Supporting TBI victims a no-brainer

March is Brain Injury Awareness month, but if you are any kind of a sports fan, you already know that brain injury has been one of the hottest topics at the intersection of sports, law and medicine for the past few years. The National Football League (NFL) and National Hockey League (NHL) are both embroiled in litigation brought by former players over concussions, and Major League Baseball (MLB) just recently banned home plate collisions.

But professional athletes are just a small part of the story. The truth is, brain injury has become an invisible epidemic in our country, impacting millions of people from all walks of life. According to the Brain Injury Association of America (BIAA), an estimated 2.4 million children and adults in the U.S. sustain a traumatic brain injury (TBI) and another 795,000 individuals sustain an acquired brain injury (ABI) from non-traumatic causes each year. Currently more than 5.3 million children and adults in the U.S. live with a lifelong disability as a result of TBI and an estimated 1.1 million have a disability due to stroke.

I’ve been firsthand in my own law practice the suffering experienced by clients with brain injury. I also know how easy it is to miss its signs and symptoms, which often is why it is so difficult to diagnose. But let me assure you, brain injury is real, and its effects are devastating.

Just last month I had the privilege to meet a real American hero: U.S. Rep. Tammy Duckworth (D-IL), an Iraq war veteran who lost both her legs when the Black Hawk helicopter she was piloting was shot down over Iraq in 2004. (See related story, page 13.) On behalf of the MBA, I thanked her for supporting Boston Mayor Martin J. Walsh; and the 2014 Access to Justice Awards.

‘Hardball’ host Chris Matthews to deliver Annual Dinner keynote

The Massachusetts Bar Association is pleased to announce that Chris Matthews will deliver the keynote address at its Annual Dinner on Thursday, May 15, at the Westin Boston Waterfront.

Matthews is a highly respected political news commentator, who hosts the top-rated “Hardball” program on MSNBC. Matthews is also a celebrated author of several literary works, including books profiling some of Massachusetts’ favorite sons, John F. Kennedy and Tip O’Neill.

Whether working in government or as a journalist, Matthews has kept an abiding faith in electoral politics, with a quadrennial hope that the American people will make the best judgment on who should lead. Matthews has kept that faith through war and peace, good times and bad, through great leaders and not-so-great. Matthews has never lost his vigorous love of democracy and how it can serve to make this country, through all its challenges, a more perfect union.

“We are honored to have Chris Matthews address the Massachusetts legal community at our hallmark event of the association year,” MBA President Douglas K. Sheff said. “Matthews’ presence at our annual dinner is especially meaningful because he shares the Massachusetts Bar Association’s belief in the importance of speaking up on behalf of justice and what’s right.”

In addition, the MBA Annual Dinner will include the presentation of the Legislator of the Year Award to Rep. Garrett J. Bradley (D-Hingham), First Division Chair of the House Rules Committee; the President’s Award to Boston Mayor Martin J. Walsh; and the 2014 Access to Justice Awards.

To purchase tickets or tables of 10, or to find out more about sponsorship opportunities, visit www.massbar.org/AD14 or call (617) 338-0530. Tables of 10 are $1,500 and individual tickets are $150 each.
year alone we fed nearly 2,000 people at a Thanksgiving Turkey drive and contributed to a lawyer-backed project to fight homelessness at the Pine Street Inn. Our “12 for 12” program is still ongoing, where we’ve brought lawyers and clients together to advocate for increased funding for legal aid and our courts.

People suffering from brain injury also need our help. Because brain injury is so often overlooked, victims sometimes go unassisted for years. Yet each day, TBI victims face challenges at their jobs or when trying to get medical coverage for treatment. MBA lawyers are already working pro bono with clients who suffered brain injury and other unseen injuries from the Boston Marathon bombings, but are having trouble getting the compensation their injuries deserve.

As a next step, I would like to propose the creation of a Brain Injury Task Force, one that would follow the collaborative model of our Workplace Safety Taskforce, which successfully educated the public and other attorneys on workplace safety, facilitated access to justice for workers and helped to pass legislation to protect workers and their families. I now hope to bring together leaders from the legal, business, medical, political and scientific fields to study whether TBI victims’ rights are adequately protected. Where we find gaps, we will use our collective expertise to facilitate and advocate for the proper solutions.

In the process we will educate the public about this important issue. Helping people with brain injury touch so many corners of our membership. It’s more than just a personal injury issue; it’s an employment issue, a health law issue and an access to justice issue. Most importantly, it’s an underrepresented population that needs a voice.

As the preeminent voice of the legal profession, it’s time we speak up. And since it is Brain Injury Awareness Month, I say there’s no time like the present.

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BAR SEEN: Snapshots from around the MBA

Welcome new members

More than 50 newly admitted members of the legal community attended the MBA’s “Practicing with Professionalism” Course in Worcester on Thursday, Feb. 20, at UMass Medical School.

Continued from page 1

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INSIDE THIS ISSUE
News from the Courts

Attorneys urged to respond to SJC’s Judicial Performance Evaluation survey

The Supreme Judicial Court’s Judicial Performance Evaluation Committee is asking attorneys to respond to questionnaires evaluating the performance of Western Mass. judges. The full participation of the bar is crucial to enhancing the performance and quality of the judicial branch.

Judges of the District, Superior, Probate and Family, Housing, and Juvenile courts in Berkshire, Hampden, Hampshire and Franklin counties will be evaluated by attorneys, court employees and jurors.

Attorneys should take the time to complete the questionnaire, as the more responses received, the more accurate the judicial evaluations will be. The SJC’s evaluation program is the best opportunity for attorneys to voice their opinions of the members of the judiciary.

SJC approves changes to Rule 4:02

The Supreme Judicial Court has approved changes to Rule 4:02 of the Rules of the Supreme Judicial Court effective July 1, 2014. Visit www.mass.gov/courts/sjc/ to view changes.

2014 edition of the ‘Massachusetts Guide to Evidence’ now available

The Supreme Judicial Court and its Executive Committee on Massachusetts Evidence Law have announced the release of the 2014 edition of the “Massachusetts Guide to Evidence.” The justices of the Supreme Judicial Court recommend use of the guide by the bench, bar and public.

The 2014 edition is the sixth annual edition of the guide. It is available without charge at www.mass.gov/courts/sjc/guide-to-evidence. The official print edition is available for purchase from the Flaschner Judicial Institute, which is again providing a complimentary copy to every judge and appointed and elected clerk in the commonwealth.

The “Massachusetts Guide to Evidence” assembles existing Massachusetts evidence law in an easy-to-use document organized similarly to the “Federal Rules of Evidence.” The guide includes extensive explanatory notes and citations to pertinent authorities.

Judiciary submits proposal to expand Housing Court to cover entire state

The Judicial Branch has submitted a proposal to the Legislature to expand the Housing Court to the entire commonwealth by July 1, 2015.

Created in 1978, the Housing Court Department is a court of specialized jurisdiction that deals with residential housing matters, including landlord-tenant issues, and enforces the commonwealth’s building, fire and sanitary codes. Its growth over the ensuing decades has been patchwork in nature: about 20 percent of Massachusetts in geographic terms is not covered by a Housing Court and, since the uncovered areas are quite populous, about 30 percent of the state’s population does not have access to a Housing Court.

Major areas of the commonwealth do not have the much-needed services of a Housing Court. There is no Housing Court for all of Barnstable, Dukes and Nantucket counties, most of Norfolk County and much of Middlesex County. Cities with some of the highest number of rental units, such as Chelsea, Framingham, Malden, Cambridge, Medford, Somerville, Watertown, Woburn and Waltham, do not have a Housing Court. Barnstable County has a significant number of rental units. New legislation would address this shortfall, expanding access to justice in housing matters throughout the state.

In areas unserved by a Housing Court, housing cases, along with a broad range of legal matters, are heard in a District Court. Housing Court judges have in-depth knowledge to analyze the labyrinth of federal, state and local housing laws. The judges also work closely with the court’s Housing Specialists, who mediate cases, saving time and expense of litigation, and perform on-site property reviews to resolve issues concerning housing conditions.

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Patrick highlighted the importance of re-entry programs, stating that 97 percent of those incarcerated will return to society through county correctional facilities before their release. In addition, 67 percent prefer re-entry programs to new prisons. "We need to treat substance abuse as a health problem instead of a crime, and we need to focus on rehabilitation — two areas where the current system is not seen as effective," he said.

The event featured remarks from Gov. Deval L. Patrick, who announced his newly released budget calling for doubling the number of mental health specialty courts from three to six in the next five years. The governor called for reducing time in prison. He also introduced an act that aims to reduce recidivism by using either sentencing guidelines or determining sentences on a case-by-case basis. The MassINC Polling Group results, "Ready for Reform? Public Opinion on Criminal Justice in Massachusetts," indicated an increased focus on rehabilitation rather than incarceration. (The public sees drug use as a health problem rather than a crime, and 64 percent are more likely to perceive drug use as a health problem rather than a crime.)

In areas where more inmates are released, residents agree with the fairness of home foreclosures and included a brief history of negotiable instruments and their relationship with mortgages. An overview of the current status of the Home Foreclosure Procedures Act, and the difficulties associated with municipalities and foreclosure law. The event concluded with a panel discussion centered on issues surrounding the UCC. The MBA partnered with MassINC on a presentation and panel discussion on criminal justice reform on March 27, at UMass Boston.

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It’s really bad tax policy and it’s really harmful to lawyers and other people in professional services. The way the law practice works, a lot of the work gets done before it gets paid for. Or it never gets paid for. So you have huge write-offs.

MBA Vice President Christopher P. Sullivan

Draft federal legislation has proposed a change to the way law firms account for revenue. If passed, the new legislation would change how law firms, with gross revenue of more than $10 million, report and pay taxes. With the proposed change, firms would report on their tax filings the amounts they have billed, even if the bills haven’t been paid.

MBA Members in the Media

Prison terms for juvenile killers

There’s a feeling that 35 years is a little on the harsher side, but we can understand where that sentiment is coming from.

MBA Chief Legal Counsel Martin W. Healy
The Lowell Sun, Feb. 1, 2014

A bipartisan bill, filed in Massachusetts in January, would require juveniles convicted of first-degree murder to serve at least 35 years before being eligible for parole. Under current law, juveniles convicted of first-degree murder can qualify for parole after serving 15 to 25 years. The U.S. Supreme Court has also ruled life sentences without parole are unconstitutional for young offenders. The MBA is studying the proposed bill before making a recommendation to support or oppose it.

Paid legal internships

I think it’s absolutely a step in the right direction. It’s the right thing to do.

MBA Labor & Employment Law Section Co-Chair John F. Tocci

An American Bar Association Committee has recommended a change to its policy that prohibits law students from being paid for externships and internships when they are receiving school credit. The Department of Labor allows for unpaid internships if their work is “not of significant value to the employer.” When speaking to the Boston Business Journal, Tocci favored a change to the rule that would allow for paid internships, noting that “law firms typically want their interns to produce work of value so they can judge the interns’ capabilities … and the interns typically want to produce valuable writing samples that they can use in their job searches.”

Tax policy

It’s really bad tax policy and it’s really harmful to lawyers and other people in professional services. The way the law practice works … a lot of the work gets done before it gets paid for. Or it never gets paid for. So you have huge write-offs.

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Conflict of interest

This is a textbook case of conflict of interest. It is riddled with potential, if not actual, conflicts. It’s in the best interest of the administration of justice that Judge Saylor step aside.

MBA Chief Legal Counsel Martin W. Healy
Boston Herald, Feb. 16, 2014

Healy was interviewed after prosecutors in the criminal trial of former Probation Department Chief John J. O’Brien renewed their request for Judge F. Dennis Saylor IV to recuse himself, citing a list of people tied to the case that have been friendly with the judge in the past. Former MBA Criminal Justice Section Chair Peter Elikann also spoke to the Boston Herald about the renewed request for Saylor to recuse himself, saying “It’s sort of the perfect storm … There are so many relationships here. Each and every one of them is not a problem, it’s the sheer weight and the number of relationships that could create the appearance of a lack of impartiality.”

Where available, news clips — including audio/video — can be found on our website at www.massbar.org.
Mock Trial Championship set for March 25

He is often called the “lawyer’s lawyer,” due to his work representing lawyers and judges accused of misconduct and other professional lapses.

Mone credits his son for the outcome — “he single-handedly started a human rights campaign in Ireland” — and says the case was one of the highlights of his career.

“That young man was brought to Ireland in shackles,” Mone says. “If I’m remembered for anything in my career, I hope it will be the moment that young man stepped off the plane a free man.”

No substitute for experience

Mone is already remembered for much more than that.

“He’s had a great career,” Healy says. “If anyone did just a fraction of what Mike has done over the course of his career, he or she would have a great career. Mike has really done it all.”

Mone says he has no intention of stepping down any time soon. He says the legal profession has changed significantly since he began practicing.

“More cases go to arbitration or mediation. The hardest thing now is how to train the next generation of trial lawyers,” Mone says. He says there is no substitute for experience. “If you want to be a trial lawyer, you’ve got to find places where you can get experience — the DA’s office, pro bono work, smaller firms that believe in giving young lawyers cases to try.”

Among the many honors he has received over his career are honorary doctor of law degrees from Middlebury College and Suffolk University.

He has served on judicial nominating committees at the request of former Gov. Michael Dukakis, the late Sen. Edward Kennedy, and Sens. John Kerry and Elizabeth Warren.

“Mike has always been a leader,” Boyle says. “He’s been a leader every step of the way."
BUILDING A STRONG FOUNDATION

Why I give

“When I contribute to the MBF, I know that my gift has a direct impact in helping someone who desperately needs the help of a lawyer — usually for something crucial to their life — but cannot possibly afford one. My gifts are added to programs, large and small, that have been selected by attorneys I trust to get the most bang for every gift dollar. Since I don’t work in legal services myself, I know that giving is a responsibility and a privilege. And, a donation to the MBF is the best way to honor a colleague’s achievement, new office or other occasion.”

Thank you to our newest fellows

FOUNDATION FELLOWS
Mary Lu Bilek
UMass School of Law
Jacqueline J. Bowman
Grother Boston Legal Services, Boston
Leslie P. Chuang
Attorney at Law, Boston
Jennifer K. Darbiger
Community Legal Aid, Northampton
Audrey M. Donovan
Attorney at Law, Wilmington
Judith M. Flann
Elder Law Office of Judith M. Flann, Rockland
LOUIS D. BRANDENIS FELLOWS
John Achatz
Klein Hanly LLP, Boston
Breit A. Cohen
Menz Liev, Boston
Alfred J. Geofrion Jr.
Law Offices of Alfred J. Geofrion Jr., Springfield
Catherine E. Reuben
Hirsch Roberts Weinstein, LLP, Boston
James E. Tashjian
Taishjian Sinitarian LLP, Worcester
Mindie Wasserman
Mindie Wasserman JD LLP, Boston

OLIVER WENDELL HOLMES FELLOWS
Daniel J. Gleason
Netter McClane & Fish LLP, Boston
Michelle A. Keith
Attorney at Law, N. Dartmouth
Christopher A. Kenney
Kenney & Sams PC, Boston
Robert S. Molloy
Destination XL Group Inc., Canton

FOUNDATION FELLOW ELAINE M. Epstein
Partner, Todd & Weld LLP, Boston

The MBF Society of Fellows includes Massachusetts attorneys and judges who are committed to giving back to the profession and supporting legal services for the poor in our state. To learn more, or to join, visit www.MassBarFoundation.org.

www.MassBarFoundation.org
**BAR SEEN  Snapshots from around the MBA**

**Young Lawyers take center court**
The MBA’s Young Lawyers Division hosted a Celtics Night on Feb. 12. Members of the division received a Jumbotron introduction and were able to sit court-side for pre-game warm-ups. The Celtics played the San Antonio Spurs at TD Garden.

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**JOIN US**

**2014 Annual Dinner**

**THURSDAY, MAY 15**
**WESTIN BOSTON WATERFRONT HOTEL**
Reception 5:30 p.m. • Dinner 7 p.m.

**Keynote Speaker**
**CHRIS MATTHEWS**
Host of MSNBC’s “Hardball”

**2014 Legislator of the Year**
**REP. GARRETT J. BRADLEY** (D-Hingham)

**2014 President’s Award Recipient**
**HON. MARTIN J. WALSH**
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- Logo/firm name projected at dinner

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Table for 10 — $1,500  Individual tickets — $150

**LOOK FOR EVENT DETAILS ON WWW.MASSBAR.ORG/AD14**
Building Your Law Practice
Through Board Involvement and Other Non-Profit and Civic Activities
Wednesday, March 19, Noon–1 p.m.
MBA, 20 West St., Boston
Faculty:
Sheryl Howard, Esq., program chair
Nicolene & Bluestein LLP, Boston
Stephan Seckler, Esq.
Seckler Legal Consulting and Coaching, Newton
Kristen Zampell Noon, Esq.
Executive Director, Wintham Museum

MBA CLE AT-A-GLANCE
MARCH CONTINUING LEGAL EDUCATION PROGRAMS BY PRACTICE AREA

BUSINESS LAW
Lifestyle of a Business Part IV:
Mergers and Acquisitions and Bankruptcy
Tuesday, March 18, 5–7 p.m.
MBA, 20 West St., Boston
Faculty:
David A. Parke, Esq., program chair
Balleyk, Richardson & Gelinas LLP, Springfield
Francis Morrissey, Esq.
Morrissey, Wilson & Zafrinos LLP, Braintree
Kyradelphia D. Duburessa, Esq.
Foley Hoag LLP, Boston

FACULTY SPOTLIGHT
DAVID E. BELFORT
Bennett & Belfort PC, Cambridge
Program co-chair: “Employment Law for Lawyers”
Belfort is a founding member of Bennett & Belfort PC, an employment and business law boutique in Cambridge. Belfort litsigates employment and commercial disputes, and represents both individuals and organizations in the areas of employment discrimination, restrictive covenants, wages, FMLA, whistleblower claims, fiduciary duty claims, shareholder disputes and other related matters. He is currently the president of the Massachusetts Employment Lawyers Association, an organization dedicated to enforcing and advancing employee rights. Belfort is a frequent author, commentator and lecturer on developments in employment law, is AV rated by Martindale Hubbell and has been named a New England/Massachusetts “Super Lawyer” every year since 2006. He is also a volunteer member of Health Law Advocates, a pro bono advocacy organization aimed at improving access to health care for under-served populations. Belfort obtained his B.A., with honors, from Hobart College and earned his J.D. from The University of New Hampshire School of Law. He resides in Newtonville.

CATHERINE E. REUBEN
Hirsch Roberts Weinstein LLP, Boston
Program co-chair, “Employment Law for Lawyers”
Reuben provides counseling, training and litigation defense for employers’ labor and employment matters. Her clients include both private and nonprofit businesses, and professional organizations involved in a wide range of industries, including education, technology, healthcare, human services, manufacturing, legal and other professional services, insurance, finance/banking, pharmaceuticals, retail and consulting. Often quoted in the press on labor and employment law matters, including Lawyer’s Weekly, the Boston Globe and NBC’s Today, Reuben is ranked in Chambers USA for employment law. She is a frequent speaker on labor and employment law issues and has chairied seminars and served on panels for a variety of trade, bar and continuing legal education associations, organizations and schools. She is a MCAD-certified trainer in discrimination, harassment and reasonable accommodation.
Reuben is a member of the Massachusetts Bar Association’s Budget and Finance committee, and formerly served as co-chair of its Labor and Employment Law Section. She is active in numerous other professional and civic activities and projects, including bar association task forces involved with youth outreach and transgender inclusion.

35TH ANNUAL LABOR & EMPLOYMENT LAW SPRING CONFERENCE
Thursday, April 24, 1–5:30 p.m.
University of Mass. Club Function Room
225 Franklin St., 33rd Floor, Boston
Faculty:
Galen Gilbert, Esq., conference co-chair
Gilbert & O’Bryan PC, Boston
Angela L. Rapko, Esq., conference co-chair
Davies, Brooks & Smith LLP, Boston
Meghan H. Slack, Esq., conference co-chair
Law Office of Meghan Slack, Arlington
Nathan L. Katz, Esq.
Morgan, Brown & Joy LLP, Boston
Daniel J. Murphy, Esq.
Rubin & Rudman LLP, Boston
Beth Myers, Esq.
Rodgers, Powers & Schwartz LLP, Boston
Leigh A. Ferguson, Esq., Bennett & Belfort PC, Cambridge
Sandulli Grace PC, Boston

Catherine E. Reuben, Esq., program co-chair
Hirsch Roberts Weinstein LLP, Boston
Program co-chair, “Employment Law for Lawyers”
Reuben provides counseling, training and litigation defense for employers’ labor and employment matters. Her clients include both private and nonprofit businesses, and professional organizations involved in a wide range of industries, including education, technology, healthcare, human services, manufacturing, legal and other professional services, insurance, finance/banking, pharmaceuticals, retail and consulting. Often quoted in the press on labor and employment law matters, including Lawyer’s Weekly, the Boston Globe and NBC’s Today, Reuben is ranked in Chambers USA for employment law. She is a frequent speaker on labor and employment law issues and has chairied seminars and served on panels for a variety of trade, bar and continuing legal education associations, organizations and schools. She is a MCAD-certified trainer in discrimination, harassment and reasonable accommodation.
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LAWYERS JOURNAL MARCH 2014
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Nathan L. Katz, Esq.
Morgan, Brown & Joy LLP, Boston
Daniel J. Murphy, Esq.
Rubin & Rudman LLP, Boston
Beth Myers, Esq.
Rodgers, Powers & Schwartz LLP, Boston
Leigh A. Ferguson, Esq., Bennett & Belfort PC, Cambridge
Sandulli Grace PC, Boston
Murphy certified as elder law attorney

Massachusetts Bar Association member and Milton attorney Philip D. Murphy has become certified as an Elder Law Attorney by the National Elder Law Foundation, the only organization approved by the American Bar Association to offer certification in the area of elder law.

Murphy, who has served as a member of the MBA House of Delegates representing MassNAELA is “proud, very proud. It’s all about bringing up the standards of the practice to better serve the community we serve.”

The process to become certified is a grueling one. Only about 20 percent of those who take the test pass. MassNAELA, which has about 500 members and is the largest state chapter of the National Academy of Elder Law Attorneys, only has about 25 lawyers amongst its ranks who are certified.

In addition to his recent certification, Murphy has practiced law for more than 30 years in Milton and focuses on elder and special needs law, including estate/medical planning, probate, real estate and guardianship.

Somerville named managing partner at Hemenway & Barnes LLP

Massachusetts Bar Association member Kurt F. Somerville has been named managing partner of the law firm Hemenway & Barnes LLP. A graduate of Dartmouth College and Boston College Law School, Somerville has advised high net worth clients on a variety of issues and concerns related to preserving, enhancing and transferring family wealth for the past 30 years.

Somerville is also an important figure in the trust and estates arena, serving as co-trustee of Jane’s Trust, a leading charitable trust in New England.

In addition to his legal work, Somerville has served as a faculty member and written course materials for Massachusetts Continuing Legal Education, the American Law Institute, the American Bar Association, the National Business Institute and several other legal organizations.

Somerville succeeds fellow MBA member Stephen Kidder as managing partner, who held the position from 2006 to 2013.

Feinberg and Pawa honored as 2013 Lawyers of the Year

Massachusetts Bar Association members Kenneth Feinberg and Matthew F. Pawa were honored as 2013 Lawyers of the Year by Massachusetts Lawyers Weekly, Rhode Island Lawyers Weekly and New England In-House at the 2014 Leaders in the Law event, held Thursday, March 6, at the Boston Park Plaza Hotel.

According to Massachusetts Lawyer’s Weekly’s webpage for the event, Leaders in the Law: “...demonstrate innovative and practical business and legal skills, either as general counsel or staff attorneys. They are corporate in-house lawyers who are leaders in the community, forward thinkers and best exemplify the noble tradition of the legal profession.”

In addition, a special dedication to honor the lifetime achievements of MBA member John J. Curtin was made at the event.
BAR NEWS

Calendar of Events

TUESDAY, MARCH 18
Managing Your Work Search Process
10 a.m.-noon
MBA, 20 West St., Boston

TUESDAY, MARCH 18
Lifecyle of a Business Part IV
Mergers & Acquisitions & Bankruptcy
5:30–7:30 p.m.
University of Massachusetts School of Law – Dartmouth, 333 Faunce Corner Road, North Dartmouth

THURSDAY, MARCH 20
Practicing with Professionalism
8:30 a.m.–5:30 p.m.
University of Massachusetts

THURSDAY, MARCH 20
MBA Mock Trial Final Four Trial
1 p.m.
John Joseph Moakley U.S. Courthouse, 1 Courthouse Way, Boston

THURSDAY, APrIL 2
35th Annual Labor & Employment Law Spring Conference
1:30 p.m.
University of Massachusetts Club, 225 Franklin St., Boston

TUESDAY, APrIL 29
Tiered Community Mentoring Wrap-up Event
9 a.m.-noon
John Adams Courthouse, 1 Pemberton Square, Boston

TUESDAY, MARCH 25
MBA Mock Trial State Finals
10 a.m.-12:30 p.m.
Faneuil Hall Marketplace, Great Hall, Boston

WEDNESDAY, MARCH 26
Employment Law for Lawyers
9 a.m.-noon
MBA, 20 West St., Boston

WEDNESDAY, MARCH 26
Blue Ribbon Commission Hearing
2:30 p.m.
2nd Floor Conference Suite, John Adams Courthouse, 1 Pemberton Square, Boston

WEDNESDAY, MARCH 26
Young Lawyer Speed Networking
3:30-8 p.m.
MBA, 20 West St., Boston

WEDNESDAY, APRIL 2
Monthly Dial-A-Lawyer Program
3:30–7:30 p.m.
Statewide dial-in #: (617) 338-0610

THURSDAY, APRIL 24
5:30 p.m.
University of Massachusetts Club, 225 Franklin St., Boston

TUESDAY, APRIL 29
Tiered Community Mentoring Wrap-up Event
9 a.m.-noon
John Adams Courthouse, 1 Pemberton Square, Boston

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CONTINUED FROM PAGE 10

EXPERTS & RESOURCES

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"the best part of being a legal aid attorney is the ability to assist low income families to stay in their homes, obtain safe shelter, combat wage theft and secure erroneously denied benefits, such as social security disability, unemployment and welfare. the hardest part of being a legal aid attorney is that our office must turn away so many clients who need our representation to protect their livelihood, health and families. for that reason, i am so appreciative of the '12 for 12' effort to heighten awareness of the need for increased funding.

Monica Halas, employment law unit lead attorney, Greater Boston Legal Services

Funding for Massachusetts courts and civil legal aid programs is not just a lawyer issue — it’s a fairness issue. That’s why the Massachusetts Bar Association has launched its “12 for 12” initiative — asking 12,000 lawyers to reach out to 12 clients each, to ask state lawmakers to support our courts and legal aid programs in the fiscal year 2015 budget.

Join “12 for 12” by asking 12 of your clients to call or email their legislators to voice their support for increased funding for our courts and legal aid programs.

Please watch and share our new video, “12 for 12” Program: Funding Fairness for Our Courts and Legal Aid,” where Mass. Bar Association President Douglas K. Sheff explains why funding for our courts and legal aid programs is so important. You can view the video and direct clients to our website, www.massbar.org/12for12, for FAQs, sample language and other useful links.

The goal of this initiative is to ensure that elected representatives hear our collective call for increased funding for courts and civil legal aid programs.

Join ‘12 for 12’: It’s more than funding. It’s fairness.

Earlier this month, Massachusetts Bar Association (MBA) President Douglas K. Sheff recognized U.S. Rep. Tammy Duckworth (D-IL) for her service towards victims of the Boston Marathon bombings. 

Duckworth, an Iraq war veteran and Black Hawk helicopter pilot, lost both her legs and wounded an arm when she was shot down over Iraq in 2004. A recipient of the Purple Heart, Duckworth has visited with victims of the Boston Marathon bombings, including MBTA Transit Police Officer Richard Donohue at Spaulding Rehabilitation Hospital.

“Representative Duckworth embodies the ideals of the Massachusetts Bar Association and its members,” said MBA President Douglas K. Sheff. “We are proud to honor her continued work with Boston Marathon bombing victims and the inspiration she has provided to survivors of this tragedy. Since the marathon bombings last April, the Massachusetts Bar Association has also been a vocal advocate for bombing survivors and our attorneys have provided pro bono assistance to those who needed legal help and information.”

Criminal Justice Compensation Panel to hear from practitioners

The Massachusetts Bar Association’s Blue Ribbon Commission on Criminal Justice Attorney Compensation will hold a hearing on March 26, 2014, at 2 p.m. in the 2nd Floor Conference Suite at the John Adams Courthouse. The hearing is an opportunity for current and former criminal practitioners to discuss the challenges they face living in Massachusetts where compensation rates have changed little in the 20 years since the MBA’s groundbreaking Callahan Report was issued.

The commission was appointed this year by MBA President Douglas Sheff and is chaired by MBA Past President Richard P. Campbell. Members include: Denise Squillante, MBA past president; Randy Chapman, Chapman & Chapman PC; William D. Delahunt, former congressman and district attorney for Norfolk County; Hon. Suzanne V. DelVecchio (ret.), former chief justice, Superior Court, mediator, Commonwealth Mediation; Hon. Charles Johnson, chief justice, Boston Municipal Court; Martin Kane II, McGrath & Kane; Gerard T. Leone, partner, Nixon Peabody LLP and former district attorney, Middlesex County; Richard Lord, chief executive officer and president, Associated Industries of Massachusetts; and Martin W. Healy, MBA chief legal counsel and chief operating officer, who serves as commission counsel.

Members of the MBA’s Blue Ribbon Commission on Criminal Justice Compensation are examining the impact of low prosecutor and public defender salaries on the Massachusetts criminal justice system.

Massachusetts Lawyers Journal | March 2014
Creating a successful leadership transition from law firm founders

BY SUSAN LETTERMAN WHITE

Recently, I assisted a law firm in beginning a leadership transition process. The firm consisted of one founder, additional lawyers, three offices, professional support staff and secretarial support staff. In a small firm, such as this one, leadership transition often means an ownership transition too. When an ownership transition changes the balance of power from vesting fully in one or two founders to others, the firm’s identity is put into flux. When identity changes, changes in responsibilities for making the business model continue to function effectively usually follow.

As a law firm owner, be aware of what you want

Changes in identity and decision-making authority for any organization forces the currently empowered owner or leaders to consider their personal vision for success and goals. This means first asking a very personal question: What do I want? Seven months before the firm’s annual retreat, the founder and I first discussed a leadership transition. Between then and October 2013, the founder, after conversations with his spouse, expressed the desire to transition ownership within the next three to five years. Identifying this SMART goal was an important first step. SMART goals are Specific (ownership transition), Measurable (owner to non-owner), Actionable (possible to identify action steps to reach the goal), Relevant (to vision of a successful and happy future with spouse and no management responsibilities for a business), and Time Bound (three to five years). During the next six months, he began thinking about what that really meant. He was forced to consider the control he was willing to give up. The firm’s name might change. New owners might manage the firm differently or might even change the firm’s vision and strategy. Perhaps they would decide to aim for a different target market. Perhaps they saw the firm’s value differently. Although he wanted to transition ownership, it also was possible that none of the six possible attorneys, identified as possible new owners, would be interested in the responsibilities that are tied to ownership.

Ownership and leadership transitions raise strategy issues

The following strategy-related issues are common in any ownership or leadership transition:
• Do the attorneys to whom ownership and leadership is to be transferred have the requisite skills to be effective? If not, what skills are missing and what is the plan to develop their skills?
• What is the current organizational business model and strategy? Who is responsible for doing what to bring in business, do the work and collect revenue for delivering the work?
• What do the incoming owners and leaders want for the future business model and strategy?
• How will you create a shared understanding and language about the business model for the current and future owners so that coordination of efforts necessary for the transition of roles and responsibilities becomes possible?

Create a shared understanding of and language for discussing strategy issues

In the capacity of law firm consultant and retreat designer and facilitator, I was able to introduce a three-pronged “Open System Business Model” to explain the law firm dynamics, roles and responsibilities. (See Diagrams 1 and 2) The intention was to get the attorneys thinking about what roles and responsibilities, beyond doing good legal work, are necessary to generate clients and revenue in any law firm. This is a significant difference in thinking
partners and associates or owners and employees of a business. After hearing an explanation of how law firms generate clients and revenue and seeing the business model, they examined the actual data collected on the current state of the marketing and sales roles and responsibilities in the law firm. Review and discussion of the data identified two significant gaps in the marketing and sales activities. The first gap was a complete absence of any attorneys publishing to build lawyer reputation. The second was a weakness in developing and adjusting marketing messages to sell individual lawyers and the firm. This “reveal” was the first step in beginning to answer whether the attorneys had adequate skills and how efforts could be coordinated for the business model to be effective.

Make immediate process changes that will drive information sharing, skill development and future behaviors needed to support the business model

Once the group shared a language and understanding of the business model, they could discuss new behaviors to support the effectiveness of the business model. Academic and anecdotal research has repeatedly demonstrated that the best way to learn how to lead and develop marketing and sales skills is by leading and engaging in marketing and sales activities with specific goals. Leading and engaging in marketing and sales activities in small groups is the ideal process design for the shared goals of learning the skills and achieving sales goals. Five separate marketing and sales teams were formed after identifying key clients and potential clients, discussing the best opportunities and deciding on the top five opportunities. Each team identified a team leader. I provided a list of team leadership responsibilities and team marketing and sales tasks. This small change also planted the idea that there will be a need for or an organization redesign.

Organization redesign: What is it and why does it matter?

As mentioned in the introduction, an ownership transition often changes the balance of power, puts the firm’s identity in flux, and changes roles and responsibilities for making the business model effective. It changes the organization dynamics. Organization dynamics refers to the interaction of strategy, structures, processes and resource allocation. When we talk about organization dynamics, we are talking about how the different parts of the organization interact to drive the organization’s revenue generation strategy. Important questions to review are:

1. Are the revenue generation centers supposed to be individual attorneys or groups of attorneys? Once centers are identified, what is the strategy? This action plan that is intended to enable the centers to reach their revenue targets?

2. Which of the organization’s structures ensure that the right people are interacting as needed to reach assigned targets for revenue generation, work production and revenue collection? Which structures impede such behavior? “Structures” refers to the formal and informal groupings of people.

3. Which processes are supporting the skills and best practices necessary to reach those targets? Which processes are obstacles? The term “processes” refers to the Open System Business Model processes for generating requests for legal work, creating the legal work and delivering work and collecting fees.

4. Are resources being allocated as needed to support revenue generation strategic plans?

In closing, prepare for an ownership or leadership transition and increase your success. It’s that simple.

Open System Business Model

Diagram #1

Input

Request for legal work

Processes for getting request for legal work.

Output

Delivery of legal work and free collection

Processes for delivering work and collecting fees.

Throughout

Creation of legal work.

Roles and Responsibilities

Who is doing what?

Diagram #2

Input

Request for legal work

Output

Delivery of legal work and free collection

Who is doing what?

Roles and Responsibilities

Who is doing what?

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Restorative justice another path for citizens of the commonwealth

As we carry out our work in the legal community, it is good to consider the maxim, “Melior est justitia vera praeventibus quam severe punitionibus,” which translates to, “Justice is better when it prevents rather than punishes.” At the same time we also need to remember that one who spared the guilty threatens the innocent. As you ponder these maxims, we move forward. The Middlesex District Attorney Restorative Justice Diversion also lift up the voices of the harmed by a criminal act and work with the legal community to further justice in our commonwealth. In doing so, we ask you to consider the following questions: How can we work towards justice that prevents repeat offending, holds responsible parties accountable and increases victim satisfaction?

What if a program existed that evaluated the root causes of a person’s delinquent act? In conjunction with law enforcement, family members, the victim and supporting members of the community, would come together to create individually-tailored, case-specific resolutions that demanded accountability while providing an opportunity to repair the harm created by the offense, rather than just punish the offender? Would it not be an exciting way to attempt to repair, increase victim satisfaction and reduce recidivism?

Today, this kind of program does exist. Juvenile Court Restorative Justice Diversion (JCRJD), a nonprofit diversion program based on restorative justice, has partnered with the Middlesex District Attorney’s Office to lead the commonwealth in this new option for administering justice. This article explains the many steps that took place in order to make this program a reality.

Restorative justice, an emerging niche in the practice of law, is a set of principles that encourage engagement between parties after a criminal act, and seeks to assess the harm and determine what can be done to repair it, while holding the offender accountable for their actions. In the restorative justice framework, harm is understood as between members of a community, not between actors and the state. The restorative justice model differs from the traditional, more adversarial approach in four key ways: First, participation must be entirely voluntary for all parties. Second, the process focuses on the harm created by the offense, rather than seeking to punish the occurrence of the offense itself. Third, the responsible party must acknowledge that their harmful act created an obligation to the impacted party and the larger community. Fourth, the responsible party must engage in a reparative process with the impacted party, their family members and others that encourage them rather than being punished in isolation by the state. Restorative justice aims to reestablish the personal and community relationshipships that were damaged.

For seven years, the Legal Skills in Social Change (LSSC) program at Northeastern University School of Law (NUSL) has invested considerable human capital into better understanding restorative justice’s value to the field of law, and researching how its principles can be implemented in legislation, school discipline and court diversion. As the director of LSSC, Professor Susan Mazze-Rothstein has facilitated and directed nearly 100 students since 2006 to complete five distinct LSSC projects, numerous independent study assignments and nearly 12,000 hours of research. NUSSL research has shown that school discipline has become increasingly punitive and adversarial, funnelling children and youth more rapidly into the criminal justice system. The JCRJD program grew out of this work and continues to help bring restorative justice into practice.

JCRJD began its work in Middlesex County, in large part because of the cross-agency collaborations and the demonstrated level of need in the community. The support in Middlesex, and specifically the city of Lowell, was fostered by First Justice Jay Blitzman and included a variety of stakeholders, such as the District Attorney’s Office, Public Defender’s Office, the public school system, police department and several nonprofit community organizations that attended monthly “School Court” meetings at the Juvenile Court. In 2008, after seeing a sharp increase in the number of young people in Juvenile Court and understanding that a tarnished record can create a whole new set of challenges for young people, this collaborative set out to identify alternative methods for addressing the needs of youth and families. The LSSC program program they founded, the Juvenile Court Restorative Justice Meetings program, was an outgrowth of the work of these “School Court” meetings through its dedicated research in 2010 for Associate Justice Leslie Harris of Suffolk County and First Justice Jay Blitzman of Middlesex County. One result of these many efforts was the new partnership with JCRJD as another resource for the court.

Over the last few years, JCRJD has become recognized as a positive option for responding to cases in the Middlesex County Juvenile Court in Lowell. JCRJD’s executive director is attorney Erin V. Freeborn, an expert in restorative justice practices. Freeborn is also a member of the Massachusetts Restorative Justice Collaborative and the strategic team coordinating support for Senate Bill 52, An Act to Promote Restorative Practices.

JCRJD’s primary facilitator at this time is Janet Connors, a restorative justice practitioner, and a homicide support services consultant at Beth Israel Deaconess Hospital. Connors realized the value of restorative justice in her own life when she met with some of the men who pled guilty to killing her son in 2001. She is widely considered one of the best practitioners in the commonwealth. JCRJD is also supported by an active board of directors, which includes two Juvenile Court judges as advisory members. Freeborn is both relevant experience in nonprofit organizational development, fundraising and community organizing. Professor Susan Mazze-Rothstein, Professor Hirsch, Jeff Coos, Roy Karp and Amanda Grant-Rose.

JCRJD’s primary partner is the Middlesex District Attorney’s Office. JCRJD and Middlesex District Attorney Mark Schapstein and juvenile Ryan recently received support from the U.S. Department of Justice, Office of Justice Programs as awarded by the Massachusetts Executive Office of Public Safety and Security to accomplish their restorative justice cases.1 District Attorney Ryan supports restorative justice programs because they “require offenders to take responsibility for their actions, listen to the victims, and take active and concrete steps to make amends to the victim and community.” Her support has been invaluable for JCRJD and the institution-alization of restorative justice and has positioned Middlesex County as a leader in the state.

JCRJD’s mission is to keep at-risk youth in school and out of juvenile detention by offering a restorative justice program that addresses the underlying causes of conflict and true intent of crime on communities. JCRJD’s goals include:

• To provide at-risk youth in Massachusets with an alternative to the court process.

• To provide a path to justice that is inclusive of victims’ voices and needs.

• To empower youth to be agents for positive change in their communities.

• To train community partners about the principles and practices of restorative justice.

JCRJD is an exciting alternative resource for the juvenile court system because it has the unique ability to consider cultural differences and socio-economic impacts when addressing an offense. It is able to address the root causes behind an event beyond the restorative justice shifts the paradigm with which we evaluate an event away from what laws have broken to the question of what harm does he/she deserve. The paradigm shifts to ask: who has been hurt, what are their needs, and whose obligations are these? JCRJD can then create a case-specific reparation agreement focused on accountability and support. This individualized reparation agreement also provides law enforcement with systems to support a young person as they make amends, helping fulfill one of the organizations primary missions — reducing recidivism.

JCRJD also recently partnered with the Lowell Police Department to conduct trainings in restorative justice and help law enforcement navigate the process for identifying cases, making referrals and participating in restorative justice meetings. Almost 1,000 police officers from 33 departments, spanning Middlesex, Essex and Suffolk counties, have attended trainings since September 2013.

According to data provided by the Lowell Police Department, from 2009-2011, an average of 407 young people were arrested per year. The primary offense categories were crimes against the person (136), nuisance crimes (68) and property crimes (62). JCRJD accepts referrals from all of these categories and will be able to reach more cases as law enforcement officers are trained on this new approach and how to flag cases. JCRJD’s objective referral criteria offer diversion to young people of all races and socioeconomic status. This model is highly replicable and has the potential for scale across Massachusetts. JCRJD has expanded its geographic outreach beyond the Lowell area. In 2014, JCRJD intends to accept referrals from the entire Middlesex County and focus on partnership building that will lead to referrals from surrounding counties. This special initiative has the potential to change the face of juvenile justice for hundreds of youth and community members in the coming years. JCRJD’s intervention with first-time offenders aims to make a young person’s first encounter with the court their last and JCRJD’s community involvement after a crime aims to increase individual satisfaction and feelings of public safety.

Today, the legal community in Massachusetts has embraced restorative justice as an effective and impactful framework to work to achieve a safer and more just society. For example, Middlesex County Juvenile Court has embraced restorative justice as a diversion option and the Boston Public School Committee has incorporated restorative justice into the Disciplinary Code. Additionally, restorative justice is the subject of pending legislation on Beacon Hill, in Senate Bill 52, An Act to Promote Restorative Practices, which would provide restorative justice options for adults in the court system as well as juveniles. If you are interested in supporting this work, getting involved with the JCRJD in the Lowell, Massachusetts, or learning more about the work of the Juvenile Court Restorative Justice Diversion program, please contact Erin V. Freeborn at erin.freeborn@massrestorativejusticediversion.org.

1. Federal grant #2012-IB-08004 The opinions, findings, and conclusions or recommendations expressed in this publication are those of the authors and do not necessarily reflect the views of the State or the U.S. Department of Justice, Bureau of Justice Assistance.
A benefit for all

How the benefit corporation could ensure access to justice for the underserved

By Joshua D. Nadreau

On Jan. 30, 2014, more than 500 attorneys descended on the State House to lobby their elected representatives to push for increased funding for civil legal aid in the 2014 state budget. With a goal of $17 million, attorneys from throughout the commonwealth sought to highlight the importance of such aid, particularly in a climate that has witnessed a 51 percent decrease in funding since 2008, despite a nearly 200,000-person growth of those eligible for free legal representation.

Although the continued support for civil legal aid is paramount, there exists an even larger segment of the population that, while ineligible for free legal aid, are incapable of affording legal representation and remain grossly underserved in their basic legal needs. For example, only individuals making less than $14,588, or just under $29,813 for a family of four, qualify for the free assistance offered by organizations such as Greater Boston Legal Services. This results in a significant gap between those who qualify and those who can afford “market” rates. What is needed is an increased effort to promote the availability of low cost legal services provided to those who qualify.

One way to help bridge this gap might come from an unlikely place — our tax code. Specifically, for-profit law firms and attorneys dedicated to serving underserved populations should receive preferential tax treatment, akin to the tax breaks afforded to others engaged in “charitable” pursuits.

Within the past decade, the Supreme Judicial Court (SJC) has taken a somewhat broader view of what constitutes charitable tax laws. In particular, the SJC’s decisions in New Habitat, Inc. v. Tax Collector of Cambridge, 451 Mass. 729 (2008), and Bridge water State University Foundation v. Board of Assessors of Bridgewater, 463 Mass. 154 (2012), have been viewed by many commentators as a liberalization of the commonwealth’s treatment of tax-exempt charitable organizations. That the SJC is willing to revisit and modernize its application of charitable tax laws suggests that it is time to reconsider the tax status of what some consider “non-traditional” or “quasi-charitable” endeavors.

Indeed, significant inroads have already been made at the liberalization of once strict charitable tax limits on a charitable organization’s operations. Although charitable entities remain prohibited from distributing their income to non-charitable uses, charities are already permitted to charge substantial fees for their services and pay significant salaries to their employees. For example, in New Habitat, the charity charged an “entrance fee” of $150,000 in addition to $17,000 a month for the brain-injured residents of its long-term housing facility. Moreover, it has become commonplace for charities to spend significant amounts of money in salaries to their employees. According to the Attorney General’s 2013 report, “Massachusetts Public Charities CEO Compensation Review,” CEO compensation ranged from a “low” of $487,397 to a high of $8,827,494 for CEOs of the 25 largest public charities throughout the commonwealth from 2009-2011.

Given these staggering numbers, a solo-practitioner or law firm charging $40 or $50 an hour to a client, who does not qualify for free assistance or cannot afford representation, in exchange for a lower tax bill is certainly a “quasi-charitable” endeavor. If bona fide charitable organizations are permitted to make their directors and CEOs millionaires while avoiding taxation, then it is certainly time to consider expanding the umbrella for charitable organizations to those engaging in much needed, low-cost legal services, even if they make a modest profit.

Such an expansion is unlikely to come through judicial decisions alone. Fortunately, however, an appropriate framework and enforcement mechanism largely exists already for the legislature to follow: the benefit corporation. Statutorily, benefit corporations are for-profit entities with a purpose of creating a positive impact on society. Enacted in 2012, the Massachusetts Benefit Corporation Act added Massachusetts to the 19 states and the District of Columbia that also recognize the socially conscious corporate entity.

Benefit corporations differ from traditional corporations in three significant ways. First, benefit corporation fiduciaries are permitted to prioritize social responsibility and its impacts over the corporation’s bottom line without incurring the risk of shareholder litigation. Second, benefit corporations are subject to heightened oversight within the organization by virtue of the statutorily mandated “benefit director.” The benefit director oversees and reports on the corporation’s public benefit goals, must be independent, and may not serve in any other role within the corporation. Finally, benefit corporations are required to issue an annual benefit report, which evaluates the corporation against an independent third party metric. Consequently, benefit corporations are subject to increased accountability and oversight by both third parties and their shareholders.

Building on this concept, I propose the establishment of a new corporate entity, the “legal benefit organization” (LBO), by the legislature. Essentially, an LBO would serve clients with income higher than the eligibility guidelines for existing civil legal aid programs, but not nearly high enough to afford market-priced legal services. In exchange for reduced taxation, attorneys would be required to charge sub-market rates relative to the client’s income. Such rates...
Over 70 percent of lawyers in private practice in the United States are in firms of 20 or fewer attorneys. Nearly half of all lawyers in the United States are solo practitioners. Although most law schools send a majority of their students into small and solo practices, much of traditional law school education is designed to train associates in corporate firms, with minor curricular deference to public interest and government practice. Although many of these attorneys choose solo or small firm practice intentionally, current economic conditions are adding to the growing ranks of legal entrepreneurs. These graduates need client-based lawyering experience during law school, as well as courses in business planning, marketing, client generation and retention, technology-based practice systems, billing and attorney’s fees practice, fee-generating and fee-shifting statutes, and other courses related to the host of issues that attach to solo or small firm practice.

Low- and moderate-income individuals cannot afford to obtain the services needed to confront the legal problems of everyday life. These problems include maintaining a home in times of financial crisis; family disruption and death; unsafe or unlawful leased homes; unfaith, unhealthy, and discrimina-
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MARCO LAREDO
Massachusetts Law Review Book Review Editor
Partner, Laredo & Smith LLP, Boston

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Decanting after Morse v. Kraft
SJC takes up ‘pouring’ issue in Kraft family trust

BY DEBRA RAHMIN SILBERSTEIN AND CHRISTOPHER G.R. DAVIES

To a wine enthusiast, decanting serves a dual purpose: to provide aeration and to separate the wine from any sediment that developed during the aging process. To decant, simply pour the contents of the wine bottle into a separate container (the decanter), leaving any indigestible sediment behind. To the trust and estate attorney, decanting generally means “pouring” the assets of an existing trust into a new trust (the decanter), and segregating the provisions of the old trust left behind.

It might sound fairly simple, but the power to decant can have serious implications by changing a grantor’s intent, omitting or restricting beneficiaries, and causing unintended tax consequences. Policy in Massachusetts, by its relative silence on the subject, appears to recognize this. In fact, during the recent enactment of the Massachusetts Uniform Trust Code in 2012, and a full review of trust law during the process, Massachusetts chose not to adopt a decanting statute.

Despite the legislative silence, the Supreme Judicial Court (SJC) recently took up the decanting issue in Morse v. Kraft, 466 Mass. 92 (2013). Richard Morse, sole trustee of the Kraft Family Irrevocable Trust (the trust), sought the SJC’s approval to decant the trust’s assets. Created by Robert Kraft (the donor) in 1982, the Kraft Family Irrevocable Trust was administered by the Kraft Family Irrevocable Trust Association, with a dual purpose: to provide aeration and sediment separation. To decant, simply pour the contents of the wine bottle into a separate container (the decanter), leaving any indigestible sediment behind. To the trust and estate attorney, decanting generally means “pouring” the assets of an existing trust into a new trust (the decanter), and segregating the provisions of the old trust left behind.

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In addition to the terms of the trust, the parameters of a trustee’s powers are defined by a large body of trust and tax law. A general trust power is found throughout the Massachusetts Uniform Trust Code (MUTC), which provides the framework and “default rules” within which Massachusetts trusts should be administered. See Mass. Gen. L. c. 203E (2012). The MUTC also outlines avenues to the court, if and when judicial intervention is appropriate, and it establishes certain duties that cannot be avoided. These duties include, but are not limited to: (1) duties of skill, care, and loyalty (see id. at §§ 802, 804, 806); (2) duty to furnish information to, and communicate with, beneficiaries (id. at § 813); (3) duty to avoid conflicts of interest (id. at 802); (4) duty to segregate property (id. at § 810); (5) duty of impartiality regarding current and future beneficiaries (id. at § 803); and (6) duty to enforce and defend claims of the trust (id. at § 811).

In addition to the MUTC, a trustee must understand that the Massachusetts Investor Act (MIA), G.L. c. 203C, which addresses fiduciary investment author- ity as it concerns the investment performance of the trust portfolio as a whole. Broadly stated, the MIA permits a trustee to invest assets under the “modern investment portfolio,” or “total return” theories, an important evolution from prior standards. Equally important is the Massachusetts Principal and Income Act, G.L. c. 203D, § 1, which addresses the general fiduciary duty of care and relates to determining appropriate distributions of trust property to current beneficiaries, depending on the trust’s purpose and the importance, and interrelation, of both the MIA and Principal and Income Act and takes them into consideration when setting investment policies and making distribution decisions. Massachusetts case law also provides a rich source of trust law principles (a discussion beyond the scope of this article).

Once familiar with the trust document and relevant laws, and upon accep- tance of the trusteeship, the real work of administration begins. First, and perhaps foremost, a trustee makes distributions to current beneficiaries while still preserving trust principal for future beneficiaries. When making distributions, a trustee must respect the express provisions of the trust, which range from an “ascertainable stan- dard” to broad discretion. Whatever the case may be, a trustee making distributions should keep in mind the current and future beneficiaries, sometimes years away, while remembering the interests of future beneficiaries (involving the duty of impartiality).
Petition for instructions and complaints for declaratory judgment in the Probate Court

**Final parity rule supports protections for mental health and addiction benefits**

**BY LAURA GOODMAN**

On Nov. 8, 2013, mental health stake-holders across the nation applauded the release of a “Final Rule” implementing the Mental Health Parity and Addiction Equity Act of 2008 (MHPAEA). The long-awaited regulations arrived more than five years after the MHPAEA was signed into law. Although interim regu-lations were issued in 2010, the Final Rule offers much needed clarification and more definitive guidance on a complex area of health care law.³

**Background on MHPAEA**

The MHPAEA is a federal law that requires many health benefit plans to cover mental health and substance use disorder (MH/SUD) services to the same extent the plans cover medical and surgical services. For example, health plans cannot impose greater financial requirements (e.g., copayments) for MH/SUD treatment, disparate financial requirements (e.g., copayments) for MH/SUD treatment, or that may or may not anger the siblings or the issue of the siblings, the personal representative should file a petition for instructions. The siblings or issue of the siblings can then decide whether or not to advocate in a favor of one interpretation or another to litigate against those who have a different interpretation.

Litigation of the issues raised by a petition for instructions is governed by the procedural rules of the Probate Court and the Massachusetts Rules of Civil Proce-dure. Interested parties often choose not to appear, agreeing that an instrument is ambiguous and willing to let the court decide whatever the court decides. Or interested parties may file an

**Health law protections strengthened**

Final parity rule supports protections for mental health and addiction benefits

**BY PATRICIA L. DAVIDSON**

Fiduciaries have a lot of authority, the proverbial buck stops with them. And with all that discretion, not to mention all that fiduciary duty, fiduciaries must have all the answers, right? Aren’t they the omniscient wizards of wills and trusts? Believe it or not, trustees and personal representatives do not have all the answers. Neither do their wise counsel. Sometimes an instrument is clear as mud. Or it is internally inconsistent. Or the beneficiaries have different opinions about what a fiduciary should or should not do.

When questions about the interpretation of an instrument persist, petitions (or sometimes complaints) for instructions and complaints for declaratory judg-ment utilize the probate court’s equity jurisdiction to solve issues that may or may not be adversarial. While a petition for instructions takes a neutral position, a complaint for a declaratory judgment defines a controversy and then advocates for instructions takes a neutral position, may not be adversarial. While a petition for instructions takes a neutral position, a complaint for a declaratory judgment could define a controversy and then advocates for instructions.

A petition for instructions asks the court, “what do we do?” A fiduciary typ-ically files the petition, seeking specific direction from the court in the form of a judgment. The judgment resolves the legal question and provides guidance to the fiduciary, successor fiduciaries and beneficiaries.

The judgment also should insulate a fiduciary from liability for actions the fiduciary takes in accordance with the judgment. A petition for instructions and the resulting judgment take some of the guesswork out of fulfilling fiduciary obliga-tions and thus should help avoid, or at least minimize, conflicts with beneficia ries and the potential claims for breach of fiduciary duty that can arise from those conflicts.

In addition to how to interpret an ambigious instrument, questions asked by a petition for instructions can include how to make distributions, how to value assets, whether or not there is authority to take action, how to apply or interpret relevant law, and whether adopted issue have the same rights as biological issue. A petition for instructions must address a present issue. It cannot request direc-tion on a future decision or ratification or ratification of the fiduciary’s past con-duct.

A petition for instructions is spe-cifically permitted by the Massachusetts Uniform Trust Code (MUTC). G.L.c. 203E, §§ 302-04. It must be served upon all interested parties. A citation may also distinguish publication of the proceedings. In many cases, the fiduciary may seek and/or the court may request the appointment of a guardian ad litem in some cases.

A petition for instructions can pro-vide a context for interested parties, usu-ally differing beneficiaries or factions of beneficiaries, to litigate if they seek to take a position on the issues. Often, once the petition tees up the issues, a fiduciary can watch from the sidelines as benefi-ciaries with opposing legal positions lit-igate.

For example, a will may be ambigious about the distribution of a share of a beneficiary who predeceased the testator. A literal reading of one sentence seems to indicate the share passes to the testa-tor’s surviving siblings and a literal read-ing of another sentence seems to indicate the share passes to the issue of the sur-viving siblings. Everyone agrees that the drafting is poor and ambiguous. Rather than make a distribution that may or may not be consistent with the testator’s intent or that may or may not anger the siblings or the issue of the siblings, the personal representative should file a petition for instructions. Thesiblings or issue of the siblings can then decide whether or not to advocate in a favor of one interpretation or another to litigate against those who have a different interpretation.

Litigation of the issues raised by a petition for instructions is governed by the procedural rules of the Probate Court and the Massachusetts Rules of Civil Proce-dure. Interested parties often choose not to appear, agreeing that an instrument is ambiguous and willing to let the court decide whatever the court decides. Or interested parties may file an

**Final Rule Highlights**

While the MHPAEA provides significant consumer protections for health plan members requiring mental health or substance use disorder treatment, the lack of final regulations led to uncertainty surrounding application of the law. State and federal agencies charged with enforcing the MHPAEA were unsure how to effectively imple-ment the law’s requirements, resulting in relatively weak enforcement efforts. The final regulations provide more clar-ity and give more clout to the agencies, which will ultimately improve access to needed treatment of mental health and substance use disorders.

The key provisions of the final regu-lations include:

- **Clarification that parity require-ments apply to the full “scope of services” offered by a health plan, including “intermediate” services such as residential treatment, partial hospitalization, and intensive outpatient programs.**
- **Prohibition of discriminatory limita-tions on coverage based on provider geographic location, facility type, or specialty.**
- **A requirement that insurers disclose more comprehensive information about how they make coverage deci-sions.**
- **Clarification that states have pri-mary enforcement authority when it comes to parity.**

**Parity across a broader scope of services**

Prior to the Final Rule, a major un-resolved issue was whether the MHP EA PAE’s requirements apply to the full

**“scope of services” available to treat mental health and substance use disor-ders. While the MHPAEA and its 2010 interim regulations discussed inpatient and outpatient benefits, they were silent on “intermediate” services such as resi-dential treatment, partial hospitalization, and intensive outpatient programs. Significantly, the Final Rule clarifies that intermediate MH/SUD services are treated like federal parity services. While health plans do not have to offer benefits for any particular intermediate MH/SUD service, a plan must cover any intermediate MH/SUD services that are comparable to intermediate services covered for medical/surgical condi-tions.**

**Non-Quantitative Treatment Limitations**

Fiduciaries and its interim regu-lations prohibited plans from imposing disparate financial requirements (e.g., copayments) for MH/SUD treatment, and barred plans from covering fewer office visits or hospital days for such care. The interim rule also interpreted the law to prohibit “non-quantitative treatment limitations” (NQTLs), which cannot be measured in numbers or dol-lar amounts. Two examples of NQTLs are prior authorization procedures and “fail first” policies, where patients must first try and fail at a lower level of care (e.g., outpatient therapy) before a higher level of care will be considered. The final rule will be approved. Under the

**P R O B A T E L A W**
spective of the language of the trust. Id. at 99. Further, the SJC put drafting attorneys on notice that the current wording of the power suggests an intent to preclude decanting.

The SJC also recognized that the power to decant is potentially the power to amend an unmanageable trust. (See Morse, 466 Mass. at 180.) With the potential for abuse that future legislation in the commonwealth will need to address. Twenty-one states have adopted some form of decanting legislation and a handful more are actively considering it. (See M. Patricia Culler, American College of Trust and Estate Counsel, List of States with Decanting Statutes, Passed or Proposed, Nov. 15, 2013.) These states, in developing their legislation have developed a model of understanding and practical management tools in accounting and billing, marketing, external controls (financial auditing and effectiveness assessments) and other business competencies. Therefore, through the Accelerator Clinic, student will learn a replicable model for building a sustainable practice. In this article, “Accelerator” refers to the third-year portion of the program. Case selections, outcomes and clients will be intentionally chosen to be studied to offer students the opportunity to learn techniques to assess both the value to clients and the organization’s bottom line. Student learning will include observation, participation, and hands-on experience in accounting and billing, marketing, external controls (financial auditing and effectiveness assessments) and other business competencies.
TRUSTEE
Continued from page 20

loss in asset value may be the most sig-
nificant liability risk faced by a trustee. Asset
inflation typically occurs in an inflation-
ary manner, so a cautious trustee will de-
velop a written trust investment policy and
will review that policy at least every year.
A trustee should not ignore the essential responsibility to determine the basic asset allocation targets of a trust (i.e., investment goals or a fixed in-
come component), both the MUTC and the
MHPAEA permit trustees to “delegate” investment responsibilities to other pro-
fessionals, such as investment decisions.
See G.L.c. 203E, § 807; G.L.c. 203C, § 10. If an investment advisor is selected and monitored with care, delegation of these tasks can greatly reduce the trust-
ee’s personal risk for liabilities associ-
ated with losses. Id. Importantly, a lawyer
should not provide specific investment
advice (or advertise investment services)
unless she is a Registered Investment
Advisor under applicable federal and
state securities laws. E.g., G.L.c. 110A, § 201.

PETITION
Continued from page 2

appeal, answer and engage in dis-
covery, particularly if the issue concerns a settlor’s or testator’s intent. Interested
parties may file counterclaim or cross-
claim for a declaratory judgment assert-
ing his/her view of the appropriate outcome.

The petitioner is typically eager to
obtain a judgment as soon as possible.
The petitioner often must coordinate the
advance of the case, since a declaratory
judgment is often most interested in an expe-
dition of discovery. If no interested parties appear, the court may issue a
status or pretrial conference to ascertain
how the court wishes to advance and ad-
judge the matter. A court may request legal
memorandum from the petitioner
on the issues. While the petitioner will
not take a position on the matter, the pet-
titioner can explain the pending issues and
relevant law. The petition should try
to ensure that a judgment is comprehen-
sive, answering the questions raised and
providing the answers. Thus, if so that the
judgment is defensible to interested par-
ties and successor fiduciaries. If
interested parties appear in the
action, they may file cross-motions for
judgment on the pleadings or cross-
claims for summary judgment. If material
facts are in dispute, as is often the case
in matters of intent, an evidentiary hear-
ing may be necessary in order for the
court to issue the requested instructions.

Unlike other cases, settlement may be appropriate in order to minimize fees and
achieve a modus of harmony among
interested parties. A fiduciary will al-
most always seek to have the settlement
agreement entered as a judgment to
minimize liability and to provide expla-
nation to others, known and unknown,
who have an interest in the matter. Any
settlement should be consistent with the
settlor’s or testator’s likely interest, agree-
able to a sufficient number of interested
parties, particularly those who have ap-
peared, and within the scope of the fidu-
 ciary’s discretion.

A petitioner’s fee may be paid from
the estate or the trust. Respondent’s fees
are with the court’s discretion as “justice
and equity” permit under G.L.c. 215, § 45. An award of fees to a respondent is un-
ger intended to cover the legal expenses of
a petitioner in a petition for instruction may disagree
on the outcome, they generally agree of
the necessity of the proceeding.

Mental health parity information and resources
Department of Labor
www.dol.gov/ehs/mentalHealthparity

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The interim regulations included a
plan uses in setting provider reim-
bursement rates as a form
of NQTL and explains that any factors
limits based on geographic location,
provider reimbursement rates as a form
of NQTL and explains that any factors
limits based on geographic location,
that affect medical necessity may
be considered NQTL. In other words, the
MHPAEA Final Rule defines “instruments” to include medical necessity criteria and policies
establishing NQTLs. The Final Rule recognizes
that health plans may take into account
clinically appropriate standards of care” in establishing medical coverage
policies; however, the rule explicitly
limits clinical appropriateness as an express
exemption from compliance with the
parity law.

Increased health plan transparency and disclosure
The Final Rule requires increased transparency and disclosure about how
health plans make decisions on what
they cover. According to the rule, health plans must disclose to members
and beneficiaries, since failure to commu-
nicate adequately may be a violation of
duties contained in the trust instrument
and the MUTC) and may result in feel-
ings of mistrust, even if unintentional. Id.

Tax Considerations
A trustee must also ensure compli-
ce with tax reporting and payment ob-
duties. In general, the person who acts as
a trust is a “taxpayer,” requiring trustees to file annual federal and state income tax
returns. See Federal Form 1041, Mas-
sachusetts Form 2. These statements may
be responsible for the payment of federal
and state income taxes. Applicable in-
come tax rules are complicated and dif-
fier in important respects from the rules
that apply to individuals, so a cautious
trustee will consult regularly with his or
her tax professional, preferably before the
trust is funded. A trustee must also
understand, and plan for, the gift,
estate and generation skipping transfer
taxes consequences of particular trusts.
As this article, which provides only a
glimpse into trust objectives, it may
create conflicts between fiduciaries and
beneficiaries or between factions of
beneficiaries. The complaint provides a
case for differing parties to litigate, sometimes very assertively. Defendants
typically file a counterclaim seeking a
declaration consistent with their view of
the issues. The litigation may re-
quire discovery and a trial, particularly
if intent is at issue. A declaratory judg-
mnet action certainly can be settled if a
sufficient number of interested parties
assert. The petitioner will seek to memo-
ralize the settlement as a judg-
ment in order to settle the controversy
now and in the future.

In probate matters, rightly so, courts
are most concerned with honoring the
intent of settlors and testators. While
trusts typically provide the window into
that intent. But when they don’t, peti-
tions for instructions and complaints
for declaratory judgment provide fidu-
ciaries and beneficiaries tools that help
effect more adversarial litigation, such
as a potential breach of fiduciary duty
claim that may be brewing among un-
happy beneficiaries. The declaration
would settle the controversy and re-
move uncertainty for all interested par-
ties. If the fiduciary acts in accordance
with the declaration, the beneficiaries
would be insulated from liability.

A complaint for declaratory judgment is an adversarial proceeding,
it is often considered the least adversar-
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create conflicts between fiduciaries and
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