MASSACHUSETTS
LAWYERS JOURNAL
WWW.MASSBAR.ORG
Volume 23 | Number 7 | May/Jun 2016

DISPUTE RESOLUTION DROPS THE 'A'

Newest MBA section reflects growing field

BY ANNA SIMS

Out-of-court dispute resolution is no longer just an *alternative* form of resolving legal matters, according to members of the bar and bench alike. It's also the focus of the Massachusetts Bar Association's newest section.

Officially approved at the MBA's March House of Delegates meeting, the Dispute Resolution Section is in many ways a natural evolution of the MBA's own Alternative Dispute Resolution (ADR) Committee, which has been active for many years. To reflect the field's increasing and more mainstream use, the Dispute Resolution Section title stands without the familiar "A" for "alternative" that was included in the name of the committee.

"Over the past 25 years, really no area of practice has grown to have a wider impact on legal operations than dispute resolution," said Brian Jerome, current chairman of the ADR Committee and founder and CEO of Massachusetts Dispute Resolution Services. "Studies show that about 97 percent of all civil cases which are presented result in settlements and never reach trial. What this really means is that dispute resolution has evolved to become the *primary* means of case management — and not the alternative."

According to *The Law Dictionary*'s website, 95 percent of pending personal injury lawsuits end in a pretrial settlement, while legal news site *Above the Law* reports that only 1.5 percent of civil cases in Massachusetts make it to a jury, Jerome said.

It was these numbers, as well as interest from its members, that led the MBA to create the first section for dispute resolution in the state. "The Massachusetts Bar Association has a really fantastic reputation for professional excellence. … It is fitting that the MBA continues to support evolving legal industries like dispute resolution," Jerome said.

Also, unlike the standing committee, the DR section will be open to all MBA members — an important change that will facilitate greater outreach and service, Jerome said.

MBA Chief Legal Counsel and Chief Operating Officer Martin W. Healy said the new DR section will provide members with better resources, as well as "excellent" opportunities to network and "perhaps gather new skills." Vivian Hsu, ADR committee member and principal of Hsu & Associates LLC, said she believes the section will provide "greater recognition for dispute resolution as a profession and not as an add-on," as well as more engagement with MBA leadership.

Exponential growth

The section, which will officially launch Sept. 1 at the start of the 2016-17 membership year, is expected to build off of the working groups that the ADR committee founded. Those groups include the Judiciary Outreach Group, which works with judicial leadership, judges and clerks to encourage the use ➤ 5

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PRESIDENT'S **VIEW**

You can't be serious all the time

One of the events that I look forward to at the Massachusetts Bar Association is the Annual Dinner. This year was no different — although this year I had the privilege of being the master of ceremonies. It was a great time, and it was even better to see the lawyers in attendance enjoy themselves and, for maybe even a short time, forget about the issues at the office. I've been to a number of events that have been nice, but, at times, stuffy. Ours is anything but stuffy.


Robert W. Harnais

As I was walking through the crowd I heard one young lawyer call it the "lawyer's prom," which I thought was a fitting name. All year long, we deal with serious issues of the bar. One night a year, we put cases and issues aside and just have fun, with the focus on hanging out with other lawyers and having a good time.

Throughout the year, we are proud to sponsor some of our affiliated bars, and it was great to see so many come out and support us at the Annual Dinner. You're an important part of our family. As always I have to give a shout out to the Massachusetts Association of Hispanic Attorneys (MAHA), which got me started on this road. People come from all parts of the state — some in a limo, like the folks from the Hampden County Bar Association. (See, it is like a prom!) Not only was it a responsible idea, but I could tell that they were having a blast. It could have been the fact that when I first saw them, they were tailgating. I wish I could have joined them, but the emcee duties were calling (Jeff, Lisa and the rest of the gang, save me a seat for next year.)

It was also great to see so many young lawyers and law students in attendance. I was very impressed with the UMass Law School Student Bar Association, who all came together. (Thanks for allowing me to speak at your school this year.) These young lawyers and students are our profession's future, and you could feel the enthusiasm they bring. I know that the legal world will be in good hands.

This year's Annual Dinner had fun in droves, and there was plenty of funny as well. Keynote speaker Dennis Lehane's reflections on Boston had everyone in stitches. It was a perfect way to end the night.

Let's not forget it, and let's not wait until next year to remember to have more fun. Let our Annual Dinner be a reminder to take time to enjoy what we do — and enjoy each other — all year long. Our upcoming Summer Networking Series in Springfield (June 16) and Boston (July 14 and Aug. 18) offers a great opportunity to keep this camaraderie going.

Practicing law is a serious profession and a difficult job. We deal with clients who are often under tremendous pressure and stress, which ultimately lands on our shoulders. As we take on these cases we know that on the other side is a lawyer as equally, if not more, experienced who will as zealously represent their client as we represent ours. And though this is sometimes exciting, it is undoubtedly, at times, exhausting.

But events like our Annual Dinner remind us that we are members of a very special profession, and we should celebrate that fact. So let's commit to not taking ourselves so seriously, at least every once in a while. As my great friend and mentor the late Peter Muse always said to me: "You can't be serious all the time. *Enjoy life!*" Pete, thanks for the advice. I'll see you all at next year's prom! ■

BAR SEEN

Snapshots from around the MBA

Technology, client relations highlight 'How to Start and Run' conference

The Massachusetts Bar Association hosted its "How to Start and Run a Successful Solo or Small Firm Practice" conference in collaboration with Western New England University School of Law on April 8. Participants learned about the mechanics of setting up a small firm or solo practice, the logistics of running it, and best practices to successfully market it. The program included a continental breakfast and lunch; lunch was courtesy of the MBA Insurance Agency. ■

MASSACHUSETTS LAWYERS JOURNAL

Vol. 23 / No. 7 / May/June 2016

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Lawyers Journal (ISSN 1524-1823) is published bi-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,
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MASSBAR ASSOCIATION
A publication of the Massachusetts Bar Association

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CALENDAR OF EVENTS

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

June

Thursday, June 16
Summer Networking Series Session I
5-7 p.m.
Storrowton Tavern, 1305 Memorial Ave., West Springfield

Friday, June 17
Students in State Custody
10-11 a.m.
MBA, 20 West St., Boston

Wednesday, June 22
Learn from the Doctors: Common Work-Related Conditions
4-5:30 p.m.
MBA, 20 West St., Boston

Thursday, June 23
Workers' Comp. Settlements after the *DiCarlo* Decision
4:30-7 p.m.
Holiday Inn, 700 Myles Standish Blvd., Taunton

Friday, June 24
Understanding the Psychological Dimensions of Divorce
1-4 p.m.
MBA, 20 West St., Boston

REAL-TIME WEBCAST AVAILABLE FOR PURCHASE THROUGH MBA ON DEMAND AT WWW.MASSBAR.ORG/ONDEMAND

July

Wednesday, July 6
MBA Monthly Dial-A-Lawyer Program
5:30-7:30 p.m.
Statewide dial-in #: (617) 338-0610

Wednesday, July 13
Volunteer Recognition Dinner
5-8 p.m.
Lombardo's, 6 Billings St., Randolph

Thursday, July 14
Summer Networking Series Session II
5:30-7 p.m.
The Terrace at Hyatt Regency Boston, 1 Avenue de Lafayette, Boston

Thursday, July 14
Practicing with Professionalism
8:30 a.m.-4:30 p.m.
MBA, 20 West St., Boston

August

Wednesday, August 3
MBA Monthly Dial-A-Lawyer Program
5:30-7:30 p.m.
Statewide dial-in #: (617) 338-0610

Thursday, August 18
Summer Networking Series Session III
5:30-7 p.m.
Tia's on the Waterfront, 200 Atlantic Ave., Boston

Friday, August 26
End of Summer Boat Cruise
6-8 p.m.
Spirit of Boston, 200 Seaport Blvd., Boston

Rapoza, McGovern honored at Excellence in the Law

The Massachusetts Bar Association honored former Massachusetts Appeals Court Chief Justice Phillip Rapoza (ret.) and Boston Herald reporter Bob McGovern at the May 4 Excellence in the Law event co-presented by *Massachusetts Lawyers Weekly*. Rapoza received the Daniel F. Toomey Excellence in the Judiciary Award and McGovern accepted the association's Excellence in Legal Journalism Award.

The judicial and media awards are among several awards given out at the event, which took place at the Marriott Long Wharf Hotel. Others honored at the event included awardees in the categories of Up & Coming Lawyers, and Excellence in Alternative Dispute Resolution, Firm Administration/Operations, Marketing, Paralegal Work and Pro Bono.

From left: MBA President Robert W. Harnais, Excellence in Legal Journalism Awardee Bob McGovern, Boston Herald reporter; and Massachusetts Lawyers Weekly Publisher Susan A. Bocamazo.

Massachusetts Bar Association leaders and honorees at the 2016 Excellence in the Law event.

From left: MBA President Robert W. Harnais; Massachusetts Appeals Court Chief Justice Phillip Rapoza (ret.), the Daniel F. Toomey Excellence in the Judiciary Awardee; and Massachusetts Lawyers Weekly Publisher Susan A. Bocamazo.

Daniel F. Toomey Excellence in the Judiciary Award Honoree: Appeals Court Chief Justice Phillip Rapoza (ret.)

Throughout his judicial career, Rapoza has advanced the role of the judiciary, both in Massachusetts and around the world.

Rapoza received a B.A. in history, magna cum laude, from Yale College and a J.D. from Cornell Law School. Thereafter he served as an assistant district attorney in Suffolk and Bristol counties, and was a partner in law firms in Fall River and New Bedford. Beginning in 1992, he served as a trial judge in the District Court and, subsequently, the Superior Court. In 1998, he was appointed to the Appeals Court, where he served for almost 17 years, nine of which as the court's chief justice. Leading the court during tough economic times, he emphasized greater use of its IT resources, expanding public access through the court's website, increasing the automation of court operations, and laying the groundwork for the e-filing of appeals.

Prior to his appointment as chief justice, he took an unpaid leave of absence to work for the United Nations in East Timor as the head international judge on the Special Panels for Serious Crimes. The SPSC was a war crimes tribunal established to prosecute crimes against humanity and other serious crimes committed in East Timor during the period leading up to the country's independence. In his published memoirs, the former head of the UN mission in East Timor described Rapoza as a "tower of strength" in the war crimes process.

Rapoza has subsequently traveled on numerous occasions to East Timor to assist in the development of the country's justice system. Since his retirement in 2015, he has returned to lead programs on judicial independence and to conduct trainings of Timorese judges. Most recently, he was instrumental in helping to establish East Timor's first judges' association.

Prior to his retirement from the Appeals Court, Rapoza was appointed by UN Secretary-General Ban Ki-moon to serve as the international reserve judge on the Supreme Court Chamber of the UN-backed war crimes tribunal in Cambodia, a position that he continues to hold. The tribunal was established to bring to justice senior leaders and those most responsible for the deaths of as many as two million Cambodians during the rule of the Khmer Rouge.

Rapoza was recently re-elected to a second five-year term as president of the International Penal and Penitentiary Foundation, which is headquartered in Switzerland and promotes studies around the world in the field of crime prevention and the treatment of offenders. As president of the IPPF, Rapoza was invited to a private audience with Pope Francis in 2014 to discuss the challenges presented by mass incarceration.

Chief Justice Rapoza has received numerous awards and other recognition for his judicial work. In addition to several honorary doctor of law degrees, he has received the MBA President's Award for Judicial Excellence and the Haskell Cohn Award for Distinguished Judicial Service from the BBA. Internationally, he has been decorated by the president of Portugal, who awarded him the rank of Commander in the Order of Prince Henry the Navigator. He has also received the Brazilian Medal of International Merit.

"While leading the Appeals Court, Chief Justice Rapoza ushered in an era of openness and transparency by expanding its sessions to the four corners of the commonwealth," said Massachusetts Bar Association Chief Legal Counsel Martin W. Healy. "As a true missionary for justice and the rule of law, Rapoza selflessly took on international criminal justice work in developing countries on behalf of the United Nations. In short, he has created an impressive legacy both here and beyond our borders."

Excellence in Legal Journalism Award: Bob McGovern, *Boston Herald*

Bob McGovern is the *Boston Herald*'s legal columnist and also works as a reporter for the paper. During his time with the *Herald*, McGovern has covered everything from high-profile murder trials to "Deflategate" in his Full Court Press column. He also keeps an eye on legal stories that frequently go unnoticed by the media — the inside baseball of the Massachusetts legal system.

When he's not in court, talking to attorneys or following the federal docket, McGovern is often on the street covering breaking news. He has covered presidential campaigns, fires, murders and even a few college football games. A graduate of the New England School of Law, McGovern joined the Herald's editorial staff in 2013 after working as an attorney in Boston.

"Bob McGovern has contributed a fresh and informed voice to the *Boston Herald's* coverage of big cases and other important legal news, particularly through his Full Court Press column," said Healy. "Using his unique perspective as a lawyer and a reporter, McGovern has excelled at bringing readers the story behind the story." ■

MBA co-hosts MassINC criminal justice reform summit

PHOTO BY MIKE VIGNEUX.

MBA President Robert W. Harnais (left) introduces a panel discussion at the MassINC Criminal Justice Reform Coalition Policy Summit.

BY MIKE VIGNEUX

The Massachusetts Bar Association co-hosted MassINC's "Third Annual Massachusetts Criminal Justice Reform Coalition Policy Summit: Working Together for Results," on March 18, at UMass Boston. The theme of the event was the role of cross-agency partnerships within the criminal justice community, focusing on serving individuals with behavioral health conditions, integrating information systems to enable data-driven decision-making and facilitating successful reentry.

The keynote speakers were Hampden County Sheriff Michael Ashe and Essex County Sheriff Frank Cousins. Two of the longest serving sheriffs in Massachusetts, Ashe and Cousins each provided their perspectives on effective cross-agency partnerships.

Following the keynote address, panel discussions were held on "Improving Performance through Cross-Agency Data Sharing" and "Improving Outcomes through Cross-Agency Behavioral Health Partnerships." MBA President Robert W. Harnais introduced the second panel.

"The Massachusetts Bar Association has been a longtime partner of MassINC and we're proud to be part of a coalition that works for criminal justice reform across the commonwealth," said Harnais.

"Beyond the Wall," a film following a small community of men released from prison and attempting to rebuild their lives in Lawrence and Lowell, was shown at the conclusion of the event.

The policy summit was co-presented by MassINC, the MBA and the Massachusetts Criminal Justice Reform Coalition. ■

2016-17 MBA officers and delegates announced

The Massachusetts Bar Association Nominating Committee, led by MBA Immediate Past President Marsha V. Kazarosian, has issued its report for the 2016-17 nominations for MBA officers and regional delegates.

The committee was composed of Kazarosian, MBA Past Presidents Douglas K. Sheff, Robert L. Holloway Jr., Denise Squillante and Warren Fitzgerald, as well as George G. Hardiman and Hon. Nancy Holtz (ret.).

Jeffrey N. Catalano automatically succeeds to the office of president on Sept. 1, 2016. Pursuant to Article VIII, Section 1 of the MBA bylaws, the committee has filed with MBA Secretary John J. Morrissey the following list of 2016-17 officers: ■

MBA Past Presidents and current leadership at the 2015-16 Past President's Dinner.

OFFICERS

President	Jeffrey N. Catalano
President-elect	Christopher P. Sullivan
Vice President	John J. Morrissey
Treasurer	Christopher A. Kenney
Secretary	Denise I. Murphy

REGIONAL DELEGATES AND AT-LARGE DELEGATES

Region 1	Martin V. Tomassian Jr.
Region 2	Scott D. Peterson
Region 3	Brigid E. Mitchell
Region 4	Lee D. Flournoy
Region 5	Kyle R. Guelcher
Region 6	Walter A. Costello Jr. Damian J. Turco
Region 7	Lee J. Gartenberg Martin F. Kane II Philip Privitera
Region 8	Melissa A. Juarez Frank J. Riccio
Region 9	Anthony J. Benedetti Melissa Conner Peter T. Elikann Courtney Carolyn Shea
Region 10	Francis A. Ford James G. Reardon Jr.
At-Large	Thomas J. Barbar Morgan J. Gray Scott Heidorn Patricia A. Metzer Michael E. Mone Jr. Martha Rush O'Mara Paul E. White Sr.

DISPUTE RESOLUTION
Continued from page 1

of court-connected DR; the Best Practices Group, which provides programming for practitioners, attorneys and law students on topics that arise in actual dispute resolution practice; and the Law School Outreach Group, which offers seminars, presentations and mock mediations and arbitrations to students, professors and administrators at each law school in Massachusetts.

The Law School Outreach Group's very existence is a strong example of the increased status of dispute resolution in recent years, according to Sarah Worley, ADR committee member and principal of Sarah E. Worley Conflict Resolution P.C.

Indeed, the dispute resolution field itself has evolved and expanded from the traditional mediation and arbitration services to more than a dozen services (see related sidebar).

"When I started practicing law in Massachusetts 25 years ago, this concept [of dispute resolution] truly was an alternative," Worley said. "The whole notion of DR was not taught in law schools. There were no programs put together by any bar association. Part of the reason was there were very few people who actually were mediators or arbitrators full time. Over the years, the concept picked up traction. As attorneys and litigants became frustrated with the pace of court system, the demand grew, and the field of providers grew exponentially."

Jeffrey N. Catalano, MBA president-elect and partner at Todd & Weld LLP, also cited the speed of dispute resolution as one of its many benefits.

"Often times, [dispute resolution] resolves a case sooner, more efficiently and less expensively than going to a trial," Catalano said. "There's no scheduling difficulty. If you pick a date, that's set in stone — especially for arbitration. Nothing's going to get changed on you the week before. With trials, it sometimes happens that you get a date, and then all of a sudden it gets postponed for a year or more, which can be frustrating."

While dispute resolution offers a firm date, it gives participants flexibility in nearly every other aspect of the process, Worley said. "Dispute resolution gives parties the opportunity to create the best environment in which they can resolve their particular case," she said. "The parties have paramount control over who to work with as a neutral. They can control location. They can control time. For people who would find it stressful or impossible to get to one of our courts, dispute resolution can take place anywhere." Worley has mediated cases at someone's house, a hospital and a nursing home.

Catalano noted that "lawyers should never forego entirely the opportunity to get to courts and try cases. Learning how to try cases is a dying art. In order to arbitrate a case well, you need to know how to try a case well. … If you're going to mediation, and you haven't tried a lot of cases and aren't that experienced in courts, that's going to affect how the other side acts. They'll know you don't want to go to a trial."

Healy also acknowledged the importance of utilizing both dispute resolution and the court system. "Not every mediation will be successful," he said. "But at least it's the first really serious look at a case and trying to give parties an idea of the positives, the negatives and the drawbacks to their case."

Massachusetts Superior Court Associate Justice Dennis Curran, who called the topic of dispute resolution his "favorite judicial subject," said that he enters an order to consider mediation to the parties in his courtroom whenever possible.

"And you know what? It works. Most of them, once they sit down with their lawyers, agree to mediation," he said. "And if I send that case to [an in-house mediator], there's a 79, 80 percent chance that case will settle. Four out of five times, I will never see those cases again."

For parties that opt to use a private mediator, the settlement rate becomes 95 to 99 percent, he said.

Curran listed several reasons that he supports dispute resolution, including the large amount of money it can save clients.

"Look, most people don't want to be in the legal system," he said. "Most people don't want to go to court." He also called it a "common sense" way to help judges resolve the hundreds of cases filed each civil session. Curran referenced "The Trial Judge," published in 1937 by former Associate Justice of the Massachusetts Supreme Judicial Court Henry T. Lummus, in which he prophesied that judges of the future would function more as "managers" and would need new tools to manage their heavy caseloads. Dispute resolution, Curran said, is one such tool.

Back in the present day, both Worley and Hsu commended Jerome and the ADR Committee for their work in championing dispute resolution as a section. Jerome is eager to see the results of the hard work in the fall.

"We're really looking forward to launching our section and hope to be the primary resource of collaboration, outreach and service for the entire DR industry here in Massachusetts," he said. "We're very excited to be given this opportunity by the Massachusetts Bar Association." ■

DR services expand beyond mediation & arbitration

While dispute resolution (DR) practitioners have dropped the "alternative" tag, many have added services to their list of DR offerings. It is clear DR doesn't just mean mediation and arbitration anymore. DR now includes:

- Adjudication by referee
- Arbitration and its alternate evolutions (such as baseball arbitration)
- International arbitration and negotiation
- Collaborative law
- Conciliation
- Dispute avoidance
- Early case management
- Facilitation
- Fact-finding hearings
- Hybrid methods (for example, medical arbitration)
- Mediation
- Mini-trial/Summary jury
- Negotiation
- Ombuds services
- Settlement conferences
- Skills training and education
- Special masters services

BAR SEEN
Snapshots from around the MBA

Young Lawyers Division volunteers at the Greater Boston Food Bank

The Young Lawyers Division hosted an MBA Volunteer Night at the Greater Boston Food Bank on March 9. Volunteers sorted 9,654 pounds of food and made 7,215 meals possible. ■

Hirsch Roberts Weinstein LLP: a 'true business partner'

What types of law does your firm handle?

Labor and employment, business litigation and higher education.

Any particular areas where the firm has made a name for itself?

We represent organizations across a broad spectrum of industries, including higher education, healthcare, human services, professional services, transportation, technology, manufacturing, property management and emergency services.

What firm attribute do clients find most attractive?

Clients see HRW not as a vendor but as a true business partner; our clients appreciate the high-level attention, responsiveness, depth of knowledge and practicality we provide.

Briefly describe a recent "win" or client success story that the firm is proud of?

This year HRW lawyers led a project team that developed a college's first campus police department in the history of the school. HRW also recently obtained a summary judgment dismissal on behalf of a lender on a plaintiff's claim for $3 million arising from allegations of unfair lending and collection practices.

Describe a recent pro bono project the firm has undertaken.

We are proud to provide pro bono representation on an ongoing basis to a Massachusetts Legal Services organization in connection with its labor and employment needs. The organization is unionized, and the representation offers our attorneys a rare opportunity to do traditional labor work on a pro bono basis for a deserving nonprofit client.

HRW is also proud to participate in Middlesex District Attorney Marian Ryan's volunteer 209A Domestic Violence Restraining Order assistance program.

Is your firm regularly active with any charitable or civic outside of the MBA?

HRW is regularly active with numerous charitable organizations, including transgender rights organizations, community health centers, nonprofit human service providers and private special education schools. We volunteer our time, chair events, provide financial support and offer legal and practical advice. One of our partners even plays in a band at various fundraisers.

Anything to announce in the coming year?

We are going to continue having a blast working together and may expand our team. We'll continue to make work fun with such events as our annual "Battle of the Lawyers" and "Workplace Wizards Workshop" roundtables for our clients, and our continued participation in the Boston Podcast.

Name at least one fact about the firm that people might be surprised to learn?

An HRW partner serves as president of the Massachusetts Chapter of the International Network of Boutique Law Firms.

In what way(s) do you find the MBA beneficial to the lawyers in your firm?

Through the MBA, HRW lawyers have presented at and attended numerous educational programs, testified in support of important legislation, published scholarly works, assisted low income individuals, advocated on behalf of legal services, collaborated with other bar associations, and many other highly rewarding and beneficial activities.

Are there any specific MBA programs you find particularly helpful to your firm?

The MBA Labor and Employment Law Conference, the Civil Litigation and Labor and Employment Law Digests, the annual NLRB Practice and Procedure subcommittee meeting, collaboration with affinity bar associations and access to ethics guidance are just a few of the many programs and benefits we find valuable. We also enjoy the fun variety of social and networking events, including Casino night. ■

Just the facts

Firm Name: Hirsch Roberts Weinstein LLP

Year founded: 2008

Location: Boston

Number of attorneys: 17

Managing partners: Jeffrey L. Hirsch and Scott A. Roberts

The MBA — your firm's partner

MBA Honor Roll firms have five or more Massachusetts lawyers and enroll 100 percent of their attorneys in the MBA within an association year. Learn more about the many ways the MBA can work for your firm at www.massbar.org/honorroll.

Join our growing list of Honor Roll firms by contacting MBA Member Services at (617) 338-0530 or memberservices@massbar.org.

HOD votes to submit comments on access to court records

The Massachusetts Bar Association's House of Delegates (HOD) voted to submit comments on a proposed Trial Court rule governing access to public records at the HOD meeting on May 19 at the Sheraton Framingham.

In a unanimous vote, the HOD supported the submission of separate comments from both the Criminal Justice Section Council and Probate Law Section Council on proposed Trial Court Rule XIV, Uniform Rules on Public Access to Court Records.

The comments from the Criminal Justice Section Council ask that data from criminal cases and family law cases (except estate cases, as now available) and financial information from these cases not be made available to the public on the Trial Court website. In addition, the comments note the need to address the problem of errors in records and landlords using the online Housing Court database to reject housing applicants who had prior landlord-tenant cases.

Comments from the Probate Law Section Council call for supporting public online access to the following documents: Order of Informal Probate of Will and/or Appointment of Personal Representative, Decree and Order on Petition for Formal Adjudication, Bonds and Appointment of Special Representative and allowed wills. The comments also ask that the Attorneys Internet Portal allow access to imaging of all documents unless otherwise impounded, as well as remote access to all cases, regardless of whether an attorney has entered an appearance.

In other business, the HOD voted to support in principle the proposed changes to HB.4107, "An Act relative to child-centered family law," made by the Family Law Section Council. The HOD also voted to support in principle HB.43, "An Act relative to the Uniform Electronic Legal Material Act."

MBA President Robert W. Harnais, presiding over his final HOD meeting as president, thanked those in attendance for their continued support throughout the year. Harnais highlighted the creation of a statewide MBA Section 35 Helpline as the most meaningful accomplishment of his presidency.

MBA President Robert W. Harnais (left) presided over his final House of Delegates meeting on May 19. President-elect Jeffrey N. Catalano (right) will succeed Harnais as president on September 1

The MBA's House of Delegates met in Framingham for the final meeting of the 2015-16 association year.

In addition to his legislative update, Chief Legal Counsel and Chief Operating Officer Martin W. Healy, announced that three members had submitted applications to serve on the Executive Management Board: Peter T. Elikann, Lee J. Gartenberg and Scott D. Peterson. All three were voted in unanimously.

The meeting concluded with the ceremonial passing of the president's gavel from Harnais to President-elect Jeffrey N. Catalano, who will succeed Harnais as president on September 1. Following the meeting, the MBA hosted a dinner for leaders of the county bar associations. ■

Inaugural ComCom conference draws a crowd





Nearly 100 practitioners attended the Massachusetts Bar Association's inaugural Complex Commercial Litigation Conference on April 14 at the Hyatt Regency Boston. Sponsored by the MBA's Complex Commercial Litigation Section, the conference featured three panels covering intellectual property, bankruptcy and business litigation. The program was bookended by a keynote address from Supreme Judicial Court Justice Robert J. Cordy at the beginning and a cocktail reception at the end.

Thank you to the judges and lawyers who served on the conference's panels:

- Hon. Brian Davis (Suffolk Superior Court, Boston)
- Hon. Mitchell Kaplan (Suffolk Superior Court, Boston)
- Hon. Janet Sanders (Massachusetts Superior Court, Business Litigation Session)
- Hon. F. Dennis Saylor IV (United States District Court – District of Massachusetts, Boston)
- Hon. Allan van Gestel, ret. (JAMS)
- Charles R. Bennett Jr. (Murphy & King PC, Boston)
- Jerry Cohen (Burns & Levinson LLP, Boston)
- Lee Gesmer (Gesmer & Updegrove LLP, Boston)
- Lee Harrington (Nixon Peabody LLP, Boston)
- Francis C. Morrissey (Morrissey, Wilson & Zafiropoulos LLP, Braintree)

Special thanks to the program co-chairs for putting together this successful first conference: Lindsay M. Burke (Kenney & Sams PC, Boston), John O. Mirick (Mirick, O'Connell, DeMallie & Lougee LLP, Worcester), Laurence A. Schoen (Mintz, Levin, Cohn, Ferris, Glovsky & Popeo PC, Boston) and Paul E. White (Sugarman Rogers Barshak & Cohen PC, Boston). ■

Tiered Community Mentoring Program wraps up 2016 session

The Massachusetts Bar Association's Tiered Community Mentoring Program wrapped up its seventh year with an event and reception at the MBA in Boston on April 14. Featured speakers were Attorney General Maura Healey (pictured at far right), MBA President Robert W. Harnais (pictured second from right) and Massachusetts Probate and Family Court Chief Justice Angela M. Ordoñez (pictured second from left). In addition, Associate Justice of the Massachusetts Appeals Court Diana L. Maldonado spoke to participating students and presented them with certificates. MBA Chief Legal Counsel and Chief Operating Officer Martin W. Healy was also in attendance (pictured at far left).

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 Roxbury Community College, New Mission High School, Community Academy of Arts and Sciences (CASH), Brighton High School, Fenway High School, Suffolk University Law School and Bay Path University.

Apply for the inaugural MBA Leadership Academy class

The Massachusetts Bar Association believes that exceptional leaders are essential to the improvement of our profession. However, there are few opportunities to train young attorneys on how to best lead firms and organizations.

Continuing its commitment to cultivating leaders who work diligently toward the improvement of our profession and our society, the MBA has developed a Leadership Academy to better prepare young attorneys to assume leadership roles at the bar, in their firms or organizations, and in government.

The MBA's Leadership Academy — a 12-month program which will run concurrently with the MBA membership year — starts in September 2016. Apply today to be a part of the inaugural 2016-17 class. Applications are due Aug. 1. The curriculum will include educational programming, class projects and mentoring.

To be considered for inclusion in the MBA's Leadership Academy, candidates should meet the following requirements:

- Active MBA member in good standing
- 3-10 years of legal experience as a member of the bar
- Written nomination by an MBA member other than the applicant
- Submission of two letters of recommendation supporting the candidate's professional and personal qualifications, MBA experience and potential for future leadership at the bar
- Completion of the application
- Submission of a resume

MASSBAR LEADERSHIP ACADEMY

NOMINATIONS OPEN

Nominations for qualified candidates are welcome at leadacademy@massbar.org. Individuals chosen for the MBA Leadership Academy must commit to active participation in all MBA Leadership Academy activities, including quarterly programs.

Visit www.massbar.org/leadacademy to complete an application and learn more about the Leadership Academy. ■

Access to Justice Award winners honored at Annual Dinner

Prosecutor Award

Ellen Berger

Hampden County District Attorney's Office

Ellen Berger has been a dedicated prosecutor in the Hampden County District Attorney's Office for 25 years. She currently serves as the chief of the Grand Jury Intake Unit, a division of the office that has contact with every law enforcement agency in the county.

Described as an unsung hero, Berger plays an important, but often behind-the-scenes role in all Superior Court prosecutions. She screens cases for possible indictment, evaluates evidence, contacts law enforcement agencies to obtain additional information, works with assistant district attorneys to prepare and present cases before the grand jury and coordinates the administration of the unsolved homicide cases in Hampden County. A key facet of her work is presenting cases to the grand jury, which includes instructing the grand jurors on the law by defining the elements of crimes and legal concepts.

This position is a meaningful and important role for Berger, who previously served as an assistant district attorney in the District Court and in the Appellate Division of the office.

"As a prosecutor, your job is to seek the truth and by doing so, you are protecting and serving the citizens of the commonwealth," said Berger.

In addition to being a valued and trusted colleague, she has also been praised for her mentoring of younger attorneys as they advance and transition from District to Superior Court. Berger strongly believes that mentoring others is a way of paying it forward and ensuring the fairness and integrity of the criminal justice system.

"Justice requires well-trained prosecutors. I was mentored by experienced prosecutors and I try to help less experienced attorneys to grow into this important job," added Berger.

A native of New Paltz, New York, Berger is a graduate of Springfield College and Western New England University School of Law, and was a law clerk to the Justices of the District Court prior to joining the District Attorney's office.

Pro Bono Publico Award

Charles R. Casartello, Jr.

Pellegrini, Seeley, Ryan & Blakesley PC

A native of Springfield, Charles Casartello Jr. is a partner at Pellegrini, Seeley, Ryan & Blakesley PC, where he concentrates in personal injury, workers' compensation and Social Security law.

Known for his passion and dedication to *pro bono* efforts, his proudest moment as a volunteer lawyer was representing victims of the World Trade Center attacks in New York City. Recruited by Massachusetts Bar Association Past President Leo V. Boyle, Casartello worked on four *pro bono* cases, and represented first responders and families who suffered the loss of a loved one in the 9/11 tragedy.

"I was proud to do it. I felt humbled to do it and I hope I brought some solace to those folks and their families," said Casartello. "Going there and meeting families and victims was really an emotional experience, but also a very fulfilling experience."

Casartello is chair of the Hampden County Bar Association's (HCBA) Pro Bono Committee and Hampden County Legal Clinic, which helps provide "Lawyers for the Day" who volunteer to represent *pro se* clients in the Housing Court, Probate and Family Court, and District Court.

"We're trying very hard to increase the number of lawyers who dedicate time and talent to *pro bono* service, because there's an ever-growing need coming to the courts," added Casartello.

A past recipient of the MBA's Community Service Award, Casartello helped facilitate a "Day of Service" program in Hampden County in which volunteer lawyers are made available to the public to answer common questions in areas, such as employment law, landlord/tenant matters and benefits eligibility. Casartello is a past recipient of the HCBA's John M. Greaney Award for his outstanding citizenship to the law community in Hampden County.

In 2000, Casartello received the Harriet Louise Hardy Award for outstanding service to workers in issues of health and safety. In 2003, he was also named a Silent Hero by Griffin's Friends Children's Cancer Fund. Casartello is also the 2015 recipient of the Legal Aid Champion Award by Community Legal Aid.

Casartello attended the U.S. Coast Guard Academy and is a graduate of Springfield College and Western New England University School of Law.

Legal Services Award

Valerie Fisk

Community Legal Services and Counseling Center

Valerie Fisk, a supervising immigration attorney at Community Legal Services and Counseling Center (CLSACC) in Cambridge, has represented hundreds of clients in immigration proceedings throughout the past 25 years.

During her career she has achieved a near 100 percent success rate in obtaining legal status for her clients, none of whom have ever been deported under her legal guidance. Fisk is deeply committed to providing high quality legal services to immigrants and refugees and acknowledges the importance of the daily work she conducts on behalf of her clients.

"A client once told me I had the best job because the work that we do allows people to start their lives over," said Fisk.

Known as an immigration and domestic violence expert in Massachusetts, Fisk was one of the first attorneys in the state to focus on providing representation in Violence Against Women Act and U-visa cases. She has also been one of the pioneers in successfully representing Special Immigrant Juvenile cases. Fisk has conducted numerous immigration law trainings throughout the commonwealth, and frequently participates in trainings facilitated by the Massachusetts Immigrant and Refugee Advocacy Coalition.

Through training and mentoring, Fisk has helped expand the pool of *pro bono* attorneys and has taught the nuances of immigration law to a new generation of legal services attorneys. Given the constantly changing landscape of immigration law, having well-trained attorneys is vital to helping clients avoid unpleasant outcomes.

"There are big consequences for people if you don't do things the right way. People can be deported from the United States, and families can be broken up," noted Fisk.

Prior to joining CLSACC, Fisk was a staff attorney at Centro Presente in Cambridge, and program director of community services at Centro Las Americas in Worcester. Fisk is a graduate of North Park College and Western New England University School of Law.

An accomplished musician, athlete, coach, beekeeper and rosarian, Fisk is a person of many talents who not only balances work with her numerous activities, but also brings joy and creativity to her colleagues and clients.

Pro Bono Publico Award

Ingrid Martin

Collora LLP

Described by her colleagues and clients as tenacious, intelligent and a committed advocate for justice, Ingrid Martin is an experienced criminal defense attorney and civil litigator.

A partner at Collora LLP in Boston with a primary focus on the health care industry, Martin volunteered in 2009 to represent Joseph Donovan on a *pro bono* basis before the Massachusetts Parole Board. Donovan was 17 years old in 1993, when he was tried as an adult and convicted of first degree felony murder. Many, including Martin, felt that his sentence of life without parole was out of proportion, given his age and culpability in a fight that abruptly and unexpectedly turned fatal in the fall of 1992.

Martin has worked relentlessly on Donovan's behalf for the past seven years, fighting for justice at every step of the process. After a 2013 Supreme Judicial Court decision (*Diatchenko v. District Attorney*) granted parole eligibility to juveniles convicted of life without parole, Martin succeeded in obtaining a parole hearing for Donovan, who became the first juvenile life without parole inmate to appear before the Parole Board after the landmark ruling. In 2014, Martin's staunch advocacy ultimately convinced the board to release Donovan after he had spent more than 20 years in prison.

"For the criminal justice system to work properly, somebody needs to stand up and test the government's evidence," said Martin.

Donovan is now enrolled in a step-down program, with the goal of soon reintegrating back into society as a free person. That will be a day Martin has looked forward to for quite some time.

"There's no question it's going to be the proudest professional moment in my career," acknowledged Martin. "Life without parole was not the right outcome for Joe Donovan. It took people working on a lot of different pieces, but in the end he is going to get out and have a life, and that is so satisfying because that's the right outcome."

Martin is also quick to mention that her selection for this award recognizes many in the legal community who have also advocated for juvenile parole reform.

"I'm the lucky designee for a large group of people who've been working hard on the issues around juvenile life sentences without parole," said Martin.

Born in Switzerland, Martin is a graduate of Harvard Law School and Yale University.

Defender Award

Benjamin H. Keehn

Committee for Public Counsel Services

As a public defender at the Committee for Public Counsel Services (CPCS), Benjamin H. Keehn has never had a boring day since he began working there in 1987. He has dedicated his career to defending indigent, marginalized, and underserved clients, and has advanced the cause of access to justice as an inspirational public servant for close to three decades.

Keehn has worked on more than five dozen reported cases, sometimes as the lead, but often behind the scenes as a member of a collaborative defense team. Reflecting on his career, Keehn acknowledges that the nature of being a public defender is challenging and even disheartening at times. But constantly striving for justice is the goal that has kept him in the public defender role for so many years.

"If you're doing this type of work in order to be a 'success,' or if 'winning' is your measure of success, it's going to be an exercise in futility," said Keehn. "The actual engagement with the client, the law, the court — the attempt to accomplish something meaningful — is where I get my reward."

Among his most gratifying projects has been aiding clients who were convicted of murder as juveniles and received mandatory life sentences without the opportunity for parole. As a result of Keehn's work in this area, juveniles convicted of life without parole were granted parole eligibility and the right to a fair hearing in the Supreme Judicial Court's two decisions in *Diatchenko v. District Attorney of the Suffolk District, I and II*.

"You don't often get the opportunity to literally walk a client who has been behind bars for all of his adult life to his home," remarked Keehn.

Described by his colleagues as an outstanding litigator with contagious enthusiasm, Keehn has served as a thoughtful mentor to many young lawyers at CPCS. Whether working with one of his clients or a coworker, he has always displayed a willingness to go above and beyond.

Keehn is a graduate of Columbia University and Northeastern University School of Law.

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Rising Star Award

Margaretta Homsey Kroeger

MetroWest Legal Services

In her own words, Margaretta Kroeger advocates for "people in crisis who are trying to access basic life necessities." As a government benefits attorney at MetroWest Legal Services, Kroeger assists clients who have been denied or improperly terminated from disability benefits, as well as those who have been denied other government benefits, such as food stamps, cash assistance, unemployment benefits, health insurance and emergency shelter.

Kroeger, a 2010 graduate of Boston College Law School, is passionate about her work with low-income clients, many of whom face physical and mental disabilities.

"To help prevent somebody from becoming homeless or help them access basic benefits is incredibly rewarding," said Kroeger. "It's really hard to imagine doing any other kind of work when you see the power that you have to transform people's lives on a day to day basis."

While in law school, Kroeger interned in the health and disability unit at Greater Boston Legal Services (GBLS), where she represented clients with disabilities in Supplemental Security Income (SSI) appeals. After graduation she received a prestigious Skadden Fellowship to develop the Transitioning Foster Youth SSI Assistance Project at GBLS, which enabled her to represent youths with disabilities who were aging out of the state foster care system and needed assistance accessing SSI benefits.

In 2014, Kroeger volunteered to serve as co-counsel with the Massachusetts Law Reform Institute in a lawsuit filed against the Massachusetts Department of Transitional Assistance. The suit challenged a new automated procedure for those applying for or receiving food stamps, which resulted in thousands of people being improperly denied or terminated from receiving food stamp benefits.

"I do a lot of individual case work, so it's been great to have the opportunity to advocate for systemic change on a statewide basis as well," said Kroeger.

A native of Delaware, Kroeger received her undergraduate degree from Harvard University in 2004.

Lifetime Achievement Award

T. Richard McIntosh (1948–2015)

South Coastal Counties Legal Services Inc.

Thomas Richard (Rick) McIntosh spent his entire 42-year career working tirelessly to improve the lives of thousands of low-income families in southeastern Massachusetts. As a civil legal aid attorney at South Coastal Counties Legal Services Inc. (SCCLS), formerly known as Legal Services for Cape Cod and the Islands (LSCCI), McIntosh was a trusted colleague and a mentor to many attorneys and paralegals.

McIntosh was dedicated to fighting poverty and advocating for disadvantaged clients. His unparalleled commitment to ensuring that low-income families had access to quality legal representation made him a recognized leader in the Massachusetts legal aid community.

"He found something that he believed in and tried to find a way to do the type of work he wanted to do, which was to protect the less fortunate," said close friend Thomas Kosman, a staff attorney and former colleague at SCCLS.

An expert in unemployment law, McIntosh litigated many cases before the Supreme Judicial Court and the Appeals Court. He also had a keen understanding of laws pertaining to government benefits, particularly veterans' benefits, in addition to housing, elder and juvenile matters.

"Dad was the sort of person who believed that hard work was its own reward," said his son, Andrew McIntosh. "He would have been humbled, delighted and probably surprised to receive this award, even though he clearly deserves it."

Nominated by the Barnstable County Bar Association, McIntosh received the Massachusetts Bar Association's Legal Services Award in 1993 for his significant contributions in the area of civil legal aid.

McIntosh was a resident of Falmouth for more than 40 years and was a dedicated member of the community. He served on the board of directors of the Community Action Committee of the Cape and the Islands, was a member of the Head Start Policy Council for Cape Cod Child Development and served on the Policy Advisory Board for the Department of Transitional Assistance. McIntosh was also acting director of LSCCI twice during his career, once in the late 1970s and again in the mid-1990s.

He was a graduate of Columbia University and earned his law degree from Boston University.

Pro Bono Law Firm

Nutter McClennen & Fish LLP, Boston

Founded by social justice pioneer and (later) U.S. Supreme Court Justice Louis D. Brandeis, Nutter McClennen & Fish LLP has enjoyed a strong commitment to *pro bono* representation for 135 years. The firm provides extensive *pro bono* services on a broad range of issues, and encourages all of its lawyers at every level to get involved with various projects and important causes.

"We've inherited our *pro bono* philosophy and our attachment to *pro bono* from the seeds that were planted by Louis Brandeis," said Kenneth R. Berman, a partner at the firm and chair of its *pro bono* committee. "We realize that, as attorneys, we have a responsibility to help people who can't afford to hire lawyers. It makes us understand that we can make really impactful changes in the lives of our *pro bono* clients."

The firm has been highly involved with the Kids In Need of Defense (KIND) program, an initiative started by the actress Angelina Jolie in collaboration with Microsoft, which provides free legal representation to immigrant teenage children facing deportation. Many of these children arrive at the United States border trying to connect with a family member when they are confronted by immigration authorities. Nutter provides attorneys who represent and counsel these teens on a *pro bono* basis as they apply for special immigrant juvenile status. The program has recently been expanded to have Nutter work in collaboration with the legal department at EMC to service even more clients.

A founding member and challenge participant in the Pro Bono Institute's Law Firm Pro Bono Project, Nutter participates in numerous *pro bono* programs, including the Division of Unemployment Assistance Project, the Political Asylum/Immigration Project, Housing Court Lawyer for the Day/Eviction Defense Project, the Women's Bar Foundation Family Law Project for Battered Women, the Medical-Legal Partnership (Boston), the New England Innocence Project and the Veterans Consortium Pro Bono Program, among many others.

In many *pro bono* cases the firm handles, the real world impact for clients is often immeasurable.

"In the lives of the *pro bono* clients whose cases we handle, it's the individual equivalent of a bet-the-company case," added Berman. "For a *pro bono* client, the consequences are existential. To be able to win the future for a *pro bono* client is enormously gratifying." ■

BC Law student wins Oliver Wendell Holmes Jr. Scholarship

Lauren N. Schaal, Boston College Law School

Third-year Boston College Law School student Lauren N. Schaal is the recipient of the Massachusetts Bar Association's 2016 Oliver Wendell Holmes Jr. Scholarship. The $10,000 scholarship, established in 2015, is given to a third-year law student in Massachusetts who is committed to public interest law upon graduation, has a proven record of hard work and academic accomplishment, and has demonstrated integrity and honesty.

This coming fall, Schaal will work as a staff attorney at Community Legal Aid (CLA) in the Family Law Unit. CLA is a nonprofit organization that provides free civil legal services to low-income and elderly clients in central and western Massachusetts. Based at CLA's Worcester office, Schaal will continue working with low-income survivors of domestic violence, handling family law matters such as divorce, child custody, child support and visitation. In addition, she will be actively involved in community outreach and education initiatives centered on the issue of domestic violence.

"I think it's really exciting that the state bar association will recognize public-interest oriented students," said Schaal. "It makes me feel that the bar association and the Massachusetts legal community, in general, really values work with indigent clients."

In 2015, Schaal served as a legal intern at Casa Myrna Vazquez Inc., Boston's largest provider of shelter and supportive services to survivors of domestic violence. She provided legal advocacy and Rule 3:03 representation at Probate & Family Court hearings, assisted staff attorneys with research, performed intake for new clients, and drafted motions, temporary orders and pre-trial memoranda for divorce and paternity cases.

Throughout the past seven years, Schaal has worked with survivors of domestic violence and sexual assault in shelters, crisis centers and legal programs. During law school she has also served as a legal advocate at the Boston Area Rape Crisis Center.

"I work with survivors of domestic and sexual violence and have since college," added Schaal. "I'm honored to be able to be a voice for those clients. Getting recognized with this scholarship will hopefully shed some light on those issues and will allow me to be able to talk more about the needs of domestic and sexual violence survivors."

At Boston College, Schaal served as note editor for the *Journal of Law and Social Justice*, was named a Legal Public Service Fellow by the Clough Center for the Study of Constitutional Democracy and was named a Legal Fellow by the Massachusetts Bar Foundation. She was also a member of the Supreme Judicial Court Pro Bono Honor Roll.

"I am recommending Lauren with much enthusiasm and without any reservation," wrote Kari E. Hong, assistant professor of law, in her letter of recommendation. "Indeed, it is difficult for me to think of any prior student who would be a better fit for this fellowship. Lauren is a brilliant student who will go on to be an outstanding attorney."

Originally from Omaha, Nebraska, Schaal is a graduate of the University of Nebraska-Lincoln, where she received a degree in political science and communication studies in 2013. ■

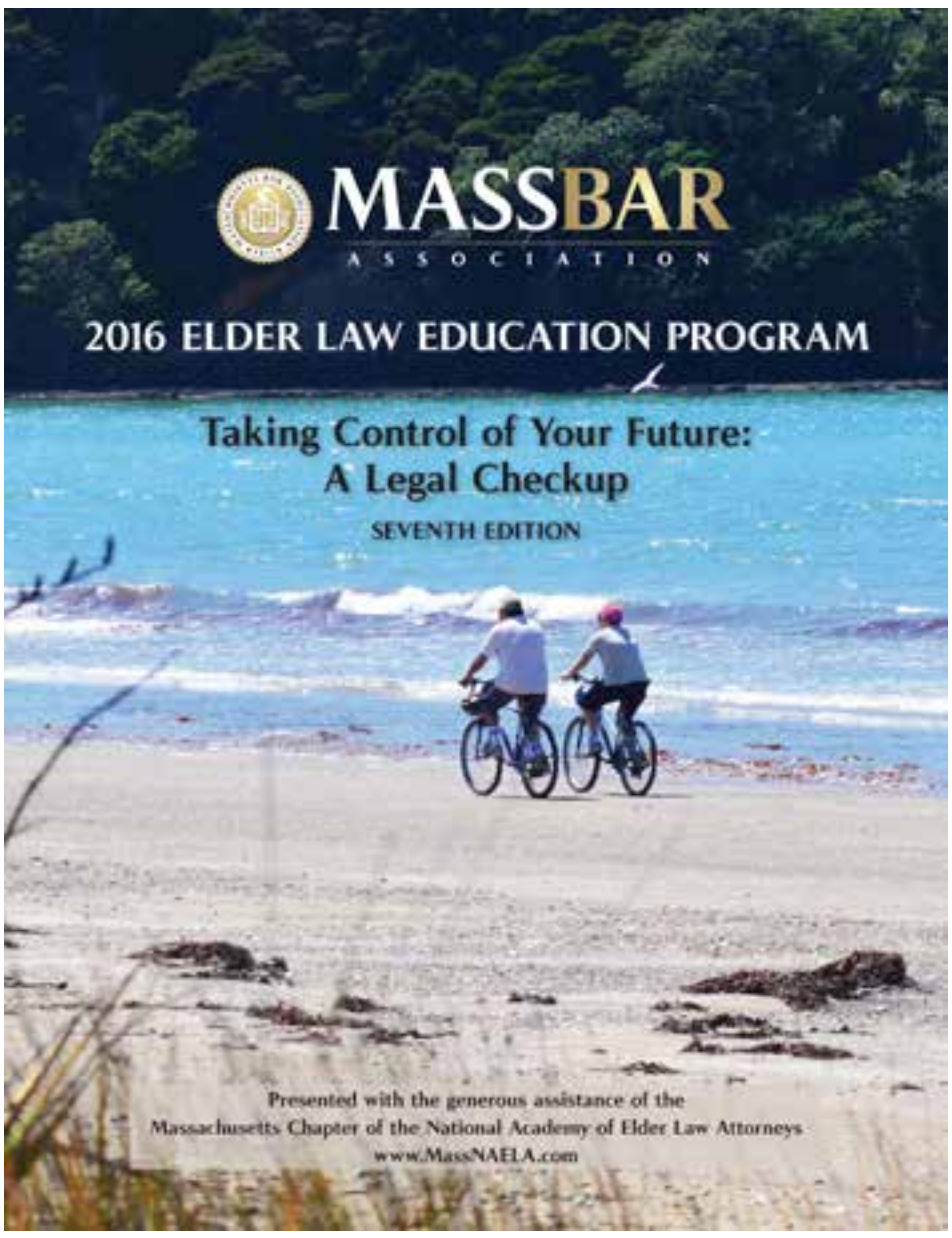
2016 Elder Law Resource Guide now available

The Massachusetts Bar Association's 2016 "Taking Control of Your Future: A Legal Checkup," a resource guide on a wide range of legal issues affecting the lives of seniors, is now available. Visit www.masslawhelp.com/estate-planning to download a copy.

Since 1988, the MBA has celebrated Law Day by organizing free educational presentations about elder law throughout the commonwealth during the month of May. The Elder Law Education Program 2016 guide is made possible due to the assistance and cooperation of the MBA's Health and Probate Law Section Council and the Massachusetts Chapter of the National Academy of Elder Law Attorneys.

This year, an advisory committee revised and expanded the guide's 2016 edition, which was distributed to all participating councils on aging, senior centers and attorney volunteers. Some of the topics included in the guide are:

- Commonly asked questions in elder law
- Veterans' aid and attendance benefits
- Long-term care insurance
- Reverse mortgages
- Medicare Part D/Medicaid
- Long term care regulations and resident rights
- Protecting the home: Homestead and tax exemptions ■



Bar leaders visit Washington for ABA Day

Massachusetts Bar Association President Robert W. Harnais, President-elect Jeffrey N. Catalano and Director of Policy and Operations Lee Constantine participated in American Bar Association Day in Washington, D.C., on April 20. ABA Day gathers bar leaders from across the country to lobby their congressional delegations on issues of importance to the organized bar.

Members of the MBA and Boston Bar Association delegation met with Sen. Elizabeth Warren (pictured top) and Sen. Edward J. Markey (pictured middle). ■

BAR SEEN Snapshots from around the MBA

Harnais urges legislators to increase civil legal aid funding

MBA President Robert W. Harnais (seated third from left) was a panelist at a legislative briefing on civil legal aid at the State House on March 30. Harnais spoke to legislators and their aides about the importance of fulfilling the Massachusetts Legal Assistance Corporation budget request of $27 million for fiscal year 2017. Harnais also invited legislators to visit their local courts where 64 percent of those eligible for free legal services are turned away from legal aid programs due to a lack of resources. ■

Open forum on amendments to Superior Court rules

The Massachusetts Bar Association hosted an open forum on March 31 on three Superior Court initiatives to amend court rules pertaining to case management and expert disclosure. MBA Judicial Administration Section Chair Lori Cianciulli (left) moderated the program, which included Superior Court Chief Justice Judith Fabricant (center, right) and Associate Justice Raymond J. Brassard (right). MBA Judicial Administration Section Vice Chair Thomas M. Bond was also in attendance (center, left). ■

Newton North wins Mock Trial State Championship

Newton North High School students accept a $2,500 donation from MBA Executive Director Elizabeth M. Lynch (pictured, left). The MBF, the MBA's philanthropic partner, partially funded the Newton North team's travel expenses to the National High School Mock Trial Championship.

Runners-up the Boston Latin School pictured with MBA President Robert W. Harnais and team coach Jeffrey N. Catalano.

Newton North and Boston Latin School competed in the 2016 Massachusetts Bar Association's 2016 High School Mock Trial State Championship.

The Newton North High School team with MBA President Robert Harnais (pictured, left).

BY MIKE VIGNEUX

Newton North High School was named state champion of the Massachusetts Bar Association's 2016 High School Mock Trial Program on March 29.

The state title is the school's 10th since 1988, with their most recent prior championship coming in 2004.

Newton North earned the chance to compete at the National High School Mock Trial Championship in Boise, Idaho, May 12-14. A portion of their trip was funded by a $2,500 donation from the MBA's philanthropic partner, the Massachusetts Bar Foundation.

Newton North and Boston Latin School competed in a two-hour mock trial in Faneuil Hall's Great Hall. In the fictional scenario at issue, Boston Latin School represented the plaintiff, a former star soccer player who was diagnosed with terminal cancer in 2014, and Newton North represented the defendant, a doctor who performed heart surgery on the plaintiff in 2011 after the plaintiff suffered heart failure following a game.

Hon. Mark D Mason, Massachusetts Superior Court, presided over the mock trial and was assisted by Hon. John D. Casey, Massachusetts Probate and Family Court, and Hon. Margaret R. Guzman, Massachusetts District Court. All three judges commended the students on both teams for performing at such a high-level.

"All students conducted themselves in a manner which was more than competent. A manner which demonstrated truly the very best that our profession has to offer," Mason said in his remarks after the trial. "You have all demonstrated an achievement in advocacy which is rarely reserved even for the finest lawyers."

Started in 1985, the MBA's Mock Trial Program began its 31st year in January. The competition places high school teams from across the state in simulated courtroom situations where they assume the roles of lawyers, defendants and witnesses in hypothetical cases. More than 1,500 students at 127 high schools competed in this year's competition.

MBA President Robert W. Harnais welcomed the students to the historic venue, and thanked the families and coaches of both teams for their support.

"I am delighted to welcome our finalists here to the Great Hall in Faneuil Hall — the place where thousands of new lawyers get sworn in each year," said Harnais. "Perhaps many of you will go on to become part of the Massachusetts legal community." ■

Members win prizes during Appreciation Week

To thank members for their commitment to the Massachusetts Bar Association, the 2016 Member Appreciation Week was held April 4-8. The week featured giveaways and raffles. This year, we also added two exciting new benefits to celebrate Member Appreciation Week: free professional headshots and Trivia Night.

Winners included:

- **MBA April 28 Annual Dinner Pass**
  Sheldon C. Toplitt
- **$100 AMEX gift card**
  Samuel S. Reidy of Boston
- **FREE conference pass**
- Sara Husseini of Springfield and Iliana Diaz of Holbrook
- **$250 AMEX gift card**
  Eric J. Moreno of Boston
- **Free MBA membership plus free LRS membership**
  Diana Chea of Lowell ■

As part of Member Appreciation Week, the MBA hosted a networking Trivia Night on April 7. The event, which featured "Geeks Who Drink quizzes," brought the laughs.

BAR SEEN

Snapshots from around the MBA

Celtics Night

The MBA's Young Lawyers Division hosted a Celtics Night on March 2. Members of the division were able to sit courtside for pre-game warmups. The Celtics played the Portland Trail Blazers at TD Garden. ■

MASSBAR EDUCATES

DENOTES SEMINAR WITH REAL-TIME WEBCAST

UPCOMING CLE, SEMINARS AND MBA ON DEMAND PROGRAMMING

Civil Litigation

Feed Your Mind: Mass. Appellate Court Goes Paperless

Tuesday, June 14, 12:30–1:30 p.m., MBA, 20 West St., Boston

Join several Appeals Court clerks for an informative program about the new opportunity for civil practitioners to electronically file briefs and appendices, as well as other documents, in the Appeals Court through a new third-party vendor, Tyler Technologies, without having to file paper versions. This program will cover the basics of registering your firm with the vendor, the many types of documents accepted for e-filing and how to properly format your documents for electronic submission.

Attendees are encouraged to bring their own lunch.

Faculty:
Craig D. Levey, Esq., program co-chair, Bennett & Belfort PC, Cambridge
Courtney C. Shea, Esq., program co-chair, Peabody & Arnold LLP, Boston
Joseph F. Stanton, Massachusetts Appeals Court, Boston
Julie Goldman, Massachusetts Appeals Court, Boston
Tiffany Knapp, Massachusetts Appeals Court, Boston


Craig D. Levey


Courtney C. Shea

Family Law

Understanding the Psychological Dimensions of Divorce

Friday, June 24, 1–4 p.m., MBA, 20 West St., Boston

Three seasoned mental health professionals, one of whom is a GAL, will present and then lead an informed discussion regarding the interplay among divorce and grief, uncoupling, personality disorders, and the physiological responses to stress and emotion. The discussion will be moderated by Heidi Webb, who founded Consilium Divorce Consultations, a practice that merges law and psychology.

Faculty:
Heidi R. Webb, Esq., program chair, Consilium Divorce Consultations, Lincoln
Claudia A. Harris, LICSW, BCD, Belmont
Kevin M. Kozin, Esq., 76 Bedford St., Lexington
Mira Levitt, Ph.D., Natick


Heidi R. Webb

Juvenile & Child Welfare Law

Students in State Custody: Legal Chat

Friday, June 17, 10–11 a.m., 20 West St., Boston

This program will focus on school district responsibility for students in state custody. An attorney who represents a school district, the deputy director of Children's Law Center of Massachusetts, and an attorney from the Department of Children and Families will have an in-depth discussion on this important topic.

Faculty:
Alisia E. St. Florian, Esq., program chair, Murphy, Hesse, Toomey & Lehane LLP, Quincy
Jessica Berry, Esq., Children's Law Center of Massachusetts, Lynn
Brian R. Pariser, Esq., Department of Children & Families, Boston


Alisia E. St. Florian

Workers' Compensation

Learn from the Doctors — Common Work-Related Conditions

Wednesday, June 22, 4–5:30 p.m., MBA, 20 West St., Boston

Workers' compensation attorneys and many others must educate themselves about common injuries, medical conditions and medical procedures to effectively represent their clients. This series will bring medical experts to the MBA to provide you with the information you have been looking for in a congenial group setting.

Faculty:
Lauren Michele Bergheimer, Esq., program co-chair, Ready, Kiernan & McNally LLP, Wareham
Christina M. Schenk-Hargrove, Esq., program chair, Smith Duggan Buell & Rufo LLP, Boston
Martin B. Schneider, Esq., program co-chair, Law Office of Martin B. Schneider, Salem
Alan Curtis


Lauren Michele Bergheimer


Christina M. Schenk-Hargrove


Martin B. Schneider

Workers' Compensation Settlements after the *DiCarlo* Decision

Thursday, Jun. 23, 4:30–7 p.m., Holiday Inn, 700 Myles Standish Blvd., Taunton

Now that the Supreme Judicial Court has decided the *DiCarlo/Martin* cases and affirmed the Appeals Court's ruling in *Curry*, our panel of experts will address the following questions: 1) How has the landscape changed?; 2) What are some of the strategies that can be used in dealing with workers' compensation carriers?; and 3) How should one conduct hearings in third-party settlements going forward?

Faculty:
Charlotte E. Glinka, Esq., program co-chair, Keches Law Group PC, Taunton
Leo M. Spano, Esq., program co-chair, Gay & Gay PC, Taunton
Additional faculty to be announced.


Charlotte E. Glinka


Leo M. Spano

Register online at www.MassBar.org/Education or call (617) 338-0530.

PRACTICING WITH PROFESSIONALISM
MASSBAR ASSOCIATION

Supreme Judicial Court Rule 3:16 requires all persons newly licensed to practice law in Massachusetts on or after Sept. 13, 2013, to complete a one-day Practicing with Professionalism Course.

As the only approved provider offering the course in multiple locations statewide, the Massachusetts Bar Association is committed to ensuring that newly licensed attorneys enter the profession in good standing by offering an affordable and convenient means of satisfying this rule's requirement.

UPCOMING COURSE DATES

Thursday, July 14, 2016—MBA, Boston

Thursday, Sept. 22, 2016—UMass Lowell Inn and Conference Center, Lowell

Friday, Oct. 21, 2016—Western New England University School of Law, Springfield

Registration is $50 and includes:

- **Breakfast and lunch**
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Pride, unity emphasized at 2016 MBA Annual Dinner

Award-winning novelist and screenwriter Dennis Lehane shares memories about his family's storytelling tradition at the MBA's Annual Dinner on April 28.

From left: MBA Criminal Justice Vice Chair Lee J. Gartenberg, Chair Peter T. Elikann and novelist and screenwriter Dennis Lehane.

From left: MBA Chief Legal Counsel and Chief Operating Officer Martin W. Healy, Superior Court Chief Justice Judith Fabricant, Celeste Healy, Keynote Speaker Dennis Lehane.

PHOTOS BY JEFF THIEBAUTH.

The 2016 Access to Justice Award winners. From left: Defender Award Winner Benjamin H. Keehn; Legal Services Award Winner Valerie Fisk; Kenneth R. Berman of Nutter McClennen & Fish LLP, who accepted the firm's Pro Bono Award for Law Firms; Pro Bono Publico Award winner Ingrid Martin; Andrew McIntosh, who accepted the Lifetime Achievement Award on behalf of his father T. Richard McIntosh; Prosecutor Award winner Ellen Berger; Rising Star Margaretta Homsey Kroeger; and Pro Bono Publico Award winner Charles R. Casartello Jr.

MBA President Robert W. Harnais (center) with his family and Annual Dinner Keynote Speaker Dennis Lehane (third from right).

From left: MBA Secretary John J. Morrissey, MBA Chief Legal Counsel and Chief Operating Officer Martin W. Healy, Keynote Speaker Dennis Lehane, MBA President Robert W. Harnais, MBA Treasurer Christopher P. Sullivan and MBA President-Elect Jeffrey N. Catalano.

From left: MBA Legislator of the Year Awardee Senate President Stanley C. Rosenberg and MBA President Robert W. Harnais.

BY JOE KOURIEH

Camaraderie was the word at the 2016 Massachusetts Bar Association Annual Dinner, held on Thursday, April 28, at the Westin Hotel in South Boston's Seaport District, when more than 1,000 members of the legal community from across the commonwealth convened in Boston to celebrate their profession among peers and friends.

They were joined by famed Bostonian author Dennis Lehane, whose keynote address took the audience on a humorous trip through a Boston upbringing, illustrating the capital city's influence on his development as a storyteller.

MBA President Robert W. Harnais in his opening remarks reminded his colleagues that their profession, driven by the love of justice, needs to be protected.

"My first goal this year was to steer our profession back toward civility and camaraderie. We need to return to a profession rather than a business," he said. "Now, MBA members are leading by example. Not only are we making a difference with each other, we're increasing the respect of our profession. And that's what it deserves.

"As lawyers we have an incredible power, but a much bigger responsibility," he added. "Going out and getting your diploma, passing the bar, making money — that's what's expected of lawyers. But going out and making a difference — that's what's respected of lawyers."

Night of awards

Harnais eagerly ushered in the event's award ceremony, during which a litany of MBA members and allies, both established and up-and-coming, were recognized for their outstanding achievements throughout the preceding year.

First up were the MBA President's Award winners: Boston Municipal Court (BMC) Clerk-Magistrate Daniel J. Hogan and attorney George G. Hardiman. The President's Award honors attorneys for their significant contribution to the work of the MBA, to the preservation of MBA values, to the success of MBA initiatives, and to the promotion of the MBA leadership role within the legal community of Massachusetts.

Harnais then presented Senate President Stanley C. Rosenberg (D-Amherst) with the Legislator of the Year honors. Harnais called Rosenberg a public servant with "simply too many accomplishments to mention," among them a key role in the creation of the bipartisan Criminal Justice Commission, influential advocacy for attorney-conducted *voir dire* in Massachusetts and spearheading the enlistment of the Council on State Governments' Justice Center to assess the overall integrity of the Bay State's criminal justice system.

Rosenberg, in contrast, described himself as "a humble legislator from Western Massachusetts" with the simple goal of bringing society's concerns within the doors of the State House to further the cause of criminal justice reform in tandem with his colleagues.

"We are going to see a lot of change," Rosenberg said, "in order to help you and your clients get a better situation and better opportunity for fair and responsive justice in the commonwealth. … In accepting this award, I do so with ➤16

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Renew your MBA membership by mail or online

The MBA reminds you that the 2015–16 membership year is drawing to a close, and membership renewal notices for the 2016–17 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.

iBelong to something remarkable

ANNUAL DINNER
Continued from page 14

From left: MBA President's Award Honoree George G. Hardiman and MBA President Robert W. Harnais.

From left: MBA President's Award Honoree Daniel J. Hogan and MBA President Robert W. Harnais.

From left: Celeste Healy, Supreme Judicial Court Chief Justice Ralph D. Gants, Chief Justice of the Trial Court Paula M. Carey and MBA Chief Legal Counsel and Chief Operating Officer Martin W. Healy.

respect and admiration for the work that you do, on behalf of all of us in the legislature."

Following Rosenberg's acceptance address, nine additional awards were distributed, including the Oliver Wendell Holmes Jr. Scholarship to Boston College Law School student Lauren N. Schaal, and the Access to Justice Awards. (See related stories, this issue.)

Captivating storyteller

The night was punctuated by Lehane's address, in which he extolled the virtues of his city as a cultural haven with "a very interesting relationship with the truth."

Lehane, the son of Irish immigrants whose primary pastime was storytelling, described how his family and their friends would gather on a weekly basis and tell stories of their antics, almost always set back home on the farms of Ireland. The catch, however, was that, as the storytellers' cache of anecdotes ran dry, the same stories would be recirculated, but with ever-evolving plotlines. Not only this, but bad stories — those that didn't captivate both the heart and the imagination — would be shouted down.

"Fiction is the lie that tells the truth," Lehane said of the realization he came to over the course of his education in the literary arts, after reflecting for years on the bizarre nature of his relatives' nebulous yarn-spinning. "What they were doing was searching out some type of emotional truth. And that emotional truth is the emotional truth that all immigrants search out."

Nod to civility

Lehane gave his encouragement to those faithfully serving the profession of law, acting as the guardians of the truth.

"I love what you're doing," he said. "I love the outreach, I love the civic pride. I love that you care a little bit more about the bottom line.

"We stand on the rule of law," Lehane said after his address, noting the importance of law in his own books, such as "Mystic River" and "Shutter Island." "There's a reason for law, whether you like it or not. We need the law — it's what makes us civilized."

"Lawyers are always in adversarial situations," Harnais said, standing beside Lehane amid the crowd following the ceremony. "We argue all the time in court. But out of court we shouldn't. … Tonight we bring lawyers together and we all enjoy each others' company. We bring the camaraderie back to the profession as it should be."

Also present following the dinner was MBA Past President Marsha V. Kazarosian, who said that the main function of the Annual Dinner is to "bring everyone together.

"It really does," she said. "We work so hard, and this is a fun night for everybody."

Kazarosian described how the trend of the law profession from a business back to a profession is "going in the right direction.

"Bob [Harnais] and all the officers worked hard for it, and it's only going to help everyone going forward," she said.

Of the event, she said, "You keep this in your mind — it's hard to be uncivil to someone you've just seen at an event and shared a story or dinner with. This goes a long way." ■

Joe Kourieh is an associate editor at The Warren Group, publisher of *Massachusetts Lawyers Journal*.

BAR SEEN
Snapshots from around the MBA

Young Lawyers Division hosts social in Worcester

The Massachusetts Bar Association's Young Lawyers Division and the Worcester County Bar Association hosted a social on May 4 at Mezcal Tequila Cantina in Worcester. Attendees networked with fellow MBA members, WCBA members and distinguished judges. ■

MASSACHUSETTS BAR FOUNDATION

Keeping the promise of justice since 1964

MBF honors Mary Bonauto

At the Massacusetts Bar Foundation's recent Annual Meeting, Attorney Mary L. Bonauto of GLBTQ Legal Advocates & Defenders (GLAD) was honored with the Great Friend of Justice Award. More than 100 MBF Fellows, grantees and friends attended the event held at the Social Law Library in the John Adams Courthouse in Boston.

MBF's Great Friend of Justice honoree Mary L. Bonauto and MBF President Janet F. Aserkoff.

The MBF's Great Friend of Justice Award is presented annually to an individual who has demonstrated extraordinary commitment to justice, consistent with the MBF's values and mission of increasing access to justice in the state.

The Civil Rights Project Director at GLAD since 1990, Bonauto is nationally known for her tireless advocacy to eradicate discrimination based on sexual orientation and gender identity. In presenting the award, MBF President Janet F. Aserkoff noted, "You have upheld the very highest ideals of our profession, and through your extraordinary advocacy and very brilliant legal skills, brought justice and equality to individuals and families, who, before you, were denied rights that they deserve."

MBF elects 2016–17 officers and trustees

The MBF proudly announces its newest officers and trustees, who were elected at the foundation's Annual Meeting on March 15.

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A complete list of MBF trustees is available at www.MassBarFoundation.org.

MBF 2016 Annual Meeting

MBF Immediate Past President Robert J. Ambrogi and MBF President Janet F. Aserkoff.

Great Friend of Justice honoree Mary L. Bonauto (left) and Massachusetts Attorney General Maura Healey (right).

From left: MBF Treasurer Richard J. Grahn, MBF Past President Robert J. Ambrogi, MBF President Janet F. Aserkoff, MBF Vice President Harvey Weiner and MBF Secretary Angela McConney Scheepers.

From left: MBF Grantees Shelley Barron and Katherine Schulte of Casa Myrna Vazquez, Jamie Sabino of the Massachusetts Law Reform Institute and Christy Rodriguez of Dove Inc.

Jay McManus of the Children's Law Center of Massachusetts delivered the grantee address.

2015 MBF Life Fellows: Robert S. Mangiaratti; Robert J. Ambrogi; MBA Past Presidents Robert L. Holloway Jr. and David W. White; Hon. Bonnie H. Macleod-Mancuso; Angela C. McConney Scheepers; Hon. John C. Cratsley; Monica Pastorok; MBA President-elect Jeffrey N. Catalano; Hon. Megan H. Christopher; Iris Taymore Schnitzer and G. Perry Wu.

From left; MBF Fellows Dennis M. Lindgren, Pierce & Mandell PC; Megan Elise Kures, Hamel Marcin Dunn Reardon & Shea PC; and Lewis C. Eisenberg, Cosgrove, Eisenberg & Kiley PC.

From left: MBF Fellow Denise I. Murphy, Rubin & Rudman LLP; MBF Grantees Pattye Comfort, Women's Bar Foundation of Massachusetts; Eva Millona, Massachusetts Immigrant and Refugee Advocacy Coalition.

From left: MBF Fellows John T. Lynch of Davis, Malm & D'Agostine PC with Thomas P. Jalkut, David C. Henderson and Daniel J. Gleason of Nutter, McClennen & Fish.

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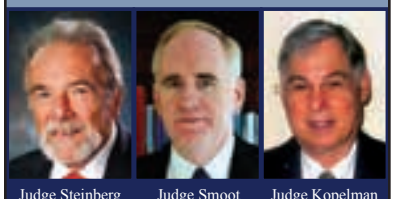

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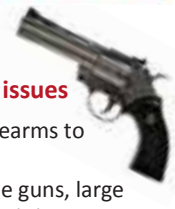

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LEGAL **NEWS**

News from the Courts

High school students participate in Student Government Day at SJC

High school students from schools across the commonwealth learned about the state judiciary and the appellate process during Student Government Day at the Supreme Judicial Court on April 1.

The students began their day participating in activities at the State House and learning about the state's executive, judicial and legislative branches. Appeals Court Justice Mark V. Green addressed the students on behalf of the judiciary. Lt. Gov. Karyn Polito greeted the students and spoke on behalf of the executive branch. Senate President Stanley Rosenberg and Speaker of the House of Representatives Robert A. DeLeo spoke on behalf of the legislative branch.

The students then went to the John Adams Courthouse, where Supreme Judicial Court Justice Margot Botsford spoke to the students about her role as a judge and the role of the appellate courts within the judiciary. The two clerks of the Supreme Judicial Court, Eric Wetzel, first assistant clerk for the county of Suffolk, who spoke on behalf of Clerk Maura S. Doyle, and Francis V. Kenneally, clerk for the commonwealth, educated the students about their roles as clerks and the history and founding of the Supreme Judicial Court. SJC law clerks also engaged the students in a discussion of their roles during lunch.

Established in 1947, Student Government Day is sponsored by the Massachusetts Department of Elementary and Secondary Education to encourage students to learn about the role and function of the three branches of government through observation and active participation.

Appeals Court launches electronic filing pilot project

The Appeals Court has launched an electronic filing pilot project as of March 31.

The pilot includes all civil, non-impounded appeals subject to review by a three-judge panel. A case initiation document (Civil Appeal Entry Form), electronic payment of entry fees, and many types of motions and other documents may be electronically filed and served through the Massachusetts Court System Odyssey File and Serve Site. In May, the pilot will expand to include the electronic filing and service of briefs and appendices in all civil, non-impounded panel cases.

Any Massachusetts attorney may register to participate in the e-filing pilot. Before participating, all filers should become familiar with the Interim Electronic Filing Rules for Pilot Courts, the Appeals Court Order Concerning Electronic Filing Pilot Project and the helpful training and guidance materials, which are all located on the Appeals Court FAQ Guidance page at www.mass.gov/courts/court-info/appealscourt.

Comments sought on proposed amendments to SJC rules

An update to the Supreme Judicial Court's "Notice Inviting Comment" section has been posted seeking comments on proposed amendments to miscellaneous rules.

For a full listing of the notices, visit www.mass.gov/courts/case-legal-res/rules-of-court. ■

BAR SEEN Snapshots from around the MBA

ComCom's IP Practice Group meets on trademark law

The Complex Commercial Litigation Section's Intellectual Property and Business Litigation practice groups hosted a meeting on trademark law on May 3. From left: Thomas E. Kenney, Esq., co-chair of the Trademark Practice Subcommittee; guest speaker Jennifer D. Chicoski, administrator for Trademark Examination Policy & Procedure from the Office of the Commissioner for Trademarks at the U.S. Patent and Trademark Office; and Damian R. LaPlaca, chair of the MBA's IP Practice Group. ■

FOR YOUR **PRACTICE**

Technology is revolutionizing practice management – and clients are reaping the benefits

BY P. TYLER SUMMERS


P. Tyler Summers

Slowly but surely, technology is revolutionizing the practice of law. At the solo and small firm level, the law offices of just a decade ago bear little resemblance to those of today. The proliferation of mobile devices and widespread use of "the cloud" have streamlined practice management, allowing for enhanced client collaboration, decreasing the need for administrative support and eliminating costly overhead.

At my divorce and family law firm in Newton, I utilize a slew of ingenious cloud-based services and apps to manage my operation. The heart of my practice is Office 365, an inexpensive, cloud-based subscription service from Microsoft. It hosts e-mail, provides browser-based access to the programs we are so familiar with (Outlook, Word, Excel, and PowerPoint) and offers a terabyte of encrypted file storage. Not only does this service eliminate the need for my office to maintain its own server, but I can also access all of my case files remotely, whether at court or on the beach. It should be noted that Google offers a similar product, utilizing the Gmail interface with which we are all so familiar.

The cloud also offers a secure platform for client collaboration. With a simple link and a password, clients can access their files securely, allowing them to review court filings, correspondence and the like. For clients who prefer a "hands on" role in their representation, I can even permit them to redline draft pleadings, resulting in more effective advocacy. Client reaction to enhanced collaboration has been wildly enthusiastic — particularly from those who worked with other counsel prior to retaining my office.

As a family law litigator, I often work with mothers and fathers who juggle parenting responsibilities and full-time careers. Due to professional demands, their ability to meet with me during normal business hours is limited. For them, being able to remotely access their case file at times of their choosing is a game changer. In fact, I recently represented an executive who travelled to Asia two weeks of the month. Given the 12-hour time difference, one would imagine that lawyer-client interaction was an insurmountable obstacle. However, by employing cloud technology, the client could review documents and collaborate on various aspects of her case from her hotel room after work; when I would arrive at my office the next morning, I received notification of the client's collaboration. Without such cloud-based tools, my representation would be far less efficient and costlier for the client.

It's 2016; clients should have remote, on-demand access to their case files. While more lawyers are adopting this view, many law firms continue to employ older technology, requiring lawyers to take a more manual, time-consuming and costly approach to representation. Microsoft Office 365 and Google Apps for Work are great tools for lawyers to utilize before making the jump to more comprehensive practice management software, such as Clio or Rocket Matter. For those who have just hung their shingle and are trying to minimize overhead, the inexpensive options are more than sufficient. ■

P. Tyler Summers concentrates his Newton-based practice in the negotiation and litigation of complex divorce and family law matters. Prior to founding his own office, Summers honed his skills at a prominent domestic relations firm, served as a criminal prosecutor (Rule 3:03) and worked with judges at multiple trial courts, including the federal court.

Everybody's doing it – are you ready to move your practice to the cloud?

BY HEIDI S. ALEXANDER


Heidi S. Alexander

Using the cloud in your practice can provide a plethora of benefits, including increased mobility, productivity and even security. Once you've made the decision to move your practice to the cloud, you should approach the move through a series of preparatory steps. Whether you've only recently started your practice or have a long-standing shop, preparation is an essential component in moving your practice to the cloud in a seamless manner. If you are just starting out, you have the luxury of adopting cloud-based systems straight away without having to worry about transitioning years of data and changing the way your firm does business. Consider the following steps to help accomplish a successful transition to the cloud.

Take an Inventory of Your Current Systems

First, take an inventory of your current systems (i.e., file storage, matter management, financial management, administration) to determine your firm's needs. If you are a new firm, this information should come from your business plan or be written into your business plan. If you are an existing firm, you'll need to compile this data.

Conduct Research and Due Diligence

Next, it's time to search for cloud platforms that can accommodate your firm's needs. To maximize your firm's efficiency, your goal should be to find cloud-based products that will service multiple needs or integrate well with other services to streamline your workflow and make it easier to collaborate. For example, cloud-based law practice management programs now include time and billing features as well as matter management, tasks and calendaring. Some even include accounting/financial management features or integrate with financial management programs. You'll also need to conduct due diligence to ensure that the cloud provider(s) meets your ethical and legal obligations.

Determine What, When and How Data will Move to the Cloud

What:

In determining what and how much data to transfer to the cloud, there are a few options:

1. All Files: This is a good option if you are starting from scratch or already maintain most of your files in electronic format.
2. Open Matters and Frequently Accessed Information: For firms that have been in operation for a number of years and have accumulated a plethora of records and information, it may be most efficient to upload only open matters and frequently accessed information (i.e., contacts, notes, administrative files) to the cloud.
3. When New Matters Open and New Information is Obtained: This is an ideal option for longstanding firms that don't wish to spend the time transferring records back in time. Pick a date, and from that date forward enter all new records and data into your cloud-based system.
4. If you choose not to transfer all your data to a cloud system, you'll want to maintain a legacy system and include it in your processes — for example, start with a conflict check in your cloud-based system and also check your legacy system. Over time, you'll phase out your legacy system.

When:

Set a timeline. Rather then attempting to do it all in one day, take an incremental approach, which should include alerting staff to upcoming changes.

Consider what makes the most sense for your practice. Is there a traditional lull in client intake? Do you plan to close any major cases in the upcoming months? When can your budget handle a reduction in caseload (consider reserving funds for the transition period)?

How:

If your records are already electronic, you are in good shape. If not, you'll need to first convert your paper files to paperless format (at least, for those files you plan to upload to the cloud) and back up your data. Leverage an IT professional and/or support from your cloud provider of choice to deal with technicalities and troubleshooting.

Train Attorneys and Staff

Finally, training is essential to ensure a successful transition to a cloud-based system. Everyone in your office should be trained in how to upload, organize, access, use and secure information in the system. ■

Heidi S. Alexander is a law practice management advisor at Massachusetts Law Office Management Assistance Program. LOMAP offers free and confidential law practice management consulting to Massachusetts attorneys. For more information call (857) 383-3250 or email info@masslomap.org.

BAR SEEN

Snapshots from around the MBA

Practical advice on mediating with municipalities

The Massachusetts Bar Association hosted a "Mediating with Municipalities: Practical Advice on Initiating Municipal Mediation and the Secrets of Successful Outcomes" program on May 3. The program was sponsored by the Public Law Section and the Alternative Dispute Resolution Committee, and offered attendees an opportunity to learn more about how to get a municipal conflict to the mediation table. Faculty included (from left) John W. Fieldsteel, Shelagh A. Ellman-Pearl, Kerry T. Ryan and Sarah Worley. ■

NOTABLE & QUOTABLE

"It's almost like there was a boxing match where one guy entered the ring with his hands tied behind his back, while the other guy punched away." – Peter Elikann

MBA Criminal Justice Section Chair **Peter Elikann** was quoted by the *Boston Globe* on June 3 ("SJC orders new trial in 'shaken baby' case") after the Supreme Judicial Court ordered a new trial for a man convicted of violently shaking his daughter because his trial counsel did not challenge the commonwealth's medical expert. Elikann said the decision was "a clarion call to lawyers that you can't leave this medical testimony absolutely unchallenged without, at the very least, presenting another version of what could have happened."

"Bill would require first-time drunk drivers to use ignition interlocks," *Springfield Republican* (April 26) — MBA Chief Legal Counsel and Chief Operating Officer **Martin W. Healy** was quoted on the legal concerns around a bill (S.1895) that aims to put more ignition lock devices into cars of first-time drunken driving offenders.

"MassHealth's termination of Medicaid benefits overturned," *Massachusetts Lawyers Weekly* (April 25) — MBA member **Gina M. Berry** weighed in as an elder law expert following an Appeals Court decision involving irrevocable trusts as a Medicaid planning tool.

"Solve it 7: Zika virus," WHDH-7 News (May 19) — MBA President **Robert W. Harnais** was the featured legal expert in a "Solve it 7" case concerning a refund on plane tickets.

"Few legal options left for Tom Brady to keep fighting 'Deflategate' suspension," *Boston Globe* (April 25) — MBA Chief Legal Counsel and Chief Operating Officer **Martin W. Healy** provided his analysis of what legal options remain for New England Patriots quarterback Tom Brady after a U.S. Court of Appeals for the Second Circuit in New York voted to reinstate Brady's suspension on Monday.

"Mass. Bar Association honors 2 with Canton roots," *Canton Journal* (May 6) — MBA members and President's Award winners Boston Municipal Court Clerk-Magistrate **Daniel J. Hogan** and attorney **George G. Hardiman** were profiled in Canton.

"Against the grain," *Massachusetts Lawyers Weekly* (May 2) — MBA member **Howard G. Zaharoff** was quoted in the Hearsay column as a copyright law expert in a story about a federal lawsuit over alleged similarities in books involving gluten-free diets.

"Opioid crisis touches wildlife center in Weymouth," *Boston Globe* (May 13) — MBA President **Robert W. Harnais** was quoted in the *Boston Globe* about the MBA's Section 35 Helpline, which provides free legal assistance to families struggling with a loved one's addiction. Harnais was one of eight speakers at a meeting on drug addiction hosted by the New England Wildlife Center.

"We know that legal aid makes a tremendous difference when it comes to assisting low-income residents keep their housing from illegal foreclosure or eviction. But it's one thing to know it, it's quite another to see it in action from inside a courthouse. We're grateful to Reps. Barber and Brodeur for taking the time to learn more about this important issue." — Robert W. Harnais

Massachusetts Bar Association President **Robert W. Harnais** was quoted in a piece on May 16 in the *Medford Transcript* about a tour of the Boston Housing Court for legislators organized by the MBA, Equal Justice Coalition, Massachusetts Legal Assistance Corporation and Greater Boston Legal Services.

Standing, from left: MBA President Robert W. Harnais, Lonnie Powers (MLAC), Rep. Christine Barber (D-Somerville), Rep. Paul Brodeur (D-Melrose), Barbara Zimbel (GBLS), John Carroll (EJC). Seated, from left: Hon. MaryLou Muirhead, Hon. Jeffrey Winik, and Hon. Timothy Sullivan (chief justice of the Housing Court).

Quoted in the media? Let us know. Email JScally@MassBar.org.

LAWYERS **CONCERNED FOR** LAWYERS

Burdened by disturbing ideas

Q: I am far from organized and orderly in my life, so you wouldn't think of me as obsessive-compulsive, but I do have a symptom that I've been told may indicate OCD. Even during my work day (commercial litigation for a medium-sized firm), I cannot fully shake the thought that I might inadvertently do some kind of harm to our baby. This is despite the fact that my wife, who has taken a break from her career to be at home with the baby, is a great, attentive mother, and that I have never actually done anything harmful to any child (or to any adult beyond a scale that would apply to pretty much anyone).


Dr. Jeff Fortgang

A: To begin with, there is a difference between Obsessive Compulsive Personality (a type of personality disorder) and Obsessive Compulsive Disorder (OCD). People with the personality disorder tend to have an exaggerated need for order, detail and inflexible obedience to rules. People with OCD are filled with anxiety about persistent, disturbing thoughts (obsessions) and feel compelled to engage in a recurrent behavior (such as checking to be sure the gas stove was turned off, or washing hands many times a day out of a fear of germs) to provide momentary relief.

Sometimes, as in your case, there is an obsession without a compulsion (I'm not diagnosing you long-distance — there are other conditions associated with ruminating and worrying, but let's assume that it's obsessive OCD for the sake of this Q&A).

People with Obsessive Compulsive Personality tend to have an exaggerated need for order, detail and inflexible obedience to rules. People with Obsessive Compulsive Disorder are filled with anxiety about persistent, disturbing thoughts.

Traditional therapies, such as those focusing on developing insight, may or may not do much for OCD, and for many individuals, regardless of treatment, the symptoms continue on and off indefinitely. But in most cases symptoms can be significantly reduced with specialized treatment.

The main forms of treatment are:

- Cognitive Behavior Therapy (CBT) of a specific sort, working with your thought patterns.
- Behavior Therapy (not so cognitive) in which the idea is to extinguish unhelpful behaviors (very effective for compulsions; less easily applied to obsessions).
- Medications — many but not all sufferers get significant relief from SSRI antidepressants.
- Support organizations — comforting in feeling less alone or different and sharing coping strategies with others (e.g., through the International OCD Foundation.

As you suggest, you are no more likely to harm your baby than anyone else — maybe less so, since you are so conscious of and concerned about the matter. Unfortunately, such reassurances or mere facts tend not to carry much weight when up against persistent obsessive worries. The person with OCD knows that the thoughts are not rational, but finds it incredibly difficult to let them go. Although there are probably days when your obsessions weigh so heavily that it's hard to focus on work, in general OCD does not prevent a lawyer from doing high quality professional work.

There are some cutting edge OCD-focused treatment programs in the Boston area. We would be glad to help you connect with these therapies if you care to come for an initial (free) evaluative session at LCL. ■

Dr. Jeff Fortgang is a licensed psychologist and licensed alcohol and drug counselor on staff at Lawyers Concerned for Lawyers of Massachusetts, where he and his colleagues provide confidential consultation to lawyers and law students, and offer presentations on subjects related to the lives of lawyers. Q&A questions are either actual letters/emails or paraphrased and disguised concerns expressed by individuals seeking LCL's assistance. Questions may be emailed to DrJeff@LCLMA.org.

PRIVATELY HELD COMPANIES

Five common disagreements when valuing privately held companies

BY BRIAN DIES, CFA


Brian Dies

Valuing small, privately held companies is a challenging task, as inherent data limitations often provide fertile ground for judges, lawyers, and regulatory bodies to challenge the opinions of business valuation professionals. There are five general areas where business valuation professionals most commonly disagree when valuing privately held companies.

Fundamentally, many of these disagreements between valuation professionals are the result of an "information asymmetry." In the absence of robust public information on privately held companies, business valuation professionals often are required to subjectively apply and adjust information from the universe of public companies to smaller, privately held firms. In valuations of closely held businesses, many of the disagreements between valuation professionals stem from these subjective adjustments. There are five areas where lawyers commonly see differences in valuations of privately held companies resulting from different subjective decisions made by valuation experts.

Measurement of Risks Associated with Firm Size

A key variable in most business valuations is the measurement of risk associated with owning the equity of the subject company. The measurement of risk for privately held companies requires subjective analysis and is often one of the key areas of disagreement among valuation professionals.

Most valuators accept that, all other things being equal, owning equity in smaller public companies is riskier than owning equity in larger public companies. However, there is no consensus in the business valuation community on how to extend that size to risk relationship to smaller, privately held companies.

Tax Issues Related to Corporate Structure

As with measurements of risk, much of the challenge in assessing the impact of taxation on the value of a business arises from information asymmetry. Nearly all of the robust information on the valuation of public companies involves the valuation of C corporations that are subject to double taxation. However, privately held firms are commonly structured as pass-through entity tax structures. Valuation professionals can often disagree on the appropriate adjustments to account for the difference in tax rates arising from differing corporate structures.

Compensation Adjustments for Employee-Owners

In valuing a privately held business, it is often necessary to separate the employee-owner's reasonable salary from the earnings from his/her ownership interest. The value of the business is tied to the earnings as the owner, not the salary as an employee. However, the reasonable salary and the equity earnings are often commingled in the company's financial statements. The relative size of the compensation adjustment made by the valuation professional for employee-owners is a contentious topic in most valuation-related disputes.

Application of Discounts and Premiums

It is generally accepted that ownership interests in privately held companies face some reduction in value for illiquidity. This is typically addressed by a Discount for Lack of Marketability (DLOM). A DLOM can significantly impact the value of the equity of a firm and is often an area of disagreement among business valuation experts. Lack of marketability is, almost by definition, an issue faced exclusively in the valuation of privately held firms.

Another major source of discounts and premiums in business valuation relates to the level of control by the owner of a given equity interest. Smaller companies are more likely to have few investors with majority equity interests. Accordingly, control premiums and minority discounts are much more relevant in the valuation of small, privately held companies. The best practices in the business valuation community are evolving on how to measure and apply premiums for controlling interests in privately held businesses. This is another area of complexity specific to the valuation of privately held companies.

Value May be Tied to Individuals and Not the Enterprise

In certain valuation contexts (e.g., marital dissolution, gift/estate tax), it is especially important to separately identify the goodwill associated with the key individuals (personal goodwill) from the goodwill associated with the business itself (enterprise goodwill). Although there are certain frameworks for this analysis, the allocation of personal and enterprise goodwill is subjective and relies on the professional judgment of the valuation professional.

Valuing privately held companies is a challenging task commonly faced by business valuation professionals, lawyers and the courts. There are five common areas of disagreement in disputed valuation matters, and each stems from either a lack of robust public information on peer firms or from the specific size or structure of most privately held businesses. In disputed matters, lawyers should be particularly attuned to differing assumptions in these five areas and their potential impact on the valuation conclusion. ■

Brian Dies, CFA, is a principal at Hoffman Alvary & Co. LLC in Newton. His practice focuses of business valuation and financial consulting matters, including providing expert witness testimony in litigations and arbitrations.

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SECTION REVIEW
MASSACHUSETTS BAR ASSOCIATION

Business Law

Advantages of amending the Massachusetts nonprofit corporation law

BY DAVID A. PARKE

The Massachusetts statute governing nonprofit corporations, M.G.L. c. 180, was originally adopted in 1971. For the past 45 years, this statute has governed many large institutions and smaller nonprofit organizations in Massachusetts. Efforts are underway by a working group from the Boston Bar Association to propose changes to the Massachusetts nonprofit corporation law. It will be important to consider those changes, and their potential improvements on the organization and operation of nonprofit corporations in Massachusetts.

Law Needs to be Modernized

In 2004, Massachusetts adopted a new Business Corporation Act, M.G.L. c. 156D. The new BCA updated the law previously applicable to business corporations. The new BCA is based on the American Bar Association's Revised Model Business Corporation Act, which is the basis of the business corporation statutes in most states.

The new Massachusetts BCA has options that were not available under the old corporation law, M.G.L. c. 156B, regarding corporate governance. The new BCA explicitly recognizes various types of notice, and modern forms of communication, including electronic transmissions. The new BCA is more flexible in allowing remote participation in corporate meetings. The new Massachusetts business corporation statute recognizes entities like limited liability companies, and reorganizational transactions like domestications and conversions, that did not previously exist in Massachusetts.

A business enterprise has several options to consider when deciding on an entity through which to conduct its for-profit operations. Options include a corporation under the new Massachusetts BCA, a limited liability company under the relatively new Massachusetts LLC statute, or a non-Massachusetts business entity. However, a nonprofit enterprise in Massachusetts is largely limited to organizing as a nonprofit corporation under Chapter 180, many of whose provisions are vague, cumbersome, old-fashioned and outdated.

One example of outdated language is in M.G.L. c. 180, § 4, which lists the specific purposes for which a nonprofit corporation may be formed in Massachusetts. This list includes such purposes, that originated in earlier times, as "promoting temperance or morality in the commonwealth," "fostering, encouraging or engaging in athletic exercises or yachting" and "the association and accommodation of societies of Free Masons, Odd Fellows, Knights of Pythias or other charitable or social bodies of like character and purpose." A more modern statute would generally allow incorporation for any nonprofit purpose.

Another example of an outdated provision is the local investigation provision. M.G.L. c. 180, § 5 says that before issuing a certificate of incorporation, or approving a change of location of the principal office of a Massachusetts nonprofit corporation, the State Secretary may refer the matter to the appropriate city or town for a local investigation. The purpose is to determine if the incorporators, officers or others identified with the corporation have been engaged in the illegal selling of alcoholic beverages, keeping places used for illegal gaming, or other business prohibited by law, or are persons of ill repute. The current regulations under the Office of the Secretary of State indicate that the Corporations Division now dispenses with the local investigation if a statement is signed by the incorporators regarding the lack of convictions by the incorporators and officers for crimes relating to alcohol or gaming in the past ten years.

Chapter 180 also has various specialized provisions, that appear to have originated in the late 1800s or early 1900s, relating to conferring degrees by medical corporations (M.G.L. c. 180, § 13), horse breeding corporations (M.G.L. c., § 14), and medical milk corporations (M.G.L. c. 180, §§ 20-25).

The most outdated feature of the Massachusetts nonprofit corporation statute is that it does not comprehensively cover, within Chapter 180, all aspects of the organization and operation of a nonprofit corporation. Instead Chapter 180 refers to and incorporates the old Massachusetts Business Corporation Law, Chapter 156B, as the law governing various areas not covered by Chapter 180. One effect of this is that the improvements brought to corporate practice by the new Massachusetts BCA are still inapplicable to the large number of nonprofit corporations in Massachusetts.

Corporate Operations Can be Cumbersome

The Massachusetts nonprofit corporation statute does not easily accommodate fundamental corporate transactions if the corporation has a large number of members, which is a characteristic of many nonprofit corporations. Chapter 180 requires the approval of two thirds of all voting members in order for a nonprofit corporation to amend its articles of organization, to dispose of its assets, or to merge with another corporation. With a large voting membership, obtaining such a vote can be impossible or difficult. M.G.L. c., § 7A, prescribes a process to petition the state secretary for approval of charter amendments and mergers, when the two-thirds vote cannot be achieved. While the state secretary's office has been very helpful to corporations that must file Section 7A petitions, the process under Section 7A still involves significant planning, risk and expense in order to be sure that the Section 7A standards are satisfied.

The failure of the Massachusetts nonprofit corporation statute to specifically recognize modern methods of communication and voting also creates difficulties when there is a large membership. There would be an advantage to large membership corporations if provisions similar to those in the new Massachusetts BCA, that allow for electronic communications, and alternative forms of notice, were part of the nonprofit corporation statute.

The present nonprofit corporation statute limits the types of mergers in which a Massachusetts nonprofit corporation may engage. Under M.G.L. c. 180, a nonprofit corporation may merge with another nonprofit corporation if such other corporation law so permits. This statute does not allow for mergers with limited liability companies or other non-corporate entities. Because the merger provisions of M.G.L. c. 156B do not address mergers with nonprofit corporations, a Massachusetts nonprofit corporation may not directly merge with any Massachusetts corporation, for example, a cooperative corporation under M.G.L. c. 157, that is still governed by M.G.L. c. 156B.

There are also issues regarding whether remedies to enforce director and officer duties, such as derivative actions by members of a Massachusetts nonprofit corporation, are available in Massachusetts. This is unfortunate because the need for an effective remedy to address breaches of officer and director duties applies as much to nonprofit corporations as to for-profit corporations.

New Areas, Newer Statutes

The new Massachusetts BCA, the ABA Model Nonprofit Corporation Act and newer state nonprofit corporation statutes have provisions that, if adopted in Massachusetts, could improve the operation and governance of nonprofit corporations in Massachusetts.

The new BCA and Model Nonprofit Act recognize electronic means of communication in various areas. Those acts also allow not only for notices by the traditional methods of mail and hand delivery, but also, under appropriate circumstances, by electronic communication, orally or by newspaper of general circulation, radio, television or other form of public broadcast communication. These acts allow for annual meetings to be held by means of the internet or other electronic communications technology where members can participate in the meeting concurrently with their proceedings.

The Model Nonprofit Act includes several provisions that would remove impediments to corporate action when there is a large membership. This act has provisions allowing a membership corporation to operate with delegates instead of members. The Model Nonprofit Act also allows for approval of proposed corporate actions by ballot. This act allows for a relaxation of quorum requirements if a members' meeting must be adjourned due to a lack of quorum.

Moreover, the Model Nonprofit Act provisions regarding authorization of extraordinary corporate actions allow much more flexibility in obtaining the required approval of members. Thus, under the Model Nonprofit Act, unless a greater member vote is required by the organizational documents or by the directors, a proposed charter amendment, a plan of merger, a disposition of assets outside of the ordinary course of a nonprofit corporation's activities, or a dissolution of the corporation, may be approved by a majority of a quorum at a properly called meeting.

Nonprofit corporations, particularly charities, now recognize the importance of having and enforcing conflict of interest and related policies. While M.G.L. c. 180 includes standards by which directors and officers of a nonprofit corporation must perform their duties, the Model Nonprofit Act has more robust provisions that address manager duties, conflict of interest situations and remedies for enforcement. Thus the Model Nonprofit Act includes a duty by an officer to report to his or her superiors information known to be material to the superior officer, board or committee, as well as to report of any actual or probable material violation of law or material breach of duty by an officer, employee or agent of the corporation. The Model Nonprofit Act includes provisions to validate transactions involving conflicts of interest, which generally call for disclosure and approval by disinterested directors or members. The Model Nonprofit Act includes provisions specifically permitting members or directors to bring derivative proceedings in the name of the nonprofit corporation. The more recently amended New York nonprofit corporation statute contains stricter requirements for approval of related party transactions, and maintenance of conflict of interest and whistleblower policies by the corporation.

The Model Nonprofit Act and new Massachusetts BCA allow for domestication, by which a corporation may change its state of incorporation, and conversions, by which a corporation may convert to a different entity. These options do not exist under M.G.L. c. 180.

Need to Preserve Massachusetts Traditions

Provisions like those described above would give nonprofit corporations options that would make it easier to take corporate action, allow better participation by members and ➤ 29

SECTION REVIEW
MASSACHUSETTS BAR ASSOCIATION

Probate Law

Trying to settle probate disputes: mediators share their insights and strategies

BY PATRICIA L. DAVIDSON

Family tensions make great, often amusing drama — like *Jarndyce v. Jarndyce*, the Corleones, the Simpsons and the Bunker household at 704 Hauser St. We love the eccentricity, back-stabbing and lampooning of illusory notions of family harmony. One way or another, we can all relate. We all have families.

And many of us represent them. Lawyers who represent beneficiaries and fiduciaries know that probate litigation is rarely a laughing matter. Will contests, breach of fiduciary duty claims, petitions to partition, objections to accounts, etc., are among the most acrimonious cases. When emotions run high and decades of family baggage suffuse legal claims, litigants, lawyers and judges alike are usually desperate for a resolution. Many disputes are so entrenched that a trial is the only end game. However, because many family disputes involve much more than money, probate disputes are particularly well-suited to mediation.

Why Mediate Probate Disputes?

Mediation is a process where adverse parties try to come to a voluntary settlement agreement. The mediator, a neutral party, tries to facilitate the settlement. Mediation provides a context for resolving legal claims as well as tempering obsessions that often torment litigants fighting about wills, trusts and real estate. While mediation may not guarantee that Thanksgiving will be warm and fuzzy, it may provide an opportunity for parties to get on with their lives.

Experienced mediators agree that probate disputes present many challenges. They also agree that there are many benefits to trying to avoid prolonged litigation among family members. Conservation of resources is a key benefit. "Mediation ought to be the most appropriate resolution" to probate disputes, says Brad Honoroff of The Mediation Group. Honoroff stresses that in family feuds, family assets are "petered away by conflict." Brian Jerome of Massachusetts Dispute Resolution Services agrees. He observes that that in many probate disputes, the "legacy is given to the lawyers."

David "Tack" Burbank of Burbank Mediation Services notes that trying to settle probate disputes is a "different type of mediation." In his experience, parties to a tort claim or a contract matter are "typically mediating risk," i.e., the risk and cost of taking a matter to trial. In those cases, litigants are usually focused on finding a practical resolution. But in probate matters, pervasive and perhaps irrational emotions create additional obstacles for the mediators.

Emotion, Emotion, Emotion

Jerome quickly points out that in probate litigation, the "biggest word involved is 'emotion.'" In many cases, the inter-family disputes have festered for years. He stresses that family conflicts are "often not about the money" and that "extensive litigation is a prescription for emotional carnage." Jerome notes that mediation "sets the groundwork for future relationships."

Honoroff maintains that understanding the "psychological stuff" is important. From the beginning of a mediation, Burbank tries to be empathetic. Honoroff stresses that paying attention to "emotional dynamics" ultimately helps solve problems. He says that a mediator must assist parties work through both "economic and emotional realities."

The Keys to a Breakthrough

Jerome notes that a mediator can assist parties work through "power imbalances" such as the relationship between a trustee and a beneficiary. Power imbalances between siblings are particularly difficult. Jerome stresses that a skillful mediator will help "balance the playing field."

Honoroff similarly understands that "parties have to know that the mediator understands the conflict from their point of view." A mediator must also try to accommodate the different positions of the parties. "Part of the job is to explain that the mediator's job is to understand where everyone is coming from," said Honoroff. Then the mediator can "have the heart to heart about how to move forward collaboratively." Honoroff, Burbank and Jerome all stress that building trust is crucial. But, Jerome warns, "Mediators cannot suffer fools too much."

"Mediators are in the job of adjusting expectations," Burbank says. While Jerome states that part of the mediation process involves letting parties "vent to an impartial person," he acknowledges that there is a fine line between letting a party vent and keeping him or her focused on the key legal issues. A mediator should try to "direct the discussion like an orchestra leader," he says.

According to Honoroff, a good mediator must balance "listening" with the "business" of the legal issues. He stresses that the mediator's "job is empathy" with all parties and that the mediator must understand the subjective issues. "Breakthroughs come when legal, emotional and economic needs are met."

If parties remain intransigent, Jerome tries to focus the parties on what happens if the case does not settle and the risks of trial, including costs. While successful probate litigants may be able to recover attorney's fees more frequently than prevailing parties in other types of litigation, Jerome still emphasizes to parties that in court "there are winners and losers." Mediation, on the other hand, can not only help the parties find compromises, but also can promote creative resolutions beyond what a court can adjudicate. Jerome stresses that a mediation should help "sculpt an agreement" to meet the needs of the parties.

Honoroff observes a common dichotomy of a party involved in a family dispute: "Part of a person wants to be reasonable, and part wants to beat the living daylights out of the other." Sometimes, in order to deflect responsibility away from those involved in the litigation, Honoroff may "help heirs understand that other parties, e.g., parents, helped set up the conflict." If parties can be objective about the fact that mom gave the recalcitrant brother wide discretion as trustee or that dad intentionally named the evil step-mother as the primary beneficiary of the trust, then parties may be able to turn resentment into compromise.

Mediation of course offers no guarantees and often parties will walk away. "That's alright," says Burbank.

The Role of the Lawyers

Honoroff, Burbank and Jerome agree that lawyers can both assist and thwart successful mediation. "Lawyers can be incredibly helpful," said Honoroff. Often lawyers are working in the private breakout sessions "behind the scenes" to help clients understand the benefits of resolution and the uncertainty and expense of further litigation, including a trial. Even though most lawyers try to advocate and control the discourse, Jerome notes that "good mediators need to hear directly from the parties, at least during the private session."

But lawyers can be impediments. Sometimes lawyers are "too caught up in zealous advocacy," Honoroff says. They emphasize the "adversarial side" of settlement discussions and "not the collaborative side."

Burbank laments that the mediator sometimes has to overcome "unrealistic expectations planted" by one or both of the lawyers. He warns that lawyers should be careful not to get too invested in his or her clients' "grievances." In Burbank's experience, mediation is also more difficult when lawyers "unload on other parties."

At some point, mediators will often try to engage just the lawyers. Burbank will sometimes pull experienced counsel together to discuss the issues and potential settlement terms without their clients. If the lawyers are professional, there is a greater likelihood of resolution or at least progress in narrowing the disputes.

Honoroff is admittedly "less quick" to pull the lawyers aside. He prefers trying to "empower clients." But he concedes that in probate disputes "sometimes empowering is a disaster."

Timing of Mediation

Lawyers and parties spend a lot of time trying to figure out at what stage they should engage in mediation and at what point mediation is most likely to resolve the disputes. Before litigation? Right after filing suit? After discovery? On the proverbial eve of trial?

Every case is of course unique, and Honoroff believes that there are no general answers on the best timing for a successful mediation, but he generally believes the earlier the better. Burbank agrees and observes that he is seeing mediation earlier in probate disputes.

Maximizing the Chances for Resolution

A lawyer can do many things to try to increase the likelihood of an appropriate, if not necessarily good, settlement. Lawyers should be careful not to channel their clients' emotions; should try to maintain objectivity; and should stress the many financial and psychological benefits of not having the dark cloud of probate litigation hanging over a client's head. Mediators can help everyone understand that in family feuds trials rarely bring vindication; that fact-finders are rarely outraged; that mediation may lead to a creative solution beyond what a court can order; and that investment in probate litigation is almost always a fiscal crap shoot.

We all know the old adage that the mark of a good compromise is when no one is happy. And we cannot forget the old joke that if you have a perfect case (and no one of course has a perfect case) you have an 80 percent chance of winning. Sharing these precepts with clients is probably a good idea in advance of any mediation. ■

Patricia L. Davidson is a partner at Mirick O'Connell in the Probate, Trust and Fiduciary Litigation Group and the Business and General Litigation Group. Her practice focuses on helping families resolve issues involving wills, trusts and real estate as well as disputes involving family and closely held businesses. In addition, she represents individual and institutional fiduciaries and assists them with resolving conflicts concerning their rights and obligations.

SECTION REVIEW
MASSACHUSETTS BAR ASSOCIATION

Real Estate Law

Who can afford to live in Boston or the 'burbs anymore?

BY MELANIE HAGOPIAN

On Jan. 26, 2012, Supreme Judicial Court Justice Ralph D. Gants led lawyers on a walk to Beacon Hill seeking additional funding for the Massachusetts Legal Assistance Corporation (MLAC). He delivered a resounding address citing reasons the legislature should approve additional funds for the MLAC. He began by noting that legal services ensure that the promise of "justice for all" is more than a promise. He ended by urging his colleagues to ask our elected representatives some variation of the questions asked centuries ago by Hillel: "What kind of commonwealth would we be if we did not protect the rights of those in need by providing them with adequate legal services? And if we do not protect the rights of those in need, who will? And if not now, when?"

Access to justice is a fundamental human right. Access to affordable housing (although not guaranteed under the U.S. Constitution) is considered to be a fundamental human right under national and international declarations. See Article 25 of the Universal Declaration of Human Rights, and Article XI (11) of the American Declaration on Rights and Duties of Man, among others. Declarations and covenants do not create obligations that are legally binding; however, the Universal Declaration is widely used as the primary source of what are considered human rights.

Whether or not you consider access to affordable housing a right, the current affordable housing crisis cannot be ignored. It's ironic that this crisis began at the end of the subprime lending "boom" and subsequent mortgage and financial crisis. Many of us who witnessed subprime lending practices such as "no doc" loans, 100 percent financing, negative amortization and high-capped adjustable-rate mortgages knew that the housing bubble wasn't sustainable. There had to be a correction in the market and an overhaul of lending and mortgage investment practices. As we know, there has been a dramatic shift in lending practices. Some would say the tightening of lending practices and loan underwriting has gone too far. Housing prices dropped for a brief time in 2008-2009, but now, rather than a slow, steady rise in values, we have another bubble. To add insult to injury, incomes have not risen to keep up with home values.

Now we are faced with the reality that fewer and fewer people can afford to buy or rent in Boston and the 'burbs and many other urban centers across the country. As residential real estate attorneys, we have borne witness to transaction after transaction where sellers have enjoyed choosing from multiple offers over asking price. Oftentimes the offers are cash transactions from well-heeled foreigners looking to put their money in real estate in the U.S. On the flip side, we have sympathized with our buyer clients who have been discouraged after losing bidding war after bidding war. Many of us have worked with buyers who have lost bids on multiple homes, sometimes over a period of a year or more.

The dilemma is that, the longer it takes to enter the market, the tougher entry becomes. In January, Standard & Poor's issued a report which estimated that home values (in the Boston area) will increase 24 percent by 2020. S&P's predicts home prices in the Boston area would still actually go up if another recession hits of the magnitude of the economic downturn in 2007.

To make matters worse, being forced to continue to rent puts would-be homeowners at a further disadvantage. In the Greater Boston Housing Report Card issued March 31, 2015,

Barry Bluestone notes that we are now at the point where it takes an annual income of $100,000 to afford Boston's median monthly rent.

With no foreseeable end to dramatic rises in housing and rental costs, is there any way to address the lack of affordable housing? Inclusionary housing programs may offer some solutions. These programs, as well as land use and zoning laws, are not new, and have evolved over the years, i.e., M.G.L. c. 40B, R and S. Known as The Comprehensive Permit Act, M.G. L. c. 40B was enacted in 1969 to allow developers of affordable housing to override certain municipal zoning bylaws. The goal was to encourage the production of affordable housing by reducing barriers created by local building permit processes, zoning and other restrictions.

In 2004, Massachusetts enacted the Smart Growth Zoning and Housing Production Act (Chapter 40R). Rather than focus on developers, Chapter 40R encourages cities and towns to zone for compact residential and mixed-use development by offering financial incentives and control over design. Chapter 40S covers the costs of educating school-age children who move into cities and towns that establish 40R districts.

The current crisis underscores the continuing and urgent need to address the lack of affordable housing. Could there be further amendments to our housing and economic development laws that would help to address the situation? Perhaps corporate benefactors could help. General Electric will be receiving huge incentives from Boston and the commonwealth to relocate their headquarters here. Maybe they could "spread the love" a bit by partnering with Boston and the commonwealth in developing affordable housing.

Cambridge-based Lincoln Institute of Land Policy has published reports on inclusionary housing policies that link approvals for market-rate housing to the creation of affordable homes for low and moderate-income households. One goal of inclusionary housing programs is to expand the supply of affordable housing. Could affordable housing requirements stand in the way of development? Not if there are sufficient incentives for developers to include affordable housing in new developments.

At the time this article was written, there were 934 luxury condominium units for sale in Boston, from the Financial District to Back Bay to the Leather District to the Seaport, Roslindale and Jamaica Plain. Prices ranged from $1.9 million to more than $12 million. It would appear that 98 percent of the population cannot afford to live in Boston anymore.

Practicing attorneys are not policymakers, but just as many of us walked up the hill with Gants to ensure access to justice for all, we must walk up the hill again to ensure access to affordable housing for all of our citizens. The MBA has a time-honored process of identifying and addressing legal and public policy issues in ways that promote solutions to pressing problems. The MBA must address affordable housing. What kind of organization would we be if we did not help the vast majority of the population who need affordable housing? And if we do not protect those in need, who will? And if not now, when? ■

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Real Estate Law

'Just cause eviction' proposal cause for serious concern

BY JORDANA ROUBICEK GREENMAN

Small property owners continue to face an uphill battle in Massachusetts. On March 14, 2016, the Boston City Council held a public hearing on a proposal of tenant advocacy groups to amend the eviction laws and in essence, cap rents in the city of Boston. These groups, led by City Life/Vida Urbana, have been fighting for this new legislation (titled "Just Cause Eviction") as a result of gentrification and development. The March 14 hearing was attended by an overflow crowd of landlord and tenant groups, including a panel of three on each side of the dispute and hundreds of people interested in testifying.

Not only is the intent of the proposal eerily similar to Massachusetts' long-abolished rent control (eliminated by voter referendum in November 1994), the additional, burdensome and costly regulations of dubious public good will add an even greater hurdle to an eviction process that can already take anywhere between three months and two years.

In summary, the proposal includes:

- a prohibition on evictions for non-payment of rent until a resident is "habitually late;"
- a limit and possible prohibition on an owners' right to occupy his/her own unit for personal use or use by a family member;
- a prohibition on evictions for property damage if a tenant agrees to a repayment plan for repairs whether or not the damage is ongoing and causes harm to others;
- a limitation on evictions to those of "just cause" as determined by the city of Boston;
- mandatory mediation with city-selected mediators for all lease expirations, prohibitions on terminations of tenancies-at-will and rent increases in excess of 5 percent;and
- a provision that market tenants have the right to ignore their lease expiration date and remain in the apartment indefinitely.

As Attorney Jeffrey Turk correctly pointed out at the March 14 hearing, the suggestion that a market tenant should be able to remain indefinitely after the expiration of a lease flies in the face of basic contract law. Currently tenants routinely remain in properties as tenants at will after the expiration of their leases and landlords already face severe penalties for violating these leases.

The process of completing any eviction, especially one falling under the "no-fault" category, already includes ample protection for so-called "vulnerable" tenants. For instance, Chapter 239, Section 8A of the Massachusetts General Laws provides, in part, that in the event that a tenant can prove that he or she brought an adverse condition in the property to the attention of the landlord and said condition was not corrected promptly or said condition has returned, the tenant is entitled to remain in possession of the property.

Tenant advocacy groups have taken the position that large corporate landlords, real estate speculators and "flippers" are currently using the ability to commence a "no-fault" eviction as a way to push people out of their communities to make a bigger profit. As applied to the large corporate landlords, this position may in fact adversely impact low income tenants, and while the proposal presumably attempts to target all property owners/landlords, it is small and mid-level property owners who will suffer the most severe and detrimental impact if it were adopted — especially those already struggling to make investments worthwhile after incurring the costs of non-payment or other evictions. In my practice, I always advise clients that being a landlord in Massachusetts carries risks, responsibilities and requires capital for contingencies. However, it should not go unnoticed that every landlord offering housing to tenants unable to purchase his/her own property is serving the general public. Small landlords trying to build investments and communities should not be asked to shoulder ➤ 29

SECTION REVIEW
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Family Law

Family feud, *Pfannenstiehl*-style

BY STEVEN D. WEIL

Divorce disputes involving a spouse's rights as a beneficiary of a third-party trust are often complex and bitterly contested. Typically, a beneficiary-spouse will argue that the settlor (parent) had no intention of subjecting the trust assets to a property division for the benefit of a former son-in-law or daughter-in-law, and that the terms of the trust expressly prohibit the court from invading the trust for this purpose. The non-beneficiary-spouse will likely argue that he or she made a substantial contribution to the marriage, and that the family relied on the trust funds to live, such that a division of some portion of the trust principal is both warranted and within the court's authority to divide pursuant to M.G.L. c. 208, § 34. What is a Probate Court to do?

The Most Recent Controversy

In *Pfannenstiehl v. Pfannenstiehl*, the Appeals Court recently upheld a Probate Court decision awarding a non-beneficiary wife a substantial portion of a marital estate, which included her husband's interest in a multimillion-dollar irrevocable spendthrift trust established by the husband's father.[1] The Probate Court valued the husband's beneficial interest in the trust at approximately $2.3 million.[2] Throughout the marriage, the husband received distributions of income and principal, which abruptly ceased upon the eve of his filing for divorce.[3] The wife, who, at the urging of the husband and his family, gave up a military career and devoted herself to the care of the parties' two children, was told that the spendthrift provision of the trust prohibited the trustees from continuing to issue distributions to the husband.[4]

The Probate Court rejected the husband's interpretation of the trust.[5] Appalled by the way the husband's family suddenly cut off all distributions and used the spendthrift provision as a shield in the divorce action, the Probate Court ordered the husband to pay to the wife 60 percent of his share of the trust, plus a sizeable award of attorney's fees.[6] The Appeals Court upheld the Probate Court's ruling that the husband's interest in the trust was a marital asset for purposes of calculating an equitable division of marital property pursuant to M.G.L. c. 208, § 34, because the husband had a present, enforceable right to distributions based upon an ascertainable standard.[7] The Appeals Court reaffirmed that a trust, even one with a spendthrift provision, may be included in a marital estate for purposes of equitable division under § 34.[8] A strong dissent in *Pfannenstiehl* questioned whether the husband's interest was sufficiently definite, non-discretionary and properly valued, as to be includible in the marital estate.[9]

The case is now on further appeal to the Supreme Judicial Court.[10] It has generated a great deal of debate within the bar over the extent to which trust assets like these can be protected from the claims of a non-beneficiary spouse.[11]

When is a Beneficial Interest in a Trust a Marital Asset?

The threshold issue is usually whether a particular beneficial interest is a marital asset, subject to division pursuant to M.G.L. c. 208, § 34. For the most part, this is a relatively well-settled question of law. Massachusetts appellate courts apply an "expansive," rather than a restrictive, approach to what constitutes marital property for purposes of § 34.[12] A Probate Court is not bound by traditional concepts of title or property.[13] "When the future acquisition of assets is fairly certain, and current valuation possible, the assets may be considered for assignment under § 34."[14]

There are many examples of cases involving beneficial interests in trusts found to be marital assets,[15] subject to equitable division. In the oft-cited case of *Lauricella v. Lauricella*, a husband's beneficial interest in a spendthrift trust, which owned a two-family house that the husband had a vested right to use and a contingent right to legal title provided he survived his father by 21 years, was determined to be a marital asset. The Supreme Judicial Court ruled that where the husband's interest in the trust property was "present, enforceable and valuable," his beneficial interest was includible in the marital estate.[16] Many subsequent cases have relied on *Lauricella* in reaching the determination that a trust interest is a marital asset.[17] More recent appellate decisions have excluded trust interests, but these have generally occurred in circumstances involving contingent beneficial interests, which are devoid of any history of the beneficiary spouse's receiving payments of income or principal, or trusts that are purely discretionary.[18] On balance, beneficial interests in trusts, which are likely to vest and possible to value are considered marital assets, subject to equitable division in a divorce action.

Only the Beginning

The issues that arise in determining an equitable division of marital property in cases involving trust interests often only begin once the Probate Court determines that a spouse's beneficial interest is a marital asset. Other difficult issues then appear due to the interplay of trust and divorce law. These issues reflect the collision of interests between trust settlors and their beneficiaries, and those of non-beneficiary spouses.

For example, a ruling that a particular beneficial interest in a trust is a marital asset may be of little value to a non-beneficiary spouse if the Probate Court does not have the power to order the trustee to issue distributions of income or principal to the non-beneficiary spouse as part of an equitable property division. Must the non-beneficiary spouse wait until the trustee issues distributions to the beneficiary spouse before receiving any portion of the trust (that could be long wait)? Does a spendthrift provision, which prohibits distributions to creditors, or the discretionary nature of a beneficial interest in a trust, prevent the Probate Court from ordering the trustee to issue distributions to a non-beneficiary spouse, once the asset is included in the estate?

In *Pfannenstiehl*, the Appeals Court did not hold that the trustees of an irrevocable trust can be ordered to make distributions directly to the non-beneficiary spouse.[19] As a result, it is unclear how the wife will collect her portion of the marital estate, and the husband has argued on appeal that the court's ruling, in effect, impermissibly gives the wife a right to compel distributions *before* they are issued to the husband.[20]

Other questions arise out of these disputes. What state law applies to the interpretation of the trust instrument? Does the non-beneficiary spouse have standing in a divorce action to challenge a trustee, who interprets the trust as prohibiting such distributions? Must the trustee and other beneficiaries be included as necessary parties in an action to determine the non-beneficiary's rights? What state law applies to determine the equitable division, if the trust is interpreted under the law of a state other than Massachusetts? These issues pit the power of the Probate Court to order equitable divisions of marital property against common law principles, which generally give effect to the intentions of trust settlors and recognize the enforceability of spendthrift provisions and other limitations on how monies placed in a trust may be used.

The dispute in *Pfannenstiehl* addressed some of these issues. The final decision will likely further develop the law in determining whether a broad ascertainable standard, like the one stated in the husband's trust, is too remote, indefinite or discretionary as to remove the trust interest from the marital estate. It may also provide guidance on complex valuation issues due to the open-ended nature of the beneficiary classes. Still, the case does not solve many of the problems that arise in equitably dividing a marital estate, once a trust interest like the interest in *Pfannenstiehl* is included, especially if there are no off-setting assets.

The Protection of Vested Interests

Massachusetts law has long considered spendthrift protections to be valid, whether a beneficiary's interest in the trust is in the income or the principal.[21] Most arguments against the enforceability of spendthrift provisions in trusts subject to Massachusetts law have been rejected in favor of the view that a settlor ought to be able to dispose of his assets in trust as he wishes.[22] Indeed, the Massachusetts version of the Uniform Trust Code provides that a creditor or assignee of the beneficiary may not reach the interest or a distribution by the trustee before its receipt by the beneficiary.[23] Notably, the Legislature did not adopt those provisions of the Uniform Trust Code, which would have created exceptions to the enforceability of spendthrift provisions for certain preferred creditors, including children, spouses, and former spouses, who hold judgments or court orders against the beneficiary for support.[24] This was true despite a growing trend to grant a spouse or minor child rights to trust property.[25]

Massachusetts Takes the Minority View

In this regard, Massachusetts law is out of step with the prevailing view. Principles articulated in the Restatement (Third) of Trusts, federal bankruptcy law and the Uniform Trust Code all support the view that a Probate Court has authority to order distributions from trusts to non-beneficiary spouses under certain circumstances. The Restatement (Third) of Trusts invalidates spendthrift provisions where a beneficiary has a non-discretionary right to withdraw or receive trust property, including exercisable, but unexercised general powers of appointment.[26] The restatement provides that creditors may reach a beneficiary's right to withdraw trust property or to demand distribution of a stated or formula amount, including a power to periodically compel payments of stated or percentage amounts.[27] The restatement treats a power to require periodic distributions as property of the beneficiary, even if the power has not been exercised, irrespective of the existence of a spendthrift restraint.[28]

Federal bankruptcy law has long been in accord.[29] In *In re Behan*, the U.S. Bankruptcy Court for the District of Massachusetts applied the above principles to render a spendthrift clause unenforceable.[30] The Bankruptcy Court ruled that a bankruptcy estate includes a debtor's interest in that portion of a trust, spendthrift or otherwise, that the debtor has an absolute right to receive.[31]

Finally, the Uniform Trust Code codifies the above principles.[32] The creditor's rights provisions of the Code specifically render spendthrift provisions unenforceable and allow creditors to reach trust property where a beneficiary has a non-discretionary right to withdraw or receive trust property.[33] As mentioned above, the code also recognizes exceptions for children, spouses and former spouses with judgments or court orders against the beneficiary for child and spousal support and maintenance.[34]

Applying these principles, the above sources of law support a Probate Court's authority to compel trust distributions to achieve an equitable division of marital assets for a non-beneficiary spouse, to the extent that the beneficiary spouse has non-discretionary rights to withdraw trust property or demand a distribution of a specified amount, regardless of whether the trust contains a spendthrift provision. At the same time, they balance that authority with limitations, which recognize that to the extent a beneficiaries' interest requires the exercise of a trustee's discretion (apart from the discretion associated with enforcing a spendthrift clause), the Probate Court may only divide those distributions as part of an equitable division of marital property, if, as and when the beneficiary spouse receives them.

Consequently, it is important that family law practitioners understand the creditor's rights provisions of the state law which govern their particular trust dispute. In Florida, for example, a state which adopted the Uniform Trust Code's creditor's rights provisions, a non-beneficiary spouse may reach trust assets to the extent the beneficiary has a general power of withdrawal, or a support or maintenance order, regardless ➤ 31

SECTION REVIEW
MASSACHUSETTS BAR ASSOCIATION

Family Law

The preferences and voices of children in Massachusetts

BY DONALD G. TYE AND MICHELLE ROTHMAN

In divorce and custody proceedings, courts are often saddled with the heavy burden of determining children's proper custodial placement. In adjudicating this issue, courts must determine how the child's preference is obtained and relied upon. This is a process fraught with complexity, as courts must balance protecting the child with procedural due process. In light of these complexities, courts across the country have developed two primary and interrelated means of "hearing" a child's "voice": First, by allowing for judicial interviews of children, and second, through representation for the child, whether through an attorney, a guardian *ad litem* (GAL), or combination thereof.

Massachusetts courts are of the opinion that the child's voice is an important factor in any proceeding where the child's interests are at issue and a child's averred preference is evidence to be considered in any custody dispute. In considering this preference, Massachusetts courts have understandably attempted to balance the desire to protect the child from the stressors of testifying and the parties' constitutional rights. These decisions are delicate and fact-specific, and there are few concrete rules. The Massachusetts Appeals Court has stated in *Ardizoni v. Raymond* that the child's expression of preference "must be treated with caution," especially in staunchly contested proceedings.

Judicial Interviews

The primary means of eliciting a child's preference is through some type of examination, including by the judge. However, the customary legal process in which a witness provides direct testimony to a court with the opportunity for cross examination is often unfair, ineffectual and potentially harmful to a child. As a result, many courts have moved toward judicial interviews of children, often in the judge's chambers. With this method children are protected from the adversarial process and attendant emotional trauma, particularly when a child is required to choose between its parents in front of them and others in open court. However, judicial interviews have drawbacks. Specifically, *in camera* judicial interviews raise important ethical and due process concerns. Judicial interviews require judges to be trained in handling such interactions, particularly with younger children, to ensure the interviews are fruitful while limiting undue stress on the child. In terms of due process, *in camera* interviews obviate the ability for other parties in the case to examine or cross examine the child. Such interviews also leave the parties and the appellate record without objective evidence of the court's basis for its decision.

Massachusetts's history of permitting judicial interrogation of children, including in chambers, dates back to at least 1865, when, in *Dumain v. Gwynne*, the Massachusetts Supreme Judicial Court held that the trial judge properly "may direct that the children be brought before him, and may examine them privately." This practice continues, albeit in limited circumstances, to this day. For instance, in 1993, the Massachusetts Supreme Judicial Court ruled in *Adoption of Kimberly* that a trial court judge's decision to interview a seven-year-old child in chambers was appropriate where the child's therapist opined that testifying would be psychologically and emotionally traumatic for the child, the parties stipulated to the interview and its recording, and the questions were based on party submissions. These standards were relaxed in 1998, when the Massachusetts Appeals Court held it was proper for the trial court judge to hold an *in camera* interview of the child even though the judge had not made a specific finding that live testimony would traumatize the child. A 2015 Massachusetts Appeals Court case, *In re Adoption of Harry*, reiterated that excluding parents from the child's interview did not violate their due process rights, as long as they were given the opportunity to rebut allegations.

Importantly, Massachusetts has determined that judicial interviews are not exempt from the requirement that court proceedings must be recorded. In *Abbott v. Virusso*, the Massachusetts Appellate court vacated a trial court's decision, ruling instead that the trial judge erred in relying on an unrecorded, *in camera* interview of the children. The Appeals Court reasoned that in order to abide by the requirements of due process, trial courts must record all judicial interviews of children, even if conducted in chambers, and produce the recordings for the interested parties.

While judicial interviews are permitted, they are certainly not mandated. For instance, in 1982, the Massachusetts Appeals Court ruled in *Hayden v. Hayden* that the trial judge acted within allowable discretion in determining the child was under the influence of his father and thereby declining to conduct an interview of the child in chambers. More recently, in *Adoption of Olivette* in 2011, the Massachusetts Appeals Court upheld the trial court's decision that testimonial alternatives like judicial interviewing were insufficient to "eliminate the risk of harm" — indeed, "severe emotional trauma" — that would likely result if the "emotionally fragile" child was required to give testimony.

Indeed, Massachusetts courts have even found judicial interviews impermissible in certain situations. For instance, in *White v. White*, the Massachusetts Appeals Court ruled that the trial judge's examination of an adult daughter, in private, regarding the custody of her younger sister was in error. The Appeals Court reached its decision relying on the Massachusetts Supreme Judicial Court case *Adoption of Mary*, from 1993, which counseled that: "[d]ue process concerns and fundamental fairness require that a parent have an opportunity effectively to rebut adverse allegations concerning child-rearing capabilities, especially in a proceeding that can terminate all legal parental rights."

Further, some courts have endeavored to find creative alternatives to *in camera* judicial interviews that still maintain an appropriate balance between protecting the child's interests and the parties' procedural rights. For instance, in 2001, the Massachusetts Supreme Judicial Court held in *Adoption of Don* that custody hearings do not mandate abiding "right to face-to-face confrontation guaranteed to defendants in criminal cases." Therefore, the trial judge acted reasonably in having the parents sit in the back of the court room during the children's examination — as the parties still had the opportunity to rebut allegations and cross-examine the witnesses. Similarly, in 2002, the Massachusetts Appeals Court ruled in *Adoption of Roni* that the trial court was within its discretion to bar the parents from the courtroom during the children's examination, noting the children's therapists' opinion that the parents' presence would traumatize the children, that the parents' counsel would be present and permitted to cross-examine, and the children would not be testifying beyond the parents' knowledge. However, the court noted that parents should be prohibited from observing proceedings only when "absolutely necessary." More recently, in 2011, the Massachusetts Appeals Court held in *Adoption of Thea* that the trial judge acted appropriately in permitting a seventeen-year-old child to testify by telephone.

Notwithstanding these occasional allowances, it is clear that Massachusetts prefers live testimony and an open courtroom whenever feasible. For instance, in *Roni*, the Appeals Court cautioned that "any order limiting parties' access to, or participation in, any portion of the proceedings" must be "*narrowly tailored* to the particular protection required in the circumstances." Further, in *Thea*, the Appeals Court noted that, were the circumstances different, the trial court should strive to "benefit from face-to-face proceedings where the judge would be able to assess not only her words but her demeanor and body language." Similarly, in *Olivette*, the Appeals Court stated its preference for live, open court testimony of child witnesses when possible.

The other means of providing the child with a voice in the matter is to procure representation for the child. Representation is often necessary because custody proceedings present a unique situation where the court's purpose is to determine the child's "best interests," yet neither adverse party can reliably represent or advocate those interests. Such representation generally comes in two basic forms: a GAL, charged with representing the child's best interests and an attorney for the child, whose purpose is to advocate the child's wishes.

Guardians Ad Litem

In addition to conducting judicial interviews, a traditional approach Massachusetts courts have used to amplify the voice of children has been to appoint a GAL to represent the child's best interests before the court. Specifically, Massachusetts General Law c. 215, §56A provides that: "Any judge of a probate court my appoint a guardian ad litem to investigate the facts of any proceeding pending in said court relating to or involving questions as to the care, custody or maintenance of minor children." A testimonial GAL is often engaged to determine whether testimonial privileges held by a child should be waived with regard to doctors, therapists, and social workers who treat the child. A court may also appoint a GAL to investigate, pursuant to M.G.L. c. 215, § 56A, and M.G.L. c. 215, § 6. Standards and training required for investigative and evaluative GALs are provided by Standing Order 1-05, Standards for Category F Guardians Ad Litem/Investigators and Standing Order 1-08, Standards for Guardians Ad Litem/Evaluators.

Attorney for the Child

There appears to be a scholarly trend towards a more client-directed approach to children's legal representation, with an attorney appointed to advocate the child's stated preference in a custody dispute. While there is no specific authority for judges to appoint an attorney for the child, some judges assert that they have authority pursuant to M.G.L. c. 208, § 16 as well as under the broad inherent powers vested in the Probate Court relative to children and custody. While other states have enacted statutes authorizing the appointment of an attorney for a child in divorce matters, Massachusetts has failed to enact such legislation. Accordingly, children do not enjoy the absolute right to counsel in divorce actions. Further, where counsel is appointed, the question of payment arises as there is no authority to have the commonwealth pay for the attorney. Some Massachusetts counties operate *pro bono* ARC programs whereby attorneys provide representation in cases where the Department of Children and Families (DCF) is not involved. See, Massachusetts Law Review, Vol. 95, No. 3. Where DCF involvement is imminent, the judge must inform the child of his or her right to counsel at all hearings involving DCF. The child's attorney can pursue discovery but is not subject to it. Practical questions can arise as to the implementation of the ARC representation tand there is little guidance in Massachusetts as to how such issues are resolved. At this point, in the absence of statutory or other guidance, they must be addressed on a case-by-case basis. The attorney may also attempt to facilitate settlement of issues because it is consistent with the child's best interests.

Weight of Child's Preference

Once the court determines how it will receive statements of preference are not accorded as much evi-

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dentiary weight if the child is younger, although there are no bright-line age guidelines. Ultimately, the weight accorded to a child's preference is a matter of judicial discretion. For instance, in 1993 the Massachusetts Appeals Court upheld the trial court's decision in *Adoption of Arthur*, which gave considerable weight to the 14-year-old child's stated desire to be adopted after the child was interviewed by the judge with counsel present. On the other hand, in 1996, the Massachusetts Appeals Court ruled in *Ardizoni v. Raymond* that the trial judge accorded too much evidentiary weight to the opinions of 11-year-old identical twins. Specifically, the Appeals Court found the judge errantly ignored evidence from the children's GAL and school counselor that the twins should not be separated, instead relying too heavily on the individual children's wishes.

This topic continues to evolve.

In 2012, Massachusetts Gov. Deval Patrick created a Working Group on Child-Centered Family Laws, comprised of representatives from various spheres. The Working Group's mission was to examine current state laws and recommend any changes it deemed necessary to preserve the best interests of children in the commonwealth. An evaluation of the child's voice in the divorce process was one of the Working Group's proposed goals. ■

The authors would like to thank the Administrative Office of the Probate and Family Court of Massachusetts for permission to use research conducted for The Voice of the Child committee, which was chaired by the Chief Justice of the Probate and Family Court of Massachusetts; Sara Helmers and Ryan Deck, who were each formerly summer law clerks; and Danielle Starr, who was formerly an associate at Prince Lobel Tye LLP.

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directors, define duties of managers and create remedies for breaches. However, we must be mindful of principles and traditions peculiar to nonprofit corporations that have been established in Massachusetts. Many nonprofit corporations operate under organizational documents that were created long ago, and governance procedures that were developed under Chapter 180. It is important to consider the impact of any proposed amendment to the nonprofit corporation statute on existing Massachusetts practices and case law.

The authority of the Office of the Massachusetts Attorney General to protect public charities and address issues in the management of their assets has long been recognized under Massachusetts common law and statutory law. M.G.L. c. 12, §§ 8 – 8M, relates to the jurisdiction of the attorney general over public charities. M.G.L. c. 180 has several provisions that require attorney general involvement in fundamental actions by Massachusetts charities. These include M.G.L. c. 180, § 8A, regarding the disposition of assets by public charities and hospitals, and Sections 11A and 11B, regarding dissolution of public charities. Any amendment that, for example, might allow the conversion of a Massachusetts nonprofit corporation or a derivative lawsuit by a member of a nonprofit corporation, would have to take account of, and not interfere with, the attorney general's oversight authority over public charities.

Massachusetts also has developed case law regarding various governance issues of public charities. There are important Massachusetts decisions that, for example, address the higher standards of care by directors, the power of officers, the ability of the board to change charitable purposes or delegate its powers with regard to the charity's assets, or the right to transfer control over the charity's assets.

Care should also be taken not to upset systems and processes at the Massachusetts Secretary of State's Office that work well. A large number of Massachusetts nonprofit corporations have organizational documents that have been developed under the current law, and tax exempt recognition has been granted based on those documents. Statutory changes that would require unnecessary changes to bylaws or other organizational documents should be carefully considered.

In summary, there are a number of areas where improvements could be made to the nonprofit corporation law in Massachusetts. The work being done to consider and propose amendments to this law is to be commended. ■

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the burden of a large scale "affordable housing crisis" that neither they nor their tenants created.

As a part of the "Just Cause" movement, tenants are being encouraged by groups such as City Life/Vida Urban and the Harvard Project to band together, stop paying rent, demand costly upgrades to apartments and plant signs on lawns and in windows informing the public that the tenants refuse to relocate. Again, this is largely a reaction to economic realities entirely outside of the control of landlords. As financial burdens increase (i.e., the cost of maintaining ones' property and/or expensive legal procedures), at some point, these private individuals will no longer be in the position to sustain ownership of affordable rental properties. No one will be left but large, corporate landlords with the financial wherewithal to do as they please — including wholesale transformation of rental properties into market-rate condo units for sale.

Massachusetts laws currently include adequate safeguards to ensure no person is unnecessarily or unfairly evicted. For example, every Thursday the Boston Housing Court begins with a 10 to 15 minute lecture by the sitting judge explaining to everyone in the courtroom that there are dozens of lawyers and law school students standing by to speak to tenants about their case. The staff in each courthouse is required to inform tenants of the various "court service centers," where they will be directed to attend a free seminar hosted by either the Greater Boston Legal Services clinic or Harvard Legal Aid Bureau clinic. Once there, tenants will be advised to fill out preprinted forms on which they can check boxes to countersue the landlord and file discovery, which automatically delays the first hearing date by no less than two weeks. These preprinted forms also contain a demand for jury trial that, in the Boston Housing Court, can take between three and twelve months. Current Housing Court Standing Orders even eliminate the deadlines for filing, if a pro bono tenant advocate is willing to file a "limited appearance" on the date of the initial hearing.

The pressure caused by current economic conditions cannot be passed on to small and mid-level landlords. When a landlord is required to spend significant money on capital improvements, and sustain significant yearly tax and insurance increases, our system allows a raise in rent to offset the cost. The Just Cause Eviction proposal attempts to reintroduce rent control into the Boston housing market. Property owners will lose more property rights to the bureaucracy. With restrictions on rent, landlords may no longer have the financial ability to improve their properties, causing neighborhood deterioration. Furthermore, the proposed requirement that landlords engage in a non-binding mediation with tenants prior to initiating any rent increase will inevitably place strains on landlord/tenant relationships — turning what should be friendly and personal relationships into hostile and adversarial ones. Mediation is already encouraged by the Boston Housing Court and available to all litigants with an active case.

An analogy to the lead paint laws is appropriate. There is no question that lead paint poisons children. There is little question that lawmakers had little or no sway over paint companies, builders who were long gone, or banks taken over by the FDIC. Politically, the best lawmakers could do was hold landlords liable. In the immediate days after lead paint was banned, larger owners could tap their insurance coverage without much damage to their businesses, but small owners were effectively put out of business because of strict liability.

It is always easiest to lay the most blame on the person who is most readily available, and appears one step ahead in the pecking order. Yes, there is a housing crisis; yes, increased homelessness presents a public safety and public health issue. Whether or not housing is a right is a public policy issue, and to date this country has chosen not to deem it as such. Until such time, no one has the right to live in another person's property without complying with lease rules within the bounds of the law and standards that are "commercially reasonable" for residential property. To overburden the small/mid-level owner, regardless of which side you are on, only avoids the bigger issue of who benefits from the increasing stranglehold the law puts on small landlords. They are a small business, not a monopoly. They are keeping housing local, not changing neighborhoods by wholesale removal of its residents. In some ways, small landlords have as yet unexplored common ground with tenants. Both are fighting over something relatively small, and that fight keeps both from viewing and attacking the larger questions of housing, and more important issues in this country including housing policy. Until larger economic and societal issues at the root of the housing crisis are rectified by policy changes, we will continue facing these challenges in the rental property market. However, expanding the existing laws and regulations that already provide adequate protection for tenants is not a forward-thinking solution and will only exacerbate the problems. ■

Jordana Roubicek Greenman is a sole practitioner whose practice consists of a broad range of real estate related matters, including commercial and residential landlord-tenant litigation, condominium association representation, and commercial and residential conveyancing. Greenman is recognized as a Super Lawyers Rising Star 2012.

SECTION REVIEW
MASSACHUSETTS BAR ASSOCIATION

Family Law

Collaborative law: practicing family law with heart

BY JUSTIN KELSEY

In May of 2014, I attended the Massachusetts Collaborative Law Council's day long Advanced Training Forum. The attendees included lawyers, coach/facilitators, mental health practitioners, financial neutrals and other professionals who help divorcing couples. There were the usual discussions about finding better ways to help our clients divorce, finding more clients, and finding other professionals willing to practice collaboratively. And there was also singing!

I'm breaking a vow we all took, just by telling you that there was singing. But you need to know. Because this is how collaborative law is different. Collaborative law is a team process that uses interest based negotiation to settle cases outside of court. But that technical definition doesn't really explain the value and influence collaborative law has had on my practice and my clients. Collaborative law has changed how I see conflict, and that has changed how my clients experience their divorces.

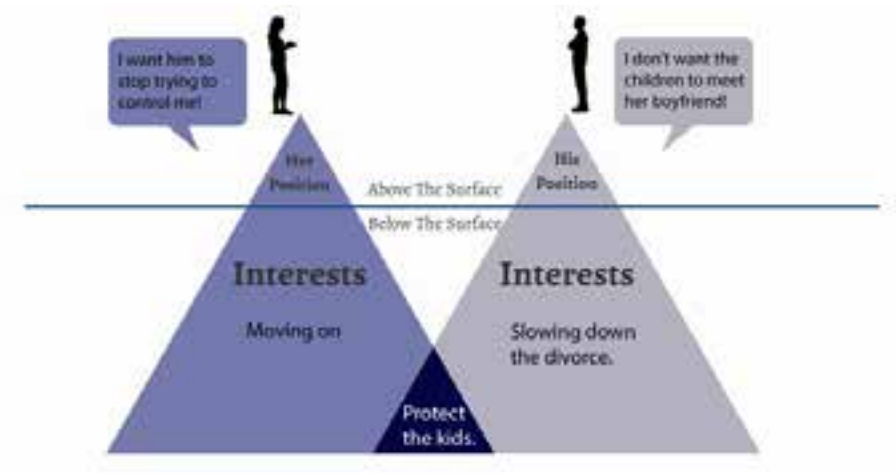
The collaborative law training is different. The one thing that still stands out for me from my Collaborative training is not some practice tip or tidbit I learned. I remember most how the trainers genuinely seemed to be friends and I left motivated to be more like them. Honestly, it was not because I really understood how much better collaborative law would be for my clients, but I saw how much better it could be for me. I saw a glimpse of a world in which I could help my clients through their divorce, and still be who I was and who I wanted to be. I didn't see at first that by changing myself I would also change my clients.

I spent the first five years of my career litigating divorce cases in court. I started out idealistic, wanting to help every client reach their goals and find their peace after the divorce. I asked them what their life looked like a year from now, five years from now, etc. I wanted them to focus on the future. But I started to burn out because many of my clients were not able to reach their goals through the court process and that was frustrating.

The court's complaint process is set up first to protect people and children, and that should be the priority because the people who need protection need the court's help the most. But for those people who don't need protection, the court rules and process treat them all the same, as presumed adversaries. The court process and we as practitioners have a significant influence on those undecided or uneducated potential litigants by how we handle our first interactions with them. We are not disconnected observers, and how we measure the conflict between people has an effect on how they choose to resolve that conflict. I call it the "Observer Effect" of family law. If I start with the assumption that most of the people who walk into my office can settle, then I believe most of those people will settle without the need for the cost and pain of adversarial litigation. But if I start with the assumption, as the complaint process does, that most of the people who are starting a divorce are adversarial, then I believe most of those people will end up acting that way.

Collaborative law is a different experience for my clients. If my divorcing clients finish their case having no better idea how to deal with conflict than when they first came into my office, then I have failed them. Divorce is a by-product of conflict in the marriage, but if people are ending their marriage to escape that conflict, why do so many couples end up in long drawn out court fights for years, essentially continuing that conflict? Because somewhere along the line the complaint-style system has failed them.

Collaborative law teaches us how to transform that conflict using the support of a team and proven techniques for reducing and resolving disputes. That is not easy. In fact, in many ways it is easier to just try and beat each other in court than to actively listen and work together. Traditional negotiation and litigation only requires you to define what your client wants as an endpoint and then try to get it. It ignores the relationship the two parties have. Collaborative law uses an in-



terest based negotiation approach to understand what both parties' goals and interests are. By knowing what lies beneath each person's wants we are better able to negotiate a mutually satisfying result to any dispute.

Collaborative law is different because we accept that the conflict is a part of life and we don't fight that fact. Instead we use the energy of that conflict to help both sides understand their needs and wants better. I recently read a blog post by a Collaborative attorney in Florida whose partners had to ask him to quiet down because the divorcing clients in his Collaborative settlement meeting were laughing too loudly. Collaborative law brings back into the room the human dignity our clients deserve and the comfort that gives them permission to laugh when life is funny. We even find ways to sing about it.

Collaborative law has changed how I see conflict, and that has changed how my clients experience their divorce, and therefore how they experience their life after divorce. The theme of the MCLC Advanced Forum from May 2014 was Mindfulness. It is impossible to be more aware, more mindful of how you do something and not have that carry over into other parts of your life. Collaborative law is not just different, it is better for everyone involved and it changes them.

If you're reading this and you have worked within the collaborative law community then you already understand what I am talking about. If you're reading this and it is the first time you've heard about collaborative law, you might be wondering what we're thinking. I'm not asking you to buy into it right away. Just give it a chance and maybe it will change you too. ■

Thank you to the great speakers from MCLC's program and specifically David Hoffman of the Boston Law Collaborative for teaching us how being more positive will change the people around us (and for leading the singing). If you're interested in learning more, check out MassCLC.org for information on the next collaborative law training coming up in September 2016.

Justin Kelsey is the owner of Skylark Law & Mediation PC in Framingham, and is the president-elect of the Massachusetts Collaborative Law Council. Skylark has five attorney/mediators all focusing their practice on resolving family conflict in all forms. Learn more at SkylarkLaw.com. This article was adapted from multiple posts from blog.skylarklaw.com.

Family Law

Custody, codified

How 'An Act Relative to Child Centered Family Law' could shake the foundations of Massachusetts family law

BY LISA G. KENT

"All happy families are alike; each unhappy family is unhappy in its own way." — Leo Tolstoy, "Anna Karenina"

The proponents of Senate No. 834, "An Act Relative to Child Centered Family Law," are out to prove Tolstoy wrong. If SB.834 passes in its current form, the situation-specific approach to child custody will in part give way to checklists, new presumptions and shifted burdens of proof. Unhappy families — our clientele — will be judged by new mandatory yardsticks. Think that the "Section 34 factors" could never happen to child custody? Think again.

Testimony and press from legislative hearings indicate that the bill originated in the so-called "father's rights" movement, the result of efforts to counteract what fathers perceive as the courts' bias in favor of mothers as primary child custodians. Women's groups decry SB.834 as a "cookie cutter" approach to custody that elevates the "right to parent" over a child's best interest. The bill's most radical aspects, such as the presumption in favor of one-third parenting time for a parent, and mandating the court's consideration of "friendly parent" factors — seem aimed to favor the "secondary" parent, still largely fathers.

While I enjoy a good public policy debate, I am tired of the "moms vs. dads" rhetoric. I suspect most attorneys are too. I have a busy practice and clients to serve. I need answers to practical questions to help my clients. If it passes in its current form, how will SB.834 change the practice of family law? Will it change how we advise clients about custody? How will it impact the settlement of cases? Will it affect the cost and means of litigation? Will it benefit certain types of clients over others?

To explore these questions, I made a presentation about SB.834 to a small group of busy family lawyers from my county bar association — a wonderfully collegial group. We brainstormed how the law could change our practices. Here are the results of this "focus group," along with a few observations of my own:

From "happiness" to mandatory factors: We began by reviewing the underlying principles of the current custody law, M.G.L. c. 208, § 31.[1] There's no presumption about shared physical or legal custody, except where there is proven abuse (as provided in section 31A). Read in light of the bill, section 31 seems a tad quaint in basing custody decisions on "the happiness and welfare" of children. With typical lawyerly sarcasm, several of my colleagues observed that the bill seemed to be another out-of-touch effort by legislators and interest groups to tell us practicing lawyers how to negotiate for the "happiness" for our clients' children. ➤ 31

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One attorney asked why we needed a new law to tell us what was in a child's best interest. Here were some thoughts:

Perhaps "happiness," being subjective, has outlived its usefulness as a yardstick. In an age where there can be two capable parents, a child could be "happy" in both households. We need guidelines by which to choose one parenting over another.

Underfunded and understaffed courts, inundated with unrepresented litigants need speedy resolutions, especially at the temporary order stage. It's easier for a court to use a checklist when it has little to no time to hear nuanced stories or take evidence.

On the other hand, specific criteria could help anchor clients with objective criteria by which they'll be judged. This helps made custody decisions more predictable, and cases more likely to settle.

The "right to parent" contends with the "best interest" standard: The keystone of SB.834 is contained in this sentence: "Each parent has a right to parent his or her child, absent any limiting factor the contrary and subject to the court's determination of each child's best interest."[2] What, exactly, does this mean? One interpretation of this sentence is that it creates an "equation" for courts to apply — meaning that, first, there's a "right to parent;" second, consider limiting factors (i.e., domestic violence); and, lastly, a reflection on what is in the child's best interest as a whole? Or does it create a balancing test (right to parent vs. limiting factors) that is then subject to the court's own ideas about best interest? How does this make the law clearer? And, as one astute attorney noted, even though there's a "right to parent," do siblings have any rights to remain together? Under SB.834, no.

New names, no problem; but a parenting time presumption?: No one was surprised that the term "physical custody" would be replaced by "residential responsibility." Swapping out the term "decision-making responsibility" for "legal custody" was welcomed. However, the presumption of one-third or more parenting time per parent raised eyebrows. "This is being done to align parenting time with child support guidelines," sighed one attorney. Child support payors will benefit from a new parenting time "floor" from which to negotiate. Parties will negotiate in a much narrower "playing field." This new "tilt" to the custodial playing field could make negotiations more efficient. However, it would add the cost, in lawyer's time and impact on children and parties, of overcoming the presumption in cases where children really should reside primarily in one home.

My colleagues considered SB.834's list of factors that a court *must* consider in allocating custody. These include:

- The reasonable wishes of the child.
- The ability of the parent to foster a positive relationship and frequent contact with the other parent; (the "friendly parent" standard).
- The ability to communicate and make decisions jointly.
- Which parent performs caregiving functions.[3]

Certainly "the children's voice" should be heard, but how are the "reasonable wishes" of a child to be ascertained? Does the bill appropriate funds for children's attorneys? (Answer: no) Will cases become more costly with the need for guardians ad litem? (Answer: yes) How will a court determine if the child is "of sufficient age, capacity and understanding" to have her wishes known? Will the "friendly parent" provisions — those requiring judges to favor parents who communicate well with the other parent and support co-parenting — favor gregarious parents over timid ones? And what if the gregarious parent is a sociopath and manipulator?

If a court awarded sole decision-making responsibility to a parent at the temporary order stage, it would have to write a written rationale. "Now we'll have to wait longer for decisions," sighed one attorney. Will judges tend to award joint legal custody increasingly to avoid the burden of the written rationale?

The limiting factors for awarding custody — such as incarceration or emotional abuse of a parent or child — seemed self-evident. However, these factors are permissive, not mandatory. If we're requiring courts to factor in positive parenting attributes, why not require them to factor negative parenting attributes as well? One wonders what the reason is behind this significant omission.

The requirement of detailed parenting plans for temporary orders and separation agreements had us all thinking about the extra work needed. In addition to where a child will be every day and night, we must now include in parenting plans, among other things; the child's school district; his or her extracurricular activities; transportation and exchange of the child; a process for making periodic changes to the schedule; information sharing and access, both by telephone and by electronic/digital means; and a dispute-resolution process.

In the end, my colleagues gave SB.834 mixed reviews. My own view is also mixed. The bill has good intentions based upon nationally recognized norms, but there should be no parenting time presumption that tilts the playing field from the start. The "positive parenting factors" should be permissive, not mandatory. Checklists can increase productivity and efficiency and promote high standards for custody decisions, but their worth will always be determined by their application in each individual case. SB.834 needs significant amendments to allow courts and attorneys to help unhappy families, who will, no doubt, continue to be unhappy, each in their own way.

UPDATE: The Massachusetts House of Representatives recently released its own version of SB.834 and currently the bills have been merged as HB.4107 ■

FOOTNOTES

1. SB.834 only amends the section 31, the section applying to the children of married parents. Never-married parents will continue to be judged by their own statutory scheme. The impact of that omission is beyond the scope of this article.
2. Senate Bill No. 834, § A.
3. SB.834, § D, "Determination of Parental Responsibilities."

Lisa Kent graduated from the Rutgers University School of Law – Newark and is a shareholder at Esser Kent P.C. in Greenfield, Massachusetts, and the creator of the soon-to-be-released family log, "Splitting the Baby" (www.splittingthebaby.com). She serves on the MBA's Family Law Section. The views expressed in this article are her own and not those of the MBA.

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of whether the trust contains a spendthrift provision.[35] If Florida law governs the interpretation of the trust in a Massachusetts divorce, a beneficiary spouse's rights to trust distributions over which he or she may exercise control would not be shielded by a spendthrift provision.[36]

Conclusion

Divorce cases involving trust disputes are becoming more prevalent. The Supreme Judicial Court's decision in the *Pfannenstiehl* appeal will likely clarify the extent to which a beneficial interest in a trust may be included as a marital asset for purposes of calculating an equitable distribution. Beyond *Pfannenstiehl*, however, family law practitioners should be aware of the strong protections Massachusetts has enacted that can and often are used to thwart the Probate Court's enforcement of child and spousal support and maintenance orders and equitable property divisions. Practitioners should also be aware that many other states have enacted exceptions to the enforceability of spendthrift provisions, which provide non-beneficiary spouses and children greater rights to reach a beneficiary spouse's trust funds. While this awareness may not resolve the *Pfannenstiehl* family feud, it may shine light on others. ■

FOOTNOTES

1. 88 Mass. App. Ct. 121, 122-124 (2015).
2. *Id.* at 126.
3. *Id.* at 125.
4. *Id.* at 125 and 131.
5. *Id.* at 131-132.
6. *Id.* at 126-127.
7. *Id.* at 131-134 (the Appeals Court ruled that where the trustees were obligated to and actually did distribute the trust assets to the husband, for such things as comfortable support, health, maintenance, welfare and education, the husband's interest in the trust was vested in possession, with a presently enforceable right to the trust distributions to support his lifestyle during his lifetime).
8. *Id.* at 132.
9. *Id.* at 137-142 (the dissent pointed out that the trustees made distributions in some years and not in others, such that the husband's interest in the trust stands on different footing from a party's interest in cases where interests are more clearly fixed and certain).
10. Supreme Judicial Court Docket No. 12031.
11. Marc A. Chorney, Pfannenstiehl v. Pfannenstiehl: Massachusetts Supreme Judicial Court Grants Petition for Certiorari in Unusual Property Division Involving Trust Interests, ACTEC Journal (2016); Lisa M. Rico and Judith A. Saxe, "The planning implications of 'Pfannenstiehl'," Massachusetts Lawyer's Weekly (December 17, 2015); William M. Levine, O Pfannenstiehl! Part 3: No Wonder We're All Confused (Be Careful What You Wish For)," http://levinedisputeresolution.com/divorce-mediation-blog/o-pfannenstiehl-part-3-no-wonder-we-re-all-confused-be-careful-what-you-wish-for (Oct. 28, 2015); Harry S. Margolis, "Does Pfannenstiehl Case Undermine Asset Protection in Massachusetts," http://www.margolis.com/our-blog/does-recent-divorce-undermine-centuries-of-spendthrift-trust-law (Sept. 22, 2015).
12. *Davidson v. Davidson*, 19 Mass. App. Ct. 364, 371 (1985).
13. *S.L. v. R.L.*, 55 Mass. App. Ct. 880, 882–883 (2002).
14. *Williams v. Massa*, 431 Mass. 619, 628 (2000).
15. *Lauricella v. Lauricella*, 409 Mass. 211, 214 (1991).
16. *Id.* at 216.
17. See, e.g., *S.L. v. R.L.*, 55 Mass. App. Ct. 880, 882-883, 884 (2002) (a wife's beneficial interest in numerous spendthrift trusts established by her father, contingent upon her surviving her 77-year old mother); *Ruml v. Ruml*, 50 Mass. App. Ct. 500, 511-512 (2000) (a husband's interest in a spendthrift trust established by the husband, in which the husband maintained a non-general power of appointment to withdraw trust income and principal); *Comins v. Comins*, 33 Mass. App. Ct. 28, 30 (1992) (a wife's beneficial interest in a discretionary trust established by her father with stocks, bonds and other securities, in which the wife had a testamentary power of appointment); see also *Davidson v. Davidson*, 19 Mass. App. Ct. 364, 371–372 (1985)(a husband's contingent remainder interest in a testamentary trust).
18. See, e.g., *D.L. v. G.L.*, 61 Mass. App. Ct. 488, 494-505 (2004); cf., *Child v. Child*, 58 Mass. App. Ct. 76, 82-84, n. 4 (2003).
19. In *Pfannenstiehl*, the Appeals Court set aside a contempt judgment against the husband for failing to make payments of over $200,000to the wife, illustrating the very issues described above. See 88 Mass. App. Ct. at 136.
20. See Brief of Appellant, Curt F. Pfannenstiehl, at pp. 20-22 (Feb. 19, 2016), 2016 WL 943890.
21. See *Boston Safe Deposit & Trust Co. v. Collier*, 222 Mass. 390, 393-395 (1916); Broadway National Bank v. Adams, 133 Mass. 170, 173 (1882).
22. See 23 Patricia M. Annino, Estate Planning § 13.13, n. 7 and 8 (2015 3d ed.) (and cases cited therein including *Pemberton v. Pemberton*, 9 Mass.App.Ct. 9, 19-22 (1980) (in which the Appeals Court refused to enforce an alimony and child support order from a father's trust funds, even in the face of strong public policy arguments favoring such a recovery).
23. G.L. c. 203E, § 502(c).
24. 23 Patricia M. Annino, Estate Planning § 13.0.50 (2015 3d ed.).
25. 24 Patricia M. Annino Estate Planning § 28.13, n. 5 (2015 3d ed.) (and cases cited therein).
26. Restatement (Third) of Trusts § 56 cmt. b; Restatement of Trusts § 58 cmt b.
27. Restatement (Third) of Trusts § 56 cmt. a
28. Restatement (Third) of Trusts § 56 cmt. b
29. See 11 U.S.C. § 541(a) and (b).
30. *In re Behan*, 506 B.R. 8,15-17 (2014); see also *In re Dorsey*, 497 B.R. 374, 386 (Bankr. N.D.Ga. 2013), citing *Lunkes v. Gecker*, 427 B.R. 425, 431 (N.D. Ill. 2010).
31. *Id.*
32. See Uniform Trust Code §§ 500, et. seq.
33. Uniform Trust Code § 505 (unlike the version of the code adopted in Massachusetts, the Uniform Trust Code treats non-settlors that have a power of withdrawal as the settlor of the trust to the extent of the power).
34. Uniform Trust Code § 503.
35. F.L.A. § 736.0505; *Miller v. Kresser*, 34 So.3d 172, 175-177 (2010); *Bacardi v. White*, 463 So. 2d 218, 222 (Fla. 1985).
36. *Id.*

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MassBar Bulletin

Announcements

NORFOLK

Heidi A. Nadel and **Darren P. Cross** have partnered to form Cross Nadel LLC, a Metro South boutique law firm located in the historical Willard Building in Quincy. The firm provides premier legal services to individuals and businesses with a focus on litigation, appeals, bankruptcy, immigration and trademark and copyright registrations.'

SUFFOLK

Doreen M. Sankowski

Doreen M. Zankowski has joined Duane Morris LLP as a partner. Zankowski will enhance the firm's construction law and litigation capabilities in Boston, nationally and internationally.

Peter Foundas

Peter Foundas has joined the Boston office of Robins Kaplan LLP (HR) as an associate. Foundas' practice focuses on general liability, professional malpractice, product liability, construction litigation and commercial disputes.

(HR) ***Denotes: MBA Honor Roll Firm***

In Memoriam

Hon. Judge Beverly W. Boorstein (ret.)

Retired Probate & Family Court Judge Beverly W. Boorstein passed away in April. Boorstein was a judge from 1992 until her retirement in 2007. After leaving the bench, she opened a dispute resolution practice in Newton. Boorstein graduated from Brandeis University in 1961 and Boston University Law School in 1964, the same year she was admitted to the bar. From 1979 to 1985, she was co-partner in a firm with another future judge, Suzanne V. DelVecchio.

MBA Past President Roy A. Hammer

Roy A. Hammer

It is with great sorrow that we share the news that Massachusetts Bar Association Past President Roy A. Hammer (1978-79) died in late April at the age of 81. He had been of counsel to the Boston law firm Hemenway & Barnes LLP. An MBA Gold Medal Winner (1985), Hammer was active with the MBA for many years, as well as a past president of the Massachusetts Bar Foundation (MBF), the MBA's philanthropic partner. In 2014, the MBF presented Hammer with its President's Award at its 50th Anniversary Gala, noting his leadership in committing the MBF to be a core funder of the Flaschner Judicial Institute.

MassBar Bulletin publishes updates from Massachusetts Bar Association members. Information is listed alphabetically by county. Email your announcements to bulletin@massbar.org.