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MASSACHUSETTS
LAWYERS JOURNAL
WWW.MASSBAR.ORG
VOLUME 20 | NUMBER 10 | JUNE 2013

Reminiscing

As I write this column, many young people and their families are participating in graduation events, the wedding season is upon us, and college and other reunions are commencing, including my 45th college reunion. Even fictional folks are having reunions: Garry Trudeau has assembled his "Doonesbury" characters for their reunion. I am looking forward to my real one.

Several weeks ago I was honored to play piano at the wedding of the daughter of friends, a young woman who played youth soccer for me 20 years ago. The wedding and reception were at MIT, where the bride works. As a thank you, the bride and groom gave me a too generous but very thoughtful gift certificate. When I received this gift certificate, I happened to be thinking about my upcoming reunion. I also was in the process of deciding whether to have a particular watch of mine repaired, a diving watch I have no objective need for, being one of several watches I own because of a fondness for gadgets generally and watches in particular. However memory banks work, mine then clicked to a longtime friend who died a few years ago.

He was a college classmate, fraternity brother and sports teammate. He was a first-rate athlete (an all-state quarterback), first-rate intellect and a superb storyteller. He became a lawyer and, after clerking for a federal judge, worked on Wall Street for a while, thereafter becoming a headhunter. He ultimately landed in academia at a major law school as an assistant dean. For a variety of reasons, he decided to extricate himself from everything to do with the legal profession and moved to the Virgin Islands, where he became a professional diver and instructor. He returned to the states, and a few years ago I got a call from another fraternity brother who reported that our good friend had just been diagnosed with brain cancer. This was in January and a few months later he was gone. He was as full of life as anyone I ever have known and I confess that his death hit me pretty hard.

So, armed with the unexpected gift certificate arising from my piano gig at MIT, I impulsively acquired a new professional diving watch, yet another watch for which I have no objective need. While I have done some scuba diving – years ago – my current water related activities are confined mainly to showering, swimming in my pool and occasional snorkeling on vacation, none of which remotely require a professional diving watch. Wearing the watch, however, reminds me of

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Kate Cook's rise to chief legal counsel

BY KELSEY SADOFF

On Jan. 4, 2013, Massachusetts Gov. Deval L. Patrick announced senior staff appointments on the eve of a new legislative session. Among the appointments, attorney Kate Cook was named the governor's chief legal counsel.

"Serving as the governor's chief legal counsel is a dream job for me," Cook said. "I am extremely honored and proud to serve the governor in this unique capacity."

Widely reported as the first woman to hold the high-ranking position of chief legal counsel in a Massachusetts governor's office, Cook has served the Patrick administration for more than five years, first as deputy legal counsel, then as the director of Policy and Cabinet Affairs and now as its chief

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Attorney Kate Cook, Massachusetts Gov. Deval L. Patrick's chief legal counsel.

PHOTO BY: MERRILL SHEA

MBA honors best at annual dinner

BY KRISTIN CANTU

As scores of Massachusetts Bar Association members filled the Westin Boston Waterfront ballroom for a night of festivities and to celebrate the accomplishments of their peers, attendants also recognized this event as a time to encourage the future good work of others. The dinner, taking place just three weeks following the Boston Marathon bombings, began with a moment of silence.

"Let us reflect and remember ... the four who lost their lives in the senseless, tragic events involving the Boston Marathon" said MBA President Robert L. Holloway Jr. at the start of the annual dinner.

While the evening was dedicated to honoring the best in the local legal community, there was no denying the lingering presence of recent terrorist attacks on the city of Boston. The evening's distinguished keynote speaker, Massachusetts Gov. Deval L. Patrick, was proof of that.

"The horrific events of Marathon Monday brought such tragedy and devastation ... the senselessness of it all, even now, is hard to absorb," Patrick said. "And yet in some ways Marathon Monday and the days following brought out the best in our community ... (including) the everyday people who, in their own private ways, showed repeated acts of kindness, compassion and courage."

That theme of kindness, compassion and courage rings true in the work of all those honored during the annual dinner. Each

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Gov. Deval L. Patrick delivers the 2013 MBA Annual Dinner keynote address.

MBA Treasurer Marsha V. Kazarosian (left) presents the association's 2013 Legislator of the Year Award to State Rep. Brian S. Dempsey (D-Haverhill), chairman of the House Committee on Ways and Means.

PHOTOS BY: MERRILL SHEA

PRESIDENT'S VIEW

Continued from page 1

my late friend.

My late father-in-law, who had a lengthy, successful career on Wall Street and was more practical than I, did not covet gadgets and watches as I do. Many years ago, however, he did acquire a high-end French watch. After he died, my wife got the watch, which by then was not working, and we decided to have it refurbished.

Refurbishing old high-end watches is not for the faint of heart, and many dollars later we had an old watch that works – sort of. We gave it to our son, a sort of Wall Street type, who appreciated getting something significant connected to his grandfather.

We lawyers have considerable concern – some might say obsession – about time. Perhaps my own fascination with watches is somehow connected to that. In this season of graduations, weddings and reunions, I see further connections worth noting, however obvious they may be. Graduations celebrate the end of time at school and the corollary beginning of time devoted to other things. Weddings celebrate the union of a couple, the beginning of a hoped for long time together. Reunions celebrate time spent together and the reinforcement and renewal of relationships established during that time spent together.

The MBA's recent annual dinner in Boston, with more than 1,000 lawyers and others in attendance, had elements of graduations, weddings and reunions. There was a ceremonial passing of the gavel, as MBA officers will be changing in a few months. New friendships and connections were established. Old friendships and connections were renewed. And there was music by a band from New York City led by my childhood friend, Dave Chamberlain, with whom I have maintained regular contact for 55 years but, for a variety of reasons, had not seen in person for more than 40 years until the annual dinner.

As a small token of my appreciation for incoming MBA president Doug Sheff, I gave him my copy of Julian Barbour's book, "The End of Time." Barbour is a British physicist and philosopher whose thesis is that time does not exist. Quite apart from my difficulty in understanding his thesis, my sometimes whimsical nature compelled me to give the book to Doug, especially because it allowed me to point out that he will not have time to read it.

We often do not make the best use of our time; however that concept may be defined. It is useful, I think, in this season of graduations, weddings and reunions, to reflect on how we will use our time going forward. After all, we cannot recapture, other than by reminiscing, time past. We can and should make the best use of the time still available to us. And, as I do love irony, I note that we do not need watches for that.

The two watches I have described are not just timepieces. While one is new and the other old, both serve as tangible reminders of important relationships and connections to time past.

I will keep wearing the unneeded diving watch and be reminded of my friend. When my son wears his grandfather's watch that sort of keeps time, he will have a reminder of his grandfather and maybe even his mother and father.

In 1967 the Chambers Brothers released a song called "Time Has Come Today."

That song resonated with me and many others, including my late friend. The song ends simply: "Time." Forty-six years later that song still resonates with me. While of course no one needs a watch to listen to it, I think I will wear my new diving watch the next time I do. ■

Letter to the editor

Ladies and Gentlemen:

My sincerest compliments to Robert Holloway Jr., for expertly weaving together the stories of two iconic figures in American literature and music – Kurt Vonnegut and Thelonious Monk – in his "President's View" in the April issue of *Massachusetts Lawyers Journal*. As a voracious reader of Vonnegut's writing and an even more voracious listener of Monk's music, it was a joy to see Holloway cite their visionary artistry as examples of how a professional association (of lawyers, no less!) can leverage the strength of individual voices for the common good of collectively advancing its causes and objectives – Vonnegut's "karass."

In Monk's case, the other musicians he surrounded himself with shared his desire to find a new musical language to express their feelings, a language that eventually came to be known as "bebop." Rooted in the individual sounds and ideas these founding members of bebop (including Dizzy Gillespie, Charlie Parker and Bud Powell) brought to the table, the conception they created together continues to influence jazz today, more than 70 years later. Recently, one of Monk's young disciples, the brilliant pianist, Vijay Iyer, described Monk as an "architect of feeling." Attempting to play some of Monk's compositions that seemed simple on the surface made him appreciate how difficult and unique they actually were.

Monk's legacy continues today in the form of yet another karass — the Thelonious Monk Institute of Jazz, whose mission is to nurture and acknowledge musical excellence and which sponsors educational programs and an annual contest for young jazz talents, many of whom have gone on to noteworthy careers. The Monk Institute's story provides another nice parallel to the MBA's nurturing and acknowledgment of legal excellence and the noteworthy careers of its members! ■

Laurence D. Shind, Esq.
Kertzman & Weil LLP, Wellesley
Jazz host, WGBH, 89.7 FM, Boston

MASSACHUSETTS LAWYERS JOURNAL

Volume 20 / No. 9 / June 2013

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

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

Telephone numbers: editorial (617) 338-0682; general MBA (617) 338-0500.

E-mail address: lawjournal@massbar.org.

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

MBA

A publication of the Massachusetts Bar Association

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LEGAL NEWS

Carey named the next chief justice of the Massachusetts Trial Court

The Massachusetts Bar Association supports the selection of Probate & Family Court Chief Justice Paula M. Carey as the next chief justice of the Massachusetts Trial Court.

"Chief Justice Carey started in the trenches of law practice and worked her way up through the Probate Court system as a hard working, innovative justice," MBA Chief Operating Officer and Chief Legal Counsel Martin W. Healy said. "We couldn't be more pleased with the Supreme Judicial Court's selection."

"The Massachusetts Bar Association applauds the selection of a proven court leader to the position of Chief Justice of the Trial Court," Healy said.

Known for her work ethic and problem solving skills, Carey has commanded the Probate & Family Court through a time of great financial strain. Carey was promoted to chief justice of the Probate & Family Court in 2007 after six years as associate justice, a post she was appointed to by Gov. Paul Cellucci. She previously worked as an attorney for 15 years. For years, she was an active member of the MBA. ■

Chief Justice Paula M. Carey

BAR NEWS

MEMBER SPOTLIGHT

Gartenberg honored with the Greater Lowell Bar Association's 2013 Normand D'Amour Award

Massachusetts Bar Association Executive Management Board member Lee J. Gartenberg will receive the Greater Lowell Bar Association's Normand D'Amour Award for 'Lawyer of the Year.' The award was given out at the Greater Lowell Bar Association's Annual Dinner Meeting on June 3 at the Vesper Country Club in Tyngsborough.

Gartenberg has worked as the director of Inmate Legal Services in the Middlesex County Sheriff's Office for over 25 years where he oversees the legal needs of more than 1,000 inmates in the county detention system.

This past year, Gartenberg sat on the committee convened by Chief Justice for Administration and Management Robert A. Mulligan and Court Administrator Lewis H. "Harry" Spence that assisted the trial court in selecting Edward Dolan as the new commissioner of probation.

In 2008, Gartenberg received the MBA's Gold Medal Award. The award is presented to individuals who have provided outstanding legal services that have both benefitted the legal profession in Massachusetts and demonstrated a commitment to public service.

Gartenberg has served the state bar association in many capacities as a long-time MBA member and leader. In 2007, Gartenberg served as chair of the Criminal Justice Section and represented the MBA on Gov. Deval L. Patrick's Anti-Crime Council. In addition, Gartenberg has contributed to the MBA's Budget and Finance Committee, House of Delegates, Judicial Administration and Individual Rights & Responsibilities sections.

Gartenberg received his law degree from Boston University School of Law. ■

Lee J. Gartenberg

KATE COOK'S RISE

Continued from page 1

attorney.

"I am continually inspired by the governor's compassion, integrity and intelligence," Cook said. "When it comes to those core principles lawyers embrace – equality, civil rights, civil liberties and doing the right thing – the governor is the real deal. He is such an inspiration and it's contagious for all of us lucky enough to work on his team."

THE ROAD TO POLITICS

Growing up in Arkansas, Cook knew she wanted to be an attorney at a young age.

"My mother sparked my interest in the law," Cook said. "She was one of the court-appointed juvenile defenders and made a career out of helping people, until she became a juvenile court judge – the first woman judge in Garland County, Arkansas. I grew up listening to her stories about her cases, her clients, her challenges and her joys … and I knew I wanted to be a lawyer too."

Cook's parents, who were college students in the late '60s in Stillwater, Oklahoma, were deeply inspired by the political climate in the United States at the time.

"It was impossible to grow up in my house and not be interested in politics," Cook said. "I can remember my parents complaining about Reagan's tax cuts and driving around Hot Springs, Arkansas with the only Mondale/Ferraro bumper sticker in town. We ate dinner together most every school night, cooked by my father. And over dinner [we] would talk about the news of the day, including public policy issues. My brother and I were encouraged and expected to have our own opinions and to participate in the discussion."

Cook was a sophomore in high school when she was on a school trip to Washington D.C. and heard Arkansas Sen. David H. Pryor's staff talk about his start in politics as a page. Cook was hooked. She applied for a position her junior year and served as a page for Arkansas Democratic Representative Beryl F. Anthony Jr., for a semester – getting to school at the crack of dawn so she could be on the floor of the House of Representatives when it opened.

Cook's early involvement in politics was no surprise to her parents.

"She was always curious," said Cook's mother, Judge Vicki Shaw Cook, who recognized the impact the D.C. trips had on her daughter. "We knew we had lost her to the East Coast."

Cook, who went on to study at Brown University, spent a summer in college interning at the Clinton White House during the 1996 re-election campaign, before entering Harvard Law School in 1998.

"In law school I geeked out a bit on local government and administrative law, and I have been incredibly fortunate to have had the opportunity to mesh my intellectual and political passions through my career." Cook said. "I can still remember the day my administrative law professor, David Barron, cracked open David McCullough's *Truman* to guide our discussion about the Youngstown Steel Seizure issue that brought the three branches of government to a head during the Korean War. It's a great case for thinking about separation of powers and executive powers in particular. We poured over Justice Jackson's amazing concurring opinion that describes the spectrum of executive power, and what is meant by Jackson's reference to a "zone of twilight" in which the Executive and Legislative branches may have "concurrent authority, or in which its distribution is uncertain." For me, that decision, and classroom discussion, made the constitution come alive in an entirely new way. And there was another lesson Professor Barron made sure we understood when studying this case. After the Supreme Court rejected Truman's right to seize the steel mill, the president and justices had a drink. There's an important nugget there regarding good sportsmanship. I think in law and politics, once you've fought the good fight, it's critical to be able to shake hands and agree to disagree sometimes and move on."

Cook meets with members of Gov. Patrick's office staff – including Senator William "Mo" Cowan, to her left.

Cook (right) on a family vacation in 2012 with her mother, Judge Vicki Shaw Cook (center).

PUBLIC PASSIONS

Cook, who came to Massachusetts to attend Harvard Law School, never expected to stay, but fell in love with the commonwealth over the course of law school.

"I tell law students and new lawyers whenever I can, that Massachusetts is a wonderful place to live and work – especially if you are a lawyer," Cook said. For someone like me, from a small town in Arkansas, the collegial and close-knit legal community gives the area a small-town feel. I'm always amazed by the shared commitment to providing *pro bono* services across the Massachusetts bar."

While at Harvard, Cook participated in Professor Charles Ogletree's criminal justice clinical and was SJC Rule 3:03 certified – allowing her to represent low-income defendants in Dorchester Juvenile Court and Roxbury District Court. This gave her an introduction to the courtroom, advo- ➤8

BAR NEWS

MBA's Tiered Community Mentoring Program celebrates fourth year

Look for people who are in the career you aspire to and approach anyone you admire, in either their personal or professional lives. That was the message Massachusetts Secretary of Public Safety Andrea Cabral had for participants in the Massachusetts Bar Association Tiered Community Mentoring Program.

"Nobody makes it on their own. Everybody needs a mentor," said Cabral, a keynote speaker at the program's wrap-up event on April 25. "Look for people who seem to have the qualities you admire."

In its fourth year, the program matches 10 practicing lawyers with more than two dozen students from high school, college and law school. The goal of the program is to provide information, guidance and real life experiences to participants so they can make informed decisions regarding their future career.

Cabral called the MBA's Tiered Community Mentoring Program "amazing" and urged participants to continue adding mentors throughout their lives. She suggested that mentorship is a unique form of learning.

"People can mentor you in the moment," said Cabral, who learned she had the capacity to become a lawyer after taking an aptitude test in the fifth grade. "Take away something from every interaction."

MBA President Robert L. Holloway Jr., said mentoring can lead you to open doors that might otherwise have remained closed. "It's not that what you know is not important . . . but whom you know is also important," he said.

The MBA's Tiered Community Mentoring Program was the idea of Norfolk Probate and Family Court First Justice Angela M. Ordoñez. The program was honored with the 2011 ABA Partnership Award from the American Bar Association because of its commitment to diversity. ■

Massachusetts Secretary of Public Safety Andrea Cabral was the keynote speaker at the 2013 Tiered Community Mentoring Program wrap-up event.

Norfolk Probate and Family Court First Justice Angela M. Ordoñez speaks to Tiered Community Mentoring Program attendees.

Calendar of Events

WEDNESDAY, JUNE 5

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

34th Annual Labor and Employment Law Spring Conference
1–5:30 p.m.
Suffolk University Law School, 120 Tremont St., Boston

THURSDAY, JUNE 6

Visa Issues for International Medical Professionals
9 a.m.–12:30 p.m.
UMass Memorial Medical Center, Amphitheater II, 55 Lake Ave., Worcester

FRIDAY, JUNE 7

2013 Annual Health Law Legal Chat
Noon–1 p.m.
NOTE: There is no on-site attendance for Legal Chats.

THURSDAY, JUNE 13

Summer Networking Series Session I
6–7:30 p.m.
The Terrace of Avenue One, Hyatt Regency, One Avenue De Lafayette, Boston

Uniform Law Foundation program and cocktail reception fundraiser
5-8 p.m.
Suffolk University Law School, 120 Tremont St., Boston

FRIDAY, JUNE 21

Juvenile & Child Welfare Legal Chat
1–2 p.m.
NOTE: There is no on-site attendance for Legal Chats.

TUESDAY, JUNE 25

Health Law Conference
9 a.m.–2 p.m.
MBA, 20 West St., Boston

THURSDAY, JUNE 27

YLD Bowling Night
6–8 p.m.
King's, 50 Dalton St., Boston

WEDNESDAY, JULY 10

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

THURSDAY, JULY 11

Summer Networking Series Session II
6–7:30 p.m.
Rooftop Deck, blu Restaurant, Bar and Café, 4 Avery St., Boston.

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

Indicates recorded session available for purchase (after live program) through MBA On Demand at www.massbar.org/ondemand.

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

EXPERTS&RESOURCES

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ANNUAL DINNER

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PHOTO BY: MERRILL SHEA

From left to right: MBA Chief Operating Officer and Chief Legal Counsel Martin W. Healy with 2013 Annual Dinner keynote speaker Gov. Deval L. Patrick.

person acknowledged has done something their community can be proud of.

Patrick, building on that theme said:

"The common good. The commonwealth. Community. Out of the dust of tragedy, the spirit of community emerged. It might just have been our finest hour because we showed the world – and each other – that nothing can defeat that spirit."

MBA Legislator of the Year, Rep. Brian S. Dempsey, was proof of that spirit of community as he leaned over the stage's podium, speaking passionately about his hometown of Haverhill to the applause of everyone in the crowd that evening. Dempsey, who has "proven to be a leader," said MBA Treasurer Marsha V. Kazarosian, has "made an exceptional contribution to the administration of justice in the commonwealth."

"I'm certainly no stranger to the voice of the Mass. Bar and the effective voice of the legal community in the State House," Dempsey said. "Over the last few legislative sessions, we have worked to enact legislation that would continue to make the Massachusetts judicial system among the best in the nation."

The MBA took time to honor some of the best legal representatives in the nation with its 2013 Access to Justice Award recipients, which included five attorneys and one law firm "for their exemplary delivery of legal services," according to the MBA.

Pro bono awards were given to the law firm Brown Rudnick LLP and to Timothy G. Lynch of Swartz & Lynch LLP. Since 2001, Brown Rudnick has contributed nearly 90,000 hours of *pro bono* legal representation, much in Massachusetts, valued at $36 million. Lynch, a longtime child advocate, has volunteered for the nonprofit Boston CASA Inc., which concentrates on the best interests of children in abuse and neglect cases, since 1991.

Legal services awards were also handed out to Ruth A. Bourquin, of the Massachusetts Law Reform Institute, and James Breslauer, of Neighborhood Legal Services. Bourquin has worked tirelessly over the years to expand access to emergency shelter and income support for needy and homeless families. Breslauer, whose career has been dedicated to helping underrepresented persons, focuses on issues such as anti-hunger, unemployment, housing and health law.

The Hon. Gloria Tan, associate justice of the Juvenile Court, accepted the Defender Award for her diligent work in the legal system. Tan sees clients as "more than just a docket number on a case," she said. "It's your job to tell the court who your client is and what crime they're charged with."

Adam J. Foss, of the Suffolk County District Attorney's Office, accepted the Prosector Award in part for his efforts to give back to the community. Foss, who originally thought he wanted to work as an defense attorney, quickly changed his mind after discovering that "ADAs are capable of giving someone a second chance," he said.

The MBA thanks its 2013 Annual Dinner sponsors for helping to make the association's hallmark event a success (see page 19 for a list of sponsors). ■

ANNUAL DINNER PHOTOS

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PHOTO BY: JEFF THIEBAUTH

From left to right: Chief Operating Officer and MBA Chief Legal Counsel Martin W. Healy, MBA President Robert L. Holloway Jr., MBA Vice President Christopher P. Sullivan, MBA Secretary Martha Rush O'Mara, MBA Vice President Robert W. Harnais, MBA Treasurer Marsha V. Kazarosian and MBA President-elect Douglas K. Sheff.

PHOTO BY: JEFF THIEBAUTH

From left to right: Norfolk and Family Court First Justice Angela M. Ordoñez; Supreme Judicial Court Chief Justice Roderick L. Ireland; MBA President Robert L. Holloway Jr.; Probate & Family Court Chief Justice Paula M. Carey, the next chief justice of the Massachusetts Trial Court; and Boston Municipal Court Chief Justice Charles R. Johnson.

BAR NEWS

Excellence in the Law salutes profession's finest

MBA, *Mass Lawyers Weekly* honor the Hon. Sandra Lynch, WBUR-FM's News Department

Massachusetts Lawyers Weekly and the Massachusetts Bar Association honored the best of the legal profession at "Excellence in the Law" on the evening of May 2 at the Renaissance Boston Waterfront Hotel.

Following welcome remarks led by *Massachusetts Lawyers Weekly* Publisher Susan Bocamazo, MBA President Robert L. Holloway Jr. presented the Daniel F. Toomey Excellence in the Judiciary Award to the Hon. Sandra Lynch, chief judge of the United States Court of Appeals for the First Circuit; and the Excellence in Legal Journalism Award to WBUR-FM's News Department.

Lynch is the first woman to serve on the U.S. Court of Appeals for the First Circuit, and in 2008, became its first female chief judge. Lynch is the ninth chief judge of the First Circuit Court of Appeals since Congress created the position in 1948.

With operations based on the campus of Boston University, WBUR-FM is the preeminent news and information public radio station in Massachusetts, reaching close to 500,000 listeners each week. With its extensive newsroom, WBUR produces hourly local newscasts, original reporting, investigative and feature series, and in addition, has a robust – and growing – digital presence at wbur.org

The event also saluted the 2013 Up & Coming Lawyers, as well as the recipients of this year's other Excellence in the Law awards for diversity, *pro bono*, marketing, firm administration and operations. ■

The Hon. Sandra Lynch, chief judge of the United States Court of Appeals for the First Circuit (with husband Erik Lund) was honored with the Daniel F. Toomey Excellence in the Judiciary Award.

Sam Fleming, WBUR's managing director of News and Programming, accepts the Excellence in Legal Journalism Award.

MBA President Robert L. Holloway Jr. presents the Daniel F. Toomey Excellence in the Judiciary Award and the Excellence in Legal Journalism Award at the May 2 "Excellence in the Law" event.

From left to right: *Massachusetts Lawyers Weekly* Managing Editor David E. Frank, MBA Chief Operating Officer and Chief Legal Counsel Martin W. Healy and MBA President-elect Douglas K. Sheff.

BAR NEWS

Senate adopts budget, now rests with conference committee

BY LEE ANN CONSTANTINE

Last month, the Senate approved a $34 billion budget for fiscal year 2014 after two days of debate on hundreds of amendments. The Senate bottom line mirrors what the House passed in April; however, there are many differences to be worked out by a six-member conference committee to be appointed by both branches.

One line item that does not need to be addressed by the conference committee is funding for legal aid to the Massachusetts Legal Assistance Corporation. MLAC's funding from both the House and Senate is $13 million, a $1 million increase over fiscal year 2013 funding, but still below what is needed to address the civil legal needs of those who are eligible for services.

Also passed by both branches is a judicial compensation increase which would bump Massachusetts jurists' salaries to $159,694 on July 1, 2015. The increase is incremental and while the House and Senate agree on the amount of the increase, they differ on the schedule in which it would be implemented. The House budget sets the first increase effective Jan. 1, 2014; the second July 1, 2014 and the final increase on July 1, 2015. The Senate budget sets the first increase effective July 1, 2014; the second Jan. 1, 2015, and the final increase on July 1, 2015. This will be among the items decided upon by the conference committee members.

Also to be meted out by the conference committee will be funding for the Trial Court. The Senate budget gives the Trial Court $579 million in funding, while the House funded the Trial Court at $573.8 million. While the Senate funding is preferable, both branches fell far short in providing the $589.5 million requested by the Trial Court for maintenance funding.

The conference committee will be meeting over the coming weeks. Once an agreement is reached, the House and Senate will vote to approve/disapprove the conference committee's report before sending the budget to Gov. Deval L. Patrick for his signature and line item vetoes. The commonwealth's new fiscal year begins on July 1, 2013. ■

KATE COOK'S RISE

Continued from page 4

cacy and Boston's legal community.

"Like so many attorneys, I went to law school to help people," Cook said.

After graduation, Cook clerked for two years with the Hon. U.S. District Judge Morris E. Lasker. After clerking, Cook turned down a law firm offer to serve as assistant corporation counsel to the City of Boston, before taking a deputy legal counsel position in the Patrick Administration – working on budget and legislative matters – some of the most difficult and complex issues in the governor's office. In 2010, Cook took a general counsel position at the Massachusetts Senate Committee on Ways and Means before returning to the Patrick administration a year later as the director of Policy and Cabinet Affairs.

"Before graduating from law school, I had many customer service jobs, from making sandwiches at Subway to the front desk clerk at the Hilton, and I learned some of the best lessons in those jobs," Cook said. "So much in life comes down to treating people with respect, building relationships and creatively finding solutions to problems presented. The years I spent in the courtroom as assistant corporation counsel to the City of Boston and my time as general counsel to the Senate Ways and Means Committee required me to make difficult judgment calls quickly and to present complex legal and policy arguments succinctly to judges, city employees and senators."

In addition to her professional commitments, Cook further connected herself to the Massachusetts legislative process post-Harvard by serving on the Women's Bar Association Board, the WBA Legislative Policy Committee and the National Abortion Rights Action League Board and political committee. Cook continues to serve on the Women's Bar Foundation board and is immediate past president of the foundation, which connects poor women and families to legal representation. A Massachusetts Bar Foundation fellow, the philanthropic partner of the Massachusetts Bar Association, Cook is also a longtime and active member of Boston's Ward Five Democratic Committee and a regular volunteer at the Women's Lunch Place.

"I have seen [Kate] grow from an eager young law student to a dynamic and driven senior public official," said U.S. Senator William M. Cowan, who has known Cook since she was a summer associate at Mintz Levin, while at Harvard Law.

TAKING A SEAT AT THE TABLE

Medical marijuana. Boston Marathon bombings. Small business regulations. Judicial appointments. CORI reform. As the governor's chief legal counsel, Cook faces a wide range of legal issues on a daily basis and never has a "typical" day.

Kate Cook and Gov. Deval L. Patrick

"She is the best kind of lawyer in that she understands that the law is a tool," said Cowan. He believes Cook always has her eye on the larger picture, knows the "devil is in the details" and is always able to give the best reasoned, well-rounded, and always correct interpretation of the legal issues in play to the governor.

Cook, who feels "truly blessed" to have had wonderful mentors throughout her life, has crossed paths with Cowan throughout her entire career, until he was ultimately her boss within the Patrick Administration.

"Mo has taught me many things. Among them, he has always encouraged me to make my voice heard. A few years ago when he was chief of staff to the governor and I was new to the governor's senior team working as director of Policy and Cabinet Affairs, we had gone to the governor's office for a meeting and I opted for a chair not at the table, but around the perimeter," Cook said. "After the meeting, Mo whispered in my ear, 'if there is an empty chair at the governor's table, I don't ever want to see you pass it up to sit on the sidelines.' I have to admit that sometimes I still have to remind myself of that when I walk into the governor's office."

> "Like so many attorneys, I went to law school to help people," Cook said.

As the governor's chief legal counsel, Cook leads a team of attorneys, who are collectively responsible for a wide range of legal issues in the areas of public safety, education, health and human services, state finance, housing, transportation, energy and environmental affairs, labor and workforce development, as well as working with the Judicial Nominating Commission.

"Kate is wicked smart, unflappable and has a true moral rudder, all of which are helpful in any good lawyer, but essential in her current post," Patrick said. "She also gets along with everybody and takes everybody as she comes."

"Kate brings a strong desire to ensure Gov. Patrick's goals are achieved, and she comes to work every day with unparalleled enthusiasm and energy. Importantly, because of her background as the governor's director of Policy and Cabinet Affairs, she appreciates and understands the relationship between law and policy and how one informs the other. She has experience in important roles in both state and city government," said Nicholas P. Martinelli, Cook's deputy chief counsel. "She has an extraordinary work ethic and she takes a personal interest in the issues and in ensuring we do the best job we can do. She has a down-to-earth sensibility and – perhaps most importantly – she has a can-do attitude."

In the fast-paced environment at the Office of the Legal Counsel, Cook stays grounded through family and running.

"Running for me is such a fine metaphor for life – you apply hard work and discipline and it pays off. You still might have a bad patch, but you keep putting one foot in front of the other, and the bad patch passes," said Cook, who has run 15 marathons and a few ultramarathons. "For me, running is truly my time for meditation, working through issues and discovery."

"She listens and observes well, which allows her to understand the full-range of legal issues," said Cowan, of Cook's strengths as a chief legal counsel. "She brings realism to her work."

Cook's number one goal as the governor's chief counsel is to make sure there are no vacancies in the judiciary by the end of Patrick's term in 2015.

Using a running saying, Cook notes that "the governor is sprinting to the finish line of his second term. The Patrick administration has a tried-and-true method for job creation and economic development: investing in innovation, infrastructure and education. We will continue pushing in these three areas until the last hour of the last day," Cook said. "In the judicial arena, the governor intends to fill every judicial and clerk-magistrate vacancy. The Joint Bar Committee is such a valuable resource, representing a cross-section of the bar from around the commonwealth. I appreciate their volunteer efforts, and value the administration's excellent working relationship with Marty Healy and the JBC Chair Carol Starkey.

"Kate, as chief legal counsel, has joined an exclusive, small coterie of the state's top lawyers who are privileged to work directly with the governor on extremely sensitive and challenging issues," said Martin W. Healy, the MBA's chief legal counsel and chief operating officer. "There is a history of great accomplishments from this distinguished group. You can quickly grasp Kate's keen intellect and approachable style when engaging her on an issue. The bar is very fortunate to have her in this position, at the forefront of legal issues affecting the practice of law and the administration of justice."

Cook is proud to have been part of the Patrick administration for over half a decade.

"I have been very fortunate in that I have loved every job I have had as an attorney, each one more than the one before," Cook said. "And with all my different roles, I've had the privilege of working with smart, dedicated people. Serving as chief legal counsel is challenging, fulfilling and fast-paced, and I can't imagine the next gig will be as great as this one." ■

BAR NEWS

MBA's House of Delegates meets, elects ABA House of Delegates representatives

BY LIZ KENNEDY

On May 15, the House of Delegates of the Massachusetts Bar Association met at the MBA's offices at 20 West St.

The meeting began with former MBA Vice President Jeffrey N. Catalano, of Todd & Weld LLP, speaking about his involvement with the Massachusetts Alliance for Communication and Resolution following Medical Injury or "MACRMI" as it's commonly known. This alliance is comprised of patient advocacy groups, teaching hospitals and their insurers, and statewide provider organizations. Its mission is to provide patients with transparent communication, sincere apologies and fair compensation in cases of avoidable medical harm. Fearing that patients would be compelled to accept settlements without proper consideration or consultation, Catalano lobbied to have the MBA become a part of this alliance. Last month, MACRMI elected to have the MBA join. Going forward, Catalano will participate in all MACRMI meetings and ensure patients are encouraged to seek legal representation when presented with a settlement.

"If you're not at the table, you're on the menu," said Catalano about his push to have MBA representation at MACRMI policy meetings. "Patients are extremely vulnerable in these situations, and ensuring that they receive a fair offer that takes into account all things is critical for their future well-being," he stated.

The House of Delegates then heard from president Robert L. Holloway Jr., as he summarized his tenure over the past nine months. He stated that his goal had been and continues to be the unification and promotion of the legal profession. He cited the recent successful annual dinner – where more than 1,000 legal professiona–s gathered to support and celebrate the association and its efforts – as proof of the strength of Massachusetts' legal community. He then introduced his successor, Douglas K. Sheff, and reminded him of how fleeting time is, and how important it is to maximize every moment.

President-elect Sheff took to the podium to lay out his goals for the following year. He voiced his concerns on how the image of lawyers has eroded in the past 30 years, and how terms like "elitest," "deceitful" and "takers" are often used when the press refers to legal professionals. He stated that no other profession gives back as much as the legal profession, in terms of *pro bono* efforts and other community support. Drawing from three words – family, consumer, justice — that resonate strongly with most people, Sheff outlined three platforms on which he will establish his presidency. First, he talked about the Working Family Initiative, which will support family-run businesses, workplace safety and tax relief. His second initiative is consumer advocacy, promoting consumer-friendly practices and rights for individuals. Lastly, he talked about "justice for all," which would include *pro bono* and charitable initiatives, Access to Justice efforts, Dial-A-Lawyer programs, the MBA's work with the One Fund Boston and the MBA's Lawyer Referral Service.

Vice President Christopher P. Sullivan gave brief remarks and strongly encouraged all members of the MBA to support the victims of the Marathon bombings. He highlighted the upcoming Dial-A-Lawyer program, scheduled for May 30, which was created specifically to answer calls from victims. He also talked about the MBA's work with the One Fund Boston, spearheaded by Civil Litigation Section Chair Paul E. White and MBA Past President Leo V. Boyle, as well as the opportunity for lawyers to represent victims on a *pro bono* basis.

MBA Chief Legal Counsel Martin W. Healy provided delegates with a legislative update. Since the last HOD meeting, the House passed a budget that included a long-awaited judicial compensation increase. The Senate released its budget on May 16. For more details see page 8.

Healy also noted that the Hon. Paula M. Carey has been appointed Trial Court Chief Justice, and that the MBA looks forward to working closely with her in her enhanced role.

Lastly, Healy highlighted recent testimony by MBA Secretary Martha Rush O'Mara before the Joint Committee on the Judiciary. Rush O'Mara spoke in support of a bill that would raise the age of juvenile jurisdiction from 17 to 18 years of age. This bill has a long list of supporters, including Chief Justice Michael Edgerton, CPCS and Citizens for Juvenile Justice. It has passed the House and awaits action by the senate.

The ABA Nominating Committee, comprised of Boyle, Thomas Carey, Josephine McNeil, Denise Squillante, Richard Campbell, then presented its candidates for the ABA's House of Delegates. Three names were put forth by the committee – Marsha V. Kazarosian, Robert W. Harnais, Kay H. Hodge – and a fourth name, Martha Rush O'Mara, was nominated from the floor. After a brief debate, the House of Delegates voted to elect Kazarosian, Harnais and Hodge to the ABA House of Delegates.

The meeting concluded with the ceremonial passing of the gavel, and a book, "The End of Time," from Holloway to Sheff. ■

Delegates listen to former MBA Vice President Jeffrey N. Catalano discuss the MBA's involvement in the Massachusetts Alliance for Communication and Resolution following Medical Injury.

EXPERTS&RESOURCES

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EXPERTS&RESOURCES

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BAR NEWS

MBA holds first Marathon Bombing Dial-A-Lawyer

Volunteer to offer legal assistance to Boston Marathon bombing victims

The Massachusetts Bar Association is offering legal assistance to victims of the Boston Marathon bombings. At its first Marathon Bombing Dial-A-Lawyer on Wednesday, May 8, attorneys fielded several calls from victims between the hours of 5:30 and 7:30 p.m.

"I decided to volunteer for the Marathon Bombing Dial-A-Lawyer because I want to do my part, as a member of the legal community, to help the victims overcome this horrific tragedy," said volunteer attorney Samuel A. Segal, an associate with Breakstone, White & Gluck, PC. "It is our responsibility as members of the Boston legal community to help the victims recover and the community rebuild in the wake of this tragedy. It is a privilege and a pleasure to help."

Please visit the web site www.massbar.org/BostonStrong to learn more about the MBA's efforts and how you can help. Visit www.onefundboston.org to donate to The One Fund Boston.

In addition to offering victims legal representation when needed, the MBA is also seeking attorneys who are available to volunteer to take one case, if called upon. The MBA anticipates that there will likely be a need for legal help in the areas of housing, disability claims, workers' compensation, employment and insurance.

If you, or any of your colleagues, want to help, please contact the MBA at (617) 338-0695 or communityservices@massbar.org and specify your area of expertise.

All volunteers must commit to take no legal fee for this representation.

The MBA thanks its May 8 Marathon Bombing Dial-A-Lawyer attorney volunteers:

- Peter G. DeGelleke;
- Kwadwo Frimpong;
- Sheryl R. Furnari;
- David Hass;
- Eric J. Robbie;
- Samuel A. Segal;
- J. Daniel Silverman;
- Richard A. Sugarman; and
- Geraldine M. Zipser. ■

PHOTOS BY CAROL FEE.

Volunteer attorneys answer calls from Boston Marathon bombing victims on May 8.

MBA CLE AT-A-GLANCE

JUNE CONTINUING LEGAL EDUCATION PROGRAMS BY PRACTICE AREA

IMMIGRATION LAW

Visa Issues for International Medical Professionals

Thursday, June 6, 9 a.m.–12:30 p.m.
UMass Memorial Medical Center
Albert Sherman Center Auditorium AS2-2012
55 Lake Ave., North Worcester

Faculty:

Joseph P. Curran, Esq., program co-chair
Curran & Berger, Northampton

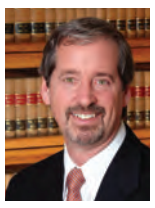
Roy J. Watson, Esq., program co-chair
Watson Law Office, Bedford

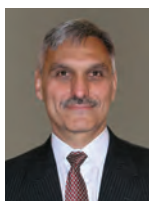
Eleanor M. Fitzpatrick
Educational Commission for Foreign Medical Graduates, Philadelphia, PA

Mahsa Khanbabai, Esq.
Law Offices of Mahsa Khanbabai, Brockton

THIS EVENT IS FREE

Sponsoring section: Immigration Law


JOSEPH P. CURRAN


ROY J. WATSON

Annual Health Law Conference

Tuesday, June 25, 9 a.m.–2 p.m.
MBA, 20 West St., Boston

Faculty:

Lorianne Sainsbury-Wong, Esq., conference co-chair
Health Law Advocates Inc., Boston

J. Michael Scully, Esq., conference co-chair
Bulkley, Richardson & Gelinas LLP, Springfield

Sponsoring section: Health Law

KEYNOTE SPEAKER

JOHN POLANOWICZ

SECRETARY, MASSACHUSETTS EXECUTIVE OFFICE OF HEALTH AND HUMAN SERVICES

CONFERENCE CO-CHAIRS


LORIANNE SAINSBURY-WONG


J. MICHAEL SCULLY

Denotes real-time Webcast available for purchase at www.MassBar.org/OnDemand.

FACULTY SPOTLIGHT

CLARE D. McGORRIAN, ESQ.

Faculty, 2013 Annual Health Law Conference

McGorrian represents individuals in health insurance and disability benefits matters. Until 2005, she led litigation efforts for Health Law Advocates, including a successful lawsuit to improve dental care for low-income children.

McGorrian is a member of the MBA Health Law Section Council. She has also been active in the Health Law Section of the Boston Bar Association.

McGorrian served on the Advisory Committee for the Massachusetts Commission on End of Life Care's 2005 survey. She speaks and writes frequently on the legal aspects of health care access.

McGorrian is an adjunct professor at Suffolk University Law School. She has a Juris Doctor from Northeastern University School of Law and a Bachelor of Arts from Harvard College.

See page 12 for McGorrian's Section Review *article, "Federal Health Reform and Access to Mental Health Care."*

34TH ANNUAL LABOR & EMPLOYMENT LAW CONFERENCE

Wednesday, June 5, 1–5:30 p.m.
Suffolk University Law School Conference Room
120 Tremont St., Boston

Faculty:

Angela L. Rapko, Esq., conference co-chair
Constangy, Brooks & Smith LLP, Boston

Meghan H. Slack, Esq., conference co-chair
Law Office of Meghan Slack, Arlington

Nicholas Anastasopoulos, Esq.
Mirick, O'Connell, DeMallie & Lougee LLP, Boston

Patrick N. Bryant, Esq.
Pyle Rome Ehrenberg PC, Boston

Andrew L. Eisenberg, Esq.
Seyfarth Shaw LLP, Boston

Michael K. Fee, Esq.
Ropes & Gray LLP, Boston

Mary E. Hoye
Area Director, U.S. Dept. of Labor, OSHA, Springfield

Christopher B. Kaczmarek, Esq.
Littler Mendelson PC, Boston

Michael Mabee
Supervisory Investigator, U.S. Dept. of Labor, OSHA

Paul Merry, Esq.
Law Offices of Paul H. Merry, Boston

Jeffrey A. Newman, Esq.
The Law Offices of Jeffrey A. Newman & Assoc., Boston

Sponsoring section: Labor & Employment

KEYNOTE SPEAKER

JONATHAN B. KREISBERG

REGIONAL DIRECTOR
BOSTON REGIONAL OFFICE (REGION 1)
NATIONAL LABOR RELATIONS BOARD

CONFERENCE CO-CHAIRS


ANGELA L. RAPKO


MEGHAN H. SLACK

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

Health Law
Legal Chat Series

Friday, June 7, Noon–1 p.m.

Lorianne Sainsbury-Wong, Esq.
Health Law Advocates Inc., Boston

*NOTE: There is no on-site attendance for this series.

Juvenile & Child Welfare
Legal Chat Series

Friday, June 21, 1–2 p.m.

Marlies Spanjaard, Esq., program chair
The EdLaw Project, Boston

*NOTE: There is no on-site attendance for this series.

Your Land, Your Legacy: Planning for Preservation and Development of Family Land
Legal Chat Series

Tuesday, June 18, 4–5 p.m.

Joe Boynton, Esq.
Attorney at Law, Worcester

Deborah A. Eliason, Esq.
Eliason Law Office LLC, Gloucester

Amanda Zuretti, Esq.
CATIC, Westborough

*NOTE: There is no on-site attendance for this series.

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Substantive section-specific articles are featured regularly in *Lawyers Journal.*

SECTION REVIEW

MASSACHUSETTS BAR ASSOCIATION

LABOR EMPLOYMENT

Case report: *Croker v. Townsend Oil Company Inc.*

BY CHRIS CALLANAN

The Supreme Judicial Court's December 17, 2012 decision in *Croker v. Townsend Oil Company Inc.*, clarifies several issues regarding claims under the Wage Act. Specifically, the decision clarifies the application of the Wage Act's statute of limitations and the enforceability of general release language covering Wage Act claims.

The plaintiffs in *Croker* were both truck drivers, classified as independent contractors by Townsend Oil, an oil distribution company. Each signed contracts requiring full-time delivery of oil and containing non-compete clauses prohibiting delivery for other companies. At the end of their employment, each signed similar termination agreements containing general releases of all claims. After another Townsend driver, Hughes Amero, successfully established that he had been misclassified as an independent contractor rather than an employee, the *Croker* plaintiffs sued, alleging that they too had been misclassified and were entitled to pay, including overtime pay under the Wage Act. Townsend moved for summary judgment, arguing the claims were barred by the Wage Act's three-year statute of limitation and otherwise waived in the general release of claims agreed upon in the termination agreements.

CHRIS CALLANAN practices employment at business litigation at Stevenson McKenna & Callanan LLP in Boston. Callanan thanks Brian Z. Leblanc, a second year student at Suffolk Law School for his contributions to this article.

STATUTE OF LIMITATIONS

The court considered several questions regarding the statute of limitations. First, the court decided whether or not the plaintiffs' overtime claims (subject to a two-year statute of limitations) could be brought beyond the two-year timeframe via the Wage Act's three-year statute of limitations. The court held that the Wage Act's statute of limitations defined the window in which any Wage Act claim could be brought. However, to permit overtime claims for three years would render meaningless the legislature's two-year statute of limitations for overtime claims. Therefore, the court concluded that the Wage Act's three-year statute of limitations permits a claim for overtime pay, but in the event the claim is barred by the two-year statute of limitations for overtime claims, recovery is limited to regular pay, not overtime pay.

The plaintiffs also claimed that the statute of limitations should be tolled in this case because of the discovery rule, the defendant's fraudulent concealment of facts, and because of the continuing violation doctrine. The court found that on the facts of this case, there was no evidence to suggest that the defendant fraudulently concealed evidence. Further, the court found the discovery rule inapplicable because the plaintiffs possessed all the facts necessary to reach the conclusion that they might qualify as employees. As to the continuing violation doctrine, the court found that claims related to pay are discrete and separate wrongs, to which the continuing violation doctrine should not apply. The court distinguished Wage Act cases from discrimination claims where often the facts are such that to fully appreciate the nature of the discrimination, one must consider a complete series of events, some of which occurred beyond the statute of limitations. Claims related to pay give rise to causes of action each time they occur and are easily identifiable. Therefore, the Wage Act provides the right to recover for violations from three years prior to the date the lawsuit is filed.

RELEASE LANGUAGE

Both plaintiffs had signed general releases as part of their termination. Townsend Oil argued that the releases barred their Wage Act claims. The court balanced its policy of enforcing release language with the policies that support the Wage Act as a special protection for employees. It adopted the language and logic of its *Warfield* decision relating to the language necessary to effectively release discrimination claims. To effectively release statutory Wage Act claims, a release must use language that clearly and unmistakably waives the claims in language an ordinary person can understand. Broadly worded legalese will not suffice to effectively release Wage Act claims.

The *Croker* decision provides helpful information to both plaintiffs and defendants. It demonstrates that for plaintiffs, moving quickly on Wage Act claims (like other employment claims) is essential to preserving the ability to pursue causes of action. For defendants, it underscores the importance of using clear and unmistakable language in referring to Wage Act claims when drafting release agreements. ■

Federal health reform and access to mental health care

BY CLARE D. MCGORRIAN

Based on the many uninsured persons with mental health or substance use disorders (MH/SUD) and the limits of coverage for those who have MH/SUD benefits, the Patient Protection and Affordable Care Act (ACA) could expand MH/SUD coverage for millions of people. The ACA offers various means to improve access to and enhance quality of MH/SUD coverage and services. This article explores some of the opportunities and challenges under the Affordable Care Act with regard to mental health and substance use disorders.

ACCESS TO MH/SUD BENEFITS

The ACA contains broad insurance reforms that will impact access to MH/SUD benefits, including elimination of pre-existing conditions and of annual and lifetime caps on coverage, group eligibility for children to age 26, and prohibition of rescission of coverage. The ACA requires that certain plans offer MH/SUD benefits as part of the essential health benefits package in qualified health plans. It also calls for expansion of Medicaid eligibility, which would significantly increase access to mental health care. Finally, the law extends the reach of federal mental health parity laws.

ESSENTIAL HEALTH BENEFITS

About one-third of individuals covered in the individual insurance market have no coverage for substance use disorders; nearly one in five has no coverage for mental health services. One estimate projects that 3.9 million people in the individual market will gain MH/SUD coverage through the ACA. The Congressional Budget Office anticipates that millions more will secure MH/SUD benefits through exchange-offered small group policies.

Prior to the ACA, federal law did not mandate benefits for mental health conditions or substance use disorders in private plans. The ACA creates, for the first time, a *federal* coverage mandate for certain group and non-group plans. Effective in 2014, all health plans offered in the individual market and all qualified small group health plans offered through an exchange must cover an "essential health benefit" (EHB) package that includes MH/SUD benefits. The ACA does not prescribe the services to be covered, however, and the final rule offers only broad guidelines.

Massachusetts requires that state-regulated insurance policies include certain mental health benefits. A state may require exchange plans to cover benefits beyond EHB categories, provided that the mandates were in place before December 31, 2011. Massachusetts-required MH/SUD benefits for qualified health plans are found in the state mental health parity statutes.

MEDICAID EXPANSION

The focus of the Supreme Court's 2012 decision in *National Federation of Independent Business v. Sebelius* was the ACA's requirement that individuals have health coverage. Yet the other major issue – the legality of the Medicaid expansion – is arguably more important to expanding access. While the Court upheld Congress' authority to expand Medicaid eligibility, it ruled that states did not have to adopt the new standards.

Participating states must actively enroll eligible individuals with mental health and substance-related disorders. Nearly 18 percent of people who would be eligible under full Medicaid expansion (all states) have such a disorder. Unfortunately, hundreds of thousands of people with severe mental and substance use disorders will not receive coverage due to states' non-participation.

CLARE MCGORRIAN focuses her practice on health insurance disputes and disability benefits matters. She is a member of the MBA Health Law Section Council. She teaches at New England and Suffolk law schools and speaks frequently on legal issues in health care.

FEDERAL PARITY LAW AFTER THE ACA

The Mental Health Parity Act of 1996 (MHPA) and the Mental Health Parity and Addiction Equity Act of 2008 (MHPAEA) require a certain level of coverage for mental health and substance use disorders based on parity with financial requirements and treatment limitations applicable to medical/surgical benefits. Before the ACA, large group plans had to comply if they offered medical/surgical and MH/SUD benefits. Individual market policies were not subject to federal parity requirements. Although most small group plans cover some MH/SUD benefits, federal parity laws have exempted such plans from compliance. Regulators estimate that 23.3 million current small group enrollees will benefit from expanded parity.

The ACA expands the reach of federal mental health parity requirements to: 1) individual and small group qualified health plans; 2) Medicaid non-managed care benchmark and benchmark-equivalent plans; and 3) plans offered through the individual market. Yet the Act expands the small employer exemption even as it extends parity to qualified small group health plans. Under the ACA and MHPAEA, a small employer is defined as having one to 100 employees, increased from two to 50 employees under the MHPA. According to the Department of Labor, the broadened definition applies only to nonfederal governmental plans while the original definition applies to private employer plans. Until 2016, however, states may use the definition of small employer in pre-ACA law for plans offered through exchanges.

Health insurers are now preparing individual and small group products to be sold on exchanges. Yet there is disagreement about the interpretation and implementation of the MHPAEA. Among the important issues to be resolved are whether plans must cover a full continuum of services and whether HHS has properly regulated plan management of benefits.

FEDERAL PARITY LAW AND PUBLIC PLANS

Prior to the ACA, Medicaid managed care plans and CHIP plans had to comply with some or all federal mental health parity requirements. Post-ACA, *non-managed care* Medicaid benchmark and benchmark-equivalent plans must offer MH/SUD benefits that satisfy federal parity law with respect to financial requirements and treatment limitations. Plans that cover Early and Periodic Screening, Diagnostic, and Treatment Services (EPSDT) for eligible children will be deemed to meet parity requirements.

Medicare plans are exempt from federal parity laws. Notably, however, the ACA requires Medicare to cover an annual wellness visit that assesses risk factors and conditions, including mental health conditions, for which

preventive intervention is recommended or underway.

INTERACTION OF FEDERAL AND STATE PARITY LAWS

States have filled gaps in federal parity laws by mandating MH/SUD benefits in insurance policies. Massachusetts has taken a *full parity* approach to mental health benefits in state-regulated plans, requiring coverage of certain MH/SUD conditions and services on the same terms as coverage of physical conditions. The proposed EHB benchmark plan for Massachusetts restricts benefits for "non-biologically based" mental disorders, as permitted by the state parity law. Pursuant to the ACA, however, qualified health plans must comply with the MHPAEA. The quantitative treatment limits for mental disorders designated non-biologically based by state law appear to violate the MHPAEA unless also applied to medical/surgical benefits.

ACA PROVISIONS RELATING TO QUALITY AND DELIVERY OF MH/SUD SERVICES

The ACA contains numerous provisions that affect the quality and delivery of health care. Some general provisions will almost surely impact MH/SUD services. Other sections of the Act are directed at prevention and treatment of mental illness and substance use disorders.

GENERAL PROVISIONS LIKELY TO IMPACT MH/SUD SERVICES

General provisions of the ACA likely to impact the quality and delivery of MH/SUD services include sections creating the National Prevention, Health Promotion and Public Health Council, the Center for Medicare and Medicaid Innovation, the National Strategy for Quality Improvement, and the Patient-Centered Outcomes Research Institute; sections establishing Healthy Aging, Living Well and Community Transformation grants; certain initiatives to integrate and coordinate primary and specialty care; expansion of Medicaid home and community-based services; and mandated data collection.

NATIONAL PREVENTION, HEALTH PROMOTION AND PUBLIC HEALTH COUNCIL

The ACA requires the President to establish a National Prevention, Health Promotion and Public Health Council. The council is charged with providing coordination and leadership on prevention, wellness and health promotion, public health, and integrative health care. Mental health and substance abuse are among the council's national priorities.

CENTER FOR MEDICARE AND MEDICAID INNOVATION

The law establishes a Center for Medicare and Medicaid Innovation to test innovative payment and service delivery models that will reduce expenditures while preserving or enhancing quality of care.

NATIONAL STRATEGY FOR QUALITY IMPROVEMENT

The ACA requires the Department of Health and Human Services (HHS) to develop a National Strategy for Quality Improvement, which focuses on high-cost chronic diseases and identifies priorities that have the greatest potential for improving outcomes, efficiency, and patient-centered care. As the leading cause of disability for individuals age 15 to 44, mental health disorders will presumably be a focus of the national strategy.

PATIENT-CENTERED OUTCOMES RESEARCH INSTITUTE

The law creates a Patient-Centered Outcomes Research Institute to fund research comparing the clinical effectiveness of treatments.

HEALTHY AGING, LIVING WELL

The Healthy Aging, Living Well program awards grants to state and local health departments and Indian tribes to provide public health community interventions, screenings and clinical referrals for individuals aged 55 to 64 years of age. Intervention and screening activities may address substance abuse and mental health. Under a related provision, the secretary must evaluate community-based prevention and wellness programs for Medicare beneficiaries, including programs that address mental health.

COMMUNITY TRANSFORMATION GRANTS

The ACA creates a Community Transformation Grant program for state and local governments, community organizations and Indian tribes to implement, evaluate, and disseminate evidence-based preventative health activities. Among other purposes, grant activities may focus on improving social and emotional wellness and mental health.

INITIATIVES TO INTEGRATE AND COORDINATE PRIMARY AND SPECIALTY CARE

The ACA establishes a *Federal Coordinated Health Care Office* within CMS to more effectively integrate benefits for persons eligible for Medicare and Medicaid benefits ("dual eligibles"). The FCHCO seeks to ensure full access to covered services and improve quality and continuity of care. The ACA also supports and expands medical homes for Medicare and Medicaid beneficiaries with chronic conditions, which includes one serious and persistent mental health condition. The patient chooses a designated provider or health team to coordinate care. A community mental health center may be a designated provider if it satisfies certain criteria. MH/SUD service providers are also eligible for community health team grants to support medical homes. Under a separate provision, the ACA funds states and Indian tribes to establish community-based interdisciplinary health teams to support primary care practices; such teams may include behavioral and mental health care providers.

HOME AND COMMUNITY-BASED SERVICES UNDER MEDICAID

The ACA allows states to offer home and community-based (HCB) supports to Medicaid beneficiaries without obtaining a waiver from HHS. State HCB programs must maximize beneficiary independence, support self-direction and improve coordination among providers.

DATA COLLECTION

The ACA requires expanded and improved data collection related to health care disparities. People with disabilities, including those with mental illness, will be one focus of such efforts. The data will be used to develop better policies and practices for treatment of individuals with MH/SUDs, and to enhance integration of mental health and primary care.

ACA PROVISIONS TARGETED AT MH/SUD PREVENTION AND TREATMENT

Provisions in the ACA that explicitly target research, prevention and treatment with respect to mental health conditions and substance use disorders include: 1) a program to combat postpartum depression and psychosis; 2) the establishment of Centers for Excellence in Depression; 3) co-location of primary and MH/SUD care in mental health treatment settings; 4) funding of MH/SUD services in school-based health centers; 5) workforce capacity expansion in the MH/SUD treatment field; 6) grants for small businesses to provide comprehensive wellness programs; and 7) the Medicaid Emergency Psychiatric ➤14

EXPERTS&RESOURCES

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Demonstration Project.

DEPRESSION INITIATIVES

The ACA funds an initiative to address and combat postpartum depression and postpartum psychosis through research and education. The secretary may make grants to state and local governments and nonprofit private hospitals, community health centers and community based organizations to deliver essential services to persons with or at risk for postpartum mental health conditions. The ACA also includes the Establishing a Network of Health-Advancing Centers of Excellence for Depression (ENHANCED) Act of 2009. Under the ENHANCED Act, the secretary may fund institutions of higher education and nonprofit research institutions to establish national centers of excellence for the treatment of depressive disorders. Grantees must develop evidence-based interventions, train mental health professionals, and educate the public to reduce stigma and raise awareness of treatments.

CO-LOCATION OF PRIMARY AND SPECIALTY CARE

A coordinated, team-based approach to the delivery of primary care improves quality and outcomes for individuals with mental health and substance use disorders. One such model, the medical home, is discussed above. The ACA also funds coordination and integration of primary and specialty services for adults with mental illness and co-occurring conditions, through co-location of services in community-based behavioral health settings.

MH/SUD CARE IN SCHOOL-BASED HEALTH CENTERS

Mental health is the primary reason that students visit school-based health centers, with 70 to 80 percent of children who receive mental health services accessing them in school. School-based health centers must provide an array of mental health services, including assessments, crisis intervention counseling, treatment, and referral. The ACA funds new and existing SBHCs, giving priority to communities that evidence barriers to MH/SUD prevention for children and adolescents.

PROGRAMS TO DEVELOP WORKFORCE CAPACITY

The ACA sets the capacity of the mental health workforce and the integration of physical and mental health services as priorities of the National Workforce Strategy. The act creates a National Health Care Workforce Commission and a National Center for Healthcare Workforce Analysis, with grants for collaborating state centers.

The ACA establishes a loan repayment program targeting the pediatric health care workforce, including qualified professionals in child and adolescent mental and behavioral health care and substance abuse prevention and treatment. The ACA also funds medical schools to build capacity in primary care, with priority given to innovative approaches, including systems that integrate physical and mental health care, and to training in the care of vulnerable populations, including individuals with mental health and substance-related disorders. The act further subsidizes tuition and fees for students in mental/behavioral health education programs, including social work and psychology programs and institutions providing field placements in child and adolescent mental health.

The act creates a United States Public Health Services Track for students in accredited health professions programs at academic health centers, of which 12 percent must be in the behavioral and mental health professions. The act also funds new and expanded Area Health Education Centers, which recruit, train and educate health professionals for underserved areas and to serve health disparity populations. Grantees may develop and implement innovative curricula that involve collaboration between primary care and behavioral/mental health facilities. Finally, the act authorizes Teaching Health Center development grants to community mental health centers to establish and expand primary care programs.

GRANTS FOR SMALL BUSINESSES TO PROVIDE COMPREHENSIVE WELLNESS PROGRAMS

Employers with fewer than 100 employees may apply for grants to establish comprehensive wellness programs. Among the required program activities are supportive environment efforts, specifically including policies to encourage improved mental health.

MEDICAID EMERGENCY PSYCHIATRIC DEMONSTRATION PROJECT

The ACA authorizes HHS to assess emergency psychiatric stabilization services for non-elderly adult Medicaid beneficiaries with respect to access to inpatient care, discharge planning and cost. Psychiatric hospitals must report to HHS on quality measures beginning in 2014.

CONCLUSION

The ACA expansions come at a critical time for persons with mental illness and substance-related disorders. States' investment in mental health services dropped dramatically between 2009 and 2012 as many more people sought publicly financed treatment. Funding for timely, quality treatment of mental health conditions and substance use disorders is essential. The Affordable Care Act offers hope that greater access to quality mental health care may not be such a distant promise after all. ■

1. The Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (March 23, 2010), as amended by the Health Care and Education Reconciliation Act of 2010, Pub. L. No. 111-152, 124 Stat. 1029 (Mar. 30, 2010) (referred to herein as "The Affordable Care Act" or "ACA" or "The Act").
2. Twenty-five percent of the uninsured are believed to have a mental health condition or a substance use disorder or both. ASPE Research Brief: Affordable Care Act Will Expand Mental Health and Substance Use Disorder Benefits and Parity Protections for 62 Million Americans, by Kirsten Beronio, Rosa Po, Laura Skopec and Sherry Glied, Department of Health and Human Services, Office of the Assistant Secretary for Planning and Evaluation (February 2013), at 2.
3. ACA Health Reform: Overview of the Affordable Care Act, SAMHSA News, Vol. 18, No. 3 (May/June 2010), accessed May 1, 2013 at http://www.samhsa.gov/samhsanewsletter/Volume_18_Number_3/AffordableHealthCareAct.aspxSA.
4. ACA § 131 extends applicability of federal parity laws enacted by the Mental Health Parity Act of 1996, P.L. 104-204 (1996) and the Paul Wellstone and Pete Domenici Mental Health Parity and Addiction Equity Act of 2008, P.L. 110-343 (2008).
5. ASPE Research Brief: Affordable Care Act Will Expand Mental Health and Substance Use Disorder Benefits and Parity Protections for 62 Million Americans, supra, note 2, at 1.
6. Id. at 2.
7. Visit http://www.cbo.gov/topics/health-care/affordable-care-act for the latest CBO analyses of the ACA's impact.
8. Neither the Employee Retirement Income Security Act of 1974, 29 U.S.C. 1001 et seq., nor the federal parity laws, supra, note 4, mandate such coverage.
9. Mental Health Parity and the Patient Protection and Affordable Care Act of 2010, Amanda K. Sarata, Congressional Research Service (December 28, 2011),

CRS Pub. No. 7-5700, at 1.

10. ACA §1302(b)(1).

11. A state's EHB package (EBHP) must equal the scope of benefits provided under a typical employer plan. ACA §§ 1302(b)(2)(A), 1311(d)(3). State-required benefits (mandates) include only those specifying care, treatment, or services that a health plan must cover. Guide to Reviewing EHB Benchmark Plans, accessed May 7, 2013 at http://cciio.cms.gov/resources/data/ehb.html#massachusetts

12. See Patient Protection and Affordable Care Act; Standards Related to Essential Health Benefits, Actuarial Value, and Accreditation, 78 Fed. Reg. 12834 (February 25, 2013). For benefit classes mandated after December 31, 2011, the state will have to cover the cost differential. Id.; ACA § 10104(e)(1). For a discussion of issues raised by the EHB provisions of the Act, see The Essential Health Benefits Provisions of the Affordable Care Act: Implications for People with Disabilities, by Sara Rosenbaum, Joel Teitelbaum and Katherine Hayes, Commonwealth Fund Pub. 1485 Vol. 3 (March 2011), at 3, accessed April 23, 2013.

13. See Mass. Gen. Laws c. 175 § 47B (g), c. 176A § 8A(g), c. 176B § 4A(g), and c. 176G § 4M (g).

14. A plurality found the individual mandate provision constitutional, but on a different basis than anticipated (the Tax Clause rather than the Commerce Clause). National Federation of Independent Business v. Sebelius, -- U.S. --, 132 S. Ct. 2566, 2601, 183 L. Ed. 2d 450 (2012).

15. ACA § 2001(a)(1).

16. National Federation of Independent Business v. Sebelius, 132 S. Ct. at 2607-8.

17. ACA § 2201.

18. The CBO has estimated that 13 million Americans would receive MH/SUD benefits in 2014 as a result of a full expansion. Easiest Path to Mental Health Funding May Be Medicaid Expansion, Michael Ollove, Stateline: The Daily News Service of the Pew Charitable Trusts (January 18, 2013), accessed May 14, 2013 at http://www.pewstates.org/projects/stateline/headlines/easiest-path-to-mental-health-funding-may-be-medicaid-expansion-85899443812.

19. The CBO has projected that around three-quarters of a million people with severe mental disorders will lose the opportunity for Medicaid coverage due to the decision in NFIB v. Sebelius, supra, note 16. U[niversity] of M[innesota] examines consequences of the Affordable Care Act's Medicaid expansions on people with mental disorders, posted April 3, 2013 5:00 pm at http://www.health.umn.edu/healthtalk/2013/04/03/u-of-m-examines-consequences-of-the-affordable-care-acts-medicaid-expansions-on-people-with-mental-disorders/

20. (press release for Two Steps Forward, One Step Back? Implications of the Supreme Court's Health Reform Ruling for Individuals with Mental Illness, Ezra Golberstein and Susan H. Busch, JAMA Psychiatry, published online April 3, 2013).

21. Mental Health Parity and the Patient Protection and Affordable Care Act of 2010, supra, note 9, at 3.

22. ASPE Research Brief: Affordable Care Act Will Expand Mental Health and Substance Use Disorder Benefits and Parity Protections for 62 Million Americans, supra, note 2, at 3.

23. The ACA establishes American Health Benefit Exchanges, which must make available qualified health plans to qualifying individuals and employers. ACA §§ 1301(a), 1311.

24. ACA § 2001(c).

25. See Standards Related to Essential Health Benefits, 78 Fed. Reg. at 12864, supra, note 12.

26. ACA § 1304(b)(2).

27. FAQs About Affordable Care Act Implementation Part V and Mental Health Parity Implementation, Q8: After the amendments made by the Affordable Care Act, are small employers still exempt from the MHPAEA requirements? How is "small employer" defined?, accessed May 14, 2013 at http://www.dol.gov/ebsa/faqs/faq-aca5.html.

28. ACA § 1304(b)(3).

29. HHS' failure to issue a final rule is blamed as one source of this confusion. Since 2008, Insurers Have Been Required by Law to Cover Mental Health – Why Many Still Don't, Judith Graham, The Atlantic, posted March 11, 2013 at 10:16 AM ET, available at http://www.theatlantic.com/health/archive/2013/03/since-2008-insurers-have-been-required-by-law-to-cover-mental-health-why-many-still-dont/273562/ (accessed May 1, 2013). Operative MHPAEA guidance can be found in the Interim Final Rules Under the Paul Wellstone and Pete Domenici Mental Health Parity and Addiction Equity Act of 2008, 75 Fed Reg. 5410 (February 2, 2010).

30. The alternative is to cover only certain services in each of the six required categories: inpatient care in network, inpatient care out of network, outpatient care in network, outpatient care out of network, emergency care and prescription drugs. Insurers Have Been Required by Law to Cover Mental Health – Why Many Still Don't, supra, note 27.

31. Plan management of benefits refers to HHS' restriction of "nonquantitative" treatment limitations. See Interim Final Rules Under the Mental Health Parity and Addiction Equity Act of 2008, 75 Fed Reg. at 5436, 5443, 5449-50.

32. ACA § 2001(c).

33. Id.

34. ACA§ 4103(b).

35. Federal law takes a mandated offering parity approach, requiring parity for policies under which MH/SUD benefits are offered but lacking a mandate that such benefits be provided. Mental Health Parity and the Patient Protection and Affordable Care Act of 2010, supra, note 9, at 2.

36. Massachusetts selected the state's largest small group HMO plan as its benchmark. Appendix A to Standards Related to Essential Health Benefits, 78 Fed. Reg. at 12871 (Blue Cross Blue Shield of Massachusetts' HMO). Under the designated benchmark plan, outpatient services are limited to 24 visits and inpatient services are limited to 60 days for "non-biologically based" mental disorders. Office of Consumer Affairs and Business Regulation, Essential Health Benefit Benchmark Plan, accessed on May 7, 2013 at http://www.mass.gov/ocabr/business/insurance/doi-regulatory-info/essential-health-benefit-benchmark-plan.html

37. 45 C.F.R. § 156.115(a)(3).

38. ACA § 4001(a).

39. ACA § 3021.

40. ACA § 3011.

41. How Will Health Reform Help People with Mental Illnesses? An analysis of the Affordable Care Act passed by Congress in 2010 and how it will affect people with psychiatric disabilities, by Chris Koyanagi and Allison Wishon Siegwarth, Judge David L. Bazelon Center for Mental Health Law (November 2009, updated June 2010), accessed April 23, 2013 at www.bazelon.org.

42. ACA § 6301.

43. ACA § 4202(a).

44. ACA § 4202(b)

45. ACA § 4201.

46. ACA § 2602.

47. ACA § 2703(a).

48. Care Integration in the Patient Protection and Affordable Care Act: Implications for Behavioral Health, Bevin Croft and Susan L. Parish, Adm. Policy Ment. Health, published online February 28, 2012; see also ACA Could Benefit Elders with Mental Health Problems, but Will It?, Michael B. Friedman and Kimberly A. Williams, Aging Today Online, American Society on Aging, accessed April 23, 2013 at http://www.asaging.org/blog/aca-could-benefit-elders-mental-health-problems-will-it.

49. Update: Details on Healthcare Law's Landmark Expansion of Addiction/Mental Illness Coverage, Legal Action Center, accessed May 2, 2013 at http://lac.org/index.php/lac/378.

50. ACA § 3502. Accountable care organizations (ACOs) are another integration and coordination mechanism encouraged by the Act. ACOs coordinate care among multiple health providers that share responsibility for enrolled patients in an effort to improve quality and control costs. For a discussion of ACOs' promise for improving delivery of mental health care, see Moving Beyond Parity: Mental Health and Addiction Care under the ACA, Colleen L. Barry and Haiden A. Huskamp, 365 N. Engl. J. Med. 973 (September 5, 2011), accessed May 7, 2013 at http://www.nejm.org/doi/full/10.1056/NEJMp1108649

51. ACA § 2402.

52. Care Integration in the Patient Protection and Affordable Care Act, supra, note 46, at 3.

53. ACA § 2952(b).

54. ACA § 10410.

55. Health Care Reform and Care at the Behavioral Health-Primary Care Interface, Benjamin G. Druss and Barbara J. Mauer, Psychiatric Services, vol. 61 no. 11 (Nov. 1 2010), accessed April 23, 2013 at http://ps.psychiatryonline.org/article.aspx?articleid=101629. For another discussion of mental health care quality and delivery under the ACA, see Seizing Opportunities Under the Affordable Care Act for Transforming the Mental and Behavioral Health System, David Mechanic, 31 Health Affairs 376 (February 2012).

56. ACA § 5604.

57. See Cunningham, J., Grimm, L. O., Brandt, N. E., Lever, N., & Stephan, S. (January, 2012). Health Care Reform: What School Mental Health Professionals Need to Know. Baltimore, MD: Center for School Mental Health, Department of Psychiatry, University of Maryland School of Medicine.

58. ACA § 4101.

59. ACA §§ 5101, 5103.

60. ACA § 5203.

61. ACA § 5301.

62. In addition, the Act funds training of paraprofessional child and adolescent mental health workers and of direct care workers in long-term care and HCB settings. ACA §§ 5301, 5306.

63. ACA § 5315.

64. ACA § 5403(a).

65. ACA § 5508.

66. ACA § 10408.

67. ACA § 2707.

68. ACA § 10322(a).

EXPERTS&RESOURCES

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The Massachusetts Medical Marijuana Law and the Workplace

BY DANIEL B. KLEIN

In November 2012, Ballot Question 3, "An Initiative Petition for a Law for Humanitarian Medical Use of Marijuana," passed with a 63.3 percent vote, making Massachusetts the 18th state in addition to the District of Columbia to approve the use of marijuana for medical purposes. This measure, which became law on Jan. 1, 2013 (Chapter 369 of the Acts of 2012) (the act), allows qualifying patients with certain defined medical conditions or debilitating symptoms to obtain and use marijuana for medicinal use, and it eliminates state criminal and civil penalties for such use by qualifying patients.

The act also required the Massachusetts Department of Public Health (DPH) to issue regulations by May 2013 to guide the use and availability of medical marijuana for qualifying patients. DPH issued its final regulations (105 CMR 725.000 *et seq.*), which the Public Health Council approved on May 8, 2013. The regulations were published and effective on May 24, 2013. In the ensuing weeks, DPH will be issuing guidance pertinent for each category of registrant that will clarify application processes and timelines, as well as requirements in the period preceding full implementation of the medical marijuana program.

In order to qualify under the act, a patient must be diagnosed with a "debilitating medical condition" as defined in the statute and must obtain a written certification from a physician with whom the patient has a *bona fide* physician-patient relationship. This certification must state the patient's particular debilitating medical condition and symptoms, as well as that the potential benefits of the medical use of marijuana outweighs any associated health risks for the patient. The act allows a patient to possess up to a 60-day supply of marijuana for his or her personal use, with DPH defining said quantity and the process through its regulations.

DPH's regulations include rules for the use of medical marijuana, including registration cards for qualifying patients, the definition of a 60-day supply allowed under the law, and procedures for the operation of up to 35 nonprofit dispensaries for medical marijuana. However, with respect to the workplace, the regulations do not provide any guidance beyond what is already contained in the law itself. While certain employment-related questions will likely be tested in the courts in future cases, the experiences of how courts in other states with similar laws have addressed related workplace issues provide a helpful lens into how Massachusetts courts may determine the extent of employer obligations under the act. This article addresses a number of the issues relating to the act's likely impact on the workplace.

WHAT DO THE ACT AND REGULATIONS STATE RELATIVE TO THE WORKPLACE?

The act states that its purpose and intent is that there should be no punishment under state law for qualifying patients, physicians and health care professionals, personal caregivers for patients, or medical marijuana treatment center agents for the medical use of marijuana, as defined in the law. Act, § 1. Of primary importance for the impact of this law on the workplace, the act and the regulations provide the following three provisions:

> Nothing in this law or regulation requires any accommodation of any on-site medical use of marijuana in any place of employment, school bus or on school grounds, in any youth center, in any correctional facility, or of smoking medical marijuana in any public place. Act, § 7(D); 105 CMR 725.650(B)(4).
>
> Nothing in this law or regulation requires any health insurance provider ... to reimburse any person for the expenses of the medical use of marijuana. Act, § 7(B); 105 CMR 725.650(B)(2).
>
> Nothing in 105 CMR 725.000 shall be construed to limit the applicability of other law as it pertains to the rights of ... employers … 105 CMR 725.650(A).

Further, several of the act's and regulations' definitions relevant to the workplace include:

> "Debilitating medical condition" means: cancer, glaucoma, positive status for human immunodeficiency virus (HIV), acquired immune deficiency syndrome (AIDS), hepatitis C, amyotrophic lateral sclerosis (ALS), Crohn's disease, Parkinson's disease, multiple sclerosis (MS), when such diseases are debilitating, and other debilitating conditions as determined in writing by a qualifying patient's certifying physician.
>
> "Qualifying patient" means a Massachusetts resident 18 years of age or older who has been diagnosed by a Massachusetts licensed certifying physician as having a debilitating medical condition.
>
> "Registration card" means a personal identification card issued by DPH to a qualifying patient, personal caregiver, or dispensary agent. The registration card verifies that a physician has provided a written certification to the qualifying patient and the patient has been registered with DPH; that the patient has designated the individual as a personal caregiver; that a patient has been granted a hardship cultivation registration; or that a dispensary agent has been registered with DPH and is authorized to work at a registered marijuana dispensary. The registration card shall identify for DPH and law enforcement those individuals who are exempt from Massachusetts criminal and civil penalties for the medical use of marijuana in compliance with the law and regulations.
>
> "Written certification" means a form submitted to DPH by a Massachusetts licensed certifying physician, stating that in the physician's professional opinion, the potential benefits of the medical use of marijuana would likely outweigh the health risks for the qualifying patient. Such certification shall be made only in the course of a bona fide physician-patient relationship and shall specify the qualifying patient's debilitating medical condition(s) and pertinent symptoms.

Beyond these provisions, the act and the regulations do not explicitly address the act's impact on employer obligations and employee rights. Let us turn to several primary questions for employers and employees, and how other states have addressed these issues.

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CAN EMPLOYERS DENY EMPLOYMENT TO APPLICANTS AND EMPLOYEES WHO USE MEDICAL MARIJUANA?

Generally speaking, most states that have enacted similar laws have treated issues relating to employers the same, as have courts that have decided employer-related questions. The general consensus in the courts and the legal commentaries is that these laws do *not* require employers to modify their employment practices, drug-free workplace policies, drug testing policies, or accommodation policies. The courts have consistently held for employers in these states. In fact, the state supreme courts in California, Montana, Oregon and Washington have all upheld employers' decisions to terminate medical marijuana users. These courts have found that because federal law preempts state medical marijuana laws, medical marijuana users authorized under state law are not protected from employer drug testing policies. Further, the courts have held that medical marijuana laws do not create a public policy protecting medical marijuana users.

For example, in 2011, in *Roe v. Teletech Customer Care Management*, 257 P.3d 586 (Wash. 2011), the Washington Supreme Court held that Washington's medical marijuana law did not protect medical marijuana users from adverse hiring or disciplinary decisions under an employer's drug testing policy. In that case, the employer rescinded the plaintiff's job offer after she failed a drug test for marijuana, and she sued for wrongful termination based on violation of public policy because she was an authorized medical marijuana user. The Court found that Washington's medical marijuana law did not prohibit an employer from discharging an employee for medical marijuana use, even when the marijuana use was offsite and on the employee's own time. In September 2012, in *Casias v. Wal-Mart Stores, Inc*., 695 F.3d 428 6th Cir. 2012), the U.S. Court of Appeals for the Sixth Circuit reached the same conclusion in a case under Michigan's medical marijuana law, agreeing with the U.S. District Court for the District of Michigan's finding that the law did not impose restrictions on private employers.

Massachusetts courts obviously have not yet had the opportunity to consider these questions, and a Massachusetts court could conceivably decide that a termination for such authorized use outside of the workplace and not on work time, nor causing impairment at work, amounts to a wrongful termination based on a violation of a public policy. While there are strong arguments and persuasive authority upon which employers can rely in disputing the viability of such a claim, nothing is certain.

In sum, based on current case law in other states at this time, employers can continue to include marijuana in their drug testing. While Massachusetts employers will likely be able to decline to hire an applicant or discharge or discipline an employee for a positive test for marijuana use, even if for authorized medical reasons outside of the workplace and not on work time, nothing is guaranteed at this time.

MUST EMPLOYERS ACCOMMODATE APPLICANTS AND EMPLOYEES WHO USE MEDICAL MARIJUANA?

As discussed above, unlike some of the other states' laws, the new Massachusetts law explicitly provides that it does not require any accommodation in any place of employment. Thus, employers are not required to allow their employees to possess or use medical marijuana in the workplace, even if the drug is being used to treat a disability.

Of particular note, courts have unanimously held that the Americans with Disabilities Act (ADA) does not protect medical marijuana users or provide them a right to accommodation for medical marijuana use because marijuana is still an illegal controlled substance under federal law, regardless of any changes in state laws. The ADA does not protect employees currently using illegal drugs, and because marijuana remains an illegal drug under federal law, these various state laws will not make its use "lawful" under federal law. Accordingly, the ADA excludes marijuana use from its protection.

EMPLOYERS' PRE-EXISTING DOT OBLIGATIONS

Employers' obligations under federal law are unaffected by the new Massachusetts law, including Department of Transportation (DOT) drug and alcohol testing obligations for certain drivers. After several states passed medical marijuana laws, DOT issued guidance that such laws were inapplicable to DOT drug and alcohol testing regulations, stating that "it remains unacceptable for any safety-sensitive employee subject to drug testing under the Department of Transportation's regulations to use marijuana." As federal law, DOT regulations will preempt any conflicting state law, and employers subject to DOT regulations should continue to comply with these obligations.

WHAT, IF ANYTHING, SHOULD EMPLOYERS DO NOW?

Based on the above, below are some general guidelines and issues for employers to consider, keeping in mind that future court decisions and possible legislative revisions to the law may alter the landscape:

- The Massachusetts law does not permit an employee to use marijuana in the workplace or to be impaired at work.
- Employers need not accom- ➤18

Medical Marijuana Law

WHAT WE KNOW SINCE THE NOVEMBER ELECTION

BY PAT CANTOR

By now most people, including lawyers, know that Massachusetts voters at the November 2012 state election overwhelmingly approved a ballot question legalizing the dispensing and use of "medical marijuana" in certain instances. The approved ballot question is now titled Chapter 369 of the Acts of 2012, "An Act for the Humanitarian Medical Use of Marijuana" (the act). Since the election, state and local authorities have grappled with how to implement the act. This article will briefly review the act, address initial municipal responses, and highlight key provisions in the Department of Public Health (DPH) Regulations, 105 CMR 725.000, promulgated on May 8, 2013 and effective on May 24, 2013.

THE ACT

"Medical use of marijuana" is defined in the act as "the acquisition, cultivation, possession, processing (including development of related products such as food, tinctures, aerosols, oils or ointments), transfer, transportation, sale, distribution, dispensing or administration of marijuana, for the benefit of qualifying patients in the treatment of debilitating medical conditions, or the symptoms thereof." Section 8 allows a "qualifying patient" to possess up to a 60-day supply of medical marijuana and §9(C) authorizes the DPH to register up to 35 Medical Marijuana Treatment Centers (termed "Registered Marijuana Dispensary" in the Regulations) by Jan. 1, 2014. Under §11, qualifying patients who have limited access to such centers may also register with DPH to cultivate their own limited supply of medical marijuana. The law went into effect on Jan. 1, 2013. However, since no Medical Marijuana Treatment Center may operate unless licensed by the state and such licenses could not be issued until DPH promulgated regulations, no such centers are yet operating.

The act, §2(K), defines a "qualifying patient" as: "a person who has been diagnosed by a licensed physician as having a debilitating medical condition." Section 2(C) defines such a condition as: "cancer, glaucoma, positive status for human immunodeficiency virus, acquired immune deficiency syndrome (AIDS), hepatitis C, amyotrophic lateral sclerosis (ALS), Crohn's disease, Parkinson's disease, multiple sclerosis, and other conditions as determined in writing by a qualifying patient's physician." Under §2(N), the qualifying patient must obtain a "written certification" from a licensed physician, which "certification shall be made only in the course of a *bona fide* physician-patient relationship." Section 2L requires DPH to issue "registration cards" to a "qualifying patient, personal caregiver [defined in §2(J)], or dispensary agent [defined in §2(E)]."

The Act, §2(H), requires a Medical Marijuana Treatment Center to be a Massachusetts nonprofit entity registered in accordance with the act that "acquires, cultivates, possesses, processes (including development of related products such as food, tinctures, aerosols, oils or ointments), transfers, transports, sells, distributes, dispenses, or administers marijuana, products containing marijuana, related supplies, or educational materials to qualifying patient or their caregivers."

Section 9(C) provides that the DPH may register up to 35 treatment centers by January 1, 2014 and that at least one treatment center must be located in each county, with no more than five located in a single county. If the DPH determines 35 centers are insufficient, it may later decide to increase the allowable number. §9(C). The DPH has 90 days after a registration application is filed to act on the application. §9(B).

In addition to treatment centers, the Act, §11, provides that DPH "shall issue a cultivation registration to a qualifying patient whose access to a medical treatment center is limited by verified financial hardship, a physical incapacity to access reasonable transportation, or the lack of a treatment center within a reasonable distance of the patient's residence ... [s]uch registration shall allow the patient or the patient's personal caregiver to cultivate a limited number of plants, sufficient to maintain a 60-day supply of marijuana, and shall require cultivation and storage only in an enclosed, locked facility." Such an enclosed, locked facility is defined in §2(F) as a "closet, room, greenhouse, or other area equipped with locks or other security devices, accessible only to dispensary agents, patients, or personal caregivers."

MUNICIPAL RESPONSE

Municipalities have most commonly responded to the act by considering zoning issues related to the siting of medical marijuana treatment centers. In so doing, the following options have emerged: (1) do nothing; (2) amend zoning bylaws and ordinances to specifically regulate such siting; (3) adopt a temporary moratorium; (4) adopt an out-right ban; or (5) pursue a combination of options. The temporary moratorium and ban approach have generated the most interest, with a number of communities across the state choosing those options.

Under Massachusetts law, town bylaws (but not city ordinances) are subject to review and approval by the attorney general. While the attorney general has approved a Burlington bylaw imposing a moratorium, a Wakefield bylaw imposing a ban was disapproved. While approval by the attorney general does not insulate a town bylaw from possible legal challenge, such approval indicates the attorney general has determined that the bylaw does not conflict with state law. The legal analysis underlying the attorney general's conclusions, would, of course, be available to a city in the event of a challenge to an ordinance. The attorney general's rulings on both the Burlington and Wakefield bylaws are available on the attorney general's website.

The attorney general approved Burlington's 18-month temporary moratorium, ending June 30, 2014, on the use of land or structures for medical marijuana treatment centers. In approving the bylaw, the attorney general found the moratorium to be a reasonable exercise of the town's zoning power because it allowed the town time to manage a new use and to study and reflect to make a decision on a complex subject matter. The attorney general further found that this time period was reasonable, because: (1) at the time the bylaw was adopted, DPH had not yet issued regulations expected to provide guidance regarding regulation of medical marijuana related uses; and (2) the temporary moratorium was similar to other land use moratoria previously upheld by the courts. The attorney general stated: "We approve this temporary moratorium because it is consistent with the town's authority to 'impose reasonable time limitations on development, at least where those restrictions are temporary and adopted to provide controlled development while the municipality engages in comprehensive planning studies.' *Sturges v. Chilmark*, 384 Mass. 246, 252-53 (1980)."

In contrast, the attorney general disapproved the Wakefield bylaw banning medical marijuana treatment centers outright. In disapproving this bylaw, the attorney general determined such a ban would frustrate the act's purpose and therefore conflict with state law. The attorney general noted the act requires the DPH to register up to 35 medical marijuana treatment centers, with one center in each county and no more than five centers per county. In considering the totality of the act's provisions, the attorney general looked at the portions of the act that (1) authorized the DPH to register more centers if it determines that 35 are insufficient to meet demand; and (2) provided for hardship cultivation registration for qualifying patients who are unable to access medical marijuana treatment centers due to financial, physical or transportation hardships. The attorney general ruled that a municipal ban on medical marijuana treatment centers would undermine these purposes. The town of Wakefield has filed an appeal from the attorney general's ruling.

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THE REGULATIONS

The DPH Regulations, 105 CMR 725.000, implement the act comprehensively and in great detail. A sample of the provisions follows.

A "Medical Marijuana Treatment Center" is defined in 105 CMR 725.004, as "a not-for-profit entity registered under 105 CMR 725.100, to be known as a registered marijuana dispensary (RMD)." A "Sixty-Day Supply" is defined in 105 CMR 725.0004 as 10 ounces, unless a certifying physician determines and certifies that a qualifying patient requires marijuana in an amount exceeding 10 ounces, as provided for in 105 CMR 725.010(I). "Registration of Certifying Physicians" is regulated under 105 CMR 725.005 and the factors a certifying physician must apply before certifying that a patient qualifies for marijuana use are addressed in 105 CMR 725.010. A certifying physician, as well as the physician's "co-worker, employee, or immediate family member," may not have any involvement with a RMD. 105 CMR 725.010(K).

To be eligible as a "Qualifying Patient," a person under 18 years of age must be "diagnosed by two Massachusetts-licensed certifying physicians, at least one of whom is a board-certified pediatrician or board-certified pediatric subspecialist, as having a debilitating medical condition that is also a life-limiting illness." 105 CMR 725.004. A person 18 years of age or older is eligible to be a "Qualifying Patient" upon diagnosis of one certifying physician as having a debilitating medical condition. Registration of "Qualifying Patients" is regulated under 105 CMR 725.015. Registration and activities of "Personal Caregivers" and "Dispensary Agents" are regulated in 105 CMR 725.020, 725.025, and 725.030, respectively.

"Hardship Cultivation Registration" is allowed under 105 CMR 725.035 and requires, among other criteria that such cultivation occur only at a specified location, that the amount be for a 60-day supply, and that the cultivation be in "an enclosed, locked area accessible only" to the registered qualifying patient or registered personal caregiver. A personal caregiver may cultivate marijuana for a "patient who has obtained a hardship cultivation registration." 105 CMR 725.025(A)(3).

A "Registered Marijuana Dispensary" (RMD) is subject to 105 CMR 725.100, which requires, among other provisions, that no entity may control more than three RMDs. After conducting a multiple-step application process, which includes the submission of very detailed application materials, DPH may issue a certificate of registration for a RMD. 105 CMR 725.100(C). Among other specific requirements, all cultivation of marijuana must occur in "designated, locked, limited access areas that are monitored by a surveillance camera system." 105 CMR 725 .105(B)(1)(c). Additional detailed standards for cultivation and testing of marijuana are set forth in 105 CMR 725.105(B) and (C). Testing of marijuana by an independent laboratory is required by 105 CMR 725.105(C). Under 105 CMR 725.105(E)(1): "Marijuana shall be packaged in plain, opaque, tamper-proof, and child-proof containers without depictions of product, cartoons, or images other than the RMD's logo" and "shall not bear a reasonable resemblance to any product available for consumption as a commercially available candy."

"Security Requirements for Registered Marijuana Dispensaries" are addressed in 105 CMR 110.00 and include the following, among other detailed requirements. Only specified categories of persons are allowed access to the RMD. 105 CMR 725.110(A)(1)(2). The MDP also must: "ensure that the outside perimeter of the RMD is sufficiently lit to facilitate surveillance" [725.110(A)(10)], and "ensure that trees, bushes, and other foliage outside of an RMD do not allow for a person or persons to conceal themselves from sight" [725.110(A)(11)]. Video cameras must be installed and the recordings made available to the DPH.

Confidentiality of information is addressed in 105 CMR 725.200. 105 CMR 725.200(A) provides that information held by the DPH is confidential and exempt from disclosure under the Public Records Law, G.L. c.66. The persons to whom and circumstances under which information may be disclosed are addressed in 105 CMR 725.200(B).

Under 105 CMR 725.600(A), "A RMD and other registered persons shall comply with all local rules, regulations, ordinances, and by-laws." See also, 105 CMR 725.110(A)(14) (an RMD must comply with local requirements, and, unless otherwise regulated by local law, may not be located closer than 500 feet from "a school, daycare center, or any facility in which children commonly congregate."). Also, under 105 CMR725.100(B)(3)(f), an applicant for registration as a RMD must submit, "[i]f available at the time of submission, a description of plans to ensure that the RMD is or will be compliant with local codes, ordinances, and bylaws" where the RMD will be located, "including any demonstration of support or non-opposition furnished by the local municipality."

Finally, the regulations, 105 CMR 725.650(A), provide: "nothing in 105 CMR 725.000 shall be construed to limit the applicability of other law." For example, the regulations do not require health insurance to cover expenses related to the medical use of marijuana and do not require any accommodation for the use of marijuana in any place of employment, school, or correctional facility. Nor do the regulations supersede other Massachusetts laws regarding marijuana, or require "the violation of federal law or purport[] to give immunity under federal law." 725.650(B).

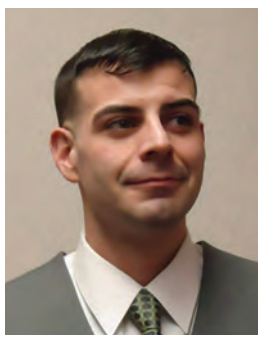
CONCLUSION

While other states have addressed legal issues related to medical marijuana, Massachusetts is grappling with them for the first time. Over the next year, as the DPH works to administer the act and regulations and municipalities work to apply current ordinances and bylaws and develop and enact new ones in light of the state law, many complex issues will arise. As that process unfolds, state and local officials will be at the forefront of this evolving area of law. ■

VIEW POINT

You do have the right to remain silent

BY PATRICK J. NOONAN


PATRICK J. NOONAN

In *Berghuis v. Thompkins*, 560 U.S. 370 (2010), Samuel Morris and Frederick France were shot outside a mall in Southfield, Michigan. Morris died of multiple gunshot wounds. France recovered from his injuries. The main suspect in the shooting was Van Chester Thompkins, who evaded capture and fled Michigan. Approximately one year later, Thompkins was arrested in Ohio. Two police officers from Southfield traveled to Ohio and interrogated him there.

Detective Helgert started the interrogation by presenting Thompkins with a form entitled "Constitutional Rights and Notification." The form enumerated Thompkins' constitutional rights derived from *Miranda v. Arizona.* Detective Helgert wanted to ensure that Thompkins could read and understand English so he asked Thompkins to read the fifth warning out loud. Thompkins complied and read aloud the fifth right listed on the form:

"5. You have the right to decide at any time before or during questioning to use your right to remain silent and your right to talk with a lawyer while you are being questioned."

Based on Thompkins' recitation, Detective Helgert concluded that the suspect could read and understand English. Detective Helgert then read the remaining four Miranda rights out loud to Thompkins. After advising the suspect of his Miranda rights, Detective Helgert asked Thompkins to sign the form as evidence and confirmation that the suspect understood all the rights listed on the form. Thompkins refused to sign the form. Nevertheless, Helgert initiated the interrogation and proceeded to question Thompkins about the shooting for approximately three hours during which time Thompkins remained "largely" silent.

About 2 hours and 45 minutes into the interrogation, Helgert asked Thompkins three questions, which elicited three affirmative responses. First, Helgert asked Thompkins whether he believed in God ("yes"). Second, Helgert asked Thompkins whether he prayed to God ("yes"). The final question elicited a fatal affirmative answer and solidified Thompkins' conviction for first-degree murder:

Helgert asked, "Do you pray to God to forgive you for shooting that boy down?" Thompkins answered "Yes."

Thompkins claimed that he "invoked his privilege" to remain silent by not saying anything. That is, he invoked his right to remain silent by "largely" remaining silent for almost two-hours and forty-five minutes. Put simply, he invoked his right to remain silent by remaining silent.

The Supreme Court found Thompkins' claim unpersuasive. The court expanded the standard set forth in *Davis v. United States*, holding that a suspect must invoke his right to remain silent "unambiguously." The right to remain silent cannot be invoked ambiguously and equivocally. Here, Thompkins did not "unambiguously" invoke his right to remain silent because he did not make the simple statements that he wanted to remain silent or that he did not want to talk to police. Therefore, in order to invoke the right to remain silent, the suspect must affirmatively state "I want to remain silent" or "I do not want to talk to you."

The Supreme Court departed from the government's "heavy burden" of establishing waiver. Now, the prosecution need not show that a waiver of Miranda rights was express. Rather, an "implicit waiver" of the "right to remain silent" is sufficient to admit a suspect's statement into evidence. A waiver of Miranda rights may be implied through "the defendant's silence, coupled with an understanding of his rights and a course of conduct indicating waiver."

The court stated that an implied waiver can be accomplished where the prosecution shows that (1) a Miranda warning was given, (2) that is was understood by the accused, and (3) the accused's statements were uncoerced. No waiver is *presumed*, from the very fact that the defendant made any uncoerced statements, but the defendant cannot invoke his right to remain silent unless he does so with the utmost clarity. Here, the government is relieved of its "heavy burden" of establishing waiver and places the onus on the suspect to invoke his right to remain silent with the utmost clarity.

The Supreme Court found that Thompkins implicitly waived his Miranda rights under the utmost clarity standard. First, there was more than enough evidence that Thompkins understood his rights. Second, Thompkins' did not invoke his right to remain silent with the utmost clarity because he answered Detective Helgert's questions, which was a "course of conduct indicating waiver." "If Thompkins wanted to remain silent, he could have said nothing in response to Helgert's questions, or he could have unambiguously invoked his Miranda rights and ended the interrogation."

In *Commonwealth v. Clark*,, 461 Mass. 336 (2012), Detectives Ahlborg and Lyles of the (MBTA) transit police arrested the defendant for an indecent assault and battery. After the arrest, the defendant was brought to an interrogation room at MBTA headquarters.

Similar to *Thompkins*, Ahlborg provided the defendant with a waiver form, which listed his rights under Miranda. Like Detective Helgert, Ahlborg verbally reviewed the rights in the form with the Defendant. After reviewing those rights with the defendant, Ahlborg asked him whether he wanted to discuss the charges. After a brief exchange, Ahlborg asked the defendant, "So you don't want to speak?" In response, the defendant "shook his head back and forth in a negative fashion." Ahlborg interpreted the defendant's head movement as an indication that he didn't want to speak.

Lyles, on the other hand, didn't have the same interpretation and sought to correct a misapprehension that she thought resulted from that brief exchange. The "misapprehension" was the implication of the defendant's decision not to speak. Alhborg informed that the defendant that "nothing" would happen if he chose not to speak. Lyles explained that "nothing" did not mean that the defendant would be free to leave and go home. In a further exchange, Lyles asked the defendant whether he wanted to speak with them. The defendant answered, "Yeah." The defendant then signed the Miranda waiver form. In the ensuing interrogation, the defendant made inculpatory statements. The defendant successfully suppressed the inculpatory statements made post head-shake.

Relying on *Thompkins*, the commonwealth argued that the defendant must actually speak to invoke the right to remain silent, e.g., that he must unambiguously invoke his right to remain silent with the utmost clarity. The SJC rejected the premise that a suspect must affirmatively speak in order to invoke his right to remain silent emphasizing the communicative value of nonverbal expressive conduct. Here, the defendant's nonverbal expressive conduct of shaking his head back and forth in a negative fashion was sufficient to invoke his right to remain silent. Citing the dissenting opinion in *Thompkin*s, the SJC found that to require a suspect to affirmatively speak in order to invoke his right to remain silent is counterintuitive. As Justice Sotomayor pointed out, "Advising a suspect that he has a 'right to remain silent' is unlikely to convey that he must speak (and must do so in some particular fashion) to ensure the right will be protected."

Thompkins created a heightened standard in which the suspect is required to invoke his right to remain silent with the "utmost clarity." The SJC declined to adopt this heightened standard. Instead, SJC adheres to the principle of *Miranda*, which sets a lower bar for the invocation of the right to remain silent. "If the individual indicates *in any manner*, at any time prior to or during questioning, that he wishes to remain silent, the interrogation must cease." (Emphasis added). *Thompkins* utmost clarity standard ignores this longstanding precedent. Here, defendant Clark indicated that he wished to remain silent in a manner of shaking his head from side to side in a negative fashion. Placing such a heightened burden on the suspect "turns *Miranda* upside down" by placing too great a burden on the exercise of a fundamental constitutional right.

The SJC rejected *Thompkins* approach to implied waiver (which places the burden on the defendant to invoke his right to remain silent with the utmost clarity) because such an approach effectively reverses the burden of proof applicable to waiver. That is, the suspect (not the government) must prove waiver with the utmost clarity. Instead, the SJC keeps the "heavy burden" on the government in proving waiver, as a matter of state law. Under Massachusetts law, "[t]he court will indulge every reasonable presumption against waiver of constitutional rights." *Commonwealth v. Hosey*, 368 Mass. 571, 577, 334 N.E.2d 44 (1975). If the commonwealth cannot prove waiver beyond a reasonable doubt, *Commonwealth v. Tavares*, 385 Mass. 140, 430 N.E.2d 1198 (1982), then all evidence derived therefrom is tainted.

Thompkins unquestionably favors police interrogators by allowing them to question a criminal detainee for hours on end with impunity unless and until the detainee has the wherewithal to utter those magic words with the utmost clarity to cease the interrogation. In *Clark*, the SJC placed a limit on the power of the interrogator and tipped the scales back toward the detainee by giving him the power to exert some control over the course of the interrogation in a police-dominated atmosphere. ■

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MASSACHUSETTS MEDICAL MARIJUANA LAW

Continued from page 16

modate a medical marijuana user in any way, even if he or she possesses a registration card.

- Employers can continue to include marijuana in their drug testing. Employers will likely be permitted to decline to hire an applicant or discharge or discipline an employee for a positive test for marijuana use, even if for authorized medical reasons outside of the workplace and not on work time, especially for safety-sensitive positions. As discussed above, DOT regulations will continue to dictate an employer's obligations as to employees subject to these regulations. However, in other circumstances, because Massachusetts courts have not yet had the opportunity to consider these questions, there is some risk that a court would find such a discharge to amount to a wrongful termination for violation of a public policy.
- Employers should consider reviewing and revising their written drug testing and drug-free workplace policies to make clear that marijuana use and possession, "even for medical purposes," is prohibited and may subject employees to disciplinary action.
- Employers may also want to confirm that their job application and related paperwork contain clear information on their drug testing policy and drug-free workplace policy, including addressing the use of marijuana for authorized medical purposes, and that these policies are clearly communicated to applicants and employees. Employers may want to consider having employees sign an acknowledgment, confirming their understanding of such policies as well.
- To the extent an employer considers being more lax than required and making exceptions to its drug testing policy or zero tolerance drug-free workplace policy, federal contractors should be careful that in doing so, they may be compromising their compliance with their obligations under the federal Drug-Free Workplace Act. This federal law has not changed and does not make exceptions for such state laws.

While we await further guidance from DPH on the application processes and timelines and full implementation of the medical marijuana program, the act's impact on the workplace likely will not differ significantly, if at all, from the impact of similar laws in other states. Nevertheless, employers should be prepared for challenges and expect an increased number of employees who claim that the new law protects them from adverse consequences as a result of a failed drug test. Employers and human resources professionals should consult with their counsel and review their drug testing and drug-free workplace policies for possible revisions incorporating this new law. ■

1. A "qualifying patient" also includes a Massachusetts resident under 18 years of age who has been diagnosed by two Massachusetts licensed certifying physicians, at least one of whom is a board-certified pediatrician or board-certified pediatric subspecialist, as having a debilitating medical condition that is also a life-limiting illness.
2. See, e.g., Roe v. Teletech Customer Care Management, 257 P.3d 586 (Wash. 2011); Emerald Steel Fabricators Inc. v. Bureau of Labor and Indus., 230 P.3d 518 (Or. 2010); Johnson v. Columbia Falls Aluminum Co. LLC, 213 P.3d 789 (Mont. 2009); Ross v. RagingWire Telecommunications Inc., 174 P.3d 200 (Cal. 2008).

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