found where the information sought can be obtained by piercing the protected work product doctrine.

PIERCING WORK-PRODUCT PROTECTION

In Commissioner of Revenue v. Comcast Corp., the SJC stated that the purpose of the work-product doctrine is to establish a “zone of privacy for strategic litigation planning ... to prevent one party from piggybacking on another party’s representative” and (3) “in anticipation of litigation or for trial.”21 But this protection is weaker than an evidentiary privilege: “work product is a weaker right of privacy for strategic litigation planning ... to prevent one party from piggybacking on another party’s representative” and (3) “in anticipation of litigation or for trial.”22

Under Rule 26(b)(3), a party may obtain discovery of its adversary’s work product upon a showing (1) of “substantial need of the materials in the preparation of his case”; and (2) “that he is unable without undue hardship to obtain the substantial equivalent of the materials by other means.” The rule also instructs courts to afford greater protection to “opinion” work product, i.e., “the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation,” than for ordinary or “fact” work product.23

The SJC has never enunciated a precise definition of “substantial need,” and it did not do so in McCarthy. The court did, however, cite with approval a case that held that substantial need had to be established where the work product “at issue is central to the substantive claims in litigation.”24 Presumably applying that standard, the court held that defendants had established a substantial need for the ordinary work product they sought because McCarthy’s “injection of the discovery rule ... into the play of her knowledge about the location of [the property] purchased by her in 1990.”25

The court reasoned that the materials being withheld may have shown whether McCarthy and B&L knew or reasonably should have known about the actual location of the property over three years before she commenced her lawsuits, which would defeat the application of the discovery rule.26 The court also found that the defendants could not obtain a substantial equivalent of the materials sought because only the withheld materials potentially contained information about what McCarthy and B&L actually knew about the location of the property, and when they learned that information.27

McCarthy and B&L were ordered to produce several categories of fact work product, including B&L’s billing records and documents relating to any title examination commission by B&L. A B&L attorney was also ordered to identify in writing (1) every deed, instrument, or other document B&L reviewed to determine the ownership of McCarthy’s property before filing the Land Court action; (2) all documents that the title examiner provided to B&L before a certain date; and (3) all documents that B&L received from the title examiner and which it in turn provided to McCarthy. The court held that the mere identity of documents that are reviewed by an attorney or other representative of a party concerning the litigation, than for ordinary or “fact” work product.28

The SJC has never enunciated a precise definition of “substantial need,” and it did not do so in McCarthy. The court did, however, cite with approval a case that held that substantial need had to be established where the work product “at issue is central to the substantive claims in litigation.” Any lawyer worth his or her salt can almost always make a plausible argument that an adversary’s work product is central to the substantive claims or defenses in a lawsuit. But it is unlikely that courts will be overly indulgent in ordering a party to turn over work product to an adversary, which would undermine the central purpose of the work product doctrine. Without a clear standard, the issue of what substantial need means will have to be decided on a case-by-case basis.

Third, the cost of discovery will further increase if parties were to file more motions to compel the production of work product. With the proliferation of electronic documents and communications, privilege and work-product logs are becoming ever longer, often times listing hundreds, if not thousands, of entries. Litigants, in response, are seeking to test overly broad and questionable claims of privilege and work-product protection by filing motions to compel the production of documents on such logs. The McCarthy decision should only increase the incentive to file such motions.

RAMIFICATIONS OF MCCARTHY

Although it remains to be seen what extent the McCarthy decision will affect discovery practice in Massachusetts, we can make some reasonable predictions. First, in cases where the discovery rule has been invoked, defendants are likely to more aggressively seek the production of work product to attempt to prove that plaintiffs had actual or constructive notice of the accrual of their claims outside the applicable limitations period. This means that work product arising out of any pre-litigation investigations into the existence of potential causes of actions will be targeted.

Parties, their counsel, and other representatives need to be aware that courts will afford privileged communications and opinion work product markedly more protection than fact work product. Thus, it would be advisable to incorporate fact work product into other forms of protected materials and communications wherever possible.

Second, courts will be called upon more often to define the term “substantial need.” In McCarthy, the SJC did not enunciate a bright-line definition of that term, but instead appeared to endorse a definition providing that substantial need may be established where the work product “is central to the substantive claims in litigation.” Any lawyer worth his or her salt can almost always make a plausible argument that an adversary’s work product is central to the substantive claims or defenses in a lawsuit.

First, the cost of discovery will further increase if parties were to file more motions to compel the production of work product. With the proliferation of electronic documents and communications, privilege and work-product logs are becoming ever longer, often times listing hundreds, if not thousands, of entries. Litigants, in response, are seeking to test overly broad and questionable claims of privilege and work-product protection by filing motions to compel the production of documents on such logs. The McCarthy decision should only increase the incentive to file such motions.

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vide short-term intervention, rather than a new statute on the provision of services to the school must state “the specific steps taken under the truancy prevention program, if one is available to the family before an application for assistance is filed with the court, the clerk’s office, or a social worker of the Department of Children and Families (DCF).” The educational materials relative to available services have not yet been drafted. Upon the filing of an application, the court has to schedule a date for preliminary hearing “as soon as possible, but not later than five days after the request is made to the clerk for filing,” and must appoint counsel for the child immediately, if the child is determined to be indigent. At the preliminary hearing, the court can dismiss the application, refer the matter to probation for informal assistance, or accept the application and schedule a “fact-finding hearing.” The new law allows the possibility of the provision of counsel for the parents at a much earlier stage of the case than was previously allowed. The informal assistance offered under the new law is essentially the same as it was under the old law. That is, it will be much shorter, with a maximum of 180 days, instead of the 12 months maximum under the prior law (two six-month periods). The new law also attempts to address the issues raised in the case of Matter of Gail, 417 Mass. 321 (1994), as to when a parent can dismiss an application. While the legislative intent was to allow the parents more control over how far to go with an application, the final language leaves much to be desired. Counsel at the least until the dispositional hearing, the parent can file a motion to dismiss the application unless certain requirements are met. The court can also file a motion to dismiss. Counsel for the child in appropriate cases should be notified at the time the motion is filed. The court must consider whether there would be sufficient cause to satisfy the requirements of the new statute. The court is required to make all determinations at the time that a written finding is made. The court must consider whether the child is likely not to appear at the fact finding or disposition hearing. Adoption of temporary custody may last for a maximum of 15 days, and can be extended only twice, for a total maximum of 45 days. As discussed above, before holding a preliminary hearing where the child may be placed in the temporary custody of DCF, the court must appoint counsel for the parent. This right of appeal of the placement of a child in the temporary custody of DCF is by G.L. c. 231 s. 118 to a single justice of the Appeals Court. The prior statute allowed for a bail appeal to the Superior Court.)

NEW WARRANT PROVISIONS

No child is to be confined in shackles or similar restraints, or placed in court lockers under the effective date of any CRA statute, under any circumstances. The statute does not extend to the power “arrest” children requiring assistance, without written notice to the child’s parents or guardians. The new law requires law enforcement to immediately notify the parent when a child is taken into “custodial protection,” and does not allow

The CRA law no longer requires a school attendance officer to file a school-based application, but rather provides that a “school district” may file a school-based application. This raises questions as to who is the proper person to authorize the filing and for what purposes that person has the authority to take the child. “A parent, legal guardian, or custodian of a child having custody of such child, or who is about to initiate an application for assistance.” C.119 §39G. The court is required to make all determinations at the time that a written finding is made. The court must consider whether the child is likely not to appear at the fact finding or disposition hearing. Adoption of temporary custody may last for a maximum of 15 days, and can be extended only twice, for a total maximum of 45 days. As discussed above, before holding a preliminary hearing where the child may be placed in the temporary custody of DCF, the court must appoint counsel for the parent. This right of appeal of the placement of a child in the temporary custody of DCF is by G.L. c. 231 s. 118 to a single justice of the Appeals Court. The prior statute allowed for a bail appeal to the Superior Court.)
The warrant of custodial protection requires the three-part diversion efforts discussed above, even if the courthouse is closed.

In the case where a child has run away from home and there is no CRA application, upon the parent or custodian filing the runaway CRA application, the court would need to issue the summons to the child and have the child not appear for the preliminary hearing before a warrant could be issued.

The alternative procedure would be to have the police take the child into custodial protective custody which would allow a law enforcement officer to initiate custodial protective custody if there is probable cause to believe the child has run away and will not respond to the summons.

The warrants issued in new CRA cases are not entered into the warrant management system maintained by the courts and law enforcement. Law enforcement authorities have raised concerns about their inability to access information about these warrants. The lack of automated lists of procedures for transporting children and notifying parents and custodians from the field.

Defense counsel are concerned that the new CRA warrant procedure may cause police to bring minor charges against runaway or stubborn children in order to allow the child to be restrained.

DISPOSITION

After the court has determined at a fact-finding hearing that the child requires assistance, the court holds a dispositional hearing to determine whether a custody order shall be entered. Before the court can hold the dispositional hearing, it must convene a conference in which the judge may participate. The probation officer is required to present written recommendations at the conference.

There is also an opportunity for counsel for other parties to provide written recommendations at the conference. The conference allows an opportunity for counsel, whether representing the child or a parent or guardian, to bring to court all collaterals that are involved with the family to provide information about the needs of the child and family.

Counsel should strategize their presentation at the conference, and determine whether collaterals should be summoned to appear, or records should be summoned to present to the court.

The ability of the probation officer and collaterals involved with the family to present information at the conference raises issues of confidentiality that need to be brought forward by counsel and determined by the court.

Counsel for both parents and children should be able to review the case file, to determine whether or not the child should be allowed to appear, or the case should be continued for further review.

The status offense offense is construed narrowly and additional terms are not read into the statute. See In re Vincent, 408 Mass. 527 (1987) and Commonwealth v. Florence F., 429 Mass. 523 (1999).

Continued bail or temporary custody was not required under the prior bail statute because the adjudication and disposition were done at the same time. Now the statute requires a conference before disposition.

The juvenile court may attempt to hold some of these different court events on the same day. The juvenile court memorandum of dand in temporary custody pending the conference and disposition be held on the same day in all cases.

The other disposition provisions of the new law do not apply to a dispositional order unless the court finds that the timeframes for a dispositional order are drastically reduced, and the maximum amount of time that an order can last is 390 days.

The process is in place because the first dispositional order can be for a maximum of 120 days, and it can only be further extended for ninety days at a time, for a maximum of three times. Query whether dismissing a CRA case after 390 days would result in the filing of a new application, as sometimes happened before under the CHINS law at age 16 when a school-based petition had to be dismissed and a parent would file a stubborn petition. In the absence of a new CRA application, it is possible that DCF would accept a voluntary placement agreement of the child, and care and protection case to keep custody of the child.

As was held by the SJC in the Matter of G, 445 Mass. 55 (2005), the “fact-finding hearing” and the dispositional hearing and extension hearings require evidence to be heard, and must follow the rules of evidence.

The juvenile court has determined that the provisions of the new CRA law should be applied retroactively to all CHINS cases pending on Nov. 5, 2012. This requires that CHINS cases where the child has a dispositional order that has been in effect for more than 390 days be dismissed on the next date the case is in court.

Children turning 18 who are in the custody of DCF and want to continue to receive services can still sign themselves in to DCF as adults and have the benefit of permanency reviews under c. 119 s. 29B past their 18th birthday.

APPEALS

In an effort to expedite appeals, the new law provides that an appeal of any order in a CRA case must be filed under G.L. c. 231 s. 118, which is an interlocutory appeal to the single justice of the Appeals Court. The law requires that an appeal of a final order after an initial dispositional hearing must be taken under 231 s. 118, as opposed to the regular appellate process.

The CRA law also provides that all such appeals, whether final or interlocutory, shall proceed under the Mass. Rules of Appellate Procedure, which otherwise have not been used in cases under c. 231 s. 118. As appeals filed under c. 231 s. 118 go to a single justice of the Appeals Court, they have their own set of rules which do not follow the Rules of Appellate Procedure. As these provisions for appeals do not appear in the current statute, the new law is likely to be the subject of proposed technical amendments in the future.

In addition, the new act changes the interlocutory appeal process in all cases in Juvenile Court, including care and protection cases. Interlocutory appeals in all juvenile court cases must now be filed in the Appeals Court under G.L. c. 231, sec. 118, not in the SJC under G.L. c. 211, sec. 3.

EXPUNGEMENT

The new law prohibits CRA cases from being entered into the state Criminal Offender Record Information (CORI) system, or the Court Activity Record Index (CARI) system, as CHINS cases were.

Counsel should argue for retroactive application of this provision and should request upon dismissal of all cases that the court remove all records pertaining to the cases and expunge all records from CORI and CARI.

“No record pertaining to the child in the proceeding will be maintained or remain active after the application for assistance is dismissed.” C. 119 s. 39E.

And in those circumstances where an application is dismissed before “a fact-finding hearing,” the new law provides that “the court shall enter an order discharging the child from the interlock program and expunging any records.” Counsel should support such an order.

RETOACTIVITY

The juvenile court memorandum states that the new law should be applied retroactively to all open CHINS cases pending on Nov. 5, 2012. The new law will be applied at whatever stage the CHINS case is at on the next scheduled court date. The CHINS case will essentially be converted to a CRA application and the procedure of the new law will be applied. Any warrants that are to be entered and stayed upon the dismissal of the case.

The new CRA law updates many court procedures and provides for more consistent treatment of the cases as civil custody matters rather than quasi-criminal matters. This completes the progression of the status offense statute from a delinquency-based system to a system that is intended to provide services to children and families having difficulties. The ultimate success of the new law will be measured when the new system of services is in place throughout the state.
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