



**MENTORING PROGRAM WRAPS UP 5TH YEAR**

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**PRESIDENT ELECT HONORED BY HAVERHILL BAR**

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# MASSACHUSETTS LAWYERS JOURNAL



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VOLUME 21 | NUMBER 10 | JUNE 2014

## MBA report shines light on woeful criminal justice salaries

BY MIKE VIGNEUX

Salaries of attorneys who work in the state's criminal justice system are both "inadequate and inequitable," according to a May 2014 report from the Massachusetts Bar Association Blue Ribbon Commission on Criminal Justice Attorney Compensation.

The report, "Doing Right by Those Who Labor for Justice: Fair and Equitable Compensation for Attorneys Serving the Commonwealth in its Criminal Courts," analyzes the "declining economic status" of prosecutors, public

defenders and bar advocates due to low salaries. (The full report can be accessed online at: [www.massbar.org/blueribbon-report](http://www.massbar.org/blueribbon-report).) It is the first study conducted on this topic since the MBA's groundbreaking "Callahan Report" in 1994.

Perhaps the most striking finding in the commission's report is that the lowest paid person in a Massachusetts courtroom is a new assistant district attorney (\$37,500), whose salary ranks less than the courtroom custodian (\$38,796) and the switchboard operator (\$42,834).

Massachusetts also ranks last in the nation in public defenders' salaries (\$32,786.89) when cost of living ►6



Committee for Public Counsel Services Chief Counsel Anthony Benedetti testifies at a hearing before the MBA Blue Ribbon Commission on Criminal Justice Attorney Compensation on March 26.

PRESIDENT'S VIEW

DOUGLAS K. SHEFF

## Adding 'chief' won't change the justice

Many years ago, when I shared a brown-bag luncheon at the Thorndike Library with then Superior Court Judge Ralph Gants, along with several other dedicated justices, I don't think either of us could have envisioned that the thoughtful, humble man I was talking with would one day be named chief justice of the Supreme Judicial Court. Now that it has actually happened, I could not be more proud of him or more excited for all of us.

Since those first informal meetings, I've had the good fortune to work with Justice Gants on many projects and grown to know him better as a jurist and as a friend. I can say without reservation that, like us, Justice Gants is someone who is committed to making sure the underrepresented receive justice in our system.

Just look at some of Justice Gants' laudable accomplishments on the Access to Justice Commission, especially as they relate to support for those less fortunate who are in need of legal assistance. He is responsible for the \$51 opt-out attorney registration fee under SJC Rule 4:03, as well as the fee for pro hac vice appearances under SJC Rule 3:16 — fees which together generate approximately \$1.5 million per year for legal services for the poor. ►2

## Annual Dinner celebrates contributions to the profession



From left: MBA Secretary Christopher A. Kenney, MBA Chief Legal Counsel and Chief Operating Officer Martin W. Healy, Legislator of the Year Awardee Rep. Garrett J. Bradley (D-Hingham), District Court Judge Heather Bradley, MBA President-elect Marsha V. Kazarosian, Keynote speaker Chris Matthews of MSNBC's "Hardball," MBA Vice President Martha Rush O'Mara, MBA Vice President Christopher P. Sullivan, MBA President Douglas K. Sheff, MBA Treasurer Robert W. Harnais.

SEE STORY, PAGE 8. THANK YOU TO OUR SPONSORS, PAGE 20.



MBA President Douglas K. Sheff (left) honors Boston Mayor Martin J. Walsh with the MBA's 2014 President's Award.



MBA Vice President Christopher P. Sullivan (left) presents the MBA's Legislator of the Year Award to Rep. Garrett J. Bradley (D-Hingham).

## New sections fill expanding member needs

BY JASON SCALLY

Last month the Massachusetts Bar Association's House of Delegates (HOD) voted to establish a new Complex Commercial Litigation Section — the second new section added during the 2013-14 membership year, along

with the Workers' Compensation Section. By adding these specialty areas, both new sections fill existing member needs and open opportunities to attract new members.

The Workers' Compensation Section has been very active since its addition by the HOD last September. It is already holding monthly meetings under

the leadership of Workers' Compensation Section Chair Deborah G. Kohl and Vice Chair Marianne Swenson.

The number of workers' compensation members at the MBA has tripled since the section was added, according to Kohl. "It encouraged a lot of people who weren't MBA members to become

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## PRESIDENT'S VIEW

Continued from page 1

Justice Gants has also established a pilot program of court service centers in Boston and Greenfield, which is expected to expand statewide. He spearheaded a legislative effort to expand the Housing Court to provide access for the 31% of Massachusetts residents who are presently denied same because of where they live.

As a member of the Supreme Judicial Court Pro Bono Committee, Justice Gants has been working on new pro bono initiatives, including a provision which allows for pro bono work here in the commonwealth by lawyers not admitted in Massachusetts.

The list goes on. No other judge I know of has done so

much for those in need. Many talk about access to justice but Justice Gants gets it done. He is unprecedented in his accomplishments, efficient in his use of resources and extremely effective at seeing initiatives followed through to successful completion.

Like Justice Gants, the Massachusetts Bar Association has never changed its commitment to justice and fairness. From representing marathon survivors, including those with invisible injuries like traumatic brain injury (TBI), to feeding the less fortunate over Thanksgiving, our accomplishments this past year have carried on the MBA's storied history of representing the underrepresented.

Our shared values are why the MBA and Justice Gants have always worked well together. I know our working relationship will grow even stronger, because Justice Gants hasn't changed, and neither will we.

Just last summer, before my presidency started, Justice Gants and I got together for a brief bench/bar walk, where we decided to bring judges and attorneys together by reinstating the brown-bag luncheons. We conduct them regularly with the SJC. The MBA is now attempting to establish them with every court, and with our ever-committed clerks, as well.

You see, Justice Gants is not only a champion of access to justice; he is also a cham-

panion of lawyers' access to our courts. That's why I invited him to be the first guest speaker of the year at our House of Delegates. He honored us there and continues to do so through his participation at many other MBA events.

Justice Gants has always been a justice of superior intellect, but he has never been constrained by the walls of an ivory tower. He does not know the meaning of arrogance. He is the most compassionate and able judge I know, and I am not alone in my opinions.

Justice Gants will soon be *Chief Justice Gants*, but I have no doubt that he will remain the same brilliant, humble, accessible person he was so many years ago over our first brown-bag lunch. ■

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## Snapshots from around the MBA



## Health Law hosts first Central Mass. Healthcare Conference

The Massachusetts Bar Association's Health Law Section Council hosted its first Central Massachusetts Healthcare Conference in April. The conference offered attendees a unique opportunity to gain a better understanding of a wide variety of topics in the complex world of health law practice. ■

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## LEGAL NEWS

### New website MassProBono.org to enhance pro bono delivery

We're excited to announce that MassProBono.org — a new website that will enhance the delivery of pro bono legal services to people of limited means in Massachusetts — is live! The website creates a comprehensive pro bono "marketplace" for would-be volunteers across Massachusetts. MassProBono.org allows lawyers to focus their energy on doing pro bono work rather than looking for it.

The site was launched by the Volunteer Lawyers Project, in partnership with Pro Bono Net (a national nonprofit organization), the Massachusetts Legal Aid Websites Proj-

ect (housed at the Massachusetts Law Reform Institute) and the Massachusetts Bar Association.

The centerpiece of the site is a Pro Bono Opportunities Guide, developed in partnership with the MBA, which includes an extensive statewide listing of pro bono opportunities. The Pro Bono Opportunities Guide on MassProBono.org builds on the MBA's pro bono catalogue and incorporates the interactive functions of the Pro Bono Net platform to create a robust new tool to promote pro bono engagement.

To join MassProBono and review the array of pro bono opportunities, visit [massprobono.org](http://massprobono.org). You can also follow @MassProBono on Twitter and join the MassProBono group on LinkedIn.



## News from the Courts

### Amendment to Board of Bar Examiners Rule III

The Supreme Judicial Court has approved the amendment to Board of Bar Examiners Rule III, effective July 1, 2016. Visit [www.mass.gov/courts](http://www.mass.gov/courts) to learn more.

### Hon. Amy L. Nechtem appointed Juvenile Court Chief Justice



Judge Amy L. Nechtem

Trial Court Chief Justice Paula M. Carey has announced the appointment of Judge Amy L. Nechtem as chief justice of the Juvenile Court for a five-year term commencing July 31, 2014. Nechtem has served on the Juvenile Court since 2001, and in 2012 was selected president of the National Association of Women Judges (NAWJ). She will succeed Chief Justice Michael F. Edgerton, whose term ends on July 30, when he

reaches mandatory retirement.

Nechtem serves in the Essex County Juvenile Court and has served in a variety of leadership roles to develop educational and community outreach programs. She is a member of the Trial Court's Standing Committee on Alternative Dispute Resolution, Mentoring Program and Videoconferencing Committee. She was recently awarded an innovative grant for Essex County to provide alternative dispute resolutions and education to youth and families involved in harassment cases. She received the 2011 Massachusetts Judges Conference Judicial Excellence Award for the Juvenile Court Department.

As president of the 1,200-member National Association of Women Judges, she led the development and implementation of a strategic plan, presented three national conferences and oversaw 30 specialized committees working to advance fair and equal access to justice and national juvenile justice and child welfare initiatives.

### Magistrate Judge Neiman to retire

United States Magistrate Judge Kenneth P. Neiman has advised the court that he intends to retire on Jan. 5,

2015, the 20th anniversary to the day of his swearing-in in 1995.

Neiman has served in Springfield for the last 20 years and was chief magistrate judge for the District of Massachusetts from January 2006 through December 2009.

Neiman graduated from Tufts College in 1967 and Harvard Law School in 1971. He was a partner in the Northampton firm of Fierst & Neiman from 1981 through 1994. While there, he received the Massachusetts Bar Association's Community Service Award for Outstanding Pro Bono Service. Prior to the private practice of law, Neiman served as a legal services attorney with the Center on Social Welfare Policy in New York from 1971 to 1973 and with Western Massachusetts Legal Services from 1973 to 1981. He has also been an adjunct faculty member at Western New England University School of Law and served on the editorial board of the *Federal Courts Law Review* from 1999 to 2006.



Judge Kenneth P. Neiman

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## BAR NEWS

# DelVecchio, Stevens honored at Excellence in the Law



From left: MBA Chief Legal Counsel and Chief Operating Officer Martin W. Healy, Excellence in Legal Journalism Award Honoree Carl Stevens of WBZ News Radio 1030 and Daniel F. Toomey Excellence in the Judiciary Awardee Hon. Suzanne V. DelVecchio (ret.)



Massachusetts Bar Association leaders pay tribute to the Hon. Suzanne V. DelVecchio (ret.) (middle: blue) and Carl Stevens (middle) of WBZ News Radio 1030 at the 2014 Excellence in the Law event

PHOTOS © MIKE RITTER

### BY MIKE VIGNEUX

Achievements across the legal community were celebrated at Excellence in the Law, an event co-presented by *Massachusetts Lawyers Weekly* and the Massachusetts Bar Association on May 1 at the Fairmont Copley Plaza Hotel in Boston.

The MBA paid special tribute to the Hon. Suzanne V. DelVecchio (ret.) and Carl Stevens of WBZ News Radio 1030. DelVecchio was presented with the Daniel F. Toomey Excellence in the Judiciary Award and Stevens was honored with the Excellence in Legal Journalism Award.

The event also featured award presentations for excellence in Pro Bono, Marketing, Firm Administration, Paralegal and Up & Coming Lawyers. A portion of the proceeds from the event will be do-

nated to the Massachusetts Bar Institute Public Service Fund, which helps support community services throughout the state such as the Elder Law Program, the Tiered Community Mentoring Program, the Judicial Youth Corps Program, the Law Day Initiative, pro bono programs and the popular high school Mock Trial Program.

DelVecchio, a senior mediator and arbitrator at Commonwealth Mediation & Conciliation Inc., is a former Superior Court chief justice. As chief justice, DelVecchio implemented the Superior Court's Business Litigation Session. Her distinguished career also includes serving as the regional administrative justice in Plymouth County, as a staff attorney for the Boston Legal Aid Society and as corporate counsel for the City of Boston. DelVecchio sits on the MBA's Blue Rib-

bon Commission on Criminal Justice Attorney Compensation, which examines the impact of low prosecutor and public defender salaries on the state's criminal justice system.

"Excellence usually comes in threes," MBA President Douglas K. Sheff told the audience. "So where is the triad of excellence in the law? The answer is Judge Suzanne DelVecchio. Without her, our legal community would be incomplete, less human and considerably less colorful."

"This is special. This really means a lot to me coming from my colleagues," said DelVecchio after receiving her award.

Stevens is an award-winning general assignment reporter for WBZ News Radio 1030. During his career at WBZ, Stevens received the first-ever Edward R. Murrow National Award for Writing. In 1996, Ste-

vens and WBZ received the prestigious Murrow Award for Feature Reporting on a story entitled "Blue M&M's." Named "Best Radio Reporter" by *Boston Magazine*, Stevens also uses a video camera to report on unique and enterprising stories for RadioVision on wbz.com.

"These days it's so easy to paint lawyers and judges alike in a negative light," said Sheff. "But Carl Stevens is not like most reporters."

Making light of his spot in the event's program, Stevens noted that "following Suzanne DelVecchio is like following David Ortiz in the batting order."

A total of 38 awards were presented including 25 to Up & Coming lawyers, those attorneys who have been members of the bar for 10 years or less but have already distinguished themselves as rising stars in the state's legal community. ■

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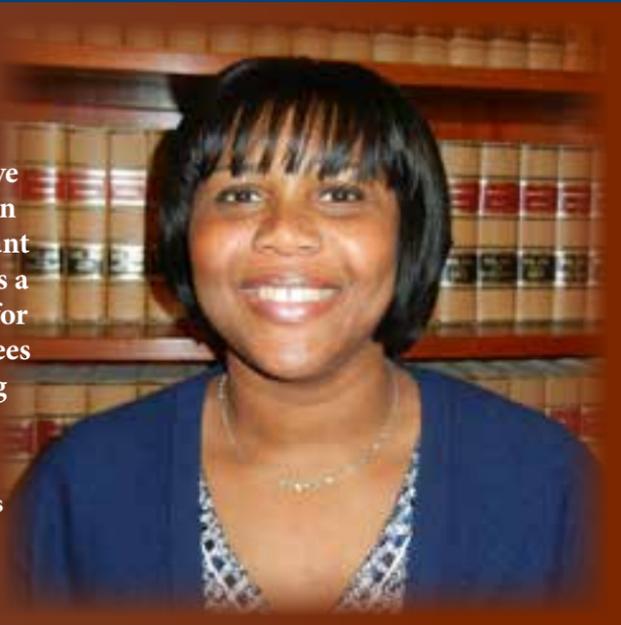
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## BAR NEWS

# House of Delegates addresses new section, officers and ethics opinions

The Massachusetts Bar Association's House of Delegates (HOD) voted to add the MBA's newest section — Complex Commercial Litigation — and elected the slate of officers and delegates for the 2014-15 membership year at its May 8 meeting in Boston. The Complex Commercial Litigation Section is the second new section to be added this year, joining Workers Compensation, which the HOD approved last September. (See related story, page 1.)

The HOD also adopted the report of the Blue Ribbon Commission on Criminal Justice Attorney Compensation. MBA Chief Legal Counsel Martin W. Healy noted that the recommendations in the report include raising assistant prosecutor and public defender salaries, and looking at the caps on bar advocate reimbursement to give these attorneys a living wage. (See related story, page 1.)

Following a report from Ethics Committee Chair Andrew Kaufman, HOD members approved for publication five opinions, including one that allows attorneys to “friend” an unrepresented adversary on social media.

HOD members also took up several measures brought by representatives from the Juvenile Law, Access to Justice and Family Law section councils. The HOD voted to:

- Support, in principle, the Statement of Principle on Fair Sentencing of Youth Convicted of First Degree Murder (as amended);
- Support, in principle, legislation relative to the proposed expansion of the Housing Court to other areas of the commonwealth; and
- Support proposed changes to Supreme Judicial Court Rule 3:03 allowing law students to represent clients on a pro bono basis in civil court under mentor supervision.

The May HOD meeting was the last one of the 2013-14 membership year.



MBA Secretary Christopher A. Kenney (right) speaks to MBA House of Delegates members about establishing a new Complex Commercial Litigation Section.

PHOTO BY JASON SCALLY

### BLUE RIBBON

Continued from page 1

is factored in. Public defenders are the third-lowest paid workers in a Massachusetts courtroom, and the salaries of entry-level assistant district attorneys and assistant attorneys general rank well below those in neighboring states.

“Assistant district attorneys, assistant attorneys general, public defenders and bar advocates (lawyers appointed to defend indigents) are grossly underpaid, earning far less than their counterparts in comparative jurisdictions across the country,” the report notes. “Embarrassingly, other states put a higher premium on the services of their criminal justice work force than does Massachusetts.”

The commission found that entry-level salaries for assistant district attorneys in Massachusetts (\$37,000) are far less than those in New Hampshire (\$52,000) and Connecticut (\$60,000). Salaries for entry-level assistant attorneys general in Massachusetts (\$55,000) rank less than those in Rhode Island (\$56,000), New York (\$60,000), New Jersey (\$62,000), Connecticut (\$73,000) and New Hampshire (\$74,000).

The report also notes that a wide salary gap exists between federal attorneys and state attorneys in Massachusetts, with prosecutors' starting salaries significantly less than other state agency attorneys. A Counsel I attorney receives a salary in the range of \$54,946 to \$79,659, and a Counsel II attorney earns between \$62,978 and \$80,000. In comparison, a state assistant district attorney starts at \$37,500.

In March, the commission convened a hearing at the John Adams Courthouse in Boston, where it heard testimony from several district attorneys, public defenders and bar advocates about the impact of low salaries. Statements made at the hearing were incorporated in the commission's report.

“The testimony taken from lawyers practicing on the criminal side of our justice system was incredibly heart-rending and powerful,” said MBA Past President Richard P. Campbell, who chaired the

commission. “I started the proceedings believing that these lawyers were underpaid, but the enormity of their hardships and their resolute commitment to professionalism despite them was emotive and awe inspiring.”

In addition to Campbell, members of the commission included: Denise Squillante, MBA past president; Hon. William D. Delahunt, former congressman and district attorney for Norfolk County; Hon. Suzanne V. DelVecchio (ret.), former Superior Court chief justice, mediator, Commonwealth Mediation and Conciliation, Inc.; Gerard T. Leone, partner, Nixon Peabody and former district attorney, Middlesex County; Hon. Charles Johnson, former chief justice,

**“I hope that the report reaches the commonwealth's legislative decision-makers ... I also hope that the people and institutions who drive public opinion in our state will seize on this report, adopt its conclusions and push the commonwealth to act. There is really only one fair resolution of the current problem — ending the status quo.”**

**— MBA Past President Richard P. Campbell,  
Commission Chair**

Boston Municipal Court; Richard Lord, chief executive officer and president, Associated Industries of Massachusetts; Randy Chapman of Chelsea, MACDL past president (2007–2009); and Martin Kane, past president of the Middlesex County Bar Association and former Middlesex assistant district attorney. Martin W. Healy, MBA chief legal counsel and chief operating officer, served as commission counsel.

### Key recommendations

The commission provided suggestions within the report on how to improve the challenges assistant district attorneys, public defenders and bar advocates face

living in a state where compensation rates have changed little in 20 years.

Some of the key recommendations include:

- Immediately raise starting salaries for assistant district attorneys, assistant attorney generals and full-time public defenders (attorneys in the Public Counsel Division of CPCS) to \$55,000, which must be fully funded with commensurate increases for more experienced lawyers.
- Increase budget line items applicable to compensation of lawyers employed by district attorneys offices, the Office of the Attorney General, and CPCS to allow for a 20 percent increase in salaries.

- Take steps to keep the levels of compensation of full-time criminal justice attorneys at least equal to that of other public sector attorneys.
- Eliminate rules and practices of CPCS applicable to bar advocates, which treat these lawyers differently than and more inferior to full-time public defenders.
- Address bar advocate compensation to ensure: 1) compensation for bar advocate programs are fair and reasonable and meet prevailing standards in the relevant communities, 2) hourly rates for bar advocates are structured such that serious felony cases in Superior Court attract participants, and 3) hourly rates for bar are reviewed whenever a substantial change in the cost of liv-

ing is experienced and on an regular biennial period.

### Report garners media attention

The commission's report has already shined a light on this critical issue by garnering strong media attention on both a national and regional level after it was adopted by the MBA's House of Delegates in May.

First appearing in print in the *Boston Globe* on May 9 (“Criminal justice lawyers are becoming ‘working poor,’ study says”), the issue of low criminal justice salaries has been covered in print and on television, and by two leading national online law blogs: *The Wall Street Journal Law Blog* and *Above the Law*.

On May 19, commission member and former Middlesex County District Attorney Martin Kane appeared on “Broadside” on New England Cable News, along with current Middlesex County District Attorney Marian Ryan, where they discussed ADA/defender salaries and the commission's report with host Jim Braude.

*Boston Globe* columnist Yvonne Abraham examined low ADA/public defender salaries in her May 22 column, “A salary that's hard to defend.” Abraham wrote: “When we shortchange them, we shortchange the entire justice system. And our vaunted progressive ideals are exposed as hollow.”

Other outlets that covered the report included the *Lowell Sun*, *ABA Journal* and the *MetroWest Daily News*.

“I hope that the report reaches the commonwealth's legislative decision-makers both physically, meaning that they receive it and actually read it, and spiritually, meaning that they are moved to do something about this travesty,” said Campbell, the commission chair. “I also hope that the people and institutions who drive public opinion in our state will seize on this report, adopt its conclusions and push the commonwealth to act. There is really only one fair resolution of the current problem — ending the status quo.”

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[MassBar.org/SummerNetwork1](http://MassBar.org/SummerNetwork1)

**Thursday, July 17**  
**THE YARD AT THE LIBERTY HOTEL**  
 5:30-7 p.m.  
 215 Charles St., Boston  
[Massbar.org/SummerNetwork2](http://Massbar.org/SummerNetwork2)

**Thursday, Aug. 21**  
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**Renew your MBA membership by mail or online**

The MBA reminds you that the 2013-14 membership year is drawing to a close, and membership renewal notices for the 2014-15 year will be distributed soon. As in years past, the MBA offers members two renewal options:



**By mail:** Renew your MBA membership through the mail with a check or credit card payment. Look for your dues renewal form to come in the mail in mid-July.



**Online:** Look for a renewal notice via email in mid-July with instructions on how to renew your membership online. We understand how valuable your time is and are happy to offer you this time-saving, green alternative.

**As always, thank you for your continued support of the MBA.**

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# Annual Dinner celebrates contributions to the profession



Access to Justice award honorees, including: Defender Award Honoree James B. Krasnoo; Prosecutor Award Honoree Lisa F. Edmonds; Pro Bono Publico Attorney Stephen J. Phillips; Legal Services Award Honoree Gerald D. Wall; Klein Hornig LLP's Teresa M. Santalucia, this year's Pro Bono Law Firm; Rising Star Award Honoree Jessica Berry.



From left: Massachusetts Trial Court Administrator Lewis H. "Harry" Spence, MBA Past President Leo V. Boyle and Chief Justice of the Trial Court Paula M. Carey.

## BY SCOTT VAN VOORHIS

From judges to top lawmakers, a who's who of the legal and political worlds turned out for the Massachusetts Bar Association's Annual Dinner on May 15 to applaud an array of distinguished recipients for their dedication to the law and community service.

Chris Matthews, host of MSNBC's "Hardball," offered a sweeping keynote address to a packed ballroom at the Westin Boston Waterfront, reminiscing about his years as an aide to House Speaker Thomas P. "Tip" O'Neill and lamenting the hyper-partisanship of today's Washington.

Matthews, a Holy Cross graduate, also had a confession to make in keeping with the theme of the evening — a celebration of dedication to the rule of law and service to the larger community.

"I salute you for being what I wanted to be for the last 40 or 50 years — a lawyer," said Matthews, adding he admired "your skill set of being able to know the law, but also being able to spot the key conflicts and areas of common ground."

"At least from what I saw on 'The Good Wife,'" he quipped.

Rep. Garrett J. Bradley (D-Hingham) was honored with the MBA's Legislator of the Year Award. Bradley was cited for his work fighting for funds to spur economic development projects in his district, as well as his work with the MBA on medical malpractice legislation.

Bradley also helped forge legislation in 2012 to control health care costs and has risen to a leadership position that "puts him in a direct path of every piece of legislation passed in the House," said MBA Vice President Christopher P. Sullivan.

Boston Mayor Martin J. Walsh received the MBA's 2014 President's Award. Walsh, a Boston native, was cited for his years of work with the organization on workplace safety issues as well as his long record as a legislator and now mayor promoting economic development, civil rights and marriage equality, among other important causes.

Walsh brought his decades-long commitment to workplace safety when he was appointed to the MBA's Workplace Safety Task Force.

"I can't think of any other profession that has made service such a central part of its mission," Walsh noted.

MBA president Douglas K. Sheff reflected on his time in office, which he said was shaped by the aftermath of the Boston Marathon bombings.

Sheff noted the Massachusetts legal community rose to the occasion, with 87 lawyers "tirelessly" putting in countless pro-bono hours representing victims and their families through the MBA's program.

"[After the] two blasts that changed our lives, the MBA, as always, was there providing representation to victims and their families," said Sheff.

"We made this the year of the worker," he said. "The MBA took pride in the representation of the underrepresented."

Sheff, in turn, won praise from Marsha V. Kazarosian, the MBA's president-elect. "You are a tough act to follow," she said.

A range of top local elected officials and judges attended the Annual Dinner, including Chief Justice Roderick L. Ireland of the Massachusetts Supreme Judicial Court and House Speaker Robert A. DeLeo, among others.

Five lawyers and one law firm were recognized with Access to Justice Awards for their dedication to working with the underrepresented and underprivileged:

- Gerald D. Wall won the Legal Services Award for his decades of work providing legal help to immigrants at Greater Boston Legal Services.
- Stephen J. Phillips won the Pro Bono Award for his dedicated representation of more than 130 hospice patients at Baystate Visiting Nurse & Hospice.
- The law firm of Klein Hornig LLP received the Pro Bono Award for Law Firms for many hours spent helping with local food banks and representing low-income tenants fighting eviction or foreclosure.
- James B. Krasnoo, who won the Defender Award, began his career in the Attorney General's Office but decided to become a bar advocate after seeing firsthand the plight of defendants without adequate legal representation.
- Lisa F. Edmonds won the Prosecutor Award for her work with juvenile offenders and domestic violence at the District Attorney's Office for the Cape and Islands.
- Jessica Berry received the Rising Star Award for her work above and beyond the call of duty at the Children's Law Center.



From left: Suffolk District Attorney Daniel F. Conley and MBA Chief Operating Officer and Chief Legal Counsel Martin W. Healy.



Members of the legal community listen to MBA Annual Dinner Keynote Speaker Chris Matthews.



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## 2014 ANNUAL HEALTH LAW CONFERENCE

Thursday, June 19, 9–2:30 p.m.  
MBA, 20 West St., Boston



**FACULTY:**

- J. Michael Scully, Esq., conference chair  
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- Shannon Choy-Seymour, Esq.  
Attorney General's Office, Boston*
- Linn Foster Freedman, Esq.  
Nixon Peabody LLP, Providence*
- David Gregory  
PrivaPlan Associates Inc., Santa Fe, NM*
- Lois H. Johnson, Esq.  
Health Policy Commission, Boston*
- Francesca L. Miceli, Esq.  
Attorney General's Office, Boston*
- David Seltz  
Health Policy Commission, Boston*
- Kathryn Sylvia, Esq.  
Nixon Peabody LLP, Providence, RI*
- Erin Walker  
U.S. Dept. of Health and Human Services  
Washington, D.C.*

## Keynote Speaker

### David Seltz

**EXECUTIVE DIRECTOR  
MASSACHUSETTS HEALTH POLICY COMMISSION**

David Seltz is the executive director of the Massachusetts Health Policy Commission, which aims to modernize health care payment and delivery models to establish a more accountable, affordable system. He will be the keynote speaker at this year's MBA Annual Health Law Conference on Thursday, June 19, at the MBA, 20 West St., Boston. Seltz will be speaking on the status of Chapter 224 of the Acts of 2012, and health care payment and delivery system reform in Massachusetts.



Prior to his role at the Massachusetts Health Policy Commission, Seltz was the chief health care advisor for Senate President Therese Murray and served as the special advisor on health care for Gov. Deval L. Patrick. Through these positions, Seltz helped shepherd passage of Chapter 58 of the Acts of 2006 and Chapter 224 of the Acts of 2012. Seltz is a 2003 graduate of Boston College and originally from Minnesota.

### REAL ESTATE LAW

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Wednesday, June 18, 4–6 p.m.  
Western New England University School of Law  
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### SOLE PRACTITIONER & SMALL FIRM

#### ANTITRUST LITIGATION: A PRIMER FOR SOLO AND SMALL FIRM PRACTITIONERS

Wednesday, June 18, 5–7 p.m.  
MBA, 20 West St., Boston



**FACULTY:**

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- Kevin J. Handly, Esq.  
Kevin J Handly LLC, Jamaica Plain*
- Kellie Lerner, Esq.  
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### PROBATE LAW

#### DRAFTING AND ADMINISTERING TRUSTS FUNDED WITH RETIREMENT ASSETS

Thursday, June 26, 1–4 p.m.  
MBA, 20 West St., Boston



**PROGRAM CHAIR:**

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### COMING IN JULY ...

### CIVIL LITIGATION

#### PERMISSION TO APPROACH? A JUDGE'S TAKE ON ETIQUETTE AND ARGUMENT IN THE COURTROOM

Wednesday, July 9, 4–7 p.m.  
MBA, 20 West St., Boston

**PROGRAM CHAIR:**

*Victoria Santoro, Esq.  
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## NEW SECTIONS

Continued from page 1



**Workers' Compensation  
Section Chair  
Deborah G. Kohl**



**Complex Commercial  
Litigation Section Chair  
Paul E. White**

members because they see the benefit from having the section," she said.

Although the Complex Commercial Litigation Section is only a month old, its newly appointed chair, Paul E. White, has high expectations for his group, which also addresses a specialty area that members have been looking for.

"This section focuses exclusively on the litigation of business disputes and business-related disputes, rather than the broad range of business law issues," said White. Noting that the section plans to hold activities in Worcester and Springfield, as well as Boston, he added, "Commercial litigators will now have a specific home for their practice areas, whether they are from large or small firms, or in or outside of Boston."

## A workers' comp voice

Workers' Compensation had previously existed at the MBA as a subcommittee under the Civil Litigation Section. Kohl credited MBA President Douglas K. Sheff for recognizing the opportunity that creating a Workers' Compensation Section would bring to attorneys whose administrative practices makes this such

and technology (e-filing), and they just created another subcommittee to conduct seminars next year, which will be open to all MBA members. Already in the works are an introductory seminar on workers' compensation, and another on the interplay between workers' comp benefits and other benefits.

The Workers' Compensation Section has been active on My Bar Access, which Kohl said is the best place to visit for up to date information on the section, as well as workers' compensation law. Members interested in learning more about the section can also reach out to Kohl directly at [dgklaw@aol.com](mailto:dgklaw@aol.com).

"We're bringing people in and we've made a lot of progress this year," said Kohl. "We have a structure in place that's working, and people are doing a substantial amount of work."

## 'Com Com' plans active year

The MBA has always welcomed commercial litigators, many of whom already participate in the Civil Litigation or Business Law sections. But the Complex Commercial Litigation Section, colloquially dubbed "Com Com," will provide a more specialized section for attorneys whose practices involves litigation in intellectual property, commercial contracts, business torts, bankruptcy and other areas across the commercial litigation spectrum.

White said the opportunity to have educational opportunities that are specific to this substantive practice area will be a huge plus to commercial litigators, like himself. He also said having a section where there are many commercial litigators from different levels of experience and judges will provide great opportunities to network and enhance one's practice.

**"Now that we are organized we speak with the voice of the bar behind us, and that's really important. It's given us entry we've never had before."**

**— Workers' Compensation Section  
Chair Deborah G. Kohl**

a specialized area.

The benefits since the section was formed have been tangible.

"As individual attorneys, we'd say things and not be heard. Now that we are organized we speak with the voice of the bar behind us, and that's really important," said Kohl. "It's given us entry we've never had before."

For example, Kohl's section has been able to establish a regular dialogue with a senior judge at the Department of Industrial Accidents (DIA), which has already led to the availability of walk-in lump sums — a welcome change that means workers' compensation attorneys no longer have to wait five weeks to get a settlement date.

There are five regional DIA offices, and the Workers' Compensation Section has already held seminars for practitioners in two of the regions: Boston and Lawrence. Another is planned for Springfield this month with a speaker who is an expert on Medicare set-asides.

The section has already created subcommittees covering legislative issues

MBA members can join an unlimited amount of sections, and White said members — especially those in the Business and Civil Litigation sections — should see the Com Com Section as a complement to other sections. "It's cross-pollination," he said. "It enhances everybody's skills as a lawyer to recognize how business disputes can arise and how they can best be handled."

The Com Com Section is in the process of ramping up for what promises to be an active 2014-15. White said the section hopes to publish a quarterly newsletter and will start offering CLE programs in the fall in each of the substantive areas that the section covers. The plan is to also hold a section-wide symposium, which will become an annual event for Com Com members.

While several positions in the Com Com section council have been filled, there are still openings available. Interested, experienced commercial litigators should contact President-elect Marsha V. Kazarosian at [marsha@kcolaw.com](mailto:marsha@kcolaw.com) or Paul White at [white@srbc.com](mailto:white@srbc.com). ■

CONTINUED ON PAGE 11

**BAR NEWS**

**Member Spotlight**

**President-elect honored by Haverhill Bar**

Massachusetts Bar Association President-elect Marsha V. Kazarosian was honored with the Moody Award at a Haverhill Bar Association event recognizing Law Day 2014 on April 30 at the Barking Dog Alehouse in Haverhill.

The award, named for former U.S. Supreme Court Justice William Henry Moody, is presented to an attorney who embodies Moody's endeavors for the advancement of justice. Born in Newbury, Moody not only practiced law, but served in the legislature and in various nominated positions before eventually serving on the Supreme Court from 1906 to 1910.

The Moody Award honors an attorney who strives to push the law forward (taking on and prosecuting or defending new and unique cases), provides service in various levels of either legislation/



**From left: Haverhill Bar Association Secretary Elizabeth Rose, last year's Moody Award recipient; MBA President-elect Marsha V. Kazarosian; Margaret Kazarosian and Edgar Mosesian**

teaching, and advocates for the advancement of fellow attorneys.

Kazarosian is managing partner of Kazarosian Costello & O'Donnell LLP. She concentrates in civil rights litigation, family law and discrimination law. Long active in bar associations across the state, Kazarosian is a past president of the Essex County Bar Association and the Massachusetts Academy of Trial Attorneys.

Kazarosian has served as MBA vice president, treasurer and secretary. She was elected as an MBA delegate to the American Bar Association and has served on numerous committees and councils, including the MBA's Executive Management Board, House of Delegates and the Joint Bar Committee on Judicial Nominations. She will become MBA President on Sept. 1, 2014.

**EXPERTS & RESOURCES**

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CONTINUED ON PAGE 13

## BAR NEWS

# Tiered Community Mentoring Program wraps up 5th year



Group photo from the 2014 Tiered Community Mentoring Program's year-end event.

PHOTO BY JASON SCALLY

The Massachusetts Bar Association's Tiered Community Mentoring Program wrapped up its fifth year with an event and reception at the John Adams Courthouse on Tuesday, April 29. A dozen mentor-mentee teams heard from several speakers before tackling one final exercise during a breakout session.

MBA President-Elect Marsha V. Kazarosian welcomed all the mentors and mentees, and conveyed her gratitude for all their dedication during this past year's program.

"To the attorneys, law students and college students, we thank you for your willingness to share your wisdom and perspective with program participants," said Kazarosian. To the students, she added: "Even though we're wrapping up today, you should all continue to seek out mentoring and networking opportunities. Mentoring and networking are so important as you complete your education and move into the professional world."

Supreme Judicial Court Chief Justice Roderick L. Ireland, U.S. Attorney Carmen

M. Ortiz and Massachusetts Probate and Family Court Chief Justice Angela M. Ordoñez also addressed the students and mentors, each expressing their strong support for the program and the importance of mentors in one's professional career.

The MBA's Tiered Community Mentoring Program provides high school, undergraduate and law school students access to legal professionals, an understanding of the legal profession and an awareness of the career opportunities available. Participating schools are New Mission High School, Roxbury Community College, Northeastern University and Suffolk University Law School. This year, the program expanded to nearly 50 participants.

The MBA is looking for attorneys with a diverse practice willing to make a rewarding, year-long commitment to mentor high school, college and law students during the upcoming 2014-15 Tiered Community Mentoring Program. To request an application, contact Elizabeth O'Neil at [eonil@massbar.org](mailto:eonil@massbar.org).

# Winsor School competes at Mock Trial Nationals



The Winsor School of Boston's Mock Trial team.

The Winsor School of Boston competed at the National High School Mock Trial Competition on May 8-10 in Madison, WI. A portion of their trip was funded by a donation from the Massachusetts Bar Association's philanthropic partner, the Massachusetts Bar Foundation.

This past March, Winsor defeated Pioneer Valley Performing Arts Charter Public School of South Hadley to repeat as State Champion in the 29th annual High School Mock Trial Program. The championship marked the third state title for Winsor since 2010 and earned the team a

second straight trip to nationals.

The annual competition places high school teams from across the state in simulated courtroom situations where they assume the roles of lawyers, defendants and witnesses in hypothetical cases. A total of 139 teams competed in this year's state competition, which featured 211 trials, 106 judges and more than 40 court venues across the state. The program is administered by the MBA with support from the Brown Rudnick Charitable Foundation Corp. and the Massachusetts Bar Foundation.

**BAR NEWS**

**Staff Profile**

**West Street office blessed by Devine's presence**

BY JOSHUA CRAWFORD

When the Massachusetts Bar Association purchased its home at 20 West Street in 1994, after renting it for the previous 10 years, the MBA got more than just a great building all to its own. It also got Bill Devine.

Devine has been the building manager at 20 West Street for each of 20 years the MBA has owned its West Street headquarters, plus the five years before, when he worked directly for the management company that served as the MBA's former landlord. What's interesting is that a job that has lasted a quarter century initially began as something that was only expected to last about half a month.

When he first started at 20 West Street, Devine was just filling in for "two weeks" because the guy who was supposed to be the building manager was on vacation. After two weeks turned into three, and three turned into five, Devine realized the job was more permanent; his predecessor had quit.

In retrospect, this turn of events was the MBA's good fortune. Devine has served as a steady presence, ensuring that the day to day operations at the MBA go off without a hitch.

Of course, over the years, Devine has seen his fair share of wacky happenings, as well.

One day, Devine remembers, he received a call in the early hours of the morning that someone had thrown a bar-



rel through the front window of the MBA. When he arrived on scene the police had a suspect in custody, but the events of the morning were only beginning. It turns out that the suspect was not a fan of lawyers and, in addition to shattering the glass, placed a young pot bellied pig inside the office. After a few hours of the pig being chased around, normalcy was restored.

This is just one story that fits into the narrative Devine describes as, "No day is a typical day for me here." What *is* typical is the professional and friendly approach that he continues to bring to 20 West Street, day in and day out.

"Bill Devine is an invaluable long-term member of the MBA's team," says MBA Chief Legal Counsel Martin W. Healy, who has known him since the MBA moved to West Street. "Bill's considerable skills make the building and operations of the MBA appear seamless. He is always willing to pitch in to make the organization a better environment and enjoys working with our many members and great team of staff." ■

**EXPERTS & RESOURCES**

CONTINUED FROM PAGE 12

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**WEDNESDAY, JUNE 18**

**How to Open a Real Estate Practice**  
 4-6 p.m.  
 Western New England University School of Law, 1215 Wilbraham Road, Springfield

**THURSDAY, JUNE 26**

**MBA Western Mass. Dial-A-Lawyer Program**  
 4-7 p.m.  
 Statewide dial-in #: (413) 782-1659

**WEDNESDAY, JUNE 18**

**Antitrust Litigation: A Primer for Solo and Small Firm Practitioners**  
 5-7 p.m. 📺  
 Massachusetts Bar Association, 20 West St., Boston

**WEDNESDAY, JULY 2**

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

**THURSDAY, JUNE 19**

**2014 Annual Health Law Conference**  
 9 a.m.-2:30 p.m. 📺  
 Massachusetts Bar Association, 20 West St., Boston

**THURSDAY, JULY 17**

**Summer Networking Series Session II**  
 5:30-7 p.m.  
 The Liberty Hotel "The Yard," 215 Charles St., Boston

**THURSDAY, JUNE 19**

**Summer Networking Series Session I**  
 5:30-7 p.m.  
 Battery Park Boston, 33 Battery March St., Boston

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

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

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CONTINUED ON PAGE 14

# EXPERTS & RESOURCES

CONTINUED FROM PAGE 13

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## FOR YOUR PRACTICE

# Get ready for a changing new lawyer landscape

BY DAMIAN TURCO



Damian Turco

The legal job market for new law school graduates has been so bad for so long that most potential employers now consider it the norm. Well, guess what? Things will be changing one year from now.

The demand for legal work has not substantially increased. The number of available positions has not skyrocketed. The demand side of the equation is not likely to be significantly altered over the next year. However, due to significant declines in law school enrollment over the past few years, the supply will finally start to thin.

Let's look at the numbers, which are readily available due to the American Bar Association's requirement of law school reporting. Let's first go back to 2010. We were in the thick of the national financial crisis when many Americans decided to pursue law school. They may have made wise decisions, but they were not alone. In fact, in 2010 we had the largest first-year law school enrollment ever at 52,488. From that point forward, the job market worsened while new lawyers continued to flood the market. The dismal job market for new lawyers translated to law school being less desirable and enrollment continued to plummet. In 2013, the ABA reported that first-year law school enrollment fell 24 percent from the 2010 figure, to its lowest levels since 1975.

As the story unfolded, we talked about how law schools would adapt, how new lawyers would be unable to find work and how law firms would have a never-before-seen selection of potential candidates. While it would be a bit too speculative of me to opine on how law schools will adapt, predicting how the latter two stories will play out is straightforward. There will be less lawyers competing for the same jobs and the employers will have fewer candidates from which to choose.

We are a year away from seeing a big drop off in new lawyers. This will be a much

bigger story a year from now. We may be ahead of the curve on this issue, but we are not early. As practitioners, we sometimes move ahead by accurately predicting the future and developing a corresponding competitive advantage. For the employers, this is the last year you'll have such an expansive selection of potential candidates. It will shrink quickly year over year. Colleagues will be remarking on how difficult it is to find a good candidate.

The laws of supply and demand are simple. When there is greater demand, you pay more money for the resource. When there is less selection, you have to make more sacrifices between the vision of your ideal candidate and the applicants with which you're presented. If you are debating whether to take on a bright new lawyer now versus later, consider these facts in making your decision. If now is not the right time for your practice to take on someone new, consider taking action to shore up this risk. Develop a formal internship program now and start developing your future employees. It is well established that income is not the determining factor in whether an employee stays with a firm. Set clear expectations, communicate clearly, listen and mentor, and you will have an edge on securing that intern as a promising new associate next year.

For the law student and new members of the bar, these numbers are good news. Job seeking will logically get easier in the next few years. That's *easier*, not easy. You will still need to excel at all the objective criteria that sets new lawyers apart from the pack. Do your best to get great grades. Get involved in associations, like the MBA or student groups. For new lawyers, get involved and get whatever relevant experience you can. For students and new lawyers alike, go to events and build your professional network. When the numbers of new lawyers thin out, you'll have a great edge if you stay busy and grow your knowledge and professional network in the meantime.

.....  
**Damian Turco owns Mass Injury Firm PC, a Boston-based personal injury law firm, representing the victims of negligence across Massachusetts. Damian is the vice chair of the MBA's Law Practice Management Section Council and is a regular presenter at MBA CLE courses.**

## BAR NEWS

# Court budget priorities emphasized at bench-bar event

Supreme Judicial Court Chief Justice Roderick L. Ireland, Trial Court Chief Justice Paula M. Carey and Court Administrator Harry Spence invited all bar association presidents in Massachusetts for a discussion and reception at the John Adams Courthouse on Monday, April 28.

Court leaders discussed the state of the courts, the judiciary's budget priorities and the Strategic Planning Initiative. Massachusetts Bar Association President Douglas K. Sheff (pictured) also addressed attendees at the bench-bar event, where he conveyed the MBA's support. ■



PHOTO BY JASON SCALLY

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# SECTION REVIEW



MASSACHUSETTS  
LAWYERS JOURNAL  
JUNE 2014

MASSACHUSETTS BAR ASSOCIATION

PUBLIC LAW

## Suitability challenged

### The judicial creation of suitability standards for firearms licensing

BY BRANDON H. MOSS

In Massachusetts, to “carry” a firearm, an individual must possess a license to carry or a firearms identification card (FID card), which is issued by the appropriate licensing authority (e.g., a chief of police or their designee), unless the individual is exempt.<sup>1</sup> In order to obtain and hold a Class A or B license, an individual cannot be automatically disqualified under M.G.L. c. 140, § 131 and must be a “suitable person.”<sup>2</sup>

The Second Amendment to the United States Constitution provides that “[a] well regulated militia, being necessary to the security of a free state, the right of the people to keep and bear arms, shall not be infringed.” In recent years, the United States Supreme Court has defined limits to government regulation of firearms vis-à-vis the Second Amendment.<sup>3</sup>

In *Heller*, the United States Supreme Court recognized that “the right of law-abiding, responsible citizens to use arms in defense of hearth and home” was protected by the Second Amendment.<sup>4</sup> Accordingly, a complete ban on handguns inside the home and a trigger-lock requirement, which prevented immediate self-defense, violated the Second Amendment. Still, *Heller* recognized that the Second Amendment was “not unlimited” and “presumptively lawful regulatory measures” were permissible.<sup>5</sup>

Subsequently, in *McDonald*, a plurality of the United States Supreme Court held that the Second Amendment applied to the States, through the Due Process Clause of the Fourteenth Amendment.<sup>6</sup> *McDonald* recognized that “the right to keep and bear arms [is] among those fundamental rights necessary to our system of ordered liberty,” and included the “right to possess a handgun in the home for the purposes of self-defense.”<sup>7</sup> While the *McDonald* plurality recognized that the Second Amendment right could be reasonably regulated, it concluded that local laws that effectively prohibited handgun possession by nearly all private citizens violated the Second and Fourteenth Amendments.

Recent judicial recognition of the applicability of the Second Amendment creates the potential for increased scrutiny of the “suitable person” standard. Significantly, in *Firearms Records Bureau v. Simkin*, 466 Mass. 168 (2013), the Supreme Judicial Court held that an individual’s conduct, even if ostensibly unusual, did not constitute a proper basis for revoking a license to carry firearms on the basis of the “suitable person” standard. The holding of *Simkin*, particularly in light of recent Second Amendment precedent, creates the possibility of judicial limitations on the otherwise broad discretion of licensing authorities over licenses to carry firearms.

#### Overview of procedures for licenses to carry firearms

Class A and Class B licenses to carry firearms allow individuals to acquire, possess and carry non-large capacity firearms, and rifles and shotguns (including large capacity rifles and shotguns).<sup>8</sup> However, unlike a Class B license, a Class A license also



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allows an individual to hold “large capacity firearms” and to possess or carry concealed firearms in public.<sup>9</sup>

In order for an individual to receive and hold a Class A or Class B license, the individual must: (1) be a “suitable person,” (2) have a “proper purpose” and (3) not be statutorily disqualified.<sup>10</sup> Currently, there is no statutory or regulatory definition of a “suitable person” — the parameters of the standard have been judicially created.

The “suitable person” standard is consistent with the judicial recognition that firearms control legislation serves the objective of restricting “access to deadly weapons by irresponsible persons.”<sup>11</sup> Accordingly, the “suitable person” standard is considered on a case-by-case basis by the licensing authority. For example, in *Gemme v. Smith*, No. WOCV201100977D, 30 Mass. L. Rptr. 439, 2012 WL 6616936 (Mass. Super. Nov. 13, 2012), a revocation of a license to carry firearms was upheld because of the license holder’s involvement in a domestic altercation and his lack of cooperation when the police responded to the incident.

In determining that an individual is not a “suitable person,” the licensing authority has “broad discretion” and “considerable latitude.”<sup>12</sup> However, the licensing authority must issue his or her decision in writing, along with the supporting reason(s).<sup>13</sup>

The decision of the licensing authority is subject to judicial review in state District Court.<sup>14</sup> To overturn the denial, suspension or revocation of a license to carry firearms, a plaintiff must demonstrate that “no reasonable ground” existed for the decision by the licensing authority and that the decision was “arbitrary, capricious, or an abuse of discretion.”<sup>15</sup> Further appeal is to the Superior Court via a petition for certiorari under M.G.L. c. 249, § 4.

#### *Simkin* and its potential for narrowing discretion

*Simkin* may reflect a retreat from the broad discretion conferred upon a licensing authority, as the plaintiff’s license to carry firearms in that case was improperly revoked on the basis of the “suitable person” standard. In *Simkin*, Jay E. Simkin, the plaintiff, a nonresident and federally licensed firearms dealer, held an unrestricted license to carry firearms in Massachusetts. In his license application, Simkin represented that he traveled in Massachusetts for business reasons, with firearms, ammunition and cash, and that he needed to conceal firearms for self-defense purposes.

Simkin’s license to carry was revoked as a result of his visit to a medical appointment and subsequent events. Simkin informed staff at the medical office that he was armed,

as he brought with him firearms, ammunition, and knives. The employees at the medical office were “alarmed” and “concerned for their safety.”<sup>16</sup> During a subsequent investigation, the local police learned that Simkin provided the medical office with a pseudonym and an address in Maryland to cover up his identity, even though he actually resided in New Hampshire, and he paid in cash, which seemed unusual.

Simkin’s license to carry firearms was revoked because: (1) he was “heavily armed” at the medical office, (2) “fear and alarm” resulted from his visit to the medical office and (3) he provided a pseudonym to the medical office, paid \$1,500 in cash for medical services and did not provide other information about his identity. The Massachusetts Firearms Records Bureau essentially used a totality of the circumstances approach to determining that Simkin was not a “suitable person.”

While recognizing that the phrase “suitable person” was undefined, the Supreme Judicial Court acknowledged that a person may not satisfy this licensing requirement under certain circumstances, including acts that do not violate the statutory disqualifiers for holding a license to carry firearms and non-criminal conduct. However, the “suitable person” standard was not unlimited, and the Supreme Judicial Court held that Simkin’s conduct did not render him unsuitable to hold a license to carry firearms.

The Supreme Judicial Court characterized Simkin’s conduct as “innocuous,” even if “arguably unusual,” and based on the circumstances no “reasonable ground” prohibited him from being a “suitable person” for the license to carry firearms.<sup>17</sup> The Supreme Judicial Court placed particular emphasis on the absence of any state regulations concerning suitability, leaving applicants and license holders without any guidance on how to be a “suitable person.” For example, there were no regulations prohibiting the use of a pseudonym in connection with carrying concealed firearms, which was the precise conduct Simkin engaged in when he visited the medical office. Without some regulatory parameters or other official guidance, the Supreme Judicial Court cautioned that licensing decisions could be more exposed to challenges as arbitrary and capricious.

On the facts, the conduct involved did not render Simkin “unsuitable.” The Supreme Judicial Court declined to credit the observations and reactions of the medical office staff, essentially faulting the medical office staff, rather than Simkin, for being “alarmed” upon learning about his concealed weapons, and it instead recognized that Simkin did not violate the terms of his unrestricted license to carry firearms “for all lawful purposes.”<sup>18</sup> Moreover, Simkin was upfront with the medical office staff about his concealed weapons, cooperated with the law enforcement authorities and did not attempt to participate in a crime or carry out a fraud.

*Simkin* serves as a warning that, especially in combination with evolving Second Amendment jurisprudence, the discretion of licensing authorities may ultimately have limits, particularly in the absence of a statutory or regulatory definition of what constitutes a “suitable person.” Because suitability

is not confined to solely criminal conduct or the six categories of statutory disqualifiers, it instead remains susceptible to individualized interpretation on a case-specific basis. By that same token, *Simkin* creates an increased risk for individual licensing decisions to be challenged as arbitrary, capricious, or an abuse of discretion.

*Simkin* underscores the need for licensing authorities to more fully evaluate and consider the grounds for each individual licensing decision. The focus may need to be based on objectivity, rather than subjectivity, invoking consideration of whether an underlying incident renders an individual an improper person to hold a license to carry firearms, and including evaluation of the scope of the license itself and its use restrictions.

#### ‘Suitability’ remains intact

*Simkin* did not invalidate the “suitable person” standard. To the contrary, Massachusetts courts considering the “suitable person” standard in the aftermath of *Heller* and *McDonald* have recognized that this standard passes constitutional muster.

Indeed, the United States Court of Appeals for the First Circuit upheld the constitutionality of the “suitable person” standard in *Hightower v. City of Boston*, 693 F.3d 61 (1st Cir. 2012), both on a facial basis and as applied to the revocation of the *Hightower* plaintiff’s license to carry firearms. *Hightower* specifically held that the “suitable person” standard was not subjective, nor did it bestow overbroad discretion on the licensing authority.

*Hightower* involved circumstances where false information on the license application, rather than to a third party, constituted a reasonable basis for holding that an applicant or license holder is unsuitable. The First Circuit acknowledged that the revocation was not a general determination in *Hightower*, and instead related to the grounds for which the firearms license was sought.

Moreover, in *Ferrill v. Chief of Police of Sandwich*, 83 Mass. App. Ct. 1114 (Feb. 19, 2013), a Rule 1:28 decision, the Massachusetts Appeals Court, in *dicta*, rejected the plaintiff’s challenge to the constitutionality of the “suitable person” standard. In *Ferrill*, the Massachusetts Appeals Court upheld the denial of a firearms license to a plaintiff with a criminal record, who failed to disclose prior court appearances, was associated with a known felon and who provided a pseudonym during a police investigation. *Ferrill* demonstrates the continued validity of criminal conduct as a consideration for suitability.

Similarly, in *Michaud v. Chief of Police of Kingston*, 85 Mass. App. Ct. 1111 (Apr. 3, 2014), also a Rule 1:28 decision, the Massachusetts Appeals Court rejected the plaintiff’s argument that the revocation of his firearms license contravened the limits on reasonable regulation under the Second Amendment and its focus on self-defense in the home. The license revocation in *Michaud* was upheld because the plaintiff overreacted to employees of a repossession company who approached his property, by discharging his firearm in their **►16**

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# SECTION REVIEW



MASSACHUSETTS  
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FAMILY LAW

## Family law practice in the electronic age What every client should know

BY KATHERINE MCCARTHY

There is no question that communication has become more convenient and accessible due to advancements in technology. Computers, mobile devices and other types of electronics play a significant role in much of our daily lives. But the everyday use of such modern technology has resulted in many complex and novel legal issues. This article will highlight the particular issues the use of electronics presents in family law cases, and what every client should know at the outset of litigation.

### Electronic evidence

Technology has changed the face of traditional evidence. Common types of electronic evidence attorneys routinely come across in their practice include information obtained from social media sites (Facebook, Twitter, MySpace, LinkedIn, YouTube), Global Positioning System (GPS) tracking, text messaging, email, blogging, files stored on a computer and websites.

These types of electronic evidence are increasingly being introduced into family law cases. For example, in the context of a highly contested divorce case, a family law attorney is aware that a wealth of relevant information may be gleaned from the opposing party's public Facebook or other social media page. Too often, clients do not realize the implications of posting comments and pictures on social media sites. A client could easily damage his or her credibility before the court by posting questionable content on social media.

In a divorce case, custody is often an issue that is front and center. If, for example, a client appears in pictures or making comments on Facebook which suggests over indulgence in alcohol or other substances during his or her parenting time with the parties' child, this could negatively impact the client's request for custody. More generally, it is important to recognize that anything published on a social networking site can resurface in litigation, and can have a negative impact on the parent/spouse's credibility before the court.

Deleting a particular comment, message or picture from a social media site may not be enough. It is, perhaps, not surprising that technology exists that can resurrect information a person mistakenly believed had been successfully deleted from a website or



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computer's hard drive. Similarly, changing one's Facebook security settings to private is not enough, because the user's information could show up on the Facebook pages of those on their "Friend" list who have not made their pages private. Social media account records can also be subpoenaed for use in a court proceeding.

Additionally, clients should be aware that posting derogatory or negative comments about their spouse on a social media site could have legal consequences. Such comments could result in an unnecessary defamation lawsuit, or, depending on the severity of the circumstances, a lawsuit for harassment or infliction of emotional distress.

The point here is that individuals involved in family law disputes must be extremely careful before publishing anything on social media. As a best practice, clients should refrain altogether from publishing any information about their pending case, about their spouse or anything else which could negatively affect the client's credibility before the court. If a client has already posted such information, they should take the material down immediately so as to mitigate any potential repercussions which may follow.

### Privacy concerns

Another increasingly common issue in family law cases concerns one spouse surreptitiously monitoring or spying on the other spouse. Emotions can run extremely high during a divorce, and some clients have an inclination to "spy" on their spouse whom they suspect is behaving poorly, perhaps believing that discovered information may give the spying spouse an upper hand in a divorce. However, these clients fail to recognize that their actions are often times in violation of the law and could make them susceptible to serious ramifications. It is true that privacy and wiretapping laws

tend to vary from situation to situation. Even so, all too often clients incorrectly assume that because they are married, it is okay to log on to their spouse's social media and email accounts or look at their spouse's cell phone content. It is important that clients understand what types of actions are potentially illegal.

In the electronic age, spying has become much more sophisticated. An increasing number of people are utilizing spyware technology to monitor their spouse's online activity. Spyware is software which may be uploaded onto a computer, enabling a user to monitor and track the web activity of a specific person. Spyware software is readily available at retail stores and online for a modest cost. Once uploaded, the software is often difficult for the novice computer user to detect.

What many clients do not know is that Massachusetts has adopted several protective privacy and wiretap laws which carry both civil and criminal penalties for violations. Uploading spyware software to a spouse's computer, even if the client shares the computer with his or her spouse and/or purchased the computer, could run afoul of these laws. It is imperative that clients realize that, just because he or she can purchase spyware online or at a retail store, that does not necessarily mean that the software may be legally used to monitor a spouse's web or cell phone activity. Illegally obtained evidence not only raises ethical considerations for the spying spouse's attorney, but such evidence will likely be kept out of a court proceeding by a judge, rendering it useless.

Clients also too often have the misconceived notion that it is permissible to secretly hack into their spouse's email, cell phone and social media accounts, and are surprised to hear that what they are doing could be illegal. A typical scenario a family law attorney may encounter involves a client who feels strongly that because he or she is still married, he or she is free to monitor the other spouse's communications. Similarly, because two spouses share a computer, one spouse may feel justified in monitoring the other spouse's Internet activity.

However, it is illegal under both Massachusetts and federal law to gain unauthorized access to a computer system. Clients should be aware that logging onto their spouse's online accounts and viewing his

or her emails or messages without permission could subject the spying spouse to criminal penalties. This is especially true if the spied-on spouse maintains exclusive control over the device or the account is password protected. Further, as a general rule, secretly videotaping or voice recording another person, even a household member, is illegal.

The current state of the law regarding unauthorized access to a spouse's cell phone is less clear. Courts have recognized a diminished expectation of privacy between spouses, which means that what may be deemed an offensive invasion of privacy between non-married persons may not be recognized as such between spouses. But it is important to caution clients that the trend of the Massachusetts courts has been to protect the privacy of individuals, including individuals within a marriage. Hence, just because a client guesses or secretly learns the password to the other spouse's cell phone does not mean that it is permissible to view its contents. Additionally, cell phones, particularly smart phones, are similar to computer systems. Courts could interpret the unauthorized access of a cell phone as falling within the purview of the law prohibiting the unauthorized access to a computer system, resulting in possible criminal liability.

Very often information obtained by a spying spouse involves another spouse's extramarital affair. However, proof of adultery in and of itself does not hold much weight in a contemporary divorce action in Massachusetts. Hence, the risks simply outweigh the benefits in most cases.

### What every client should know

Family law cases are emotionally-charged proceedings. Very rational clients may display seemingly irrational behavior in the midst of a highly contested divorce. That is why it is so important for every divorce client to have clear guidance from the outset on his or her use of electronics. In sum, information about a pending divorce should not appear on a client's social media accounts. Clients should also avoid posting anything which may be harmful to their case. And no matter how tempting it may be to secretly monitor a spouse's email and social media accounts and cell phone contents, clients should completely

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### SUITABILITY CHALLENGED

Continued from page 15

proximity and instilling fear in them. The repossession company employees had not attempted to enter the license holder's residence, nor did they threaten the license holder or his family with bodily harm, notwithstanding the license holder's reaction.

Significantly, in *Michaud*, the Massachusetts Appeals Court recognized that neither self-defense nor any other justification existed for the plaintiff's conduct. *Michaud* suggests that the Second Amendment considerations for

protecting the "hearth and home" — a "core right" — may be appropriate for the "suitable person" analysis and whether an incident renders an individual unsuitable. Thus, in examining whether any incident is relevant to the suitability analysis, a licensing authority, and a reviewing court, may consider that incident in light of the protections of the Second Amendment.

Second Amendment jurisprudence will likely contribute to defining the limits on licensing deci-

sions under the "suitable person" standard, such as the relevance of activities outside the home. The consequence is a potential for judicial reassessment of the suitability standard, on a case-by-case basis, and a more focused and involved analysis on the conduct used to determine whether an individual is unsuitable.

1. See M.G.L. c. 140, §§ 121, 129B, 131; M.G.L. c. 269, § 10.

2. See M.G.L. c. 140, § 131(d), (f).

3. See *District of Columbia v. Heller*, 554 U.S.

570 (2008); *McDonald v. City of Chicago*, 130 S.Ct. 3020 (2010) (plurality opinion).

4. See *Heller*, 554 U.S. at 635.

5. See *id.* at 596 & n.26.

6. See *McDonald*, 130 S. Ct. at 3042, 3050 (plurality).

7. See *id.* at 3042.

8. See M.G.L. c. 140, § 131(a), (b).

9. See *id.*, § 131(a).

10. See *id.*, § 131(d), (f).

11. *Ruggiero v. Police Comm'r of Boston*, 18 Mass. App. Ct. 256, 258 (1984).

12. *Ruggiero*, 18 Mass. App. Ct. at 259.

13. See M.G.L. c. 140, § 131(f).

14. See M.G.L. c. 140, § 131(f); *Chief of Police of Shelburne v. Moyer*, 16 Mass. App. Ct. 543, 544 (1983).

15. See *Howard v. Chief of Police of Wakefield*, 59 Mass. App. Ct. 901, 902 (2003); *Godfrey v. Chief of Police of Wellesley*, 35 Mass. App. Ct. 46-47 (1993).

16. See 466 Mass. at 170.

17. See *id.* at 182.

18. See *id.*

19. See *Wesson v. Town of Salisbury*, C.A. No. 13-10469-RGS, 2014 WL 1509562, at \*4 (D. Mass. Apr. 18, 2014) (recognizing, on an as applied basis, the plaintiffs' "Second Amendment right to possess firearms in the home for self-defense").

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# SECTION REVIEW



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FAMILY LAW

## The basics of equitable distribution and the treatment of gifted and inherited assets in Massachusetts

BY PATRICIA A. O'CONNELL AND DONALD G. TYE

Your client has decided to end the marriage, and your client is concerned about future financial security. Your client is eager for reassurance that the other spouse will depart the marriage with the many gifted assets that your client alone brought into it. On the other hand, your client may be the other spouse who wants only a fair share of the inherited assets brought into the marriage by his/her spouse — assets that your client alone managed and grew over the course of many years. Either way, it is crucial for you to understand and explain to your client the basics of “equitable distribution” of property upon divorce in Massachusetts and, in particular, the treatment of gifted and inherited assets.

### Basics of equitable distribution

**The marital estate subject to distribution consists of all property owned by either property, including pre-marital property.**

In the Commonwealth of Massachusetts, a Probate and Family Court's authority to distribute property upon divorce is entirely statutory and governed by M.G.L. c. 208, § 34 (hereinafter Section 34). Section 34 provides, *inter alia*, that:

In addition to or in lieu of a judgment to pay alimony, the court may assign to either husband or wife *all or any part of the estate of the other*, including but not limited to, all vested and non-vested benefits, rights and funds accrued during the marriage<sup>1</sup> and which shall include, but not be limited to, retirement benefits, military retirement benefits if qualified under and to the extent provided by federal law, pension, profit-sharing, annuity, deferred compensation and insurance. M.G.L. c. 208, § 34.

A party's “estate” (as referenced above) is defined broadly to include “all property to which [he or she] holds title, however acquired.” *Rice v. Rice*, 372 Mass. 398, 400 (1977) (rejecting the husband's contention that the trial court lacked authority to transfer his separate property acquired before the marriage to his wife upon divorce); *see also Bacchanti v. Morton*, 434 Mass. 787 (2001) (upholding trial court's inclusion of pre-marital assets in the marital estate, despite the husband's testimony that the parties orally agreed to keep those assets separate); *Drapek v. Drapek*, 399 Mass. 240, 243 (1987). As such, the commonwealth is unlike other “marital property” states that specifically exclude premarital property from the marital estate subject to distribution. *See Moriarty v. Stone*, 41 Mass. App. Ct. 151, 156-57 n. 4 (1996) (“The term ‘estate’ ... includes property obtained by a party before marriage ...”). In fact, assignable assets can even include post-marriage assets in certain circumstances. *See Brower v. Brower*, 61 Mass.



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App. Ct. 216, 218 (2004) (holding that assignable assets can include portion of teacher's pension accrued after divorce). In a nutshell, everything is “in the marital pot” for distribution upon divorce. The more nuanced issue is how that marital pot will, in fact, be doled out fairly between the parties.

**The court has broad discretion in weighing the statutory factors that must be considered when distributing the estate.**

How does the actual distribution work in the absence of a negotiated agreement? The Probate and Family Court judge assigned to the case will hold an evidentiary hearing (trial), whereby the attorney for each party will present evidence (i.e., witness testimony and exhibits/documentary evidence) relating to each of the various factors that the court must consider pursuant to Section 34, namely:

- Length of the marriage;
- Conduct of the parties during the marriage;
- Age;
- Health;
- Station;
- Occupation;
- Amount and sources of income;
- Vocational skills;
- Employability;
- Estate, liabilities and needs of each of the parties;
- The opportunity of each for future acquisition of capital assets and income;
- Amount and duration of alimony, if any, awarded under sections 48 to 55, inclusive;
- The present and future needs of the dependent children of the marriage;
- Contribution of each of the parties in the acquisition, preservation or appreciation in value of their respective estates (discretionary); and
- Contribution of each of the parties as a homemaker to the family unit (discretionary).

These factors “reflect a view of marriage as an implied partnership for the purposes of distribution of property.” *Savides v. Savides*, 400 Mass. 250, 252 (1987). In fashioning a judgment to distribute the marital estate following trial, the court must make it clear in written “findings of fact” that he/she considered

each one of the “mandatory factors” set forth in Section 34.<sup>2</sup> *King v. King*, 373 Mass. 37, 40 (1977). Further, the court must provide a clear rationale, based on its findings, for the judgment reached. *See Mahoney v. Mahoney*, 425 Mass. 441, 447 (1997); *Bowring v. Reid*, 399 Mass. 265, 267-68 (1987) (review requires appellate court to look for the lower court's findings of fact and rationale; the decision must flow rationally from the judge's findings).

Clients often ask, “Isn't the length of the marriage the most important factor?” or “Doesn't the distribution really depend on much income is available?” No one factor trumps all others, and “[t]he weight to be accorded each of the § 34 factors in a particular case is committed to the judge, who has broad discretion in fashioning a judgment under § 34.” *Langerman v. Langerman*, 9 Mass. App. Ct. 869, 870 (1980). “Such broad discretion is necessary in order that the courts can handle the myriad of different fact situations which surround divorces and arrive at a fair financial settlement in each case.” *Rice*, 372 Mass. at 401. *See also Redding v. Redding*, 398 Mass. 102, 107 (1986) (trial judge's decision and the weight accorded to the respective Section 34 factors will not be reversed unless the judgment is “plainly wrong”). The practical effect of this far-reaching discretion is that two different judges, evaluating the very same evidence, could arrive at very different judgments — particularly in mid-length marriages, where the equities may be more nuanced than those presented in a short-term or long-term marriage. For instance, it is easy to understand why a judge might opt to “split everything down the middle” in a 40-year marriage, or to let each party “walk out with what he walked in with” following a two-year marriage. But what happens in a 12-year marriage where there are various assets, inherited or otherwise? Given this uncertainty, the marked increase in the use of prenuptial agreements to protect familial wealth is not surprising.

**There is no presumption of a 50/50 distribution of the estate.**

Unlike some other states that have adopted an equitable distribution theory, Massachusetts does not have a statutory presumption in favor of a 50/50 distri-

bution. There is no specific formula that must be followed in determining an equitable division of marital property, nor is there any precedent requiring an equal division of assets (even in a long-term marriage). *See Handrahan v. Handrahan*, 28 Mass. App. Ct. 167, 168 (1989) (“mathematical precision” isn't the test); *Cabot v. Cabot*, 18 Mass. App. Ct. 903 (1984) (no specific financial formula requiring precise parity in an equitable division of the marital estate). Rather, “[t]he parties' respective contributions to the marital partnership remains the touchstone of an equitable division of the marital estate.” *Moriarty v. Stone*, 41 Mass. App. Ct. 151, 157 (1996). The goal is to achieve an equitable division of the parties' assets, not necessarily an equal division. *See Williams v. Massa*, 431 Mass. 619, 626 (2000).

**The court has discretion to determine the date for dividing the marital estate.**

Fixing the end date of the marriage (for the purpose of determining what can be included in the marital estate) “is best left to a case by case analysis.” *Davidson v. Davidson*, 19 Mass. App. Ct. 364, 376 (1985). In many (if not most) cases, the court will consider the Section 34 factors and divide the marital estate as of the date of the divorce. *See id.* at 375-76. This is particularly true if the parties are separated but one of them is still providing a non-economic contribution by caring for a child. *See DeCastro v. DeCastro*, 415 Mass. 787 (1993). Yet in certain instances (such as a lengthy separation), the court will value an asset at the date of separation where there have been no subsequent contributions. *See Savides*, 400 Mass. at 252; *Daugherty v. Daugherty*, 50 Mass. App. Ct. 738 (2001).

### Treatment of gifted, inherited and pre-marital assets

The Supreme Judicial Court has flatly rejected any rule that gifted and inherited assets should inure to the spouse who brought them into the marriage upon divorce. *See Williams v. Massa*, 431 Mass. 619, 626 (2000) (noting that Massachusetts “has no hard and fast rules” on the allocation of gifted and inherited assets in divorce proceedings, unlike many other states). Gifted and inherited assets are treated like any other property, in that the Probate and Family Court has “considerable discretion” in determining their distribution. *Drapek v. Drapek*, 399 Mass. 240, 243 (1987). Yet while the commonwealth does reject any “notion that inherited wealth should remain in blood lines,” *Bacon v. Bacon*, 26 Mass. App. Ct. 117, 123 (1988) (Kaplan, J., concurring), the Probate and Family Court will look very closely at the overall “contributions” of the party who did not receive the gift/inheritance to the marital partnership and/or to the gifted/inherited assets (such as by managing those assets or helping them appreciate in value). In that regard, the case law suggests that the lon-

## EQUITABLE DISTRIBUTION

*Continued from page 17*

ger the marriage, the more likely that the court will view the parties' contributions to be relatively equal (and therefore distribute the gifted/inherited assets, rather than setting them aside for the party responsible for acquiring them). See *Denninger v. Denninger*, 34 Mass. App. Ct. 429 (1993) (error to limit husband's share of wife's inheritance to 15 percent after 27-year marriage); *Comins v. Comins*, 33 Mass. App. Ct. 28 (1992) (husband assigned 46 percent of estate derived of gifts from wife's family after a 48-year marriage).

The seminal case involving gifted/inherited assets in Massachusetts is *Williams v. Massa*, 431 Mass. 619, 626 (2000). The parties in *Williams*, who had two children together, had been married for 19 years when they separated in 1993. *Id.* at 620-21. They lived a comfortable middle-class lifestyle, largely as a result of the husband's gifted/inherited assets (including stocks and bonds gifted by his parents prior to the marriage, and interests in family trusts). *Id.* at 620-21. The husband worked as the CEO of the family's closely-held business, and the wife had not worked outside of the home since the birth of the parties' first child. *Id.* at 621.

Following a trial on the distribution of the estate, the court made explicit and detailed findings as to the husband's extensive contributions to the marriage and the wife's shortcomings in this regard. The trial court found that the husband was the primary breadwinner (running the family business), the primary homemaker and was primarily responsible for taking care of the children's routine care as they got older. *Id.* at 624. He also managed the gifted/inherited assets (which, the court specifically noted, were kept separate from other assets acquired during the marriage) and made all investment decisions. *Id.* at 625. In short, the husband's contributions to the marital enterprise in *Williams* far exceeded those of the wife (who had issues relating to mental health and interpersonal relations; who had alienated the parties' daughter from the husband; and who was described in a manner that suggested she was lazy). Based on these findings, the trial court awarded the husband all of his inherited and gifted assets (totaling \$2,725,194) and 26 percent of the non-inherited assets (totaling \$507,040) after the evidence reflected "no special circumstances which would justify an assignment to the wife of the husband's inherited or gifted property." *Id.* at 625. The wife was awarded alimony and 74 percent of the non-inherited assets (totaling \$1,443,115). *Id.* at 624. The wife appealed, claiming that the trial court utilized an improper "special circumstances" test to distribute the estate.

The Supreme Judicial Court affirmed the lower court's decision, rejecting the arguments that (i) the trial court improperly excluded the gifted and inherited assets from the marital estate, and (ii) the trial court imposed an improper test ("special circumstances") instead of the Section 34 factors in dividing those assets. *Id.* at 620. The SJC found that the lower court properly considered the statutory factors set forth in G.L. c. 208, §34, especially the fact that the husband's contributions to the marital partnership "greatly exceeded" those of the wife. *Id.* at 627. Further, the SJC found that the trial court was well within her discretion in considering the source of the gifted/inherited assets (the husband's family, pre-dating the marriage); each party's role in managing the gifted and inherited assets;

and the fact that these assets were kept separate from other assets acquired during the marriage. *Id.* at 627.

The *Williams* case thus elucidates several important factors that the court will consider in distributing gifted/inherited assets:

- The source of the inherited assets (i.e., a willingness to "sequester" assets to the party responsible for acquiring them, when a balancing of the Section 34 factors — particularly conduct — would make it equitable).
- Each party's role in managing the gifted/inherited assets (suggesting that a party not responsible for acquiring the gifted/inherited assets may be more likely to receive a portion of the same if he or she is actively involved in the management of the assets).<sup>3</sup>
- Whether the gifted/inherited asset was kept separate from the other marital assets (suggesting that such assets are more likely to be equitably distributed if there is some co-mingling, particularly in a long-term marriage).

Still, the tone of the *Williams* decision suggests that the lower court found the wife's behavior downright distasteful. One has to wonder if the husband would have been awarded all of his gifted/inherited assets if the wife had not been so apparently "unlikeable" and if the marriage hadn't been so one-sided.

The treatment of gifted and inherited assets — and the mandate to focus on the parties' contributions to the same — was also carefully addressed in *Bacon v. Bacon*, 26 Mass. App. Ct. 117 (1988). In *Bacon*, the wife had gifted/inherited assets of \$3,020,552, consisting of property acquired for the wife's benefit by her family prior to the marriage. *Id.* at 118. When the parties married, the wife was the beneficiary of a trust that provided her with income of about \$20,000 per year; when the trust terminated during the marriage, she received significant distributions. *Id.* at 119. The assets grew over the years until the time of the parties' divorce, largely due to inflation and the addition of dividends/interest to the principal. *Id.* The husband did little to appreciate the value of these assets. *Id.* The marital estate also included a marital home, which had equity of \$865,621; the home was purchased and improvements were made with the wife's gifted/inherited funds. *Id.* at 120. The lower court noted that the husband was self-supporting, had adequate housing, and had been abusive during the marriage. *Id.*

The Appeals Court in *Bacon* affirmed the lower court's decision, permitting the wife to retain the vast bulk of the assets traceable to the corpus of the trust created for her by her biological family and ordering the husband to convey to the wife his interest in the marital home (which had been purchased with her gifted assets). *Id.* at 118. Like the SJC in *Williams*, the Appeals Court emphasized the importance of the parties' respective contributions to the gifted/inherited assets — and focused on the distribution of the marital estate as a manner of correcting an imbalance. *Id.* The Appeals Court highlighted that:

Disparity of contribution[s] within the marriage may be addressed by a close judicial examination of particular facts on the case presented. Such an examination should reveal whether the marriage has been a true partnership characterized by team effort, or whether the burdens have been unequally allocated. An imbalance in the assumption of responsibilities and burden[s] is an indication that one spouse has failed to contribute. The

discretion to make an equitable rather than an equal division of property enables the trial judge to deal flexibly with the problem of imbalance ...

*Id.* (citing Inker & Clower, "Towards a New Justice in Marital Dissolution: The Massachusetts Statutory Scheme and Due Process Analysis," 16 Suffolk U.L. Rev. 907, 935-936 (1982)). The failure of the husband in *Bacon* to make any notable contribution to the acquisition, preservation or appreciation of wealth which the wife brought to the marriage, or to homemaking, was critical in allowing the wife to keep most of her inheritance. *Id.*

However, the reality is that an imbalance of contributions is not readily apparent in most marriages. In *Baccanti v. Morton*, 434 Mass. 787 (2001), for instance, the parties had been married for nine years when the wife filed for divorce. *Id.* at 789. The marriage was traditional in nature, in that the husband was the primary breadwinner and the wife was primary caretaker of their child and the primary homemaker. *Id.* at 788. Following trial, the trial court distributed the marital estate on a 50/50 basis and thereby assigned the wife portions of the husband's premarital assets. *Id.* at 789. On appeal, the husband claimed that the lower court failed to make findings as to each of the requisite Section 34 factors and that the assignment of the husband's pre-marital assets to the wife was an abuse of discretion. *Id.* at 790, 793. The Appeals Court upheld the decision, noting that the lower court "determined that an evenly divided distribution of marital property was most equitable in light of the parties' contributions to the marital enterprise, the length of the marriage, and their ability to obtain future income and assets" despite the fact that the husband was the one who brought the assets into the marriage. *Id.* at 793.

The existing case law demonstrates that the treatment of gifted and inherited assets upon divorce is highly case-specific (i.e., driven by the unique facts of each case). Nevertheless, the following trends are apparent:

- The longer the marriage, the more likely that gifted and inherited assets will be distributed in some manner between the parties.
- A gifted or inherited asset is more likely to be distributed between the parties if it has been "woven into the fabric" of the marriage (for example, the couple historically met their living expenses off of income generated from an account gifted by one spouse's family).
- "Contribution" seems to be particularly important in the context of gifted and inherited assets. The spouse who did *not* receive the gifted/inherited asset will be more likely to benefit from it if he/she has historically been actively involved in managing or caring for the asset (for example, overseeing an investment portfolio and paying taxes on the income generated, or maintaining/improving a home that had been gifted).
- If the divorcing spouses (particularly in a long-term marriage) had planned on using a gifted/inherited asset (whether principal or income) to finance retirement, then the "non-gifted" spouse who relied on that asset is more likely to share in the distribution of the asset.
- Despite case law rejecting the idea of "bloodlines," there seems to be, in practice, a hesitancy to use divorce as a vehicle for transferring wealth across families. If a court awards a spouse all or nearly all of his/her gifted and inherited assets, it will often award the "non-gifted" spouse a disproportionate share of the remaining marital estate to

cushion the blow.

- Assets that are available to a spouse for his/her use are often included in the marital estate subject to distribution, even if he or she does not technically control the asset. See *Comins v. Comins*, 33 Mass. App. Ct. 28 (1992) (holding that the trial court properly included in the marital estate the wife's interest in a trust that had been settled and funded by her father, the terms of which allowed the trustee in his sole discretion to pay to the wife so much of the principal and interest deemed advisable for her comfort and support).
- Even non-vested, contingent interests (such as a remainder interest in a family trust) can be included in the marital estate and subject to distribution in certain circumstances, provided that future acquisition is fairly certain (not remote or speculative). See *S.L. v. R.L.*, 55 Mass. App. Ct. 880 (2002) (holding that interests in trusts that depended on the wife's surviving of her mother were properly included in the marital estate, even though discretionary powers to invade principal were given to the trustee); compare *D.L. v. G.L.*, 61 Mass. App. Ct. 488 (2004) (husband's interest in trust was too remote to include in estate, where his interest would vest only if his father died by a date certain and the husband survived him). If a court finds such an interest to be remote or speculative, it will still usually consider it under the Section 34 criterion of "opportunity of each for future acquisition of capital assets and income."
- A potential inheritance will not be included in the marital estate for distribution, as it is a mere "expectancy." *Davidson*, 19 Mass. App. Ct. at 374.

In light of these considerations, it is imperative that your client tell you all that he/she knows (and provide any available documentation) about the source of any gifted/inherited assets; your client and the other spouse's use, or sequestration, of those assets during the marriage; and your client and the other spouse's contributions to both the gifted/inherited assets and the overall marital partnership. ■

1. "Accrued during the marriage" should not be read as a "marital property" limit on the power of the court to distribute assets.
2. The text of Section 34 states that the court "may" consider the two so-called "discretionary factors" — that is, (1) the contribution of each of the parties in the acquisition, preservation or appreciation in value of their respective estates, and (2) the contribution of each of the parties as a homemaker to the family unit. In practice, these factors are almost always considered and awarded significant weight.
3. See also *Denninger v. Denninger*, 34 Mass. App. Ct. 429, 434 (1993) (rejecting disproportionate distribution of marital estate to the wife after a 27 year marriage that produced two children, and stating "[i]t is difficult to understand why the husband should share so little of the run-up in value of the marital residence, the consequence of market factors, or of the investment portfolio, whose source was the wife's parents, but to whose growth the husband made at least some contribution by helping to pay taxes on the portfolio income.").

## FAMILY LAW IN ELECTRONIC AGE

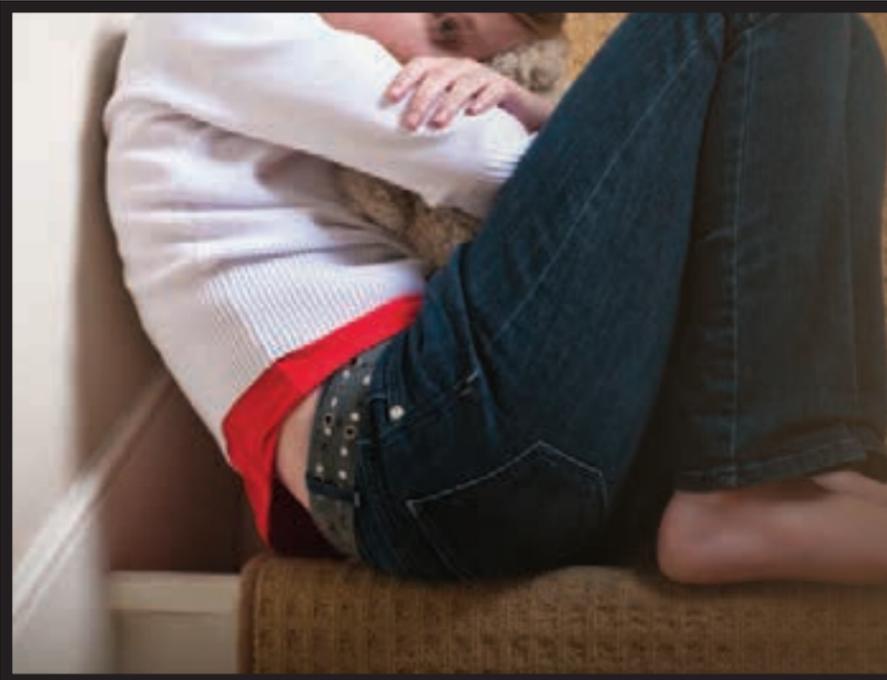
*Continued from page 16*

refrain from doing so, as it could expose them to criminal or civil penalties. Family law attorneys should have an understanding of the possible legal penalties so that they may advise their clients accordingly.

Although there is no guarantee that a client will heed an attorney's warning about the use of electronics during the pendency of a family court proceeding, it is a warning worth making in light of the frequency with which these issues crop up in today's electronic age. ■

# NOTABLE AND QUOTABLE

MBA MEMBERS IN THE MEDIA



## DCF abuse accusation

“ Any time DCF supports those types of allegations, it’s a serious situation. It ‘basically means’ there is evidence the child was abused or neglected or at risk of being abused or neglected. ”

MBA PRESIDENT-ELECT MARSHA V. KAZAROSIAN  
CAPE COD TIMES, APRIL 25

Kazarosian was quoted in the *Cape Cod Times* in a story on a Department of Children and Families (DCF) report that accuses two South Yarmouth caregivers of abuse against 23-month-old Lucas Braman.



## Supreme Court — warrantless cellphone search



“ Never before has the United States Supreme Court decided whether or not a cellphone is subjected to police search after the arrest of an individual. ”

MBA CHIEF LEGAL COUNSEL AND CHIEF OPERATING OFFICER, MARTIN W. HEALY, WBUR (NPR), APRIL 28

Healy spoke to Boston’s NPR affiliate about the Supreme Court case *United States vs. Wurie*, which originated in South Boston. At question is whether police without a warrant can search the call log of a cell phone found on someone who has been arrested.



## Blue Ribbon Commission report

“ They just can’t stay there. They get married, they get a mortgage, they have student loans a lot of them, and so as a result, they’re forced out of the public defender service or the prosecutor’s office. ”

MBA BLUE RIBBON COMMISSION MEMBER MARTIN KANE  
NECN, MAY 19

Kane, a defense attorney and former assistant district attorney, and Middlesex County District Attorney Marian Ryan appeared on “Broadside” with Jim Braude to speak about the new report issued by the MBA’s Blue Ribbon Commission on Criminal Justice Attorney Compensation.



## Pothole damage statute



“ The statute just doesn’t provide for property damages on a state road. If you can find some way of saying maybe the city and state combined to create a defect then you might have an argument. ”

MBA PRESIDENT DOUGLAS K. SHEFF  
WBZ TV CHANNEL 4 (CBS BOSTON), APRIL 28

Sheff spoke to WBZ TV as part of a story on damage caused by potholes on both city and state roads in Boston. State and municipal roads are not governed by the same statute.



## Tsarnaev friends in Federal Court

“ Generally speaking these sorts of motions do not go well for the defendant when they kind of knock out the evidence on some kind of a legal technicality unless it’s really egregious. ”

MBA PAST CRIMINAL JUSTICE SECTION CHAIR PETER ELIKANN  
FOX25, MAY 14

Elikann spoke to FOX25 News about three friends of Boston Marathon bombing suspect Dzhokhar Tsarnaev who appeared in U.S. District Court for a pretrial hearing.





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