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MASSACHUSETTS LAWYERS JOURNAL



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VOLUME 22 | NUMBER 10 | JUNE 2015



PRESIDENT'S VIEW
MARSHA KAZAROSIAN

A fitting tribute to our year

If you weren't able to join us at our Annual Dinner last month, you missed an incredible event that had an energy that was infectious. Between the beautiful weather, the sold-out crowd, the well-deserved awards and a wonderful keynote by Attorney Mark Geragos, the evening was the pinnacle event of our association year.

And I am so proud of the Massachusetts Bar Association's Oliver Wendell Holmes Jr. Scholarship recipient this year, Ying Wang, who received her scholarship at the Annual Dinner. As you can see from the cover story about her and her extraordinary accomplishments, she is truly the embodiment of what our profession celebrates.

Although the Annual Dinner had no official theme, it was a celebration of everything that we have all accomplished this year — especially the advent of *voir dire* after decades of advocacy. As if part of the script, Geragos' stories about *voir dire* and his own high-profile trials were the perfect punctuation to our night.

There was no better way to kick off the dinner than with the presentation of the Chief Justice Edward F. Hennessey Award to Superior Court Associate Justice Dennis J. Curran, whose own *voir dire* tri- >2

Voir dire, service awards highlight Annual Dinner



MBA Chief Legal Counsel and COO Martin W. Healy, MBA Vice President John J. Morrissey, 2015 Annual Dinner Keynote Speaker Mark J. Geragos, MBA President Marsha V. Kazarosian, MBA Secretary Christopher P. Sullivan, MBA Treasurer Jeffery N. Catalano and MBA President-elect Robert W. Harnais. PHOTO BY JEFF THIEBAUTH

Legislators, judges and attorneys gathered at the Massachusetts Bar Association's sold out Annual Dinner on May 7 to celebrate a milestone year for the legal community — a year in which lawyers earned the right to engage in jury *voir dire* in Superior Court for the first time.

At the dinner, the MBA honored House Speaker Robert A. DeLeo with its 2015 President's Award and Massachusetts Superior Court Associate Justice Dennis J. Curran with the Chief Justice Edward F. Hennessey Award, for their exceptional contributions to the administration of justice in the commonwealth.

Keynote speaker Mark J. Geragos, principal of Geragos & Geragos, APC, in Los Angeles, commended the MBA as a great legal association and touted the ef-

orts of its members to secure attorney-directed *voir dire* this past year.

"There is no more important valued right — at least in the criminal justice system — than the ability to do attorney-directed *voir dire*," said Geragos. "It's my conclusion at this point that all trials — especially in the criminal law — are won and lost in jury selection. No matter what you think. No matter what kind of an orator you think you are. No matter what kind of rhetorical skills you think you have. You are never going to change somebody's viewpoints ... in a one-week, two-week or three-week trial ... it's just not going to happen. The die is cast when you tell the judge 'we set the jury as present.'"

In addition, the MBA presented third-year New England Law | Boston student

Ying Wang with its first \$10,000 Oliver Wendell Holmes Jr. Scholarship and the 2015 Access to Justice Awards to six attorneys and one law firm for their exemplary legal skills and service to the community.

"This is what we talk about at the MBA," said MBA President Marsha V. Kazarosian. "You advocate for human rights, you advocate for consumers, the underrepresented, the people who need the support, and that's what the theme [of this dinner] was. It was wonderful."

Access to Justice Award winners included:

- Brian J. McLaughlin, who received the Pro Bono Public Award for his work in family law and advocacy for those with disabilities.
- Benjamin Evans, who was >6

Ying Wang honored with first Oliver Wendell Holmes Jr. Scholarship

The Massachusetts Bar Association awarded Ying Wang, a third-year law student at New England Law | Boston, the first-ever MBA's Oliver Wendell Holmes Jr. Scholarship. The \$10,000 scholarship was presented to Wang at the MBA's Annual Dinner on May 7, at the Westin Boston Waterfront.

"Ms. Wang demonstrated an impressive, deep and sincere commitment to serving the underprivileged," said MBA Treasurer Jeffrey N. Catalano, who chaired the MBA's Oliver Wendell Holmes Jr. Scholarship Committee, which selected Wang for the inaugural scholarship. "From her rise from humble beginnings, to paying for college through ROTC, to achieving academic success at New



Ying Wang, of New England Law | Boston PHOTO BY JEFF THIEBAUTH

England Law | Boston, she confirmed that she has the resilience, character and empathy so necessary to servicing the poor. The MBA is very proud to support her in her heroic journey."

A daughter of immigrants, Wang considers herself a "public kid." >4

Going solo: MBA conference, resources help launch firms

BY MIKE VIGNEUX

For attorneys who want to start their own solo practices or small firms, knowing where to begin is often the first challenge.

Attorney Marc L. Breakstone believes a practical place to start is with this question — What does success mean to you? That question is often the way he begins "How to Start and Run a Successful Solo or Small Firm Practice," a Massachusetts Bar Association conference he has co-chaired for the past 20 years with his law partner and MBA Past President David W. White.

Breakstone and White ask attendees to write the answer to that question on a piece of paper. That answer ultimately

helps steer the new solo or small firm in the right direction based on work/life balance. The key is to find a practice area that you can enjoy and have satisfaction working in while still building in time for what's important to you.

"It's a very personal voyage starting your own firm, and we really try to emphasize that the practice should be built around you, rather than you building yourself around the job," said Breakstone.

Another key goal of the conference, which was most recently held on May 29 in Randolph, is to simply instill in attendees the confidence to go out and start their own solo or small firms. While starting a solo practice or small firm may seem daunting and overwhelming at the outset, this conference provides some practical and simple steps that can be taken >10

PRESIDENT'S VIEW*Continued from page 1*

als played such an integral role in proving *voir dire* works. We were also honored to host so many members of the judiciary at the Annual Dinner, including Supreme Judicial Court Chief Justice Ralph D. Gants. Without the collaboration of the judiciary, we never would be where we are today, and we are thankful for their continued partnership and support.

It was also particularly inspiring to see so many of our friends from the trial bar, including those from the Massachusetts Academy of Trial Attorneys, with whom we worked so closely for 20 years to achieve this goal of *voir dire* in Massachusetts. It was truly a celebration of our joint efforts..

Of course, *voir dire* would not have become law without support from our elected officials. When we presented the President's Award to Speaker Robert A. DeLeo, his acceptance remarks were telling: "I was proud to work with the Massachusetts Bar Association and many of you here on the legislators' attorney-directed *voir dire* law. In drafting that law we relied on diverse opinions, and after much consideration were compelled to address the system on a whole. I believe that because of this strategy we are seeing positive effects much earlier than it

would have taken. That's why I can stand here tonight and say that today the state of the judiciary is strong and getting stronger every day."

And looking around the packed ballroom at the Westin on May 7 and seeing so many engaged and dedicated members of our association, I realized that the same is true of the MBA. We are getting stronger and stronger every day.

There are many wonderful organizations that represent specific interests of the bar — many being long-time MBA-affiliated bars with which we enjoy a synergetic partnership. But one of the things about the MBA that makes us so special is our unique position as *the* statewide bar association.

The MBA boasts members from large firms and small firms, solos and in-house lawyers, criminal lawyers, civil litigators, transactional attorneys, and judges. We have 50-year members and law students and everyone in between from every corner of the commonwealth. Our constituents are our profession and those who work in the legal community day in and day out, and it is an honor and a privilege to serve them both.

Thank you to all of our sponsors, friends and colleagues around the commonwealth for making this Annual Dinner the huge success that it continues to be each and ev-

ery year. We are deeply grateful for your continued support of the MBA.

I also want to thank my fellow MBA officers and Executive Management Board members for their collective dedication to this annual milestone and to the excellence of the MBA, especially our Chief Legal Counsel and Chief Operating Officer Martin W. Healy, whose leadership of the MBA staff in orchestrating this special event is admired and appreciated. And a very special thanks goes out to the staff — thank you all for putting on what has become *the* highlight of the year for fun events in the legal community.

Our Annual Dinner may be the symbolic end of the association year, but we still have several exciting programs to look forward to this summer. Please mark your calendars for our upcoming Summer Networking socials. The first one is Thursday, June 25, at Watermark East in Kendall Square. Then there will be one at Sterling's in Boston on July 23 and a third at Tia's on the Waterfront on Aug. 13. These are the events to attend if you want to meet new attorneys and new members and have fun in the process. I hope to see you there.

The MBA's best keeps getting better and better. I am looking forward to what next year brings!

MASSACHUSETTS
LAWYERS JOURNAL

Volume 22 / No. 10 / June 2015

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Lawyers Journal (ISSN 1524-1823) is published monthly by the Massachusetts Bar Association, 20 West St, Boston, MA 02111-1204. Periodicals postage paid at Boston, MA 02205. Postmaster: send address changes to *Lawyers Journal*, 20 West St., Boston, MA 02111-1204.

Subscription rate for members is \$20, which is included in the dues. U.S. subscription rate to non-members is \$30. Single copies are \$3.

Telephone numbers: editorial (617) 338-0680; general MBA (617) 338-0500.

Email address: lawjournal@massbar.org.

Readers are invited to express their opinions as letters to the editor and op-ed commentaries. All submissions are subject to editing for length and content. Submit letters and commentaries to: Editor, *Lawyers Journal*, at the address given above or via email to lawjournal@massbar.org, or fax to (617) 542-7947.



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PHOTO BY MIKE VIGNEUX

Members of the Massachusetts Bar Association's Young Lawyers Division participated in a networking social on Thursday, May 14, at Mezcal Tequila Cantina in Worcester.

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LEGAL NEWS

Holtz, Cramer honored for ‘excellence’

A diverse group of lawyers were honored for their achievements at the May 14 Excellence in the Law event, which was presented by *Massachusetts Lawyers Weekly*, in partnership with the Massachusetts Bar Association.

The MBA paid special tribute to the Hon. Nancy Holtz (ret.) and *Boston Globe* crime and legal reporter Maria Cramer. Holtz received the Daniel F. Toomey Excellence in the Judiciary Award and Cramer was presented with the MBA’s Excellence in Legal Journalism Award.

The annual Excellence in the Law event, which was held at the Marriott Long Wharf Hotel, also featured award presentations to individuals in the following categories: Up & Coming Lawyers, and Excellence in Pro Bono, Paralegal, Marketing and Firm Administration. A portion of the proceeds from the event was donated to the Massachusetts Bar Institute Public Service Fund, which helps support community services throughout the state.

Holtz, a former Superior Court judge with more than 30 years of legal experience, is now a “go-to” mediator and arbitrator for high-stakes and complex matters for JAMS. The current chair of the MBA’s Alternative Dispute Resolution Committee, Holtz began her career as a trial attorney, as assistant corporation counsel for the city of Boston’s Law Department, and then became partner at Merrick and Louison, where she tried complex civil and criminal jury trials in U.S. District Court and Massachusetts Superior Court. Holtz went on to serve as commissioner of the Alcoholic Beverages Control Commission, before becoming secretary and general counsel of the Executive Office of Consumer Affairs and Business Regulation. Holtz was appointed to the Superior Court bench in 1996 where, for 15 years, she presided over civil and criminal cases, including significant multimillion-



(From left): Hon. Nancy Holtz (ret.) accepts the Daniel F. Toomey Excellence in the Judiciary Award from MBA President Marsha V. Kazarosian and *Massachusetts Lawyers Weekly* Publisher Susan A. Bocamazo.

dollar business litigation, construction litigation, first degree murder, kidnapping and home invasion.

“Judge Toomey, for whom this award was named, was known to be one of the most eloquent legal writers on the bench [and] that makes this award particularly befitting of Judge Holtz” said MBA President Marsha V. Kazarosian. “In addition to her outstanding qualities as a lawyer, and a jurist, and a neutral, there are more droll, witty, Nancy Holtz-isms flying around out there than you will ever know; but once heard, will repeat with abandon! Judge Holtz, like Judge Toomey, has established an impeccable reputation in the legal community for her intellect, fairness and ability to handle the most complex high-stakes cases.”

Cramer began her career in New Jersey covering municipal government at the *Trenton Times*. In December 2003, she was hired to work for *Globe South* the suburban zones section of the *Boston Globe*, and was quickly promoted to metro staff as a general assignment reporter in 2005. Cramer



Maria Cramer speaks to attendees after receiving the Excellence in Legal Journalism Award. PHOTOS © MIKE RITTER

was assigned to cover Boston Police, a beat that sparked her love for trial coverage and broke news on some of the biggest stories in the city. She has led the news pack on cases like Philip Markoff, otherwise known as the Craigslist Killer, Clark Rockefeller, and the Woolson Street murders, the killings of three adults and a two-year-old boy on a Mattapan street. In 2013, she was part of the team that won the Pulitzer for coverage of the Boston Marathon bombings and in 2014, she was assigned to cover the state’s court system full-time and has broken stories on the Aaron Hernandez case and the Parole Board.

“Covering crime in courts has been my passion since my early days as a reporter,” said Cramer, who praised the legal community for recognizing the role of reporters in the court room.

A total of 36 awards were presented including 26 to Up & Coming lawyers, those attorneys who have been members of the bar for 10 years or less, but have already distinguished themselves as rising stars in the state’s legal community. ■

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Hon. Allan van Gestel
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LEGAL NEWS

News from the Courts

New class action rule change requires IOLTA notification

The Supreme Judicial Court has amended the rule governing class action lawsuits to require plaintiffs to notify the Massachusetts IOLTA Committee before a judgment is entered or a compromise approved regarding the disposition of class action residuals. The April 24 amendment to Rule 23 follows a 2008 amendment to the same rule directing the payment of residual funds to the IOLTA Committee or to one or more nonprofit organizations (including legal services programs) that benefit the class directly.

Mass. R. Civ. P. 23 outlines the requirements for bringing and maintaining a class action lawsuit. Such suits often end with residual funds, that is, funds that couldn't be distributed to the plaintiffs. Up until 2008, Rule 23 did not provide direction with respect to how such funds should be disbursed.

The new amendment is effective July 1. In addition to the notification requirement, it authorizes the IOLTA Committee to respond by making a limited appearance to be heard on whether it ought to be a recipient of any of the residual funds.

For more information, please contact Jayne Tyrrell, Massachu-

setts IOLTA Committee, 7 Winthrop Square, 3rd Floor Boston, MA 02110-1245; jtyrrell@maiolta.org; Tel: (617) 723-9093.

2015 edition of the Massachusetts Guide to Evidence now available

The Supreme Judicial Court and its Executive Committee on Massachusetts Evidence Law recently announced the release of the 2015 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 2015 edition is the seventh annual edition of the guide. It is available without charge on the court's website (www.mass.gov/courts/case-legal-res/guidelines), where it can be searched and downloaded. The Official Print Edition of the 2015 edition of the Massachusetts Guide to Evidence is available for purchase from the Flasher Judicial Institute. 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. ■

SCHOLARSHIP

Continued from page 1

"Growing up in Boston, I lived in public housing, benefitted from public assistance, went to public schools [and] took public transportation," she said. Now, as Wang looks beyond graduation, she plans to dedicate her life to public service.

In addition to her studies, Wang served as a legislative intern to State Rep. Elizabeth A. Malia. As a new attorney, Wang said she intends to focus her efforts on making sure adequate mental health services are provided to those who are often overlooked by the system — a population that often feels like they have nowhere to turn.

"Mental health problems disrupt an individual's ability to participate fully in society," said Wang. "As a future attorney, I would like to work on ways to enhance and protect the rights of such individuals to lead full and independent lives free of discrimination."

One demographic particularly susceptible to mental health issues are the men and women serving in the armed forces returning from overseas combat. As a first lieutenant in the United States Army, Wang has seen firsthand the effects Post Traumatic Stress Disorder has on our service-

men and servicewomen.

Whether serving her country or serving her community, it is clear Wang has a passion for public service. From "public kid" to public servant, Wang truly embodies what it means to give back.

About the MBA's Oliver Wendell Holmes Jr. Scholarship

The MBA's Oliver Wendell Holmes Jr. Scholarship awards a \$10,000 scholarship to a third-year

law student currently attending a Massachusetts law school who is committed to providing legal assistance to underrepresented individuals and communities upon graduating. Candidates applying for this scholarship must meet the qualities 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 academic accomplishment, and (3) have demonstrated integrity and honesty. ■



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Tia's on the Waterfront

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Enjoy a summer night out at these upcoming Boston Red Sox games

The Massachusetts Bar Association has a limited number of Red Sox tickets available to members for the following two games:

Red Sox vs. Chicago White Sox

Thursday, July 30 • 7:10 p.m.

Ticket price: \$55

Red Sox vs. Cleveland Indians

Wednesday, Aug. 19 • 7:10 p.m.

Ticket price: \$83

Email: Kwest@MassBar.org or call (617) 338-0561 for tickets.



Dues renewals are right around the corner Renew your MBA membership by mail or online

The MBA reminds you that the 2014-15 membership year is drawing to a close, and membership renewal notices for the 2015-16 year will be distributed soon. As in years past, the MBA offers members two renewal options:



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

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

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

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ANNUAL DINNER

Continued from page 1

given the Defender Award for his high-quality work as supervising attorney for the Committee for Public Counsel in Fall River and his support for practical experiences for law students.

- Elizabeth Toulan, who was honored with the Legal Services Award for her work serving low-income and marginalized populations in Boston, as well as her efficacy in

bringing about earned sick time benefits through a ballot question.

- Ropes & Gray LLP, which received The Pro Bono Award for Law Firms for the firm's projects to reduce recidivism among young men and to help local families at the Dorchester House Multi-Service Center.
- Jonathan Miller, who was presented with the Prosecutor Award for his work in the Attorney General's office challenging the Defense of Marriage Act and acting quickly

to restore a buffer zone law outside abortion clinics following the Supreme Judicial Court's strikedown of the law.

- Adriana Lafaille, who was honored with the Rising Star Award for her work at the ACLU of Massachusetts to provide legal counsel and support for immigration detainees.

The MBA thanks its 2015 Annual Dinner sponsors for helping to make the event a success (sponsors listed below).



Morrissey (right) presents the 2015 Chief Justice Edward F. Hennessey Award to Massachusetts Superior Court Associate Justice Dennis J. Curran.



House Speaker Robert A. DeLeo accepts the MBA's 2015 President's Award from Harnais (right).



New England Law | Boston student Ying Wang was awarded the MBA's first \$10,000 Oliver Wendell Holmes Jr. Scholarship by Catalano (left).



Access to Justice Legal Services Awardee Elizabeth Toulan (left) receives her award from MBA Secretary Christopher P. Sullivan.



Winthrop G. Minot (left), a partner at Ropes & Gray LLP, accepts the Pro Bono Award for Law Firms from MBA Secretary Christopher P. Sullivan.



MBA Secretary Christopher P. Sullivan presents the Pro Bono Publico Award to Brian J. McLaughlin (left).

PHOTOS BY JEFF THIEBAUTH

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JUNE 2015



MASSBAR EDUCATES

EMPLOYMENT LAW

EMPLOYMENT CONTRACTS IN CHANGE OF CONTROL TRANSACTIONS: DOs, DON'TS, TRICKS AND TRAPS

Wednesday, June 10, noon–1:30 p.m., MBA, 20 West St., Boston

This program will highlight some of the employment contract and seller-purchaser negotiation issues that arise when employers go through a change of control.

The expert panel will highlight “traps for the unwary” and strategies for avoiding such traps by:

- Careful drafting of change of control clauses and agreements
- Following a “due diligence” pre-change of control checklist regarding pre-change of control obligations (restrictive covenants, protection of intellectual property, equity and deferred compensation plans and agreements, and severance plans and agreements)

FACULTY: Tamsin R. Kaplan, Esq., program co-chair; Nancy Shilepsky, Esq., program co-chair; James Hartley, Esq.; Daniel Janis, Esq.



TAM SIN R. KAPLAN



NANCY SHILEPSKY

FAMILY LAW

INSURANCE ISSUES IN DIVORCE CASES

Thursday, June 25, 4–7 p.m., MBA, 20 West St., Boston

Join us for a review of current law and best practices related to a wide array of insurance issues that surface in the context of divorce. With a diverse panel of family law, estate planning and insurance professionals, topics for discussion will include life insurance, including how to approach irrevocable life insurance trusts; health insurance and COBRA; disability insurance; automobile and property insurance; and a variety of drafting and practical tips.

FACULTY: Calvin J. Heinle, Esq., program chair; Gina J. Calabro, Esq.; Allison M. McCarthy, Esq.; Derek Schultz



CALVIN J. HEINLE

GENERAL INTEREST

READING BETWEEN THE LINES: THE ABCs OF ARBITRATION FOR NEW PRACTITIONERS

Thursday, Jun. 11, 5:30–7 p.m., MBA, 20 West St., Boston

As the trend toward the use of arbitration clauses increases, advocates of all experience levels will need some familiarity with this evolving means of dispute resolution in order to effectively build and argue their clients’ cases — regardless of the ultimate forum.

Join the Young Lawyers Division and the Alternative Dispute Resolution Committee for a panel of experienced arbitrators and practitioners who will guide the colloquy through the key steps of the arbitration process, and highlight the often unforeseen differences between representing your client in front of an arbitrator as opposed to in front of a judge or jury.

A brief Q&A session and networking reception to follow.

FACULTY: Hon. Nancy Holtz (ret.), program co-chair; Todd M. Torres, Esq., program co-chair; John W. Fieldsteel, Esq.; Jonathan W. Fitch, Esq.; Conna A. Weiner, Esq.



HON. NANCY HOLTZ (RET.)



TODD M. TORRES

LITIGATION

MINIMIZING DISCOVERY DISPUTES AND CONTROLLING YOUR CLIENT’S LEGAL SPENDING

Thursday, June 4, 2–5 p.m., MBA, 20 West St., Boston

This seminar seeks to provide litigators with the tools they need to control the cost of discovery and minimize disputes through cooperation and use of the rules, while still being a zealous advocate for their clients every step of the way.

FACULTY: David G. Thomas, Esq., program chair; Hon. Robert B. Collings; Benjamin Berman, Esq.; Robert Brown, Esq.; Jason Glass; Ian J. McLoughlin, Esq.; James Vant, Esq.



DAVID G. THOMAS

LITIGATING CIVIL RIGHTS CASES UNDER SECTION 1983

Monday, June 8, 3:30–5 p.m., U.S.D.C. for the District of Massachusetts, Western Division, 300 State St., Suite 250, Springfield

This program will help practitioners learn the basics of litigating cases under the federal civil rights statute (Section 1983) and under the Massachusetts Civil Rights Act. It will cover pleadings; theories of recovery; affirmative defenses, including qualified immunity; and individual, supervisory and municipal claims. It will go over discovery, evidentiary issues, dispositive motions and trial. The program will include a distinguished panel of speakers and federal judges from the U.S. District Court (District of Massachusetts, Springfield).

FACULTY: Paul J. Klehm, Esq., program co-chair; Hector E. Pineiro, Esq., program co-chair; Hon. Mark G. Mastroianni; Hon. Michael A. Ponsor; Hon. Katherine A. Robertson; Howard Friedman, Esq.; Nancy Frankel Pelletier, Esq.; Luke Ryan, Esq.



PAUL J. KLEHM



HECTOR E. PINEIRO

FUNDAMENTALS OF CIVIL MOTION PRACTICE

Tuesday, June 16, 4–7 p.m., MBA, 20 West St., Boston

Most civil cases involve motion practice. This seminar addresses procedural and substantive requirements of motion practice, advice on drafting and arguing motions, and aspects of common motions. Topics will include a comparison of procedures in state and federal court, special rules for summary judgement, reply briefs and discovery, dispositive and trial motions.

FACULTY: Philip M. Hirshberg, Esq., program chair; Alice A. Kokodis, Esq.; Bruce Medoff, Esq.; Gareth W. Notis, Esq.



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PROBATE LAW

MODIFYING/TERMINATING IRREVOCABLE TRUSTS AND NON-JUDICIAL SETTLEMENT AGREEMENTS

Tuesday, June 2, 1–4 p.m., MBA, 20 West St., Boston

This program will review options available under the Massachusetts Uniform Trust Code and recent Supreme Judicial Court guidance on modifying and terminating trusts under *Bosch* and *Kraft*. Specific topics include: complaints vs. petitions in equity; notice; statute of limitations; *Bosch* petitions; petitions for instructions; and decanting.

FACULTY: Timothy D. Sullivan, Esq., program chair; Patricia L. Davidson, Esq.; Thomas Jalkut, Esq.



TIMOTHY D. SULLIVAN

TAX LAW

FIDUCIARY INCOME TAX AND POST-MORTEM PLANNING, THE BASICS

Wednesday, June 17, 1–4 p.m., MBA, 20 West St., Boston

Attend this program and receive a basic understanding how fiduciary taxes work and how important they are to the planning and administration process. Specific topics include trusts vs. estates, calendar year vs. fiscal year, types of trusts, taxable income vs. fiduciary accounting income and more.

Faculty: Leo J. Cushing, Esq., program chair; Lisa M. Rico, Esq. *Additional faculty to be announced.*



LEO J. CUSHING

2015 ANNUAL HEALTH LAW CONFERENCE

Friday, June 12 • 8:30 a.m.–2:30 p.m.
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DIVORCE BASICS: A VIEW FROM THE BENCH AND BAR

Recorded: May 4, 2015

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BAR NEWS

Calendar of Events

THURSDAY, JUNE 11

**Reading Between the Lines:
The ABCs of Arbitration for New Practitioners**
5:30-7 p.m. 
MBA, 20 West St., Boston

FRIDAY, JUNE 12

2015 Annual Health Law Conference
8:30 a.m.-2:30 p.m. 
MBA, 20 West St., Boston

TUESDAY, JUNE 16

Fundamentals of Civil Motion Practice
4-7 p.m. 
MBA, 20 West St., Boston

WEDNESDAY, JUNE 17

Fiduciary Income Tax and Post Mortem Planning, the Basics
1-4 p.m. 
MBA, 20 West St., Boston

THURSDAY, JUNE 25

Insurance Issues in Divorce Cases
4-7 p.m. 
MBA, 20 West St., Boston

THURSDAY, JUNE 25

Summer Networking Series Session I
5:30-7 p.m.
Commonwealth Cambridge (Roof Garden Terrace), 11 Broad Canal Way Kendall Square, Cambridge

TUESDAY, JUNE 30

MBA "Lawyers Have Heart 5K"
5-10 p.m.
Blue Hills Bank Pavilion, 290 Northern Ave., Boston

WEDNESDAY, JULY 1

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

THURSDAY, JULY 16

Practicing with Professionalism
9 a.m.-5 p.m.
MBA, 20 West St., Boston

THURSDAY, JULY 23

Summer Networking Series Session II
5:30-7 p.m.
Sterling's (Outdoor Patio), 60 State St., Boston



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

FOR MORE INFORMATION, VISIT MASSBAR.ORG/EVENTS/CALENDAR



Snapshots from around the MBA



Bench, bar leaders meet

PHOTO BY JASON SCALLY

MBA President-elect Robert W. Harnais speaks to members of the bench and fellow bar association leaders at a meeting on April 30, where Harnais welcomed guests and reminded attendees how important it is for the organized bar to speak on behalf of the courts.

EXPERTS & RESOURCES

CONTINUED FROM PAGE 8



Snapshots from around the MBA



MBA President-elect Robert W. Harnais (left) presented an MBA Community Service Award at the May 1 Worcester County Bar Association's Law Day Breakfast to Judge Michael Allard-Madaus, who accepted the award on behalf of his brother Gerald F. Madaus Jr. (who was awarded posthumously).



From left: MBA Past President Denise Squillante, MBA President-elect Robert W. Harnais, MBA Community Service Awardee Mardee Xifaras, Judge John M. Xifaras (ret.) and Mary Jeanne Stone, Bristol County Bar Association president, on April 30.



Winsor School places third in National Mock Trial Championships

The Winsor School of Boston competed and came in third, out of 46 teams, in the National High School Mock Trial Championship in Raleigh, North Carolina. The Winsor School won each of their four trials during the May 14-16 competition, which is the first time a team from Massachusetts has gone undefeated at the nationals. A portion of their trip was funded by a \$2,500 donation from the MBA's philanthropic partner, the Massachusetts Bar Foundation.

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CONTINUED FROM PAGE 9

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MBA CONFERENCE

Continued from page 1

to ease that anxiety.

The conference is just one of several resources the MBA provides for attorneys who are thinking about starting their own firms. In addition to free continuing legal education courses for members, the MBA also offers networking and career building opportunities in specific practice areas through its sections, committees and social events. The MBA also works in collaboration with area law schools to host events and programs geared to law students and recent graduates.

"The MBA has made great strides in providing so many resources now to law schools and law students than it ever has before," said Beth M. Padellaro, chair of the MBA's Sole Practitioner & Small Firm Section Council.

Who's going solo?

Designed for recent law school graduates, young lawyers who have started their own practices and groups of more experienced attorneys who are leaving firms to start their own small firm, the conference typically attracts a diverse group of attendees.

"There's always a broad cross-section," said Breakstone. "Sometimes we have lawyers with 30 years of experience who have finally decided to go out and do their own thing."

Breakstone and White note that recently the conference has primarily drawn younger lawyers and recent graduates, a fact they attribute to a tight job market and the merging of many large law firms. Given the current job market, employment options for young lawyers and recent law school graduates can be limited with many becoming public defenders, assistant district attorneys or serving in legal roles with nonprofit or service organizations.

"It's difficult to get experience without going into some sort of a public sector," said Leo M. Spano, vice chair of the MBA's Sole Practitioner & Small Firm Section Council.

With limited opportunities at larger firms, starting a solo or small firm practice is another option for young lawyers or recent graduates to pursue. In addition to resources such as the MBA's solo and small firm conference, advances in technology have made starting a solo or small firm less complicated.

New technology and 'virtual lawyering'

In the pre-Internet age, attorneys could market themselves in person through word of mouth or pay for advertising in the yellow pages. Today, the Internet is the primary source of finding lawyers for most people. This technological shift has

required most attorneys to have websites and perhaps a presence on free social media sites such as Twitter, Facebook and LinkedIn. The conference addresses the most recent technologies to market a solo practitioner or small firm including the use of social media, options for creating a website and how to appear on search engines.

"We are always evolving the course and no new technology escapes us as far as we know," said White.

Thanks to the prevalence of technology, launching a simple website for a solo practice or small firm is now relatively easy, inexpensive and can be done quickly.

"You can really get up and running for next to nothing today," noted Breakstone.

As technology keeps advancing, Breakstone believes there will be a shift from brick and mortar to "virtual lawyering" with more lawyers practicing remotely. In the '90s, Breakstone met 100 percent of his clients face to face. Today, he only meets 30 percent of his clients. In most of his smaller, non-complex cases, most business is handled over email and the phone. He believes the legal field will continue moving in that direction.

"With all the technology out there, all the office equipment out there, and the idea that you can really work from your home, the library or the coffee shop, I think is somewhat appealing," added Spano.

Word of mouth still relevant

Even with advances in technology, word of mouth marketing is still very much a part of starting a solo or small firm. Breakstone and White urge conference attendees to tell everyone what they do and that they are available to help. Clients can be found at health clubs, churches or rotary club meetings. Anyone could realistically be a potential client.

The conference also addresses the importance of joining bar associations, registering for referral lists and networking with other attorneys for cross referrals.

"You really need to be in front of people all the time," said White.

Networking opportunities are provided at the conference for attendees to connect with each other. One popular feature of the conference, known as "the ultimate networking lunch," involves experienced attorneys in specific practice areas talking with attendees about the secrets to their success. As a result of these networking opportunities, law partnerships for small firms have been formed at past conferences.

By joining the MBA and participating in conferences and other events, the networking opportunities can be vital, especially when starting a solo or small firm in the early stages of a legal career.

"Sometimes the only way to get your face out there is to join an organization," said Spano. ■



MBA Past President David W. White (left) and Marc L. Breakstone are law partners who have chaired the MBA's "How to Start and Run a Successful Solo or Small Firm Practice" Conference for the past 20 years PHOTO BY JASON SCALLY

CONTINUED ON PAGE 11

BAR NEWS

Tiered Community Mentoring Program wraps up 2015 session



Members of the 2015 Tiered Community Mentoring Program.

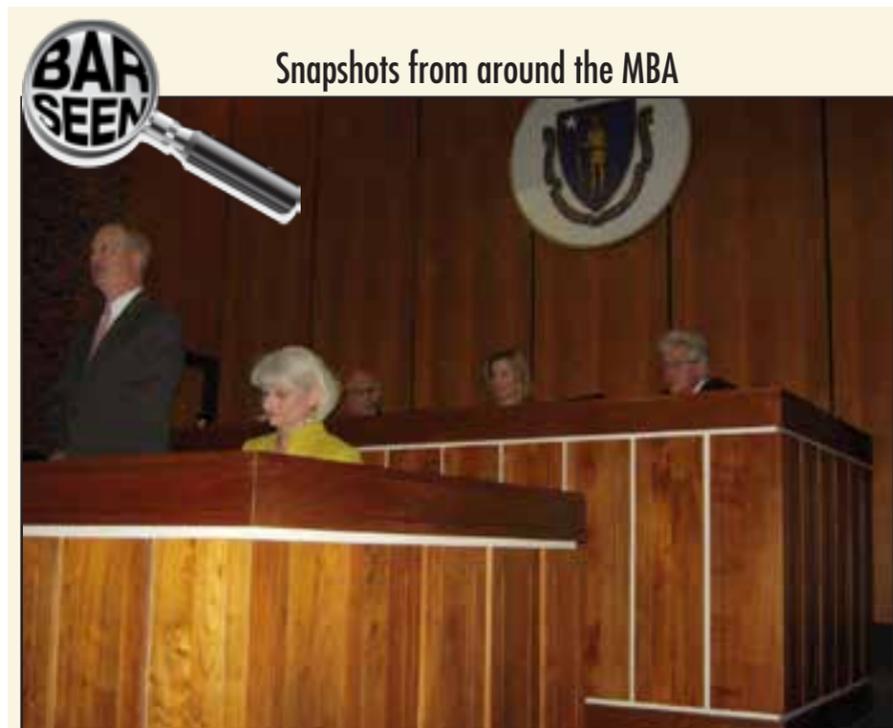
PHOTO BY MIKE VIGNEUX

The Massachusetts Bar Association's Tiered Community Mentoring Program wrapped up its sixth year with an event and reception at the John Adams Courthouse on April 16.

Featured speakers were MBA President-elect Robert W. Harnais, Supreme Judicial Court Associate Justice Geraldine S. Hines and Walter B. Prince of Prince Lobel Tye LLP. Mentor-mentee teams then participated in a group discussion on the death penalty led by Carol Liebman, professor and criminal justice coordinator at Roxbury Community College.

The event also featured the presentation of certificates and scholarships to participating students. Closing remarks were given by Chief Justice Angela M. Ordoñez of the Massachusetts Probate and Family Court.

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



Snapshots from around the MBA

MBA members celebrate Law Day

Massachusetts Bar Association Executive Management Board member Scott Peterson spoke to more than 70 students from local public, private and parochial schools at Hingham District in celebration of Law Day. Pictured, from left, co-chairs Scott Peterson and Anita Comerford in foreground and District Attorney Timothy Cruz, Judge Heather Bradley and Judge John Canavan in background. This year, Law Day, which is a national day set aside to honor the crucial role of the legal process in protecting everyday American freedoms, focused on the Magna Carta and how it is a symbol of freedom under law. MBA President Robert W. Harnais also spoke at the Malden Law Day event on May 8.

EXPERTS & RESOURCES

CONTINUED FROM PAGE 10

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The recently published fourth edition of *Massachusetts Practice Series, Volume 30, 30A, 30B, Criminal Practice and Procedure* remains the pre-eminent and singularly most comprehensive volumes covering every aspect of the practice of criminal law in Massachusetts ranging from pre-arrest considerations to actions even after regular appellate efforts have been exhausted such as pardon applications.

If a new attorney knew nothing about criminal law, took no CLE classes and had no experienced criminal defense attorney to be mentored by, then the mere reading of this work would, at the very least, familiarize one with every aspect of the process. It could be subtitled, albeit awkwardly, "Everything You Wanted to Learn About the Practice of Criminal Law But Were Afraid to Ask." It is a great first stop in the practical study of criminal law.

Its strength lies in the fact that, though it may be an intellectual treatise, it is also a very well organized and easily accessible practical guide. The information is all-inclusive while, at the same time, written in simple, plain-speaking prose. No nuance or small obscure detail of criminal law and procedure appears left out in this encompassing, almost encyclopedic compilation, yet it is eminently readable.

To meet the problem posed by the fact that criminal law is historically the area of law most subject to continuous change, this set of books remains a perpetual living work-in-progress that is updated both in its language and with the ever-evolving law. This fourth edition includes new chapters on the Sex Offender Registry Board, probation violation proceedings and abuse prevention orders. A previously excised chapter on interstate renditions was reinstated, and there are new case appendices. Additionally, there have been extensive restructurings on chapters concerning arrests, stops, searches and seizures and interrogations. For example, the law on automobile searches was separated from other stop and searches and given its own chapter since the law on it has so greatly expanded.

There is also a rich and full backstory to this set. The work was conceived and originally written by the storied long-term Massachusetts Appeals Court Judge Kent B. Smith who tended it and nursed it as a labor of love for 42 years from its debut in 1970 to his death in 2012. Its first edition was one volume and, through his efforts, it grew to three volumes. He took enormous pride in this, his legacy, and even asked, years earlier, that it be talked about some day at his memorial service.

One of his greatest admirers in the legal world was Elspeth Cypher, who respected him as a role model for both his gravitas as a practical jurist and his near-legendary kind and helpful temperament she had experienced firsthand from her years as a defense attorney and as an appellate prosecutor until her own elevation alongside him on the Appeals Court bench. She admired

the way he would ask tough questions from the bench, but never try to embarrass the attorneys appearing before him or flaunt his own superior knowledge. Cypher learned from the way he would skillfully elicit the legal principles in a way that would make the murkiest problems argued crystal clear to all.

The year before he died, Smith asked Cypher to co-author the fourth edition and then to presumably carry it on some day after he was gone. Cypher was overwhelmed with the enormity of the honor. It was practically an anointment. Yet, she had grown so close to Smith as her mentor over the years that, after he passed away, she found the assignment surprisingly difficult to work on; every time she began, she'd experience deep feelings of grief. Fortunately, she persevered and the rich legacy of what Smith referred to only as "The Book" remains alive.

One of the strengths of *Mass Practice – Criminal Practice and Procedure* is that, even before it takes one by the hand through handling a criminal case, it gives perspective.

The first chapter, entitled "The Sources of Criminal Practice and Procedure in Massachusetts," begins with an explanation of how the federal and state constitution began and remain the spring-like source of all criminal law since to practice criminal law is essentially to practice constitutional law. It then explains how the Legislature picks things up from there as it establishes the court, enacts statutes, creates punishment and how those laws can be challenged. Next, it explains the authority and role of the judiciary.

The second chapter explores from every angle the concepts of jurisdiction and venue. It is only then, after establishing how the entire framework came into being and how this entire area of law came into place that the book finally gets to the practical topic of the arrest.

As in every other chapter of the book, the authors attack the topic from every an-

gle, both from a constitutional standpoint and a nuts and bolts "how to" approach. It goes through the elements of an arrest with a warrant and without a warrant, examines the necessity of probable cause and how to challenge or justify an arrest in court.

It then shifts forward to an exhaustive examination of stops and frisks of a person, automobile stops and searches, and all searches and seizure with and without warrants. It next moves through every other pre-charge issue having to do with arrests, identification and statements. Again, the approach is the same as with every chapter. A scholarly scrutiny of the latest cutting-edge law followed by a down-to-earth pragmatic guide that takes one by the hand through its incredible complexities and obfuscations.

This three-volume set is so thorough and in-depth that it is only after approximately 1,100 pages that it finally arrives at the defendant's very first appearance in court, the arraignment. The length is entirely undaunting, since it is such a clear, well-organized, user-friendly reference book with a detailed index, table of cases and table of contents.

No stone is left unturned; every minute issue that a criminal defense attorney, prosecutor or judge could face is illuminated. In addition to the step-by-step aspects of a case through the discovery phase, trial and appeal, there are entire chapters dedicated to such obscure issues as the removal of a disruptive defendant, how to handle the event that a judge becomes disabled or how to remedy clerical errors.

It is, indeed, an unparalleled masterpiece. It remains a fitting tribute and legacy to the life's work of Justice Kent B. Smith. Yet, more importantly, under the hand of current Justice Elspeth Cypher, it remains an ever-evolving work-in-progress. ■

Peter Elikann is a criminal defense attorney and vice chair of the MBA's Criminal Justice Section Council. He also serves as a member of the MBA's Executive Management Board.

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Snapshots from around the MBA



Worcester hosts bench-bar meeting

PHOTO BY LEE ANN CONSTANTINE

MBA Chief Legal Counsel and Chief Operating Officer Martin W. Healy speaks to attendees at the May 13 Bench-Bar Meeting in Worcester. The Massachusetts Trial Court's District Court Department, in partnership with the Massachusetts Bar Association and local county bar associations, is holding a series of bench-bar gatherings across the commonwealth to facilitate increased dialogue between judges, clerk magistrates, chief probation officers, local practitioners and other court personnel. ■

NOTABLE AND QUOTABLE

MBA MEMBERS IN THE MEDIA

Breathalyzer tests

“ We want to make sure that everyone has a fair trial and a trial that's based on scientifically proven evidence. And in this case, we don't have that. ”

**MBA CHIEF LEGAL COUNSEL AND CHIEF OPERATING OFFICER
MARTIN W. HEALY, *BOSTON GLOBE*, APRIL 28**

Healy was quoted in the *Globe* in a story about the Executive Office of Public Safety's announcement that flawed breath test results were based on "operator error." The MBA also received coverage in the *Boston Herald*, WBUR, *State House News*, *Lowell Sun* and the *Worcester Telegram & Gazette*.



“ So you're being convicted based on a number that's produced by a machine. Well don't you want to be darn sure that number is right and the way you got to that number is pristine? I would. ”

**MBA PRESIDENT MARSHA V. KAZAROSIAN
FOX25, APRIL 28**

In addition to the segment on April 28, FOX 25 interviewed Kazarosian about the flawed Breathalyzer test results on April 24. Kazarosian also spoke to WBZ NewsRadio 1030 (April 24), the *Eagle Tribune* (April 25) and the *Salem News* (April 23).



Wearables as e-discovery

“ You have a privacy expectation with respect to your personal devices. If the employer owns it, you may have lost your privacy rights. If you bought it, I don't think they can get to it. ”

**MBA WORKERS COMPENSATION SECTION CHAIR DEBORAH G. KOHL
MASSACHUSETTS LAWYERS WEEKLY, MAY 7**

Kohl was quoted in a *Massachusetts Lawyers Weekly* story about data from "wearable" devices such as smartwatches and Fitbit trackers being used in court.



Tsarnaev trial: Cost of life in prison vs. death row

“ On average it's eight to 10 times more expensive. In some states like California, it's 20 times as expensive. ”

**MBA CRIMINAL JUSTICE SECTION VICE CHAIR PETER ELIKANN
FOX25, MAY 13**

Elikann was interviewed for a piece on the cost of life in prison versus the cost of death row in relation to the penalty phase of the Tsarnaev trial.



Planet Fitness sale

“ You really have to be assertive in protecting your rights, particularly when you know the other side is spending time and money for your benefit. ”

**MBA BUSINESS LAW SECTION CHAIR EURIPIDES D. DALMANIERAS
MASSACHUSETTS LAWYERS WEEKLY, MAY 7**

Dalmanieras was quoted in a *Massachusetts Lawyers Weekly* story about a recent federal court decision in the sale of the Planet Fitness health club chain.



Where available, news clips – including audio/video – can be found on our website at www.massbar.org.

SJC decision on employment law

“ Before this decision, Prong 2 was pretty much the death knell of the possibility of having independent contractors work for you. And what the SJC is saying is, 'not so fast, it really deserves much more analysis and it really deserves a common sense approach on a case-by-case and industry by industry basis.' ”

**MBA LABOR & EMPLOYMENT LAW SECTION CHAIR
JOHN F. TOCCI *BLOOMBERG BNA DAILY LABOR REPORT*, APRIL 29**

Tocci provided his insight into the recent Supreme Judicial Court decision (*Sebago v. Boston Cab Dispatch*), which found that certain Boston taxicab drivers are not employees of taxicab owners and should remain classified as independent contractors.



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

SECTION REVIEW



MASSACHUSETTS
LAWYERS JOURNAL
MAY 2015

MASSACHUSETTS BAR ASSOCIATION

CRIMINAL JUSTICE

Nobody's perfect: the need for new expungement law

BY PATRICK J. NOONAN

In Massachusetts, the second you are arrested, the damage is done. The criminal charge will follow you forever. Nobody is perfect. We all make mistakes. Don't we deserve a second chance? Expungement gives people a second chance. It wipes the record clean. It gives them a "clean slate."

In Massachusetts, the court has the power to order expungement. However, the court *almost never* orders expungement, even in cases that cry out for it. The reason why expungement is practically unattainable in Massachusetts is because we have record-sealing statutes instead. A sealed record is nothing like an expunged record. A sealed record provides some protection, but does not give the person the "clean slate" they want and need. On top of that, getting your record sealed in Massachusetts is no easy task. Courts will always deny expungement whenever a defendant has some remedy under the record-sealing statutes. So why do we even have an expungement statute?

Sealing: Not a Clean Slate

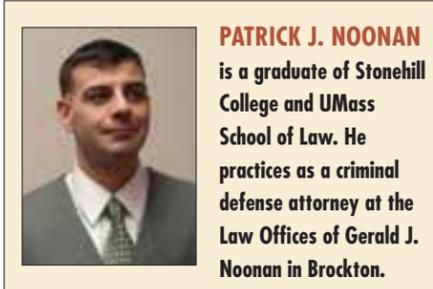
The sealing of records pertains to the papers and docket entries in a particular case maintained by the Clerk-Magistrate's Office, and records of the case kept by the court's Probation Department, as well as records maintained by the commissioner of probation. When a record is sealed, it only becomes unavailable to the public. Sealing does not mean that the record is wiped out completely, as most would think. A sealed record will *always* be accessible to law enforcement, probation officers, the court, and certain entities authorized by statute. G.L. c. 6, §§ 172 provides a list of entities with authority to heightened CORI access. The biggest benefit of a sealed record allows an applicant for employment to answer "no record" to an inquiry relative to prior arrests or criminal court appearances and the commissioner of probation must corroborate that statement by reporting that no record exists.

Sealing Your Record: A Difficult Task

There are two principal sealing-statutes: G.L. c. 276, §100A (applicable to convictions) and G.L. c. 276, §100C (applicable to non-convictions).

G.L. c. 276, §100A permits the sealing of a conviction upon the passage of time. A person must wait five years to seal a misdemeanor conviction and ten years to seal a felony conviction.

G.L. c. 276, §100C ¶ 1 gives the commissioner of probation discretion to seal certain non-convictions, such as when the defendant has been found not guilty, a no bill has been returned by the grand jury, and upon a finding of no probable cause by the court. G.L. c. 276, §100C ¶ 2 gives the court the discretion to seal certain non-convictions in which the court has entered a dismissal or in which a *nolle prosequi* has entered subject to a finding by the court that "substantial justice



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would best be served."

It is no easy task to seal one's record under §100C ¶2. "[S]ealing of the court record of a criminal defendant should only occur in *exceptional cases*." *Commonwealth v. Doe*, 410 Mass. 142, 149 (1995). The defendant must undergo an onerous process consisting of two hearings. At the first hearing, the defendant must make out a prima facie case entitling him to sealing. Passing that hurdle, the defendant must undergo a second, more extensive hearing in which the public, the press, the police, the prosecutor, the probation department, the victim, or anyone else may intervene and present their objections. Now comes the hard part. The defendant "must show that *specific* harm is threatened by the continued existence of the record." *Doe* at 149. The court will not seal a record based on general reputation and privacy interests. The defendant's showing of specific harm must be strong enough and "clearly outweigh" the constitutional value of the record remaining available to the public. Oftentimes, defendant's try to seal their records pro se and they are routinely denied because the defendant (a non-lawyer) cannot sustain the heavy burden of showing specific harm.

Expungement: A Clean Slate

Unlike sealing, expungement erases everything associated with a person's criminal case. Expungement involves the removal and destruction of records "so that no trace of information remains." *Police Commissioner of Boston v. Municipal Court of Dorchester District*, 373 Mass. 640, 648 (1978). Whereas sealing involves records kept by the court and probation, expungement eliminates all traces (e.g., complaints, arraignments, fingerprints, photographs, police reports, arrest registers, etc.). Expungement is the best remedy because it gives the person the "clean slate" they desperately want. However, expungement is difficult if not impossible in Massachusetts. The court has declined to expunge records in cases of mistaken identity, clerical errors, and false allegations. Basically, whenever a defendant has a remedy under any of the sealing-statutes (G.L. c. 276, §100A-C), the trial court lacks the authority to order expungement. Only in the rarest of circumstances will the court find that there is no statutory remedy other than expungement.

Mistaken Identity

In *Commonwealth v. S.M.F.*, 40 Mass. App. Ct. 42 (1996), S.M.F. was the victim

of identity theft. Jane Doe (most likely the thief) was charged with unrelated crimes and identified herself to authorities as S.M.F. As a result, all records of Jane Doe's case (arrest, criminal complaint, arraignment, and disposition) were entered on S.M.F.'s permanent record, which she sought to have expunged. In a rare case, the court upheld expungement only because they could not fit the bizarre circumstances within the broad reach of the sealing-statutes.

Although *S.M.F.* involved an imposter, the Supreme Judicial Court declined to uphold expungement in a clear case of mistaken identity in *Commonwealth v. Boe*, 456 Mass. 338 (2010). In *Boe*, the defendant was the victim of poor police work and mistaken identity. A vehicle registered to the female defendant (Boe) was involved in a car accident in which the sole occupant of Boe's vehicle (a Hispanic male operator) fled the scene. The police misidentified Boe as the perpetrator of the hit-and-run when the offense was committed by a male, and Boe was clearly a female. As a result, a criminal complaint issued against Boe for leaving the scene of an accident causing personal injury. Obviously, the complaint was later dismissed. Anyone looking at these facts would think that expungement was a no-brainer because Boe clearly didn't commit the crime and was the victim of poor police work. The SJC, however, declined to expunge Boe's record because she had a remedy under §100C of the sealing statute, as her case ended in a dismissal by the court.

Clerical Error

In *Commonwealth v. Alves*, 86 Mass. App. Ct. 210 (2014), the Appeals Court held that expungement was warranted only because of rare and unusual circumstances. In *Alves*, the defendant was the victim of a clerical error. The defendant and the perpetrator of a hit-and-run accident shared the same unique name (Octaviano Alves) but they had different dates of birth. The clerk's office mistakenly issued the criminal complaint against the innocent Alves by using his date of birth (1983) instead of the real Alves' date of birth (1977). Obviously, the complaint against the innocent Alves was dismissed. In a rare move, the Appeals Court granted expungement finding that sealing was not an appropriate remedy due to the narrow and exceptional nature of the case because "the person originally charged with the crime was not only factually innocent, but was never the intended target of law enforcement." *Id.* at 215.

In *Commonwealth v. Boe*, 456 Mass. 338 (2010), the defendant was also the victim of an error committed by the court. Upon receiving a summons for a show cause hearing on a charge she didn't even commit, Boe dutifully appeared in court on time. A court employee mistakenly directed Boe to the arraignment session instead of the clerk's office where the show cause hearing was to be held. Due to the court employee's mistake, the criminal complaint was issued against Boe. Alves and Boe were both victims of a court mistake and both Alves and Boe were factually

innocent but Alves was entitled to an expungement and Boe was not.

Fraud on the Court & False Allegations

In *Commonwealth of Probation v. Adams*, 65 Mass. App. Ct. 725 (2006), the Appeals Court affirmed an order expunging all records associated with a 209A order issued against the defendant by her ex-boyfriend. The circumstances of *Adams*, however, were extreme because the 209A order was obtained through a "fraud on the court," which gives the court broad discretion to invoke its inherent powers. The ex-boyfriend made 19 allegations in four different affidavits against the defendant that were "false and perjurious." His behavior was "extremely alarming" and indicative of obsessive compulsion. In ordering expungement, the Appeals Court appeared to be more focused on the court being the victim of fraud rather than the defendant being the victim. Expunging Adams' record was necessary to protect the integrity of the courts.

In *Commonwealth v. Moe*, 463 Mass. 370 (2012), the defendant was not the victim of fraud but something much worse — extortion. In *Moe*, the defendant was charged with assault with a dangerous weapon stemming from false allegations by the alleged victim, a disgruntled employee. After the complaint issued, the alleged victim called the defendant's lawyer on several occasions and threatened to report the allegations on national television unless the defendant paid him \$5,000. Even the detective admitted to the prosecutor that he did not believe the alleged victim's story. The prosecutor filed a *nolle prosequi*. Citing *Adams*, Moe moved for expungement, arguing that the alleged victim committed a fraud on the court. One may view the alleged victim's actions in *Moe* to be more egregious than the ex-boyfriend's actions in *Adams*. Even the SJC admitted that the alleged victim made intentional misrepresentations and basically acknowledged that he committed the crime of attempted extortion. The SJC, however, found *Adams* to be distinguishable because the alleged victim never made false statements under oath like the ex-boyfriend did in *Adams*. Relying on *Boe*, the SJC declined to expunge Moe's record because he had a remedy under §100C of the sealing statute, as a *nolle prosequi* had been entered.

New Expungement Legislation is Needed

Expungement provides a better remedy than sealing, as it gives the defendant a second chance with a "clean slate." However, the existing law makes expungement impossible because the court will always deny expungement whenever the defendant has a remedy under the sealing statute regardless of how unjust the circumstances may be. Therefore, new legislation is needed to correct these wrongs.

Those Who Should be Entitled to Expungement

First, expungement should be made available to first-time offenders, depending on the nature of the charge. Everyone makes a mistake and a first-time offender (regardless of age) should not be forced to live the rest of their life with a blemish on their record. Quite commonly, I have represented middle-aged persons and elderly persons with no prior involvement with police or the court system, but they made a mistake and got arrested. These people went their whole lives without getting into trouble, but they made a mistake (it happens) on one occasion. They should be given a second chance.

Second, young, first-time offenders should be eligible for expungement depending on the nature of the charge. Obviously, if somebody is young and commits a petty, non-violent misdemeanor offense (shoplifting, disorderly conduct, whatever) they should have the benefit of automatic expungement. Even when the offense is more serious, a young, first-time offender should be entitled to discretionary expungement. Young people have the capacity to make small mistakes and big mistakes. I have represented high-school and college students (good kids) who've done some pretty reckless things and were whacked with some serious charges. I'm not saying that we should look the other way, but they should be afforded the opportunity

to make their pitch for expungement in a hearing similar to the hearings we have for record sealing.

Third, first-time drug offenders should have the benefit of automatic expungement depending on the nature of the drug charge. Presently, G.L.c. 94C, §44 allows a defendant to seal his record for a drug offense (usually simple possession) if found not guilty, if the complaint is dismissed, or if the indictment nol prossed. If the defendant is a first-time drug offender under Ch. 94C

Incorporate the Sealing Laws

§100C ¶ 1 of the sealing statute (permitting sealing in cases of not guilty, no bill, and no probable cause) should be incorporated into a new expungement statute where a defendant's record shall be automatically expunged in cases of not guilty, no bill, and no probable cause.

It baffles me that someone is not entitled to automatic expungement when a judge or jury finds them "not guilty." Imagine being falsely accused of a crime; the stress, the anxiety, the embar-

If the commonwealth can't even present the minimal evidence necessary to pass the low threshold of probable cause, the defendant's record should be automatically expunged.

§100C ¶ 1 of the sealing statute (permitting discretionary sealing in cases of dismissal and *nolle prosequi*) should be incorporated into a new expungement statute where a defendant's record may be expunged in cases of dismissals and *nolle prosses* — subject to a hearing similar to that contemplated in §100C ¶ 2. The defendant's difficult burden of demonstrating "specific harm" should be less rigid and there should be more of an analysis on how the case ended with a dismissal or *nolle prosequi*. For example, if the case was dismissed or noll prossed because the charges were rubbish, than expungement is appropriate. On the other hand, if there's considerable validity to the allegations but the charges were dropped for whatever reason than that should be considered against expungement.

The benefits of expungement should be made available to the people of Massachusetts, as it is in other states. Expungement shouldn't be impossible (as it now is) but made available to the first-time offender, the young and immature, the drug addicted, the misidentified, the wrongly accused, the wrongly prosecuted, the over-prosecuted, the exonerated and those who can make the case for a second chance. ■

"The existing law makes expungement impossible; the court will always deny expungement whenever the defendant has a remedy under the sealing statute, regardless of how unjust the circumstances may be."

§34, he should be entitled to automatic expungement in the same circumstances (not guilty, dismissal, *nolle pross*). Even if a first-time offender is convicted of simple possession, he should be entitled to automatic expungement. The rationale being that first-time drug offenders ought to be given the opportunity for treatment and rehabilitation rather than being convicted and imprisoned due to their substance dependency.

arrassment, the humiliation, and the day finally comes when you're exonerated and found not guilty. Then, you're told that you can't have your record expunged even though you're innocent! When a grand jury (who can indict a ham sandwich) returns a "no bill" a defendant should have his record automatically expunged. Automatic expungement is warranted when the commonwealth fails to sustain the low burden of probable cause.

ANNUAL DINNER *Continued from page 6*

PHOTO BY JEFF THIEBAUTH UNLESS OTHERWISE NOTED.



Defender Award honoree Benjamin Evans (left) accepts his Access to Justice Award from MBA Secretary Christopher P. Sullivan.



Access to Justice Prosecutor Award Honoree Jonathan Miller (left) receives his award from MBA Secretary Christopher P. Sullivan.



Adriana Lafaille (left), was awarded the Access to Justice Rising Star Award.



MBA Secretary Christopher P. Sullivan presents the Access to Justice Lifetime Achievement Award to Willard P. Ogburn (left).



Mark J. Geragos speaks to a sold out MBA Annual Dinner crowd about his experiences with *voir dire*.



Massachusetts Superior Court Associate Justice Dennis J. Curran (second from left) enjoys the Annual Dinner reception. PHOTO BY ERIC HAYNES



Members of the legal community mingle during the Annual Dinner reception.



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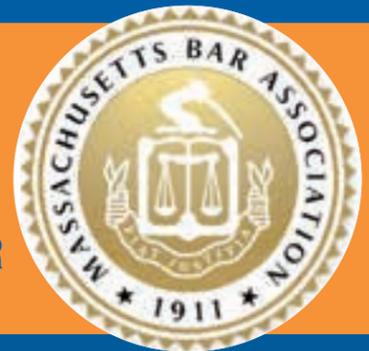
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