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MASSACHUSETTS LAWYERS JOURNAL

WWW.MASSBAR.ORG

VOLUME 20 | NUMBER 7 | MARCH 2013

PRESIDENT'S VIEW

ROBERT L. HOLLOWAY JR.

# The price of civilization

Many years ago, the great jurist Oliver Wendell Holmes Jr. stated, "I like to pay taxes. With them, I buy civilization." Imagine any public figure saying that today.

Today we have many among us who would revile Holmes, believing that taxes are, at best, a necessary evil. Those who would treat Holmes in that manner should heed the philosopher George Santayana's famous statement: "Those who cannot remember the past are condemned to repeat it." Remembering the past of course implies knowing about the past in the first place. Too many, I think, speak from ignorance, however well intentioned that ignorance may be.

The word "taxes" is invoked today in too many quarters as if it were an obscenity. I am reminded of yet another famous quotation, Supreme Court Justice Potter Stewart's famous statement in *Jacobellis v. Ohio* (1964) regarding obscenity. As he struggled with the definition of obscenity, he said simply, "I know it when I see it, and the motion picture in this case is not that."

If we substitute "taxes" for the motion picture Stewart was grappling with and conclude that taxes are not an obscenity, you will catch my drift — ➤2

# Governor files FY14 budget recommendations

**BY LEE ANN CONSTANTINE**

Gov. Deval L. Patrick filed his budget recommendations for fiscal year 2014 on Jan. 23. Patrick recommends funding the Trial Court at $577 million, which is less than the $589 million maintenance request by the court.

A supplemental budget, filed on the same day, contains a newly formed commission to study court realignment and judicial salaries. The commission will be comprised of legislative, bar and court leadership and must report back within six months. The language establishing the commission specifically asks for a recommendation on 15 courts that could close in the next 10 years.

The supplemental budget ➤2

# May 9 Annual Dinner to feature Gov. Patrick as keynote speaker

**BY KELSEY SADOFF**

The Massachusetts Bar Association is pleased to announce that Gov. Deval L. Patrick will deliver the keynote address at its Annual Dinner set for Thursday, May 9 at the Westin Boston Waterfront.

"We are honored to have Gov. Patrick address the Massachusetts legal community at our hallmark event of the association year," MBA Chief Legal Counsel and Chief Operating Officer Martin W. Healy said. "His perspective and accomplishments gained through his years as corporate counsel and leadership positions in both state and federal government are admirable and will make for a highly relevant keynote address."

Patrick was first elected as the Commonwealth of Massachusetts' governor in 2006 and was re-elected to a second term in November 2010. Committed to expanding opportunity and prosperity in Massachusetts, the Patrick administration has maintained or expanded the state's investment in critical growth sectors, despite challenging economic times. Under Patrick's leadership, the commonwealth has become as a global leader in biotech, bio pharmaceuticals and IT and a national leader in clean energy — the home to the country's first offshore wind farm.

As governor, Patrick committed the commonwealth to renewing its aging and neglected infrastructure and oversaw the expansion of affordable health care insurance to over 98 percent of Massachusetts residents. The Patrick administration also accomplished major reforms that had eluded decades of other elected leadership, reforming the state's pension systems, ethics laws and transportation bureaucracy.

A graduate of Harvard College and Harvard Law School, Patrick began his legal career clerking for a federal judge and went on to become an attorney and business executive, rising to senior executive positions at Texaco and Coca-Cola. In 1994, President William Jefferson Clinton appointed Patrick as assistant attorney general for civil rights, the nation's top civil rights post.

Gov. Deval L. Patrick

*The MBA will bestow its Legislator of the Year Award to Rep. Brian S. Dempsey (D-Haverhill), House Ways and Means Chair, at the May 9 dinner. Visit www.massbar.org/AD13 to learn more.* ■

# Spence proving to be an effective change agent at a critical time

**BY TRICIA M. OLIVER**

At various speaking engagements in the last several weeks, Massachusetts Trial Court Administrator Harry Spence has centered his remarks on his initial assessments and progress during his inaugural nine months on the job. When listening to those remarks, one cannot question that he has hit the ground running at a pace necessary to achieve much change in the remaining four years of his five-year appointment.

Also hard to question are Spence's credentials for this pivotal role in the state's third branch of government.

"After many decades of lobbying by the MBA specifically calling for the appointment of a professional court administrator, we are extremely pleased to have an individual of Harry's intellectual and policy depth to work closely with," MBA Chief Legal Counsel and Chief Operating Officer Martin W. Healy said.

An expert in managing change, Spence has served in the public and private sectors at the state and local levels. A graduate of Harvard Law School and Harvard College, Spence's skill and style have been tapped to turnaround operations in the City of Chelsea, New York City Board of Education and Massachusetts' Department of Social Services. He is applying much of what he learned in those arenas to his current task at hand.

According to Spence, no matter what size organization he's been a part of, somehow there is something magical about the third year. "That is when the process of change gains traction," he said. However, Spence is quick to clarify that the time leading up to his third year on the job is not void of activity.

"Good things are happening ➤4

**PRESIDENT'S VIEW**
*Continued from page 1*

or get the picture.

The Commonwealth of Massachusetts, home of many great lawyers and jurists throughout our history and the history of our great nation, now ranks 48th in compensation for judges among the 50 states and the District of Columbia, when compensation is adjusted for cost of living. Only Vermont, Hawaii and Maine are lower in this ranking.

Is this where Massachusetts wants to be? At the bottom? I confess, as a matter of philosophy, not being a fan of rankings, but where our great commonwealth stands in this matter of judicial compensation is both illuminating and, I think, shameful.

I know there are many demands on our tax dollars, and I know that many among us are struggling to recover from the substantial economic downturn of the last several years. But, it is a fact that our society, as a whole, measures success and value in economic terms. Whether or not you, individual readers, or I, do so is presently beside the point. If our judges are objectively underpaid — which I submit to you the overwhelming evidence indicates they are — then we are saying, as citizens of this commonwealth, that we do not value judges' services.

Is that the statement we want to make in this commonwealth? I think not, and I hope not.

So, I invoke again Holmes to ask all of us to "buy civilization" by supporting increased compensation for our judges. In doing so, we will be making a positive statement not just about our judges, but also about our entire system of justice and how we view ourselves as members of a civilized society. Our legal system and our judges are the gatekeepers of our civilized society, after all, guarding over our laws and rules, striving to provide a level playing field for everyone in our system of justice. It is only fitting that our gatekeepers be recognized appropriately by providing them with fair compensation. While that is not now the case, it can and should be the case. That's why I urge you to "buy civilization." That's what this is all about. ■


**GOVERNOR FILES FY14 BUDGET RECOMMENDATIONS**
*Continued from page 1*

proposal also included a section establishing a standing commission to study the criminal justice system.

The Massachusetts Legal Assistance Corporation budget recommendation was $15.5 million, a $3.5 million increase over fiscal year 2013 funding. Patrick also recommends funding the Committee for Public Counsel Services at $189 million, $6.1 million below their maintenance request. The governor does not recommend any structural changes.

The House and Senate will take up their own versions of the budget in April and May respectively. ■

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## ON THE COVER



## LEGAL NEWS



## BAR NEWS



## FOR YOUR PRACTICE



## SECTION REVIEW

LEGAL NEWS

## LAWYERS CONCERNED FOR LAWYERS

# Distracted from legal work by spouse's emotional roller coaster

**Q:** My wife and I met in law school and, as I launched a solo practice, she worked for a nonprofit until the first of our two young children was born. In the courtship stage, I was very attracted by a kind of excitement and unpredictability that she exuded. But since we have been trying to run a family together, her moodiness, flashes of anger (as well as much more welcome humor), and huge, dramatic reactions to so many things that happen in the course of day-to-day life have been hard to take. On those occasions when she is confronted (by me or occasionally a friend), she alternates between rage and tears, and at one point took a large bunch of pills that could have done her real harm. She did start therapy and initially thought her therapist walked on water, but now sees him as useless, and her constant emotional ups and downs have not stopped. Her doctor has prescribed antidepressants, which certainly helped a bit, but not enough. So many of my work days are disrupted by phone calls from her, or just by my distracting worries about how she is doing while looking after the kids. Recently, her therapist said he'd like to refer her to a "DBT" group. Is that a good thing? Is it likely to make a difference?

**A:** DBT is dialectical behavior therapy, a treatment approach developed by psychologist Marsha Linehan in the 1970s that has gained wide acceptance in the past couple of decades. It combines cognitive behavioral and Buddhist-influenced elements into a package that often combines individual and group therapy in a way that has been particularly useful to individuals who experience intense floods of emotion that may contribute to destructive behavior and unstable relationships. Over time, participants learn, for example, to better accept unpleasant realities, tolerate distress, solve interpersonal problems, and to soothe and encourage themselves. These and other elements are taught (largely in class-like groups that include homework) as *learnable skills*. There is good research to back up reports of treatment success using DBT — of course, no treatment is a panacea, and this approach requires active effort.

The DBT therapist recognizes that people with a tumultuous mood/personality style did not choose it and are not seeking to make life difficult — their behavior reflects their internal reality. But the therapist also makes it clear that many of these behaviors are maladaptive and requires collaboration from the patient with a joint mission to develop more workable and rewarding ways to cope.

It sounds as if your wife's therapist is already aware of DBT resources in the area. If you would like to consult further about your role and stance as family life moves forward, feel free to arrange a (free, confidential) consultation at LCL.

*Questions quoted are either actual letters/e-mails or paraphrased and disguised concerns expressed by individuals seeking assistance from Lawyers Concerned for Lawyers. Questions for LCL may be mailed to LCL, 31 Milk St., Suite 810, Boston, MA 02109; e-mailed to email@ lclma.org or called in to (617) 482- 9600. LCL's licensed clinicians will respond in confidence. Visit LCL online at www.lclma.org.* ■

**SPENCE**
*Continued from page 1*

now," he said.

Spence has gained much information from his weekly visits to courthouses and results from a recent staff survey. Much of his attention has been devoted to evaluating staffing levels and department structure. The fiscal year 2014 budget request, technology enhancements and implementation and the Trial Court's current strategic planning process have also consumed most of Spence's energy and time. All add up to a tall order to be realized in Spence's relatively short appointment.

Spence remains optimistic. He is putting his confidence in a general principle of management that modest improvements in operations by department will lead to collaborative improvement to the system as a whole.

## RE-ENERGIZING AND REPLENISHING A WORKFORCE AND ITS RESOURCES

Following the lift of the hiring freeze in November, Spence has been working to replace 100 positions lost to attrition. He hopes to have that finalized by the end of May. He will also work to hire an additional 200 "desperately needed" positions.

As he begins acting on his careful assessment of his newest employer, Spence has been surprised by the lack of resistance to proposed change from court personnel. Nearly 50 percent of the 6,255 personnel responded to the recent staff survey. Results indicated 30 percent were interested in aggressive change, 90 percent were in favor of change and 10 percent were comfortable with the status quo.

Through the survey and his courthouse visits, Spence has been met with a fair share of skepticism.

"Skepticism is valid," said Spence. "Just set aside the cynicism." He said that "part of our task is to give incremental evidence over time that we have the capacity to change."

In less than a year, Spence has learned much from the conversations he has with staff at all levels. Many of the staff that Spence has interacted with have been asked to participate in meetings with local legislators to put a face to the effects of the lack of court funding. The Massachusetts Bar Association has coordinated two such meetings in Salem and Springfield, and it is evident that those staff have been provided a voice, thanks to Spence.

Spence likes to quote President of the Massachusetts Association of Magistrates and Assistant Clerks Daniel J. Hogan to describe the caliber of court personnel.

"The system is not as good as the people in it," Hogan told Spence during one of their first conversations.

Hogan, like many, is pleased with Spence's "refreshing approach" and work so far. "I look forward to much needed change to bring this branch of government back to the prominence it should enjoy," said Hogan.

According to Spence, courts previously did not have an essential "accountability for performance," which, according to him, is the most fundamental tool of management. "We are beginning to raise the floor on performance," he said.

As expected, he places much confidence in the court's ability to move change through its managers. Spence explains that any organization's management skills need to be "tethered to the craft of the organization." Said Spence, "We must connect management skills with the delivery of justice."

In addition to a strong management team, Spence sees technology playing a critical role in modernizing court operations. In addition to the 2013 roll out of MassCourts to the Superior Court, a request for proposal is currently out for e-filing. "Both will lead to rapid and dramatic improvement," Spence said.

"We want to move to as much digital storage as we can, saving us and attorneys significant amounts of money," he added.

## COUNTY-BASED CULTURE

Spence explains that the Trial Court culture is affected by the county-based system. He said that there is a tradition of localism. What is clear, Spence mentions, is that within the administration, "we need to strengthen Boston's capacity to support those around the commonwealth." He said, "our courts are our customers."

In speaking with the MBA House of Delegates in January, Spence voiced his opposition to the unification of the courts, a concept the MBA has long lobbied for in its many reports issued on court reform. Spence is, however, open to and seems to be working toward, consolidating many of the "back office" functions that support the various Trial Court departments. Spence realized there is duplication of overhead in many areas.

## A STRATEGIC VISION

In a move to improve the culture of the courts, Spence has engaged the Trial Court in a strategic planning process. To help with landmark change in the system, The Ripples Group — a Boston-based management consulting firm specializing in growth strategies and performance improvement — has been tapped to help.

Cynthia Robinson-Markey, legal counsel to Boston Municipal Court Chief Justice Charles R. Johnson, serves as the project manager for this important process. "Strategic planning is a big part of Harry's agenda," said Robinson-Markey, who has seen the highs and lows of the system during her 16 years with the Trial Court.

"Other plans haven't had the push of one core, central person," she said. Robinson-Markey explains that fortunately Spence is that person currently. "He is a true visionary who knows what it takes to have an actionable, managed plan." Robinson-Markey differentiates the current strategic planning process as being bottom-up, when compared to others in the past that have been top-down.

Spence and Robinson-Markey estimate that the strategic plan will be presented to the SJC for evaluation and endorsement in the summer months, but Spence and Robinson-Markey, through the guidance of The Ripples Group, are not holding out on change until that happens.

## A CASE FOR FISCAL SUPPORT

As he works on the court's roadmap for the future, Spence's more immediate focus is securing adequate funding for Fiscal Year 2014. "I need to make sure the lifeblood continues to flow," Spence said to MBA delegates in January.

The court's budget request was submitted to Gov. Deval L. Patrick in November. In addition to the Massachusetts Trial Court's maintenance request of $589.5 million, Spence put together six other enhancements that the governor and/or the Legislature can decide to allocate funds to. Those "modules," as Spence refers to them, are:

- Judicial pay increase, totaling $21 million;
- Staffing to restore full public hours in certain courts, totaling $1 million;
- Videoconferencing equipment, totaling $400,000;
- Enhanced security systems and increased security personnel, totaling $2.5 million;
- Information technology and phone system upgrades in the BMC, totaling $500,000; and
- Drug court enhancements to reduce recidivism, totaling $500,000.

Released in late January, Patrick's recommended FY14 state budget allocated $577 million for court funding, $12 million shy of the Trial Court's request. The House and Senate will take up their own versions of the budget in April and May respectively. ➤6

# Spence addresses MBA HOD, delegates revisit spousal elective share debate

**BY TRICIA M. OLIVER**

Trial Court Administrator Harry Spence was the featured guest speaker at the Jan. 31 House of Delegates meeting. Spence detailed the areas of focus in his nine-month tenure in this newly created position in the Trial Court Department.

Spence told the MBA delegates of his strongest impression since beginning his post — he has encountered a highly competent and professional work staff with "surprisingly more of an appetite for change" than he was anticipating.

Spence continues to make weekly visits to various courthouses throughout the state. These visits and a staff survey have provided his office with key anecdotal information, as well as data to help quantify and qualify staff perceptions. Spence reported the survey revealed that 30 percent of court staff was interested in aggressive change, 90 percent wanted change and 10 percent was comfortable with the status quo.

Spence indicated that the Trial Court will soon be reaching out to the MBA for advice and assistance in the preparation of its strategic plan, which the court expects to submit to the Supreme Judicial Court for approval in June.

Aside from Spence's remarks, the delegation also heard from the MBA Taxation Section. The section requested that the delegates rescind their vote taken in November to support in principle, the filing of legislation amending the Massachusetts Uniform Probate Code to add provisions relative to spousal elective share. After vigorous debate with input from representatives from the tax, probate and other MBA sections, as well as members of the ad hoc committee who brought the issue to the floor at the November meeting, the delegates voted against rescinding their original vote in November on the legislation.

The group also voted to support in principle the resolution and report relative to the powers of federal bankruptcy judges and to advocate for passage by the American Bar Association. The delegation voted unanimously in favor of this.

The next meeting of the MBA House of Delegates will take place on March 21 in Framingham.

LEGAL NEWS

# News from the Courts

## Extended hours pilot at the Brooke Courthouse

The Massachusetts Trial Court has announced the commencement of a pilot program extending the hours in three court departments operating sessions at the Brooke Courthouse in Boston.

This program is designed to assess, over a period of time, the usefulness of extended court hours as a convenience for certain segments of the public. Effective Feb. 26, the Boston Municipal Court, Housing Court and Probate and Family Court departments began conducting certain limited court sessions on two Tuesdays each month until 7 p.m. In addition to Feb. 26, the dates for the first several months are March 12, March 26, April 9 and April 23.

The purpose of this pilot is to make the court available to members of the public during late afternoon and early evening hours. The sessions will be limited to specifically-designated case types. All matters will be pre-scheduled and/or by agreement of the parties.

The Clerks' Offices and Registry of Probate will not be open to the public during the extended hours. Those offices will staff the sessions, as needed. Emergency matters occurring weekday evenings from 4:30 p.m. to the opening of court at 8:30 a.m., or on weekends or holidays will continue to be processed through the Judicial Response System as accessed through the local police departments.

Information regarding the types of matters that will be available for this pilot, their scheduling and courtroom locations will be posted to www.Mass.Gov/Courts by court department, or the courts can be reached as follows:

- Boston Municipal Court: (617) 788-8600
- Boston Housing Court: (617) 788-8485
- Suffolk Probate and Family Court: (617) 788-8300

## Interim chief justice of the District Court appointed

Chief Justice of the Trial Court Robert A. Mulligan has announced the appointment of Hon. Paul F. LoConto as interim chief justice of the district court, in accordance with G.L. c.211B, §7. LoConto will succeed Chief Justice Lynda M. Connolly, who will retire on March 1, 2013. Mulligan, who will reach the mandatory retirement age in July of this year, recently stated that his successor will appoint the Chief Justice of the District Court to the full five-year term.

LoConto has been a regional administrative judge of the district court department since 1999. He also has served as first justice of the Worcester District Court since 2004. Prior to that, he was first justice of the Fitchburg District Court for five years and first justice of the East Brookfield District Court for 10 years. He also served as presiding justice of the Appellate Division of the District Court in the western region from 1989 to 2011. He was first appointed to the District Court Department in 1985. Previously, he served as clerk magistrate of the East Brookfield District Court for 10 years, following his career as an attorney in private practice.

## Probate and Family Court announces release of a procedural advisory and updated trust forms

Chief Justice Paula M. Carey of the Probate and Family Court has announced the release of a procedural advisory on trust matters, as well as new and revised trust forms. The procedural advisory highlights procedural and form changes as a result of the adoption of the Massachusetts Uniform Trust Code. The MUTC was enacted as part of Chapter 140 of the Acts of 2012. Chapter 140 amended various sections of G. L. c. 190B, the Massachusetts Uniform Probate Code and incorporated the MUTC as Chapter 203E of the General Laws.

The procedural advisory and trust forms were developed over the last several months by the MUPC Procedures Committee and the MUPC Forms Committee. Both committees are comprised of Probate and Family Court judges, court staff and members of the bar.

## Proposed amendments to Rule 412 of the supplemental rules of the Probate and Family Court

Chief Justice Paula M. Carey, along with the Probate and Family Court Bench/Bar Committee on Rules, solicits comments on proposed amendments to Rule 412 of the supplemental rules of the Probate and Family Court.

The proposed changes to Rule 412, Joint Petition for Modification of Child Support Judgment, would expand the rule to allow parties to modify any judgment or temporary order of the Probate and Family Court where the parties are in agreement, the agreement is in writing and all other requirements of the rule are met.

## Separate and Secure Waiting Area Task Force releases implementation progress report

The SSWA Task Force has filed a progress report outlining steps taken to implement the provision of the Massachusetts Victim Bill of Rights. The report outlines the results of the court-by-court assessments through January 2013.

## Regulations of the jury commissioner

The Supreme Judicial Court has approved amended Regulation 9 and new Regulation 10 of the Regulations of the Jury Commissioner, effective March 1, 2013.

## Changes approved to SJC Rule 4:02

The Supreme Judicial Court has approved changes to the Rule 4:02 of the Rules of the Supreme Judicial Court effective March 1, 2013. ■

# EXPERTS&RESOURCES



CONTINUED ON PAGE 7

**SPENCE**
*Continued from page 4*

Spence has been a featured speaker at the MBA-led events to advocate for funding, including the Feb. 14 Court Advocacy Day (*see related article, page 8*). He and Supreme Judicial Court Chief Justice Roderick L. Ireland have emphasized the critical funding needs of the courts to the larger legal community at the events.

"We are fortunate to have someone of Harry Spence's caliber in a leadership position in the court system. In the short time since becoming Court Administrator, Harry has been working diligently to modernize the operations of the Trial Court," said Ireland.

"He has already accomplished a great deal, and is doing an outstanding job," Ireland added. ■

## New divorce/ family law firm serves those most in need

**BY CHRISTINA P. O'NEILL**

Gabriel Cheong, owner of Quincy-based Infinity Law Group, has opened his second law firm, Cambridge Divorce Group LLC. The firm, which opened February 4, will offer exclusively reduced-fee limited assistance representation (LAR), in all areas of family law including divorce, custody, child support, alimony, and property division. Its 10 contract attorneys will help clients on a pay-as-needed basis to fill forms, draft agreements and court filings, and provide limited representation in court and general advice.

It targets middle-income divorce and family law clients who don't qualify for free legal services, but who can't afford traditional attorney fees for various reasons. Clients, expected to be largely walk-ins or referrals, are expected to be low-income people or those without access to their funds. Its hourly rate is $125, and it doesn't take up-front retainers from its clientele.

"It's definitely a volume-based business," says Cheong. The contract attorneys, all versed in family law and all of whom are mainly younger attorneys trying to build their own legal businesses, choose their shifts at Cambridge Divorce Group. They'll be able to do their own work while they wait for walk-ins, he says.

Ninety percent of litigants in Massachusetts probate court don't have legal representation and encounter legal roadblocks as a result. Referring these pro se clients to non-profit legal services in a bad economy, does not work, because a bad economy usually dries up Legal Services funding.

"The business model is not in sync with the population that it services," Cheong says.

Pro bono work doesn't close the gap.

"How can you ask new young lawyers struggling to pay their own bills, to give more of what they don't have?" Cheong says. " So I took a look at this and said, let's try to work at it from a different angle."

A January 25 open house marking the firm's opening saw 40 guests, mostly attorneys, but also representatives from domestic violence shelters across the state.

Cheong does say he's gotten a bit of a pushback from legal-community skeptics who question whether they'll have to lower their fees in order to compete. He disagrees with that assessment — if piecemeal legal help is all a client can afford, that client never would have hired a more traditional-model firm in the first place, he says. His hope, he says, is to get the legal community to realize there is value in LAR work and that it doesn't take away from more standard practices.

# Connect, share and collaborate with fellow section members on My Bar Access

## How to post a blog

The Massachusetts Bar Association has launched My Bar Access, a valuable new member benefit, which provides MBA members will an opportunity to share practice information in one convenient, online community.

Each MBA section/division has an interactive blog option on My Bar Access, which offers members an opportunity to post opinions about recent legal decisions, personal experiences in the courtroom, practice tip ideas and more.

### HOW TO START A BLOG:

1. Visit http:// access.massbar.org.
2. Log-in to My Bar Access using your MBA user name and password.
3. Click on BLOGS in the My Bar Access gold navigation bar.
4. In the BLOGS drop-down menu, click on "Create New Blog."
5. Follow the My Bar Access blog template to create your entry. If you want to associate the blog with a particular My Bar Access group, choose your section/division from the drop-down menu under the content box. Don't forget to spell check.
6. Click on who can see your post.
7. Click on who can make comments on your blog entry.
8. Click the "Publish" button to make your blog live.

The blog post will display on your My Bar Access homepage and on your member group's landing page, if you associated the blog with a specific My Bar Access group. Questions? E-mail mybaraccess@massbar.org. ■

# BAR NEWS

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## Calendar of Events

**TUESDAY, MARCH 12**

**Lifecycle of a Business Part IV**
**5–7 p.m.**
**MBA, 20 West St., Boston**

**WEDNESDAY, MARCH 13**

**Juvenile CORI Reform Roundtable**
**4–6 p.m.**
**MBA, 20 West St., Boston**

**FRIDAY, MARCH 15**

**Juvenile & Child Welfare Legal Chat Series**
**1–2 p.m.**
**MBA, 20 West St., Boston**

**MONDAY, MARCH 18**

**Mock Trial Program – Final Four Match**
**1 p.m.**
**Worcester Superior Courthouse, 225 Main St., Worcester**

**Mock Trial Program – Final Four Match**
**1 p.m.**
**John Joseph Moakley Courthouse, 1 Courthouse Way, Boston**

**WEDNESDAY, MARCH 20**

**Law Firm Business Plan Workshop**
**2–5 p.m.**
**MBA, 20 West St., Boston**

**Mock Trial Program -- Finals Match**
**10 a.m.**
**Great Hall at Faneuil Hall Square, Boston**

**WEDNESDAY, APRIL 3**

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

**YLD Greater Boston Food Bank Volunteer Event**
**5:30–8 p.m.**
**Greater Boston Food Bank, 70 South Bay Ave., Roxbury**

**THURSDAY, APRIL 4**

**Building Your Professional Network**
**Noon–2 p.m.**
**MBA, 20 West St., Boston**

**WEDNESDAY, APRIL 10**

**Use of Social Media in Health Care Organizations**
**4–7 p.m.**
**MBA, 20 West Street, Boston**

**FRIDAY, APRIL 19**

**Juvenile & Child Welfare Legal Chat Series**
**Noon–1 p.m.**
**MBA, 20 West St., Boston**

**WEDNESDAY, APRIL 24**

**Law Firm Marketing Workshop**
**2–5 p.m.**
**MBA, 20 West St., Boston**

**THURSDAY, APRIL 25**

**The Sole Practitioner & Small Firm Symposium**
**Time: TBA**
**Lombardo's, 6 Billings St., Randolph**

**FRIDAY, APRIL 26**

**Probate & Family Court Conciliation Training**
**9 a.m.–3 p.m.**
**MBA, 20 West Street, Boston**

**THURSDAY, MAY 9**

**SAVE THE DATE**
**2013 MBA Annual Dinner**
***5:30 p.m.***
***The Westin Boston Waterfront, 425 Summer St., Boston***

The Massachusetts Bar Association will hold its 2013 Annual Dinner on Thursday, May 9, at the Westin Boston Waterfront, 425 Summer St., Boston. **Gov. Deval L. Patrick** will deliver the dinner's keynote address. In addition, the event will feature the presentation of the annual Access to Justice Awards. Consider attending this event as a sponsor. Visit www.massbar.org/ad13 for our growing list of dinner sponsors, to learn more about sponsorship opportunities and buy tickets.

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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**ADR**



**AVIATION LAW**



**BRAIN INJURY**



**COURT REPORTING**



**COURT REPORTING**



**CRIMINAL APPEALS**



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# EXPERTS&RESOURCES

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BAR NEWS

# MBA co-hosts Court Advocacy Day at the Statehouse

BY JENNIFER ROSINSKI

The Massachusetts Bar Association and the Boston Bar Association hosted a Court Advocacy Day at the Statehouse on Feb. 14 to urge our legislators to preserve the rule of law in Massachusetts by supporting the Massachusetts Trial Court's budget request for fiscal year 2014.

The Trial Court has asked for $589.5 million to maintain quality justice for Massachusetts citizens. This funding is needed to address critical operating needs and stabilize the court system which has seen devastating cuts in recent years.

"The MBA has been and will be a strong supporter of adequate funding for our state's third branch of government," MBA President Robert L. Holloway Jr. said. "Our message to the Legislature is clear and simple — supporting the court's maintenance request of 589.5 million dollars in funding for fiscal year 2014 is essential, it is not a luxury, to provide basic services to the public and preserve access to justice for everyone in this commonwealth."

Supreme Judicial Court Chief Justice Roderick L. Ireland said 22 percent of the commonwealth's workforce reduction came from the judiciary despite having only nine percent of Massachusetts's state workers.

"The judiciary branch has suffered a disproportionate share of hardship," Ireland said. "That has had a dramatic impact on our ability to deliver timely justice."

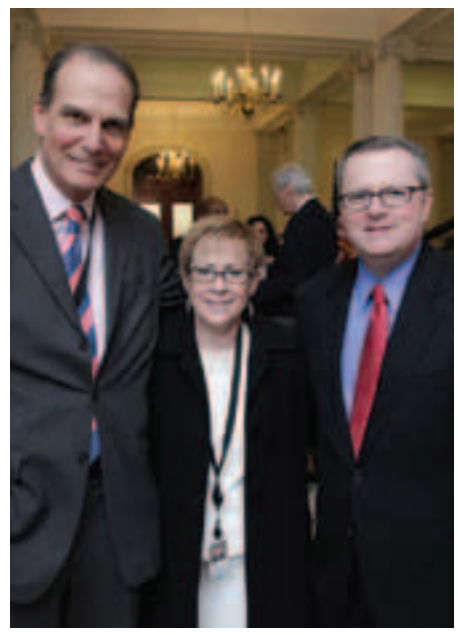
Ireland also called on the Legislature to support a judicial salary increase. Massachusetts judges are ranked 48th in the nation for salaries when cost of living is adjusted, and have had no increase for the past seven years. "It is a matter of basic fairness and equity," Ireland said.

Employees of the Massachusetts Trial Court have continued to do exemplary work in spite of the budget constraints and workforce reductions, and they should be commended, said Chief Justice for Administration and Management Robert A. Mulligan.

Trial Court Administrator Harry Spence said the full $589.5 million in funding is necessary.

"We're struggling to sustain the belief in the rule of law in this society," Spence said. ■

From left: Boston Bar Association President James D. Smeallie, Supreme Judicial Court Chief Justice Roderick L. Ireland and Massachusetts Bar Association President Robert L. Holloway Jr.



From left: Trial Court Administrator Lewis H. "Harry" Spence, Chief Justice of the Probate and Family Court Paula M. Carey, and MBA Chief Operating Officer and Chief Legal Counsel Martin W. Healy.

# New Legal Lunch Series draws a hefty crowd

BY KELSEY SADOFF

The Civil Litigation section and Young Lawyers Division hosted Part I of the Legal Lunch Series on Jan. 31. The series, geared toward civil litigators of all experience levels, provides attendees with an opportunity to participate in a discussion of selected areas of law or practice in a collegial setting.

Hon. Stephen E. Neel (ret.) was the guest speaker at the first lunch event. Neel discussed his experiences as both a trial judge and a mediator and offered his perspectives on the different challenges presented to practitioners in these forums.

The lunch series was moderated by Courtney Shea, Esq. of Looney& Grossman, LLP and Craig Levey, Esq. of Bennett & Belfort PC. ■

The Hon. Stephen E. Neel (ret.)

# BAR NEWS

## MEMBER SPOTLIGHT

### Cowan to serve as the Massachusetts interim U.S. senator

William "Mo" Cowan has been selected by Gov. Deval L. Patrick to serve as the Massachusetts interim U.S. senator. Patrick's former chief of staff, Cowan will hold the post until a June 25 special election determines who will succeed John F. Kerry, who resigned after being named Secretary of State.

Patrick announced his selection of Cowan on Wednesday, Jan. 30 in the Governor's Council chambers at the State House.

"The governor went with his most trusted confidant. Cowan has the wisdom and practicality to be a great steward for the state," said Martin W. Healy, MBA chief legal counsel and chief operating officer.

"Mo has been at the forefront of every one of Patrick's inside political appointments and complex legal decisions. He enjoys a great working relationship with federal and state office holders," Healy said. "The historic appointment of an African American U.S. senator could not have been handled better by the governor."

Hired by Patrick in 2009 as his legal counsel, Cowan was promoted to chief of staff one year later. He stepped down from his position in November with plans to return to the private sector.

**William "Mo" Cowan has participated in numerous Massachusetts Bar Association events. Cowan (left) is pictured here with MBA Chief Legal Counsel and Chief Operating Officer Martin W. Healy at the 2012 Bench Bar Symposium.**

### Flynn wins MBA iBelong campaign challenge

**Judith M. Flynn**

The Massachusetts Bar Association is pleased to announce member Judith M. Flynn has won the association's iBelong campaign challenge. The iBelong campaign was established in November 2012 and allows members to share their personal reasons for belonging to the MBA at www.massbar.org/iBelong. As the 2013 iBelong winner, Flynn has received a free 2013-14 MBA membership.

"The whole (of the MBA) is greater than the sum of its parts: there is not really one distinguishing element of the MBA that makes it the valuable resource that it is, but the totality of its many resources. The educational programs, networking, advocacy, publications, member groups, events, etc. The MBA is a great value, providing far more than the annual cost in benefit," wrote Flynn in her winning submission.

Flynn is the founder of the Elder Law Office of Judith M. Flynn in Rockland, where she specializes in long-term care planning, estate planning, assisted living, crisis planning, special needs planning and conservatorships.

An MBA member since 2003, Flynn joined because of the valuable resources the MBA has to offer. Recently, Flynn has greatly benefited from the numerous MBA educational seminars and resources highlighting changes in the Massachusetts Uniform Probate Code and the Massachusetts Uniform Trust Code.

"The educational programs and networking were most important to me as a new attorney," Flynn said. "The educational programs are just as important to me today [as they were when I started out] since nearly every aspect of my practice area has been affected by significant changes in the laws over the past few years. The On Demand programs are a valuable resource to me as a sole practitioner, allowing me to view programs at my convenience."

### Fee named trustee of Parmenter VNA and Community Care Inc.

**Michael C. Fee**

Massachusetts Bar Association member Michael C. Fee was recently named to the board of trustees of Parmenter VNA and Community Care Inc. in Wayland. Parmenter VNA and Community Care Inc. is an independent, non-profit provider of home care and hospice services to residents of MetroWest, founded in 1954.

As a shareholder at the law firm of Pierce & Mandell PC in Boston, Fee's practice concentrates in the areas of commercial, real estate, and health care litigation.

Fee has been involved with the MBA for many years. From 2002 to 2004, he served as chair of the MBA's Property Law Section Council. He formerly served on the MBA's Budget and Finance Committee, as well as the Executive Management Board.

Fee has also served on a variety of non-profit and municipal boards, and is currently the chairman of the Sudbury Planning Board and a commissioner of the Sudbury Water District. Fee received his Bachelor of Arts degree from Harvard University in 1982 and is a 1988 graduate cum laude from Boston College Law School. ■

# EXPERTS&RESOURCES

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## BAR NEWS

# Mass. Bar Foundation honors Boyle, announces 2013 officers and trustees

On Jan. 24, the fellows of the Massachusetts Bar Foundation gathered for their Annual Meeting at the Social Law Library in the John Adams Courthouse. Following the recommendations of the Nominating Committee chaired by Steven Wollman and including Francis Ford, Wendy Sibbison, and Craig Stewart, the MBF Fellows unanimously elected the following:

### OFFICERS

- President Jerry Cohen, Burns & Levinson, LLP, Boston
- Vice President Robert J. Ambrogi, Law Office of Robert J. Ambrogi, Rockport
- Treasurer Janet F. Aserkoff, Rappaport, Aserkoff & Gelles, Boston
- Secretary Lawrence J. Farber, Law Office of Lawrence J. Farber, Amherst

### TRUSTEES

- Frank J. Ciano, Law Office of Frank J. Ciano, Cambridge
- Lewis C. Eisenberg, Cosgrove, Eisenberg & Kiley, P.C., Quincy
- Hon. Andre A. Gelinas, Fitchburg
- Gerald P. Hendrick, Edwards Wildman Palmer LLP, Boston
- Dennis M. Lindgren, Pierce & Mandell, P.C., Boston
- Angela McConney Scheepers, Commonwealth of MA – Division of Administrative Law Appeals, Boston
- Andrew Rainer, Office of the Attorney General, Boston

In addition to presenting the Great Friend of Justice Award to Massachusetts Bar Association Past President Leo V. Boyle of Meehan, Boyle, Black & Bogdanow, PC, at the meeting, the MBF inducted 19 new Life members into the MBF Society of Fellows, all of whom successfully completed generous pledges made to advance the MBF's mission of increasing access to justice.

**MBA Past President Leo V. Boyle (left) accepts the award from MBF President Jerry Cohen (right).**

In sharing his vision for the year ahead, MBF President Jerry Cohen reaffirmed the MBF's determination to preserve the structure and scope of legal services in the Commonwealth. He urged outreach by the MBF Fellows to identify new sources of "money, time, and compassion" to mitigate the effects of the drastic cuts in IOLTA and other funding sources for the Foundation and its grantees. Cohen reminded all in attendance, "it's easy to become jaded when we hear of great need and the like, but it's not enough to say the need is great, we also have to say the cause is right."

For more information about the MBF, please visit www.MassBarFoundation.org. ■

# Mock Trial Championship set for March 20

Join the MBA for the final round of the Massachusetts Bar Association's 2013 Mock Trial Program competition on Wednesday, March 20 at 10 a.m. in the Great Hall at Faneuil Hall in Boston. The winning team will secure the state championship and advance to the national competition in Indianapolis, May 9-11. ■

# MBA CLE AT-A-GLANCE

## MARCH CONTINUING LEGAL EDUCATION PROGRAMS BY PRACTICE AREA

### CIVIL LITIGATION

#### Winning Closing Arguments

***All-star panel of Top Litigators Puts Michael Jackson, Star Wars and the Boston Red Sox on Trial***

**Tuesday, March 5, 4–7 p.m.**
**MBA, 20 West St., Boston**

***Faculty:***

Anthony V. Agudelo, Esq., program chair
Sugarman, Rogers, Barshak & Cohen PC, Boston

Hon. Stephen E. Neel (ret.)
JAMS, Boston

Joan A. Lukey, Esq.
Ropes & Gray LLP, Boston

Frank J. Riccio, Esq.
Law Office of Frank J. Riccio, Braintree

John P. Ryan, Esq.
Sloane & Walsh LLP, Boston

Anthony J. Sbarra Jr., Esq.
Hermes, Netburn, O'Connor & Spearing, PC, Boston

Valerie A. Yarashus, Esq.
Meehan, Boyle, Black & Bogdanow, Boston

***Sponsoring section/division:*** Civil Litigation, Young Lawyers

### BUSINESS LAW

#### Lifecycle of a Business Part IV: Mergers and Acquisitions and Bankruptcy

**Tuesday, March 12, 5–7 p.m.**
**MBA, 20 West St., Boston**

***Faculty:***

Matthew S. Furman, Esq., program co-chair
Tarlow, Breed, Hart & Rodgers PC, Boston

Kelly Kneeshaw-Price, Esq., program co-chair
Finneran & Nicholson PC, Newburyport

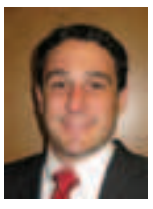
Christopher M. Condon, Esq.
Murphy & King PC, Boston

Euripedes D. Dalmanieras, Esq.
Foley Hoag LLP, Boston

Francis C. Morrissey, Esq.
Morrissey, Wilson & Zafiropoulos LLP, Braintree

David A. Parke, Esq.
Bulkley, Richardson & Gelinas LLP, Springfield

***Sponsoring sections/division:*** Business Law, Young Lawyers



MATTHEW S. FURMAN

KELLY KNEESHAW-PRICE

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

## FACULTY SPOTLIGHT

### ANTHONY V. AGUDELO, ESQ.

**SUGARMAN, ROGERS, BARSHAK & COHEN PC, BOSTON**

**Program chair: "Winning Closing Arguments"**

Agudelo's practice encompasses complex cases in product liability, toxic torts including asbestos, medical malpractice, premises liability, personal injury, liquor liability, employment discrimination and business disputes. Before joining SRBC in 2000, he was an associate for five years at a civil litigation firm in Richmond, Virginia, where he represented clients in a similar range of matters.

In addition to his trial practice, Agudelo has been active in pro bono work. He served as section editor for the Massachusetts Bar Association's Health Law Section Council for three years and currently serves on its Civil Litigation Section Council.

Agudelo was named a *Boston* magazine Massachusetts Super Lawyers "Rising Star" (General Litigation) in 2006–07 and 2009–10. He is a member of the Massachusetts Bar Association, Massachusetts Academy of Trial Attorneysand the Defense Research Institute.

### JUVENILE & CHILD WELFARE

#### Juvenile CORI Reform Roundtable

**Wednesday, Mar. 13, 4–6 p.m.**
**MBA, 20 West St., Boston**

***Faculty:***

Georgia Cristley, Esq.
Dept. of Criminal Justice Information Services, Chelsea

***Sponsoring sections/division:*** Criminal Justice, Juvenile & Child Welfare, Young Lawyers

#### Juvenile & Child Welfare

**Legal Chat Series**

**Friday, March 15, 1–2 p.m.**

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

### LAW PRACTICE MANAGEMENT

#### Law Firm Business Plan Workshop

**Wednesday, March 20, 2–5 p.m.**
**MBA, 20 West St., Boston**

***Faculty:***

Damian J. Turco, Esq., program chair
Turco Legal, Boston

DAMIAN J. TURCO

Sofia S. Lingos, Esq.
Lingos Law, Boston

Stephen Seckler, Esq.
Seckler Legal Consulting and Coaching, Newton

Susan Letterman-White, Esq.
Lawyers Leaders & Teams, Braintree

***Sponsoring section:*** Law Practice Management

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MEMBER BENEFIT

Visit www.MassBar.org/OnDemandHelp for system requirements.

BAR NEWS

# Hundreds of lawyers turn out to advocate for civil legal aid funding at the Annual Walk to the Hill

**BY JENNIFER ROSINSKI**

More than 650 lawyers assembled at the State House on Jan. 30 to request their legislators support Gov. Deval L. Patrick's fiscal year 2014 budget recommendation of $15.5 million for the Massachusetts Legal Assistance Corporation.

The 14th Annual Walk to the Hill for Civil Legal Aid featured a visit from Patrick, who told attendees in the standing room only Great Hall of Flags that civil legal aid is necessary.

"I value what you do. I value on whose behalf you do it," Patrick said. "We do not have to be victims of economic circumstance. We can shape our own future."

The largest single funding source for civil legal aid in Massachusetts, MLAC received a $12 million appropriation from the state this fiscal year.

Legal aid programs are often the last resort for low-income people in Massachusetts, Supreme Judicial Court Chief Justice Roderick L. Ireland said.

"Without these services, indigent clients often try to navigate the legal system on their own, or give up hope … The results can be devastating," he said. "We are here today to help balance the scales of justice."

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

Civil legal aid programs have been struggling to meet demand due to a 78 percent decrease in revenue since fiscal year 2008 from the Interest on Lawyers' Trust Accounts program, the other major funding source for civil legal aid. MLAC has cut grants to the 16 legal aid programs it funds by 56 percent since fiscal year 2008.

"We need to have adequate finding for civil legal aid services," MBA President Robert L. Holloway Jr. said.

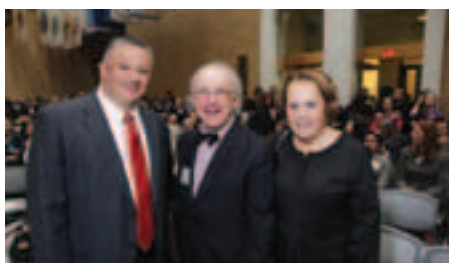
"The bottom line is we have a system in place there the funding is the lowest when the need is the greatest," Boston Bar Association President James D. Smeallie said. "Thus, it is critical that the state step in to increase funding for civil legal services to assure access to justice for our citizens who are most in need of it."

Civil legal aid saved her life, said Daniele Bien-Aime of Brockton. The former South Coastal Counties Legal Services client lost her job, health insurance, and was in danger of becoming homeless during her battle with breast cancer. The advocacy of a legal aid attorney helped Bien-Aime get her job back, providing her with health insurance to finish her cancer treatment and the income needed to keep her in her home.

"My legal aid attorney was Heaven-sent," Bien-Amie said. "I don't know what I would have done without her help, and I am grateful to everyone who supports the funding that enables these lawyers to continue to help people like me." ■

From left: BBA President J.D. Smeallie; SJC Chief Justice Roderick L. Ireland; MBA President Robert L. Holloway Jr.; and MLAC Executive Director Lonnie A. Powers gather before the speaking portion of the program.

MBA President Robert L. Holloway Jr. provides remarks.



From left: MBA Vice President Robert W. Harnais; MBA President Robert L. Holloway Jr.; and MBA Secretary Martha Rush O'Mara.

Gov. Deval L. Patrick addresses the crowd.

Daniele Bien-Aime of Brockton shares how civil legal aid has impacted her life.

BAR NEWS

# MBA and WGGB-TV team up to offer free 'Lawyer on the Line' call-in service

**BY JENNIFER ROSINSKI**

Volunteer lawyers from the Massachusetts Bar Association fielded 111 calls from Western Massachusetts residents with legal concerns during the "Your Money Monday: Lawyer on the Line" call-in segment on Feb. 11 presented jointly by the MBA and WGGB-TV, the station that broadcasts ABC 40 and Fox 6.

Callers flooded the phone line as soon as the program started at 5 p.m., when WGGB-TV's newscast began. The segment was scheduled to end at 6:30 p.m., but most of the MBA's eight volunteer attorneys stayed until 7 p.m. to answer questions from callers on hold.

While volunteer lawyers provided free legal help as a public service, WGGB-TV anchor and reporter Shannon Hegy interviewed MBA member and Springfield attorney Keith A. Minoff live in the newsroom. Minoff discussed the MBA's mission and public services, the MBA Lawyer Referral Service and Court Advocacy Day on Feb. 14.

ABC 40/Fox 6 is the Pioneer Valley's source for breaking news, weather, traffic and national information, 24/7, online, and on the air. ABC 40/Fox 6 is locally owned by Gormally Broadcasting LLC in Springfield.

The eight volunteer lawyers who handled the calls are:

- Jeffrey Burstein, Burstein Law Office, Springfield;
- Corey Carvalho, UMass Legal Services, Amherst;
- Mark Cress, Bulkley, Richardson & Gelinas LLP, Springfield;
- Michele Feinstein, Shatz, Schwartz and Fentin PC, Springfield;
- John Garber, Weinberg & Garber PC, Northampton;
- Andrea Reid, Reid & Gaudet Law Group, LLP, Springfield;
- Katherine Robertson, Hampden County District Attorney's Office, Springfield; and
- Daniel Rothschild, Bulkley, Richardson & Gelinas LLP, Springfield. ■

PHOTO: JENNIFER ROSINSKI

**During the program, MBA member and Springfield attorney Keith A. Minoff discussed the MBA's mission and public services with WGGB-TV anchor and reporter Shannon Hegy.**

# MBA Tiered Community Mentoring program holds networking event at Roxbury Community College

**BY JENNIFER ROSINSKI**

Accomplished professionals in the legal community shared their paths to success at the Tiered Community Mentoring Program Networking Event held at Roxbury Community College on Feb. 7.

The program, in its fourth year, matches up 10 practicing lawyers with more than two dozen students from high school, college and law school.

"Learn from people around you," said MBA Vice President Robert W. Harnais, a partner at the law firm of Mahoney, Diamond and Harnais Law Offices in Quincy.

Working in law offices while attending high school in Chicago helped open the Hon. Shannon Frison's eyes to a career in the law. She is now a judge at the Roxbury Division of Boston Municipal Court.

Keeana S. Saxon, deputy general counsel at the Executive Office of Housing and Economic Development, explained how she fell into a career in the law. A music major at Spellman College, Saxon took the LSATs while she was planning her career path following college. She learned that she loved it. "Being in law school was probably the best non-decision I ever made," Saxon said.

Other speakers included Roxbury Community College Professor Carol Liebman. The speaking program was followed by a speed networking event and question and answer session.

The Tiered Community Mentoring Program was the idea of Norfolk Probate and Family Court First Justice Angela M. Ordoñez. Its goal is to expose high school students to information about college, provide pre-law undergraduate students with information about the law school admission process and give law students with an inside view of the practice of law with their attorney mentors.

The program was honored with the 2011 ABA Partnership Award from the American Bar Association because of its commitment to diversity. ■

PHOTO: JENNIFER ROSINSKI

**(Left to right) Executive Office of Housing and Economic Development Deputy General Counsel Keeana S. Saxon, Roxbury Division of Boston Municipal Court Judge Shannon Frison and MBA Vice President Robert W. Harnais.**

# Immigration and juvenile sections host open meetings

**BY KELSEY SADOFF**

The Immigration Law Section hosted a Feb. 13 section social, featuring Kate Auspitz, issues director for Congressman Michael E. Capuano, representative, 7th Congressional District of Massachusetts.

Auspitz discussed what a congressional inquiry can accomplish, how to request assistance and what cannot be reasonably expected from an inquiry. In addition, Auspitz spoke to attendees about what is happening on the hill regarding comprehensive immigration reform issues.

That same evening, Reece Erlichman, director of the Bureau of Special Education Appeals, an independent subdivision of the Division of Administrative Law Appeals, attended the Juvenile & Child Welfare Section open meeting. ■


**Kate Auspitz, issues director for Rep. Michael E. Capuano, speaks at the Feb. 13 Immigration Law open meeting.**

**Reece Erlichman provided attendees an overview of the BSEA, a brief description of both the voluntary dispute resolution options offered by the BSEA and the due process hearing and fiscal year 2012 BSEA statistics.**

# EXPERTS&RESOURCES

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# BAR NEWS

## The sole practitioner and small firm section

BY SCOTT D. GOLDBERG

As many of you may know, this year the "General Practice, Solo and Small Firm Section" changed its name to "The Sole Practitioner and Small Firm Section." This change was not just for form but also for substance. We sought this change to better represent who we are, as well to distinguish our section membership from who we are not — all general practitioners or young lawyers. In fact, our section's membership is comprised of attorneys who focus their practice in one or a few areas of law, many of whom have been practicing law for decades. In doing so, we are further defining how we can best assist our section's members. We are forging our new identity and description within the MBA — and welcome your involvement.

The council views the section's mission as identifying specific issues and challenges that most concern and affect sole practitioners and members of small firms, and assisting our members in a variety of ways. This assistance includes: exchanging ideas, opinions and advice at meetings, promoting and sponsoring programs, fostering networking and sharing useful information at events and through My Bar Access. Prospective members sometimes ask "What can I get out of joining this section?" We like to reply, "What would you like to get out of it? How can we collectively best assist you in your law practice?" The section is yours to set a course. As part of addressing some of the issues facing sole practitioners and attorneys at small firms, we are excited to present our annual symposium. This year we will be focusing on how to prepare cases cost-efficiently and effectively. Look for details on the symposium to be available soon.

In addition to the direct exchange of information amongst section members, The Sole Practitioner and Small Firm section represents our members' viewpoints and positions on issues presented to the MBA's House of Delegates. We focus on the effects that the proposed issues may have on our specific members' practices. This year we have taken an active role in discussing and voting on issues that include: Access to Justice Section's Emergency Shelter Crisis Affecting Homeless Families and Children in Massachusetts; Family Law Section's Arbitration Act; and the Criminal Justice Section's so-called "Three-Strike Law."

The Sole Practitioner and Small Firm Section is a dynamic group of attorneys who collaborate to address the issues facing them and take positions that reflect our concerns. The SPSF section is here to serve you — and each other. Section membership is now free to all MBA members. Please join us. Together we can advance our mission to improve our legal careers. ■

**Scott D. Goldberg is chairman of the Sole Practitioner and Small Firm Section Council.**

## Annual Bankruptcy Conference held in Western Mass.

BY PATRICIA OLIER

More than 60 members of the legal community participated in the Massachusetts Bar Association's 11th Annual Western Mass Bankruptcy conference on Monday, Feb. 4 at Western New England University School of Law. Conference faculty included four federal bankruptcy judges for the District of Massachusetts.

"The Western Massachusetts Bankruptcy Conference, now in its 11th year, has evolved into a premier vehicle for continuing legal education in bankruptcy law in the District of Massachusetts," said Hon. Henry J. Boroff of the United States Bankruptcy Court in Springfield. "We are grateful for the involvement of the Massachusetts bankruptcy judges and the bankruptcy law and other practitioners who have devoted their time, attention and skills to this program over that time and for the support of the Massachusetts Bar Association, Western New England University School of Law and the western Massachusetts bar associations. The overwhelming success of the program is a great credit to each of them."

This year's conference focused on changes in the intersection of bankruptcy and family law, successful attorney/trustee interactions and issue, updates on new claims and new foreclosure law and comparing bankruptcy practice and procedure between Massachusetts and Connecticut. ■

PHOTO CREDIT: PATRICIA OLIER

**From left: Hon. Frank J. Bailey, U.S. Bankruptcy Court, District of Massachusetts, Boston; Hon. Melvin S. Hoffman, U.S. Bankruptcy Court, Worcester; Hon. Joan N. Feeney, U.S. Bankruptcy Court, District of Massachusetts, Boston; Hon. Henry J. Boroff, U.S. Bankruptcy Court, Springfield.**

FOR YOUR PRACTICE

# Developing your firm's business plan

**BY DAMIAN J. TURCO**

An attorney's decision to develop a business plan for his or her firm is similar to a client's plan to complete their estate plan. Both acknowledged long ago that it's probably the responsible thing to do. They've each had a general sense of how things should go, but the task has always found its way to the back burner. It's kind of a curious thing if you think about it. We all engage in critical, analytical thinking all the time. Our clients literally pay us to think things through and set out strategic plans upon which we then execute.

We all sometimes make false assumptions and we generally accept that by investing some meaningful time in planning, we reduce the likelihood of failure and increase our likelihood of success.

We wouldn't think to engage in any degree of complicated legal work, like go to trial or negotiate a corporate merger or plan a multimillion dollar estate plan, without first setting forth a plan. That would be foolish. We could look incompetent in the presence of colleagues and clients. We could open ourselves up to liability. Our reputations could be damaged. We could waste a lot of time, money, and energy in the process.

Are you starting to see where I'm going with this? It is important to plan important things. And when you plan effectively, your chance at success — great success — substantially increases. In developing a business plan, you think through every major component of the business of your law firm, rather than leaving important decisions to chance.

Now that I've hopefully convinced you that you need to develop your business plan, let's touch on how. Developing a business plan for your firm just takes time, information, and focus. It's best done without distraction. Most plans include the following sections, although you can find variations with a simple internet search:

- Business description
- Market analysis
- Competitor assessment
- Marketing plan
- Operating plan
- Financial plan
- Executive summary

Your plan will think through your firm's structure, goals, and how you plan to attain them. If you want to better ensure you actually get the plan done, sign up for the upcoming MBA CLE: Law Firm Business Plan Workshop, scheduled for 2 p.m., March 20, 2013. You'll walk in with ideas and walk out three hours later with your business plan in hand. One way or another, get it done. Your success depends on it. ■

**Damian J. Turco is an attorney licensed in Massachusetts and Florida and the owner of Turco Legal, a Massachusetts injury law firm. He serves on the Law Practice Management Section Council, is a member of the Boston Inns of Court, and practices primarily in Boston.**

# Rainmaking networks: Perfecting your sales

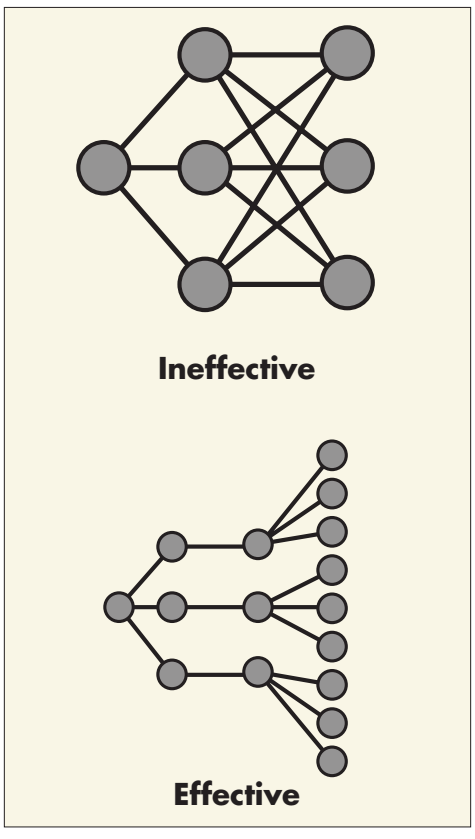
**BY SUSAN LETTERMAN WHITE**

Rainmaking is much more than a consequence of having the right skills; it is also about having the right networks![1]

Do you ever wonder why some people are better at sales than others? Well, here's the answer: They think differently. They act differently. And, they have different networks. The networks of top rainmakers look different. "Different configurations of networks produce different results, and the salesperson who develops a nuanced understanding of social networks will outshine competitors."[2]

My clients become top rainmakers by measuring and developing their networks that matter: lead generation; client decision-makers; indirect influencers of decision-makers; broad reputation; and solution collaborators. Lead generation refers to contacts, who are positioned to learn of different marketplace opportunities that matter to you.

Compare the ineffective lead generation network in the image on the left with the effective lead generation network on the right. Notice the difference between the two networks.




The effective network connects you (the circle at the far left of each image) with the knowledge of diverse indirect contacts. When your direct contacts, are connected to different people in different organizations with different interests, rather than with shared contacts, it expands your view into marketplace opportunities. Do you know what your lead generation network looks like?

Your other networks matter, too. Who are your connections in your key clients and target clients? Are you sufficiently connected with the decision-makers who distribute legal work and the indirect influencers, who have the ear of the direct decision-makers? Are you building your reputation with speaking and publishing opportunities. You can count on the decision makers and indirect influencers being influenced by your professional reputation, even if only unconsciously. Finally, clients want a lawyer they believe will solve their unique and complex problems that keep them up at night. When you have an opportunity to pitch to such a client are you sufficiently networked to solution collaborators in your firm?

Growing your network is a key piece of your marketing strategy. If you are attaining your business development goals, it's time to evaluate your network and consider options for expanding and improving it.

Growing your network is part of a disciplined marketing strategy and an organic process. Join Cynthia MacCausland, Donald Lassman, Daniel Dain and me on Thursday, April 4, 2013, at noon when the MBA Law Practice Management Section presents Growing and Mining a Professional Network. You'll receive tips from successful rainmakers on how to build your networks and have opportunities to ask them your burning questions on how to become a better rainmaker by building your professional network. ■

**Susan Letterman White, JD, MS, is a principal in Letterman White Consulting, a consulting practice devoted to improving organization and team performance and training people to think like business leaders. She works with organizations to change their structures and processes to improve business performance. She also runs Lawyers Leaders & Teams, a company devoted to marketing and leadership development training for lawyers. Her advanced training in business strategy and group facilitation from American University and NTL is integrated into all program designs. She designs and delivers performance-improvement programs that include: organization growth strategy, diversity and inclusion, business development and cross-selling, and strategic communication and conflict management. She frequently uses assessments and other tools to help her clients change the way they think and is certified to administer and interpret the Myers Briggs Type Indicator (MBTI)®.**

1. The term "network" refers to a person's direct and indirect contacts.
2. T. Üstüner & D. Godes, Better Sales Networks, *Harvard Business Review* (2006).

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

# SECTION REVIEW

MASSACHUSETTS BAR ASSOCIATION



CRIMINAL LAW

## Interfering with a police officer: a common law offence

**BY MOLLY RYAN STREHORN**

In the District Court Complaint Language Manual (COMLAW4), under the Common Law Offenses, is listed: "Police Officer, interfere with: On [date of offense] did intimidate, hinder or interrupt a police officer in the lawful performance of his or her duty, in violation of the Common Law (penalty from G.L. c. 279, § 5: 'according to the nature of the crime, as conforms with the common usage and practice in the commonwealth')."[1] This alleged common law crime lacks the appropriate legal pedigree to be an authentic crime in the Commonwealth of Massachusetts and this article presents one way to challenge its authenticity, and therefore, the court's jurisdiction.

While the number of interference with a police officer charges filed in the Commonwealth of Massachusetts has dropped between 2006 and 2010,[2] police officers are encouraged to embrace this common law crime to address a variety of difficult situations.

Most police departments do not utilize this significant common law offense. This is probably due to the fact that most police trainings do not incorporate powers of arrest components that contain common law offenses. However, some police departments have historically utilized interfering with a police officer in a variety of situations. It could be used in any situation where a person intentionally hinders a police officer in performing a police related function. It is an excellent legal device that can be used to satisfy a number of problems experienced by the street officer on any given day or night.[3]

The reason why this alleged common law crime can apply to a wide variety of police related "problems" is the extensiveness of the language in contrast to other codified laws addressing similar situations with much more particularized language. For instance, the statutes criminalizing obstruction by disguise, willful interference with a fire fighter, or witness intimidation have limiting elements that prevent vagueness and arbitrary enforcement.[4]

Specifically, G. L. c. 268, § 13B "criminalizes a number of actions that interfere with the criminal justice system."[5] While this statute applies to a broader class of people (witnesses, jurors, judicial officers, probation officers, and others) than the common law of interference with a police officer, it has a narrower focus because it criminalizes the *intent* to impede a *criminal investigation*.

Conversely, the common law is more expansive because the absence of an element of intent places the focus subjectively on the *result* of hindering the police officer. The common law also covers all lawful performance of police related functions, which includes duties beyond the scope of criminal investigation, such as the community caretaking function.[6]

The starting point to challenge the common law of interference with a police officer is the jurisdiction of the court. To look at this, it is helpful to go back to the origins of the common law, which derives from pre-revolution, English law.

Our ancestors, when they came into this new world, claimed the common law as their birthright, and brought it with them, except such parts as were judged inapplicable to their new state and condition. The common law thus claimed was the common law of their native country, as it was amended or altered by English statutes in force at the time of their emigration. Those statutes were never re-enacted in this country, but were considered as incorporated into the common law.[7]

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While unwritten common law principles "not previously defined" have been applied to cases and interpretation of statutes, there has always been some legal foundation to rely upon.[8]

Strikingly, neither the offense of interference with a police officer nor its constituent elements are mentioned in *any* case decided in the Commonwealth of Massachusetts; nor is there commentary in auxiliary legal sources such as rules of criminal procedure, rules of evidence, sentencing guidelines, or model jury instructions. This is an anomaly compared to other common law crimes which have actually been recognized in the commonwealth.

For instance, prior to being codified, mayhem was a common law crime defined as "violently and unlawfully depriving another of the use of a member proper for his defence in fighting."[9] Affray is also a common law crime supported in both case law and statute.[10] Both of these common law offenses have been referenced in other types of legal analysis — and for many years. For example, "the initiator of an affray is not in a position to claim the benefit of [self] defense."[11] However, interference with a police officer is completely absent from legal journals, cases, statutes, defenses, and procedure.

Under Massachusetts law, "[i]t is not necessary that courts interpreting the common law be able to point to a decided case exactly similar as to its facts,"[12] and may instead depend upon "usage and tradition, the well-known repositories of legal learning, [and] works of approved authority."[13]

For example, in an 1847 prosecution, the defendant was charged with false and malicious libel, but argued that the indictment should be dismissed because there was no written case law or statute defining the offense.[14] In upholding the indictment, the Supreme Judicial Court held that "there is such a thing as a common or unwritten law of Massachusetts, and that, when it can be authentically established and sustained, it is of equal authority and binding force with the statute law."[15]

In order to "authentically establish" the unwritten law, the *Chapman* court relied upon a Massachusetts libel case from 1791. The court also identified statutory references to the appellate process for libel convictions and the admissibility of evidence to show the truth as a defense.[16] Significantly, all were principles which articulated precedent and procedure already decided in the Commonwealth of Massachusetts.

A look at usage, tradition, and custom fails to "authentically establish" interference with a police officer as a common law crime. On the contrary, the analysis offers affirmative reasons why Massachusetts has not made this a crime.

The first professional police force was not created in England until 1829 by Sir Robert Peel, almost 50 years after the signing of the Massachusetts constitution.[17] Replicating the English model, but long after English precedents were a source for our common law, the Massachusetts General Court passed a bill in 1838 to establish the first police department in the commonwealth.[18] ➤18

PROPERTY LAW

## The Good Funds Statute revisited

**BY THOMAS L. GUIDI**

The Good Funds Statute, G.L.c. 183, §63B, was enacted by the Massachusetts legislature in 1994 to ensure that when a person obtains a loan that is to be secured by a mortgage on his or her home, before the mortgage is recorded the borrower has reasonable assurance of receiving the loan proceeds. The Good Funds Statute was passed in response to the crisis caused by the insolvency of Abbey Financial, a mortgage lender that went out of business without funding a large number of pending residential mortgage loans for which the mortgage documents had already been recorded. The result was that homeowners attempting to refinance their existing mortgage loans were trapped with new mortgages encumbering their properties, and no loan proceeds to pay off their prior mortgages.

The Good Funds Statute addressed this issue by requiring that the loan proceeds be transferred to the mortgagor, the mortgagor's attorney or the mortgagee's attorney, in the form of good funds, i.e., a certified check, bank treasurer's check, cashier's check or wire transfer, prior to recording of the mortgage. In practice, this means that the attorney representing the lender must have possession of the loan proceeds before the documents go to record. Although inspired by a consumer protection concern, the Good Funds Statute is not by its terms limited to residential mortgage loan transactions.

The Interest on Lawyers' Trust Accounts (IOLTA) program, which was created by the Supreme Judicial Court in 1985 and is mandated by Rule 1.15 of the Massachusetts Rules of Professional Conduct, was a major beneficiary of the Good Funds Statute. Under Rule 1.15, client funds, including mortgage proceeds, must be held in lawyers' clients' funds accounts which are usually IOLTA accounts. The IOLTA Committee, which was created by the Supreme Judicial Court to administer the IOLTA program, distributes the interest earned on IOLTA accounts to the Massachusetts Legal Assistance Corporation, the Boston Bar Foundation and the Massachusetts Bar Foundation to be distributed to legal aid providers to improve the administration of justice.

In 2007, the IOLTA program received and distributed approximately $31 million. However, the recent recession resulted in substantially fewer real estate closings, smaller loans due to decreasing property values, and in some cases, reduced interest rates on IOLTA accounts. Because title insurers and out of state settlement service companies have been conducting closings without the loan proceeds being funded to lawyers' client trust fund accounts in apparent violation of the Good Funds Statute, the funds flowing through and the earnings generated by IOLTA accounts have been further reduced. Consequently, in 2012 IOLTA receipts had dropped to approximately $7 million each year.

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The major problem with the Good Funds Statute is that it has no enforcement mechanism. State Sen. William N. Brownsberger (D-Belmont) has filed proposed legislation (S.68) amending the statute to address this issue. The proposed amendments include a private right of action for any mortgagor aggrieved by a violation of the Statute, and provide for actual damages or, absent actual damages, statutory damages of $1000 for each violation, plus costs and reasonable attorneys' fees. The proposed amendments also empower the Undersecretary of the Massachusetts Office of Consumer Affairs & Business Regulation to enforce the Statute and to promulgate reasonable rules and regulations relating thereto.

Under S.68, a violation of the Statute would constitute a violation of Chapter 93A, and could be grounds for suspension of a lender's license to make mortgage loans in Massachusetts.

The proposed amendments would better protect borrowers, generate additional funds for legal services, and deter the unauthorized practice of law. Not surprisingly, both the IOLTA Committee and the Real Estate Bar Association for Massachusetts, Inc. support the proposed legislation. ■

## THE GOOD FUNDS STATUTE REVISITED

*Continued from page 16*

Therefore, interference with a police officer cannot be considered part of the common law imported from English statutes because there was no concept of a professional police force until after the American Revolution.

Moreover, early law in Massachusetts focused more on protecting individual liberties and properties from governmental abuses than preventing citizen's interference with police powers.[19] Thus, it was common for sheriffs to be subject to common law actions for wrongdoings in the execution of their duties.[20]

Even more tellingly, a private citizen had the right to contest an unlawful arrest or seizure of property with as much force as was reasonably necessary.[21] If this rule created difficulty for police officers, the Supreme Judicial Court in 1829 believed that it was "a hardship resulting from the voluntary assumption of a hazardous office."[22] Therefore, the common law custom and tradition in Massachusetts favored an individual's right to resist an unlawful arrest over the requirement to submit to police authority.

Some states have criminalized interference with a police officer by statute and Massachusetts has a relevant pending proposal. In the 2003-2004 legislative session, Rep. Bruce J. Ayers proposed HB109 to make it a crime to "knowingly and willfully obstruct, resist, interfere with, or oppose any police officer ... in the lawful performance of his duties."[23] But this bill has remained stalled in the House Committee on Steering Policy and Scheduling for the last eight years.

Connecticut enacted a statute that a person may be charged with interfering with an officer if "such person obstruct[ed], resist[ed], hinder[ed] or endanger[ed] any peace officer."[24] In states where statutes have criminalized verbal rather than physical conduct, the statutes have been subjected to narrow constructions so as not to infringe upon protected speech.[25] Thus, statutes criminalizing interference with a police officer must state with particularity the offending conduct as well as the official duty interfered with in order to meet constitutional standards.

With no legal authority to authenticate interference with a police officer as a common law crime in Massachusetts, there is a danger of violating the separation of powers through judicial creation of new common law offense. The principle of separation of powers is one of the cornerstones of the Massachusetts government.[26] "The Legislature has great latitude in defining criminal conduct and in prescribing penalties to vindicate the legitimate interests of society."[27]

The same, however, may not be said for the courts, which have the power to apply the common law, but only premised on the usage, customs, and traditions in the commonwealth.[28] The courts decide whether certain inherited common law crimes are applicable or obsolete based upon both current applications and analysis of the common law's lineage.[29]

Consistent with that premise, the courts adhere to the longstanding common law rule that prohibits the judicial creation of new common law crimes.[30] In exercising restraint, the Supreme Judicial Court has said, "[t]he public policy of the commonwealth in the creation of crimes is not for this court to determine, but for the Legislature."[31]

Without being able to authentically establish interference with a police officer as a crime in case law, custom, usage, or tradition, a judge who gives jury instructions outlining the elements of interference with a police officer is making the law rather than following it.

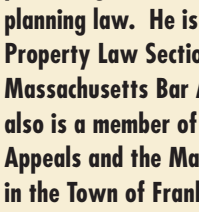
*This article is dedicated to my mentor, Charles K. Stephenson.* ■

1. The District Court Complaint Language Manual is not a legal device. The Administrative Office of the District Court serves an administrative function, taking no position on the binding authority of the manual, as it is not even reviewed by a committee.
2. Trial Court Information Services Data Management Team queried how many times the offense code COMLAW4 had been filed between January 1, 2006 and August, 2010. Results showed: year 2006, 362 charges; year 2007, 372 charges; year 2008, 349 charges; year 2008, 349 charges; year 2009, 278 charges; year 2010, 235 charges.
3. Patrick Michael Rogers, The Massachusetts Police Prosecutor's Guide: Statutes and Decisions for the Massachusetts Police Prosecutor 56 (Commonwealth Police Services, Inc. 2010).
4. G. L. c. 268, § 33; G. L. c. 268, § 32B; G. L. c. 268, § 13B.
5. *Commonwealth v. Fortuna*, 80 Mass. App. Ct. 45, 50 (2011).
6. *Commonwealth v. Shave*, 81 Mass. App. Ct. 1131 (2012) (holding that common law applied to interrupting an officer's inquiry regarding a motor vehicle accident).
7. *Commonwealth v. Knowlton*, 2 Mass. 530, 534 (1807)
8. *Commonwealth v. Klein*, 372 Mass. 823, 833 (1977). See Commonwealth v. Triplett, 426 Mass. 26, 28 (1997) ("The common law crime of obstruction of justice has been recognized in the Commonwealth for many years.")
9. *Commonwealth v. Newell*, 7 Mass. 245, 248 (1810)
10. See G.L. c. 275, § 14; *Dist. Att'y. for Norfolk Dist. v. Quincy Div. Dist. Court Dept.*, 444 Mass. 176, 178 (2005)
11. *Commonwealth v. Bray*, 19 Mass. App. Ct. 751, 762 (1985). See also G.L. c. 265, § 14 (punishment for mayhem); *Commonwealth v. Ogden O.*, 448 Mass. 798 (2007) (sufficiency of evidence for mayhem).
12. *Commonwealth v. Klein*, 372 Mass. 823, 833 (1977)
13. *Commonwealth v. Churchill*, 43 Mass. 118, 124 (1840). See also Commonwealth v. Warren, 6 Mass. 72 (1809) (analyzing English statute passed before independence and adopted as part of common law).
14. *Commonwealth v. Chapman*, 54 Mass. 68, 68 (1847)
15. *Id.* at 70.
16. *Id.* at 75-77
17. Theodore F.T. Plucknett, A Concise History of the Common Law 75 (Little, Brown, and Company 1956)
18. Donna M. Wells, Boston Police Department 7 (Arcadia Publishing 2003)
19. William E. Nelson, Americanization of the Common Law: The Impact of Legal Change on Massachusetts Society, 1760-1830 13 (Stanley N. Katz ed., Harvard University Press 1975).
20. See *Marshall v. Hosmer*, 4 Mass. 60, 63 (1808) ("The sheriff is answerable *civiliter* for the defaults of his deputies, by nonfeasance or malfeasance, in the duties of their office enjoined on them by law.")
21. This concept evolved into the rule that a citizen may only use force to resist an unlawful arrest if the force being used to effectuate the arrest is excessive. *Commonwealth v. Graham*, 62 Mass. App. Ct. 642, 652(2004). William E. Nelson, Americanization of the Common Law: The Impact of Legal Change on Massachusetts Society at 99.
22. *Commonwealth v. Kennard*, 8 Pick. 133, 140 (1829). See also *Roddy v. Finnegan*, 43 Md. 490 (1876) (holding that a police officer sued for assault and battery could use the defense of effectuating a lawful arrest.)
23. 2003 House Doc. No. 109
24. Conn. Gen. Statutes Ann. § 53a-167a. Amendments to the statute effective July 1, 2010 do not alter its meaning in this context.
25. *Gooding v. Wilson*, 405 U.S. 518 (1972). Compare Fla. Stat. Ann. § 843.02 (1987) ("[W]hoever shall resist, obstruct, or oppose any officer ... in the execution of legal process or in the lawful execution of any legal duty, without offering or doing violence to the person or officer, shall be guilty of a misdemeanor of the first degree.") with New Orleans, LA, Ordinance 828, § 49-7 (1970), invalidated by *Lewis v. City of New Orleans,* 415 U.S. 130 (1974) ("It shall be unlawful and a breach of the peace for any person wantonly to curse or revile or to use obscene or opprobrious language toward or with reference to any member of the city police while in the actual performance of his duty.")
26. MASS. DECL. OF RIGHTS, Art. 30
27. *Commonwealth v. Pyles*, 423 Mass. 717, 721 (1996)
28. *Commonwealth v. Hinds*, 101 Mass. 209 (1869) (reversing guilty plea for forgery because complaint did not allege an offense cognizable under statute or common law).
29. *Commonwealth v. Lopes*, 318 Mass. 453, 458 (1945)
30. *Commonwealth v. Hayward*, 10 Mass. 34, 35 (1813)
31. *Commonwealth v. Corbett*, 307 Mass. 7, 8 (1940)

PROPERTY LAW

# Chapter 40B cases address the regional need for affordable housing standard

**BY TIMOTHY C. TWARDOWSKI**



**TIMOTHY C. TWARDOWSKI is an attorney at Robinson & Cole LLP in Boston, where his practice focuses on representing clients on development permitting matters and land use and planning law. He is a member of the Property Law Section Council of the Massachusetts Bar Association. He also is a member of the Zoning Board of Appeals and the Master Plan Committee in the Town of Franklin.**

In a pair of cases decided in January 2013, the Supreme Judicial Court ruled that the availability of unsubsidized, affordable market-rate housing cannot be considered in weighing a city's or town's local concerns against the regional need for low and moderate income housing under the Massachusetts comprehensive permit act, G.L. c. 40B, §§ 20-23. In *Zoning Board of Appeals of Sunderland v. Sugarbush Meadow, LLC*, 2013 Mass. LEXIS 7, Sugarbush Meadow, LLC (Sugarbush) applied for a comprehensive permit to build five, three-story buildings containing 150 rental apartments. The Sunderland zoning board of appeals denied the application. Sugarbush appealed the denial to the Housing Appeals Committee (HAC), which overturned the decision and ordered the board to issue the comprehensive permit. The Superior Court subsequently upheld the HAC decision.

On appeal to the SJC, the board alleged that the HAC erred in "refusing to consider the availability of low-cost, market-rate, unsubsidized housing in the town in weighing the town's local concerns against the housing need." *Id.* at *12. In support of its position, the town provided expert testimony that:

> the town has one of the highest percentages of rental housing in the Commonwealth, that 83 percent of all existing rental housing units in Sunderland are being rented at affordable rents, even though they may not be subsidized, and that 46 percent of Sunderland's housing stock is rented at affordable prices as designated by the department.

*Id.* at *12-*13 (internal quotations omitted). Notwithstanding this evidence, the SJC rejected the town's argument on the ground that the Act and its governing regulations do not allow the HAC to consider the availability of unsubsidized housing units in determining whether the "housing need" is outweighed by local concerns.

Under the regulations issued by the Department of Housing and Community Development (DHCD) to administer the Act, "housing need" is defined to mean "the regional need for *Low and Moderate Income Housing* considered with the number of Low Income Persons in a municipality affected." 760 Code Mass. Regs. § 56.02 (2012) (emphasis added). The Act defines "low or moderate income housing" to mean:

> any housing *subsidized* by the federal or state government under any program to assist the construction of low or moderate income housing as defined in the applicable federal or state statute, whether built or operated by any public agency or any nonprofit or limited dividend organization.

G.L. c. 40B, § 20 (emphasis added). Based on these definitions, the SJC concluded that "the plain text of both the act and the governing regulations require the HAC, in weighing the housing need, to exclude from consideration any affordable housing that is *not* subsidized under a qualifying government-sponsored program." *Sunderland*, 2013 Mass. LEXIS 7 at *14 (emphasis added).

Although this analysis appears sufficient to dispose of the issue, the SJC went on to explain how the exclusion of affordable market-rate housing is consistent with the purpose of the Act, namely to "address an acute shortage of decent, safe, low and moderate cost housing throughout the commonwealth." *Id.* at *15 (quoting *Board of Appeals of Hanover v. Housing Appeals Comm.*, 363 Mass. 339, 351, 294 N.E.2d 393 (1973)) (internal quotations omitted). First, an affordable market-rate unit may be affordable simply because it is neither decent nor safe, while subsidized units typically are required to meet minimum standards in order to qualify for a federal or state subsidy. Second, even if a market-rate unit is decent and safe, its affordability may be attributable to a weak housing market, in which case there is no guaranty that it will remain affordable as market conditions improve. By contrast, under the DHCD's Comprehensive Permit Guidelines, the affordability requirements must be met for a minimum of 15 years for rehabilitated units and 30 years for new construction in order to be counted in a community's subsidized housing inventory. *See* Comprehensive Permit Guidelines (July 30, 2008) § II(A)(1). Third, unlike subsidized low and moderate income housing units, which are required by 760 Code Mass. Regs. § 56.02 to be restricted to "income eligible households," there is no way to guaranty that a market-rate housing unit will be rented by, or sold to, a low or moderate income household.

In light of these differences, the SJC agreed with the HAC that "the Legislature required a state or local subsidy in order to ensure that housing constructed under the [Act] would be subject to enforceable controls on quality, sales price or rental rate, manner of marketing, and income of the occupants — all factors essential to the long-term stability of affordable housing." *Sunderland*, 2103 Mass. LEXIS 7 at *18.

The SJC applied the same analytical framework and reached the same conclusion in *Zoning Board of Appeals of Lunenburg v. Housing Appeals Committee*, 464 Mass. 38 (2013), which involved the denial ➤20

**CHAPTER 40B CASES**

*Continued from page 18*

of an application for a comprehensive permit to build 146 condominium units and followed the same procedural path as the *Sunderland* case.

In *Lunenburg*, the town argued that the HAC should have considered the availability of affordable market-rate housing in the town and presented expert testimony that, within the Lunenburg region, "the maximum affordable sales prices for a household earning seventy and eighty per cent of area median income were $140,000 and $160,000, respectively, … that 11.5 per cent of the homes sold in the town in 2006 and 2007 were purchased for $160,000 or less, and that 8.2 per cent of the homes were purchased at prices at or below $140,000." *Id.* at 44. In a virtual carbon copy of its discussion of the issue in *Sunderland*, the SJC likewise rejected Lunenburg's argument, affirming the HAC's decision to exclude such evidence in its consideration of the regional need for affordable housing. *See generally id.* at 44-48.

While the *Sunderland* and *Lunenburg* decisions leave little question that unsubsidized, affordable market-rate housing units cannot be considered by the HAC in evaluating the "regional need for affordable housing," precisely what constitutes the pertinent "region" for the purpose of that anaysis remains an open question. As the SJC pointed out in*Sunderland*, "region" is not a defined term in either the Act or the regulations. *See Sunderland*, 2103 Mass. LEXIS 7 at *21. The DHCD's Comprehensive Permit Guidelines also do not define the term or provide guidance for determining what constitutes the pertinent "region" within the meaning of G.L. c. 40B, §§ 20, 23. As a result, the HAC is left to define the region on a case by case basis, and the results are not always consistent, as the *Lunenburg* and *Sunderland* cases demonstrate.

In *Lunenburg*, the pertinent "region" was defined as a seven-community area comprised of Lunenburg and the six towns with which it shares a common boundary (Ashby, Fitchburg, Lancaster, Leominster, Shirley, and Townsend). This approach is generally consistent with dicta in the case *Bagley v. Illyrian Gardens, Inc.*, 401 Mass. 822 (1988), in which the SJC stated: "Without attempting to define comprehensively the terms 'local need' and 'regional need,' we think that in this context it is clear that 'local' need relates to the municipality directly concerned, . . . while 'regional' need includes surrounding communities." *Id.* at 826 n.4.

In *Sunderland*, the town and the developer offered differing views on how the region should be defined. The town's version of the region was established by drawing a circle with a radius of twenty miles around the proposed site, while the developer argued in favor of a six-town region that included Sunderland and five abutting communities (Amherst, Hadley, Whately, Deerfield, and Montague). *See Sunderland*, 2013 Mass. LEXIS 7 at *21; *see also Sugarbush Meadow, LLC v. Sunderland Board of Appeals*, 2010 MA. HAC. 08-02 at *5. The HAC accepted the developer's delineation, noting that the town's radius approach was "arbitrarily determined" and "based only on a contrived interpretation" of testimony given by one of the developer's witnesses. *Sugarbush Meadow, LLC*, 2010 MA. HAC. 08-02 at *5.

The accepted Sunderland region might, at first glance, seem to employ the same "surrounding communities" approach espoused by the SJC in Illyrian Gardens and accepted by the HAC in Lunenburg. It is noteworthy, however, that this region did not include the Town of Leverett, which abuts Sunderland to the east and shares a longer common boundary with Sunderland than any of the communities that were included in the accepted region. Although the HAC noted that the Sunderland region was established "using national standards for examining supply and demand for the need for housing," it is not clear why Leverett was excluded from the defined region. It is also unclear whether the HAC's evaluation of the regional need for affordable housing would have been different if the region was drawn to include Leverett.

This comparison of the regions that were accepted in the *Sunderland* and *Lunenburg* cases highlights the importance of defining the "region" within the meaning of G.L. c. 40B, §§ 20, 23. In its *Sunderland* decision, the HAC began its analysis of the regional need for affordable housing with the following observation:

> At the outset, we must address the regional affordable housing need — a term that is not clearly defined in Chapter 40B, § 20 or our regulations and yet which is critical since it is the need that is to be balanced against local concerns in determining whether the proposed housing [is] consistent with local needs.

*Sunderland*, 2010 MA. HAC. 08-02 at *3. Until the term "region" is clearly defined, either in the Act or the regulations, this critical element of the regional need for low and moderate income housing standard will continue to be decided on a case by case basis and will remain vulnerable to inconsistent interpretation. ■

PROPERTY LAW

# Tallage Adams, LLC, et. als. – Massachusetts Land Court Case. No. 10 TL 141227

**BY AMANDA ZURETTI**

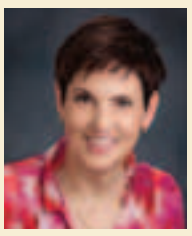
On Nov. 5, 2012, Land Court Judge Keith Long sent notice to the Massachusetts Attorney General pursuant to Mass. R.Civ.P. 24(d) coupled with a request for*amicus* briefs on two questions arising from tax lien cases in which private collection entities were seeking to foreclose taxpayers' rights of redemption of unpaid tax bills pursuant to G.L. c. 60, §§65-75.

The first question presented was: May property tax collection be privatized in the manner set forth in G.L. c. 60, §2C, 45, 52; or is the collection of property tax a core governmental function that cannot be privatized at all?

The second question presented was: If such a power can be privatized, what "safeguards" exist and what is the extent of those safeguards?

The court also posed the following questions: (a) Is the court's power limited to the ability to set "payment plans" under which the full amount owed, principal and interest alike must be paid, or can the court reduce interest and principal? (b) Can the court appoint commissioners to sell properties, preserving "surplus" for the taxpayer and other creditors? (c) Can the court appoint guardians, receivers or representatives to take action on behalf of absent heirs, with "escrow" funds established to hold those surplus funds much like partition cases? See, G.L. c. 241, §§9, 22, 31, 34, 35; and (d) Are remedies other than the setting of payment plans for the full amount of principal and interest beyond those allowed the court?

Amicus briefs were submitted by Tallage Adams, LLC, Tallage IMP, LLC, Tallage Hancock, LLC and Tallage, LLC (collectively Tallage); the city of Worcester ; Massachusetts Lien Servicing LLC; Massachusetts Collectors and Treasurers Association (MCTA); National Tax Lien Association; the town of Hopkinton; Robert C. Haley, Esq.; Coppola & Coppola; the city of Lawrence; and the National Consumer Law Center (NCLC).



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## BACKGROUND

In each of the tax lien foreclosure cases affected by Long's order, the petitioners had acquired municipal tax receivables either by bulk assignment under G.L. c. 60, §2C, under tax collector's deeds pursuant to G.L. c. 60, §45, or by purchasing tax titles pursuant to G.L. c. 60, §52. Interest on unpaid balances accrues at 14 percent from the time taxes are due until the collector's sale or tax taking occurs, under G.L. c. 59, §57, and at 16 percent thereafter pursuant to G.L. c. 60, §62.

Observing the significant difference in original and current account balances in the cases before him, Long noted that "[a] small tax bill," if unpaid, "can … rapidly become much larger … " and that the "application of 14 percent [to] 16 percent interest rate and complete loss of equity once redemption rights are foreclosed" may lead inequitable results, particularly if the property owner finds it difficult to "catch up" on missed payments. Long noted that nearly all of the taxpayers were *pro se* litigants, one of whom apparently disregarded notices from the private tax lien holder because she did not believe that it held her tax title, and expressed concern that the elderly, unemployed, and heirs who may have difficulty coordinating payment of tax bills after a parent's death, would be unfairly burdened by the imposition of such high rates of interest.

Long suggested that private tax foreclosure raises constitutional because [t]ax foreclosure proceedings brought and pursued by private entities are outside the political process " … Such entities are responsible to their investors, not the citizens of a city or town, and their goals and incentives are not the same. Maximizing return on investment may not include accommodation to individual circumstance to the same extent a municipality, acting for itself, might otherwise deem warranted."

## SOURCES OF MUNICIPAL TAX COLLECTION LAW

Municipal tax collection is a technical process with strict accounting rules that are set forth in General Laws chapters 59 and 60, and clarified in the Collectors and Treasurers Association Collector's Manual, revised in 2008; and the Informational Guidance Release (IGR) No. 05-2008, revised June 2005, which Supersedes IGR 97-201 in part.

## IS TAX COLLECTION SOLELY A GOVERNMENTAL FUNCTION?

As stated in Worcester's brief, "[w] hen the government provides protection and services for the benefit of property, that property … [is] … 'held subject to the reciprocal obligation of meeting, in its due proportion, the expenses incident to such protection.'" Worcester Brief at 4, citing *WB&T Mortgage Co., Inc. v. Board of Assessors of Boston*, 451 Mass. 716, 722 (2008). Accordingly, when the owner defaults on that "reciprocal obligation," municipalities may collect unpaid real estate taxes and municipal charges in accordance with the procedures set forth by the Legislature in G.L.c. 60.

Tallage and Worcester explained separately that while tax assessment and tax collection are municipal functions, the sale of tax collector deeds or the assignment of tax titles is a *form* of collection, *not* a delegation of a government function to a non-governmental party. But, even if this were a delegation of a government function, it is one expressly permitted by G.L.c. 60, §2B. Tallage Brief at 3.

When a tax lien buyer pays an outstanding tax bill on the property owner's behalf, the city or town receives immediate payment of the outstanding tax balance, and the tax lien buyer steps into the shoes of the municipality, so to speak, and holds the right to receive reimbursement for the amount paid to the municipality. If the property owner does not make prompt payment to the holder of the debt, the holder of the debt may charge interest on the unpaid account, bears all costs of recording the tax deed or assignment of tax lien, and bears the cost of filing a complaint to foreclose the lien in the Land Court and providing notice to the taxpayer of the foreclosure action. Regardless of whether in is the municipality or the tax lien purchaser who collects delinquent taxes, the amount that can be collected does not change. All of the municipal *amici* stressed that private parties who acquire tax receivables are bound by G.L.c. 60 just as municipalities are, and may not impose interest or charges greater than could a city or town.

## HARD TIMES, HARD DECISIONS

Lawrence, Worcester and the MCTA each stated that reductions in state aid to municipalities force communities to sell tax receivables when their budgets are not sufficient to pay for traditional tax collection. Lawrence offered that, because the Land Court filing fee for a tax lien case and providing notice is now $580, it would cost the city of Lawrence $174,000 to file 300 tax lien cases. This expense is one that Lawrence cannot afford, given that it has reduced its municipal staff and needs an immediate infusion of capital to avoid receivership. Lawrence Brief at 1-2.

Worcester offered a more detailed example, stating that: "[i]n the ➤22

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prior three fiscal years Worcester has received a total of $9,796,306, an average of $3,265,435 from the sale of tax collector's deed sale or assignments under §52. This amounts to 1.57 percent of the tax levy in FY10, to 1.49 percent in FY11; and to 1.42 percent in FY12. These average amounts represent between 62 percent and 57 percent of the allowable increase in the tax levy under Proposition 2 ½, G.L.c. 59, §21C, in each of the applicable fiscal years. In more concrete terms, this is the equivalent of 133 percent of Worcester's snowplow budget in FY10 or fifty police officers in FY-11 or fifty two teachers in FY-12."

"In addition, each tax collector's deed that Worcester sells represents a cash outlay that it avoids. In order to be valid the deed must be recorded within sixty days after the tax sale. G.L.c. 60, §45. The current cost to record the deed is $125, so Worcester was able to avoid absorbing this cost when the deed purchaser paid for the recording the prior three fiscal years this avoided cost was $81,579. Moreover, Worcester is able to avoid absorbing the $580 immediate outlay of paying the deposit with the Land Court for each foreclosure complaint filed, and that recording the Notice of Filing the Complaint. Over the three fiscal years being used as examples, this avoided cost amounts to $379,320. Although these casts are ultimately recoverable upon redemption of the tax title, the immediate cost of these expenditures can strain that portion of the municipal budget devoted to Worcester's treasury operations … ." Worcester Brief at 3.

Tallage, Lawrence, Worcester, Hopkinton and the MCTA emphasized that sales of tax receivables are both authorized by law and vital to the fiscal health of cities and towns because "collection of property tax [is] the principal source of revenue controlled by municipalities." MCTA Brief at 2.

## ARE THE SAFEGUARDS IN THE TAX COLLECTION PROCESS CONSTITUTIONALLY SOUND?

Responding to Long's concerns that there might be a tax foreclosure crisis in the making, or that third parties might reap windfall profits from purchasing and foreclosing municipal tax liens, each of the *amici* addressed the adequacy of constitutional safeguards in the tax foreclosure process. NCLC, Lawrence and Tallage, best represent the different perspectives on the tax foreclosure process.

NCLC suggested that Massachusetts tax foreclosure might be subject to constitutional challenge, citing *Pontes v. Cunha*, 310 F. Supp. 2d. 447, (D.R.I. 2004), asserting that while the *method* of notice may be constitutionally sufficient, the *content* of Massachusetts notices may be constitutionally inadequate in that they lack plain language statements of the homeowner's right of redemption or the consequences of non-response. NCLC Brief at 2.

By contrast, and perhaps more on point, Tallage emphasized that Massachusetts law satisfies the constitutional requirements set forth in *Nelson v. City of New York*, 352 U.S. 103 (1956) and *Jones v. Flowers* 547 U.S. 220 (2006) in that G.L.c. 60 provides for:

1. Payment Agreements, as provided in G.L.c. 60, §62A;
2. Tax deferral and amnesty under G.L.c. 59, § 5, cls.41(a) or 18(a), as affected by St. 2010, c. 188, §68;
3. Demand under G.L.c. 60, §§ 16, 39 and Notice to Mortgagees under G.L.c. 60, §§ 38;
4. Notice by publication, posting, and recording notices of G.L.c. 60, §§ 43-45 tax sales, G.L.c. 60, §52 tax assignments, and G.L.c. 60, §53 tax takings as required by G.L.c. 60, §42, and recording assignments and takings in the Registry of Deeds or Registry District of the Land Court as required by G.L.c. 60, §65;
5. Opportunity to be heard by the Land Court; and
6. Right of redemption G.L.c. 60, §65.

NCLC's recommended safeguards speak to "enhanced" foreclosure notice and service of process. Specifically, NCLC recommends that an "Enhanced Notice of Tax Title Sale" be sent by the municipality that sells the right to collect taxes to a third party buyer or assignee. The enhanced notice would be written in plain language, would identify the purchaser of the tax receivable, would explain that the purchaser of the tax receivable may foreclose on the taxpayer's property, and would emphasize what occurs in the foreclosure process and how foreclosure would affect the taxpayer's redemptions rights. NCLC Brief at 2-3.

The NCLC's proposed "Enhanced Foreclosure Notice and Flexible Redemption Terms" would require personal service upon the taxpayer and would require that information on how to avoid foreclosure — including allowing redemption through sale, mortgage finance, or reverse mortgage transactions — be included. Should a taxpayer fail to appear at a hearing on the foreclosure petition, the Land Court would not enter a default under G.L.c. 60, §67, but would require the holder of the tax debt to notify social service or housing agencies such as the Councils on Aging or Massachusetts Executive Office of Elder Affairs of the pending foreclosure. NCLC did not address the method to be used where a delinquent taxpayer is not a resident homeowner, or the extent to which sale or refinance might be possible for, or desired by, taxpayers who are unwilling or unable pay overdue taxes. NCLC Brief at 7.

As if responding to the NCLC, the city of Lawrence dispelled the notion that tax foreclosure is a speedy process and described why the suggestion that municipalities fail to provide taxpayers with sufficient notice of the consequences of non-payment of taxes strains credulity in light of the number of notices that taxpayers receive before a tax lien is finally foreclosed:

"Taxpayers get quarterly tax bills, a demand notice, a newspaper publication of assignment, posting of notices in public venues, a notice of assignment from the assignee when the lien is assigned, an Order of Notice filed in the Registry of Deeds, certified mail from the Land Court or deputy sheriff. If a lien is one year old when assigned, and it takes 6 months to bid it out and assign it, plus another year to foreclose it, it must be at least 30 months or 10 quarters before a Judgment is issued. If two years old before assignment, the tax payer has received 14 quarterly tax bills plus the notices mentioned above — bringing the paper trail to approximately 20 docu-

ments in total." Lawrence Brief at 3.

Lawrence also refuted the argument that tax foreclosure results in unnecessary loss of equity in real estate, pointing out that 70 percent of the housing stock in Lawrence is investment property that is owned by absentee taxpayers, and that failing to pay taxes and deferring maintenance are ways in which property owners can use real estate as a "cash cow" to be "milked" to the end of its useful life. In Lawrence, many homeowners who obtained mortgages far in excess of the value of the home during the past several years may lack either incentive or ability to pay even the smallest of tax bills." Lawrence Brief at 1-2. Holding owners to account, literally and figuratively, is one of the few tools that Lawrence has to prevent the deterioration of the housing stock in the city.

Lawrence makes the point that any debt is manageable in the early stages of delinquency, but if a delinquency is allowed to linger-even in the name of compassion-the debt can become untenable, and the incentive to bring the account current is lost. Lawrence also agrees with Tallage that few tax takings result in foreclosure, and that most end in redemption.

## THE SCOPE OF EQUITABLE POWERS

Perhaps the questions of law that have more resonance for municipalities than the constitutional issues, i.e. sufficiency of notice and the opportunity to heard and exercise rights of redemption, are those concerning the scope of the Land Court's equitable powers. Does the court have inherent or conferred powers under G.L. c. 60, §75; G.L. c. 220, §2; G.L. c. 185, §25, 25A, to appoint guardians, receivers or representatives to take action on behalf of absent heirs? Does the court have the court have the power to appoint commissioners to sell properties and to preserve "surplus" for the taxpayer and other creditors pursuant to G.L. c. 241, §§9, 22, 31, 34, 35?

The absence of case law concerning the scope of the court's powers has led Long to believe that the issue has rarely been explored in the context of tax foreclosure cases because actions to foreclose a taxpayer's right of redemption have generally been brought and pursued by the municipalities themselves, following legislative procedures set forth in G.L.c. 60 and G.L.c. 58. The inference is that, because homeowners may be treated unfairly when a private party holds municipal receivables, the court can and should exercise its equitable powers to protect vulnerable homeowners. However, the counterargument is that decisional authority on the role of the court in tax collection matters does not exist because there is no need for an equitable remedy where no equitable injury exists.

NCLC asserted that the court's powers under G.L. c. 60, §68 go beyond setting terms for repayment plans the powers to appoint a commissioner to sell property and to order redemption costs to be paid by the commissioner at the times of sale, with any surplus to be distributed to the owner and secured creditors in the same manner as would occur after a mortgage foreclosure or partition action. NCLC Brief at 7.

The *amici* representing the municipal point of view emphasized that municipalities can and do exercise discretion to enter into payment agreements and deferral agreements with taxpayers who seek such assistance, and that G.L. c. 60, §62A allows municipalities to reduce the interest owed on an outstanding tax obligation. In addition, cities and towns may apply to the Commissioner of the Department of Revenue for a reduction in the principal owed in some cases. G.L. c. 58, §8. The role of the Land Court, therefore, is essentially a collaborative one in which the taxing authority and the Land Court may "determine whether the party seeking to redeem can meet the financial burdens imposed by statute, and if he can, on what terms payment to the town should be made." *Lynnfield v. Owners Unknown*, 397 Mass. 470, 475 (1974). The Land Court may "make a finding allowing the [taxpayer] to redeem, within a time fixed by the court" and "impose such other terms as justice and the circumstances warrant." G.L. c. 60, §68.

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## THE LEGAL FOUNDATION OF TAX COLLECTION

It is Haley's brief that offers the necessary insight that tax collection is primarily a matter of municipal finance law and established statute, referring to *Kelly v. City of Boston*, 348 Mass. 385 (1964) and citing to a Department of Revenue letter (2009-1532) stating that "All proceeds from the redemption of tax titles or from the sale of tax possessions properties of tax foreclosure must be used in the calculations of a community's free cash under G.L.c. 59, section 23, with the exception of certain surplus proceeds received from land of low value foreclosure sales." Haley Brief at 3.

Long has referred this case to the Appeals Court for review pursuant to Mass.R.Civ.P. 64 before he renders judgment in the instant cases. The *amici* have presented facts and examples to show that Massachusetts tax foreclosure, whether prosecuted by municipalities or private parties, is constitutionally sound and does not put delinquent taxpayers at a disadvantage. Regardless of the outcome, this case is and will be a source of discussion and examination, particularly as municipalities struggle to balance the needs of individual taxpayers and responsibility to protect the public fisc. ■