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 regarded 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.

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, attendees 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.

PHOTO BY: MERRILL SHEA

MBA Treasurer Marlene V. Kazazian (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

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

PHOTO BY: MERRILL SHEA

Attorney Kate Cook, Massachusetts Gov. Deval L. Patrick’s chief legal counsel.
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 time spent together and 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 1,000 lawyers and others in attendance, had elements of graduation — 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 time spent together and 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.

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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 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.
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.

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.
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, cooking by my father. And over dinner [we] ate dinner together most every school night, cooking 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 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.”

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, advoca

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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.

Calendar of Events

FRIDAY, JUNE 21

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

TUESDAY, JUNE 25

Health Law Conference 9 a.m.-2 p.m. [Live]
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 (other live programs) through MBA On Demand at www.massbar.org/ondemand.

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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. Kazarian, 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 long-time 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 Prosecutor Award in part for his efforts to give back to the community. Foss, who originally thought he wanted to work as a 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).
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 pre-eminent 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.
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. MLAAC’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. It 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 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 decisions calls 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 Wilka 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 longterm and active member of Boston’s Ward Five Democratic Committee and a regular volunteer at the Women’s Lunch Place.

“No one [Cook] grows from an eager young law student to a dynamic director to senior public official,” said U.S. Senator William M. Cowan, who has known Cook since she was a summer associate at Mintz Levin.

“I still have to remind myself of that when I go into the governor’s office,” 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 mudder, 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 seriously as she can.”

“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.

“Kate is an extraordinary young public official 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, dedicated personality. 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.”

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 half 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 Martha Healy and the BJC 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 distinguished groups. 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 learned 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.”

KATE COOK AND Gov. Deval L. Patrick

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

"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."
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 involve-

ment with the Massachusetts Alliance for Communication and Resolution following Medical Injury. 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 particip-

ate in all MACRMI meetings and ensure that patients are encouraged to seek legal represen-

tation 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

been and continues to be the unification and promotion of the legal profession. He cited

as his goal had been to lay out his goals for the following year.

Second, 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 encour-

aged 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, spear-

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EXPERTS & RESOURCES

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Attorney Robert A. O’Meara

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Clare McGorrian has successfully challenged the denial of health benefits in multiple cases. Her expertise includes ERISA, state health insurance laws and government programs such as Medicare.

Attorney McGorrian also accepts Social Security disability cases and private disability insurance matters

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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, P.C. “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 website 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. Robb;
• Samuel A. Segal;
• J. Daniel Silverman;
• Richard A. Sugarman; and
• Geraldine M. Zipser.

THE MBA IS PROUD TO OFFER THE MARATHON BOMBING VICTIMS LEGAL ASSISTANCE PROGRAM

THE ONE FUND

WE ARE BOSTON STRONG.

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

PHOTOS BY CAROL FEE.
JUNE CONTINUING LEGAL EDUCATION PROGRAMS BY PRACTICE AREA

**IMMIGRATION LAW**

Visa Issues for International Medical Professionals
Thursday, June 6, 9 a.m.–12:10 p.m.
UMass Memorial Medical Center
Alpert Sherman Center Auditorium 652-2012
55 Lake Ave., North Worcester

**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.”

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**34TH ANNUAL LABOR & EMPLOYMENT LAW CONFERENCE**

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

**KEYNOTE SPEAKER**

**JONATHAN B. KREISBERG**
Regional Director, Boston Regional Office (Region 1)
National Labor Relations Board

**CONFERENCE CO-CHAIRS**

**JOHN POLANOWICZ**
Secretary, Massachusetts Executive Office of Health and Human Services

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**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.*

**Your Land, Your Legacy:**

Planning for Preservation and Development of Family Land

**Legal Chat Series**

Tuesday, June 11, 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.*
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 court clarifies the applicability 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 delivering 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 limitations. The court held that the Wage Act’s three-year 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 because individuals have an “essential health benefit” (EHB) package that includes MHSUD benefits. The court balanced its policy of enforcing release language with the policies of the Affordable Care Act with regard to health and mental health services.

The court decided whether or not the plain-tiff’s overtime claims (subject to a two-year statute of limitations) could be brought because individuals have an “essential health benefit” (EHB) package that includes MHSUD benefits. The court did not find 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 dis-crimination 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 be-yond 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.

The Supreme Court’s decision in National Federation of Independent Business v. Sebelius was the ACA’s re-turn to “essential health benefits” (EHB) package that includes MHSUD benefits. The ACA did not prescribe the coverage to be covered, however, and the final rule offers only broad guidelines. Massachusetts requires that state-regulat-ed insurance policies include certain mental health benefits. A state may require exchange plans to meet these requirements.

The ACA contends that certain plans offer MHSUD 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 mil-lion people in the individual market will gain MHSUD benefits under the ACA. The coverage, however, still leaves many with severe mental and substance use disorders without coverage due to states’ non-participation.

The Mental Health Parity Act of 1996 (MHBA) and the Mental Health 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 MHSUD benefits. Individual market policies were not subject to federal parity requirements. Although most small group plans cover some MHSUD benefits, federal parity laws had no impact on 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) in-dividual and small group qualified health plans; 2) Medicaid non-managed care bench-mark and benchmark-equivalent plans; and 3) plans offered through the individual market.

Federal health reform and access to mental health care

By Claire D. Mcgovern

Based on the many uninsured persons with mental health or substance use disorders (MHSUD), extends coverage to those persons with mental health and substance use disorders (MHSUD) covered by the ACA, states may use the definition of small group for plans offered through exchanges.

Medicaid expansion

The focus of the Supreme Court’s 2012 decision in National Federation of Independent Business v. Sebelius was the ACA’s re-turn to “essential health benefits” (EHB) package that includes MHSUD benefits. The ACA does not prescribe the coverage to be covered, however, and the final rule offers only broad guidelines. Massachusetts requires that state-regulat-ed insurance policies include certain mental health benefits. A state may require exchange plans to meet these requirements.

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tion even as it extends parity to qualified small group health plans. Under the ACA and MHPAEA, a small employer is defined as hav-
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preventive intervention is recommended or underway.

INTERACTION OF FEDERAL AND STATE PARITY LAWS

States have filed gaps in federal parity laws by mandating MBSUD benefits in insurance policies. Massachusetts has taken a full parity approach to mental health benefits in state-regulated plans, requiring coverage of certain MBSUD conditions and services on the same terms as coverage of physical conditions.

The proposed EHB benchmark plan for Massachusetts restricts benefits for "medically based" mental disorders, as permitted by the state parity law. Pursuant to the ACA, however, qualified health plans must comply with the MHPAEA.

ACO 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 certainly impact MHSUD 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 MHSUD 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; Vermont and Community Transformation grants; certain initiatives to integrate and coordinate primary 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 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 care and specialty care; expansion of Medicaid home and community-based services; and mandated data collection.

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 identities priorities that have the greatest potential for improving outcomes, efficiency and patient-centered care, and 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 preventive health activities. Among other purpose, 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 FCHO 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 designated provider if it satisfies certain criteria. MHSUD 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 (HCBS) supports to Medicaid beneficiaries without obtaining a waiver from HHS. State HCBS 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 MBSUDs, and to enhance integration of mental health and primary care.

ACO 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 MHSUD care in mental health treatment settings; 4) funding of MBSUD services in school-based health centers; 5) workforce capacity expansion in the MHSUD treatment field; 6) grants for small businesses to provide comprehensive wellness programs; and 7) the Medicaid Emergency Psychiatric
FEDERAL HEALTH REFORM

Continued from page 13

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 mental health and substance use disorders as part of the Medicaid demonstration program. To be approved, states must provide a commitment to comprehensive wellness programs. Among the required program activities are supportive environment efforts, specifically including policies to encourage improved mental health.

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.


The CBO has estimated that 17 million Americans would receive Medicaid benefits in 2014 as a result of a full expansion. Susan H. Busch, JAMA Psychiatry, published online April 3, 2013.

In addition, the Act funds training of paraprofessional mental health care providers employed by small employers and identifies these providers as “qualified health care providers” for purposes of the EHBs. See Standards Related to Essential Health Benefits, Actuarial Value, Consumer Choice, and Cost Sharing: Final Rule, supra, at 5410.


ACA § 13022(a).

ACA § 2707.

ACA §§ 5101, 5103.

ACA § 4101.

ACA § 5604.

ACA § 10410.

ACA § 2952(b).

Care Integration in the Patient Protection and Affordable Care Act: Implications for People with Disabilities, Bevin Croft, supra, at 3, 2013.

ACA § 3502. Accountable care organizations (ACOs) are creation of health care groups that coordinate and manage health care services and are paid based on performance. ACA §§ 3001(a), 3002(a).

ACA § 3001.

ACA § 4001(a).

ACA § 4001.

ACA § 4103(b).

ACA § 5010.

ACA § 5701(a).

ACA §§ 1301(a), 1311.

ACA § 1001(a).

ACA § 1311(a).

ACA § 10423.

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ACA § 5010.

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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 (see footnote to the Act (1) (the act), allows qualifying patients with certain defined medical conditions or debilitating symptoms to obtain and use marijuana for medical 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 outweigh any associated medical 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, which is defined as the patient and the process through its regulations.

DPH’s regulations include rules for the medical use of marijuana, including registration cards for qualifying patients, the definition of a 60-day supply allowed under the law, and procedures for the evaluation and authorization of 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 providers, personal caregivers for patients, or medical marijuana treatment center agents for the medical use of marijuana as allowed in the law. Act § 1. Of primary importance for the impact of this law on the workplace, the act and the regulations provide following three provisions:

Nothing in this law or regulation requires any accommodation of any one or more 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 accommodation of any one or more medical use of marijuana to … 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 any provision of a collective bargaining agreement 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 an individual as a personal caregiver; that a patient has been granted a hardship 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 valid only in the case of a bona fide physician-patient relationship and shall specify the qualifying patient’s medical condition(s) and pertinent symptoms.

Beyond these provisions, the act and the regulations provide little in the way of explicit guidance as to 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.

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

Generally speaking, most states that have enacted similar laws have treated medical marijuana users authorized under state law as public policy protecting 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. Furthermore, 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 an Oregon’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 the plaintiff’s medical marijuana law did not prohibit an employer from discharging an employee for medical marijuana use, when even the marijuana was use off site and on the employee’s own time. In September 2012, in Casillas 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 Eastern District of Michigan finding that the law did not impose restrictions on private employers.

Massachusetts courts obviously have not reached the conclusion to expand the act’s medical marijuana law, 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 public policy or an illegal discriminatory practice. There are strong arguments and persuasive authority upon which employers can rely in disputing the viability of such a claim, notwithstanding the authority from the cases.

In sum, based on current case law in other states at this time, employers can continue to include marijuana in their drug testing policies. 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 explicit provision indicates that it does not require any accommodation in any place of employment. Thus, employers are not required to accommodate 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 unani-

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In addition to treatment centers, the Act, §11, provides that DHQ shall issue a cultivation registration to a qualifying patient whose access to a medical marijuana treatment center is limited. A incident physician may apply in writing by a qualifying patient’s physician.” Section 2(L) requires DPH to issue “registration cards” to a “qualifying patient, his/her caregivers.” Section 2(C) defines such a category of persons are allowed access to the RMD. DHQ shall not issue a registration card to a qualifying patient unless a certifying physician determines and certifies that a qualifying patient requires marijuana for medical use.

The regulations do not require health insurance to be in effect for medical marijuana treatment centers. In so doing, the following options have emerged. (1) nothing; (2) amend zoning bylaws and ordinances to specifically regulate such uses; (3) adopt a temporary moratorium on the establishment or expansion of related uses; (4) adopt zoning for a combination of options. The temporary moratorium and ban approach have generated the most controversy over how best to accommodate the act’s provisions.

The attorney general noted the act requires the DPH to 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 “Six-Day Supply” is defined in 105 CMR 725.004 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 725.101. A “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 725.101(0).

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 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 Personal Caregivers” are regulated under 105 CMR 725(0.0), 725.025, and 725.030, respectively.

“Hardship Cultivation Registration” is allowable under 105 CMR 725.035 and requires, among other criteria that such cultivation occurs only at a specified location, that the amount be for a 60-day supply, and that the cultivation be “in an enclosed, locked area where reasonable access 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 addresses such things as zoning, location, premises, and other regulatory requirements. The regulations also require the DHQ to develop a “medication plan” for each patient. Finally, the regulations, 105 CMR 725.600(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 accommodations for the use of marijuana in any place of employment, school, or correctional facility. Nor do the regulations establish whether other Massachusetts laws regarding marijuana, or require “the violation of federal law or pari
toll[?] to give immunity under federal law.” 725.600(a).

CONCLUSION

While other states have addressed legal issues related to medical marijuana, Massa
cusetts is grappling with them for the first time. Over the next year, as the DHQ works to administer the act and regulations and mu

nicipalities work to apply current ordinances and bylaws and develop and enact new ones in light of the state law, many complex issues will be raised, including the need to prepare local officials will be at the forefront of this evolving area of law.
You have the right to remain silent

BY PATRICK J. NOOAN

In Berghuis v. Thompkins, 560 U.S. 370 (2010), Samuel and Frederick France were shot outside a mall in Scottsdale, Arizona. Detective Helgert initiated the interrogation 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 “no.” 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 unambiguously 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 discharge his duty to determine whether Thompkins must affirmatively state “I want to remain silent” or “I do not want to talk to you,” Helgert first showed the 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 and understand it 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.”

After Thompkins read the form, 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. During the interrogation, which took place about two hours and forty-five minutes 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 the defendant was still alive. Helgert asked Thompkins whether he prayed to God (“yes”). The final question elicited a final affirmative answer and solidified Thompkins’ conviction for first-degree murder.

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