Elevate justice, raise the pay

The Massachusetts Bar Association is the preeminent voice of the legal profession, and has never stopped speaking about the need to continue to fight for justice for all. This month with the advent of voir dire in the commonwealth our voice was heard yet again, speaking loudly in unison with our colleagues at the Massachusetts Academy of Trial Attorneys and in the judiciary.

The MBA has never stopped speaking up about the need for fairness in our courts and I am so incredibly proud of what we accomplished. I also want to publicly recognize and congratulate MBA Chief Legal Counsel and Chief Operating Officer Martin W. Healy, who deservedly was just named a 2014 Lawyer of the Year by Massachusetts Lawyers Weekly for his leading role in the unified efforts to make voir dire a reality in Massachusetts.

Speaking up for justice and fairness is part of our responsibility as the statewide bar association. And even though we cleared one hurdle with voir dire, there is still more to be done as we work hand in hand with the courts to hone the process. We could not have done as we work hand in hand with our colleagues at the Massachusetts Academy of Trial Attorneys and in the judiciary.

BY LEE ANN CONSTANTINE

The New Year began with a flurry of activity on Beacon Hill. On Jan. 7, the Senate elected Sen. Stanley C. Rosenberg (D-Amherst) as its new president, while the House of Representatives re-elected Rep. Robert A. DeLeo (D-Winthrop) as the speaker of the house. On Jan. 8, Charles D. Baker was sworn in as governor of the commonwealth of Massachusetts.

A new era for the Massachusetts legal system began this month when the highly anticipated voir dire law officially took effect on Feb. 2 in criminal and civil trials in the Superior Court. The law (Chapter 254 of the Acts of 2014), which passed last August, now permits attorney-directed voir dire during the jury empannelment process.

Hailed as a definitive legislative victory, the Massachusetts Bar Association and the Massachusetts Academy of Trial Attorneys advocated for the law’s passage for more than 20 years. Thanks to the symbiotic collaboration of the bench and bar in the commonwealth, Massachusetts now joins the vast majority of states that have laws allowing for attorney-directed voir dire.

Although the law is a new measure here, Superior Court Judge Dennis J. Curran has allowed attorney-directed voir dire at his discretion in practically all of the civil cases he has presided over during the last eight years.

“I think it’s a tremendous improvement and reform. It gives lawyers a feeling that there’s a level playing field now,” said Curran, who was appointed as an associate justice of the Superior Court by Gov. Deval L. Patrick in 2007 after serving in the Boston Municipal Court.

Curran will be honored with the Chief Justice Edward F. Hennessey Award at the MBA’s Annual Dinner on May 7 for his work with voir dire. The award is given to individuals who have demonstrated extraordinary leadership and dedication to improving the administration of justice.

“Judge Curran has always been one who thinks outside of the box, always with the goal of ensuring fairness and transparency in the process. We could not have done as we work hand in hand with our colleagues at the Massachusetts Academy of Trial Attorneys and in the judiciary.”

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BY MIKE VIGNUEUX

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had the progress in our system today if it were not for the cooperation and assistance of our colleagues on the bench, and we all owe them a debt of gratitude for their dedication. We are very fortunate to share the same objectives, and together we will realize them to the benefit of us all.

Right now there are two critical issues looming: legal aid funding and proper compensation for the attorneys in our criminal justice system. Both of these issues impact access to justice and both need to be addressed in the immediate future.

Access to legal aid is the only path to true and equal access to justice. This is why the MBA annually makes legal aid funding one of our legislative priorities. I want to thank the hundreds of attorneys who “walked” with us at last month’s Walk to the Hill, making our collective voice heard loud and clear about the dire need to increase funding for civil legal aid. We will continue to advocate on behalf of legal aid, as well as for adequate funding for our courts.

It is also imperative that we advocate zealously for appropriate salaries for the guardians of our criminal justice system: ADAs, public defenders and bar advocates — many of whom are currently not much better off financially than those who might qualify for legal aid themselves. Low pay rates are leading to untenable levels of turnover and becoming a bona fide crisis in our courts.

This past year I had the privilege to serve on a state commission convened by then-Gov. Deval Patrick to study ADA and CPCS staff attorney salaries. The Governor’s Commission released a report that recommended a minimum salary for both ADAs and CPCS staff counsel of $55,360, and that implementation occurs within three years. The recommendations sparked a lead editorial in the Boston Globe on Tuesday, Jan. 20, which said, “Beacon Hill should try to find a way to grant those salaries.”

If this sounds familiar, it’s because we have said it before. Last May the MBA issued our own report entitled, “Doing Right by Those Who Labor for Justice: Fair and Equitable Compensation for Attorneys Serving the Commonwealth in its Criminal Courts.” The report called for increases in salaries after a Blue Ribbon Commission led by MBA Past President Richard P. Campbell studied the issue and conducted a public hearing. It was the MBA report that prompted Patrick’s study, and the Governor’s Commission’s report incorporated the MBA’s report by reference.

And while rates for bar advocates were beyond the scope of the Governor’s Commission’s mandate, private attorneys who take these cases equally deserve a long-overdue increase to their compensation levels.

The reality is whether they are ADAs, CPCS staff attorneys or bar advocates, they require significant financial resources to train and prepare them. Unfortunately, because of the low pay, many of these talented attorneys are forced to leave their positions sooner than they would like because they can’t make ends meet. And so the cycle continues. Ultimately the high turnover takes its toll, not just financially, but because it deprives both prosecution and defense of experienced advocates.

These attorneys are in our trenches every day. They have tremendous responsibilities. They protect all of us. Committing finances now to raise their salaries to a respectable level will save time and money in the long run. If the bleeds stops, and the turnover decreases, everyone reaps the benefits, and that widens the path to justice.

Our voice only works when we speak. So please contact your elected representatives and tell them to fund this initiative to raise the salaries of these underpaid advocates who carry the weight of our justice system on their shoulders. Their jobs are hard enough as it is. Refusing them a fair wage would be inexcusable.

Substance use, abuse and addiction in District Court

The MBA hosted a CLE program on Jan. 13, which outlined how cases in District Court are often complicated by issues of substance use, abuse or addiction. Program faculty provided strategies for zealously and effectively representing clients within the bounds of the law. From left: Michael Glennon, Suffolk County DA’s Office; Program Chair Rick J. Dyer; Danielle Boland, master addictions coach and interventionist; Hon. Robert P. Ziemian, Brockton District Court; Sheriff Steven W. Tompkins, Suffolk County Sheriff’s Office; John Dolan, men’s treatment programs supervisor, Suffolk County Sheriff’s Office.
MBA supports commission report calling for higher ADA, defender salaries

The Massachusetts Bar Association supports the call for higher salaries for assistant district attorneys and public defenders as detailed in a recently released report by the Commission to Study Compensation of Assistant District Attorneys and Staff Attorneys for the Committee for Public Counsel Services, which was created by former Gov. Deval L. Patrick. In its report, the commission recommends a minimum salary for both ADAs and CPCS Staff Counsel of $55,360, and that implementation occur within three years.

“My colleagues and I on the commission believe there is no question that significant and immediate salary increases are necessary to remedy the woeful compensation paid to our assistant district attorneys, who are paid less than courtroom custodians, and to our public defenders, who are the lowest paid in the country,” said MBA President Marsha V. Kazarosian, who served as a member of the commission. “While I wholly support the report’s recommendations for higher salaries for both ADAs and CPCS staff attorneys, I do not support the inclusion of Exhibit C, which does not reflect the commission’s vote for parity in the salary structure.”

Kazarosian added: “We at the MBA believe even more funding is needed — including for private bar advocates, whose work, though not under the commission’s purview, is nonetheless vitally important to our criminal justice system. We will continue to advocate for the proper salaries deserved by all attorneys serving our criminal justice system.”

To read the commission’s report as well as a letter from Patrick to legislative leaders, visit www.massbar.org/voirdire. The commission’s findings incorporated by reference and affirmed the conclusion of the MBA’s May 2014 report, “Doing Right by Those Who Labor for Justice: Fair and Equitable Compensation for Attorneys Serving the Commonwealth in its Criminal Courts,” which analyzed the “declining economic status” of prosecutors, public defenders and bar advocates due to low salaries. (View all reports online at www.massbar.org/crimjusticesalaries.)

POSTPONED DUE TO WEATHER

Voir Dire in Massachusetts

February 15-16, 2015

Fairmont Copley Plaza, Boston, MA

As an MBA Member receive $150 off registration.

360advocacy.com
719.578.9645

MBA Member Discount Code: MBB06
CURRAN
Continued from page 1

ber of jurors required to impanel a Super-
ior Court civil jury case by 14.5 percent.

His comprehensive study served as an
innovative information source, which
greatly bolstered the call to pass the
voir dire legislation.

"Judge Curran is a thoughtful and com-
passionate jurist, and he’s really passion-
ate about improving the administration of
justice," said MBA Vice President John J.
Morrissey, who worked closely with Cur-
ran for several years on the MBA’s Judi-
cial Administration Section Council. "He
really understands the demands placed on
both the attorneys and their clients when
they’re involved in the litigation process."

During his more than 20 years as a trial
lawyer, Curran realized that the standard
written questionnaire given to jurors dur-
ing the empanelment process was insuf-
ficient in terms of trying to find out who
the jurors really were. In Curran’s experi-
ence, when the judge poses questions to
the entire venire, jurors may not be totally
forthcoming with their answers.

"Very few people are going to raise
their hand and say they are biased in front
of 60 strangers," said Curran. "The ques-
tionnaires are inadequate. They are a good
start, but they don’t give you a good sense
as to what the individual is like."

Throughout Curran’s career on the
bench he has seen firsthand that attorney-
directed voir dire leads to a better un-
derstanding of jurors because they have a
greater comfort level when answering
questions posed by a lawyer as opposed to
a judge.

“I have found that attorney-directed
voir dire works better in finding the lost-
cause juror,” said Curran. “They generally
give the judge a socially desirable answer.
If the lawyers are diplomatic and not in
an aggressive trial posture, they’re able to
get better information.”

“A fair shot’

Superior Court Standing Order 1-15
was issued this past December as the re-
sult of a bench-bar voir dire committee.
The order provides guidelines on the pro-
tocols for how attorney-directed voir dire
should be conducted. Curran acknowled-
ges there will likely be a learning curve
during the first year of implementation.

Throughout his eight years in the Su-
perior Court Curran has used attorney-led
voir dire without incident. He notes that
it’s important for attorneys to maintain
respect for the juror in order for the pro-
cess to run as smoothly as possible.

In his trials, Curran has encouraged
attorneys to submit as many written
questions as they wish to be posed to the
venire. Then Curran has asked virtually
every question unless it repeats what’s
asked on the questionnaire. Curran has
also allowed attorneys to ask follow-up
questions at sidebar to respect the privacy
and dignity of the juror. That relative pri-

cacy and face-to-face interaction has al-
lowed attorneys to probe a particular area
of concern. Curran has stricken jurors lib-
erally sua sponte if he suspects a bias or
hidden agenda.

According to Curran’s own experi-
ences, the process moves quickly and
utilizes fewer jurors than the traditional,
pre-Chapter 254 method. In approxi-
ately 200 cases during his career, only
once has Curran needed a second panel
of 10 prospective jurors to impanel a jury.

Curran acknowledges that getting
used to the new voir dire process may re-
quire some members of the trial bar to ex-
ercise restraint in the way they approach
some of the potential jurors. He believes
their questions should not invade the pri-


BAR NEWS

MBA Offering $10K Oliver Wendell Holmes Jr. Scholarship

The Massachusetts Bar Associa-
tion is currently accepting applica-
tions for its Oliver Wendell Holmes
Jr. Scholarship — a $10,000 scholar-
ship that will be awarded this May
to a third-year law student attending
a Massachusetts law school who is
committed to providing legal assis-
tance to underrepresented individu-
als/communities upon graduating.

Candidates applying for this
scholarship must meet the quali-
ties that the MBA values and finds
essential in those who will become
practicing attorneys. In particular,
applicants must (1) demonstrate a
strong and specific commitment to
serve the public interest; (2) have a
proven record of hard work and aca-
demic accomplishment; and (3) have
demonstrated integrity and honesty.

Applicants must submit a com-
pleted online application found at
www.massbar.org, including three
essay questions, along with a let-
ter of recommendation no later than
Feb. 20, 2015. The MBA may then
require a transcript and may conduct
an in-person interview of the final
applicants to further assess that ap-
plicant’s experience, qualifications
and interests.

The scholarship will be awarded
at the MBA’s Annual Dinner on May
7, 2015, at the Westin Boston Water-
front.
The MBA is pleased to announce its inaugural Ski-LE. This event will combine legal education with a fun afternoon of skiing and networking at Wachusett Mountain Ski Area.

**Programming:**
- **9:30 a.m.**
- **Registration:** **9 a.m.**

**Thursday, Feb. 26, 9 a.m.–5 p.m.**

**FACULTY:**
- Sean K. Thompson, Esq.
- Mat Trachok, Esq.

**Attendees are encouraged to bring their own lunch.**

**PROGRAM CO-CHAIRS:**
- Sean K. Thompson, Esq.
- Matt Trachok, Esq.

**Additional faculty to be announced.**

**FAMILY LAW**

**Sophisticated Family Law Practice: Critical Tax and Creative Compensation Issues**

**Thursday, Feb. 5, 4–7 p.m., MBA, 20 West St., Boston**

Divorce law is an emotionally charged event, especially when there is a lot of money at stake. In today’s environment of creative compensation packages and small businesses, it can be even more of a challenge if there is a lot of money at stake and you are not sure how to prove it. To further complicate matters, practitioners need to know how to explain to a divorcing client the tax realities, to avoid any post-divorce tax surprises.

**FACULTY:**
- Kimberly J. Joyce, Esq., program chair
- Marc D. Bello, CPA/ABV, CVA, MMAR, CFF, MST
- Patricia O’Connell, Esq.

**Monday, Feb. 9, 4–7 p.m., MBA, 20 West St., Boston**

**SOPHISTICATED FAMILY LAW: CRITICAL TAX AND INCOME PLANNING ISSUES**

Divorce practice ranks among the most demanding, complex and challenging areas of law. This course will teach you how to determine the facts of your client’s case, select appropriate avenues of relief and party your opponent’s strategies while you become familiar with relevant statutes, rules and leading cases you can use to achieve positive results for your client.

**FACULTY:**
- Calvin J. Henrie, Esq., program chair
- Han John D. Casey
- Winnie Munstein, Esq.
- John Rosan, Esq.

**DIVORCE BASICS: A VIEW FROM THE BENCH AND BAR**

**Monday, Feb. 9, 4–7 p.m., MBA, 20 West St., Boston**

Divorce practice ranks among the most demanding, complex and challenging areas of law. This course will teach you how to determine the facts of your client’s case, select appropriate avenues of relief and party your opponent’s strategies while you become familiar with relevant statutes, rules and leading cases you can use to achieve positive results for your client.

**FACULTY:**
- Calvin J. Henrie, Esq., program chair
- Han John D. Casey
- Winnie Munstein, Esq.
- John Rosan, Esq.

**ESTATE PLANNING AND DIVORCE**

**Tuesday, Feb. 24, 10 a.m.–1 p.m., MBA, 20 West St., Boston**

Join our panel of experts as they discuss issues dealing with divorce and post-divorce resource planning and estate planning strategies for children with special needs. Learn how the issues, legal solutions, strategies and options vary as the child of divorced parents ages.

**FACULTY:**
- Calvin J. Henrie, Esq., program chair
- Han John D. Casey
- Winnie Munstein, Esq.
- John Rosan, Esq.

**GENERAL INTEREST**

**MASSBAR ski-LE: Tort Law and Ethics**

**Thursday, Feb. 26, 9 a.m.–5 p.m.**

Wachusett Mountain Ski Area, 499 Mountain Road, Princeton

**Registration:** 9 a.m. (complimentary continental breakfast included)

**Programming:** 9:30 a.m. (complimentary lunch buffet to follow)

The MBA is pleased to announce its inaugural ski-LE. This event will combine legal education with a fun afternoon of skiing and networking at Wachusett Mountain Ski Area. Ski-LE will feature the following:

- Morning session on tort law, with an ethics component
- Complimentary continental breakfast and lunch buffet
- Discounted lift-ticket rates
- Networking opportunities with colleagues

**PROGRAM CHAIR:** Scott Goldberg, Esq.

**Additional faculty to be announced.**

**FREE CLE is MORE than just in-person programming**

Check out these MBA On Demand programs you may have missed and view them anytime, anywhere... FREE with your MBA membership.

- **How to Represent Individuals in Front of Licensing Boards**
  - Recorded Nov. 13, 2014
- **Lean Six Sigma**
  - Recorded Nov. 17, 2014
- **4 Cs Part I: Immigration**
  - Recorded Nov. 18, 2014
- **Lessons for the New Attorney: From the Courtroom and Beyond**
  - Recorded Dec. 2, 2014

**TAXATION**

**RESTORING TRUST in the IRS**

**Wednesday, Feb. 25, noon–2 p.m., MBA, 20 West St., Boston**

Frank Wolfe, Esq., Professor at Bentley University, will discuss the current IRS operational model and how it has contributed to recent mistakes, inefficiencies and growing public distrust in the agency, as well as his plan for reform through organizational restructuring.

**FACULTY:**
- Christopher R. K. Cawley, Esq., program chair
- Frank Wolfe, Esq.

**SAVE THE DATE**

**HOW TO START and RUN A SUCCESSFUL SOLO or SMALL-FIRM PRACTICE CONFERENCE**

**Tuesday, March 3, Lombardo’s, 6 Billings St, Randolph**

**CONFERENCE PRICING**

- MBA members: $75
- Non-members: $100
**LEGAL NEWS**

**News from the Courts**

**Voir dire pilot to start**

The Superior Court will implement the Panel Voir Dire Pilot Project beginning Feb. 2, 2015. The project was designed as a result of a joint effort by the Superior Court, under the leadership of Chief Justice Judith Fabricant, and the Superior Court Implementation Subcommittee of the Supreme Judicial Court Committee on Juror Voir Dire.

The purpose of the project is to contribute significantly to the ongoing evaluation by the judiciary and members of the bar as to the efficacy of group or “panel” voir dire in jury selections that will include questioning by attorneys or self-represented parties pursuant to St. 2014, c. 254, § 2. Superior Court Standing Order 1-15 (“Participation in Juror Voir Dire by Attorneys and Self-Represented Parties”), and any rules, protocols or guidelines the Supreme Judicial Court or the Superior Court may hereafter adopt or approve relative to the conduct of such questioning. The principal objective is to employ a largely uniform “panel voir dire” method in selected civil and criminal sessions during 2015, in order to obtain experience and data from trial judges, attorneys, court officers, clerks, court reporters, jurors, the Office of Jury Commissioner and other identified stakeholders concerning the effectiveness and benefits of a panel method as compared to individual questioning.

Over the next year, that experience and data will be the subject of detailed consideration by the Supreme Judicial Court Committee on Voir Dire, in an effort by the judiciary to identify best practices, with due regard to the goals of permitting attorneys and self-represented parties a fair and meaningful opportunity to participate in voir dire, supporting all stakeholders’ efforts to identify inappropriate bias, and conducting jury selection with reasonable expedition while always respecting the dignity and privacy of each potential juror. Visit the Trial Court’s website to learn more about the project and its procedures, including participating judges and sessions.

**Advisory committee re-convened to consider Boston vacancy**

U.S. Senators Elizabeth Warren and Edward J. Markey have announced that the Advisory Committee on Massachusetts Judicial Nominations will re-convene to consider applications for a federal judicial vacancy in Boston. Candidates interested in applying for a U.S. District Court nomination must submit their applications to the Advisory Committee by Feb. 23, 2015.

The Advisory Committee, first appointed in March 2013, solicits, interviews and comments on applications for federal District Court vacancies. The Advisory Committee is comprised of distinguished members of the Massachusetts legal community, including prominent academics and litigators and is chaired by former District Court Judge Nancy Gertner.

Applications for Boston vacancies are reviewed by Massachusetts attorneys Pamela Berman, Jack Corrigan, Marianne LeBlanc, Willard P. Ogburn, Walter Prince, Sue Reid and Georgia Katsoulomitis. In addition to these individuals, and Gertner, Dean Camille Nelson of Suffolk University Law School, Professor Mary Sarah Bilder of Boston College Law School, Professor Andrew Kaufman of Harvard Law School and attorney Mike Mone, representing the Massachusetts Bar Association, will review all applications.

Interested candidates may access an application at Warren’s website: www.warren.senate.gov/documents/acmjn_dtc_application.pdf.

**Trial Court creates Twitter account for court closings**

The Massachusetts Trial Court has created a Twitter account — @macourtclosings — as an additional method to quickly share news of a court closure. Twitter notifications will allow instantaneous one-way communication to those who use Twitter and who follow or check the @macourtclosings account.

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Unequaled insurance, ensuring Massachusetts Bar Association members are protected with comprehensive coverage in today’s marketplace.

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To find out how the MBA Insurance Agency can help you with your malpractice and other coverage needs, contact us:

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Email: Insurance@MassBar.org
MASSBAR CONNECTS

Join the MBA in 2015 at these great upcoming events and connect with our invaluable network of statewide legal professionals.

**Young Lawyers Division 8th Annual Speed Networking Event**

**Thursday, Feb. 12**

5:30–7:30 p.m.

MBA, 20 West St., Boston

Bring your business cards and join us for an evening of networking and fun at the MBA.

The night will begin with a speed networking session for new attorneys and members of the MBA’s Young Lawyers Division, followed by a cocktail reception where you will have the opportunity to mingle with members of the MBA’s leadership. Complimentary wine, beer and hors d’oeuvres.

R.S.V.P. at www.MassBar.org/SpeedNetworking

**Member Appreciation Week: April 6–10**

Members are encouraged to participate in exclusive giveaways and raffles throughout the week of April 6 as part of the MBA’s 2015 Member Appreciation Week.

**MBA 2015 Annual Dinner**

Thursday, May 7, 5:30–9 p.m., The Westin Boston Waterfront, 425 Summer St., Boston

Join us for the premier event of the association year. The Annual Dinner will include the presentation of the MBA President’s Award to House Speaker Robert A. DeLeo (D-Winthrop), the MBA Chief Justice Edward F. Hines, Jr. Award to Massachusetts Superior Court Associate Justice Bonnie J. Curran, the Oliver Wendell Holmes Scholarship award to a third-year law student, in addition to the honoring of the 2016 Access to Justice award recipients. Look for more details in upcoming issues of Lawyers Journal and at www.MassBar.org.

**COMING THIS SUMMER**

**3rd Annual Summer Networking Series: June–August**

Beginning in June, come and celebrate warmer weather and meet and mingle without MBA community and attendees. Check www.MassBar.org/Events for additional details.


FEATURING MEMBER BENEFIT

Join a one-of-a-kind mentoring program that allows you to be both the mentor and mentee.

MBA Mentoring Circles offers a unique spin on conventional mentoring by combining varying professional levels together and providing all members, junior and senior level, with the resources they need to develop and improve their management and leadership skills and grow within their profession.

While offering guidance, advice and valuable insights to one another, members of our mentoring circles provide support and encouragement in a confidential setting, allowing both the mentor and the mentee to walk away with important lifelong connections.

Join now to participate in this unique mentoring program.

REGISTER AT www.MassBar.org/MentorCircles
Hundreds ‘walk’ to support legal aid funding

Hundreds of attorneys participated in the 16th annual Walk to the Hill for Civil Legal Aid at the State House on Jan. 29. The Massachusetts Bar Association, the Equal Justice Coalition (EJC) and the Boston Bar Association asked participants to urge their legislators to support increased state funding for civil legal aid.

The EJC is calling on state lawmakers to adequately fund the Massachusetts Legal Assistance Corporation (MLAC) line item in the state budget. MLAC is requesting $25 million in the fiscal year 2016 budget. Despite a state funding increase last fiscal year from the Massachusetts Legislature, overall funding for civil legal aid in Massachusetts has declined in recent years.

“This is not a legal issue, it is a universal issue,” said MBA President Marsha V. Kazarosian in her remarks at the event. “And so as we meet with legislative leadership and the key members of Governor Baker’s administration, we will continue to address the dire need for increased funding for legal aid as we stand with the many bar organizations who have worked to support legal aid for the poor.”

In addition to Kazarosian, Supreme Judicial Court Chief Justice Ralph D. Gants, Attorney General Maura T. Healey and Boston Bar Association President Julia Huston also addressed the importance of funding for civil legal aid in their remarks. Two speakers also shared their experiences about how they were helped by legal-aid funded attorneys. EJC Chair John J. Carroll Jr. gave opening remarks and introduced the speakers.

Walk to the Hill was co-sponsored by the Equal Justice Coalition, MBA, BBA and many local and specialty bar associations. Attorneys from several Boston-area law firms and organizations participated. Each year, Walk to the Hill is one of the largest lobbying events at the State House.
JOIN US FOR THE 3RD ANNUAL NEW ENGLAND FAMILY BUSINESS CONFERENCE.

Bring valuable information back to your business to aid in management, growth and sustainability. Learn from experts – and, more importantly, from family business owners – on topics including preserving wealth, succession planning, conflict resolution, managing expansion of the business and the family, and much more.
ADR

Glynn Mediation

Experience • Common Sense

Attorney Glynn has been designated as a neutral for both non-binding mediation and arbitration; he has successfully managed those matters, either resolving/settling cases in mediation or rendering fair/equitable decisions at arbitration.

John B. Glynn, Esq.

25 Braintree Office Hill Park, Suite 408

Braintree, MA 02184

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ADR

Would You Rather

Gamble or Be Certain?

Anthony Tarricone, concentrating in cases involving serious personal injuries and wrongful death resulting from the operation, design, and maintenance of all types of aircraft. Twenty-five years experience in aviation cases including airline, commercial and general aviation.

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Continued on page 11
MBA seeks nominations for 2015-16 officer, delegate positions

The Massachusetts Bar Association is currently accepting nominations for officer and delegate positions for the 2015-16 membership year.

Nominees must submit a letter of intent and a current resume to MBA Secretary Christopher P. Sullivan by 5 p.m. on Friday, Feb. 20, 2015, to be eligible.

To submit a nomination, mail or hand-deliver the information to:
Massachusetts Bar Association
Attn: Christopher P. Sullivan, MBA secretary
20 West St., Boston, MA 02111

If you have any questions about the nomination process, call MBA Chief Operating Officer Martin W. Healy at (617) 988-4777.

MBA to co-sponsor ‘Remedies under the Uniform Commercial Code’ conference

BY PROFESSOR L. GARY MONSERUD

On Feb. 12, 2015, the Business Law Center at New England Law | Boston will host a conference on “Remedies under the Uniform Commercial Code.” This event will take place at 154 Stuart St. in Boston and will run from noon until 6:30 p.m. This is the fourth annual conference devoted to the exploration of current issues in commercial law. The conference will be co-sponsored by the Massachusetts Bar Association and the Uniform Commercial Code - Digest.

The panelists will address issues arising under Articles 2, 2A, 3, 5 and 9 of the Uniform Commercial Code with a heavy focus on remedies. All of the speakers will be practitioners or professors highly regarded for their expertise in code-related matters.

Anyone whose practice or academic interest in any way involves the code will find this conference interesting and rewarding.

There is no cost to attend, but the Business Law Center does encourage early registration to assist us in making final plans for the conference. Additional conference details can be found at www.nesl.edu/UCConference.

Questions? Contact Paras Kadakia at paras.kadakia@nesl.edu or (732) 865-4464 or Rebecca A. Mushlin at rebecca.a.mushlin@nesl.edu or (617) 935-1088. To register, email pgresham@nesl.edu or jchavez@nesl.edu.

Gary Monserud is a professor at New England Law | Boston and teaches Contracts, Modern Remedies, UCC: Sales and UCC: Secured Transactions.

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**CONTINUED FROM PAGE 11**

### MEDIATION

**BAMs Mediation**

Mediation and Arbitration of all Domestic Relations and Probate Matters

Judy Keremyan
Judy Keremyan
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**FEDERAL EMPLOYMENT LAW**

**BY DAMIAN TURCO**

Damian Turco owns Mass Injury Firm PC, a Boston-based personal injury law firm, representing the victims of negligence across Massachusetts. He is the vice chair of the Law Practice Management section.

Let’s take the example of prospective new client consultations. How does it work now, start to finish? Are you personally involved in scheduling the consult or is that role done by a receptionist or through a scheduling module on your website? Does the client come to you for the consultation or do you go to him or her? Or, do you do predominantly consultations by phone or video chat? How long do your consultations usually last? Fifteen minutes? A half hour? Until the prospective client stops talking? When clients sign up with the firm, do you personally go through the retainer agreement and any other documents with them or does another member of your staff do that? Do you capture all the facts presented by the client in the consultation process for use during the case or is it more of a conversation that requires the client to retell the story to another employee at a later time if retained?

Consider these questions and any others that come to mind and continuously ask yourself, “Is there a way to do this more quickly of save time in another process without sacrificing quality?” If so, what are the options? Brainstorm the viable solutions, choose those you feel will work best and then move on to the next section of your firm until the review process is complete. When you’re done with this part you’ll have a list of several things to change. You may, at that point, decide to change only a digestible handful. That’s fine. Finding ways to work more efficiently is one of those things that we know we should do but chronically push off.

Starting the review process and then scheduling it to occur periodically is a great start. Good luck!

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**BY DAMIAN TURCO**

We can agree that being more efficient means doing things with less effort and time. In our line of work, being more efficient also probably means making more money or making the same money in less time or just being able to provide a better service to our clients.

So, how do we become more efficient? Well, let’s start by thinking about how we got to our current level of efficiency. Look around your practice and give it some thought. Your practice can be broken down to hundreds or thousands of processes, each on presenting a potential opportunity for greater efficiency. To make it manageable, put the different processes into a few larger categories. For instance:

1. Business development
2. Consultations
3. New client intake
4. Research, drafting and other substantive case work
5. Communication with clients, opposing counsel and the like
6. Case management
7. Accounting
8. Document management and retention

These are just suggestions and might not be the best categories for your particular practice, but they provide some guidance.

Your process is now to assess your practice’s efficiency by going through it in parts. Your object is to find opportunity for improved efficiency as you go. That improved efficiency may be gained with the application of a technology, such as a software program, or by simply rewiring the process, adding more structure to ensure quicker completion.

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**CONTINUED ON PAGE 13**

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Q: I have just about managed my career (intellectual property law) and home life (now including two wonderful but demanding young kids) over the decade or so since I was admitted to the bar. I can be a driven person, who needs to have things “under control,” but my approach to life was more or less working, until I recently separated with my husband because of his drinking. Now I barely sleep, not only because of the kids and things I have to get done for work, but because I can’t stop thinking about how my life is changing, how my ex and I will manage as co-parents, my disappointment that I was not important enough to him to make more of an effort, etc. I’ve been cranky around friends and coworkers, and almost feel ready for a nervous breakdown. I’ve also made two significant (but fortunately reversible) errors on key documents in the past week.

A: Despite decades of predictions that technology would bring us lives of leisure, the trend seems to have run its course — we expect more of ourselves, and have less and less time for leisure, the trend seems to have run its course. In fact, the trend toward decreased sleep dates back to the basic needs, like sleep. In addition to the strains you face, this would be our first recommendation, and although it probably won’t make you sleep like a baby, there is a good chance you’ll feel some relief and be better able to unwind.

Lifestyle changes: These may include (a) using the bed only for sleep; (b) getting exercise about four hours before bedtime; (c) employing relaxation techniques; and (d) using cognitive strategies to help interrupt or turn down the volume on those ruminations that keep your mind cranking.

Medication: If the above approaches are not enough, there are of course medications that aid sleep. Before moving to the most potent ones (since they also can, for some people, cause problematic side effects or become addictive), you could start by trying melatonin or over-the-counter sleep aids (which are essentially drowsiness-inducing antihistamines). Tranxodone is a commonly doctor-prescribed medication that is non-addictive, but for some it induces a degree of hypnagogia that might either stay with you in the morning or prevent you but being sufficiently responsive to the kids at night (so the best way to give it a try would be when a friend or relative is staying over). It is also possible that you might benefit from an antidepressant (not only with regard to sleep but other symptoms such as tearfulness, decreased concentration, decreased ability to enjoy your interactions with the kids, etc.). Those longer to work, but can be considered, perhaps after trying the other measures we have already discussed. If you could use input or assistance in finding resources for any of the above (including the huge issue of alcoholism in the family, on which we have not focused in this answer), feel free to confer with any LCL clinician — that’s what we’re here for.

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

LEADERSHIP
Continued from page 1

Jurisdiction Act. Among the issues sure to surface before the Judiciary Committee this session is compensation increases for criminal justice attorneys, which have long been supported by the Massachusetts Bar Association, most recently in the report “Doing Right by Those Who Labor for Justice.” A commission appointed by former Gov. Deval L. Patrick following the MBA’s report, also recommended increases. MBA President Martha Kazarian served on that commission. (See related story, page 3.)

Mandatory minimum sentences are sure to be on the radar this session. Baker has previously indicated his support for the repeal of mandatory minimum sentences for nonviolent drug offenders. Rosenberg has discussed the need to provide treatment over incarceration for substance and mental health problems opening the door for discussion of the repeal of mandatory minimums, which is supported by the MBA.

Sen. William Brownsberger (D-Belmont) was reappointed by Rockefeller to helm the Judiciary Committee on the Senate side. This will be Brownberger’s first full session as chair. He was appointed last spring when then-Chairwoman Katherine Clark was elected to the U.S. House of Representatives.

At press time, the House had not appointed a chair. Following longtime Chairman Eugene L. O’Flaherty’s move to the administration of Mayor Martin J. Walsh, where he serves as corporation counsel, the House side had been led by Vice Chairman Christopher Markey (D-Dartmouth).

Over the coming months the Judiciary Committee, as well as the other joint standing committees, will begin holding public hearings on the over 5,000 bills currently pending. The Legislature operates in a biennial session. Formal sessions for the first part of the session will conclude on Nov. 19, 2015. Everything pending at that time will carry over to the next year, with formal sessions concluding for the second part of the session on July 1, 2016.
DOMESTIC WORKERS’ VULNERABILITY TO EXPLOITATION AND ABUSE IS DEEPLY ROOTED IN HISTORICAL, SOCIAL, AND ECONOMIC TRENDS. DOMESTIC WORK IS LARGELY WOMEN’S WORK. IT CARRIES THE LONG LEGACY OF THE DEVALUATION OF WOMEN’S LABOR IN THE HOUSEHOLD. DOMESTIC WORK IN THE US ALSO CARRIES THE LEGACY OF SLAVERY WITH ITS DIVISION OF LABOR ALONG LINES OF BOTH RACE AND GENDER. THE WOMEN WHO PERFORM DOMESTIC WORK TODAY ARE, IN SUBSTANTIAL MEASURE, IMMIGRANT WORKERS, MANY OF WHOM ARE UNDOCUMENTED, AND WOMEN OF RACIAL AND ETHNIC MINORITIES. THESE WORKERS ENTER THE LABOR FORCE BEARING MANY DISADVANTAGES.”


In the 1970s, under the leadership of Melnea Cass, an African-American woman and civil rights leader, Massachusetts granted domestic workers the right to collectively bargain, eligibility for workers’ compensation, the right to be paid the state minimum wage and coverage by the state’s overtime laws. In December 2010, the Massachusetts Coalition for Domestic Workers continued her work, starting the modern movement for domestic workers. On July 2, 2014, Massachusetts took a lead in inclusivity and civil rights. General Laws c. 149, § 190 brought domestic workers “out of the shadows.” Demonstrating the need for this new law and its popularity, it passed in one legislative session with a unanimous Senate and bipartisan veto majority in the House.

Despite the popularity and passage with virtually no opposition, disparaging misconceptions and myths about the new law abound. The authors of this article aim to correct the myths and explain why employer advocates and the management bar should appreciate this new law.

The bill ends “at-will” employment

This reaction is unfounded when considered in the proper context. It is aimed at two sections of the new law:

- Section 190 forbidding employers of domestic workers having 14 days’ notice before termination and those who live in the employer’s home having 30 days’ notice before losing their home and livelihood;
- Section 190 (j) requiring a written agreement spelling out the terms of employment, including but not limited to: rate of pay, including overtime; additional compensation for added duties or multilingual skills; working hours, including meal breaks and other time off; and provisions for days of rest, earned sick days, vacation days, personal days, holidays, transportation, health insurance, severance and yearly raises; any fees or other costs, including costs for meals and lodging; the responsibilities associated with the job; the right to collect workers’ compensation if injured; and the required notice of employment termination by either party.

Employment at-will is entrenched in the United States. It allows employers to terminate the employment relationship for any reason and without notice. The employee has the same right to end the relationship. Because the employee is the individual with much less power, this “equality” calls to mind Anatole France’s quote, “In its majestic equality, the law forbids rich and poor alike to sleep under bridges, beg in the streets and steal loaves of bread.” Discussion about the injustice of labor to this interpretation is for another day.

Our point is that, before proclaiming the end of employment at will, a little perspective is needed. Since the adoption of employment at will, the law has spawned a plethora of exceptions to the at-will rule, both through statute and the common law, including a public policy exception; exceptions banning discrimination based on race, ancestry, gender, sexual orientation and other protected classes; and exceptions banning retaliation against whistleblowers. Beyond these widely known exceptions, it is also illegal to fire someone for having made a claim under the workers’ compensation statute (M.G.L. c. 112, §121), for a public employee doating blood (M.G.L. c. 149, § 33D), for expressing breast milk (29 U.S.C. § 207(r)(1)), and, most recently added, for being a victim of domestic violence (M.G.L. c. 149, § 207(r)(s)).

The new law specifically addresses issues particular to domestic workers to clarify boundaries for privacy purposes. Unlike a worker who goes to an office to work, the domestic worker generally goes to a private home. The privacy protections prevent cameras in a person’s personal bathroom and bedroom (if that type of personal living space is provided to the worker). They also prevent listening to private calls. An employer could still tell a worker not to use his or her cell phone during work time except for emergencies. The law also combats human trafficking. Domestic workers are the second largest group of victims to be trafficked into this country behind sex trafficking victims. Surveillance by an employer is one way to combat liked victims, but without the means to report their situation secretly, victims will remain unable to extricate themselves from their situation.

The bill will hurt immigrant workers

Likely false. The authors know of no study that has shown that immigrant workers are harmed by being given the rights they now have in Massachusetts. Thus far, in the four states that have enacted protections for domestic workers, there is no evidence of a lack of job growth. In any event, it’s unlikely that the few, and small, borderlines on employers of domestic help will stanch the ability of workers who want to fly to Massachusetts to enable them to employ them. Notably, this industry has staying power. At some point, a domestic worker will break their contract. Many people couldn’t function without assistance with house clearing or nannies for...
Drug-free workplace policies have stood on firm legal ground in Massachusetts for many years, but in the age of medical marijuana, the landscape may be changing. There is a robust national trend towards legalizing marijuana for medicinal purposes, as well as an expanding movement to decriminalize its recreational use. This expansion may be fueled by a 2013 Department of Justice guidance stating that the federal government will not prioritize prosecution of individual use of medical or recreational marijuana. And as part of a spending bill passed in December, 2014 and signed by President Barack Obama, the U.S. Congress prohibited certain federal agencies from expending federal funds to prevent the implementation of state (or D.C.) laws allowing medical marijuana.

There remains debate about whether this change in federal law is permanent, and it does not make medical marijuana legal under federal law, but the move signals a significant shift in perspective by federal lawmakers.

These changes do not mean employers must tolerate a new kind of “smoking break,” however. Not all marijuana use statutes contain workplace protection for employees, and marijuana remains illegal under the federal Controlled Substance Act. While Arizona, Delaware, Rhode Island, New York and Minnesota prohibit employers from discriminating against employees or applicants who use marijuana for medicinal purposes (unless a failure to do so would cause an employer to lose a monetary or licensing related benefit under federal law or regulations), the Massachusetts medical marijuana statute (Acts of 2012, Ch. 369) does not. Moreover, neither the law nor its governing regulations (105 C.M.R. 725.000) require employers to violate federal law or allow the on-site use of marijuana. The regulations further state that they do not limit the applicability of other law as it pertains to employers’ rights. 105 C.M.R. 725.650.

Does this leave room for employers to maintain their zero-tolerance drug policies? Probably, but employers should recognize that unless they want to be a Massachusetts test case for how far such policies extend, best practice points toward analyzing each situation individually.

It is generally recognized that employers have a duty to maintain a drug-free workplace for safety-sensitive positions, such as heavy equipment operators, police officers and medical professionals. These employees can be subject to random drug testing, regular drug testing or targeted drug testing where an employee appears impaired at work. In most cases, medical marijuana legalization need not change employers’ approach to these and similarly situated employees, against whom zero-tolerance policies should remain fully enforceable.

The rest of the picture may leave many employers justifiably dazed and confused. THC (marijuana’s main psychoactive ingredient, which shows up in drug tests) can remain in a person’s system for weeks after use. This means that employees who are lawfully registered to use medical marijuana can test positive even if they do not use marijuana regularly, or while at work, and are never impaired on the job. The question is whether enforcement of zero-tolerance drug policies is still lawful when an employer fires an employee who tests positive even if there is no negative workplace impact.

This issue soon will be decided in Colorado, viewed by many as a trailblazer for medical and recreational marijuana use. In Coats v. Dish Network, Inc., the Colorado Supreme Court must decide whether the plaintiff, Brandon Coats, was wrongfully terminated from his position as a customer service representative when he was fired after testing positive for marijuana.

In the age of medical marijuana, will zero-tolerance drug policies go up in smoke?
The new Massachusetts Sick Time Law

BY CATHERINE E. REUBEN

On Nov. 4, 2014, Massachusetts vot-
ers answered “yes” to Question 4, ap-
proving a law mandating that employers provide up to 40 hours of earned sick time per year. The law goes into effect on July 1, 2015, and will be enforced by the Office of the Attorney General. Pending issuance of regulations from the attorney general, the following is a list of questions and answers about the new law, based on a plain English read-
ing of the statutory language. The article also addresses some questions that are not clearly answered.

How much sick time can employees take under the new law?

The statute states that sick time is ac-
crued at the rate of one hour for every 30 hours worked, which works out to 69.3 hours per year for a full-time employee. The law goes on to state, however, that employees are entitled to “earn and use up to 40 hours” of sick leave per calendar year. Presumably, then, once an employ-
ee has accrued 40 hours of sick leave in a calendar year, the employee stops accru-
ing sick leave; however, this is a question

for which the attorney general may pro-
vide further guidance.

For accrual purposes, exempt employ-
eses will be assumed to work 40 hours per week unless their normal work week is less than 40 hours, in which case earned sick time will accrue based on their nor-

mal work week.

Employees begin to accrue earned sick time on their date of hire or the date this law becomes effective, whichever is later; but they are not entitled to use their accrued earned sick time until the 90th calendar day following the start date of their employment. On and after the 90-


day period, employees may earn sick time as it accrues. Employers can al-
low the accrual of earned sick time at a faster rate or allow for the use of earned sick time at an earlier date than the law requires.

Is earned sick time paid or unpaid?

Employees of an employer of 11 or more employees are entitled to earn and use up to 40 hours of paid sick time per calendar year. Employees of an employer with fewer than 11 employees are entitled to earn and use up to 40 hours of unpaid sick time in a calendar year. All employ-
eses performing work for compensation on a full-time, part-time or temporary basis are counted when determining the number of employees an employer em-

ploys.

One of the questions not answered by the law is the “how and when” of earned sick

time. For example, if an employer has 11 employees for only part of a year, would the employees be entitled to use sick time for the entire year? Such ques-
tions are left for the attorney general, who is empowered to issue regulations including “the manner in which employer size shall be determined.”

Another unanswered question is how the number of employees would be counted with respect to non-Massachu-
setts employers. For example, if a Maine employer has 15 employees, but only one of them is in Massachusetts, would that employee be entitled to paid sick time? We will need to await further guidance from the attorney general on this issue.

Sick time is compensated at the same hourly rate as the employee earns at the time the employee is taking the paid sick time, provided, however, that the hourly rate may not be less than the minimum wage.
The law does not describe how that “hourly rate” would be determined. As this law is part of the wage and hour laws, it is anticipated that the attorney general would determine hourly rate in the same manner as it does for overtime purposes.

What if an employer has a PTO or other paid leave policy?

Employees who use the employ-
eses paid time off under a sick time, paid sick leave policy may continue to do so with no obligation to provide additional earned paid sick time as long as they make avail-
able an amount of paid time off sufficient to meet the accrual requirements that may be used for the same purposes and under the same conditions as earned paid sick time under this law.

One question that many employers have asked is whether they may now designate PTO as either sick or vacation time. Consider, for example, this scenar-

io: an employer provides all employees with 40 hours of PTO at the beginning of a year, which the employees can use for any reason they want. An employee chooses to use that time in March to take a vacation. In November, the employee gets sick. Does the employee have a right to take another 40 hours of sick time? In the opinion of this author, the employee would not have any obligation — at least not under the Mass. sick leave law — to provide additional paid sick time, since it was already provided. Note, however, that the law states that the attorney gen-

eral may issue regulations concerning an employer’s obligation to make, keep, and preserve records pertaining to the law. It is possible that those record-keeping re-

quirements could involve tracking of how time is used.

What happens if an employer is subject to a collective bargaining agreement?

The law states that nothing in the statute shall be construed to impair the obligation of an employer to comply with any contract, collective bargai

ning agreement or any employment benefit program or plan in effect on the effective date of the law that provides to employees greater earned sick time rights than the rights established by the law. Accordingly, only the employees covered by a collective bargaining agreement which provides less sick time than that allotted by the law would be subject to the provisions of the law.

Does earned sick time need to be used in daily increments?

No. Earned sick time can be used in the number of hourly increments or the smallest increment that the employer’s payroll system uses to account for ab-

sences or use of other time. So, for ex-

ample, if an employee needs to arrive late in order to take her child to the doctor, the employer may require the employee to use the sick time.

Can employees carry over their un-

used earned sick time at the end of the year?

Yes. Employees may carry over up to 40 hours of unused earned sick time to the following calendar year. Employees are not entitled, however, to use more than 40 hours of sick time in any one cal-

endar year.

Some employers have programs that permit or require employees to “cash out” unused earned sick time at the end of the year. The law is clear that employees have a legal right to carryover, so a manda-

tory cash-out or “use it or lose it” poli-

cy would violate the law. It is not clear, how-

ever, whether a voluntary program

that permits but does not require cash-out would be permissible. We will need to await further guidance from the attorney general on this question.

Are employers required to pay out unused earned sick time when the employee leaves the employer?

No. The law clearly states that em-

ployees are not required to pay out un-

used earned sick time upon the separation of the employee from the employer. If an employer relies on a vacation pol-

icy for earned sick time, then the employees’ vacation payout would presumably be required since, under well established law, accrued, unused vacation pay must be paid to an

employee at the time of separation.

Can employees be required to show documentation for their use of earned sick time?

Yes, but only for absences using earned sick time that covers more than 24 consecutive scheduled work hours. Any required documentation from a health care provider indicating the need for earned sick time taken for personal illness, the illness of a family member, or a routine medical examination for either the employee or a family member must be deemed acceptable for this purpose. An employer may not delay the taking of earned sick time or delay paying for the period in which the earned sick time was taken for the employees entitled to pay on the basis that the employer has not yet received the certification.

An employer may not require that the documentation describe the specific illness or other details about the reason for the sick leave. For earned sick time taken to address the effects of domestic violence, documentation deemed accept-

able under the Domestic Violence Leave law shall be deemed acceptable. An em-

ployer may not require details about the nature of the violence. The law also states that the attorney general may issue regu-

lations regarding the manner in which an employer would be able to verify that a health care provider shall provide certification.

Can employees be required to find a replacement employee to cover their hours while they are going to use earned sick time?

No. An employer may not require that employees provide a replacement to work the hours during which the employee is using earned sick time.
In recent years, attacks have been mounting on so-called teacher tenure laws across the nation. The latest challenge is Vergara v. California, in which a Los Angeles Superior Court judge struck down multiple provisions of the California Education Code, including its teacher tenure provisions.1 A similar lawsuit Wright v. State of New York was filed almost immediately in New York. Elsewhere, state legislatures have sought to streamline tenure processes, substituting a tenure delimiter based on objective measures which would substantially reduce tenure protections, extend the time required to acquire tenure, define performance measures necessary for tenure, and amend dismissal procedures for tenured teachers.

The purpose of this article is not to debate the merits of Vergara, which is on appeal, but to address widespread misconceptions that have been used to support legal, legislative and media attacks on tenure.

The term “tenure” does not appear in Massachusetts education law or in the laws of most other states; instead, states use terminology such as “fair dismissal,” “professional status” or “contracting framework.” In Massachusetts, a teacher is considered an “at-will” employee until successfully completing three consecutive years in the same position. This status is known as the “provisional teacher status” (PTS) is attained. During the “at-will” (i.e., probationary) period, the school employer has virtually unfettered discretion whether to renew the teacher’s employment.

Despite widespread belief, acquiring tenure is not as simple as remaining employed for a predetermined number of years. Massachusetts laws and regulations impose stringent requirements ensuring that only qualified and experienced teachers earn this status. First, teachers must be licensed by the state. Licensure requirements include holding a baccalaureate degree and passing a subject matter test to be licensed as a teacher. Massachusetts teachers must pass rigorous requirements and have been evaluated un- der the part of those who had shown by education attainment and by professional judgment, their education. A teacher’s level of experience affects students’ attendance, classroom behavior, time spent on homework and time spent reading.23

Furthemore, due process protections ensure that during difficult fiscal times, dis- missal does not term students’ success. 8, 9 A teacher terminated for just cause must be dismissed, a teacher has no practical right to prolong an appeal.4 Both income and benefits are gone, and the ability to obtain alternate employment is greatly undermined by the teacher’s own employment record and possibly licen- sure record.7 Tenure — or PTS — is therefore sim- ply an expression of the public’s interest in being able to quickly remove an individual who is not up to the job.
Can employees be required to give advance notice of their need to use sick leave?

If the use of earned sick time is foreseeable, employees are required to make a good faith effort to notify the employer in advance. We will need to await further guidance from the attorney general on the extent to which employees can be penalized for failing to follow the employer’s uniformly-enforced policies with respect to the method and timing for reporting absences.

Can employees be required to make up time off taken as sick leave?

No. An employer may not require an employee to work additional hours to make up for hours taken as sick time under the new law. If there is mutual consent, however, an employer and employee can agree that, if an employee works and is paid for) an equivalent number of additional hours or shifts during the same or the next period as the hours or shifts taken as sick time under the new law, the employee will not be required to use accrued sick time, and the employer will not be required to pay for the time that the employee was absent. Employers should note, however, that if the hours are made up during a different week, the employee was absent. Employers should note, however, that if the hours are made up during a different week, the employee may be entitled to overtime pay during that week.

Can an employer consider an employee’s use of earned sick time in making employment decisions, for example, when evaluating the employee’s attendance?

The law provides that use of earned sick time may not be used as a negative factor in any employment action, such as evaluations, promotions, disciplinary actions, terminations or otherwise subjecting an employee to discipline for using earned sick time.

Some employers have a policies providing that, if an employee takes a sick day the day before or after a holiday, the employee will not be paid for the holiday. It is not clear whether such policies would still be permissible.

The law also does not address whether or not an employee who uses sick time under the new law should still be eligible for an employer’s “perfect attendance” bonus. The Department of Labor takes the position that employees who take FMLA leave need not be given a “perfect attendance” bonus. This author is hopeful that the attorney general will take a consistent approach.

Are employers required to notify employees of their rights under the law?

The law requires that the Attorney General’s Office prepare a notice regarding the law in English and other languages. Employers will be required to post this notice in a conspicuous place accessible to employees in every location where employees with rights under this law work, and they will also be required to provide a copy to their employees.

What happens if an employer violates the law?

The law will be enforced by the Attorney General’s Office, which is empowered to issue rules and regulations necessary to carry out its purposes. If an employee believes that an employer has violated the law, the employee can file a complaint with the Attorney General’s Office. Employers may also file suit in court in order to enforce their rights under the law. Employers can be subject to a range of penalties applicable to wage and hour violations, including treble damages and attorney fees.

What questions are not answered by the text of the law?

While many aspects of the law are relatively clear, there are a number of unanswered questions. The employment law community will need to await guidance from the attorney general on many issues, including:

- What records will employers be required to keep?
- How will breaks in service be handled?
- Are individuals who are truly independent contractors covered?
- How is the employee’s hourly rate determined?
- How are joint employer relationships handled?
- How and when is employer size determined?

Members of the labor and employment law community are encouraged to reach out to the attorney general with their thoughts.
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Criminal justice attorney compensation

My colleagues and I on the Governor’s Commission believe there is no question that significant and immediate salary increases are necessary to remedy the woeful compensation paid to our assistant district attorneys, who are paid less than courtroom custodians, and to our public defenders, who are the lowest paid in the country.

MBA PRESIDENT MARSHA V. KAZAROSIAN
MASSACHUSETTS LAWYERS WEEKLY, JAN. 5, 2015

Kazarosian was quoted in a Massachusetts Lawyers Weekly piece on a report issued by the Commission to Study Compensation of Assistant District Attorneys and Staff Attorneys for the Committee for Public Counsel Services (CPCS).

Law school enrollment

Undergraduates are not dumb. They see people graduating from law school with upwards of $250,000 of debt that can’t get jobs.

MBA PAST PRESIDENT RICHARD P. CAMPBELL
BLOOMBERG BUSINESSWEEK, DEC. 17, 2014

Campbell spoke to Bloomberg Businessweek for a story about declining enrollment at the nation’s law schools.

Jury selection process

We want to show that in the United States of America we give fair trials. Each case is totally different, so in one case you might want a particular type of juror, whereas you wouldn’t want that juror in another case. The identical juror.

MBA MEMBER THOMAS LESSER, LESSER, NEWMAN & NASSER LLP, NORTHAMPTON, ABC 40-SPRINGFIELD, JAN. 6, 2015

Lesser was interviewed by ABC 40 (Springfield) as part of a story explaining the jury selection process in light of the jury selection going on in the Tsarnaev case in Boston.

“Solve It 7”: stolen scooter

It would be absolutely unjust for the city to try and collect money from somebody that did nothing at all but be a victim of a crime.

MBA PRESIDENT-ELECT ROBERT W. HARNAIS
WHDH TV (CHANNEL 7), DEC. 18, 2014

In this segment of “Solve It 7” Harnais provided legal analysis on the case of a stolen scooter.

Former Gov. Patrick’s impact on the judiciary

He’s had a very dramatic impact on the workings of the court system. Much more than any governor in recent history.

MBA CHIEF LEGAL COUNSEL AND CHIEF OPERATING OFFICER
MARTIN W. HEALY, BOSTON GLOBE, DEC. 21, 2014

Healy was quoted in a Globe story on the impact former Gov. Deval L. Patrick had on the judiciary during his eight-year tenure. Commenting on Patrick’s judicial nominations, Healy noted, “This governor has taken more of a bold step and said, ‘I want a bench that reflects not only the diversity of Massachusetts, but the diversity of the legal community.’”
Defining, owning and accessing digital assets

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DEBRA RAHMIN SILBERSTEIN and CHRISTOPHER G.R. DAVIES

Problems

Digital assets present themselves in a multiplicity of forms. There are digital account numbers, log-in information, photographs, videos, emails, and documents. There are your “likes” on Facebook and Instagram, web search histories and “cookie” data, including information about your browsing and shopping history. There is digital media, such as e-books, movies and music from Apple, Amazon, Google and others. There is even digital currency, such as e-books, movies and music from Apple, Amazon, Google and others. There is even digital currency, such as e-books, movies and music from Apple, Amazon, Google and others. There is even digital currency, such as e-books, movies and music from Apple, Amazon, Google and others.

Twenty-five or so years ago the sound of dial-up modems beeping and blurring their way to AOL’s remote servers rang out in basements and home offices across the country. Users were eager to join chat rooms, access their “electronic mail” and begin the agonizing wait to load sites on the “information superhighway.” Since that time, America hasn’t been able to get enough of the Internet. As it has come to permeate every moment of our lives, from our personal devices to wearable devices that track the quality of our sleep, we now have to consider the practicalities and legal consequences of dying in the digital age. The creation and dissemination of digital information—records, messages, images and histories—is the overriding function of the individual’s interaction with the Internet. What happens to the remnants of our online lives when our physical life has ended? How can our loved ones access this information, and do we want them to see it all or merely some of it? These are difficult questions to which there are no easy answers.

Only a few states have passed legislation dealing with fiduciary access to so-called “digital assets.” This legislation is relatively limited and generally applies only to personal representatives (some state statutes are more limited than others, for example the Virginia law only applies to personal representatives for estates of minors). However, the Uniform Law Commission has recommended a comprehensive law known as the Uniform Fiduciary Access to Digital As- sets Act (UFADAA). The commission recommends enactment in every state. To date, Delaware is the first and only state to adopt UFADAA. This article will provide a brief overview of the various problems associated with defining, owning and accessing digital assets; the ways in which UFADAA proposes to solve the access problem, and some steps planners can take to prepare for state legislation.

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Given this varied taxonomy, UFADAA does not provide a blanket right for fiduciaries. UFADAA does not override an individual’s ability to control access to digital assets. Thus, if an account owner agrees to limit fiduciary access in an affirmative act separate from his or her agreement to the other provisions of the EULA, then that limitation will override the UFADAA provisions granting access.

While UFADAA solves our catch-22 issue, so far it’s only been en- acted in Delaware. While we’re waiting for legislation in Massachusetts, there are a number of practical steps clients can take as stop-gap measures.

Firstly, the estate planning process should include a digital audit. Clients should be encouraged to lay out each and every important online account they own, and separately save the login information for each. This can be done using 20th century pen and paper, or through a number of online services that are designed as password managers, with the ability to name fiduciaries to gain access upon death or incapacity. This list should be kept up to date as passwords change.

Additionally, estate planners should prepare for UFADAA by inserting language into trusts and powers of attorney that authorize fiduciaries to access and manage digital assets. Clients with pri- vacy concerns may also wish to design specific services to which they do not want their fiduciaries to be granted access. While language in estate plan- ning documents may not be honored by the state, if the fiduciary is en- acted more broadly, clients will not have to revise estate planning docu- ments in the future. Additionally, it’s useful to note that UFADAA may not have to come to all states to be appli- cable. If it is adopted by even a major- ity of states, account custodians may change EULAs to mimic UFADAA’s terms. Additionally, language should be gauged to trusts and powers of attorney, the principal or grantor’s consent for the fiduciary to access data stored on local electronic devices.

Clients who intend to acquire large libraries of digital media may also want to consider purchasing these assets in the name of a trust, which would po- tentially make such media descenda- ble.

As the web’s digital tendrils have come to entwine themselves around a greater share of our lives, clear gaps within existing legislation have emerged. The overriding purpose of UFADAA is to fill the gap that is presented by the distinction between ownership of digital assets and the fiduciary’s need to access those assets to perform his or her fiduciary duties. The Uniform Law Commission addresses this problem simply, and with minimal impact on existing law. UFADAA may represent a big step forward in solving this problem, and widespread enactment would provide much-needed clarity in an increasingly important area.
Balancing family feuds and the realistic limits of the legal system is one of the most challenging tasks for an attorney engaged in probate, fiduciary and trust litigation. Decades of family history and intense emotions — including jealousy, disappointment, abandonment, grief and guilt — often complicate efforts to administer wills and trusts. Throw in some ego, power struggles, a sense of entitlement and poor communication, and a lawyer has a recipe for a psychological quagmire that eats up the most experienced practitioners.

Common themes include the relationship between fiduciary and beneficiary. Is the fiduciary acting in a self-serving manner, or is the beneficiary too demanding? Sibling disputes are pervasive and can be very contentious. Some people never forget who got what for Christmas 50 years ago. Caretaker issues are common, as well. Was the caretaker a second cousin, a saint, or both? Second marriages are also ripe for World War III. Adult children often demonize (sometimes with good reason) their step-siblings or step-parents. Will tests are another significant category of probate litigation. Was Mom subject to undue influence, or did she lack capacity when she gave the recalcitrant son her entire estate?

There are many things to keep in mind when getting to know a client involved in a probate dispute. There are at least three sides to every story, usually more. Emotions color the client’s view of the world. Few people lie, but most see the world through a self-serving prism. And family history always informs a client’s perception and motivations, even when that history has little to do with the matter at hand. In initial meetings, lawyers should explain the variables inherent in probate litigation. As in most litigation, very rarely is there a “win.” Whether due to our pervasive sports culture or the tidy endings of legal television shows, non-lawyers see the legal system in terms of victory and defeat. Explain that there is no such thing as an “open and shut case.”

Lawyers sometimes over-promise. After all, we all want to support our clients and convey that we are tenacious and will fight hard for their interests. Sometimes lawyers over-promise, and this can sometimes seem like the devil incarnate, usually he or she is not. It is never a good idea for parties to over-promise. Most people have an idealized sense of victory and defeat. Explain that there are likely to be many lawyers with experience instructing that a dramatic vindication in the courtroom is unlikely.

It is never a good idea for parties to talk about litigation or any legal matter to third parties, particularly in electronic communications. And remind folks to put the kibosh on social media. Potentially public communications can escalate emotions and minimize the legitimacy of legal positions. Emphasize that everything he or she writes can become a potential exhibit A and be blown up on a large screen in a courtroom.

Litigants in probate fiduciary litigation are so invested in the fight that they often see the opposing counsel as the enemy. It is helpful to explain that it is better to have a pro on the other side, and that while opposing counsel can sometimes seem like the devil incarnate, usually he or she is not. Explain to clients that scheduling accommodations and extensions are typical and “what goes around, comes around.” Try not to make the other lawyer a character in the play, unless of course, he or she is. Because probate fiduciary matters can be so highly charged, lawyers often channel their client’s emotions and can be very difficult to collaborate with. Sometimes problems with opposing counsel are about what a lawyer doesn’t know. Sometimes lawyers are just plain oblivious. Don’t be that lawyer. Try to start every relationship with opposing counsel in a cordial and professional way. Try to keep your cool and kill ‘em with kindness. Give in on the stupid stuff; not everything is worth fighting about.

There are particular challenges when representing a defendant — typically a fiduciary — in probate fiduciary litigation. Encourage disclosure and cooperation and take the “we have nothing to hide” approach if indeed that is the case. Give tough love when necessary and explain the high standards that come with fiduciary duty.

Probate matters are universal; we all experience them in one way or another. Lawyers can and should be brutally honest advisors and problem-solvers who help clients navigate the complexities of asset transfers as well as the fascinating and frustrating family dynamics so common in probate litigation.
MEDICAL MARIJUANA

Continued from page 15

tested positive for marijuana in a random drug test. Coats, confined to a wheelchair after a debilitating car accident, uses medical marijuana to control seizures and muscle spasms he suffers due to his injuries.

Coats was never impaired at work and his employer does not allege otherwise; rather, he argues that his extramural medical marijuana use was not "lawful" activities since marijuana use is illegal under federal law. Two Colorado courts agreed with Dish Network, holding that the state’s Lawful Activities Statute applies only to acts that are legal under both state and federal law. It remains to be seen what Colorado’s highest court will do.17

Although Massachusetts does not have a Lawful Activities Statute, a victory for Dish Network could offer support for application of zero-tolerance drug policies in other contexts. For example, employers could assert claims under the Privacy Act (M.G.L. c. 21 § 18), which grants individuals the right to privacy against "unreasonable, substantial or serious interference" with their privacy. What constitutes "private" employee conduct and "unreasonable, substantial or serious interference" by an employer is determined by a balancing test. Massachusetts courts generally support an employer’s interest in a safe work environment and have held that this interest trumps employee privacy rights.

Employers may be able to argue that employees who smoke marijuana off duty, even if permitted to do so under state law, are still violating federal law and impeding the employer’s strong interest in maintaining a safe, drug-free workplace. Therefore, the employer’s application of a zero-tolerance policy is not an unreasonable invasion of privacy.

Similarly, employers may be able to defeat claims of wrongful termination in violation of the Massachusetts Drug-Free Workplace Act, which prohibits federal employees from requiring employees to terminate their employment under a private employer’s zero-tolerance drug policy. Employers could point to federal law prohibiting employees from engaging in unlawful drug use (i.e., the statutory right to use marijuana for medical purposes) by arguing that there was no public policy protecting employees from termination under a private employer’s zero-tolerance drug policy. Employers could point to federal law prohibiting employees from engaging in unlawful drug use (i.e., the statutory right to use marijuana for medical purposes) by arguing that there was no public policy protecting employees

DOMESTIC WORKERS

Continued from page 14


The new law will not affect the ability of a family to employ a casual babysitter. The term “domestic worker” is specifically defined as “any individual whose services primarily consists of childcare on an intermittent and irregular basis. (29 CFR 552.5).

Expanding the commission’s jurisdiction duplicates rights

False. Chapter 151B, the state employment anti-discrimination statute, only applies to employers with more than six employees. In most cases a domestic worker is the only employee, putting him or her outside the purview of Chapter 151B and the Massachusetts Commission Against Discrimination (MCAD). Prior to the law’s passage there was a clause that specifically excluded domestic workforces from extending “another,” meaning virtually all domestic workers had no access to the MCAD.

While Chapter 214, Section 1C does provide that domestic workers seeking relief from sexual harassment and discrimination protections due to race, national origin, age, disability and gender, the recourse for both is filing a complaint in the Superior Court. Most domestic workers lack the funds to retain an attorney, pay the filing fee, and bring suit against their employers. Giving the domestic worker access to this a rich source of additional legal support and the potential for a court order for back pay for free. It also gives access to the commission’s procedures that offer assistance to those without counsel, including the conciliation process and an investigative hearing before a finding is made. The infor-

CASE

Conclusion

This new law is a long-awaited con-

ferring of rights to some of the common-

worker’s hardest working colleagues. It provides them rights and recourse that many workers already enjoy. It also at-
tempts to address the particular vulnerabil-
ities of individuals whose job is to “care” in a private home. The law will only increase communication and negotiation between domestic workers and their employers, or their families or other entities, empowering both the families and the workers to answer the question “What is respect and dignity” for their relationship.
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.

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