In November 1941, a special edition of the Massachusetts Law Quarterly included a report from the Massachusetts Bar Association’s Committee on Recommendations which expressed a strong need to provide “conferences on subjects of a legal nature, legal clinics, etc.

Six months later, continuing legal education (CLE) in Massachusetts was officially born under MBA President Mayo A. Shattuck with the establishment of the first two-day annual conference in Swampscott in May 1942, called the Massachusetts Law Institute. The event became known as the Swampscott Institutes and served as the annual legal education refresher for the state’s attorneys for many years.

As CLE in Massachusetts enters its 75th year in 2017, the MBA’s commitment to legal education continues today through the delivery of professional and thought-provoking CLE programs.

“As the MBA celebrates our 75th anniversary of offering CLE, it is a time to contemplate the hundreds of thousands of hours of valuable teaching disseminated to lawyers over those many years. This demonstrates the MBA’s value to the legal community in educating lawyers to help them to become the best they can be for their clients,” said MBA President Jeffrey N. Cataiano. “More recently, we have offered CLE free to members, which is further proof of the MBA’s deep dedication to education.”

Today, the MBA offers between 80 and 100 free CLE programs every association year. This includes courses, luncheon programs, legal chats and seminars. In addition, the MBA facilitates eight major conferences per association year in different locations throughout the state (Probate Law, Family Law, In-House Counsel, Labor Law, Labor and Employment, Health Law, Complex Commercial Litigation, Dispute Resolution). Later this spring, the MBA will present its first Child Welfare Juvenile Justice Conference.

In addition to courses and conferences offered in-person, the MBA’s CLE program went digital with the launch of MBA On Demand in 2010, allowing members to watch a recorded program online any time from the comfort of home or the office. Certain programs also feature a live webcast where members can watch them in real-time from a remote location.

While CLE has evolved since that first meeting in Swampscott (see related timeline), it remains a voluntary yet vital part of the legal profession in Massachusetts, as lawyers hold fast to their belief in the importance of a highly-educated and participatory bar.

“Education has been one of the major reasons why the association was formed. It’s an important part of your practice, not only when you begin, but also as you continue and keep current with the law throughout your career,” said MBA Chief Legal Counsel and Chief Operating Officer Martin W. Healy. “Massachusetts, as a whole, has been on the forefront of continuing legal education, even though it’s not a requirement that’s set out by our court in order to continue being licensed.”

**Keeping up with changing times**

As new laws and emerging technologies continue to reshape the legal landscape, CLE provides a way for attorneys to stay current and relevant within the profession.

“The law is so dynamic and changing that it’s impossible to keep your skills sharp and confident unless you attend CLE,” noted MBA past President Denise Squillante, who previously served on the MBA’s Education Committee.

Whether it has been alimony reform, new child support guidelines, attorney-led voir dire or even the legal implications of drones, the MBA has been and continues to be at the forefront of offering both timely and relative CLE programs to keep its members informed of the latest changes and developments in the law.

And MBA members have been instrumental in keeping CLE up to date through the years.

Ideas for applicable CLE courses come from several sources including Section Councils, core curriculum from the MBA’s program services department, collaboration with the Young Lawyers.
Come and visit the MBA marketplace

Thriving new food marketplaces have recently opened in Boston. Perhaps you visited “Eatily” in the Prudential Center or the Boston Public Market downtown. Upon entering, you’re introduced to a variety of appetizing options. Each section of the marketplace has varying themes and high quality offerings to fit your needs. Yet despite the diversity, there’s an unmistakable community among the vendors all seeking different but unified ways to make the experience enjoyable for everyone who enters. Friendly faces abound. People are excited to talk to you.

These marketplaces are a true study in dichotomies that combine people who genuinely care about how you are doing, professionally and personally. And, we also happen to provide really good free food and drink at many of our events.

So if this sounds appetizing, get more involved and invite someone to join you. Let’s help each other to feel that special connectedness that’s missing from most of our days.

Jeffrey N. Catalano, President
News from the Courts

**Reporters notes for amendments to Mass. R. Civ. P. 84 now available**

The Reporter’s Notes that accompany the amendments to Mass. R. Civ. P. 84 have been posted at www.mass.gov/courts/.

**2017 Superior Court Judicial Assignments**

Visit www.massbar.org/judicialassignments to view the 2017 Superior Court Judicial Assignments for each Massachusetts county, now available on the Massachusetts Bar Association’s website.*

*These assignments are subject to change at any time based on the needs of the court or other circumstances. “TBA” meaning “to be announced,” indicates sessions that, as of now, have no judge assigned. Cases in those sessions will not be neglected; the clerks and regional administrative justices will work together to ensure that scheduled trials proceed in other sessions and that motions needing hearings are scheduled and heard before an available judge.

**Elizabeth D. Katz selected for U.S. Bankruptcy Court in Springfield**

Chief Judge Jeffrey R. Howard of the United States Court of Appeals for the First Circuit has announced that Elizabeth D. Katz has been selected to fill the vacancy in the United States Bankruptcy Court for the District of Massachusetts and Connecticut. Katz’s expansive legal career began at the Office of the Attorney General in Boston upon her graduation from law school. In 1995, Katz became an assistant district attorney at the Northwestern District Attorney’s Office in Northampton, where she worked until 2007. Upon her departure, Katz was the Chief of the Hampshire County and Franklin County District Courts Divisions. In 2007, she entered private practice and represented clients in a wide-range of matters including bankruptcy cases, criminal cases, civil litigation, family law matters and landlord-tenant disputes. Since 2008, Katz has concentrated her practice in all aspects of bankruptcy law.

Katz served as president of the Hampshire County Bar Association from 2012 to 2014 and is currently a member of its executive committee. Katz is a member of the Local Rules Committee for the United States Bankruptcy Court for the District of Massachusetts and since 2011, has served as co-chair of the M. Ellen Carpenter Financial Literacy Program for western Massachusetts, a financial literacy program for high school students.

**Massachusetts awarded grant to improve access to justice**

Massachusetts has been awarded a $100,000 grant to improve access to justice throughout the commonwealth. The grant will assist the Massachusetts Access to Justice Commission, the Massachusetts courts, legal aid providers, bar associations, law schools, social service organizations, litigants, community groups and other stakeholders in collaborating to assess the resources currently available to assist Massachusetts residents who cannot afford a lawyer for their essential legal needs — as well as matters involving housing, consumer debt, and family law — and to develop a statewide plan for addressing gaps in those services.

“No many Massachusetts residents cannot afford a lawyer and must wrestle with complex legal issues involving their families, their housing, and their finances without adequate guidance and support,” said Supreme Judicial Court Justice Geraldine Hines, co-chair of the Access to Justice Commission. “This collaborative strategic planning process will help us identify the gaps in services and design programs and processes to address residents’ unmet legal needs.”

The grant is being provided through the Justice for All project, which is generously supported by the Public Welfare Foundation and housed at the National Center for State Courts. The Justice for All project was established to implement a 2015 resolution by the Conference of Chief Justices and the Conference of State Court Administrators endorsing the aspirational goal of providing 100 percent access to effective assistance for essential civil legal needs.

Massachusetts is one of seven states to receive a Justice for All grant, selected from a pool of 25 applicants. The state will be eligible to apply for additional funding next year to begin implementation of its strategic action plan.

Recently, the National Center for Access to Justice released its 2016 Justice Index, measuring how all 50 states, the District of Columbia and Puerto Rico ensure justice for all. Massachusetts ranked second in the nation, behind the District of Columbia. Massachusetts ranked eighth when the first Justice Index came out in 2014. Massachusetts ranks second in services for people without lawyers, third in language access services, and sixth nationwide in services for people with disabilities.
SCHOOL OF THOUGHT

Law student affinity mentoring forges the path to diversity and inclusion in Boston

BY ALVIN BENJAMIN CARTER III

Mentoring is important in any profession. This is especially true in the legal profession because there are specific sectors and practice areas that have unique politics, issues, and norms. I am happy to learn from anyone who wants to share their insights, but I also find it important to learn from professionals who have an interest in or a relation to the affinity group(s) that I identify with. This is important because law students have to deal with more than exams and making the best of internships. Students have to deal with more than the affinity group(s) that I identify with.

It is important for attorneys that are members of affinity groups to make themselves available not only to help law students understand the profession, but also to help them learn about and form strategies for the realities they will face when they become attorneys. Law students are less likely to leave the region if they can see what they are getting into in a given market. Advice combined with having an idea of the potential peaks and valleys of being a lawyer in Boston is beneficial because it lessens professional uncertainty and allows room for good will to build in the legal community.

Mentors also benefit from this because they are increasing their own demographic and diversifying the profession in the Greater Boston Area. I am lucky to have mentors that are like me and able to help me, and I am attempting to do my part by mentoring three 1Ls through the Black Law Student Association at Northeastern. One of my mentees, who is not struggling academically, contemplated leaving Boston because of the lack of diversity. She later told me that my advice (along with the advice of others) on where to seek community helped decide to stay in Boston.

Boston law firm diversity and inclusion demographics from the NALP Directory suggests it may be difficult to place attorneys that are part of an affinity group with every law firm that is open to their guidance. That is why it is important for attorneys who may not identify with a specific group to find a way to support diversity and inclusion efforts at their firm or company. Take the time to become educated (“get woke”) on the affinity group specific needs and situations. Take that knowledge and become a resource and, as a result, a legal community builder. Think about the intersection of these groups. Everyone can benefit from a mentor, but the legal community can reach its diversity and inclusion goals if everyone steps up and helps to forge a path for their future colleague.

Alvin Benjamin Carter III is a second year law student at Northeastern University School of Law, co-chair of the MBA Law Student Section Council, First Circuit Executive Lt. Governor for the MBA Law Student Division, Innovation Director at HighJump Archive and Research Institute at Harvard University, and an independent museum and gallery consultant. He is currently on winter co-op at Sennott & Williams in Boston.

Inaugural Law Student Section Council members announced

The Massachusetts Bar Association is proud to announce the following members have been appointed to serve on the association's first Law Student Section Council for the 2016-17 year:

- Alvin Carter, co-chair, Northeastern University School of Law
- Djanira P. Leal, co-chair, Suffolk University Law School
- Jennifer Lauren Amaral, Suffolk University Law School
- Jaime L. Capritta, New England School of Law
- Elizabeth Eijofo, Suffolk University Law School
- Elizabeth M. Henderson, Suffolk University Law School
- Tasnuva Islam, Northeastern University School of Law
- Shaneah J. Jenkins, New England School of Law
- Elizabeth Laliberty, Massachusetts School of Law
- Linchi Liang, Suffolk University School of Law
- Erica Lewis-Bowen, Massachusetts School of Law
- Colin Y. Marsetta, Suffolk University Law School
- Kristen O’Keeffe, Suffolk University Law School
- Aquasha Parks, University of Massachusetts School of Law
- Claudia B. Quintero, Western New England School of Law
- Carey D. Shockey, Suffolk University Law School
- Jordan A. Strand, New England Law School of Law

MBA Law Student Section Council members will collaborate with the MBA’s Young Lawyers Division, serve as MBA ambassadors at their law schools and MBA YLD events throughout the year, and provide meaningful input on volunteer projects, continuing legal education seminars and community events. To learn more about the MBA’s Law Student Section, visit www.massbar.org/lawstudents.

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 L. 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
Anne Denise L. 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.
CNN senior analyst, best-selling author Jeffrey Toobin to keynote 2017 Annual Dinner

The Massachusetts Bar Association is pleased to announce that Jeffrey Toobin will deliver the keynote address at the 2017 Annual Dinner on Thursday, May 4, at the Westin Boston Waterfront.

A high-profile senior analyst for CNN and staff writer for The New Yorker, Toobin is one of the country’s most esteemed experts on politics, media and the law. With unparalleled journalistic skill, Toobin has provided analysis on some of the most provocative and important events of our time. The author of critically acclaimed works, such as The Nine, The Oath, Too Close to Call and The Run of His Life, Toobin’s books have been on the New York Times Best Seller list. The Nine, which delved into the historical, political and personal inner workings of the Supreme Court and its justices, was named one of the best books of the year by Time, Newsweek, Entertainment Weekly and the Economist. In February 2016, FX’s American Crime Story: People vs. O.J., premiered — a mini-series based on Toobin’s book, The Run of His Life, which featured an all-star cast including Cuba Gooding Jr. as O.J. Simpson. Toobin received his bachelor’s degree from Harvard College and graduated magna cum laude from Harvard Law School, where he was an editor of the Harvard Law Review. After a six-year tenure at ABC News, where he covered the country’s highest-profile cases and received a 2000 Emmy Award for his coverage of the Elian Gonzalez custody saga, Toobin joined CNN as a legal analyst in 2002. A staff writer for The New Yorker since 1993, he has authored articles on subjects such as the Bernie Madoff scandal and the case of Roman Polanski, and written profiles of U.S. Supreme Court Chief Justice John Roberts and Justices Clarence Thomas, Stephen Breyer and John Paul Stevens. His article for The New Yorker, “An Incendiary Defense,” broke the news that the O.J. Simpson defense team planned to accuse Mark Fuhrman of planting evidence and playing “the race card.”

Prior to joining The New Yorker, Toobin served as an Assistant United States Attorney in Brooklyn, New York. He also served as an associate counsel in the Office of Independent Counsel Lawrence E. Walsh, an experience that provided the basis for his first book, Opening Arguments. His latest book, American Heiress: The Wild Saga of the Kidnapping, Crimes and Trial of Patty Hearst, came out in August 2016.

Consider attending this annual event as a sponsor. Sponsorship opportunities include:

• Champions of Justice ($10,000)
  Up to two tables for 10, full page ad in dinner program, firm name/logo projected at the dinner, sponsorship level recognition in Lawyers Journal and displayed on MBA website, additional prominent recognition at the dinner

• Platinum Sponsor ($5,000)
  Table for 10, full page ad in dinner program, firm name/logo projected at the dinner, sponsorship level recognition in Lawyers Journal and displayed on MBA website

• Gold Sponsor ($3,500)
  Table for 10, 1/2 page ad in dinner program, firm name/logo projected at the dinner, sponsorship level recognition in Lawyers Journal and displayed on MBA website

• Silver Sponsor ($2,500)
  Table for 10, 1/4 page ad in dinner program, firm name/logo projected at the dinner

Visit www.massbar.org/AD17 for a printable PDF outlining the above sponsorship opportunities and table reservation information.

The Massachusetts Bar Association is seeking submissions for its quarterly publication, the Massachusetts Law Review, the longest continually run law review in the country.

A scholarly journal of the MBA, the Massachusetts Law Review is circulated around the world and contains comprehensive analyses of Massachusetts law and commentary on ground breaking cases and legislation.

To submit articles or proposals for articles, email: KSadoff@MassBar.org, mail to Massachusetts Law Review, 20 West St., Boston, MA 02111 or call (617) 338-0680.
Laredo & Smith LLP lawyers known for prevention and protection

What types of law does your firm handle?

We concentrate our practice in the areas of business litigation, white collar criminal defense and government investigations, as well as corporate compliance, business and employment law.

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

We are known for preventing problems before they arise and for our determined representation of our clients in court when needed. Our approach is simple: we try to get involved quickly to minimize damage and find a solution.

What firm attribute do clients find most attractive?

We are large enough to provide our clients with the legal services they need, but are small enough to be cost-effective and focused on them. When clients contact us, they hear back from us promptly.

Describe a recent “win” or client success story that the firm is proud of?

We recently filed a lawsuit for a client against the Massachusetts Division of Banks because it was attempting to regulate a specific aspect of the practice of law. As a result of our advocacy, the Division of Banks dropped this effort.

We also like to say that some of our best results are the ones you have never heard about. For example, our efforts have aided clients in avoiding indictment and/or civil enforcement by federal and state authorities, kept local college students in school, and resolved disputes among owners of closely-held businesses.

Describe a recent pro bono project the firm has undertaken?

We recently successfully assisted a local family in obtaining special education services for their child who had been diagnosed with autism, advocating for the child and his family both at in-school meetings and in mediation.

Is your firm regularly active with any charitable or civic organization?

The lawyers in our firm have been involved in an array of charitable and civic organizations, including Middlesex Partnerships for Youth (an organization closely associated with the Middlesex District Attorney’s Office, which is dedicated to promoting the health and safety of children in Middlesex County), youth sports and raising funds for the Jimmy Fund.

Anything to announce in the coming year?

Mark Smith will become the president of the Boston Bar Association in September.

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

Marc Laredo and Mark Smith first met in the late 1980s as young attorneys in the Criminal Bureau of the Massachusetts Attorney General’s Office. Before returning to private practice in 1990, Marc Laredo indicted a securities fraud case but left it to Mark Smith to spend that summer preparing for and trying the case (which resulted in a successful conviction). Despite that long summer, when Mark Smith left the Attorney General’s Office a decade later, he joined Marc Laredo at the firm where they have practiced together for over 15 years.

Why is it important to have all the lawyers in your firm members of the MBA?

We are strong supporters of bar associations and believe that having all of our lawyers be members of the MBA is valuable to them both personally and professionally.

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

The MBA has been a strong voice for the legal community, which is a benefit to all lawyers, including the members of our firm. We benefit from its array of educational programs, both as participants and attendees, and its various publications, including the Massachusetts Law Review (Marc Laredo serves as its Articles Editor).

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

The Lawyers Law Review is an excellent source of scholarly information on Massachusetts law. The MBA’s continuing education programs are quite valuable.

What would you like to see more of at the MBA?

We encourage the MBA’s continuing efforts to reach out to lawyers throughout the state. Strong bar associations are good for individual lawyers and the entire profession.

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

CALENDAR OF EVENTS

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

February

Wednesday, February 1
MBA Monthly Dial-A-Lawyer Program
5:30-7:30 p.m.
Statewide dial-in #: (617) 338-0610

Thursday, February 2
Feed Your Mind Legal Lunch Program: Insurance Coverage Issues Faced by General Practitioners
12:30-1:30 p.m.
MBA, 20 West St., Boston

Tuesday, February 7
Special Clauses in Irrevocable Trusts
Noon-2 p.m.
MBA, 20 West St., Boston

Wednesday, February 8
Let’s Do Lunch: LPM’s Guide to the Legal Galaxy From Efficiency to Profitability
12:30-2 p.m.
MBA, 20 West St., Boston

Thursday, February 9
Practicing with Professionalism
8:30 a.m.-4:30 p.m.
College of The Holy Cross, 1 College St., Worcester

Wednesday, February 15
Estate Planning 101 Series Part I: The Nuts and Bolts
2-5 p.m.
MBA, 20 West St., Boston

Thursday, February 16
Starting or Jump-Starting an Innovative Law Practice
Noon-2 p.m.
MBA, 20 West St., Boston

Thursday, February 16
Divorce Primer: A View from the Bench and Bar
5-7:30 p.m.
MBA, 20 West St., Boston

Thursday, February 28
Gray Divorce: Representing the Elderly Divorce Client
3:30 p.m.
MBA, 20 West St., Boston

March

Wednesday, March 1
MBA Monthly Dial-A-Lawyer Program
5:30-7:30 p.m.
Statewide dial-in #: (617) 338-0610

Thursday, March 2
Access to Digital Assets after Death
12:30-2 p.m.
Holiday Inn, 700 Myles Standish Blvd., Taunton

March

Wednesday, March 1
MBA Monthly Dial-A-Lawyer Program
5:30-7:30 p.m.
Statewide dial-in #: (617) 338-0610

Thursday, March 2
Access to Digital Assets after Death
12:30-2 p.m.
Holiday Inn, 700 Myles Standish Blvd., Taunton

March

Wednesday, March 8
Access to Digital Assets after Death
12:30-2 p.m.
Holiday Inn, 700 Myles Standish Blvd., Taunton

March

Wednesday, March 15
MBA House of Delegates Meeting
4-6 p.m.
MBA, 20 West St., Boston

Thursday, March 23
Starting or Jump-Starting an Innovative Law Practice: Jump Start Your Marketing and Business Development
Noon-2 p.m.
MBA, 20 West St., Boston

Thursday, March 30
Practicing with Professionalism
8:30 a.m.-4:30 p.m.
Holiday Inn, 700 Myles Standish Blvd., Taunton

Just the facts

Firm Name:
Laredo & Smith LLP

Year founded:
1996 (the firm became Laredo & Smith, LLP in 2003)

Location:
101 Federal Street, Boston, Massachusetts 02110

Number of attorneys: 7

Managing partner:
Marc Laredo, Mark Smith and Jose Sierra

For more information, visit massbar.org/events/calendar
MassBar gives back

MBA members volunteer at two service events

The Massachusetts Bar Association teamed up with Boston’s Pine Street Inn and Friends of the Homeless in Springfield for two service events on Nov. 14. MBA volunteers put together 100 care packages so that families could enjoy a home cooked meal this Thanksgiving, and made care packages to help individuals stay warm this winter. Both events were sponsored by the MBA Insurance Agency.

Assisting veterans in unique ways

Led by MBA President Jeffrey N. Catalano, MBA members commemorated Veterans Day in a special way this year. Volunteers joined military veterans, who are members of The Mission Continues Lowell Platoon, at The Mill City Grows Rotary Club Park community garden for a day of service on Sunday, Nov. 13. Volunteers broke down old garden beds and rebuilt 40 new ones.

Members, firms donate coats, gifts to kids

Due to MBA members’ generosity, many children living in homeless or low-income situations were provided winter coats this holiday season. The MBA’s officers kicked-off the MBA’s Cradles to Crayons’ Gear Up for Winter coat drive. A special thanks for the donations provided by:

- MBA President Jeffrey N. Catalano and his law firm Todd & Weld LLP
- MBA President-elect Christopher P. Sullivan and his law firm Robins Kaplan LLP
- MBA Vice President John J. Morrissey and his law firm Morrissey, Wilson & Zafiropoulos LLP
- MBA Treasurer Christopher A. Kenney and his law firm Kenney & Sams PC
- MBA Secretary Denise A. Murphy

In addition, members donated to the MBA and Massachusetts Black Lawyers Association’s Scores4More Toy Drive.

Christmas in the City

MBA members greeted families, helped parents select toys for their kids and moved merchandise to designated locations during an evening of service on Dec. 19.
The MBA celebrates the holidays

Massachusetts Bar Association members celebrated the holidays in Boston at Casino Night on Dec. 8, and at the Western Mass. Holiday Reception in Springfield on Dec. 14.
MASSACHUSETTS LAWYERS JOURNAL | JANUARY/FEBRUARY 2017

Faculty Spotlight

NAME: Susan Letterman White, JD, MS
FIRM: Letterman White Consulting
PROGRAM CHAIR: Starting or Jump-Starting an Innovative Law Practice Series

Susan Letterman White, JD, MS coaches, consults, publishes, speaks, delivers workshops and facilitates retreats nationally and internationally. Topics include leadership, marketing/business development, team development, organizational growth, emotional intelligence, diversity and inclusion, and innovation. Outcomes transform lawyers into better leaders, managers and client relationship builders, while improving communication, the client experience, and organizational and team cohesion, performance and profitability.

Letterman White chairs the MBA Law Practice Management Section, is the managing partner of LWC On-Performance and profitability, and organizational and team cohesion, performance and profitability.

Letterman White chairs the MBA Law Practice Management Section, is the managing partner of LWC On-Management Section, and was the managing partner of a law firm in Philadelphia. Letterman White is trained in the Myers Briggs Type Indicator, Korn Ferry Leadership Structured Dialogue. She is also certified in the Myers Briggs Type Indicator, Korn Ferry Leadership Architect and Korn Ferry Voice 360° leadership assessments.

UPCOMING MBA CLE

THURSDAY, FEB. 2
Feed Your Mind — Insurance Coverage Issues Faced by General Practitioners
12:30–1:30 p.m., MBA, 20 West St., Boston
Faculty: Craig D. Lovey, Esq., program co-chair; Courtney C. Shea, Esq., program co-chair; Robert A. McCarr, Esq.; J. Tucker Merrigan, Esq.

TUESDAY, FEB. 7
Special Clauses in Irrevocable Trusts
Noon–2 p.m., MBA, 20 West St., Boston
Faculty: David Correira, Esq.; Eric Correira, Esq.; Albert Gordon, Esq.

WEDNESDAY, FEB. 8
Let’s Do Lunch: LPM’s Guide to the Legal Galaxy — From Efficiency to Profitability
12:30–2 p.m., MBA, 20 West St., Boston
Faculty: Susan Letterman-White, Esq., program co-chair; Cristina G. Shinick, program co-chair

WEDNESDAY, FEB. 15
Estate Planning 101 — Part I: The Nuts and Bolts
2–5 p.m., MBA, 20 West St., Boston
Faculty: Kevin Diamond, Esq., program chair; Kristin Monaco, Esq.; Jennifer D. Taddeo, Esq.

THURSDAY, FEB. 16
Starting or Jump-Starting an Innovative Law Practice: Part III
Noon–2 p.m., MBA, 20 West St., Boston
Program chair: Susan Letterman White, Esq.

Divorce Primer: A View from the Bench and Bar
5–7 p.m., MBA, 20 West St., Boston
Faculty: Calvin J. Heiden, Esq., program chair; Hon. John Casey; Hon. Kevin Connelly; Hon. Melanie Gargas; Hon. Patricia Gorman; Hon. Angela M. Ordalino; Martin Kane, Esq.

TUESDAY, FEB. 28
Gray Divorce: Representing the Elderly Divorce Client
3–5 p.m., MBA, 20 West St., Boston
Faculty: Jennifer Ciapciak, Esq., program chair; Steven Cohen, Esq.; Jonathan Fields, Esq.; Patricia Keane Martin, Esq.

TUESDAY, MAR. 14
Estate Planning 101 Series Part II: How to Probate an Estate
5–7 p.m., MBA, 20 West St., Boston
Faculty: Kevin Diamond, Esq., program chair, Jennifer Maggioraci, Esq.; Evelyn J. Paltos, Esq.

WEDNESDAY, MAR. 15
Nuts and Bolts of Workers’ Compensation
4–6 p.m., MBA, 20 West St., Boston
Faculty: Sean P. Kelly, Esq., program chair; Deborah G. Kahl, Esq.

THURSDAY, MAR. 23
Starting or Jump-Starting an Innovative Law Practice—Jump-Start Your Marketing and Business Development
Noon–2 p.m., MBA, 20 West St., Boston
Faculty: Susan Letterman White, program chair

Register online at MassBar.org/Education or call (617) 338-0530.
Members Helping Members: My Bar Access Q&A

Q: Good Morning. Looking for a case on removal that stands for an intrastate removal when one party moved the child a distance from the other parent that was considered ‘removal’ even though everyone remained in the same state. E.g., from Gloucester to Springfield. I have a pile of removal cases at my disposal, but have not come across this one yet.

Kathleen Delaney
Tourkantonis & Delaney PC, Woburn

A: In a 2003 decision, the Massachusetts Appellate Court expanded this prohibition on removal to include relocation within the Commonwealth: D.C. v. J.S., 58 Mass. App. Ct. 351, 355-356 (2003). From the case: “Applications for court decision in cases in which a parent seeks to relocate within the Commonwealth should not be routine but are proper only where the relocation would evidently involve significant disruption of the noncustodial parent’s visitation rights and the parents cannot agree.

Justin L. Kelsey, Esq.
Collaborative Divorce | Mediation
Skylark Law & Mediation PC, Framingham

Q: Check out Loebel v. Loebel.

Joanna Cobleigh, Esq.
East Longmeadow


Katherine McCarthy
Robinson & Donovan PC, Springfield

Q: Dear Colleagues, I hope you can help me with this. I am trustee of a court ordered spendthrift trust. The trust holds legal title to residential property and the beneficiary resides in the property, and had previously owned the property individually. As trustee I applied for a residential exemption on the real property taxes under G.L. c. 59 sec. 5(c). The town denied the exemption because the resident did not hold legal (record) title. The town relied on Kirby v. Bd of Assessors of Medford, 350 Mass. 386 (1966). In that case elderly resident had conveyed legal title to trustee in revocable trust.

Lois M. Farmer, Esq., Framingham MA

A: What hasn’t worked is nominee trust with the beneficiary as a co-trustee because Assessors are smart enough to ask for the trust behind the nominee. I know you’re trying to avoid giving the beneficiary any legal interest precisely because he/she is a spendthrift, but without a definable legal interest the assessors departments are correct in denying an owner occupied residential rate.

Timothy Borchers
Borchers Law PC, Medway

Q: Has anyone found a way to get around this? Are there any tax board decisions on this?

Kathleen Delaney
Tourkantonis & Delaney PC, Woburn

A: Thank you to all the helpful and timely responses. Much appreciated. This listserv is such a great resource!

Kathleen Delaney
Tourkantonis & Delaney PC, Woburn

A: DoR Informational Guideline Release No. 91-209 is instructive - I believe it is still valid. A copy is attached in case it is helpful.

Don J.J. Cordell
Casner & Edwards LLP, Boston

Q: Thank you to all the helpful and timely responses. Much appreciated. This listserve is such a great resource!

Kathleen Delaney
Tourkantonis & Delaney PC, Woburn

A: We’ve been successful using either limited life estate interests or co-trusteeships with the beneficiary.

Timothy Borchers
Borchers Law PC, Medway

My Bar Access is an exclusive, online MBA community. Log in at www.massbar.org/access to virtually connect with fellow members and share practice information and tips through discussions, blogs and more.
Value beyond the classroom

Hon. Bonnie H. MacLeod (ret.), chair of the MBA’s Education Committee, estimates that she has attended more than 100 MBA-sponsored CLE programs while also serving as a moderator or panel member for more than 20 programs. CLE has been a constant benefit throughout her legal career on both a professional and personal level.

“The benefits of attending CLE through the MBA lie not only in the high-quality of the presentations and the materials, but also in the networking and mentorship opportunities they provide. Connections that will last a lawyer’s entire career can be made at such events,” acknowledged MacLeod. “I know this is true for me. Professional relationships and friendships of decades’ duration were forged through the MBA.”

MBA past President Marsha V. Kazaroian, a former member of the MBA’s Education Committee who was president in 2014-15 when the new “Free CLE” benefit gave members unlimited access to CLE courses, agrees that the educational value of CLE extends beyond the specific course material being taught.

“You’re not only learning what they’re teaching you, you’re also having an opportunity to meet and relate to the bench in a way that you normally wouldn’t, especially as a young lawyer,” Kazaroian said. “You’re learning not only from what the faculty is teaching, but also from the questions that are asked and how they’re answered.”

The benefits of CLE are part of the reason it remains so popular despite being voluntary. According to the American Bar Association, Massachusetts is one of just four states (in addition to the District of Columbia) that does not have a mandatory CLE requirement for its attorneys. Maryland, Michigan and South Dakota are the other three states without the requirement. Connecticut just recently added a mandatory CLE requirement as of January 2017.

Kazaroian co-chaired the MBA’s Task Force on Mandatory Continuing Legal Education with current MBA Treasurer Christopher A. Kenney in 2011-2012. The task force conducted research and ultimately reported to the House of Delegates that mandatory CLE was not a necessary course of action to pursue. “Massachusetts has an extremely high percentage of lawyers who still do continuing legal education,” remarked Kazaroian, “not because they have to, but because they want to.”

From Swampscott to laptops: the evolution of CLE in Mass
Symposium showcases perspectives on mandatory arbitration

The Massachusetts Bar Association’s Consumer Advocacy Task Force held its Third Annual Consumer Advocacy Symposium and Pinnacle Awards on Tuesday, Dec. 6, at the MBA in Boston. Panelists from the Attorney General’s Office, consumer organizations, private business and the dispute resolution field discussed “the future of mandatory arbitration,” the theme for this year’s event.

The panelists for the program were Max Weinstein, chief of the Consumer Protection Division in the Office of Massachusetts Attorney General Maura Healey; Ira Rheingold, executive director of the National Association of Consumer Advocates; Daniel Moriarty, vice president and counsel for Kindred Healthcare; and Brian R. Jerome, founder and CEO of Massachusetts Dispute Resolution Services and chair of the MBA’s DR Section.

Each of the panelists offered his perspective on the topic of mandatory arbitration. Nursing home disputes, the future of pre-suit arbitration agreements, and the current state of Massachusetts law were some of the topics covered during the hour-and-a-half long discussion. The panelists also answered questions from moderators Christine Lee and Andrew Rainer, who are both members of the MBA’s Consumer Advocacy Task Force, before taking questions from the audience.

At the conclusion of the panel discussion, MBA Consumer Advocacy Task Force members Jaimeson E. Porter and Jessica Kelly presented the 2016 MBA Pinnacle Awards to Anton’s Cleaners and Polkadog Bakery. Each company was recognized for demonstrating “the highest commitment to their customers by taking affirmative steps to improve the consumer experience in Massachusetts.”

MBA Treasurer Christopher A. Kenney, who chairs the MBA’s Consumer Advocacy Task Force, said: “Anton’s Cleaners has generated a loyal following through its customer-focused savings programs and services, including home delivery and free storage, while following environmentally responsible business practices and demonstrating a strong commitment to the community. Polkadog Bakery has made a name for itself as a leader in pet nutrition by educating consumers and offering high quality products with locally sourced ingredients — all of which furthers its mission to support economic and social development in the Boston area. The Massachusetts Bar Association is proud to recognize both companies for their shared commitment to providing exceptional value to their customers in Massachusetts.”

Special thanks to the members of the MBA’s Consumer Advocacy Task Force for presenting this event: • Christopher A. Kenney (Chair), Kenney & Sams PC • Nadine Cohen, Greater Boston Legal Services • Thomas Delmar, Keches Law Group PC • Jessica G. Kelly, Sherrin and Lodgen LLP • Sakib A. Khan, Kenney & Sams PC • Christine Lee, Gesmer & Updegrove LLP • Adam C. Ponte, Fletcher Tilton PC • Jaimeson E. Porter, Kenney & Sams PC • Andrew Rainer, Brody, Harwood, Perkins & Kenten, LLP

The task force would also like to thank the MBA’s Complex Commercial Litigation and Dispute Resolution sections for co-sponsoring the event.

---

BAR SEEN

Snapshots from around the MBA

TCM Program tours State House

Participants of the Massachusetts Bar Association’s Tiered Community Mentoring Program got a tour of the Massachusetts State House on Thursday, Nov. 10, including the governor’s office. The group is pictured here in the Governor’s Council Chamber. Included in the above photo are Sharon Casey, executive director, Judicial Nominating Commission & Deputy Counsel, MA Governor’s Office (second from left) and Hon. Angela M. Ordonez, Chief Justice of the Probate and Family Court (back row, center).
You can’t argue the fact that email security is essential to your firm. But what are you doing about it?

CipherPost Pro is the solution you need to:

- Ensure point-to-point email encryption with one click
- Track and control each message with the Delivery Slip
- Send large attachments (up to 5 GB)
- Manage your communications securely from any device
- Meet data compliance requirements

SALES@APPRIVER.COM  (866) 223-4645  APPRIVER.COM
Fastcase 7 legal research now available

The Massachusetts Bar Association now provides you with Fastcase 7, the all-new version of Fastcase! Fastcase 7 is an even more fluid and easy-to-navigate online legal research library. It has all of the familiar features and tools as the classic Fastcase service, plus an enhanced Forecite, Tag Cloud, Authority Check and Bad Law Bot; more advanced search options; new results screen options; larger fonts and selections to make documents easier to read on computer screens; and new dual-column printing options.

The best part — you get to choose when to use Fastcase 7. When you log in to www.massbar.org/fastcase, you’ll see a slider in the top right corner of your screen that allows you to toggle back and forth between Fastcase 7 and the classic Fastcase service.

As a member of the MBA you have unlimited access to one of the largest law libraries in the world. Fastcase ordinarily costs $995 per year for an individual subscriber, but MBA members have access to Fastcase and Fastcase 7 for FREE. There are no restrictions on time or number of transactions, unlimited printing, unlimited reference assistance and unlimited customer service included with this FREE member benefit, as well as a newspaper archive, legal forms, and a one-stop PACER search of federal filings. You also have free access to Fastcase’s intuitive and smarter legal research tools, training webinars and tutorials, industry-leading mobile apps, and live customer support from members of the Fastcase team.

When you use the new Fastcase 7 version, you’ll also get the following new features and additions:

The New Home Screen
As soon as you enter Fastcase 7, you will be greeted with a guided visual tour that automatically loads the first time you toggle over and can be viewed anytime, as many times as you need. You will notice several resources, tools and updates are prominently displayed, including helpful resources, such as the ability to live chat with a Fastcase reference attorney; any new results on alerts you have set for particular searches; and quick access to

The More Advanced Search
For the first time you can search across different types of materials at the same time. Cases, state constitutions, attorney general opinions — choose to search everything or filter results down to just a select category. You can also choose to search across all materials associated with a particular state jurisdiction simultaneously.

The Results Screen
When you run a search on Fastcase 7 your main results are accompanied by several tools, all on the same page. The filter panels can be hidden or revealed without any load time, everything is pre-loaded. You can also move panels and customize your research experience.

You control which results are displayed with the Filter pane and can clear and apply filters to your heart’s content withoutever leaving the results page.

The Tag Cloud is the first of its kind in the legal research space. You can ascertain which terms are being used to discuss a legal issue in a flash, and can click to view the first results that use that term.

The Interactive Timeline is now displayed directly below your search results. You do not have to go to another page to view the timeline, and can now see your results and the data visualization of those results simultaneously. Suggested Results are displayed alongside your main results for every search. This right-hand column is no longer just for HeinOnline materials, but Forecite Results, Journals, and everything in between.

You get bottomless results. There are no pages of cases to click through on Fastcase 7. When you scroll to the bottom of the initial results, more results will load automatically.

The Document Page
Fastcase 7 makes reading cases on a screen easier by using large, beautiful fonts. You can make the reading experience even cleaner by activating full screen mode using the diagonal arrows on the top right of the opinion text.

Your results list is now displayed alongside the opinion text in larger format. You can favorite or add cases to your print queue directly from an opinion page.

Motions in limine, final trial conferences featured in ‘View from the Bench’ program

Standing Order 1-88 (S.O.88) addresses the contents of a pretrial memo for the pretrial conference, which generally happens from six to nine months before trial. But S.O. 88 does not provide any guidelines for final trial conferences, and does not make them mandatory. S.O. 88 provides only that five business days before trial, the parties submit a joint trial list to be presented to the trial judge at the commencement of trial. And three days before trial, the parties file a transcript of deposition testimony to be introduced at trial with the objections highlighted.

There is literally a black hole in the rules as to when motions in limine, jury instructions, pre-charged form of voir dire and other important matters are to be filed. Consequently, these matters are often presented to opposing counsel and to the court for the first time on the morning of trial, or at a final trial conference (in those sessions that schedule them) a few days before trial.

All the MBA’s View From the Bench Series: Motions in Limine and Final Trial Conferences, sponsored by the Judicial Administration Section Council, five Superior Court judges gave their views on how and when to present trial issues to the court. Approximately 60 trial lawyers from the defense and plaintiff’s bar, including small firm and large firm practitioners, attended this question and answer session. The consensus was that there should be a “default rule” in S.O. 88, requiring parties to submit and brief pretrial motions, oppositions, and requests for jury instructions in advance of a Final Trial Conference, and that these should be argued at the Final Trial Conference. This would make the trial go more smoothly, and would avoid keeping the jury waiting while these issues are being argued on the

Morrison Mahoney LLP sponsors MBA Mock Trial Program

Standing Order 1-88 (S.O.88) addresses the contents of a pretrial memo for the pretrial conference, which generally happens from six to nine months before trial. But S.O. 88 does not provide any guidelines for final trial conferences, and does not make them mandatory. S.O. 88 provides only that five business days before trial, the parties submit a joint trial list to be presented to the trial judge at the commencement of trial. And three days before trial, the parties file a transcript of deposition testimony to be introduced at trial with the objections highlighted.

There is literally a black hole in the rules as to when motions in limine, jury instructions, pre-charged form of voir dire and other important matters are to be filed. Consequently, these matters are often presented to opposing counsel and to the court for the first time on the morning of trial, or at a final trial conference (in those sessions that schedule them) a few days before trial.

All the MBA’s View From the Bench Series: Motions in Limine and Final Trial Conferences, sponsored by the Judicial Administration Section Council, five Superior Court judges gave their views on how and when to present trial issues to the court. Approximately 60 trial lawyers from the defense and plaintiff’s bar, including small firm and large firm practitioners, attended this question and answer session. The consensus was that there should be a “default rule” in S.O. 88, requiring parties to submit and brief pretrial motions, oppositions, and requests for jury instructions in advance of a Final Trial Conference, and that these should be argued at the Final Trial Conference. This would make the trial go more smoothly, and would avoid keeping the jury waiting while these issues are being argued on the

Morrison Mahoney LLP is the vice chair of Judicial Administration Section Council.
The Massachusetts Bar Association is currently accepting applications for its Oliver Wendell Holmes Jr. Scholarship — a $10,000 scholarship that will be awarded this April to a third-year law student attending a Massachusetts law school who is committed to providing legal assistance to underrepresented individuals/communities in Massachusetts upon graduating.

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

Applicants must submit a completed online application, including three essay questions, along with a letter of recommendation and resume to holmesscholarship@massbar.org no later than Feb. 28. The MBA may then require a transcript and may conduct an in-person interview of the final applicants to further assess that applicant’s experience, qualifications and interests. The scholarship will be awarded at the MBA’s Annual Dinner on May 4, at the Westin Boston Waterfront.

Legalization of marijuana

Several news outlets tapped MBA experts to provide analysis about the legalization of recreational marijuana in Massachusetts.

“What’s legal — and still illegal — once marijuana becomes legal in Mass,” Boston.com (via AP) (Dec. 11) — MBA Chief Legal Counsel Martin W. Healy was quoted by the Associated Press. Healy was also interviewed on the same topic by NBC Boston (Dec. 12) and WBZ NewsRadio 1030 (Dec. 15).

“If you got ‘em: Marijuana becomes legal in Massachusetts Thursday,” FOX25 (Dec. 13) — Former chair of the MBA’s Criminal Justice Section Council Peter T. Elkan offered insight on the state’s new marijuana law from a criminal defense perspective. A few days earlier (Dec. 7), Elkan was quoted on the same topic in the Gloucester Times.

“New workplace challenge: marijuana laws,” Telegram & Gazette (Jan. 14) — Vice Chair of the MBA’s Labor & Employment Section Meghan H. Slack provided commentary on how the state’s new marijuana law might impact workplace policies.

Quoted in the media? Let us know. Email JScally@MassBar.org.
Poll monitor observes day in the life of a small town

BY KEN BRESLER

When GPS instructs you to stay on your current route for the next 91 miles, you know you’re traveling far from home. I drove for more than three hours from a western suburb of Boston into the battleground state of New Hampshire on Election Day, past four “Moose Crossing” signs and one “Brake for Moose” sign, to stay with my host in Coos County. (The sign at a nearby lake read “Go Fish! [or whatever fish they were fishing for].”) And soon after the sun peeked past the horizon, I drove for more than three hours, your current route for the next 91 miles, to Northermberland, New Hampshire. I drove for more than three hours, and unlike General William Tecumseh Sherman, who didn’t work inside, although texting and surfing the Internet was not allowed, I saw the ballots when they were counted—on the back. The student voted with his voter-ID badge. Keith Young. Keith joked that for identification purposes, he turned 60 recently, the town threw a party for him. A boy handed one to me too. Barb brought her great-granddaughter across the room for a hug, but you’re sick.” She spoke to a passing man: Your mother-in-law wants to know if you’ve voted. (His mother-in-law is Elaine, who sat next to Min at the check-out table.) She collected the completed ballots, lingered as long as she could as one voter talked with fear in her voice about her health, told the voter to reach her any time and returned to the polling place.

The polling place used to be the social hall of the Moose Lodge. Now it belongs to the town. The rest of the building is the police station. Stevie, the mayor, left at 8:00 a.m., the town had 1,222 voters. An even 100 people registered to vote that day. The time that polls closed at 7:00 p.m., 1,024 people had voted, in person and absentee, a 77 percent turnout. Once or twice, voters occupied all 10 of the voting booths, shielded by red, white and blue curtains. Keith barely had time during lulls to check emails from the insurance agency that he owns. When a high school student came to register, Keith joked that for identification purposes, he could use the Groveton Eagles basketball warm-up jacket with the eagle on the back. The student voted with his mother, grandfather and great-grandmother, who, at almost 97, was born in 1920, the year that American women first won the national right to vote. Then they posed for a photograph of four generations of voters. The student came back to count the ballots that night for hours, one of three members of the high school’s honor society to do.

Two women sat at the polling place, dressed in white, to honor the 20th century suffragists who marched in white. Their ages could have made them mother and daughter. The younger one registered to vote and said that when the other woman had told her about the suffragists, she thought it would be cool to dress in white and vote for whom she hoped would be the first woman president. They were not mother and daughter, in their 30s, one appraoching 40, and one was in her 70s. The client had asked her counselor to drive her to vote.

In mid-afternoon, a voter arrived, dressed in her work uniform with her employer’s name on it. An election official asked, “They let you out early?” “Shhh,” said the voter.

Another voter said, “Just got out of the woods.” An election official asked what she had been doing. “Haunlin’ and splittin’,” she said.

Countless voters wore hunting-camouflage jackets, hats and other clothing. Many of their hats identified them as proud Vietnam veterans. Four voters breathed from oxygen tanks that they carried or wheeled.

After dark, Min delivered ballots to two voters who were too sick to enter the polling place, as New Hampshire law allows election officials to do. On the way to the parking lot, she told a man: Your mother texted me to make sure you vote. She handed the ballots to the voters and said, “I’d give you a hug, but you’re sick.” She spoke to a passing man: Your mother-in-law wants to know if you’ve voted. (His mother-in-law is Elaine, who sat next to Min at the check-out table.) She collected the completed ballots, lingered as long as she could as one voter talked with fear in her voice about her health, told the voter to reach her any time and returned to the polling place.

The polling place used to be the social hall of the Moose Lodge. Now it belongs to the town. The rest of the building is the police station. Stevie, the mayor, left at 8:00 a.m., the town had 1,222 voters. An even 100 people registered to vote that day. The time that polls closed at 7:00 p.m., 1,024 people had voted, in person and absentee, a 77 percent turnout. Once or twice, voters occupied all 10 of the voting booths, shielded by red, white and blue curtains. Keith barely had time during lulls to check emails from the insurance agency that he owns. When a high school student came to register, Keith joked that for identification purposes, he could use the Groveton Eagles basketball warm-up jacket with the eagle on the back. The student voted with his mother, grandfather and great-grandmother, who, at almost 97, was born in 1920, the year that American women first won the national right to vote. Then they posed for a photograph of four generations of voters. The student came back to count the ballots that night for hours, one of three members of the high school’s honor society to do.

Two women sat at the polling place, dressed in white, to honor the 20th century suffragists who marched in white. Their ages could have made them mother and daughter. The younger one registered to vote and said that when the other woman had told her about the suffragists, she thought it would be cool to dress in white and vote for whom she hoped would be the first woman president. They were not mother and daughter, in their 30s, one appraoching 40, and one was in her 70s. The client had asked her counselor to drive her to vote.

In mid-afternoon, a voter arrived, dressed in her work uniform with her employer’s name on it. An election official asked, “They let you out early?” “Shhh,” said the voter.

Another voter said, “Just got out of the woods.” An election official asked...
In-House Counsel Conference provides cybersecurity, employment law information

The Massachusetts Bar Association hosted its 14th Annual In-House Counsel Conference on Dec. 1, 2016. The conference, which focused on "What Keeps Counsel Up at Night," presented in-house and outside counsel with information on topics and trends of significant concern to in-house practitioners. Lon Povich, Gov. Baker’s chief legal counsel, provided the conference keynote. In addition, information was presented on compliance burdens of American business, and trends to prosecute companies and individuals for violations of law; evolving trends in cybersecurity — best practices in data security and risk management; hot topics and developments in employment law; and other timely and relevant topics.

MBA, WBZ teamwork helps 200-plus callers

Massachusetts Bar Association (MBA) volunteers answered legal questions from 206 callers in just two hours at the Ask-A-Lawyer call-in program, held at the WBZ studios in Brighton on Nov. 30. Continuing what has become an annual tradition, Ask-A-Lawyer was presented jointly by the Massachusetts Bar Association, WBZ Call for Action and WBZ NewsRadio 1030.

Typical of past Ask-A-Lawyer and Dial-A-Lawyer events, most of the calls involved questions about family law and real estate law, followed closely by torts-related questions. The MBA volunteers also fielded calls ranging from immigration law to collections to criminal law, among others.

During the second hour of Ask-A-Lawyer, MBA President Jeffrey Catalano appeared as a guest on NightSide with Dan Rea, where he talked about MBA initiatives and answered questions from callers from as far away as Alabama. The event created an excellent opportunity to showcase the efforts of the MBA volunteers, as well as the MBA’s Lawyer Referral Service. Throughout the program, Rea and Catalano reminded listeners to visit www.MassLawHelp.com for instant online referrals that are available 24/7.

If you missed it, you can listen to a recording of the show at boston.cbslocal.com/2016/12/01/nightside-ask-a-lawyer-2/.

Thank you to our partners and hosts at WBZ Call for Action, WBZ NewsRadio 1030 and NightSide with Dan Rea. Special thanks to the MBA lawyers who donated their time and expertise to this worthwhile effort:

- Ludovino Gardini
- Michael E. Katin
- Richard M. McLeod
- Soraya Sadeghi
- Samuel Adam Segal
- J. Daniel Silverman
- Gail F. Sullivan
An essential aspect of leadership is the development and honing of certain traits and skills ... in no particular order, such traits might include (but not be limited to): accountability, focus, flexibility, dependability, respect for others, trustworthiness, motivator, engager, positive thinker, collaborator and being goal-oriented. Among the skills often proven to be useful, would be communication, strategic thinking and consensus building.”

“... doing the right thing for the right reason. Leadership requires selflessness, commitment and service to achieve the group’s collective objective. Leaders much subordinate their personal preferences when they conflict with the group’s needs and requirements. Otherwise, infighting and division prevent real progress in any direction. The greatest reward of leadership is the achievement of a well-planned and well-executed goal that produces the desired outcome for the greater good.”

“... using your talents to bring out the talents of those you encounter in your professional and personal lives. Provide a healthy, open environment that will lead others to feel the comfort necessary for the relationship to blossom. Kindly suggest areas of improvement when necessary, but recognize each person’s unique and valued perspective. Welcome points of view that may challenge the status quo, and foster discussions that result in fully vetted solutions. Leadership is not a part-time avocation. It requires a constant exercise of strength, respect, empathy and the ability to listen to others without any prejudgment.”

“... “doing” not “telling.” Great leaders lead by example. They listen carefully and learn from all around them. They seek relevant information while simultaneously evaluating and synthesizing what they receive. They analyze the data obtained and consider initial evaluations made. Then, a leader develops her best plan and shares it with her team. The team members understand and appreciate their roles in executing the plan. Great leaders neither abandon, nor micro manage their team members. The best leaders create followers who eagerly contribute and who are gladly led to the plan’s successful realization.”

“... the willingness to take action, when no one else will.”

“... actively listening to the ideas, comments and concerns of others. This creates opportunities for collaboration that lead to mutually beneficial initiatives and solutions. Also, it’s important to be generous in giving out well-deserved compliments. Healthy and respectful working relationships are fostered when people know that you are invested in the important things they are saying and doing.”
“... the willingness to listen and humility. The title of leader is not given; it is earned. A true leader is able to bring people together. A leader does not seek accolades. He or she gives accolades. He or she does not have to be in the spotlight, but will lead others to it. There is a saying that I read once that helps define a true leader: ‘The character of a person is measured by the willingness to plant a seed for a tree to grow knowing that they will never sit in the shade of that tree.’”

“... preparation and the essential aspect of preparation is experience. The MBA’s Leadership Academy will provide both to the next generation of bar leaders.”

“... courage. Whether it be leading in the law or leading on a battlefield, the occasions on which we must summon our strength to do the right thing or make change are many. As a leader, setting the example of taking action in the face of your own fears is a must. In so doing, you encourage others to be brave, learn, advocate and act upon their convictions.”

“... humility. Leaders recognize that success is a team effort. ‘Team’ includes both the people working on the endeavor and the support network of family and friends outside of the project. Humility in leadership is the recognition that success in life is in large part due to the support provided by others. Humility is taking less credit for success and more blame for the setbacks. Simply put, leaders put the team ahead of self.”

“... dedication, hard work, willingness to listen and humility. The title of leader is not given; it is earned. A true leader is able to bring people together. A leader does not seek accolades. He or she gives accolades. He or she does not have to be in the spotlight, but will lead others to it. There is a saying that I read once that helps define a true leader: ‘The character of a person is measured by the willingness to plant a seed for a tree to grow knowing that they will never sit in the shade of that tree.’”

“... not being the biggest or the loudest or the brashest; it is being creative and insightful, being inspiring and interested and being patient and understanding. A true leader promotes his or her mentees and rejoices when they succeed.”

“... leadership is the recognition that success in life is in large part due to the support provided by others. Humility is taking less credit for success and more blame for the setbacks. Simply put, leaders put the team ahead of self.”

“... courage. Whether it be leading in the law or leading on a battlefield, the occasions on which we must summon our strength to do the right thing or make change are many. As a leader, setting the example of taking action in the face of your own fears is a must. In so doing, you encourage others to be brave, learn, advocate and act upon their convictions.”

“... preparation and the essential aspect of preparation is experience. The MBA’s Leadership Academy will provide both to the next generation of bar leaders.”

“... setting the right tone by your actions, day in and day out. True leaders lead by example every day, not just when everyone is watching.”

“... living a life of example so that, as Mahatma Gandhi has said, ‘My life is my message.’ If you care about access to justice, then work for it. If you care about mentoring and diversity, then help make it a reality. Leadership is also about paying attention to the context and knowing when to step forward to create enthusiasm/energy/inspiration/direction, and when to lead from behind by nurturing the gifts of others to give them space to develop their own confidence and leadership roles.”

“... the willingness to listen and humility. The title of leader is not given; it is earned. A true leader is able to bring people together. A leader does not seek accolades. He or she gives accolades. He or she does not have to be in the spotlight, but will lead others to it. There is a saying that I read once that helps define a true leader: ‘The character of a person is measured by the willingness to plant a seed for a tree to grow knowing that they will never sit in the shade of that tree.’”

“... humility. Leaders recognize that success is a team effort. ‘Team’ includes both the people working on the endeavor and the support network of family and friends outside of the project. Humility in leadership is the recognition that success in life is in large part due to the support provided by others. Humility is taking less credit for success and more blame for the setbacks. Simply put, leaders put the team ahead of self.”

“... dedication, hard work, willingness to listen and humility. The title of leader is not given; it is earned. A true leader is able to bring people together. A leader does not seek accolades. He or she gives accolades. He or she does not have to be in the spotlight, but will lead others to it. There is a saying that I read once that helps define a true leader: ‘The character of a person is measured by the willingness to plant a seed for a tree to grow knowing that they will never sit in the shade of that tree.’”

“... preparation and the essential aspect of preparation is experience. The MBA’s Leadership Academy will provide both to the next generation of bar leaders.”

“... setting the right tone by your actions, day in and day out. True leaders lead by example every day, not just when everyone is watching.”

“... courage. Whether it be leading in the law or leading on a battlefield, the occasions on which we must summon our strength to do the right thing or make change are many. As a leader, setting the example of taking action in the face of your own fears is a must. In so doing, you encourage others to be brave, learn, advocate and act upon their convictions.”
How to vet your cloud technology

BY HEIDI S. ALEXANDER

If you’ve ever heard me speak, you’ll know that I’m an advocate of using cloud technology in your law firm. Why? Here are three good reasons.

1. Cost Savings. In many instances, cloud computing can save you the need for in-house servers and costly IT services to maintain them. Rather than pay a hefty lump sum for server technology and maintenance, cloud technology jives with law firm cash flow by offering subscription services paid on a monthly or annual basis. Maintenance and updates are woven into the subscription price.

2. Increased Efficiency. Generally, access to your data remotely bodes efficiency and productivity. Copying files to a USB drive before traveling home equipped from the office not only puts your client’s data at risk and is a recipe for malpractice, but you’ve probably have multiple copies of documents stored in different places, but it is just plain time consuming and inefficient.

3. Enhanced Security. Yes, I said it. This is particularly true for solo and small firms whose infrastructure could never match that of a cloud technology provider whose entire business relies on their ability to provide secure services. Reputable cloud technology has teams dedicated to security and monitoring data 24/7, employ the most up-to-date security measures, and have sophisticated protocols for backups, service interruption, and breach response.

If you are not already using the cloud, it may be time to make the leap. Indeed, nearly half of all the states, including Massachusetts (Opinion 12-03), have opined on the ethical use of the cloud. By in large, the opinions deem it ethical to store your client’s data in the cloud, but they also oblige you to use “reasonable care or efforts” in doing so. To varying degrees, each opinion provides that reasonable care standards require the lawyer to vet the cloud service provider. So, what exactly should you be looking for when you vet these cloud service providers? It goes without saying that your first step should be to rely on the Massachusetts Bar Association Ethics Committee Opinion 12-03 which lays out five factors that constitute “reasonable efforts”. While these factors provide the overarching concepts that you must consider, they don’t provide the level of detail you need to properly vet a provider.

Beyond our ethics opinions, we now have guidance from the legal cloud computing providers themselves. In 2010, a small group of legal cloud computing companies formed what is now the Legal Cloud Computing Association (LCCA). The LCCA recently announced a formal set of standards to help lawyers understand what “reasonable care” entails. These standards should be used by lawyers as a guidepost for vetting cloud providers. You can find the LCCA standards at www.legalcloudcomputingassociation.org. Here are a few important takeaways that you can implement in your vetting process:

Policies. Providers should convey clear policies that describe their service obligations, data usage and privacy, breach response and notification practices, and disaster recovery and continuity plans.

Encryption. Data should be encrypted at rest, that is, when it is stored at the data center, and it should be encrypted when it is transmitted to and from the data center. Secure Sockets Layer (SSL) encryption technology is the industry standard for securing communications to and from a data center.

Location and Redundancies. Cloud providers should disclose the locations of their data centers that store your information. Your data should be backed up and redundantly stored at multiple centers in the event of an outage in one location.

Data Availability and Usage. Providers should make the following representations: only you own your data, data can be extracted in a usable and non-proprietary format, data permanently deleted from the cloud should be disposed of and no longer available to any entity, and private information should be treated as confidential and viewed only by the provider with your explicit consent.

You don’t need to be an expert in cloud technology to review a provider’s policies and ensure that it meets the best practice standards above. Not only do you have an ethical obligation to do so, but doing your due diligence will reduce security risks and enable you to get the most out of your cloud service.

Heidi S. Alexander, Esq., is the director of Practice Management Services for Lawyers Concerned for Lawyers, where she advises lawyers on practice management matters, provides guidance in implementing new law office technologies, and helps lawyers develop healthy and sustainable practices. She frequently makes presentations to the legal community and contributes to publications on law practice management and technology. She is the author of the forthcoming publication by the ABA’s Law Practice Division, Earnmore as a Law Practice Tool (2017) and serves on the ABA’s TECHSHOW Planning Board.

Within the past year, I got an admittance from the Board of Bar Overseers because of a foolish oversight that I need not review here. But it served as a wake-up call that there is something amiss with how I run both my practice and my life. I have always been active in my community and church, and when I became a lawyer as a second career, I continued to seek to “give back” because I think it’s the right thing to do. I have taken many kinds of cases — family law, immigration, civil suits, bankruptcies, etc. — many of them coming from friends, fellow church members, and their family members. A number of these individuals had no viable way to make more than a token payment, but I felt fine about donating my services, just as I do other kinds of volunteer work and help with local political campaigns.

In the course of these activities, as well as making errors that generated the most moral and financial consequence, I have come to realize that my life almost independently of me, so that we are more housemates than partners. Given how poorly I have organized and prioritized various elements of my life and having done some reading, and think perhaps I have attention deficit hyperactivity disorder (ADHD). Can Lawyers Concerned for Lawyers (LCL) help me evaluate that, and my options for getting it treated?

This is a very good point in time for you to have realizations that something is awry and to reach out to LCL, but not only to consider whether you have ADHD. Making that diagnosis entails a careful review of your history and a review of your symptoms, if ADHD is present, some combination of medication and coaching can be helpful in many cases.

But there may be a less clinical/reasonable explanation for finding your life adapting by growing more detached. Staying organized and maintaining healthy priorities is especially challenging in solo practice. The solo practitioner makes decisions and develops habitual behaviors in an atmosphere of that could be characterized as “too much freedom.” Without external guidance and constraints. These are among the concerns that arise in the online group I’ve been running at LCL for highly stressed solo practitioners. (You could consider joining this group, which opens up periodically to new participants.)

Please do come to LCL for consultation. Let’s discuss what kinds of approaches would help you focus on the most important elements of your life both at home and in your profession.

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

BY NICOLE M. CROWLEY

The Massachusetts Bar Association’s Law Practice Management Section welcomes the 1,198 new lawyers that joined the Massachusetts bar this past November, and we offer these tips for your practice as you begin your career:

1. Do not be afraid to ask questions and for advice. If you are at a medium to large firm, you may be working for several different partners and helping junior partners or senior associates with projects. They may take their legal, institutional, and client knowledge for granted. Be sure to understand precisely what you are being asked to do before starting a project, the timetable and deadlines for the project, and confirm that you understand the result or answer the client is looking for. Provide periodic updates if you are working on a large project. By ensuring that you understand the project and that you do not go down a stray path, you will be better able to manage your time and be more efficient throughout the day.

2. Be familiar with the Rules of Professional Conduct. While it is impractical for even the most experienced and savvy attorney to memorize the entire Code of Professional Conduct, as a new lawyer you should know basic rules and be aware of the potential pitfalls. The Massachusetts Committee on Professional Conduct produces a booklet called Your First 100 Days. It is available at free of charge from the Massachusetts Bureau of Legal Affairs. The booklet covers the basics of the Massachusetts Rules of Professional Conduct and provides specific advice for new attorneys. You should also be familiar with the Rules of Professional Conduct of whatever jurisdiction you practice in. New lawyers should ensure they are knowledgeable about the ethical inquiries their statespecific rules and they should know how to handle client conflicts.

3. Manage expectations. Finishing a project for a partner or attorney who wants to represent a new client can be a trap for even the most experienced attorney. Make sure to understand such important rules as client fees (Rule 1.5), how to handle client money (Rule 1.15), conflicts (Rules 1.7 – 1.9), and how to advertise your business (Rule 7.1). Unsure of how to respond to a particular situation? Ask another attorney for help or contact a lawyer who practices in the area. As an associate, you should not be afraid to ask for help from your partners or other lawyers.

4. Pursue opportunity (no matter how small). Want to be a litigator? Accept every opportunity to go to court, whether it is a small claims hearing, an unopposed motion, or a case management conference. Those events may seem inconsequential but they will provide you the opportunity to see other attorneys in action, appear before judges, and meet court staff. Want to work in-house but do not have the necessary experience? Check out the in-house legal department of a Fortune 500 company. For more information on the Ethics Committee and the published opinions can be found at the following websites:

www.massbar.org/january February 2017 21

| Taking Care of Business |

An overlooked source of business: Your opponents

BY JOHN O. CUNNINGHAM

Over the years, a number of highly successful attorneys have provided me with anecdotes about landing key clients as a result of recommendations from opponents. Renowned advocates have even described research-related encounters with lawyers who had impressed them as opponents. As an advocate, I too hired lawyers who had impressed me as opponents, and I was hired for a new client's case or to act on the other side of a table from me. I know of other chief legal officers who were hired after impressing their opponents as well.

Sitting on the other side of a negotiation or case provides an excellent perch from which to gauge an opposing advocate's knowledge of the law, ability to think quickly, communicate clearly and come up with win-win solutions. That same perch facilitates assessment of how responsive, organized and diligent opposing advocates are, and those are all key factors in hiring or referral decisions.

Conversely, it is obvious if an opponent is poorly qualified or ill-prepared. In today's hyper-competitive world, laced with movie and television caricatures of the law that accentuate aggressive and dramatic clashes, combative behavior can seem acceptable or even effective, but it is ultimately costly.

I know by reputation a commercial litigator in another jurisdiction who thought for full generation, selling himself as a razor sharp sword for slicing up opponents, and winning over opponents. He thought of lawyers only as weapons of conflict.

He was smart, extremely aggressive, threw lots of sharp elbows and got more than his share of "wins," though most were costly. For a while he earned a good number of client referrals. But his reputation within the bar did not earn him any praise, and many once satisfied clients eventually learned that ruthless victories had long-term consequences. As a result, the one-time big-ticket lawyer eventually saw his business dry up, and his firm dissolved.

By John o. cunningham

John o. cunningham

2. Be familiar with the Rules of Professional Conduct. When you start a project, whether it is a small claims hearing, an unopposed motion, or a case management conference. Those

an overlooked source of business: your opponents

the massachusetts bar association’s law practice management section welcomes the 1,198 new lawyers that joined the massachusetts bar this past november, and we offer these tips for your practice as you begin your career:

1. Do not be afraid to ask questions and for advice. If you are at a medium to large firm, you may be working for several different partners and helping junior partners or senior associates with projects. They may take their legal, institutional, and client knowledge for granted. Be sure to understand precisely what you are being asked to do before starting a project, the timetable and deadlines for the project, and confirm that you understand the result or answer the client is looking for. Provide periodic updates if you are working on a large project. By ensuring that you understand the project and that you do not go down a stray path, you will be better able to manage your time and be more efficient throughout the day.

2. Be familiar with the rules of professional conduct. While it is impractical for even the most experienced and savvy attorney to memorize the entire code of professional conduct, as a new lawyer you should know basic rules and be aware of the potential pitfalls. The massachusetts committee on professional conduct produces a booklet called your first 100 days. It is available at free of charge from the massachusetts bureau of legal affairs. the booklet covers the basics of the massachusetts rules of professional conduct and provides specific advice for new attorneys. you should also be familiar with the rules of professional conduct of whatever jurisdiction you practice in. new lawyers should ensure they are knowledgeable about the ethical inquiries their statespecific rules and they should know how to handle client conflicts.

3. Manage expectations. finishing a project for a partner or agreeing to represent a new client that has a fast approaching deadline is as important as agreeing to accept the project or client in the first place. do not overcommit yourself in an effort to get the details. do matter and taking on too much can lead to corner cutting and hasty review. second chances are rare. you do not want to make mistakes because you overpromised. do you understand the law adequately? do you know the other side's strategy? do you have the knowledge and skills to complete a project or your ability to handle a case.

4. Pursue opportunity (no matter how small). want to be a litigator? accept every opportunity to go to court, whether it is a small claims hearing, an unopposed motion, or a case management conference. those events may seem inconsequential but they will provide you the opportunity to see other attorneys in action, appear before judges, and meet court staff. want to work in-house but do not have the necessary experience? check out the in-house legal department of a fortune 500 company. for more information on the ethics committee and the published opinions can be found at www.massbar.org/for-attorneys/ethical-inquiries.

5. Be efficient. chances are another attorney in your firm has conducted similar research, drafted the same motion, or responded to similar discovery. do not spend time reinventing the wheel. if you are opening your own practice, make use of law practice management software that enables you to save form emails to respond to client inquiries, document assembly software to create and fill out forms, and other tools that will help you stay organized and professional.

law practice management

five takeaways for new lawyers just admitted to the bar

by nicole m. crowley

the massachusetts bar association’s law practice management section welcomes the 1,198 new lawyers that joined the massachusetts bar this past november, and we offer these tips for your practice as you begin your career:

1. Do not be afraid to ask questions and for advice. If you are at a medium to large firm, you may be working for several different partners and helping junior partners or senior associates with projects. They may take their legal, institutional, and client knowledge for granted. Be sure to understand precisely what you are being asked to do before starting a project, the timetable and deadlines for the project, and confirm that you understand the result or answer the client is looking for. Provide periodic updates if you are working on a large project. By ensuring that you understand the project and that you do not go down a stray path, you will be better able to manage your time and be more efficient throughout the day.

2. Be familiar with the rules of professional conduct. While it is impractical for even the most experienced and savvy attorney to memorize the entire code of professional conduct, as a new lawyer you should know basic rules and be aware of the potential pitfalls. The massachusetts committee on professional conduct produces a booklet called your first 100 days. It is available at free of charge from the massachusetts bureau of legal affairs. the booklet covers the basics of the massachusetts rules of professional conduct and provides specific advice for new attorneys. you should also be familiar with the rules of professional conduct of whatever jurisdiction you practice in. new lawyers should ensure they are knowledgeable about the ethical inquiries their statespecific rules and they should know how to handle client conflicts.

3. Manage expectations. finishing a project for a partner or agreeing to represent a new client that has a fast approaching deadline is as important as agreeing to accept the project or client in the first place. do not overcommit yourself in an effort to get the details. do matter and taking on too much can lead to corner cutting and hasty review. second chances are rare. you do not want to make mistakes because you overpromised. do you understand the law adequately? do you know the other side's strategy? do you have the knowledge and skills to complete a project or your ability to handle a case.

4. Pursue opportunity (no matter how small). want to be a litigator? accept every opportunity to go to court, whether it is a small claims hearing, an unopposed motion, or a case management conference. those events may seem inconsequential but they will provide you the opportunity to see other attorneys in action, appear before judges, and meet court staff. want to work in-house but do not have the necessary experience? use pro bono and volunteer opportunities to gain the skills and experience that you need. if you are a lawyer without a law firm, it may be more difficult to go without legal assistance. you will forge new relationships, and meet future clients and/or employers, while doing something you enjoy.

5. Be efficient. chances are another attorney in your firm has conducted similar research, drafted the same motion, or responded to similar discovery. do not spend time reinventing the wheel. if you are opening your own practice, make use of law practice management software that enables you to save form emails to respond to client inquiries, document assembly software to create and fill out forms, and other tools that will help you stay organized and professional.

nicole crowley is an associate at Tucker, Saltzman & o'connell llp. her practice focuses on insurance defense and coverage analysis.
Don’t let focus on victory blur ethical obligations

BY RICHARD P. CAMPBELL AND SUZANNE ELOVECKY

In many respects, trial practice is like professional athletics. Talented, highly compensated and driven individuals compete against each other with the knowledge that victory or defeat is the ultimate outcome of the contest. Sometimes the competitor operates singularly; more often, however, the competitor is part of a team of like-minded and equally talented individuals.

As in professional sports, trial practice is played out in conformity with established rules and against a time clock that inexorably runs its course and terminates the contest. But, unlike professional athletes, trial lawyers are officers of the court and hearken to a higher calling than the competitor operates singularly; more often, however, the competitor is part of a team of like-minded and equally talented individuals.

In the first paragraph of the preamble of the Rules of Professional Conduct, we are instructed that “a lawyer is a representative of clients, an officer of the legal system, and a public citizen having special responsibility for the quality of justice.” Rule 3.3 mandates candor toward the Court, prohibiting false statements of material fact or law and failure to disclose material facts. Rule 3.4 requires fairness to the opposing party and prohibits obstruction of access to evidence or the unlawful alteration, destruction, or concealment of “a document or other material having potential evidentiary value.”

When trial lawyers focus only on victory and lose sight of their primary role as officers of the court and public citizens with special duties for the quality of justice, trouble follows. The risks are great; the fall from prominence to ignominy is swift, particularly for the high and mighty.

Donovan Leisure Newton & Irvine was a white-shoe, Wall Street law firm founded in 1929 by General William “Wild Bill” Donovan, often called the “Father of the CIA.” In the late 1970s, it was one of the top five or six law firms in New York City with upwards of 200 lawyers in its employ. It was well known and highly regarded for its defense of antitrust cases and became infamous for its handling of Berkey Photo, Inc. v. Eastman Kodak. Donovan Leisure’s lead trial counsel on the Berkey Photo antitrust case was John Doar; the former counsel for the House Judiciary Committee during President Nixon’s impeachment.

Mahlon Perkins, Jr., a 59 year old partner and senior partner of the firm, was one of the 30 lawyers assisting Mr. Doar. Mr. Perkins, the son of a United States diplomat, attended Phillips Exeter Academy, Harvard College, and Harvard Law School (where he was an editor of its Law Review). He lived most of his adult life in the quaint borough of Greenwich, Connecticut.

In the course of discovery, Berkey demanded production of specific documents including correspondence by a key Kodak witness. Mr. Perkins filed an affidavit in response averring that the documents as been destroyed. In fact, he still had possession of them in his Manhattan office.

Days before final argument, Mr. Doar announced in open court that an entire suitcase of documents had not been destroyed as Mr. Perkins had testified. In his closing, counsel for Berkey described the events as a “sordid spectacle of dissembling, evasiveness, deception and concealment that disgraces the dignity of this court, this proceeding, and you jurors.” The jury’s trebled award totaled $112.8 million. Kodak fired Donovan Leisure. Some observers believe that the Kodak case ultimately led to the failure of the law firm in 1998. Donovan Leisure separated its ties with its senior partner.

More importantly, however, Mr. Perkins was charged and convicted of contempt of court and sentenced by a federal judge (and classmate) to a month in jail.

Mahlon Perkins somehow successfully defended disbarment proceedings. But he never worked at a Wall Street law firm again.

In a great story of redemption and revival, Mr. Perkins spent the balance of his career working part time at the Center for Constitutional Rights and for a small Manhattan law firm, and volunteering in Greenwich for the symphony orchestra, the library, the United Way, the National Association for the Advancement of Colored People, the Audubon Society. See D. Margolick, LAW; The Long Road Back to the Library, The Long Road Back to a Disgraced Patron, NY Times, January 19, 1990.

Mediation as a Process

Some cases cannot reach settlement at the initial session and the importance that neutrals and parties consider mediation as a process and not a single event was discussed. Mediators must be willing to remain involved in cases that may not settle at the initial mediation session, to allow the dust to settle and then have critical post session communications that often mean the difference between a settled case or not.

Users and practitioners are welcome to join us at the upcoming Best Practices for Advocates event on Feb. 1, 2017, at 5:30 p.m. at the MMA’s Springfield office.
MBF celebrates grantees, presents President’s Awards

We would like to thank all of the grantees, Fellows and friends of the MBF who joined us for our Grantee Receptions in October. Congratulations to our President’s Award recipients Robert S. Molloy and James T. Van Buren.

Eastern Mass. reception at the MBA, Boston

MBF Executive Director Elizabeth M. Lynch, 2016 President’s Award recipient Robert S. Molloy and MBF President Janet F. Aserkoff.

MBF Trustee Hon. Robert G. Fields, 2016 MBF President’s Award recipient James T. Van Buren, and MBA President Robert J. Ambrogi.

2016 MBF Legal Intern Fellow Candace Pierre of New England Law | Boston, and Mario Paredes of Boston University School of Law.

MBF Executive Director Elizabeth M. Lynch, Stephen J. Matthews and Elizabeth A. South of Metrolist Legal Services, 2016 MBF President’s Award recipient Robert S. Molloy of Elstandon P. Group, and Sonia Shain and Daniel B. Daley, also of Metrolist Legal Services.

MBF Executive Director Elizabeth M. Lynch, 2016 President’s Award recipient Robert S. Molloy and MBF President Janet F. Aserkoff.

Central and Western Mass. reception at Bowditch & Dewey, Worcester

Miriam H. Bailey of Bristol Conciliation, Jacquelynne J. Bowman of Greater Boston Legal Services, Michael C. Raabe of Northeast Legal Aid, MBF Executive Director Elizabeth M. Lynch, and Susan K. Nagi of South Coastal Counties Legal Services.

Jeanne Kain and Ronnie Miler of Irish International Immigrant Center with Jay T. McManus and Sharon Mason of the Children’s Law Center.

Miriam H. Bailey of Bristol Conciliation, Jacquelynne J. Bowman of Greater Boston Legal Services, Michael C. Raabe of Northeast Legal Aid, MBF Executive Director Elizabeth M. Lynch, and Susan K. Nagi of South Coastal Counties Legal Services.

Jacquelynne J. Bowman of Greater Boston Legal Services and 2016 MBF Legal Intern Fellow and Grantee Speaker James van Wagtendonk, of Boston University School of Law.

MBA President-Elect Christopher P. Sullivan, Matthew Selig of Health Law Advocates and MBA President Jeffrey N. Catalano.

Former MBF Trustee Hon. Joseph Lian, Hon. Patrick A. Fox, and Timothy Murphy.

Jonathan Mavres of Community Legal Aid, Margaret J. Hurley of the Office of the Attorney General, and former MBF Trustee and MBA Past President Edward W. McIntyre of McIntyre Mediation.

MBF Grant Opportunities

IOLTA Grants Program

Massachusetts non-profits that provide civil legal services to the poor or improve the administration of justice are eligible to apply for grants through our competitive grant application process. This year, approximately $2 million will be awarded through this program.

Deadline: March 10, 2017

Legal Intern Fellowship Program

By providing stipends to law students for summer internships at legal aid organizations, this program aims to help them gain the experience needed to pursue careers in public interest law.

Deadline: March 17, 2017

Applications for both programs are available online at: www.MassBarFoundation.org

The Massachusetts Bar Foundation is the commonwealth’s premier legal charity. Founded in 1964, the MBF is the philanthropic partner of the Massachusetts Bar Association. Through its grantmaking and charitable activities, the MBF works to increase access to justice for all Massachusetts citizens. There is a role for every lawyer and judge at the MBF to help safeguard the values of our justice system — to ensure that equality under the law is a reality, not just an ideal. Visit our website to learn more about our work and to get involved.

www.MassBarFoundation.org
Leadership Academy hosts training in Worcester

By Mike Vigneux

The MBA’s Leadership Academy hosted its second training session for 21 fellows selected for 2016-17 on Dec. 12 at the U.S. District Court in Worcester. The theme of the session was “Unique Perspectives on Public Service.”

Speakers were Hon. Judith Fabri-cant, Chief Justice of the Massachusetts Superior Court, Wayne Budd, Goodwin Procter LLP and former U.S. Attorney for the District of Massachusetts, and Michael P. Sams, co-founder of Kenney & Sams. Hon. Timothy S. Hillman, U.S. District Court, District of Massachusetts, provided welcoming remarks to the group.

Each of the three featured speakers offered their thoughts and advice on leadership in short presentations to the entire group of fellows before roundtable discussions were held in smaller groups. This format gave the fellows an opportunity to ask questions and interact with the speakers in a more personalized setting.

Launched in September, the MBA’s Leadership Academy is a selective 12-month program for attorneys, which is designed to recruit and nurture future bar and civic leaders. The Leadership Academy Fellows selected for the inaugural 2016-17 Leadership Academy class represent a diverse group of talented attorneys from across the commonwealth with three to 10 years of experience, along with the 2016 recipient of the MBA’s Oliver Wendell Holmes Jr. Scholarship.

Leadership Academy Fellows are given the opportunity to network, collaborate and build relationships with bar leaders; develop and enhance leadership skills important to their future in the legal profession; and get an insider’s look at the important role the MBA plays within the legal system.

See also Leadership Academy spread, pages 16-17
NEED HELP FINDING NEW PROSPECTS

We Will Find Your New Clients Among The Many With The Warren Group’s Marketing Lists.

Whether you are in search of mortgage refinance candidates or homeowner anniversaries, The Warren Group has the list you need to best reach your target audience. Successful businesses consistently rely on The Warren Group to identify new revenue opportunities with the most accurate and detailed information available. Homeowners invest in upgrades, renewal, and maintenance every day; invest in our marketing lists to find them.

There are millions of households in the United States. In every one, individuals invest time and money—painting walls, picking weeds, paying bills. Things get broken; things get built. With millions of doors for your opportunity to knock on, do your knuckles a favor by using The Warren Group’s Marketing Lists to hone in on the right homes.

Find Your Target Audience Through Our Custom Lists:

- Homeownership Anniversary
- Mortgage Refinance
- First Time Homeowner
- Home Equity Candidate
- And More ...

Pinpoint Your Next Customer With Our Marketing Lists Today!

Speak with an account manager about which marketing lists are right for you.

(617) 896-5365 | datasolutions@thewarrengroup.com
We Could Have Settled It!

Aviation Law

Attorney Glynn has been designated as a neutral for both non-binding mediation and arbitration; he has successfully managed those matters, either resolving/arbitrating or being neutral for both non-binding mediation and arbitration. He has successfully represented clients in all types of aircraft, including airline, commercial and general aviation.

Kreindler & Kreindler LLP
277 Dartmouth St.
Boston, MA 02116
Tel (617) 424-9100
Fax (617) 424-9120
E-mail: atarricone@kreindler.com
www.kreindler.com

Aviation Law

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

Lost in a maze of numbers?

EPR has been providing easy to understand, fact-driven economic analyses of damages in personal injury, wrongful death, medical malpractice, commercial, marital, and employment cases since 1983.

EPR
www.EPRconomics.com
203-878-2945, 800-765-1377
info@EPRconomics.com
400 Corrinton Dr. Ste. 500 | PO Box 660
Wilton, VT 05495-1660

Federal Employment Law

Federal Employment Law & Security Clearance Law

Arrested? Flee Your Attorney and the FBI's attorneys have earned Avery, Dooley & Noone an outstanding reputation for its representation of thousands of Federal Employees in a variety of workplace matters: removals, discrimination complaints, retaliation claims, and both Federal Employees and Government Contractors in security clearance matters.

Avery, Dooley & Noone also handles: insurance defense, discrimination cases, and disability retirement.

AveryDNLaw.com
508-588-5800
jill@averydnlaw.com
www.averydnlaw.com

Tax Attorney

Looking for an Experienced Tax Attorney for Your Clients?

Rick Stone Law

Former Chair - MA Bar Asso, Taxation Section
Serving MA Bar Asso, Members and Their Clients
State, Federal, and International Tax Matters
Planning, Internal Revenue Service audits, appeals, litigation

[617] 948 - 9360
[888] 483 - 5884
www.RickStoneLaw.com
Rick@RickStoneLaw.com

Surety Bonds

A.A. Dority

Since 1899

Office: 617-523-2935
Fax: 617-523-1707
www.aadority.com

A.A. Dority
COMPANY, INC.
262 Washington St., Suite 99
Boston, MA 02108

Firearm Services

New England Ballistic Services

Providing legal solutions for firearms-related issues
- Conversion of firearms to liquid assets
- Purchase of single guns, large collections, and estates
- Temporary storage of firearms for criminal defendants, or items in ownership dispute
- Recovery of seized firearms from police departments
- Firearm destruction and disposal
- Legal removal of firearms found in homes by heirs/guardians

508-381-0230
info@neballistics.com
www.neballistics.com
PO Box 23, Hopedale, MA 01747

Legal Research

NLRG National Legal Research Group

More than 1,460 Massachusetts attorneys have used National Legal Research Group.

Briefs
Trial Memos
Motions
Legal Research

Free Hour of Legal Research for New Clients

Use only the free hour, or apply the free hour to a larger project. Includes a Westlaw Computer Search

www.nlrg.com/MA • 1-877-689-6432 • ad@nlrg.com

Advertise in MLJ

Tell these experts you saw them in Lawyers Journal

If you’re an expert and want help MedBar members, email adverting@theavermegroup.com to introduce your expertise to this influential audience.

Advertise in MLJ

A.A. Dority
Surety Bonds

Since 1899

Office: 617-523-2935
Fax: 617-523-1707
www.aadority.com

A.A. Dority
COMPANY, INC.
262 Washington St., Suite 99
Boston, MA 02108

Firearm Services

New England Ballistic Services

Providing legal solutions for firearms-related issues
- Conversion of firearms to liquid assets
- Purchase of single guns, large collections, and estates
- Temporary storage of firearms for criminal defendants, or items in ownership dispute
- Recovery of seized firearms from police departments
- Firearm destruction and disposal
- Legal removal of firearms found in homes by heirs/guardians

508-381-0230
info@neballistics.com
www.neballistics.com
PO Box 23, Hopedale, MA 01747

Legal Research

NLRG National Legal Research Group

More than 1,460 Massachusetts attorneys have used National Legal Research Group.

Briefs
Trial Memos
Motions
Legal Research

Free Hour of Legal Research for New Clients

Use only the free hour, or apply the free hour to a larger project. Includes a Westlaw Computer Search

www.nlrg.com/MA • 1-877-689-6432 • ad@nlrg.com

Advertise in MLJ

Tell these experts you saw them in Lawyers Journal

If you’re an expert and want help MedBar members, email adverting@theavermegroup.com to introduce your expertise to this influential audience.

Advertise in MLJ

A.A. Dority
Surety Bonds

Since 1899

Office: 617-523-2935
Fax: 617-523-1707
www.aadority.com

A.A. Dority
COMPANY, INC.
262 Washington St., Suite 99
Boston, MA 02108

Firearm Services

New England Ballistic Services

Providing legal solutions for firearms-related issues
- Conversion of firearms to liquid assets
- Purchase of single guns, large collections, and estates
- Temporary storage of firearms for criminal defendants, or items in ownership dispute
- Recovery of seized firearms from police departments
- Firearm destruction and disposal
- Legal removal of firearms found in homes by heirs/guardians

508-381-0230
info@neballistics.com
www.neballistics.com
PO Box 23, Hopedale, MA 01747

Legal Research

NLRG National Legal Research Group

More than 1,460 Massachusetts attorneys have used National Legal Research Group.

Briefs
Trial Memos
Motions
Legal Research

Free Hour of Legal Research for New Clients

Use only the free hour, or apply the free hour to a larger project. Includes a Westlaw Computer Search

www.nlrg.com/MA • 1-877-689-6432 • ad@nlrg.com

Advertise in MLJ

Tell these experts you saw them in Lawyers Journal

If you’re an expert and want help MedBar members, email adverting@theavermegroup.com to introduce your expertise to this influential audience.

Avatar: Click to view in full size.

Legal Research

NLRG National Legal Research Group

More than 1,460 Massachusetts attorneys have used National Legal Research Group.

Briefs
Trial Memos
Motions
Legal Research

Free Hour of Legal Research for New Clients

Use only the free hour, or apply the free hour to a larger project. Includes a Westlaw Computer Search

www.nlrg.com/MA • 1-877-689-6432 • ad@nlrg.com

Advertise in MLJ

Tell these experts you saw them in Lawyers Journal

If you’re an expert and want help MedBar members, email adverting@theavermegroup.com to introduce your expertise to this influential audience.

Avatar: Click to view in full size.
The Massachusetts Bar Association (MBA) House of Delegates held its second meeting of the association year at the TD Bank Conference Center in Springfield on Nov. 17.

Highlighting the meeting was the presentation of the MBA’s Public Service Award to Hampden County Sheriff Michael Ashe, who is retiring after an admirable 42-year tenure. Elected to his post in 1974, Sheriff Ashe has become known a national and international innovator in the criminal justice field through his work on re-entry programs for inmates and reducing recidivism.

Also of note, Housing Court Justice Dina E. Fein provided an update on the state’s receipt of a $100,000 grant from the Public Welfare Foundation to develop a statewide strategic action plan to improve access to justice initiatives across the commonwealth. Fein reported that Massachusetts was one of just seven states to receive funding of 25 that applied. The goal of the process will be to examine existing access to justice resources within the state and identify gaps in services. Only the seven states that received funding will be eligible for implementation grants which are expected to be awarded next fall.

President Jeffrey N. Catalano opened the meeting by acknowledging and thanking those who made the trip out to the western part of the state. In his president’s report, he highlighted several successful MBA fall events that enjoyed record attendance. Catalano specifically commended a Veteran’s Day community service project with The Mission Continues and the Middlesex County Bar Association, which involved re-constructing community garden beds in Lowell. His report also highlighted the launch of the MBA’s new podcast, the MassBar Beat, which is now available through several online platforms.

Chief Legal Counsel and Chief Operating Officer Martin W. Healy reported that the MBA will have a seat on a committee convened by the courts to discuss ongoing concerns and procedures pertaining to the posting of court records online. The most recent court ruling left it up to individual court departments to determine what gets posted. According to Healy, discussions are expected to continue on this topic for the next year or two. Healy wrapped up his remarks by promoting the Annual Walk to the Hill for Civil Legal Aid on Jan. 26 at the State House. He also presented Catalano with a book inscribed by Immediate Past President Robert W. Harnais which will now be passed on to the succeeding MBA president each year.

Bar association updates from the western part of the state were provided by Richard Dohoney, president, Berkshire County Bar Association; Kevin Maltby, president, Hampden County Bar Association; John Garber, president, Hampshire County Bar Association; and Lisa Kent, president-elect, Franklin County Bar Association.

The meeting concluded with section council reports from Julie Green of the Complex Commercial Litigation Section Council and Scott Heidorn of the Civil Litigation Section Council. After the meeting, attendees were invited to a reception at the nearby Springfield Sheraton sponsored by the Hampden County Bar Association.

**BY MIKE VIGNUEX**

MASSACHUSETTS LAWYERS JOURNAL | JANUARY/FEBRUARY 2017

**LAW FIRM**

**Expert Witness**
- Trust and Will Analysis
- Fiduciary Duty
- Trust Administration

**Alexander A. Bove, Jr., JD, LLM, PhD**
bove@bovelanga.com | 1617-720-6940
Published author, international lecturer, educator and counselor in field of trust and estate for over forty years.

**BOVE & LANGA LAW FIRM**
10 Tremont Street, Suite 600 | Boston, MA 02108 | bovelanga.com

**BAR SEEN**
Snapshots from around the MBA

**MBA hosts Speed Networking with a Twist**
The Massachusetts Bar Association hosted a fun evening of networking on Dec. 1. Attendees participated in Speed Networking with a Twist, where participants shared advice on transitioning from student to lawyer, practice management and more. Speed Networking was followed by a cocktail reception with members of the Young Lawyers Division.
BY CHRISTA A. ARcos

Effective July 1, 2015, the Supreme Judicial Court adopted comprehensive amendments to the Massachusetts Rules of Professional Conduct (MRPC). Among the most significant changes is the new definition of “informed consent” and the requirement that a client’s informed consent to conflicts and potential conflicts be confirmed with a writing. This new requirement of a writing applies whenever an attorney represents two or more clients, commonly referred to as multiple party or common representation. Examples of common representation include preparing an estate plan for a husband and a wife, representing co-defendants in civil litigation, and representing both a buyer and a lender in a real estate closing transaction. In all of these situations, Rule 1.7 of the MRPC now requires that each client’s informed consent to the potential conflicts inherent in the common representation be confirmed in writing. The ethics rules continue to discourage common representation in a criminal context given the high likelihood that an actual conflict will materialize. Obtaining a client’s informed consent under the definition that became effective July 1, 2015, requires the attorney to engage in a detailed discussion with each client to explain the material risks inherent in the common representation and the reasonable alternatives. A writing that confirms a general waiver will not suffice under this new standard. If the consent given is either general or open-ended, it is unlikely that the client understood the material risks. Likewise, a writing that does not confirm a detailed conversation with each client may be ineffective even if that writing is signed by the client. The writing is not a substitute for discussing with the client the circumstances particular to that case and the potential conflicts to which the client is consenting in that situation. The purpose of the writing is to impress upon the client the importance of the consent that was discussed and to avoid later disputes or ambiguities. Although technical compliance with this provision of Rule 1.7 can be achieved with a writing that the lawyer transmits promptly following a conversation with the client, the best practice is to have the client execute the writing after the client has had a reasonable opportunity to consider the risks and alternatives that were discussed. Having the client execute a writing that confirms a consent with the attorney, will minimize the likelihood of credible confusion at a later date. The effectiveness of a potential conflict waiver will be judged by whether, and to what extent, the client reasonably understood the material risks that the waiver entailed. The comments to rule 1.7 point out that “[t]he more comprehensive the explanation of the types of future representations that might arise and the actual and reasonably foreseeable adverse consequences of those representations, the greater the likelihood that the client will have the requisite understanding.” Where a client is a sophisticated consumer of legal services and is reasonably informed regarding the risks, a waiver is more likely to be enforceable. Similarly, clients who are represented by independent counsel when weighing the considerations involved will possess a more comprehensive understanding of the risks and benefits particular to the common representation being proposed.

Although waivers will necessarily need to be tailored to the subject matter and circumstances of the particular representation, there are certain reasonably foreseeable consequences inherent in all common representation that must be discussed and confirmed in every written waiver. For example, the possibility that an actual conflict will arise in the future that requires the attorney to withdraw from representing one or more clients, must be disclosed and discussed. Such an event would require each client to incur the additional expense of hiring separate counsel, and may also result in delays that could carry financial or other consequences. Benefits inherent in all common representation will invariably include eliminating duplication of effort and expense. In addition, there are situations where a united front is far stronger and more likely to be effective than individual efforts.

There are also responsibilities inherent to all common representation that must be disclosed and discussed. The client bears a greater burden for decision-making in a common representation. If a disagreement arises among the clients concerning the strategy to be implemented or whether they should accept a settlement, the attorney cannot advocate for one client to the exclusion of the position taken by the others. Such a conference would need to be resolved by the clients without the attorney’s assistance or with the assistance of independent counsel hired at each client’s own expense. In certain situations, the risk of adversity is so great that common representation should not be undertaken. If contentious litigation or negotiations are likely, the clients should be encouraged to hire separate counsel rather than consent to common representation. Among the relevant factors for considering whether the attorney involves creating or terminating a business or commercial relationship, and the likelihood of any client or prior disclosed between the clients. Other relevant factors include whether it is likely that there will be a discrepancy in the clients’ testimony, an incompatibility in their positions or a possibility of different settlements being offered to each client. The attorney should also examine his or her relationship to the clients. If the attorney has a pre-existing relationship with any of the clients or the attorney will represent one or more of the clients on a continuing basis in the future, those circumstances may make it difficult for the attorney to maintain impartiality and common representation may not be advisable.

Paramount to any discussion regarding informed consent to common representation is the impact that common representation will have on confidential and privileged information. Clients must understand that although all information discussed with the attorney will remain privileged and confidential as to third parties, there is no confidential or privileged information between the clients being commonly represented. If one of the clients shares information that is material to the representation and asks the attorney to keep it secret from the other client, the attorney cannot comply with that request. The information will necessarily be disclosed to the other clients. Further, the request by one client that material information not be shared with the other clients could be an event that requires the attorney to withdraw from representing all clients. Clients should also understand at the outset that if they are not aligned in the future and they litigate against each other, none of their communications with the attorney are protected as privileged or confidential.

Often in a common representation situation the responsibility for payment of the fees and expenses will be borne disproportionately by the clients. Assuming the arrangement will not materially limit the attorney’s representation of all clients, each client can give informed consent to such an arrangement. Irrespective of how the obligations to pay the attorney’s fee are apportioned among them, a delinquency has the potential to create adversity that may impact the attorney’s ability to provide effective representation. For example, where a bill becomes delinquent it may give rise to the attorney’s motion to withdraw on behalf of all clients even though the delinquency may have been created by only one of the clients failing to pay his or her share of the ongoing fees and expenses being incurred. This potential conflict should be discussed with each client at the outset and confirmed in writing.

In some common representation situations, the ethics rules may require a further writing signed by the client after the initial engagement. The settlement phase of a dispute or litigation is such an example. Under the new rules, aggregate settlements for multiple clients now require informed consent signed by the clients where the prior rules permitted oral consent. Before a settlement offer is made or accepted, an attorney must speak with each client to inform each of the material terms of the settlement. Those communications must essentially include an explanation concerning what each client will pay or receive as a result of the settlement. A subsequent writing confirming those conversations must be signed by each client.

Both the attorney and the clients benefit from identifying potential conflicts and engaging in a complete and candid discussion, as well as remembering that not every potential conflict is waivable. Multiple party representation can be very advantageous to clients given both the economic efficiencies and the strength in presenting a united front. However, if attorneys fail to appreciate potential conflicts at the outset, or to identify potential conflicts during the representation which require the clients to consult with independent counsel, they could fail to achieve their clients’ joint objectives. By comparison, anticipating and disclosing potential conflicts can often eliminate actual conflicts from materializing. Being forced to withdraw counsel for one or more of the clients during the representation is likely to significantly increase the costs for all clients and will inevitably leave an attorney with unhappy clients. Either of these results can lead to bar counsel complaints, or an attorney being in the unenviable position of defending a legal malpractice claim. It is advisable that attorneys review their practices and procedures and establish protocols in multiple party representation to ensure compliance with the new ethics rules. The mandated potential conflict waivers are fact-intensive and there is no standard waiver that can be reliably used in all cases. However, the author is providing sample potential conflict letters for common representation situations on My Bar Access.
Liquating standard-essential patents: recent developments

By Michael T. Renaud and Sandra J. Badin

Recently, Lawyers Journal republished an article we had submitted to the Massachusetts Bar Association’s Complex Commercial Litigation Section Quarterly Newsletter late last year entitled, “The Impact of Recent Decisions Regarding Patent Hold-up on the Future of Standards-Setting Organizations” (CSIRO) v. Cisco Systems, Inc., providing meaningful guidance on a number of open questions pertaining to the calculation of damages for the infringement of SEPs. Among other things, the Federal Circuit determined that the district court did not take sufficient account of the asserted patent’s status as essential to the standard at issue and concluded that this failure may have resulted in an overvaluation of the patent’s value. Based on this basis, the court vacated the $16 million damages award won by CSIRO at trial. Relying on its 2014 decision in Ericsson, Inc. v. D-Link Sys., Inc., the Federal Circuit noted that when SEPs are at issue, two special assessment considerations apply to ensure that the patent owner is not improperly compensated for the value of the standardization of a technology, and is instead only compensated for the value of the patented invention itself. “First, the patented feature must be apportioned from all of the unpatented elements of the standard. Second, the patentee’s royalty must be premised on the value of the patented feature, not any value added by the standard’s adoption of the patented technology.”

Critically, the court made clear that these special considerations apply to all SEPs, even just to SEPs whose owners have agreed to license them on reasonable and non-discriminatory (RAND) terms. Explained that regardless of whether an SEP is subject to a RAND commitment, its value “is distinct from any value that artificially accrues to the patent due to the standard’s adoption.” A patent owner is only entitled to the former, the court said, but not to the latter. “Without this rule,” it observed, “SEP owners would receive all of the benefit created by standardization — benefit that would otherwise flow to consumers and businesses practicing the standard.”

The Federal Circuit went on to explain that the mere fact that an SEP owner did not act to standardize it did not account for standardization.” And because it did not have the benefit of Ericsson, the court concluded that the patented technologies as mentioned three “Global-Pacific factors” factored CSIRO-factor 8, which relates to the accused product’s commercial success; factor 9, which relates to the overlap of the patented invention over competing products, and factor 10, which relates to the advantages of the patented invention over competing products. In Ericsson, the Federal Circuit had observed that these three factors are irrelevant or misleading in cases involving patented technology that has been incorporated into a standard — especially a widely adopted standard — because products that comply with a standard are much more likely to be commercially successful, all else being equal, than products that do not.

Conversely, the court noted, competing technology that is not incorporated into a standard may be a commercial failure at least in part because it is not incorporated into a standard. Therefore, without the benefit of substantial standard-compliant products in favor of the patent owner, as the district court had, without taking into account that the commercial success may derive entirely from standardization itself, opens the door to compensating SEP owners for the value of standardization, not just for the incremental value of their patented technology.

The court’s observation that the value of standardization itself should not accrue to the patent owner is based on an unstated (but mistaken) assumption that standards setting organizations (SSOs) are agnostic when deciding among different patented technologies competing for incorporation into their standard. But SSOs typically make their incorporation determinations based on the basis of extensive evaluative work which technology is superior in a number of respects, including expected commercial success, and efficiency. Under such circumstances an SEP owner would arguably be entitled to some compensation for the success of the standard, and not just the value of the patented technology she contributed to it.

The 1020 Investigation (International Trade Commission)

In our previous article, we discussed Administrative Law Judge Essex’s approach to the enforcement of SEPs, which he outlined in his Initial Determination on Remand in International Trade Commission Investigation No. 337-TA-612/613, Certain 3G Mobile Handsets and Components Thereof (the 1020 Investigation). In its review of his determinations, the Commission did not comment on Judge Essex’s findings regarding patent holdup and patent holdup because it concluded that there was no violation of Section 337 (i.e., no importation or sale after importation into the United States of products infringing the complainant’s patents) and therefore no remedy for it to issue or to weigh against the public interest. That is, Judge Essex’s findings that the complainant did not en
Dispute Resolution

Commercial arbitration

Spotlight on the preliminary hearing

BY JONATHAN W. FITCH

The preliminary hearing presents the first and best opportunity for the parties, their counsel and the arbitrator to design a process for the arbitration that will effec-
tively meet the needs of the parties. I have had quite a diverse range of experi-
ences with preliminary hearings, both as con-
sultant and as arbitrator. The best of them have involved creative efforts to make use of the flexibility of arbitration in order to achieve the objective of a speedy, fair and just process. Here are some suggestions for getting the most out of the critical pre-
liminary hearing.

Prepare an agenda and stipulations with opposing counsel. Arbitrators and arbitral institutions commonly circulate checklists for the preliminary hearing, for instance, Section P-1 of the AAA Com-
mercial Arbitration Rules and Rule 16 of JAMS Comprehensive Arbitration Rules and Procedures. Counsel should confer on the items set forth on such lists and prepare stipulations as to all uncontested matters, such as which arbitration rules, procedural law and substantive law gov-
ern. Use the process to identify areas of disagreement and special matters that should be brought to the attention of the arbitrator at the preliminary hearing. Fi-
nally, counsel should try to agree on a proposed schedule for all events up to and including the merits hearing. Get the joint filing to the arbitrator as soon as possible, although it will surely be appreciated if it is received any time before the prelimi-
ary hearing.

Have your client attend the prelimi-
ary hearing. The parties, who are the stakeholders in the arbitration, usually do not participate in the preliminary hearing. This is a lost opportunity. The prelimi-

ary hearing gives parties the chance to hear arguments, comments and questions directly from opposing counsel and the ear of the arbitrator, and is them-

ber understanding of the personalities in-

olved, the true issues in dispute, the po-
cerned range of costs and benefits in-
hing the arbitration through to an award, the prospects for settlement and what an acceptable settlement might involve.

Request that the preliminary hear-

ing be conducted in-person. Preliminary hearings are most commonly held in a conference call. Conference calls are an efficient method of communication; they minimize the participants’ time com-
mits and they are relatively easy to schedule. But a great deal may be gained when all of the participants in an arbitration meet together, face to face, at the outset of the process. Such meetings may facilitate and encourage an exchange to enable the participants to learn about the personalities of all con-
cerned, their approach to and opinions on the merits, and their vital interests in a resolution. A face-to-face meeting may facilitate an early discussion regarding mediation or settle-
ment. Moreover, it is likely that the parties, and perhaps counsel, have not had any prior dealings with the arbitrator. I suggest that counsel should seize the opportunity to make a persuasive first im-
pression of her client’s case — in person.

Focus on advocacy and educating the arbitrator. The arbitrator will have read the papers but will still be new to the facts and may not know what law is ap-
licable. Be prepared to give a very short, clear and persuasive précis of your case.

Include counsel presentations as an agen-
da item in the joint filing.

Consider bifurcation of the proceed-
ings. It is often beneficial, particularly in complex disputes with multiple theories of liability and large potential damages, to structure the arbitration in liability and damages phases. The arbitration in one phase may involve discrete areas of limited discovery and a focused merits hearing. A determination of liability will often elimi-
nate grave uncertainties and facilitate a mediation or settlement on damages. If counsel believes that bifurcation is ap-
propriate, seek agreement with opposing counsel before the preliminary hearing. If agreement cannot be reached, alert the ar-
bitrator to your client’s interest in discuss-
ing bifurcation at the preliminary hearing.

In a complex case, the arbitrator may wish to set a briefing schedule for a motion to bifurcate as the first order of business.

Reserve a realistic number of days for the merits hearing and empower the arbitrator to manage for comple-

cion in the allotted time. One of the comparative advantages of arbitration is the ability to secure a firm date for the merits hearing at the preliminary confer-
ence. Counsel should be able to reach an agreement in advance of the prelimi-
nary hearing regarding a realistic number of days for the merits hearing and also have a mutual understanding about how many of those days should be. If counsel shares an expectation that the arbitration should be completed in a cer-
tain number of days, barring unexpected developments, that expectation should be communicated to the arbitrator with the request that the proceedings be managed accordingly.

Plan for peace. A very large percent-
age of cases settle, as every experienced lawyer has learned first-hand. Mediation of the claims in arbitration should be on the agenda in almost every case. Mediation will be more advantageous to staying at the table and put the dispute on hold than forcing the arbitrator to decide on opposing counsel and in the preliminary hearing. It is important to identify the impediments, if any, to immediate media-
tion and the avoidance of the expenses of arbitration. If a party believes that more information is required before it would be possible to conduct a successful media-
tion, the parties should explore exchange-
ning that information on an expedited ba-
sis. The parties should explore whether it would be more advantageous to stay the arbitration pending the conclusion of the mediation or to proceed with both arbi-
tration and mediation on parallel tracks.

Jonathan W. Fitch is managing partner of Fitch Law Partners LLP,

where he has worked as a trial lawyer in diverse areas of business

litigation since 1984. He is a member of the panel of arbitrators

for the International Centre for Dispute Resolution and also for the

American Arbitration Association, Large and Complex Cases. He is

a graduate of Williams College, Yale School of Management and

Boston College Law School.

Employers’ rights and restrictions under the new recreational marijuana use law

BY MEGHAN SLACK

On Dec. 15, 2016, The Regulation and Taxation of Marijuana Act (“the Act”) began to take effect in Massachu-
setts. It is now legal, under state law, for adults 21 years of age or older to possess and use recreational marijuana as

under certain restrictions. To date, voters in eight states and Washington, D.C., have passed ballot initiatives allowing for recreational use of marijuana. Twenty-one additional states have passed laws that will allow individuals 21 years of age or older to possess and use recreational marijuana for adults 21 years of age or older to possess and use recreational marijuana use law

Drug-Free Workplace

The Act provides some guidance on employers’ rights. As with the Massachusetts Medical Mariuana Ini-
tiative, the new law protects marijuana users from civil and criminal penalties. However, nowhere in the text does it create a private cause of action against employers. The law permits employers to maintain drug-free workplace pol-

icies, prohibiting use at work and em-

ployment from working while under the influence. Also important to note, many federal contractors and federal grant-

es must now ensure that they are drug-

free. Drug-Free Workplace Act, which requires these employers to maintain drug-free workplace policies.

Drug Testing

Marijuana is still a Schedule I sub-

stance under federal law, which means any use, including medicinal use, vio-

lates the Controlled Substances Act. In

other words, courts have held on this fact considerably and regularly upheld employers’ rights to terminate employees for marijuana use. Still, Massachusetts law is likely to give there careful-

ly weigh everyone’s interests in having safe and drug-free workplaces against employers’ rights. Thus, employers should evalu-

ating their drug testing policies.

Policies should focus on workplace safety and preventing use on the job. For safety-sensitive positions, random drug testing will likely continue to be permissible, however employers should consider eliminating such tests when safety is not of concern. If an employer has reason to believe an employee is intoxicated at work, drug testing that would also likely be permit-
ted regardless of the employee’s posi-

tion. Because there is currently no way to test for marijuana that can dis-

tinguish between an individual who is actively under the influence versus one who has recently used but is no longer impaired, employers should document the factors that lead them to suspect ac-

tive intoxication to counter any claims of wrongful termination.

In some cases, employers should pro-

vide advanced notice of their drug test-

ing policies, including pre-employment testing. For example, if a job offer is contingent on passing a pre-employment drug test, the applicant should be notified in the of-

fer or earlier in the application process. Because the new law is rights-based, with no pre-

 communion among workers and applicants, policies should explicitly state that drug testing will include testing for marijuana.

The new state law will not affect employer obligations under federal law. Notably, employers must still comply with the Department of Transportation drug testing requirements.

Finally, uniform enforcement of drug-free workplace policies will be a high priority. Inconsistency in the application of these policies could inadvertently lead to charges of illegal discrimina-
tion based on an employee’s protected class status.

Recent Massachusetts Trial Court Dismissal

Also of note is a recent decision out of Suffolk Superior Court, which pro-
vides some insight into how the Act will be interpreted by Massachusetts courts. In Barbuto v. Advantage Sales and Marketing LLC, et al., the court dismissed several wrongful termination claims filed under the state recreational marijuana law. The plaintiff, who had a valid prescription for marijuana, was fired after she tested positive for 32.

Labor & Employment
Important cases that would be relied on as precedents by all citizens of the commonwealth, rather than just the parties to the reformation. In short, the system was set up to force the highest court in the commonwealth to decide cases that impacted very few citizens.

This procedure was not all rosy for the parties involved either. Bringing an action directly in the SJC was not without its drawbacks, especially given that trust reformation cases were not a legal priority for the SJC when compared to other matters on its calendar — notably criminal matters. Also, despite the fact that the cases were nearly always non-adversarial, the SJC still required a full and complete record to establish that the parties seeking relief had “the requisite degree of proof that they are entitled to the relief they seek.” Walker v. Walker, 433 Mass. 581, 582 n. 5 (2001). The assembly and production of such records can be costly, if not cost prohibitive.

In 2014, while observing trends in the commonwealth and around the country, the SJC set out to identify what, if anything, could be done to have other courts hear tax-related trust reformation cases. The committee that prepared the Amended Report opined that it is “essential for the parties seeking relief to have a decision from the state’s highest court — notably criminal matters. Also, despite the fact that the cases were nearly always non-adversarial, the SJC still required a full and complete record to establish that the parties seeking relief had “the requisite degree of proof that they are entitled to the relief they seek.” Walker v. Walker, 433 Mass. 581, 582 n. 5 (2001). The assembly and production of such records can be costly, if not cost prohibitive.

In 2014, while observing trends in the commonwealth and around the country, the SJC set out to identify what, if anything, could be done to have other courts in the Commonwealth to decide cases that impacted very few citizens. This procedure was not all rosy for the parties involved either. Bringing an action directly in the SJC was not without its drawbacks, especially given that trust reformation cases were not a legal priority for the SJC when compared to other matters on its calendar — notably criminal matters. Also, despite the fact that the cases were nearly always non-adversarial, the SJC still required a full and complete record to establish that the parties seeking relief had “the requisite degree of proof that they are entitled to the relief they seek.” Walker v. Walker, 433 Mass. 581, 582 n. 5 (2001). The assembly and production of such records can be costly, if not cost prohibitive.

In 2014, while observing trends in the commonwealth and around the country, the SJC set out to identify what, if anything, could be done to have other courts in the Commonwealth to decide cases that impacted very few citizens. This procedure was not all rosy for the parties involved either. Bringing an action directly in the SJC was not without its drawbacks, especially given that trust reformation cases were not a legal priority for the SJC when compared to other matters on its calendar — notably criminal matters. Also, despite the fact that the cases were nearly always non-adversarial, the SJC still required a full and complete record to establish that the parties seeking relief had “the requisite degree of proof that they are entitled to the relief they seek.” Walker v. Walker, 433 Mass. 581, 582 n. 5 (2001). The assembly and production of such records can be costly, if not cost prohibitive.

In 2014, while observing trends in the commonwealth and around the country, the SJC set out to identify what, if anything, could be done to have other courts hear tax-related trust reformation cases. The committee that tried to serve on the committee, and the committee's proposed recommendations were adopted by the SJC on October 1, 2014. See Amended Report of the SJC's Ad Hoc Committee on Bosch Litigation (the full report is available online at http://www.mass.gov/courts/case-legal-res/rules-of-court/sjc/report-of-sjc-ad-hoc-committee-on-bosch-litigation.html). Just one month after adopting the Amended Report, the SJC set forth its new plan for Bosch cases in its decision of O’Connell v. House, 470 Mass. 1004 (2014). Specifically, the SJC in O’Connell adopted the policy that cases which “involve no novel or unsettled issue of Massachusetts law, require only the application of settled Massachusetts legal principles and have no particular significance beyond the specific parties and the specific facts involved” are to be decided by the Probate and Family Court. The committee that prepared the Amended Report opined that it is “essential for the parties seeking relief to have a decision from the state’s highest court. Specifically, it is not necessary in cases where “the applicable principles of state law are settled, and the only job of the state court is to apply settled legal principles to a given set of unremarkable facts. …The role of this court could be more limited — to hear and decide only those [tax-related reformation] cases that raise a novel and unresolved issue of Massachusetts law or are significant for some other reason.” Amended Report, p. 19-20.

Has the change had an impact? It is hard to say. As of yet, there are no reported cases in Massachusetts, and no pronouncements from the Internal Revenue Service indicating that it is unwilling to be bound by Probate and Family Court decisions. As long as that holds true, for the many cases that meet the test outlined in O’Connell, a quicker, more efficient path to reformation can be expected. At the very least, this will provide a reduction in potential stress and a diffusing of conflicts between settlors, beneficiaries and trustees, all of whom are concerned when tax issues threaten to diminish the effectiveness of an estate plan. It should be noted that trust reformation at the Probate and Family Court level is not the only avenue available to parties seeking to change certain provisions of a trust when the purpose of those changes is not related to the estate tax. The new Uniform Trust Code (M.G.L. c. 203E, § 111) allows interested parties to enter into binding, non-judicial (no court involved) settlement agreements to resolve disputes over issues such as interpreting trusts, or determining the powers, authority or liability of the trustee. The settlement agreement will be as valid as long as it does not violate a material purpose of the trust. Reforming a trust by means of the Uniform Trust Code...
In search of a true safe harbor

Diverting sexually exploited children from delinquency proceedings to support child requiring assistance petitions

BY CRISTINA F. FREITAS AND DEBBIE F. FREITAS

On Nov. 21, 2011, then-Governor Deval Patrick signed House Bill 3808, An Act Relative to the Commercial Exploitation of People, into law. The human traf-

ficking and sexual servitude law added a fifth category of Child In Need of Services petitions (now called Child Requiring Assistance or CRA petitions following the 2012 legislative overhaul) for a “sexually exploited child.” On February 19, 2012, the law went into effect. The following year, with the passage of Senate Bill 41, over 5,000 CRA applications were filed statewide. None were for a child alleged to be sexually exploited. And yet, across the United States, nearly 300,000 children are trafficked for sex each year.

In Massachusetts, the numbers are no less dire. At least 480 chil-

dren from Suffolk County alone have received services related to commercial sexual exploitation. There are likely far more statewide, but the clandestine na-

ture of sexual exploitation leaves these children in the shadows of society, un-

identified and unaccounted for. Survivors sharing their history and their other anecdotal evidence demonstrate that commercial sexual exploitation is an issue confront-
ung communities from Worcester to Lowell and Allston/Brighton to East Boston. Research shows that almost 98 percent of these children are girls and more than half are girls of color. The median age of these girls is 15 years old, although the mean age is 13 years old and the youngest was age 11. Over 75 percent of these girls are U.S. citizens or permanent residents.

Many risk factors increase a child’s vulnerability to entering the commercial sex trade. Presence of family pov-
erity; homelessness; running away; living in high crime neighborhoods or violent communities; being lesbian, gay, bisexual or trans-
gender; having mental health issues or having parents who do; using substances or having parents who do; and living in cities with international or large airports all increase a child’s likelihood of becoming sexually exploited. Many live double lives, attending school and living with their families or in state-run group homes during the day and being exploited by night. The trauma associated with sexual servitude can lead to an incidence of sexually-transmitted dis-eases, but also depression, anxiety, post-

traumatic stress disorder, and long-lasting emotional and psychological scars. A relatively untapped but potentially powerful link to sex work is the addition of a sexually exploited child CRA category. This addition reflects an evolution in un-

derstanding that these children are not of-
fendications. A CRA’s child alleged to be a ‘sexually exploited child’ is any person under the age of 18 who has been subjected to sexual exploitation as a result of being a victim of a crime of sexual ser-

vitude, sex trafficking or inducement of a minor; engages in common night walking/ street walking; or engages in sexual con-
tacts in exchange for a fee or in exchange for food, shelter, cloth-
ing, education or care. A parent or police officer may file a petition in the court requesting assistance for a sexually exploited child. Parents and police offi-
cers are doing so more now than ever, but many are met with a response from the criminal justice and child welfare sys-

tems. Contributing to this problem are the many forms that sexual exploitation can take. No longer is this crime limited to mail-order brides, brothels, and pornogra-

phy. The proliferation of the internet and electronic technology has created a sexual-
tourism industry, generating millions of dollars each year. One study estimated that one child sex trafficker can generate as much as $650,000 annually by exploit-

ing four children.

Solutions for increasing awareness and interventions for these youth require a multidisciplinary approach. The most successful laws treat these girls as vic-
tims of crimes, not criminals. Histori-
cally, prostituted females were arrested ten times more frequently for selling sex than males were for buying sex. Ex-

tricating these youth from exploitation requires increasing criminalization of victims while increasing access to inter-
terventions. The “safe harbor” provisions included in section 39L of Chapter 119 of the Massachusetts General Laws as amended by Chapter 178 of the Acts of 2011 takes important steps in actualizing this goal, but critical gaps remain. This section of the law provides the district attorney or the judge the discretion to stay an arraignment of a juvenile charged with common night walking and hold a hearing on whether a care and protec-
tion petition or child requiring assistance petition should be filed, thus diverting a delinquency case to a child welfare case. Many times, however, sexually exploited children are arrested not for common night walking but for street crimes (such as drug use, loitering and trespassing) or survival crimes (such as sleeping on the streets and evading public fares). The law has yet to create any opportunity for sexually ex-

ploited youth charged with these crimes to be tried from their delinquency proceed-
ings to supportive services.

Juvenile and child welfare practitio-

ners should be vigilant in recognizing and supporting the youth in their case-

loads that are sexually exploited or are at risk for becoming exploited. Identifi-

cation is not always obvious. Youth may be charged with property crimes often connected with the season, wear designer label clothing or shoes, present with drug use, are home-

less or have experience state agency removal from the home, have bruising, or who have certain tattooing may all be at risk for being commercially exploited. Child-

ren charged with delinquency are described as those noted above are also at risk, but even some normative adolescent non-

traditional behavior, such as running away, also increases the risk for becoming sexually exploited. Traffickers regularly target these runaway children by offering to meet their needs in ways their current custodian, including the Department of Children and Families, does not.

Unfortunately, the traumatic history that these girls face leaves them vulner-
able to sexual exploitation creates a

mistrust of adults that can impede a suc-
cessful attorney-client relationship. Suc-

cess in engaging these youth routinely requires a patient and non-judgmental approach. Adopting the language of the child (“boyfriend” versus “pimp”), awareness of the child’s physical stance (threatened or at ease), preparedness for discussion of sexual topics, maintaining appropriate boundaries, utilization of open ended questions, and positive rein-

forcement (celebration of small successes, giving credit, helping children express their feelings, etc.) are all recognized as ways to connect with this population. Chief among these considerations is the need to be consistent and supportive in accessing the right services at the right time, as dictated by the child’s position.

Moving forward, communities should employ evidence based models of engaging this population. An empow-

erment paradigm fueled by community support and the strength of survivors has successfully led to the extraction of many of these girls. Increasing ac-

cess to safe housing, a trauma informed continuum of care, street outreach, and a pathway to safety and stability are es-

sential. Attention to youth aging out of the child welfare system is also critical, as this population is at risk of becoming homeless, losing social supports as their cases close, and thus increasing their vul-

nerability.

Although creation of multidisci-

plinary teams to address the issues uniquely faced by this population im-

proves outcomes, defense attorneys for children are often not included in these task forces and committees. As treat-

ment of these youth moves away from criminal prosecution to supportive in-

terventions, inclusion of children’s at-

torneys is critical to reaching some of the most vulnerable and least likely to be identified children. These youth often form strong and trusting relationships with their long-term attorneys bound by attorney-client privilege, and these attor-

neys must be involved in service provid-

er meetings and task forces in order to reach these children and link them to the right services, consistent with their cli-

ent’s position. While much progress has been made in implementing supportive services in lieu of criminal prosecution for this unique population in Massachu-

setts and utilizing the “sexually exploit-
ed child” CRA is an important part of that progress, several known risk path-

ways remain unaddressed, leaving many children vulnerable.

What Employers Can Do Now

While we await further guidance for employers through regulations, court opinions, or a possible legis-

lation, it is advisable for employers to reevaluate their existing drug policies and tailor them to protect their inter-

ests in maintaining a safe and drug-

free workplace, while balancing their workers’ privacy rights. Employers with existing policies should affirm to their employees that those policies are still in force and clearly note that drug testing will include testing for mari-

juana. Finally, as this area of law con-

tinues to develop, employers should seek out assistance from experienced employment attorneys in redrafting and enforcing their drug policies.
Compliance without cost
Understanding and avoiding the potential economic impact of changes to federal overtime regulations

BY ELIZABETH DILLON AND LAUREN K. HALL

The U.S. Department of Labor (DOL) recently updated its federal overtime regulations, in an effort to extend overtime wages to workers currently covered under the Fair Labor Standards Act (FLSA). The U.S. District Court for the Eastern District of Texas recently enjoined the Department of Labor from implementing the regulations on Dec. 1, 2016, as planned. As the litigation continues, it is uncertain whether the court will ultimately permit the DOL to implement its updated regulations. While the parties continue to litigate the matter, attorneys representing employers should take this opportunity to advise their clients on strategies to avoid the updated regulations’ anticipated economic burden, should the courts ultimately rule that the DOL may implement them.

The updated regulations, if implemented, would benefit some employees, while significantly burdening employers. The DOL’s updated regulations would raise the mandatory minimum salary for exempt workers from $455 per week (or approximately $23,600 per year) to $913 per week (or $47,476 per year). If the DOL ultimately implements its updated regulations, employers who pay their salaried employees less than $47,476 per year would either have to increase these employees’ salaries, or reclassify the employees as non-exempt. Under the Fair Labor Standards Act, employers must pay all non-exempt employees overtime, at a rate of one and a half times their regular hourly rate, for each hour they work over forty (40) hours in a single week. The DOL’s updated regulations, if implemented, would require employers to incur significant expense to either increase employees’ salaries to maintain their exempt status, or to pay overtime to employees rendered non-exempt.

Indeed, the DOL specifically updated its regulations in an effort to provide more workers with additional income, whether through increased salaries or new overtime benefits. The regulations, once implemented, would have the potential of benefiting many employees, as the DOL estimates that the changed regulations will impact 4.2 million workers nationwide, with $8,000 of these workers in Massachusetts alone.

At the same time, however, the updated regulations, if implemented, would significantly burden employers. The DOL has estimated that the updated overtime regulations would require employers nationwide to pay their employees an additional, estimated $1.2 billion in wages per year. The economic impact of the updated regulations, if implemented, would go far beyond employers’ new obligations to pay employees additional wages, however. The DOL has estimated that, nationwide, employers would incur an additional approximately $295 million in non-wage related costs (including adjustment costs, management costs, and regulatory familiarization) each year for the first 10 years if the regulations were to go into effect. If the updated regulations are ultimately implemented, employers who fail to comply will likely face significant penalties including both mandatory treble damages required by statute as well as attorneys’ fees awards under the Massachusetts Wage Act. Further, to the extent that Massachusetts and federal governments’ recent heightened focus on enforcing wage laws to deter wage theft continues, employers who fail to comply with the updated regulations, once implemented, will likely also continue to face additional, significant economic fines and penalties issued by the government.

Massachusetts employers may take several steps to ensure compliance with the updated regulations, while protecting their bottom line. Although we anticipate that the updated regulations, if ultimately implemented, would greatly impact Massachusetts businesses, there are several changes employers may implement, to ensure compliance with the DOL’s updated overtime regulations (if and when they are effective), while limiting the regulations’ overall economic impact. Thus, while the regulations’ future remains uncertain, attorneys advising employers should take this opportunity to advise their clients as to the anticipated economic impact of the updated regulations, and ways to minimize this impact, if and when the regulations go into effect.

First employers may comply with the regulations, once they are effective, by simply raising the salary of those exempt employees who currently earn between $23,600 per year to $47,476 per year. In doing so, employers would not only comply with the updated overtime regulations, they would also ensure that their exempt employees can continue to perform unlimited overtime hours, without any additional cost. Employers whose employees already earn close to the new $47,476 per year threshold may ultimately choose this option to avoid the potentially significant additional costs associated with formerly exempt employees becoming eligible once the DOL can implement its updated regulations. Further, employers with significant overtime needs may ultimately choose to comply with the updated regulations in this manner, as increased costs associated with raising exempt employees’ salaries, even once the new regulations are implemented, once implemented, may ultimately cost less than paying those same employees (if rendered non-exempt) at time and a half for significant overtime hours.

Second, employers may comply with the updated regulations, once they are implemented, by simply re-classifying previously exempt employees earning less than $47,476 per year as non-exempt, and then paying these newly non-exempt employees time and a half for all overtime hours worked over 40 per week. If and when the new overtime regulations are implemented, businesses which rarely require their employees to work over forty (40) hours in a single week will likely choose to comply in this manner, as will businesses which can afford to pay their employees for overtime work without excessive cost (e.g., employers whose non-exempt workers earn a relatively low wage).

Third, many employers may ultimately choose to limit the hours their employees work to 40 hours per week, with a corresponding reduction in employees’ total weekly compensation to which these workers would be entitled, under the changed regulations.

Fourth, employers may avoid any additional costs by raising a few exempt employees’ salaries to $47,476, and then offering them greater flexibility to work without excessive cost (e.g., employers whose non-exempt employees’ hours are close to the new $47,476 per year threshold). Employers who fail to comply with the updated regulations may choose to extend a single (formerly exempt) employee’s job duties over multiple non-exempt employees, to avoid a single employee ever earning overtime. For example, if an employer uses two employees to perform what was once a single role, that employer may use 80 hours of employee time per week (40 per employee), without having to pay a single hour of overtime.

Conclusion
While the courts continue to determine whether to ultimately permit the DOL to implement its updated overtime regulations, attorneys representing employers should take this opportunity to advise their clients on ways to minimize the economic burden the updated regulations will cause, once implemented. For example, although the DOL has estimated that its updated overtime regulations will significantly impact employers, the courts have not reduced such an impact by implementing one or more of the recommendations set forth above. Attorneys advising employers should work closely with their clients to not only ensure compliance with the DOL regulations once implemented, they should use this time of uncertainty to determine how employers may best comply with the regulations, if and when they are implemented, while still protecting their bottom line.

Elizabeth Dillon is an attorney at Cetrulo LLP. Her practice focuses on employment advice and counseling, as well as employment, business, real estate and probate litigation. Dillon serves on the board of directors for the Young Lawyers Division and is a member of the MBAs’ Labor and Employment Section.

Lauren K. Hall is an associate at Cetrulo LLP’s Toxic Tort Group. Hall focuses her civil litigation practice on asbestos and other toxic tort litigation, product liability and insurance defense.

Jim Gallagher practices in the Business Law, Employment, and Litigation areas at Davis, Malm & D’Agostine. Jim is a trial lawyer with experience in a range of areas, including fiduciary, securities, commercial and class action, probate, and employment litigation in state and federal court, and also advises numerous residential and commercial condominium associations.
The rights of third parties to intervene in guardianship proceedings: A practical application of the holding in Re Guardianship of B.V.G.

BY VIRGINIA W. CONNELLY

Chapter 190B of Massachusetts General Laws (the “MUPC”) shifted the balance between the societal need to protect incapacitated persons and the rights of those persons to maintain as much autonomy as possible. For example, the expanded medical certificate provides much more detail about the individual’s ability or inability to perform various functions. The court will limit the guardian’s authority to oversight of those functions that the individual cannot do independently.

The MUPC also expanded the rights of third parties to intervene in guardianship proceedings to further the interests of the incapacitated persons. The Supreme Judicial Court interpreted and applied this new law in the matter Guardianship of B.V.G. 1

Background Facts and Procedural History

BVG was diagnosed with intellectual disabilities, Tourette Syndrome and emotional difficulties. When her parents divorced, the father was granted custody and the mother had supervised visits. Upon B.V.G.’s 18th birthday, the father filed a petition for guardianship. The mother filed an appearance, seeking to expand her parenting time. The court appointed counsel for B.V.G. The father was appointed temporary guardian, and the parties agreed that efforts would be made to strengthen mother’s relationship with B.V.G. Also, B.V.G.’s maternal grandfather could exchange one email per day with her. The grandfather believed that the father was interfering with the emails, and filed a motion to intervene in the guardianship proceeding under Mass. R. Civ. P. 24, claiming he was standing as an “interested person.” The court denied the motion, finding that he had no standing under c. 190B, §5-306(c), because the grandfather had no financial, fiduciary or custodial relationship with B.V.G. On appeal, the Appeals Court found that the grandfather had standing, but upheld the denial of his motion, concluding that court-appointed counsel for B.V.G. provided adequate protection of B.V.G.’s interests. The grandfather was granted another appellate review by the Supreme Judicial Court.

Court’s Analysis of Meaning of “Interested Parties”

The SJC took a second look at the meaning of “interested person” in the context of intervention in a guardianship proceeding. Chapter 190B, §1-201(24) defines an interested person as:

1. heirs, devisees, children, spouses, creditors, beneficiaries, and any others having a property right in or claims against a trust estate or a estate of a decedent, ward, or protected person. It also includes persons having priority for appointment as personal representative, and other fiduciaries represented interested persons. The meaning as it relates to particular person may vary from time to time and shall be determined according to the particular purposes of, and matters involved in, any proceeding.4

The SJC noted that c. 190B, §5-306(c) provides that the court, “on its own motion or appropriate petition or motion of the incapacitated person or other interested person…may limit the powers of a guardian…” and thereby create a limited guardianship.5

The purpose of that provision is set forth in Section §5-306(a):

The court shall exercise the authority conferred in [G.L. c. 190B, §5-301 et seq.] so as to encourage the development of maximum self-reliance and independence of the incapacitated person and make appointment and other orders only to the extent necessary that the incapacitated person’s limitations or other conditions warranting the procedure.

The MUPC comment on the preference for limited guardianships indicates:

[T]he purpose of subsections (a) and (c) is to remind an appointing court that a guardianship under this legislation should not confer more authority over the person of the [incapacitated person] that appears necessary to alleviate the problems caused by the person’s incapacity.

The SJC concluded that the Legislature intended Section §5-306(c) to “provide a means by which an individual interested in the welfare of an incapacitated person could advocate on behalf of that person’s interests in obtaining such a limited guardianship.”

Unlike intervention under Mass. R. Civ. P. Rule 24, which requires that the proposed intervenor have a pecuniary or other personal right or interest in the matter, intervention by a third party in a guardianship proceeding can be based on the third party’s interest in the welfare of the incapacitated person.

The SJC stated that “the grandfather has demonstrated an interest in B.V.G.’s welfare sufficient to establish that he is an interested person.” The grandfather had specifically asserted that B.V.G. wanted to have a relationship with him and vice versa. There was no evidence in the record to suggest that increased contact between the grandfather and respondent would be harmful. The SJC rejected father’s argument that intervention was not warranted because B.V.G. was already adequately represented by counsel. The MUPC encourages a broad right of advocacy for an incapacitated person’s protected interest in a limited guardianship. One judge has said that a proposed intervenor is an “interested person,” nothing more is required to establish that person’s right to intervene.6

Looking Forward: The Practical Application of the B.V.G. Holding

Under prior law, an unrelated third party could file a petition for appointment of a temporary guardian, but it was ineffective to intervene in a guardianship proceeding filed by another person.

Filing for guardianship can put a heavy financial and personal burden on the petitioner, as well as on the incapacitated person’s health care and personal providers. The sheer volume of guardianship proceedings does not allow for routine intervention as a matter of course. The Probate and Family courts will need to be scrupulous in determining those cases in which intervention is proper and in the best interests of the incapacitated person. The realm of possible intervenors includes not only blood relatives or relatives by marriage, but also caretakers, friends, neighbors or others who have interacted with the incapacitated person. An analysis of a motion to intervene will turn on the nature and extent of the relationship between the intervenor and the incapacitated person, the interest that is being asserted, and whether intention is likely to advance the incapacitated person’s interests.

A motion to intervene should be accompanied by a detailed affidavit, setting forth specific facts detailing the intervenor’s relationship with the incapacitated person, the rationale for intervention, and the purpose or interest that the intervenor seeks to advance. When possible the intervenor should include photos, correspondence or other materials that provide a graphic depiction of the intervenor’s relationship with the incapacitated person. It is likely in many cases the motive of the intervenor will be contested.

4. Id. at 322-324.
5. Id. at 327.
6. See former m.g.l. c. 201, §14; Gardner v. Jarantine, 245 Mass. 274 (1923).

Virginia W. Connelly, Esq. is an attorney at the firm of Doherty, Giechanski, Dugan & Cannon PC where she focuses her practice on probate litigation and family law.

Probate Law

The rights of third parties to intervene in guardianship proceedings: A practical application of the holding in Re Guardianship of B.V.G.

OUR TEAM IS COMMITTED TO SUPERIOR RESULTS

TRAUMATIC BRAIN INJURY

Our Team is Committed to Superior Results

$9,800,000
$7,000,000
$6,000,000
$4,000,000
$3,500,000
$1,000,000

SHEFF LAW
Ten Tremont Street
The Daniel Webster Suite
Boston, MA 02108
617-227-7000
www.shefflaw.com
A Sixty Year Tradition of Excellence.
GENTLE REFFERAL FEES

7. See former m.g.l. c. 201, §14; Gardiner v. Jarantine, 245 Mass. 274 (1923).
Carole Cooke of Todd & Weld LLP has been elected to the partnership. Cooke concentrates her practice on representing plaintiffs and defendants in employment law disputes involving wage claims, discrimination, restrictive covenants, and executive compensation. She also litigates complex commercial disputes.

James Kitces has been elected as a principal at Robins Kaplan LLP. Kitces counsels and represents large business insurers in first party coverage, third party liability coverage, industrial subrogation claims, and inspection claims.

Melissa Langa, managing director of the Boston trust & estates firm Bove & Langa, has been elected co-chair of the Boston Chapter of the Society of Trust & Estate Practitioners (Boston STEP), an association for estate planning professionals advising international families across generations.

Paul D. Moore, a partner at Duane Morris LLP, will be inducted into the Fellows of the American College of Bankruptcy in March 2017 in Washington, DC. The American College of Bankruptcy is an honorary professional and educational association of bankruptcy and insolvency professionals. Moore has been practicing law for 40 years and focuses his practice on business reorganization, bankruptcy law and litigation and loan workouts.

Michael J. Rossi has become a partner at Conn Kavanaugh. Rossi will continue his practice in the litigation of professional liability, employment, commercial and real estate disputes.

Kenneth A. Sherman has joined Todd & Weld LLP as a commercial litigation associate representing construction companies in litigation disputes and contract negotiations. A 2010 graduate of Suffolk University Law School and a 2006 graduate of the College of the Holy Cross, Sherman previously worked as a construction litigation associate for a New York City law firm.

Adam P. Whitney of the Law Office of Adam P. Whitney in Boston, announces a new office address. He is now at 745 Atlantic Ave., 3rd Floor, Boston, MA 02111.

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

- Practice Management
- Document Production
- Document Management
- Time, Disbursements & Billing
- Trust Accounting
- Automated Legal Forms

Contact us for a free demonstration

844-LEAP-USA | info@leap.us | www.leap.us