“One of the most important responsibilities of all lawyers and judges is to protect and promote the integrity and respectability of the legal profession.” These are the opening words of the preamble to the Massachusetts Bar Association’s new Civility and Professionalism Guidelines, which have become the focus of a series of statewide forums aimed at reaffirming the bar’s commitment to these important principles.

Created by the Massachusetts Bar Association’s Committee on Civility and Professionalism and the judiciary, the new guidelines were first publicly unveiled in Springfield on Aug. 22, at an MBA-hosted forum on civility and professionalism, which featured Superior Court Chief Justice Judith Fabricant.

More recently, members of the bench and bar gathered at the Worcester Courthouse on Oct. 24, to discuss the recently published guidelines at a forum co-sponsored by the MBA and the Worcester County Bar Association. The forum highlighted the collaborative efforts of both attorneys and judges who worked together on the committee to craft a formal document consisting of seven civility guidelines.

The aim and purpose of the guidelines are addressed in the document’s preamble:

“Our hope and expectation is that these guidelines will remind practitioners and judges of the respect that our profession demands of one another, and will ensure that we conduct ourselves at all times with the utmost personal courtesy and professionalism. Our hope is also to ensure that the public has confidence in the legal profession and respect for lawyers, and to ensure the honorability of our noble profession remains strong. Finally, it is also to make practicing law more pleasurable.”

While civility and professionalism have always been ideals of the legal profession, lifestyle aspects, such as increasing pressures, fewer personal interactions between attorneys in court and daily use of email communication, have made them more challenging to maintain.

“It’s something you have to constantly rejuvenate and be mindful of,” said MBA President Jeffrey N. Catalano, in reference to the timing of the new guidelines. “It’s not just about how to be civil; it’s about how to be a true professional.”

The forum in Worcester allowed both members of the bench and bar to share their day-to-day experiences and challenges with civility and professionalism, both inside and outside of the courtroom.

“The feedback was tremendous,” said Superior Court Justice Beverly J. Cannone, who chaired the committee. “Everybody wants to see this happen and wants to maintain the professionalism of the court.”

A common theme to the feedback was the misconception that attorneys need to be overly aggressive in the courtroom environment in order to be successful.

“You don’t need to be a pit bull to be a great lawyer,” remarked Paul E. White, past chair of the MBA’s Complex Commercial Litigation Section.

Now that the guidelines have been published, the next phase of the project is to get the word out to the legal community.
Civil rights here and now!

There is a concept that all trial lawyers who represent victims in personal injury and medical malpractice cases like me deal with: disassociation. Essentially it’s when jurors hear about something terrible that happened to our client and convince themselves it would not have happened to them because they do things differently. Many jurors think they would avoid tragedy because they are more enlightened, and make better choices than our client did. They would have avoided the car accident, challenged a doctor’s opinion or taken more precautions on the worksite. It’s a psychological protective mechanism we use to ensure that we don’t feel endangered by what happened to other people.

Similarly, we hear constantly about terrible race-related events in Ferguson, Charlotte, Dallas, Baltimore, Chicago, Baton Rouge, New York and too many other places. But many think to themselves, “That would never happen here in Massachusetts.” We are more enlightened. We are not as racially insensitive, biased or racist. It’s a protective mechanism. Deep down, most of us know that’s not so. As much as it’s hard to admit, incidents of bias and discrimination happen every day, and right here, in the Commonwealth in which we practice. They not only happen to members of the public, but to fellow attorneys based on race, gender and sexual orientation.

I personally have learned of recent discriminatory events that happened to my colleagues here in Massachusetts that shocked my conscience. I’d like to say that these kinds of incidents happen very rarely, but I don’t think I can say that with any authority. The hard truth is that we have our problems here and we need to confront them now. Some are extreme, and some are implicit.

So, in this time when civil rights abuses are being brought to the forefront and front pages seemingly every day, the MBA knows it must do its part. We are taking a prominent role to ensure that the civil rights of our fellow attorneys and the citizens of our state are protected. We want to help impressive leaders facilitate measures that benefit everyone in our state and make Massachusetts a legal leader.
Clients’ Security Board awards lowest amount since 1992

BY MIKE VIGNEUX

In a marked shift from last year, the Clients’ Security Board (CSB) of the Supreme Judicial Court of Massachusetts awarded the lowest amount of reimbursement funds in more than 20 years to clients defrauded by their attorneys in fiscal year 2016.

According to the CSB’s recently released “Annual Report to the Supreme Judicial Court Fiscal Year 2016,” the $0.85 million ($846,842.96) awarded this year is the lowest amount since 1992 ($968,894.77).

The total reimbursement made this year to 28 claimants is a striking contrast to fiscal year 2015 when a record $2.9 million was awarded to 61 claimants.

Established by an order of the SJC in 1974, the mission of the CSB is to reimburse clients whose lawyers have misappropriated their money. In Massachusetts, the CSB reimburses 100 percent of the actual client loss with no statute of limitations, whereas most other states set a cap on the amount that can be reimbursed.

Attorneys in Massachusetts pay into the fund through their annual Board of Bar Overseers (BBO) registration fee.

“Massachusetts continues to be a strong model for other states in the areas of both legal ethics and client protection,” said MBA Chief Legal Counsel and Chief Operating Officer Martin W. Healy. “While only a very small percentage of attorneys in the commonwealth defraud their clients, it’s essential that we have an entity like the Clients’ Security Board to reimburse losses in full.”

“Massachusetts remains, again, both unique in, and in the vanguard of, the client protection movement in the United States,” added Jeffery in the report.

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The total reimbursement made this year to 28 claimants is a striking contrast to fiscal year 2015 when a record $2.9 million was awarded to 61 claimants. Also of note, the dismissal rate in 2016 (dismissals divided by adjudications) of 44 percent was the sixth largest rate in 36 years with two dismissals totaling $1.2 million.

Overall numbers in the report can vary greatly from year to year based on when claims are filed. The 2016 report covers claims made between September 1, 2015, and August 31, 2016.

“The lesson that emerges from all of this is that a single year does not create a trend,” wrote CSB Chair D. Ethan Jeffery in the report. “One can begin to understand the Board’s rhythm only by examining its statistics over many years.”

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The greatest amount of reimbursed money once again came in the category of trusts and estates which totaled $284,461.30 (17.86 percent) through five awards. The real estate category was next with one award totaling $236,495.10 (3.57 percent).

For the first time in the CSB’s history, the Office of the State Auditor (OSA) conducted a performance audit of board operations during a portion of fiscal years 2015 and 2016. The official audit report was released in February 2016 and the result was a “clean” audit of all CSB operations.

<table>
<thead>
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<th>FY 2016</th>
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<td>23 out of 59,503 (0.04%)</td>
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Mandatory BBO online registration for attorneys now in effect

The Board of Bar Overseers (BBO) has announced that all attorneys admitted to practice in Massachusetts are required to submit their registrations online at www.massbbo.org, effective Sept. 1.

The Massachusetts Supreme Judicial Court approved the new requirement on Oct. 20, 2015. Currently, approximately half of Massachusetts attorneys register online, and all other registrations are processed manually with paper forms.

Margaret Carlson, executive director of the BBO, said that the agency has not increased its registration fees since 2007, and a goal of the new requirement is to help keep administration costs low, ensuring that registration fees remain level.

“The new requirement will help us continue to run the agency at the current fee structure,” Carlson said. “In addition, we are looking at a number of ways to streamline our processes in order to keep overhead low and use funds toward the mission of the organization.”

The change brings the registration process for attorneys in line with other professional boards that require online registration, including the Board of Registration in Medicine, said Donna Jalbert Patalano, chair of the BBO and Chief of Professional Integrity & Ethics at the Suffolk County District Attorney’s Office. “For attorneys, online registration should make their registration process more efficient,” Patalano said.

The new requirement doesn’t apply to newly admitted attorneys and attorneys who are registered as “pro bono inactive” and “pro bono retired” statuses. Certain other categories of attorneys are also exempt, including those who are not admitted to practice in Massachusetts, but must register with the BBO. Otherwise, the Board will handle requests to be excused from the requirement on a case-by-case basis, such as attorneys who do not have computer access.

“Any special dispensation from online registration should be granted by the Board, and the Justices ask that the Board liberally dispense with the online requirement when lawyers have a legitimate reason for being unable to register online,” SJC Justice Francis X. Spina said when approving the requirement.

The BBO has four cycles for attorneys to register throughout the year: September, December, March and June. Attorneys who typically register in the December, March or June cycles will be required to register online when they next renew.

The 2016 MBA Pinnacle Awards will also be presented to companies that have taken proactive steps to benefit consumers in Massachusetts.

Family Court Judge David Sacks appointed chair of ADR Committee

Trial Court Chief Justice Paula M. Carey has announced the appointment of Probate & Family Court Judge David G. Sacks as chair of the Trial Court’s Standing Committee on Alternative Dispute Resolution. The committee includes representatives from all seven departments of the Trial Court, as well as private dispute resolution groups and the Boston and Massachusetts Bar Associations.

Judge Sacks has served on the bench of the Hampden County Probate & Family Court in Springfield since 1986. Chief Justice Carey said he has “established a reputation as an innovative supporter of Alternative Dispute Resolution and served as a dedicated member of the ADR Standing Committee for many years.” Judge Sacks has co-chaired the Probate & Family Court’s Steering Committee on Alternative Dispute Resolution, and is overseeing the Trial Court’s first-ever mandatory mediation pilot in the Hampden Probate and Family Court.

The Standing Committee is charged with advising the Chief Justice of the Trial Court on the implementation of the Supreme Judicial Court’s Uniform Rules on Dispute Resolution, including oversight of court-connected programs providing mediation and conciliation services.

MBA seeks nominations for 2017-18 officer, delegate positions

The Massachusetts Bar Association is currently accepting nominations for officer and delegate positions for the 2017-18 membership year.

Nominees must submit a letter of intent and a current resume to MBA Secretary Denise I. Murphy by 5 p.m., on Friday, Feb. 24, 2017, to be eligible.

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

If you have any questions about the nomination process, call MBA Chief Operating Officer Martin W. Healy at (617) 988-4777.
MBA volunteers offer free legal advice to Western Mass. residents

By Mike Vignéux

Residents of Berkshire, Franklin, Hampden and Hampshire counties had their legal questions answered by local volunteer attorneys from the Massachusetts Bar Association at the semiannual Western Massachusetts Dial-A-Lawyer call-in program on Oct. 26, hosted at Western New England University School of Law.

The calls featured legal questions on a wide range of topics, including real estate law, consumer law, family law, employment law, tax law and elder law. The legal advice was provided at no charge as a public service of the MBA.

“The beauty in the internship is that’s really important to them.”

Started in 1994, the MBA’s Western Massachusetts Dial-A-Lawyer program is in its 22nd year. The program is co-sponsored by Western New England University School of Law, The Republican, El Pueblo Latino, the Massachusetts Association of Hispanic Attorneys and the Hispanic National Bar Association.

The MBA thanks the following members for donating their time and expertise to this important public service effort:

• Michelle Bugbee, Eastman Chemical Company, Springfield
• Corey M. Carvalho, University of Massachusetts Legal Services, Amherst
• Mark D. Cress, Buckley, Richardson & Gelinas LLP, Springfield
• Lan Kantany, Connor, Moreau & Olin, LLP, Springfield
• Susan A. McCoy, Cooley Shrair, Springfield
• Amy J. Meghola, Siddall & Siddall, PC, Springfield

How interning and networking go hand-in-hand with your 3L year

By Katherine L. Connolly

By now you’ve heard many times throughout your law school career how important it is to get an internship and participate in networking events. This is just as important to do while you finish out your last year of law school and prepare to take the bar exam.

Internships are a great way to get a variety of experience. Some people go into law school and know exactly what type of law they would like to practice. Others have no set direction or are interested in many aspects of the law which do not coincide. There is the beauty in the internship. Internships allow you to explore various practices and to ultimately find your niche or find out what area you do not want to practice in.

I personally recommend trying to do a variety of internships. Without experience and hands on learning, it is difficult to ascertain what you want to do. Internships provide all of that. Internships are a place to learn, cultivate legal skills and be provided guidance on how to effectively practice. With these experiences you will be able to really understand what areas of law interest you.

This is one of the things that does not come easily once you’re out and practicing for a living. There is less flexibility in the professional world to dabble in many different areas of law.

Finally, interning is a way to build and cultivate relationships, which give way to easy networking — something that is equally important as it is terrifying to most people. The hardest part about networking is getting out and introducing yourself to someone. If there is a local event (through your law school or the MBA) make an effort to go. Do some online research regarding the speakers or guests at this event and find some commonality to talk about. Networking is really about connecting with others, which is easily done through similar interests. Having done some research and having something to talk about will also surely take away some nerves! Use that commonality to make a lasting impression and to get a business card or email. Make sure that you follow up with your new connections via email or other means, such as LinkedIn. If you are unsure on how to reach out, after the initial meeting, an easy way is to say how much you enjoyed meeting the person and speaking about your common interests.

Staying in contact is an old art form that many people have trouble with but takes hardly any time. Making a conscious effort to send follow up emails or staying in touch via online resources is an effortless way to keep these connections thriving. Do not forget to keep your contacts from various internships alive, too. Many future jobs, internships and opportunities stem from experiences and connections that you make in law school and the early part of your legal career.

Katherine L. Connolly is an associate with Pierce Davis & Perritano LLP. Connolly focuses her practice on the defense of asbestos and toxic tort claims. Prior to joining the firm, Connolly focused her practice in the defense of civil litigation, including automobile and premises liability claims, consumer protection claims under MGL c. 93A and MGL c. 176D and coverage matters. She received her Juris Doctor from Suffolk University Law School in 2013, where she graduated with Pro Bono honors and completed the Macaronis civil litigation concentration.

School of Thought is a regular column geared for law student members.
SUGARMAN sets precedent as leading personal injury firm

The partners of SUGARMAN

What types of law does your firm handle?

Plaintiff’s personal injury litigation.

Any particular areas of specialization, niche (type of law, geography) where the firm has made a name for itself?

SUGARMAN is one of the oldest firms in New England that devotes its practice almost exclusively to plaintiff’s personal injury litigation, handling cases from the claim stage through trial and, when necessary, through appeal to the Supreme Judicial Court and the federal appellate courts.

What firm attribute do clients find most attractive?

The firm provides a very personal and attentive approach, where clients are in direct contact with the partners handling their case. SUGARMAN attorneys consistently achieve outstanding results for their clients, while providing compassionate and ethical representation.

Briefly describe a recent “win” or client success story that the firm is proud of.

SUGARMAN partners have obtained several multi-million dollar awards and settlements in the past year, and are proud of every successful settlement, judgment or award, regardless of its size. Examples from this past year include a $5 million settlement to the family of a woman killed by a runaway tire, a $5.5 million settlement obtained by partner Ben Zimmermann for a 60-year-old career teacher and school administrator who suffered serious injuries when he was struck by a driverless bus, and a $2.2 million arbitration award obtained by partner David McCormack for the family of a 68-year-old man who died as a result of complications of narcotic pain medications following routine hip surgery.

Describe a recent pro bono project the firm has undertaken.

As a small firm, SUGARMAN encourages its attorneys to volunteer their individual time to pro bono efforts important to them. Managing partner Benjamin R. Zimmermann recently joined the Board of Directors for Greater Boston Legal Services, an organization which provides free legal assistance and representation on civil matters to hundreds of needy residents in the area. Newest partner, Stacey L. Pietrowicz, is currently involved with the Women’s Bar Foundation Family Law Project, representing victims of domestic violence in family law matters on a pro bono basis. These are some recent examples, however, pro bono work and civic engagement are important to all SUGARMAN attorneys.

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

SUGARMAN, as of 2016, has engaged in a collaboration with Shapiro & Associates, to provide expanded legal representation for federal workers seeking benefits under the Federal Employees Compensation Act. Daniel Shapiro, founder and principal of Shapiro & Associates, has grown the firm into one of the country’s largest single providers of legal services for injured federal employees. The two firms will now collaborate to provide additional resources to this robust practice, while holding true to SUGARMAN’s primary mission, which is to provide top-of-the-line representation to personal injury victims. In addition, SUGARMAN is pleased to announce that Suffolk University Law School graduate, Rosa M. Guambana, will become the firm’s newest associate, following the February 2017 bar exam.

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

SUGARMAN founder Paul Sugarmann was a pro bono attorney for the Harrington House, working on projects to improve the home and the lives of its residents, and getting to know the children who live there. Past projects include creating a playroom, stocking it with books, games and furniture, and an art room, complete with donated easels and art supplies.

Anything to announce in the coming year?

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

On an individual basis, SUGARMAN attorneys enjoy involvement as committee members, in leadership roles, as educators and as volunteers. Firm founder Paul Sugarmann is a past president of the MBA, while other partners have served appointments and leadership roles within the Civil Litigation Section Council. SUGARMAN attorneys frequently lecture on personal injury topics at MBA continuing legal education programs. For newer associates, MBA membership provides networking and relationship-building opportunities with new and seasoned lawyers, and consistent access to high-quality continuing legal education.

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

Having on-demand access to continuing legal education forums and new and important developments in personal injury law and other areas of law are valuable benefits to SUGARMAN attorneys.

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
The Massachusetts Bar Association’s My Bar Access app is now available! Download the app today from the Apple Store or Google Play by searching for MassBar: My Bar Access, and instantly connect with fellow members. Share practice information, documents and tips through discussions, blogs and more — right from your phone or tablet.

**STAY CONNECTED**

- Get quick access to your fellow MBA members. Easily connect with colleagues phone-to-phone.
- Push notifications are available for announcements. Instantly receive the latest news from your section/division.
- View upcoming MBA seminars, conferences, section and committee meetings.
- Collaborate with fellow members and get answers to your questions. All of the MBA Member Groups you are subscribed to are available on the mobile app.
- View any direct messages you’ve received from fellow members.
- Save MBA member contact information to your device.
- Access any document on the go.

**HOW TO DOWNLOAD**

To download the MassBar: My Bar Access Mobile App:
1. Visit your device’s application store and search for the app named MassBar: My Bar Access. Save time — use your mobile device to scan the applicable QR code.
2. Once downloaded, launch the application.
3. Log in using your regular MassBar: My Bar Access username (your email address) and password. You will remain logged in to the app unless you specifically log out.

QUESTIONS? EMAIL: MyBarAccess@MassBar.org

WWW.MASSBAR.ORG • 617.338.0500
Welcome Back Member Reception
The Massachusetts Bar Association hosted a 2016-17 “Welcome Back” Member Reception on Thursday, Sept. 22, at the Back Deck in Boston, to celebrate the start of the new association year.

Dispute Resolution Section Reception
The Massachusetts Bar Association celebrated its new Dispute Resolution Section on Sept. 20. Guest speakers included the Hon. Dennis J. Curran, associate justice of the Mass. Superior Court, and Lon F. Povich, Esq., of the Office of the Governor. The new section, which is chaired by Brian R. Jerome and Sarah E. Worley, is the first statewide platform for practitioners and users, and provides outreach, support and education to MBA members, practitioners and users of DR, the judiciary, the Legislature, law students and the general public about the nature and benefits of the wide array of dispute resolution processes.

ComCom Fall Kick-Off
Members of the bar and judiciary from across the commonwealth gathered at the Massachusetts Bar Association on Sept. 29, for the Third Annual “Kick-Off” Fall Reception of its Complex Commercial Litigation Section. The Complex Commercial Litigation Section, or “ComCom,” was created in 2014 to provide practitioners focusing in the areas of business litigation, bankruptcy and intellectual property litigation a forum to share thoughts and ideas, and participate in educational and networking events.
MASSACHUSETTS LAWYERS JOURNAL | NOVEMBER/DECEMBER 2016

UPCOMING MBA CLE

WEDNESDAY, NOV. 30
Fastcase Training (1 CLE)
MBA, 20 West St., Boston
Session I: 12:30–1:30 p.m.
Session II: 4–5 p.m.
Faculty: Chuck Lowry, Fastcase Inc.

WEDNESDAY, DEC. 14
W. Mass. Fastcase Training
Catamount Court Reporting Services
1414 Main St., Suite 1810, Springfield
Session I: 9–10 a.m.
Session II: noon–1 p.m.
Faculty: Chuck Lowry, Fastcase Inc.

Post-Mortem Planning and Income Taxation of Decedents and Estates (1 CLE)
4–7 p.m., MBA, 20 West St., Boston
Faculty: Luke C. Bean, Esq, LL.M., program co-chair; Leo J. Cushing, Esq, CPA, LL.M., program co-chair; Kevin G. Diamond, Esq, CPA

THURSDAY, DEC. 15
Starting or Jump-Starting an Innovative Law Practice: Harnessing Innovation to Design Your Law Practice (1 CLE)
Noon–2 p.m., MBA, 20 West St., Boston
Faculty: Susan Lettermann White, program chair

Faculty Spotlight
NAME: Hon. Bonnie H. MacLeod (ret.)
AFFILIATION: JAMS

MBA: You were involved in the process of making Massachusetts Bar Association CLEs free to its members. How have you seen this affect the educational programming offered?

MacLEOD: The educational offerings are nothing short of exceptional, both in terms of numbers and variety of interest! Every section of the MBA has answered the call to embrace and embody our slogan “MassBar Educates.” Proof that we are meeting our mission lies in the increasing numbers of lawyers attending our diverse programs, from arbitration and mediation to voir dire.

MBA: Voir dire in Massachusetts will be two years old in February. How have you seen it progress since the implementation of the Standing Order?

MacLEOD: I believe that many trial lawyers will agree that attorney-conducted voir dire is coming into its own, to some extent more quickly and with more ease than initially anticipated. Reticence to implement it, on the part of both lawyers and judges, is in fading. Programs such as the MBA’s “Voir Dire at One Year: Nothing to Fear,” conceived of and presented by leaders of the bar and bench, have been of great assistance in moving forward.

MBA: What are your goals as the chair of the Education Committee for this association year?

MacLEOD: The primary goal is to maintain the provision of first-rate educational opportunities for every segment of the bar, whether that be through in-person or webcast seminars, webinars or lunch talks. The Education Committee, through the tireless work of the MBA staff, is constantly seeking — and finding — new ways to deliver high quality, relevant education to its members.

MBA: The MBA has educated more than 1,200 attorneys since the “Practicing with Professionalism” course has been made mandatory for newly admitted Massachusetts attorneys. What other ways can we instill a sense of civility and importance of protecting one’s reputation in the practice of law?

MacLEOD: When I entered the practice of law in 1972, there were approximately 25,000 lawyers in Massachusetts; that number is now almost 60,000. I believe that it is now far more difficult to network and identify mentors within the profession. (Some of us “oldsters” are still heard to bemoan the loss of the Civil Motions Session in the Superior Court, where new lawyers could stand cheek-to-jowl with some of the best of the bar.) I believe that bar association membership and participation in bar-related activities is the number one way to promote civility and pride within our ranks.

Lunchtime AT THE MBA
Taking advantage of FREE CLE is easy! As an MBA member, you can stay on top of the law, advance your careers and enhance your practices — all at no extra cost. The MBA’s educational programs cater to new, experienced and transitioning attorneys across a wide range of practices and programs are even available during your lunch break.

DID YOU MISS LAST MONTH’S LUNCHTIME PROGRAMS? CATCH UP VIA MBA ON DEMAND.

FREE REGISTRATION: 14TH ANNUAL IN-HOUSE COUNSEL CONFERENCE: WHAT KEEPS COUNSEL UP AT NIGHT
Thursday, Dec. 1 • 9 a.m. – 1 p.m.
The Westin Waltham Boston, Waltham

CONFERENCE CO-CHAIR
PETER D. MCDERMOTT, ESQ.
Banner & Witcoff Ltd.

PETER M. McGERART, ESQ.
Barnes & Wittes Ltd.
Boston

DAVID A. PARKS, ESQ.
Belkin, Sanders & Glassman LLP, Springfield

Check out the MBA On Demand programs you may have missed and view them anytime, anywhere ... FREE with your MBA membership.
Members Helping Members: My Bar Access Q&A

Q: A DUI client, who recently received a 24D disposition with a CWOF has inquired as to what effect this will have on his plans to travel to Canada on business in a few months. Does anyone here have any familiarity with this or know where I might find the information? Thanks.

W. Rockne Palmer
DeLeo, Angell & Palmer
Westfield MA

A: My clients have experienced difficulty crossing the border. In some cases, they have been told that Canada considers a CWOF a Guilty and denies them access. If you can provide documentation that says a CWOF is not a guilty but an admission to facts, that may help. And he/she should bring their travel permit from the probation department with them. A letter from their PO wouldn’t hurt, either.

Kathleen Delaney
Tourkantonis & Delaney PC
Woburn MA

Q: I’m wondering if anyone is aware of any limitation on how long an ANR endorsement is good for. In my client’s case the plan was endorsed by the Planning Board and recorded sixty years ago; there was a different owner at the time. The property has never been used as anything but a single lot but it is now devoid of structures and my client wants to sell it as two buildable lots per the old plan. It seems to me that they can. Any feedback is appreciated.

Stephen Dawley
Stephen E. Dawley PC
Framingham MA

A: The ANR plan creating 2 lots is still valid. However, if the owner of both lots is the same person or entity then the zoning concept of “merger” comes into play so that the lots are considered one for zoning purposes if the dimensional requirements (frontage or area, depth, etc.) in the local bylaw were changed over time so that each lot now does not comply. Therefore the lots merge so the entire lot complies. MGL c. 40A, sec. 6 (as well as some local bylaws) may contain a grandfather provision but for single or 2 family use the ownership of up to 3 contiguous lots only has a 5 year protection once any one of the lots becomes non-compliant due to an increase in dimensional requirements (as long as each lot was buildable when created, contains at least 75 feet of frontage and 7,500 square feet of area). If the 2 lots were separately owned, then each lot (for single or 2 family use) would have an indefinite grandfather protection (as long as each lot was buildable when created, contains at least 50 feet of frontage and 5,000 square feet of area).

Anthony N. Tomasiello, Jr., Esq.

A: If each of the lots still complies with current zoning requirements they are each still buildable, if they do not comply with current zoning I believe they will be treated as a single lot for zoning purposes. The lone caveat is whether the local by law has a special provision that provides protection.

William F. Riley
Riley and Norcross

A: You will at least want an engineer to sketch the new lots. You should also clear with title company.

Jordana Roubicek Greenman
Attorney at Law

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First 2016-17 House of Delegates meeting highlights section goals, accomplishments

BY JASON SCALLY

MBA President Jeffrey N. Catalano opened the first House of Delegates (HOD) meeting of the 2016-17 year by urging HOD members to be “as productive as you can” at the MBA — and on issues outside the MBA that affect the profession, the rule of law and access to justice.

“We want to be involved everywhere it matters: legislation, amicus briefs, community service projects … and task forces,” he said. “We need to get the word out about the amazing stuff the Mass. Bar Association does. We want people saying ‘I want in.’ … If we all have that mindset this year, we’re going to accomplish a lot of great stuff.”

Catalano lauded the energy he has already seen from section council chairs and vice chairs, and he made it clear that the MBA can expect big things from its sections this year. “We know the Mass. Bar can’t solve the world’s problems, but we need to step up to the plate and we need to do our job,” he said.

The Civil Rights & Social Justice Section Council, chaired by civil rights attorney Richard W. Cole, will play a key part in accomplishing this goal. Catalano noted that it includes representatives from every organization in its sections this year. “We know the Mass. Bar can’t solve the world’s problems, but we need to step up to the plate and we need to do our job,” he said.

In his report to the HOD, Cole said his section council will be looking at a range of topical issues this year, including rule of law concerns that have surfaced during the election campaign season, criminal justice reform, police misconduct, medical care for individuals in correctional facilities, fair housing and access to housing.

New Criminal Justice Section Council Chair Georgia K. Critsley’s report at the HOD meeting also signaled an ambitious agenda and a focus on “outreach.” She announced that her section will hold an open meeting in November in Springfield, which will feature a panel of judges giving practice tips for the criminal bar. And she also mentioned the section’s October 27 CLE, which doubled as CORI-training and a pro bono opportunity for lawyers.

Critsley said the Criminal Justice Section Council will look at issues involving police body cameras, the opioid epidemic and indigent defense in the coming months. And it is poised to play an important role for the MBA once the National Center on State Governments releases its report on Massachusetts’ criminal justice system.

“We will have to be a vocal constituency to try to make the case after we study the proposal and send it through our wonderful Criminal Justice Section,” said MBA Chief Legal Counsel and Chief Operating Officer Martin W. Healy, earlier in the meeting.

During his own report to the HOD, Healy noted that while the courts continued to operate with a tight budget, the slight increase in civil legal aid funding this year was a “testament to every organization in the room” that participates in Walk to the Hill and other funding outreach efforts. Healy also commended the Family Law Section Council for helping to defeat an unpopular proposed child custody bill last year. “We will continue to fight that bill this session to make changes or defeat it again,” he said.

Former MBA President Alice Richmond, who is the American Bar Association state delegate for Massachusetts, spoke to the HOD members about the MBA resolution adopted by the ABA over the summer condemning the arrests of lawyers and judges in Turkey. “We have great reason to be proud of the Mass. Bar Association,” Richmond said.

Continuing the tradition of guest speakers at HOD meetings, Superior Court Judge Mitchell Kaplan helped kick off the meeting with a report on the Business Litigation Session, where he is one of the presiding judges. Catalano noted that it includes representatives from every organization in the civil rights arena and from every minority bar association.

“The fact of the matter is everyone agreed instantly to join this Civil Rights Section because it’s an opportunity for people to come together on a regular basis as a summit, if you will, and talk about what’s going on in the world today,” he said.

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Catalano asks bar to ‘dream big’ at reception

By Joe Kourieh

The new president of the Massachusetts Bar Association, Jeffery N. Catalano, received the ceremonial oath of office on Wednesday, Sept. 14, at a reception attended by prominent judges, MBA leadership and members, and the friends and families of all. After being sworn in by Supreme Judicial Court Chief Justice Ralph D. Gants, Catalano told the audience, “Dream big, join us in leadership and thank you for being here to begin this journey with me.”

Catalano was introduced by MBA Past President Leo V. Boyle, who eschewed a survey of Catalano’s resume in favor of an illustration of his character — a hard worker worthy of his hometown of Scranton, Pennsylvania, and a genuine collaborator worthy of his Jesuit upbringing.

“This is a special guy,” Boyle said. “He needs to speak for all of us. … We need to be represented. And as far as I’m concerned, there’s no one better to do that than Jeff Catalano.”

Catalano, a partner at Todd & Weld LLP in Boston, called himself “a humble servant of this great profession,” referring to the practice of law which he swore to “honor and respect” in his oath. Though Catalano conceded that the MBA cannot single-handedly solve society’s problems, he assured his peers that it can make important strides toward alleviating those problems in coming generations, while standing up for those cannot stand up for themselves.

“This work depends on the contributions of creative leaders like you,” Catalano said, specifically citing the Leadership Academy, which he aims to develop into an incubator for skilled young legal professionals and students, armed with the knowledge and firsthand experience it takes to make a significant difference in communities across the commonwealth.

“The lofty goal is to make Massachusetts the place where future great leaders are created,” he said. “We can develop leaders of the bar who can work toward solutions for our problems — who can navigate the complexities of our society by building coalitions and forging hybrid solutions.”

PHOTOS BY ERIC HAYNES

Prominent judges, MBA leadership and members gather at Jeffrey N. Catalano’s President’s Reception.
State of the Judiciary speakers address court successes, challenges

BY MALEA RITZ

Court leaders, legislators and bar leaders gathered for the annual State of the Judiciary Address on Oct. 20, presented by the Massachusetts Bar Association, where they heard speeches from MBA President Jeffrey N. Catalano, Supreme Judicial Court Chief Justice Ralph D. Gants, Trial Court Chief Justice Paula M. Carey and Trial Court Administrator Harry Spence.

With each speaker highlighting judicial-branch accomplishments and praised recent bench-bar relations, several speakers addressed racial and ethnic disparities in the justice system and the impact of the ongoing opioid crisis, among other topics.

For example, citing statistics showing a disparity in incarceration rates for people of color, Gants spoke about the need to “better fulfill our promise to provide equal justice for every litigant.” He noted that according to Sentencing Commission data from 2014, the rate of imprisonment for African-Americans was 5.8 times greater than for whites in the U.S., and nearly eight times greater in Massachusetts. In the U.S. the rate of imprisonment for Hispanics was 1.3 times greater than for whites, while in Massachusetts it was nearly 4.9 times greater, he said.

“We need to find out why,” Gants said, before announcing that he has asked Harvard Law School Dean Martha Minow to put together an independent research team to look into the reasons for the disparity in incarceration rates.

In his opening remarks, MBA President Jeff Catalano also touched upon the need to eradicate bias in the court system, and he announced that the MBA, through MBA Vice President John Morrissey, would be holding a program about dealing with implicit bias in our legal system on March 22, 2017. Catalano also expressed a “need for more qualified and diverse judges” and referred to an upcoming panel focused on how to become a judge, aiming to take some of the mystery and intimidation out of the process.

During her remarks on the Trial Court, Carey reported that the court system is using its 44 specialty courts to help address the opioid and mental health crisis. Franklin County and Hampshire County both saw the creation of new courts, she said. Carey also discussed efforts to improve the user experience and better serve everyone interacting with the court system.

The number of drug courts has also doubled, Spence added. Additionally, the Trial Court has implemented a unified case management system and is in the process of transitioning to a fully automated digital operation, anticipated for completion by the end of 2019, he said.

In his last state of the judiciary address before his retirement next April, Spence concluded, “I am grateful to you all for how you have embraced change, and look forward to learning of your continued progress in the days ahead.”

The MBA’s Jason Scally contributed to this report. Listen to highlights from the State of the Judiciary Address on the MassBar Beat - the MBA’s podcast, available on iTunes and elsewhere.
Four Massachusetts leaders highlight inaugural Leadership Academy training session

By Mike Vigneux

The MBA’s Leadership Academy hosted its first “Profiles in Leadership” training session for 21 fellows selected for 2016-17 on Oct. 25 in Boston.

Fellows heard presentations from four prominent Massachusetts leaders: Hon. Karyn Polito, lieutenant governor of the commonwealth of Massachusetts; John Fish, chairman and chief executive officer, Suffolk Construction Company Inc.; William Sinnott, Esq., Donoghue, Barrett & Singal; and MBA Past President Valerie A. Yarashus, Esq., Meehan, Boyle, Black & Bogdanow PC.

The speakers represented a unique cross-section of professional experience including public service, business and commerce, the military and the law.

MBA President Jeffrey N. Catalano, a member of the Leadership Academy Steering Committee, provided welcoming remarks and congratulated the fellows on being selected to the program. He also stressed the importance of connecting not only with leaders, but with other fellows as well.

“Part of being a great leader is hanging around with great people. Greatness is contagious,” said Catalano.

MBA Treasurer and fellow member of the steering committee Christopher A. Kenney also noted the commitment the MBA has made to each fellow as a future leader. “I hope you see this fellowship as the honor and privilege that it really is and is intended to be,” remarked Kenney. “But I hope you also see this as an investment—the MBA’s investment in you.”

Lt. Gov. Polito, an attorney and former member of the MBA House of Delegates, spoke about her experience with leadership as a lawyer, local selectman, state senator and lieutenant governor. She acknowledged the importance of perseverance and the notion that many leadership skills are not developed overnight.

“Leadership is not just about one academy—it’s a lifetime experience,” said Polito.

After the four presentations, a brief question and answer session was held with the speakers that covered various leadership topics such as finding a mentor and work/life balance.

The MBA Leadership Academy was developed to better prepare young attorneys to assume leadership roles at the bar, in their firms or organizations and in government. A 12-month program, which will run concurrently with the MBA membership year, the Leadership Academy will include five educational programs, class projects and mentoring opportunities.
MBF Legal Internship Program benefits come full circle — and around again!

Each year, the Massachusetts Bar Foundation awards stipends of $6,000 each to public service-minded law students for their unpaid summer internships at non-profit legal aid organizations in Massachusetts. The grants are provided through the MBF’s Legal Intern Fellowship Program (LIFP), which is funded by the MBF Fellows Fund and the Smith Family Fund, and has two concurrent goals: 1) to give talented students the experience and encouragement they need to continue in the public interest law sector; and 2) to provide legal aid organizations with much-needed additional staff capacity for the summer.

This past spring, when the MBF reviewed Boston University Law School student Mario Paredes’ application for the MBF’s LIFP, many aspects of his submission demonstrated what an outstanding candidate he was. In addition to valuable experience working with the Latino immigrant community, Paredes’ essay highlighted his passion for helping communities in need and a strong commitment to using his law degree to work for social justice. His motivation, potential, and goals were clear, and he was selected to receive one of the four coveted stipends for his summer internship at the Boston office of Kids In Need of Defense (KIND). But there was something else that stood out in his application: his supervisor, Attorney Elizabeth Badger, was a recipient of the very same award when she was a law student back in 2004.

“It was great to see not only that the LIFP helped Elizabeth Badger to build her career in immigration legal services, but also that she was now in a position to help mentor and train a new LIFP recipient,” said LIFP Review Committee Chair Angela McConney Schepers. “It is our goal that LIFP recipients will pursue public interest law careers — and it is wonderful to see this goal coming to fruition in this case.”

During her LIFP fellowship, Badger interned with the Political Asylum and Immigration Representation Project (PAIR). For the past 10 years, she has built a career in assisting vulnerable, low-income immigrants at several prominent civil legal services organizations, including Lutheran Social Services in Worcester, Massachusetts Law Reform Institute in Boston and as a staff attorney at PAIR. She has also served as a visiting assistant professor at her alma mater, Boston University School of Law.

Badger is currently a senior attorney at KIND, an organization dedicated to building a national network of pro bono attorneys who, with training and support from KIND, represent unaccompanied immigrant children facing deportation which could ultimately lead to a return to dangerous lives they had tried to leave behind. KIND clients include children who have been persecuted in their home countries, trafficked to the U.S., and abused, abandoned or neglected. In Massachusetts alone, unrepresented children facing deportation number in the thousands. With such an overwhelming need, Badger was thrilled to welcome Paredes to the staff for the summer.

For his part, Paredes was drawn personally and professionally to KIND, viewing it as the ideal 1L internship. Familiar with the desperate situations unaccompanied minors may face through his work at Centro Presente, Paredes welcomed the opportunity to learn how to be an effective immigration legal advocate. Badger noted, “Mario demonstrated amazing talent and aptitude for working with our client children and the issues they face, and he contributed greatly to our capacity to work with the tremendous number of unaccompanied children in need of representation in Massachusetts.”

MBF staff met with Badger and Paredes this past summer. Both were eager to share stories about the children they were working to help and the many barriers facing them in this work. We were very impressed with their knowledge and dedication.

At the close of his internship, Paredes wrote, “I am thankful for the opportunity to have taken on meaningful responsibilities during my short time at KIND. I am more motivated than ever to continue exploring these issues and working with others to find better solutions.”

In October the Massachusetts Bar Association launched its first-ever podcast, the MassBar Beat. The podcast will feature interesting and relevant content involving MBA members and others in our legal community, practical programming and timely updates on important legal developments.

In the inaugural episode — “Leadership: All the World’s a Stage” — MBA President Jeffrey N. Catalano shared a little-known story about his time in the theater, and how it informed his vision of leadership. Catalano was excited to open this new chapter in MBA communications,” said Catalano, in his announcement message to members. “You have asked for ways to read about the great things going on at the MBA through Lawyers Journal, eJournal, the Massachusetts Law Review, My Bar Access, our social media channels, and more. And now you can hear about it, too. In the second episode of the MassBar Beat, titled, “Mastering the Unspoken Word: Body Language and Nonverbal Communication in Court,” MBA Treasurer Christopher A. Kenney addressed how a lawyer’s attire, body language, tone of voice and other nonverbal cues can impact your chances in court. Kenney also talked about tips for success, including some of the key takeaways from Sonya Hamlin’s book, “Now, What Makes Juries Listen.”

A third episode offered highlights from the 2016 State of the Judiciary Address. Be sure to listen in to the MassBar Beat to catch up on these episodes and new ones as they become available. Better yet, subscribe so you don’t miss a “Beat”!
The First Impression

The principles of “privacy” and “re-cency” teach that people best recall what they hear first and last. However, of these poles of Alpha and Omega, it is the first impression that most often dictates the outcome of a trial. It is axiomatic that “you get only one chance to make a first impression,” and that “first impressions are lasting impressions.” In this light, counsel must effectively convey in the opening statement why her client should win the case. However, the jury’s first impression of counsel begins to congeal long before she utters the first words of her opening. What goes into the mix of a first impression:

1. Dress

Shakespeare astutely recognized that “the apparel oft proclaims the man” — that is, the clothes make the man. That adage applies equally to men and women, because people generally make judgments about others based on their clothing and appearance. Psychologists believe that our clothing not only affects how others perceive us but also governs how we feel about ourselves.

Hamlin suggests that counsel cultivate an aesthetically pleasing, conservative, ornate, understated, important and if he doesn’t think so, why does he think we are?? He should get all the way back from the front of the jury box for “making the wrong move.” The position complements counsel’s communication in several ways. First, it focuses the jury on counsel’s question, not the witness’s answer. Counsel is literally and figuratively “on stage.” This position gives counsel the opportunity to make optimal eye contact with the full jury, and with each individual juror. In this prominent position, counsel can subtly look at the jurors after introducing a new witness, so the call to the floor and the jury’s approval can strike a chord – good or bad – for the witness, facing the jury box, you can subtly look at the jurors after impeaching and make a barely discernible shake of the head as you resume your position in front of the jury box. If done well, you can read the jury’s approval and grant of implicit license to become more aggressive in questioning the witness with damaged credibility.

When opening and closing, assume a position similar to cross — not too close to the jury box (or they’ll feel like you are invading their personal space) but not too far back either (or they’ll feel that you are remote and segregated from them).

Remember, when you are “on stage,” all eyes are on your every move. Button your jacket when you stand up. Be courteous to co-counsel, opposing counsel and court personnel; and always be respectful (but not obsequious) to the judge.

By moving with purpose in the courtroom you make it your space. That effect greatly enhances your credibility with the jury.

3. Eye Contact

This is one of the cultural “lie detectors” in America. In judging credibility, we often demand that the speaker “look me in the eye and say that.” Under this test, looking down or away suggests dishonesty or at least insecurity. Hamlin suggests that counsel sends the best message by fixing a steady gaze at the jury for a moment. That gaze affirms the witness’s face, “the eyes are the mirror of the soul.” The eyes are the most examined article of clothing. According to Hamlin, “eyes are the window to a person’s soul and most often whether or not your shoes are polished! They comment on the tone of your words as well as your expression: … they feel quite personally insulted if your shoes are not well polished. “Who does he think he is?? He should get all dressed up to talk to the jury – us! We’re important and if he doesn’t think so, why should I listen to him?!” So, whatever shoes you wear, check the polish and heels.

Jewelry can be distinctive or distracting. For men, cuff links should be used sparingly, and be understated when they are used. Rings are okay. In fact, wedding rings are almost always good. They show that at least someone loves and trusts you! Diamond pinky rings, by contrast, are subject to speculation.

Hamlin reminds us of the adage “the eyes are the mirror of the soul.” Therefore, eyeglasses should be avoided when contact lenses will do. Glasses block your eyes and form a barrier between you and your audience. Any advocate who wears glasses should use eye glasses, Hamlin suggests that the lenses be non-reflective; and that the frames be understated and designed not to overly shield your face. Women have more choices, but more challenges, than men with regard to their attire. Some jurors (generally older, more conservative, and rural jurors) may challenge, than men with regard to their attire. Some jurors (generally older, more conservative, and rural jurors) may

4. Facial Expressions

Any conflict between the advocate’s facial expression and oral expression confuses the jury and undermines counsel’s credibility. For example, furrowed brows and frowns communicate anger, aggression, and disagreement. They would be a mismatch when telling a joke or relaying a love story. Conversely, smiling and holding an open, facial expression suggest that you are content with the subject matter of your message. This expression would be incongruous with a tale of deception or danger. It’s critical for counsel’s facial expression to match her spoken message.
5. Gestures
Effective advocates match their gestures (movement of hands, arms, and head) to their words to reinforce and enhance their communication. These gestures engage the jury and complement counsel’s spoken message. Think about these common matchings in your everyday communications:
- “She never had a chance to stop before the crash,” spoken while plaintiff’s counsel slowly shakes her head back-and-forth to reinforce the negative.
- “There are two simple reasons why this case should be dismissed,” spoken while defense counsel holds up two fingers in front of the jury.
- “In the world could the defendant ever have foreseen the potential for this accident?” spoken while defense counsel has her arms out and up, bent at the elbows, with her palms open and facing each other.

Find a comfortable resting place for your arms and hands as you stand and argue to the court. Be aware of fidgeting hands, which connotes nervousness and insecurity, or covering your mouth or face with your hands, which suggest an intent to conceal your true feelings from the jury. Likewise, avoid holding your hands behind your back when you stand in court, as the stance projects conflict.

Likewise, avoid holding your intent to conceal your true feelings from the face with your hands, which suggest an insecurity, or covering your mouth or your arms and hands as you stand and argue. By identifying its full range of applications, one can greatly enhance comprehension of your substantive message by focusing on how, when, and why you use these tools. For example, by changing the pace of the story, plaintiff’s counsel can cause the jury to lean forward and tune in by slowing down and speaking softly to them as she gets to the scene of the fatal accident that is the subject of her client’s suit. She can then create a heightened sense of urgency and alarm by picking up the pace and volume as the impact of the accident occurs.

Likewise, your voice inflection can help the jury to hear the punctuation in your speech. Try this exercise: Say, “do you know what I mean?” and raise the inflection of your voice on the last word to form the audible question mark at the end of the sentence. See, it works! Likewise, your tone, tenor, and pace can also emphasize the point of your message. By speaking in a low, flat tone with a slow, measured pace, your voice can reinforce the point you are emphasizing. Try using that speaking style in this exercise: Say, “the plaintiff never complained about the supposedly defective brakes — not once — not ever!” By reciting these words in this manner the jury gets your message more forcefully and clearly than if you delivered it in a hurried, high-pitched voice.

What about the value of brilliant prose?
According to Hamlin and her allies, only seven percent of your message is based upon the actual words you use when delivering it. Although some dismiss this as “the 93 percent myth,” it seems to be well received and respected in the literature. Of course, word choice is important — it lays the foundation for evidence, and it creates the record for appeal — but it is not what gets the jury rooting for or against you and your client. By strategically using body language techniques and deploying the full range of tools the voice has to offer, you will complement the impact of the verbal message you deliver to the jury.

Christopher A. Kenney currently serves as treasurer of the MBA. A founding member and managing shareholder of Kenney & Sams PC in Boston, Kenney has tried cases before every level of the state and federal trial court system in Massachusetts, and has served as an appellate advocate before the Massachusetts Appellate Division, Massachusetts Appeals Court, Massachusetts Supreme Judicial Court and the U.S. Court of Appeals for the First Circuit. He recorded an episode of the MassBar Beat podcast on this topic in October.

Sounding the Message
Your voice is a toolbox for advocacy. By identifying its full range of applications you can greatly enhance comprehension of your substantive message by focusing on how you say it. Your voice has everything you need to repair an uninfused message: tone, tenor, inflection, volume, pace, and pitch can be deployed to great effect in your oral messaging.

The key is to become conscious of how, when, and why you use these tools. For example, by changing the pace of the story, plaintiff’s counsel can cause the...
What’s automation? And, why should I be using it in my law practice?

By Heidi S. Alexander

In the current state of the legal marketplace, the demand for legal services is high, but clients are looking for value that plays out in a number of ways. For large law firms, companies seek reduced rates while holding firms accountable for practice inefficiencies. Take, for example, the Casey Flaherty LegalTech Audit. Former general counsel to Kia Motors, Casey Flaherty designed a legal tech audit to vet potential outside counsel. When dissecting the audit, he found that across the board firms spent too much (billable) time on tasks that a machine (i.e., computer) could handle (and most likely better).

Large firm inefficiencies aside, there is an entire middle market not currently being served and priced out of traditional legal services. This is why products like LegalZoom and Rocket Lawyer have become wildly popular and successful. For the price, most people seem content with the end product they receive (at least in the short term). Could law firms embrace (and handle better) the board firms spent too much (billable) time to get in the game and find ways to commoditize their services and create efficiencies in their practice? Automation is the answer.

Websites offer simple tools through easy-to-use website builders, and allow you to set up your own website for free. Legalzoom and Rocket Lawyer offer a similar service, allowing you to set up a website for a fee and receive websites that will save these folks loads in time and money down the road.

Large firm inefficiencies aside, there is an entire middle market not currently being served and priced out of traditional legal services. This is why products like LegalZoom and Rocket Lawyer have become wildly popular and successful. For the price, most people seem content with the end product they receive (at least in the short term). Could law firms embrace (and handle better) the board firms spent too much (billable) time to get in the game and find ways to commoditize their services and create efficiencies in their practice? Automation is the answer.

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The single best business development tip

BY JOHN O. CUNNINGHAM

One of the largestest conversational firestorms I have seen online was sparked by a question posed to a law firm marketing group on LinkedIn.

John O. Cunningham

The question was: “What is your single best marketing and business development tip?” Literally hundreds of answers blazed in from around the world, which I subsequently recorded and categorized for my own edification.

I then posed the question to law firm rainmakers and legal marketing pros I knew, and found that the answers were still pretty consistent.

For purposes of this article, I have categorized and combined the most popular recurring answers into the following “10 best tips for legal business development.”

1. Meet with clients and prospects face to face. This tip is the one most often given by successful rainmakers and marketers alike, who say that no form of communication is better for customers or clients better are more likely to grow their market share. Why? Clients rave about great service experiences, but they tell even more people about service slumps.

2. Grow and nurture your referral networks. Successful lawyers consistently state that referrals are a key part of their business, and they offer lots of tips for growing and maintaining referral networks. One frequent tip is simply to show appreciation to those who refer business by sending “thank you” notes and occasionally thoughtful, but not ostentatious, gifts.

3. Leverage your existing clients for more work. At the successful conclusion of a project, you can ask satisfied clients for one contact in their own company or elsewhere who might benefit from your assistance. This tip is consistent with my own experience — the vast majority of clients I’ve surveyed indicate that they are happy to provide a potential client contact if they think highly of you as a service provider.

4. Focus on personal marketing plans. Marketing pros in particular say that firms benefit most from developing marketing plans and strategies for individual lawyers in ways that fit their styles and abilities. A good plan should offer a step-by-step guide to success, spelling out specific weekly and monthly actions to be taken, such as phone calls, emails, in-person visits, content marketing or other actions.

5. Focus on perpetual service improvement. A number of academic business studies have revealed the importance of cultivating a culture of continuous improvement. Organizations that obsess over how to serve their customers or clients better are more likely to win more business and grow their market share.

6. Enhance your cyber-presence. In most businesses, use of technology and the internet are key difference makers. Having a website that is user-friendly, informative and full of value-added content for clients will yield more visitors. By adding in newsletters, client alerts, blogs and/or links to social media pages, you can become ubiquitous in cyberspace.

7. Improve your marketing communications. When you communicate simply, consistently and regularly who you are, what you do, and how and why you do it, good things happen. People have to know your story, find it memorable and like it. Developing the story and telling it well is a matter of practice.

8. Measure and know the results of what you do. Measure results of both your legal and marketing actions. As one client said to me, “I have to know every measure of my business, so I want my lawyer to know from past history the expected budget for a matter, the average time to get to trial, the likelihood of winning, and the potential verdict if I lose.” Track your marketing metrics and outcomes as well, so you can make targeted expenditures on specific marketing activities that offer you the best return on investment.

9. Run a client-driven law firm. Much has been written about the success of customer-driven companies, which operate on an upside down pyramid. The customers are on top, those who serve them are the next tier down, and management is on the narrow bottom, serving those above them. Clients should drive the business strategies and planning of a law firm because they pay the revenue … or not.

10. Know the client’s business and industry. More than one survey has shown that most clients rate industry knowledge as both hard to find and critical to their buying decisions. In a 2012 Altman Weil survey, 200 general counsel even ranked industry knowledge ahead of referral recommendations as their top factor in hiring.

You will notice that all of these tips work — there is no “magic wand” tip. But there is a track record of success among those who follow through on these professional marketing suggestions.

John O. Cunningham is a writer, consultant and public speaker. As a lawyer, he served as General Counsel to a publicly traded company and to a privately-held subsidiary of a Fortune 100 company. For more information about his work in the fields of legal service, marketing, communications, and management, check out his website and blog at https://johnocunningham.wordpress.com.

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2 Ways to Give Back this Holiday Season

Donate new children’s winter coats at any of our drop-off locations.

* Donations accepted: Monday, Nov. 14, through Wednesday, Dec. 14
* DROP-OFF LOCATIONS:
  - MBA, 20 West St., Boston (lobby)
  - MBA, 1441 Main St., Suite 925, Springfield

Volunteer at ‘Christmas in the City’

* Monday, Dec. 19, 3:30 – 6:30 p.m.
* Age Requirement: 16+ years
* Space is limited. Register to participate at www.MassBar.org/Elves.
All things DR – all in one place

BY BRIAN R. JEROME

The DR Section is off to an exceptional start, with the section council having had their kick-off meeting in early September, followed by an immensely successful inaugural reception on September 20. Close to 100 people were present to celebrate the launch of the MBA’s newest section, enjoying unparalleled networking opportunities, and appreciating an interesting achievement-oriented discussion by Lon Povich, Governor Baker’s chief legal counsel, along with thoughtful and inspirational remarks by the Hon. Dennis Cunnan of the Massachusetts Superior Court.

We’re organizing programs to bring together DR practitioners and users through this section — the first statewide platform of its kind in Massachusetts. We already have more than 180 members, with interests extending through the full range of dispute resolution spectrum. Our liaison positions have been assigned and have been working to establish goals in their respective areas of responsibility.

• Sarah Worley, vice chair
• Hon. Patricia Bernstein, Young Lawyers
• Stephen Chow and Jeffrey Stern, Legislative
• Hon. Judith Dein and Jeanne Kemptome, Law School
• John Fieldsteel and Merriann Panarella, Best Practices
• Jonathan Fitch, Arbitration
• Scott Goldberg, Sole Practitioner / Small Firm
• Hon. Mal Graham and Katherine Hesse, Amicus Curiae
• Nigel Long, Pro Bono
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A career’s worth of air travel, hotels and restaurants

BY RICHARD P. CAMPBELL AND SUZANNE ELOVECKY

The practice of law is often intense, competitive, and stressful. It is also financially demanding both in terms of the cost of doing business (particularly in a major city like Boston) and of making ends meet at home (where house prices are north of $500,000 in many cities and towns and private college tuition, room, and board average $65,000 per year for each student). In private practice, lawyers confront the din of the incessant drumbeat for new business. The need to produce an ongoing flow of business drives lawyers to spend time and fortune at city, state, and national professional association conferences, often in remote (but altitude) locations. Most lawyers are not all that good at business generation. But some individuals just have the innate capacity to work a room, publish papers and deliver speeches, and to find time to squeeze this extra networking into busy practices and personal lives. The fast lane can become the wrong path for anyone.

For a lawyer, the fast lane can lead to ruin. This column relates the story of a prominent and previously successful lawyer who fell victim to the fast lane, ignored his ethical compass, and suffered the ignominy of disbarment.

Larry Spikes was a lawyer with a Wichita, Kansas, law firm renowned for its representation of Beechcraft Corporation, the manufacturer of general aviation aircraft. Mr. Spikes was one of those lawyers who could work a room and generate business for his law firm. He was an active participant in state and national professional associations and prominent in local civic affairs. Mr. Spikes practice caused him to travel extensively across the nation; v.e., air travel, hotels and restaurants were part of his daily life. He was “an outstanding lawyer” who had “the respect of his peers, clients, and friends.” At his law firm, he ultimately rose to the position of managing partner. But, his ex-pensive life style was made more challenging when he became involved with college tuitions for his children.

At some point, Mr. Spikes envisioned a better, more financially profitable life by forming a new law firm. His former partners were unhappy with his decision to start a competitive law firm, believing that they had underwritten his success by financing his networking and serving up a line of high quality clients and cases to him. So, instead of charging him on as a hale and hearty fellow, his former partners conducted a detailed audit of his time and expenses, charged to clients and to the law firm. The firm’s audit disclosed a course of conduct that included manipulation of depositions and conferences with expert witnesses that coincided with distance weddings and vacations. Airfare, hotel rooms and dinners were charged to clients or to the firm when the real purpose for the expenditures was personal. In some circumstances, the expenses were charged to clients or to the firm even when the deposition or conference was canceled. In other instances, the expense reports were entirely fictional. In the overall scheme of things, the amount of money involved was small ($12,000 over six or seven years). However, the pattern of financial misappropriation from clients and the law firm was persistent. His former partners reported Mr. Spikes’ actions to the Office of the Disciplinary Administrator, “a state agency in the judicial branch working under the direction of the Kansas Supreme Court. The Disciplinary Administrator reviews complaints of misconduct against lawyers, conducts investigations, holds public hearings when appropriate, and recommends discipline to the Supreme Court in serious matters.” http://www.kscourts.org/rules-procedures-forms/attorney-discipline/default.aspx (last visited on September 6, 2016).

The hearing panel found that Mr. Spikes “violated Rules 1.15(b) (2004 Kan. Clt. R. Annot. 414), and 8.4(c) and (g) (2004 Kan. Clt. R. Annot. 485) of the Kansas Rules of Professional Conduct.” While a review was pending before the Kansas Supreme Court on the final hearing report in accordance with Supreme Court Rule 212, Mr. Spikes voluntarily surrendered his license to practice law in Kansas. The Kansas Supreme Court accepted Mr. Spikes’ license surrender, disbarred and revoked his license and privilege to practice law, and struck his name from the roll of attorneys licensed to practice law in Kansas. Kansas Rule 1.15(b) provides:

Upon receiving funds or other property in which a client or third person has an interest, a lawyer shall promptly notify the client or third person. Except as stated in this Rule or otherwise permitted by law or by agreement with the client, a lawyer shall promptly deliver to the client or third person any funds or other property that the client or third person is entitled to receive and, upon request by the client or third person, shall promptly render a full accounting regarding such property.

Kansas Rule 8.4 provides:

(g) engage in any other conduct that adversely reflects on the lawyer’s fitness to practice law.

Massachusetts Disciplinary Rule 8.4 is materially identical to the Kansas Rule, including the official comment referencing offenses involving dishonesty and breach of trust. The following sentence is directly relevant to the low level fraud that Mr. Spikes perpetrated: “A pattern of repeated offenses, even ones of minor significance when considered separately, can indicate indifference to legal obligation.”

Our privilege to practice law in the commonwealth carries with it significant obligations to our clients and to our law firm colleagues. Dishonesty, deceit, and misrepresentation regarding time and expenses — no matter how small the amounts may be — may lead to termination of our privilege and the adverse fiscal, social, and familial consequences that flow from it.

Richard P. Campbell is a fellow of the American College of Trial Lawyers and a past president of the Massachusetts Bar Association. He founded Campbell Edwards & Conroy, P.C., a firm with a national practice, in 1983.
to White, who is managing the outreach efforts, orientation meetings will be conducted at both large and small law firms and would ideally include question and answer sessions with attorneys and judges.

Outreach is also planned for young attorneys, especially law students at all nine of the state’s law schools. The MBA’s new Law Student Section Council will conduct outreach efforts to the law schools, according to MBA member Damian J. Turco.

The Committee on Civility and Professionalism was formed as a key initiative of immediate Past President Robert W. Harnais, who noticed an overall lack of civility within the profession. Harnais acknowledged that those in attendance at the Worcester forum are the true advocates of the new guidelines and are vital in communicating the importance of the guidelines to the rest of the legal community.

“We’re actually speaking to the choir,” said Harnais. “Now we need this choir to go out there and sing our song.”

**Civility And Professionalism Guidelines**

**Preamble**

One of the most important responsibilities of all lawyers and judges is to protect and promote the integrity and respectability of the legal profession. Accordingly, we must always be mindful of conduct that undermines the legal process and the administration of justice. Incivility impugns the integrity of each of us individually and of the profession collectively. It also impedes the ability to resolve disputes rationally and efficiently for our clients, thereby diminishing respect for the law.

Currently, increasing pressures of our occupation, fewer personal interactions between attorneys and judges in court and at bar associations, and the ubiquitous use of email communications impede our ability to treat each other with respect and professionalism.

Therefore, the Massachusetts Bar Association, in partnership with the Judiciary, has undertaken the responsibility of promoting civility and professionalism within the practice of law. In particular, we have created this set of principles and guidelines to guide us in our daily professional conduct. They also remind us all of the honor and dignity of the profession we serve and our individual and collective obligation to protect, repair, and enhance it on a daily basis with politeness, professionalism, civility, decorum, and manners.

Our hope and expectation is that these guidelines will remind practitioners and judges of the respect that our profession demands of one another, and will ensure that we conduct ourselves at all times with the utmost personal courtesy and professionalism. Our hope is also to ensure that the public has confidence in the legal profession and respect for lawyers, and to ensure that the honorability of our noble profession remains strong. Finally, it is also to make practicing law more pleasurable.

It is our hope that all lawyers and judges will make a commitment to adhere to these guidelines in their dealings with one another and other participants in the legal process.

**CIVILITY GUIDELINES**

1. Lawyers should comport themselves in a manner that favorably reflects the honor, integrity, civility, respect and dignity of the legal profession. Judges should comport themselves in a manner consistent with the Code of Judicial Conduct (see in particular Rule 2.3 and Rule 2.8) which directs that judges shall require order and decorum in proceedings before the court and that judges be patient, dignified and courteous. Through their words and conduct in the courtroom, judges and lawyers should serve as role models to new attorneys, witnesses, clients, litigants and observers.

   Lawyers should not interrupt the judge, the clerk or one another when addressing the court.

2. During all aspects of a case, lawyers should treat one another with the same high degree of common courtesy, professionalism and civility that is expected in the courtroom. In all court filings and court rulings, and in any public statements, judges and lawyers should refrain from the use of insults, sarcasm and derogatory language directed at anyone, including, without limitation, lawyers and parties. There is no place in the legal profession for hostility, abuse or insults, regardless of how antagonistic the parties may be to one another.

3. A lawyer should not file a motion that includes an allegation of professional misconduct and/or a request for sanctions against another lawyer unless (a) the conduct and/or omission of opposing counsel at issue was outrageous and demeans the profession as a whole, (b) the lawyer bringing the motion has first attempted in good faith to resolve the issue with the opposing counsel, regarding the expected tardiness.

   4. opposing counsel through reasonable means, (c) the lawyer filing the motion is doing so as a result of his or her own independent determination that the motion is valid, and not solely to appease the wish of a client, and (d) the wrongful conduct and/or omission at issue is material to the issues raised in or the timely progress of the litigation. Lawyers should limit discovery requests to those reasonably necessary to protect their clients’ interest in the litigation and, at all times, lawyers should refrain from sending discovery requests that are intended solely to harass or to impose an undue burden or expense on the opposing party.

5. Recognizing that other lawyers have personal and work schedules to manage, lawyers should grant reasonable requests for extensions of time for the completion of litigation deadlines, and should agree to reasonable requests for continuances of hearings and/or trials, unless the requested extensions or continuances will cause prejudice or otherwise compromise client interests.

6. Lawyers should be punctual and prepared for all trials, hearings, meetings and depositions, and, in the event that lawyers expect to be late, lawyers should take reasonable efforts to alert others, including, without limitation, court clerks and opposing counsel, regarding the expected tardiness.

7. Lawyers should not seek to take unfair advantage of opposing counsel and/or self-represented parties through threats, intimidation, coercion or bullying. Pursuant to the Code of Judicial Conduct Rule 2.8, judges should take all steps reasonably necessary to terminate such conduct when brought to the attention of the Court.

**Snapshots from around the MBA**

**MBA members donate to local school children**

The Massachusetts Bar Association recently partnered with Crayons to host a very successful Back to School Drive. Thank you to all of our members for their donations! The items were used to help local children return to school feeling confident and prepared to learn.
A professional license is a property right that can’t be taken away without due process. This usually means a hearing right; it can’t be taken away without due process. The licensing board may suspend a particular patient met the standard of proof; or where he didn’t actually have promptness, it also requires fairness, and clarified that the board had to prove by this line of argument. She wrote, "Although due process may require a doctor’s career stops. His or her jaw. “The prosecution expert could testify, "He may have saved her jaw." The prosecution expert could not conclude that the treatment had not occurred, nor could be say that it fell below the standard of care or that the charges were excessive.

The hearing officer declined to issue a summary suspension. He had dispersed, and the newspapers had made at the close of evidence, if it has to be reasonably prompt, or if it can just issue when the hearing officer has time. Another question — we do have an answer this time — is what standard of proof has the board met the standard of proof applied. When that standard for administrative appeals. Everyone knows that. The agency’s decision is upheld if it is based on “such evidence as a reasonable mind might support the decision.”’ So that’s what the magistrate did. He held that the anonymous expert opinion provided substantial evidence to support the summary suspension. It should have been obvious that there was no administrative decision that could be entitled to deference. All the board did was proffer charges. An administrative hearing has procedures to protect the rights of the defendant, and due process.

Consider the dentist who charged summary suspensions — sometimes called temporary suspensions — are unusual. The hearing officer may not have run into one before and may be unsure what the proper procedure is or what standard of proof applies. When that occurs, the consequences to the licensee can be tragic. Summary suspensions are rare, in part, because they harm a doctor’s livelihood and reputation without a fair chance to challenge the allegations. Anyone can file a complaint with a licensing board, and many excellent practitioners go through months of worry only to have the matter dismissed at an early stage. As an expert witness in surgery once said to me, “Every one has been sued for malpractice.” In the usual case, the doctor continues to practice for months or years while the case grinds through the administrative procedure.

But summary suspension is sudden. When a summary suspension stops a doctor’s career, her destruction is even if she is eventually exonerated. The suspension disrupts connections with colleagues, hospital administrators, insurance companies, and patients. And when the matter is resolved, it is extremely difficult to reestablish those relationships in both of the cases I am going to discuss, the doctors ultimately won — but the suspensions ended their careers for years.

The Board of Registration in Dentistry doesn’t differentiate summary suspensions from ordinary suspensions in its statistics, but the assistant executive director told me he can only remember one in recent years. The Board of Registration in Medicine passed 10 summary suspensions between 2011 and 2014, the last year for which statistics are available. Five of those were in 2014.

A board will generally use this weapon where a doctor is insane or dissipative or has committed a crime. There have been cases: where the doctor’s ability to practice medicine was impaired by “mental instability”; where he sexualized a patient during treatment; where he illegally prescribed drugs and had committed Medicaid fraud; or where he didn’t actually have a medical degree. When a board suspends a doctor’s license pending a final hearing on the merits of the allegations regarding the licensee. A hearing limited to the determination of the necessity of the summary action shall be afforded the licensee within seven days of the board’s action pursuant to G.L. c. 110, § 52F.

The Board of Registration in Medicine imposed a temporary suspension based mainly on the opinion of an anonymous witness. He held that the doctor had met the standard of care and that his outcomes for the period in question exceeded the national averages. They spoke in glowing terms about his skills and learning. One said he would happily refer his own family to this surgeon. Another called him “the local expert on bariatrics surgery.”

You would think that all of this testimony — against hearsay from an anonymous witness — would make it impossible for the board to prove that the doctor posed an immediate and serious threat to the public. But then, you would also think that it was the board’s burden to prove its case.

Not so much. No one seemed to know who had the burden or by what standard of proof. The lawyer wasn’t swayed by this line of argument. She wrote, “Although due process may require proof beyond a reasonable doubt by the board. This process can drag on for 230 days after the draft decision issues, longer if someone obtains an extension. The Board of Registration in Medicine argued that due process requires a prompt decision. The petition cited cases from the Supreme Court and from other states where delays of even fifty days were held unconstitutional. A Florida decision was exactly on point when it said, “When the state undertook to temporarily restrict the petitioner’s practice by depriving her of an affirmative right to grant a post-suspension hearing and one that would be concluded without accomplishable delay” (“Doctor v. Dep’t of Prof’l Reg’n,” Bd. of Med. Examiners, 410 So.2d 213, 214 (Fla. Dist. Ct. App. 1982). The day before the SJC hearing, the draft decision issued and the board approved it. The SJC case was moot. We still don’t know if the ruling on a summary suspension hearing has been made at the close of evidence, if it has to be reasonably prompt, or if it can just issue when the hearing officer has time. The dentist got his license back, and the board declined to prosecute the principal complaint. The criminal complaint was dismissed.

The dentist got a hearing seven days after his suspension. It took 10 months for his license to be reinstated. In what the board considered a criminal for fraud and assault and told the dental board that the dentist probably was charging for work he was not doing. The board issued a summary suspension.

Seven days later at the hearing, it came out that the patient was taking a particular medication with the known side effect of bone loss in the jaw and persistent and repeated infections, and the most appropriate way to treat the condition was through the insertion of jaw and persistent and repeated infections — one of which came out that the patient was taking a particular medication with the known side effect of bone loss in the jaw and persistent and repeated infections. The Board of Registration in Dentistry imposed a temporary suspension based mainly on the opinion of an anonymous witness. He held that the doctor had met the standard of care and that his outcomes for the period in question exceeded the national averages. They spoke in glowing terms about his skills and learning. One said he would happily refer his own family to this surgeon. Another called him “the local expert on bariatrics surgery.”
Your doctor and your medical insurer are supposed to keep your health information private. But sometimes they don’t. Sometimes a company like Anthem, Ex- cellus, or Premera gets hacked and the patients’ personal health information goes — well, no one really know where it goes, or who is using it. And that’s the problem. As soon as you lose your identity, and the theft could be traced to a specific data breach, and you lost money as a result, then you’d have an easy claim. But what compensable damages have you suffered if some Russian hacker learns you have a prescription for Lipitor? Presumably, when legislators enacted HIPAA and other data privacy laws, they were trying to protect the public from some particular kind of harm. When they used the phrase “protected health information,” we can assume they intended that health information should be protected. We assume that they realized the release of the data itself is harmful. Yet HIPAA provides no remedy to a patient whose protected information was actually not disclosed.

If you or your credit card data was exposed from a data breach at a large retailer such as Target, Home Depot, Neiman Marcus, or T.J. Maxx, have you been harmed in a legally-compensable way if your credit card issuer refunded any fraudulent charges and replaced your card? This question is not easily answered. Whether there is any way to address the harm caused by the release of personal data — the disclosure itself — if you can’t prove concrete harm.

Standing

A plaintiff does not have to suffer actual tangible harm to have standing in a data breach case. But standing requires “concrete” harm. The harm can be intangible, and “the risk of real harm” may be enough. But that does not mean that a plaintiff automatically gets standing whenever a statute grants a person a statutory right and authorizes that person to sue to vindicate that right. Sosa v. Roche, 133 S.Ct. 1540 (2013). The risk of harm has to be imminent. However, while “[i]mmunization is ill-conceived elastic concept, it cannot be stretched beyond its purpose. …” Clapper v. Amnesty International USA, 133 S.Ct. 1138, 1147 (2013). How elastic is the definition of “imminent harm.” Unfortunately, not elastic enough to admit a claim in the usual data breach cases where there is no proof of identity theft or fraud risk data loss to the carelessness of the defendant. In the case of Attias v. CareFirst, Inc., 2016 WL 4250332 (D.C. 2016), the court said that the increased risk of future identity theft or fraud is too speculative to confer standing. The court went on say that a plaintiff must create standing by inflicting harm on themselves — by purchasing credit-monitoring services to ward off an otherwise speculative injury.” This is a remarkable opinion. The decision of the court is breathtaking. The decision of the court is the same decision of the court.

The real harm in these cases is not actual or concrete or imminent. It is the dis- closure of what is private and the likeli- hood — not easy to quantify — that the information will be used in the future for nefarious purposes. The definition of harm must be expanded to include this possibility. Legislatures should design and enact laws that create a cause of action against companies for data breaches and include mandatory minimum damages.

Conclusion

There are several lessons to be learned from these cases. To be successful,plaintiffs should bring contract claims based on the breach of contract law and to privacy to state laws. HIPAA cannot rely solely on federal laws. The federal courts hold that the threat of harm from a data breach is too uncertain to confer standing. However, state laws based on breach of con- tract and other causes of action have sur- vived 12(b) Motions to Dismiss. Some courts are realizing that they have to stretch the definition of “immi- nent harm” in data breach cases. As courts have noted, harm in a data breach case is often not immediate or even traceable to one event. The data collected may not be used at once or ever. However, the threat is always present that the PI will be used. The real harm in these cases is not always concrete or imminent. It is the dis- closure of what is private and the likeli- hood — not easy to quantify — that the information will be used in the future for nefarious purposes. The definition of harm must be expanded to include this possibility. Legislatures should design and enact laws that create a cause of action against companies for data breaches and include mandatory minimum damages.

Until this happens, attorneys should continue to use current laws and common law contract breaches in creative ways to sue for damages in data breach cases.

Deborah Wheaton Hemdal has a solo law practice in Shrewsbury. Her work focuses mainly on family law and special education issues. She works primarily with families with disabled members, both minors and adults. She is an adjunct instructor in the Rabb School of Graduate and Professional Studies at Brandeis University where she teaches Introduction to Legal Issues in Health and Disability and Medical Informatics. She is also adjunct faculty in the Legal Studies Department at Newbury College. Her volunteer work includes chairing the Human Rights Committee for the Horace Mann Educational Association. The author would like to thank Joel Rosen for his suggestions and revisions to this article.
Consider the following hypothetical: A bank’s general counsel (GC) learns that $200,000 has been illegally wired from a customer’s account to an account overseas. The GC immediately asks the branch manager (who is not an attorney) to interview the employees involved. The branch manager summarizes her interviews for the GC, and the GC drafts a memo to outside counsel detailing the information uncovered, and the GC’s conclusion is that the fraud occurred because branch employees did not follow the bank’s fraud-prevention policies.

Fast-forward two years, and the customer has sued. Aware of the bank’s investigation, the customer moves to compel the branch manager to testify.

The branch manager acted as an agent of the bank. As such, she is not an attorney. The branch manager’s summaries to the GC were for the purpose of seeking legal advice and kept confidential; the GC’s memo to outside counsel was for the purpose of seeking legal advice; and the investigation was “in anticipation of litigation.”

As this hypothetical illustrates, corporate assertions of attorney-client privilege raise myriad questions. Here, it seems likely that the court will order some production. Given the opportunity, what would you have advised the GC before the investigation to create and preserve the privilege?

Overview of the Attorney-Client Privilege in the Corporate Setting

The attorney-client privilege generally protects clients’ communications with their attorneys from disclosure to third parties — including both civil litigants and governmental regulators — provided the communications are:

• The communication was acting in a legal or business capacity during the investigation;
• The branch manager acted as an agent of the GC while conducting her interviews;
• The branch manager’s summaries to the GC were for the purpose of seeking legal advice and kept confidential;
• The GC’s memo to outside counsel was for the purpose of seeking legal advice;
• The investigation was “in anticipation of litigation.”

In the corporate setting, step (ii) is often complicated. Since a corporation acts through its principals, directors, officers, and employees, who, then, is the “client”? More importantly, who may invoke or waive the privilege on behalf of the company?

The authoritative test for the scope of the attorney-client privilege in the corporate setting comes from the U.S. Supreme Court’s decision in Upjohn Co v. United States 449 U.S. 383 (1981). In Upjohn, the Supreme Court held that communications between corporate counsel and employees at any level may be protected provided (i) the communication is made at the direction of corporate officials to obtain legal advice; (ii) the matters communicated fall within the scope of the employees’ duties and are not available from upper level employees; (iii) employees are aware that the purpose of the inquiry is to help in obtaining legal advice; and (iv) the communications are intended to be kept confidential.

Selected Corporate Situations Giving Rise to Attorney-Client Privilege Issues

Counsel should be aware of the corporate situations where privilege issues are most likely to arise and adopt proactive strategies to protect privileged communications.

• Conducting an internal investigation. In-house counsel should formally document the initiation of an internal investigation and establish that the purpose of the investigation is to provide legal advice to the company. The company should consider hiring outside counsel to conduct the investigation, because courts are often more willing to view outside counsel as operating in a legal capacity, making their communications related to the investigation privileged. If, as above, non-attorneys like the branch manager must be involved in gathering information during the investigation, then counsel should document that the employee’s actions are at the direction and under the supervision of legal counsel and for the purpose of providing legal advice to the company. Further, before any interviews are conducted, counsel should give Upjohn warnings to the interviewees, in which counsel explains that the interviewers are acting at the direction of counsel and that the purpose of the interviews is to gather information to provide legal advice to the company.

• Responding to a regulatory inquiry. Today’s companies operate in a highly regulated environment and frequently receive inquiries from regulators calling for the production of confidential, sensitive, and potentially privileged information. In their effort to cooperate fully, some companies may be tempted to open their files, producing privileged information and creating waiver issues for subsequent civil litigation. Companies should identify privileged material before producing it to regulators and waive the privilege only after making a conscious assessment of the benefits and detriments of doing so. In addition, any company producing documents to a regulator should be aware of applicable state and federal forms of information laws which provide the public with a right of access to government-held information.

• Board meetings. Both in-house and outside counsel frequently attend board of directors’ meetings as corporate secretaries or observers. The mere presence of counsel at board meetings, however, does not make the board’s discussions privileged. Indeed, board minutes are often one of the first categories of documents sought in litigation. If, however, the board seeks legal advice from counsel, then that portion of the meeting (and the minutes) may be protected by the attorney-client privilege. All third parties should be asked to leave the meeting before privileged matters are discussed, and the meeting minutes should clearly distinguish between the business and legal portions of the meeting. If minutes are recorded while legal advice is being sought and provided, then the minutes should document the legal nature of the discussion, be marked as privileged, and state that only the client and attorney (and no third parties) were present.

• Compliance departments. Corporate compliance departments play a key role in ensuring companies’ compliance with applicable laws, rules, and regulations. The distinct, yet related, functions of the compliance and legal departments can create uncertainty about the scope of the attorney-client privilege. Whether compliance department investigations and communications are privileged is a fact-specific inquiry, which depends on facts such as whether: (i) the work of the compliance department is undertaken at the request and direction of the legal department; (ii) attorneys are regularly involved in the compliance department’s investigations; and (iii) compliance department investigations are conducted as part of the regular course of business, to provide legal advice to the company, or in anticipation of litigation.

Best Practices for Protecting Attorney-Client Privilege

So what should we, as outside counsel, advise our hypothetical GC before he launches an investigation? As an initial matter, clients should always be told that the only way to guarantee that a communication or document will not be discoverable is to not make it. Because the pros of an internal investigation often outweigh the cons, however, the steps below will help our GC ensure that the bank’s investigation stays internal.

Explicitly state that legal advice is being provided. The GC should state that the investigation is being undertaken to inform the GC of facts necessary to seek (from outside counsel) and provide (to the bank’s principals, ...
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The impact of recent decisions regarding patent hold-up on the functioning of standards-setting activities

BY MICHAEL T. RENAUD AND SANDRA J. BADIN

Earlier this year, Qualcomm and InterDigital, two major contributors to the development of wireless telecommunications standards, announced they would no longer participate in licensing commitments under the new patent policy introduced by the Institute of Electrical and Electronics Engineers (IEEE). Among other changes, the IEEE’s new patent policy makes it much more difficult — and in some cases impossible — for patent owners who have contributed their patented technology to license their SEPs on fair, reasonable and non-discriminatory (FRAND) terms. These changes are designed to address the “patent hold-up” problem that has come to be known as “patent hold-up” — when owners of standard essential patents or “SEPs” (allegedly) try to extract a royalty for using the patented technology in the first instance, potentially retarding the development of standards. Such an outcome is of great concern over what has come to be known as “patent hold-up” — when owners of standard essential patents or “SEPs” (allegedly) try to extract a royalty for using the patented technology in the first instance, potentially retarding the development of standards. Such an outcome is of great concern and brings into question the validity of the standards. The impact of recent decisions regarding patent hold-up on the functioning of standards-setting activities is uncertain. Balancing the competing concerns of innovators and of implementers is critical. As Judge Essex has noted, without the threat of injunctive relief, implementers of standards may not have enough of an incentive to engage in licensing negotiations—let alone an incentive to pay a royalty for using the patented technology of others — because they know that, at worst, they will get sued and will be required to pay the same FRAND rate they would have had to pay for using the patented technology embodied in those standards, then innovators will no longer have any incentive to contribute their patented technology to the development of those standards, and the development of standards will suffer as a result.

A singular concern over patent hold-up may skew the balance to such a degree that innovators will be incentivized to opt out of standard-setting activities altogether. Such an outcome will not only hurt consumers and businesses, who have come to take the interoperability of their devices and systems for granted, but may hurt the future of American technological innovation, which relies on the participation and cooperation of innovators across many different businesses and technologies, working together to develop and refine the basic platform on which much of the world’s technological development now rests.

Complex Commercial Litigation

A Word on Standards

Industrial standards play an important role in the modern world. Among other functions, standards ensure that our various car, medical, telecommunications systems and devices are compatible and interoperable — that smartphones made by Apple and Samsung, for example, have the same Wi-Fi capability and can communicate with each other on the same network. Standards are often set by standards setting organizations (SSOs), which typically comprise voluntary, private sector associations of innovators. Many of these SSOs participate in standard-setting activities altogether. Such an outcome will not only hurt consumers and businesses, who have come to take the interoperability of their devices and systems for granted, but may hurt the future of American technological innovation, which relies on the participation and cooperation of innovators across many different businesses and technologies, working together to develop and refine the basic platform on which much of the world’s technological development now rests.

This article appeared in the December 2015 edition of the ComCounter Quarterly, the newsletter of the Complex Commercial Litigation Group of Levin, Cohn, Fervis, Glossyv and Popeo PC. Please visit our website for more articles like these on business litigation, bankruptcy, and intellectual property topics, check out the Quarterly at http://bit.ly/QLJ.

Implications

The future of standard-setting activities is uncertain. Balancing the competing concerns of innovators and of implementers is critical. As Judge Essex has noted, without the threat of injunctive relief, implementers of standards may not have enough of an incentive to engage in licensing negotiations—let alone an incentive to pay a royalty for using the patented technology of others — because they know that, at worst, they will get sued and will be required to pay the same FRAND rate they would have had to pay for using the patented technology embodied in those standards, then innovators will no longer have any incentive to contribute their patented technology to the development of those standards, and the development of standards will suffer as a result.

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Cornerstone decision instructive on claims against directors for fiduciary breach

BY ALEC ZADEK

In re Cornerstone Therapeutics Inc., 2016 Del. Ch. LEXIS 187 (May 12, 2016); In re Wheeling & Lake Erie Railway Co. v. Keach (In re Montreal), 799 F.3d 287 (2d Cir. 2015), the Delaware Supreme Court held that allegations that a director approved an interested transaction will not be sufficient to support a claim that the directors breached their duty of loyalty and good faith, regardless of the absence of any evidence suggesting that the director acted for an improper motive. The court observed that the Delaware court had denied dismissal to a Delaware public corporation. Both mergers were negotiated by special committees of independent directors, were ultimately approved by a majority of the minority stockholders, and were at substantial premiums to the market price. The plaintiffs in both cases sued the controlling stockholder and their affiliated directors as well as the independent directors who had negotiated and approved the mergers. In both cases, independent directors moved to dismiss the claims against them because the plaintiffs failed to plead any claims that were not excused by their company’s charter provision adopted pursuant to 8 Del. C. § 102(b)(7). In reaching its holding on the appeals, the court rejected the plaintiffs’ argument that they should be entitled to an automatic inference that the directors who facilitated the interested transaction were disloyal and did not act in the corporation’s best interest. The court held that “to require independent directors to remain defendants solely because the plaintiffs stated a non-exculpated claim against the controller and its affiliates would be inconsistent with Delaware law and would also increase costs for dissinterested directors ... without providing a corresponding benefit.”

For plaintiffs, the Cornerstone decision provides the following guidance: “[W]hen a director is protected by an exculpatory charter provision, a plaintiff can survive a motion to dismiss by pleading facts supporting a rational inference that the director harbored self-interest adverse to the stockholders’ interests, acted to advance the self-interest of a third party from whom they could not be presumed to act independently, or acted in bad faith.” Id. at *14. In short, if a plaintiff fails to plead specific allegations implicating a director’s duty of loyalty or good faith, then that director will have grounds to be dismissed from the case.

For independent directors, it highlights the protection offered by exculpatory charter provisions adopted pursuant to 8 Del. C. § 102(b)(7). The bottom line is that the Cornerstone decision provides guidance that will be instructive to both litigants and companies when contemplating the best strategy for initiating or defending against breach of fiduciary duty claims and for organizing Delaware corporations to begin with.

The First Circuit on whether a lender may perfect a security interest in an insurance policy

BY ANTHONY A. FROIO

A lender files a UCC-1 in the debtor’s home state with the goal of perfecting a security interest in all of the debtor’s accounts, inventory and payment intangibles, including the debtor’s rights to payment under its insurance policies. What happens when a fire or disaster strikes and the now-bankrupt debtor’s largest asset is its business interruption insurance claim for its loss of income from the disaster? Does a UCC-1 filing perfect the lender’s security interest in a debtor’s insurance coverage and claim proceeds, enabling the lender to enjoy a priority right to the insurance proceeds in bankruptcy? In Wheeling & Lake Erie Railway Co. v. Keach (In re Montreal), 799 F.3d 1 (1st Cir. 2015), the First Circuit acknowledged that the lender’s UCC-1 filing expressly lists accounts, rights to payment, and proceeds including insurance proceeds, but not proceeds of settlement. The court explained that “[a]lthough it is wise for our law to focus on whether the independent directors can say no, it does not follow that it is prudent to create an invariable rule that any independent director who disagrees with the proprietary interests of the controlling shareholder must risk a decision in which the independent directors are named as a defendant until the end of the litigation, regardless of the absence of any evidence suggesting that the director acted for an improper motive.”

Thus, the Delaware Supreme Court’s holding provides an avenue for directors to avoid litigation when there are no specific allegations that they engaged in wrongdoing. The Court explained that “[a]lthough it is wise for our law to focus on whether the independent directors can say no, it does not follow that it is prudent to create an invariable rule that any independent director who disagrees with the proprietary interests of the controlling shareholder must risk a decision in which the independent directors are named as a defendant until the end of the litigation, regardless of the absence of any evidence suggesting that the director acted for an improper motive.”

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Wheeling claimed a priority interest in the insurance proceeds, but not proceeds of settlement. Lender Wheeling objected. The court explained that “[a]lthough it is wise for our law to focus on whether the independent directors can say no, it does not follow that it is prudent to create an invariable rule that any independent director who disagrees with the proprietary interests of the controlling shareholder must risk a decision in which the independent directors are named as a defendant until the end of the litigation, regardless of the absence of any evidence suggesting that the director acted for an improper motive.”

How might the First Circuit rule in a case where the insurance proceeds arise from damage or destruction of inventory in which the lender had perfected its security interest under Article 9? Would the Court follow its strongly-worded decision in Wheeling and apply the statutory insurance exclusion? Or would it rule that because the underlying collateral was subject to an Article 9 security interest, the proceeds of the insurance policy are also subject to the Article 9 security interest? Something to think about before a secured party calls asking you about the strength of its claim to a debtor’s insurance proceeds!

This article appeared in the December 2015 edition of the Complex Quarterly, the newsletter of the Complex Commercial Litigation Section. For more articles like these on business litigation, bankruptcy, and intellectual property topics, check out the Quarterly at http://isa.gd/3CqCw.

Tony Froio is the managing partner of Robins Kaplan LLP’s Boston office and a member of the firm’s executive board. He represents clients in complex litigation related to intellectual property and trademark infringement, employment, and bankruptcy litigation, as well as general commercial disputes.
Pitfalls of advising your client to pursue a civil claim in the District Court Criminal Session

By Beth Pirro Cook

In many instances, clients bring problems to practitioners that raise both civil and criminal issues. A client could ask for advice about how to collect on a personal loan made to an acquaintance who paid off the loan with a check that bounced. Or a client could seek help with getting back a $10,000 deposit she gave to a home contractor who never started the home repair work. While it may be tempting to advise these clients to proceed with a private-party criminal claim because it will save attorney fees and costs relating to litigating a civil case, you should carefully consider the nature of the criminal process before advising your client to pursue this avenue instead of seeking civil relief.

It would be prudent to have your client speak with the police before proceeding to court. While these procedures may vary from courthouse to courthouse, some magistrates make this conversation a prerequisite as the police may wish to conduct their own investigation of your client’s claims and bring their own complaint. Standard 3:06, District Court Standards of Judicial Practice: The Complaint Procedure (2008) ("The Complaint Procedure").

Your client should be familiar with what information is necessary to begin the criminal process. The criminal complaint application will require your client to provide a narrative of the claim that is signed under the pains and penalties of perjury. The application also requires your client indicate exactly what chapter and section of the law has been violated by the accused, as well as the specific date of each offense. This information is not only needed to properly inform the clerk and the accused of the nature of the criminal claim, but is also necessary for entering the case into the MassCourts computer docketing system. MassCourts also requires additional information for particular crimes; for example, a Complaint to a police officer for an assault requires name, date, and address of the conspirators and the alleged underlying crime. Another important piece of information your client should know is the birthdate of the accused. Without this, if the complaint issues, then the charge cannot be entered into the Criminal Offender Record Index, nor could arrest warrants be processed in the Warrant Management System.

Before the application papers are accepted for filing, your client will meet with a magistrate to discuss the complaint procedure and to determine if other resolutions would be advisable, such as seeking relief with a civil complaint. Standard 3:03, The Complaint Procedure. There is a $15 filing fee for misdemeanor complaints and no filing fee for felony complaints. Although the Clerk’s Office must accept all complaint applications, an applicant is not entitled to a show cause hearing before a magistrate.

Victory Distributors, Inc. v. Ayer Div. Of The Dist.Court Dept., 435 Mass. 136 (2001), Standard 3:06, The Complaint Procedure. If a show cause hearing is authorized, your client will have the burden of satisfying the probable cause standard. You and your client should expect the magistrate to attempt to resolve the matter between the parties at the hearing. If an agreement is not reached, the Magistrate will review your client’s evidence and decide whether probable cause exists. Private complainants have no right to appeal a magistrate’s decision on probable cause. Id., 435 Mass. at 143, Standard 3:00.

If the magistrate authorizes the issuance of a criminal complaint, your client will have to return to court to sign the complaint under the pains and penalties of perjury. At this point, prosecution of the case is taken over by the Commonwealth and your client becomes one of the Commonwealth’s witnesses. Note that in this capacity, your client will not be able to watch the trial if the court makes a witness sequestration order. Also, neither you nor your client will likely directly participate in any negotiations with the accused, which could lead to disappointment with the outcome of any plea agreement. Furthermore, particular issues will arise if your client seeks restitution. In Commonwealth v. Henry, 475 Mass. 117 (2010), the Supreme Judicial Court has recently held that a sentencing court is required to consider both the defendant’s financial resources and his ability to pay when ordering restitution. This potentially affects both the amount of the restitution and the amount of time the defendant has to pay it. Under Henry, it is possible that the restitution amount ordered by a court will not fully compensate your client’s losses. Id. at 125. Moreover, a court cannot extend a probationary term for the sole purpose of satisfying restitution. Id. at 124. As a practical matter, if probatory terms other than restitution are imposed and the defendant later violates those terms, his probation could be revoked and his punishment could include a term of incarceration. If he is incarcerated, he would be relieved of all probation obligations, including the obligation to pay the restitution owed to your client. Should this happen after the civil statute of limitations has expired, often three years, your client would be barred from seeking civil relief.

Practitioners should make sure that their clients are fully aware of the criminal process before they seek to file a private criminal complaint. While clients may be upset with their home contractor or an unreliable debtor, any satisfaction in seeing that a perpetrator is incarcerated might pale in comparison to receiving restitution. Therefore, if your client is primarily seeking to recover monetary losses caused by the accused, then the criminal road could lead to disappointment. In most instances, clients are better served by a civil judgment that accrues yearly interest and can be enforced through multiple collection avenues.

The licensing boards should enact regulations for an outside limit on summary suspensions. A Board should be able to suspend a doctor for up to 30 days in an emergency — subject to the requirement of a hearing in seven days. If at the end of the 30 days, the board has not proven by a preponderance of the evidence in a G.L. c. 30A hearing that the doctor poses an immediate and serious danger, the suspension should cease by operation of law. If the boards do not act, then the legislature should. And when that happens, the board should provide guidance about how long a doctor can be deprived of his practice without the proof of a serious and immediate threat.

The alleged danger to the public has to be balanced against the doctor’s constitutional rights. A licensing board should require convincing proof from witnesses who are identified and credible, and it should require documents that are authenticated and unambiguous.

And it should be the right kind of case — where a doctor is assault- ing patients or selling drugs or staggering into surgery with bourbon on his breath. The conduct should be really bad and the doctor’s fault should be really clear. It should not be a case where there is a reasonable disagreement about whether the board has proved the standard of care was or how high a bill should.

Upon review, the administrative judge should allocate the burdens correctly and demand the proper quantum of proof. In cases where it is reasonably clear that the doctor does not pose a serious and immediate threat, an oral decision should issue at the close of evidence, with a written decision to follow within a week. In a close case, the written decision should issue in no more than thirty days. Health professionals need protection from the accusation that is weak on the merits, but can take years to fight while the professional has no income and her career withers away.

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2. The prosecutor told the magistrate that it is the Board’s normal practice not to disclose the identity of an expert until the discovery phase of the proceedings. “[i]f this is typical, I don’t think this practice is normal or defensible, but the explanation seemed to satisfy the magistrate. The SJC reversed on other grounds and did not reach the question of what happens when an unpromising witness can ever satisfy the standard for expert testimony.

Joel Rosen is the principal of Rosen Law Office in Andover. He represents medical practices in business and licensing matters.

SUMMARY SUSPENSION

Continued from page 22

The doctor was unjustly deprived of his license for three years. After all this time, nothing has been decided as to whether the summary suspension was proper. We have not even reached the merits of the actual case. The doctor has lost hundreds of thousands of dollars in income and paid substantial legal fees. The Boston Globe and other papers have reported the downfall of the father of bariatric surgery. Even if, at the end of this road, the doctor’s license is restored, he will need recertification as a surgeon before he can return to work.

Given the danger of an unjustified deprivation of a doctor’s livelihood, it’s worth asking whether any board should have the power to summarily suspend a license. For example, when the SJC feels a lawyer’s misconduct is serious, it issues a notice to show cause and offers a prehearing opportunity. Why not have a similar procedure for doctors?

The answer is probably that a lawyer’s mistake can’t produce immediate physical harm the way a doctor’s mistake can, and lawyers can’t write drug prescriptions. When a doctor is dangerous, the board needs to act right away. But there should be better safeguards.

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Joel Rosen is the principal of Rosen Law Office in Andover. He represents medical practices in business and licensing matters.
Law Practice Management

Jumpstart your career or practice in five steps

BY SUSAN LETTERMAN WHITE

Ever feel stuck? Perhaps you’ve tried the “best practices” for finding a new job or getting new clients, but nothing seems to work. You can’t use the same strategies as lawyers outside the legal industry and the design firm, IDEO to up our game and innovate? Here are five steps that make a difference.

Step One: Observe without judgment. We examine a scenario, identify the legal issues, draw conclusions, and then advocate a position. Observing without judgment is different. Here’s an example (Client identifiers have been changed in all examples).

Randy joined a mid-size firm right out of law school. He knew he wanted to work with a diverse clientele and that he didn’t want to be a “position” lawyer. He searched and found partners in an office willing to send him work and refused to give him credit for the new work from other partners. He was shocked. When things didn’t turn around, he could expect a demotion to non-equity partner the following year.

He searched and found partners in another office willing to send him work and a few new clients and current clients ready to give him more work. His efforts were squashed. The firm declined the few new clients he presented (for different reasons) and refused to give him credit for the new work from other clients. Eventually, he was told to leave. If he cooperated, he could negotiate a demotion to non-equity partner.

Realize that the firm was evaluating one of the few new clients he presented (for different reasons) and refused to give him credit for the new work from other partners. He was shocked. If things didn’t turn around, he could expect a demotion to non-equity partner the following year.

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Zig when they zag: Three marketing hacks you haven’t considered

BY JARED D. CORREIA

Marketing a solo or small law firm is hard work. The competition is steady. The potential clients are savvier than ever before. Plus, you’ve got, like, real work to do.

It’s true that the majority of solo and small firm lawyers find distasteful anything that takes them away from substantive work, for which they are billing. Of course, they also intuitively understand that, without new clients, there will be no more new billing. So, there’s a real push and pull between effectively gaining new clients, and efficiently serving the ones you’ve got. The latter is absolutely essential, since referrals (the lifeblood of successful law firms) often emanate from satisfied, existing or former clients. Nevertheless, attorneys who begin to rely too heavily on internal referrals, and ignore or neglect existing or novel marketing channels, place themselves at risk, by reducing the number of avenues to rely too heavily on internal referrals, and ignore or neglect existing or novel marketing channels, place themselves at risk, by reducing the number of avenues to

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Who has the time? The most obvious reason (and excuse!) for not developing a strat plan is simply time. I would answer the question “Who has the time?” with another question: Who can afford not to have a strat plan?

Getting started

The best strategic plans take the following into consideration: internal and external factors. A commonly used exercise is the SWOT analysis that involves considering what the internal factors are (strengths and weaknesses) as well as the external factors (opportunities and threats) that impact the firm. You would be surprised what you will gain from doing a simple SWOT analysis. Another tool used to evaluate these factors is the PEST (or STEP) analysis: What are the Political, Legal, Economic, Social/Cultural, and Technology Trends that will impact the firm? Laying these things out in a simple grid with practice groups down the side and PEST across the top often can point to where to start with the strat plan.

Competitive advantage

When determining your competitive advantage, it is critical to ask “What does our firm have that other firms don’t have?” One framework used to define this is VRIO: Valuable (value to the client), Rare (not easily found or acquired), Inimitable (competitors cannot do it or copy it), and Organizational Capabilities (the forms ability to capitalize on the advantage). I know what some of you are thinking — “Not all practice areas are rare” — but, talent, experience, nimbleness, flexibility with rare structure, are. For example, how are you using technology to give you a competitive advantage? If you are not thinking about this, you should be and it should be in your strat plan.

Keeping it simple

Strat plans typically have Goals (what do we want to achieve), Strategies (how will we achieve the goals), and Action Plans (detailed approach to the strategy). It’s important to have built-in accountability with individual names attached to action items and time periods defined for check-in. It also helps to define what success looks like at the outset. If the goal is to grow the real estate practice, then success could look like 10 percent more matters in a 24-month period. Defining success at the outset will let you determine whether or not you’ve achieved it. If you don’t define it, how will you know when you get there?

How to measure success

Key Performance Indicators (KPIs) include: monthly billables; monthly revenue; timekeeper utilization; number of new clients in a given period; number of new matters in a given period; realization of billables/billable; realization of received/billed; etc. If you can measure it, and it is elevant to the strategy you have defined, then it is a KPI.

Final thoughts

Question: What comes first? Strategy or culture? Structure or strategy?


If you define a strategy that is not consistent with the culture of your firm, you will not succeed. For example, if one of your strategies is to encourage more business development by individual attorneys and you are going to give each attorney (including associates) an annual budget but your culture is such that associates are not empowered to do business development on their own, you will not succeed.

Once the strategic plan is done, it must inform your structure and your processes. In the process of strategic planning, you pull the right people, process, and technology to achieve the desired outcomes?

Bottom line: Strategic plans don’t have to be scary, and they don’t have to be dust-catchers. They can be aspirational yet realistic, simple and achievable, informative and motivational.
Are Massachusetts students with disabilities able to drive off in a car?

BY LAURA GILLIS AND TORIE ROIG

Members of the Special Education Law world are all too familiar with the car analogy that stigmatizes services for students with disabilities in Massachusetts. In re: Arlington Public School, BSEA # 02-1327 included reference to this analogy. IDEA requires parents to ensure that their child has an Individualized Education Program (IEP) calculated to guarantee some educational benefit, not whether it will do so.1

The Tenth Circuit Court of Appeals reviewed the IDEA’s substantive standard required for a student with disabilities, is “services that are reasonably calculated to guarantee some educational benefit, not whether it will do so.” The Tenth Circuit Court of Appeals in in re: Arlington Public School, BSEA #02-1327(2002) (see footnote 1, quoting Doe v. Board of Education of Tolulahtoma City Schools, 9 F3d 455 (8th Cir. 1993)).

On September 29, 2016, the Supreme Court granted review of the Tenth Circuit Court’s decision to allow students with disabilities to provide them with a free appropriate public education under the IDEA.2

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What you need to know about child representation

BY KAREN E. HENNESSY

Lawyers representing children in delinquency and child welfare proceedings in juvenile court face unique challenges in providing their clients with the fundamental aspects of legal advocacy, including the foundational element of due process: the right to be heard. Because juvenile court sessions are closed to the public, many attorneys have limited exposure to our practice area and are unaware of how complex and challenging it can be. Our section council decided that it would be beneficial to provide a basic overview of the role of attorneys for children in delinquency proceedings at public expense, under public supervision and direction, and without charge; and meet the standards of knowledge enjoyed by those practitioners who represent children in probate and family court where children may be impacted by legal outcomes but are not parties. In that context, there is an emerging discussion about the role and professional obligations of child’s counsel. In contrast, the role of child’s counsel in juvenile court proceedings has been the subject of scholarly debate for decades and was directly addressed by the Supreme Judicial Court in Care and Protection of Georgette in 2003. As a result of that case, the Supreme Judicial Court redefined the issue to its Standing Advisory Committee on the Rules of Professional Conduct citing the need for clarification about the professional obligations of children’s attorneys to ensure that children received effective assistance of counsel.

The Standing Advisory Committee ultimately issued amendments to Rule 1.14 of the Massachusetts Rules of Professional Conduct, the rule governing representation of clients of “diminished capacity.” Children are considered to be of diminished capacity in the eyes of the law by virtue of their minority. While these changes offered guidance and helped to define our professional obligations to our clients, the burden of meeting them remains on our shoulders.

From the changes to Rule 1.14, we learned that lawyers who represent children must, as far as reasonably possible, maintain a normal attorney-client relationship. This requires that we discern the client’s expressed opinion, counsel the client on the legal implications of that position, negotiate the desired objectives on the client’s behalf, maintain attorney-client privilege, and provide zealous advocacy. In delinquency cases a client’s age will range from seven to eighteen. In child welfare proceedings a child client’s age may range from zero to eighteen, or in some cases up to twenty-two. A child client’s capacity to direct representation is very much dependent upon their developmental stage and may change throughout the representation depending on what age the child is when it begins and how long the case is active.

No matter what their age, children cannot typically express their legal goals in the same way as adults or even as adults of diminished capacity. Lawyers for children must be adept at assessing the child’s cognitive capacity, devising a developmentally appropriate framework for the client interview, and translating sophisticated legal concepts into a form that is accessible to the client. We are forced to adapt our legal representation to meet the needs of the child. This means that we must have an array of skills in communicating with children at various stages of development.

In the case of verbal children, the lawyer must begin by having a conversation to determine the child’s position. Overcoming the power dynamic inherent in relationships between adults and children is critical to developing a rapport with the client that even approximates the typical attorney-client relationship. Most children have expectations of adults based on their life experience. They may expect that an adult will decide what information to share about them and with whom, disregard their opinion unless it aligns with the adult’s, and ultimately
Crossover kids: The intersection of child welfare and juvenile justice

BY CRISTINA F. FREITAS AND DEBBIE F. FREITAS

Youth who have simultaneous involvement with the child welfare system and the juvenile justice system comprise an increasing percentage of juvenile court dockets across the country. These crossover kids, sometimes labeled due to their “crossover” from involvement with the Department of Children and Families (DCF) to the Department of Youth Services (DYS), or vice versa, pose unique challenges to the current juvenile court model. At the very intersection of the child welfare and juvenile justice systems, these youth face increased systemic service barriers, school exclusion, and prolonged detention or out-of-home placement during their childhood and greater rates of academic failure, unemployment, homelessness, and recidivism into adulthood. Improved identification, cross-system collaboration, and meaningful interventions may allow these youth to extricate themselves from the juvenile justice and child welfare systems, reaping benefits for these youth long into the future as they transition to successful adults.

The number of crossover kids in Massachusetts is staggering. A study of youth committed to DYS between 2000 and 2012 found that 72 percent had involvement with DCF either prior to or during their involvement with DYS, accounting for nearly 7,500 kids statewide. These crossover youth become involved in the juvenile justice system at an earlier age and are more frequently arrested or charged than their peers. Likewise, national studies have shown that crossover youth struggle with more persistent family, medical, and educational needs, longer lengths of stay in out-of-home placements, and more placements overall than kids with welfare cases alone. Further, minority youth make up a disproportionate percentage of crossover kids, further exacerbating the racial and ethnic disparities which already plague the juvenile justice and child welfare systems.

Crossover youth who cannot extricate themselves swiftly from the juvenile justice and child welfare systems face bleak outcomes: lower graduation rates, higher unemployment rates, higher homelessness rates, increased recidivism, and poorer health overall. Earlier identification of and intervention patterns across courts and counties. These components seek to bring together the youth, family, probation officer, DCF social worker, defense attorney, and a collaborative multi-disciplinary team to allow the mediator to make individualized suggestions in order to prevent the youth from moving deeper into the juvenile justice system.

In August 2013, the Springfield session of the Hampden Juvenile Court also began a dedicated docket to crossover cases with judges trained on the specific needs involved. While Hampden County is at the forefront of this type of crossover youth program, dual status youth initiatives are in various stages of design and implementation in Essex, Suffolk, and Middlesex Counties.

Improving outcomes for crossover kids in our own practice is also critical. Client-directed representation is not only the hallmark of the Massachusetts Lawyers’ Legal Aid Society, but it is essential to understanding and assisting this vulnerable population. The Juvenile Detention Alternatives Initiative (JDAI) is a national initiative advancing systems-reform in order to reduce the harmful and unnecessary detention of juveniles. Their reform work, particularly in Massachusetts, emphasizes data collection and analysis in order to guide fairer decision making, identifying areas of concern, and diagnosing systemic patterns across courts and counties.

County-wide initiatives are also trying to address the unique complexities of working with crossover youth. Hampden County, for example, has attempted to address the current lack of accurate identification of crossover youth by implementing a data sharing memorandum of understanding and implementing a dual status disciplinary team monitoring opportunity. These components seek to bring together the youth, family, probation officer, DCF social worker, defense attorney, and a collaborative multi-disciplinary team to allow the mediator to make individualized suggestions in order to prevent the youth from moving deeper into the juvenile justice system.

At the very intersection of the child welfare and juvenile justice systems, these youth face increased systemic service barriers, school exclusion, and prolonged detention or out-of-home placement during their childhood and greater rates of academic failure, unemployment, homelessness, and recidivism into adulthood. Improved identification, cross-system collaboration, and meaningful interventions may allow these youth to extricate themselves from the juvenile justice and child welfare systems, reaping benefits for these youth long into the future as they transition to successful adults. Youth who have simultaneous involvement with the child welfare system and the juvenile justice system comprise an increasing percentage of juvenile court dockets across the country. These crossover kids, sometimes labeled due to their “crossover” from involvement with the Department of Children and Families (DCF) to the Department of Youth Services (DYS), or vice versa, pose unique challenges to the current juvenile court model. At the very intersection of the child welfare and juvenile justice systems, these youth face increased systemic service barriers, school exclusion, and prolonged detention or out-of-home placement during their childhood and greater rates of academic failure, unemployment, homelessness, and recidivism into adulthood. Improved identification, cross-system collaboration, and meaningful interventions may allow these youth to extricate themselves from the juvenile justice and child welfare systems, reaping benefits for these youth long into the future as they transition to successful adults. Youth who have simultaneous involvement with the child welfare system and the juvenile justice system comprise an increasing percentage of juvenile court dockets across the country. These crossover kids, sometimes labeled due to their “crossover” from involvement with the Department of Children and Families (DCF) to the Department of Youth Services (DYS), or vice versa, pose unique challenges to the current juvenile court model. At the very intersection of the child welfare and juvenile justice systems, these youth face increased systemic service barriers, school exclusion, and prolonged detention or out-of-home placement during their childhood and greater rates of academic failure, unemployment, homelessness, and recidivism into adulthood. Improved identification, cross-system collaboration, and meaningful interventions may allow these youth to extricate themselves from the juvenile justice and child welfare systems, reaping benefits for these youth long into the future as they transition to successful adults. Youth who have simultaneous involvement with the child welfare system and the juvenile justice system comprise an increasing percentage of juvenile court dockets across the country. These crossover kids, sometimes labeled due to their “crossover” from involvement with the Department of Children and Families (DCF) to the Department of Youth Services (DYS), or vice versa, pose unique challenges to the current juvenile court model. At the very intersection of the child welfare and juvenile justice systems, these youth face increased systemic service barriers, school exclusion, and prolonged detention or out-of-home placement during their childhood and greater rates of academic failure, unemployment, homelessness, and recidivism into adulthood. Improved identification, cross-system collaboration, and meaningful interventions may allow these youth to extricate themselves from the juvenile justice and child welfare systems, reaping benefits for these youth long into the future as they transition to successful adults.
The attorney, the client and the mediator

By Brian R. Jerome

What makes mediation successful? To answer this question, it is useful to emphasize the roles and relationships between a lawyer, their client, and the mediator throughout the mediation process.

Many of us who are attorneys can recall our law school years being focused primarily on developing strong advocacy and trial skills. We may have also placed emphasis on developing negotiation skills to reach settlement. Litigators still rightly pride themselves on their trial and advocacy skills; it is this ability and willingness of an attorney to effectively try their case that creates the opportunity to reach more favorable pre-trial settlements. However, the primary focus on winning cases may have taken us away from the preparation, negotiation, and settlement of cases, as less than three percent of cases actually go to trial.

Mediators are experts in the complex process of negotiation and settlement of disputes, skilled facilitators who orchestrate mediations like efficient business meetings. They create dynamic, structured, and respectful climates, and encourage all parties to speak their minds and counsel and/or insurers, may have significant experience and/or otherwise would disrupt the mediation process), counsel should nevertheless present the case for the client to a mediator who will seek to engage the client in discussion, at least in private, asides, to view, emotions, needs, and priorities. It is important to af- ford a mediator the same part of the mediation process as the client to directly establish confidence, impartiality, and trust. A lawyer should con- sider participating the mediator in the session, as they are at the center of the session, as well as reasonable and realistic ranges of a monetary judgment. The client should be strongly encouraged to come to the media- tion with an open mind, avoiding bottom line positions.

It is important that clients understand the confidentiality of the mediation process. This applies to both the initial joint session and, importantly, the private discussions or caucus meetings with the mediator. Confidentiality applies to all the initial joint session and, importantly, how the private discussions or caucus meetings with the mediator are themselves confidential. Confidentiality creates the foundation of the mediation process and allows parties and their counsel to speak openly about their needs and legitimate needs. Confidentiality allows the parties to make reasonable demands of the mediator that are not expected to be disclosed with the client or the opponents or their representatives. Such statements often widen the rifts that exist between disputants. In such instances, clients expect strong advocacy from their attorney at mediation, however, should be educated that resolution is more often achieved when adopting a more collaborative approach. Mediation is not a trial, and remarks made in joint session should not be inflamma- tory or bellicose, communications between the client and the opponents or their representatives. Such statements often widen the rifts that exist between disputants. In such instances, clients expect strong advocacy from their attorney at mediation, however, should be educated that resolution is more often achieved when adopting a more collaborative approach. At the very least, counsel should consider expressing good faith intentions during the joint session, and that it is their desire to avoid, if possible, further litigation and trial. Such representation often enhances negotiation outcomes.

Attorneys can face challenging clients with unrealistic expectations regarding their likelihood of success at trial and/or expected verdict ranges, even when duly counseled. In such cases, the mediation process allows clients a firm and independent view into the strengths of the opponent’s case and gives a preview of how the evidence could play out at trial. The mediator guides parties through reality testing and risk analy- sis, with settlement often presenting more creatively than other alternatives. Mediators ask hard questions to all sides in the dispute. A practiced mediator, after having established rapport and being demonstrat- ed themselves as being both impartial and equitable, can speak in private caucuses about the strengths and potential weakness- es of the case. Mediators can then engage the thoughts and expectations of all parties, and rationally discuss the risks involved in proceeding to trial, existing judge or jury trends, the time and expense of further litigation, and the anxiety and frustration which too often accompany that path.

At times, the attorney has unrealistic expectations from their client’s case. Being sure to respect and foster the important attor- ney/client relationship, a mediator may need to engage counsel similarly about their thoughts and expectations, providing them with a different perspective on poten- tial risks and nuances of a given case.

By Brian R. Jerome

Brian R. Jerome is founder and CEO of Massachusetts Dispute Resolution Services (MDRS), and has served exclusively as a mediator and arbitrator on more than 12,000 cases over the course of 25 years. He is chair of the MBA’s 2016-17 DR Section and a recognized industry leader.
Dispute Resolution

What should a mediator expect when mediating a case?

By Judith Gail Dein

Mediation before a U.S. Magistrate Judge is available in every civil case filed in the United States District Court for the District of Massachusetts. While a U.S. Magistrate Judge may or does not have his or her own particular order regarding mediation, to the extent that a mediation session is scheduled, it is often helpful to have a brief overview of the mediation statement to be filed beforehand. This statement is often the first substantive presentation that the mediator will receive. The brief overview can be quite effective in shaping the direction of the mediation. It is not a legal brief and serves a different purpose than a formal pleading. What follows are some points you may want to consider in determining what to include in your mediation statement. The list is not intended to be exhaustive, and obviously does not provide any requirement of a specific mediator.

As an initial matter, it is important to recognize the setting in which the mediation is taking place. In Massachusetts, Magistrate Judges serve as trial judges with the parties’ consent, and can be referred any and all pretrial matters in civil cases that are otherwise being handled by a District Judge. Magistrate Judges do not mediate cases in which they are also the judge or in which they may be referred substantive matters. This means that they often mediate cases about which they have little prior knowledge. Because of this, it is often helpful to have a brief overview of what the case is really about. This does not mean a listing of all the legal claims, but rather the factual context of the dispute and a general description of the relevant legal framework. It is also helpful to explain the stage of the litigation in which the mediation is taking place, such as whether key discovery remains to be done. This information helps the mediator understand how much proof the parties actually have to support their claims. It also helps identify which considerations may be important to a party in deciding whether to settle, such as continuing litigation, whether a final resolution is imminent, and the like.

Each child client has his or her own style of mediation. I, like many of my colleagues, tend to be facilitative rather than evaluative, meaning we try and work with the parties to reach a resolution that meets their needs, rather than ruling on the merits of the case. It is important to keep the type of mediation in mind, and to provide the mediator with the information that will help in reaching a successful conclusion. As a general rule, I find that since I am not deciding the case, I do not want or need the substantive details of the parties’ goals for the outcome of the mediation. If you do need to provide your clients with detailed understanding of the law is necessary for the mediator to help the parties reach a resolution, include the analysis in your mediation statement. Just remember the purpose of your statement: it is not a legal brief, it is a position statement designed to help reach a settlement.

Because the parties are likely to be meeting the mediator for the first time at the mediation session, the mediation statement is an excellent opportunity to provide information about the key players in the dispute. A great deal of time is often spent by the mediator at the beginning of a mediation session trying to determine who the real decision makers are, the relationships between the parties (both on the same side of the case and between the sides), and the personal motivation behind the litigation. Similarly, the mediator needs to determine the relationship between the attorney and the client: is the client deerring to the attorney or calling his or her own shots? Has the attorney explained (and the client heard) the problems with the case, or are they waiting to hear it from the mediator? Insights that can be provided in the mediation statement can greatly expedite this process.

You may also want to consider whether your mediation statement should be kept confidential. Culturally, in Massachusetts the statements are kept confidential, although in other jurisdictions there is a requirement that they be shared. There are certain types of cases where the formal mediation statement is often important, such as wage and hour cases or cases asserting complicated damage calculations. It is often helpful to exchange these facts before the mediation begins.

Finally, the mediation statement can and should be used to provide any suggestions as to how the mediation process can be most successful. For example, in a multi-party case there may be suggestions as to the order in which the mediator should meet with the parties, or whether certain parties should meet together or separately. In some cases, initially meeting with the attorneys and not the clients, may be most effective. This type of information is very helpful, and enables the mediator to appropriately structure the mediation.

I encourage the parties to be honest in their statements. That having been said, mediation works best if the parties are prepared to really listen to the other side’s concerns and perceptions about the dispute, and are willing to reassess their positions. As I always say, I reserve the right to ask parties to pay more, or accept less, than they say they will do in their mediation statements. Mediation is a process in which keeping an open mind greatly enhances success.

Karen E. Hennessy is in private practice and specializes in child welfare law, guardianships, special education, and school law matters. In addition to providing direct representation, she serves as guardian ad litem in juvenile court matters and is a mentor for the Children and Family Law Program at CPCPS. Prior to beginning her private practice, she worked as a training attorney in the Children and Family Law Adjudicative Committee for the Commonwealth of Massachusetts. She is a graduate of Tufts University and Northern New Hampshire University School of Law. After law school she clerked for the Juvenile Court Department. She then spent ten years in private practice specializing in juvenile court matters. She provided direct representation to parents and children in state-intervention custody proceedings as well as status offenses and delinquency cases. Ms. Hennessy also represented parents and children in special education matters before the Bureau of Special Education Appeals.
With the coming of the information age and increased access to legal information and services, technology has become increasingly savvy in how they research and shop online for legal legal needs. Consumers are no longer an exception to that trend. Today’s potential clients searching for lawyers as well as legal information on the web are increasingly savvy in how they research and shop online for legal services, and are more educated on the law.

Having access to information is one thing, knowing where to go with it or what to do with it is another. This is where today’s lawyer’s value is found. People can probably figure out the right practice area (i.e., real estate, employment, commercial, divorce, etc.) in which to look for a lawyer. They can find the forms, the documents and the basics of the law online. But the information has not been refined yet. Nor has it been applied to their situation. What clients can’t find in the early going, either on line or talking with friends and family is what they need the most. The trusted, good lawyer is the only beneficiary of a well-informed lawyer who is responsive to their needs.

This special issue is therefore timely when it comes to finding and choosing the right dispute resolution process for their situation. Influenced by television, movies, America’s overly-litigious culture and one or more well-intentioned relatives or friends telling them they need to find a pit bull litigator, clients usually fail to make good choices when it comes to choosing a dispute resolution (DR) process for their dispute. One reason for this is that their choices at this point are being driven by their emotions and egos. Another reason is that they have very little knowledge or education on what options are available to them, with few people able or willing to discuss these choices. Some clients need at this point some one to assess their situation, educate them on their options and guide them to the right process choice. Often, the client’s first search for a lawyer for their dispute will usually lead them to a litigation firm. Litigators, following their natural and understandable zeal to sign up the client for litigation are most likely to do just that. One can’t blame litigators for that desire any more than you would blame a surgeon for wanting to do surgery, rather than the to see if his or her treatment will resolve the medical issue. This is how Ignatius, a London lawyer, described the increasing reliance on info graphic legal services. (As long as one is willing to think of the information as thinking about and seeking out their litgd gun, their warrior, their research and applying the law. When they are looking for their Atticus Finch, their lit. Calley or even their cousin Vinny Gambini, it’s tough at this point to talk them off of cliff.

Yet, that is exactly what they need. Real life disputes are not like TV or movies. First, less than three percent of the cases get filed in court ever get trial. It happens rarely, and when it does, it is not the stuff of Hollywood. Most clients do not understand how the litigation process works, and believe it to be their only effective option. It’s not uncommon for the parties to be appreciative of alternative options when they learn more. One reason they don’t know there is an overwhelming likelihood of settlement, they more easily recognize the correlation between their circumstance and the likelihood of settlement. This choice of which DR process to use is critical to the clients’ reaching a settlement and discussing their dispute. It calls on lawyers to do some “situational law” thinking. This is an important and valuable role for lawyers to play — that of legal counsel, guiding clients to the right course of action for their circumstances. Before the client signs up with any litigator or agrees to Mediation, Arbitration, Collaboration, or anything else, he should work with a lawyer to come up with the DR approach that responds to the situation that the dispute presents. Dispute Resolution is no longer “one size fits all.” Lawyers and neutrals can provide outstanding service to clients and parties by guiding them to the right process and in some instances, designing the DR process to fit the circumstances.

An efficient approach would be to conduct a three part DR process assessment with the potential client. This is not a “free consultation.” Nor is it a legal analysis of the case, nor an opinion as to the facts and application of law nor an evaluation of the strengths and weaknesses of the case. It’s a reality check; a thorough examination of the client and their situation, including their emotional and financial bandwidth, pragmatic needs, level of risk aversion, time frame needed for reaching full resolution, etc. The assessment, followed by an educational primer on DR options, and concluding with a reasoned, objective recommendation as to the process(es) most likely to resolve their predicament while allowing them to maintain as much input and control as possible, is what the savvy, cost-conscious client of today seeks.

Here are some questions a lawyer conducting a DR process assessment would ask:

- What are your goals and interests? What would a good outcome for you look like?
- Have you considered other ways of accomplishing your goals besides litigation?
- What is your time frame? How soon do you need and want to put this issue behind you?
- How important is it to maintain a healthy (business, civic, organizational or family) relationship with the other party(ies)?
- How important is confidentiality to the parties in this case?
- What is your level of risk aversion? Put this this way: A lawyer could decide this case the other way and you’d get nothing after spending several years and several tens of thousands of dollars on this litigation. How does that sit with you?
- Are there other parties and other considerations that we can include in our assessment of this dispute that will help us expand the pie of possible options for settlement? Does this dispute call for creative solutions beyond what the courts can provide?

Are you willing to collaborate towards resolution with the other side, with professional assistance and counsel from non-adversarial, negotiation-style lawyers and/or a mediator?

Do you want to have a say in the process and the outcome? Are you comfortable leaving the decision-making about your case to a jury of people you don’t know?

- Would you feel better leaving the decision to an arbitrator who is very knowledgeable in the subject matter and applicable law in this case?

This assessment lays a solid foundation for moving the client forward in a way that will achieve the best outcome. It is followed by educating the potential client as to their options, but having best suited the dispute, how each one works, when they are typically used, and the pros and cons of each one.

This assessment, education and recommendation is vital to the client in order for them to make a good, informed choice as to the most appropriate DR process. It is a service that gives the client real value, and establishes a level of comfort in the process choice ultimately selected. It is something that the client should be charged for (I recommend pricing it on a flat rate basis) as you are providing an education and a blueprint that is respons- sible for helping the client choose the best legal service which a lawyer can add to their toolbox of valuable services.

Carrying out this assessment and recommendation step sometimes means that we as lawyers or neutrals refer clients to other practitioners as the situation dictates; in the long run, that too results in benefits. It helps all practitioners by funneling the disputes to the right processes and lawyers, which is beneficial to the entire DR community as well as the overall legal community. Finally, as more lawyers provide this beneficial effort, we restore the confidence of our clients and of society in our profession. We affirm our roles as problem solvers and in some cases, as peacemakers. As Abraham Lincoln noted in his 1850 “Notes for a Law Lecture,” “As a peacemaker, the lawyer has a superior opportunity of being a good man. There will still be business enough.”

Michael A. Zytovian is an attorney and mediator whose practice focuses on employment, business, consumer protection, and special education law. He is a Collaborative Law and Dispute Resolution expert, frequently writing and lecturing on the subject.
Announcements

**MIDDLESEX**

Linda M. Mancini, who is general counsel, vice president and privacy officer of Applied Management Systems Inc. in Burlington, has been awarded the Health Information Management Advocacy Award by the Massachusetts Health Information Management Association (MaHIMA). The award, presented at the annual MaHIMA Dot Wagga Memorial Legislative Seminar on Nov. 4, recognizes outstanding efforts in support of health information management. Mancini resides in Milford.

**SUFFOLK**

Scott D. Burke has been named managing partner at Morrison Mahoney LLP in Boston. As managing partner, he will be responsible for all firm operations across its 10 offices throughout the northeast. Burke joined the firm in 1990 and is the former chair of the Professional Liability Practice Group.

Courtney C. Shea, an associate at Peabody & Arnold LLP, was recently elected a fellow of the American Bar Association Young Lawyer Liaison to the Tort and Insurance Practice Session. Shea focuses her practice on all aspects of civil litigation in the firm’s litigation department.

Alycia Kennedy has joined Todd & Weld LLP as a commercial litigation associate. She assists clients in all phases of business litigation. Kennedy was previously associated with a Boston law firm concentrating her practice on civil litigation. She is a 2013 magna cum laude and Order of the Coif graduate of Boston College Law School.

Brian W. Blaesser, a real estate and development group partner at Robinson+Cole in Boston, has been selected to join the Counselors of Real Estate, a select group that grants CRE designation which certifies individual professional achievement in the real estate counseling profession. Blaesser practices in the areas of commercial real estate development and redevelopment, leasing, multifamily development, environmental law, renewable energy, public-private partnerships using public finance mechanisms, condemnation law and land use litigation.

Scott D. Burke

Courtney C. Shea

Alycia Kennedy

Brian W. Blaesser

MassBar Bulletin publishes updates from Massachusetts Bar Association members. Information is listed alphabetically by county.

**Email your announcements to bulletin@massbar.org.**

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**NOTABLE & QUOTABLE**

“**It is eyebrow raising and jaw dropping. … Some subtle and implicit, some is overt.”** — MBA President Jeffrey N. Catalano

MBA President Jeffrey N. Catalano’s remarks at the Annual State of the Judiciary Address about bias in the legal system were quoted in the Springfield Republican (Oct. 21). The event, presented by the MBA, was also covered in the Boston Globe and Commonwealth Magazine, along with several other news outlets via the State House News Service.

MBA Past President Marsha V. Kazaroian was interviewed by WBZ NewsRadio 1030 following the SJC’s Sept. 20 decision in Commonwealth v. Warren, which involved racial profiling.

“BU professor meant ‘intimacy’ with students, not harm, lawyer says,” Boston Globe (September 28) — Margaret H. Pagell, chair of the MBA’s Labor & Employment Section Council, was quoted as an outside observer.

“Archaic laws could get the knife,” Salem News (October 18) — MBA Chief Legal Counsel and Chief Operating Officer Martin W. Healy commented in a piece on old, statutory provisions that still exist within certain Massachusetts laws. The article also ran in other North Shore papers.

“DA: Hidden key granted access to Framingham police evidence room,” MetroWest Daily News (Nov. 4) — Peter Elikann, former chairman of the MBA’s Criminal Justice Section, offered his analysis on the integrity of compromised evidence from a criminal defense perspective.
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