STANDING FIRM AGAINST HARASSMENT

BY HEIDI S. ALEXANDER, JUSTIN L. KELSEY AND MELISSA LEVINE-PIRO

Workplace harassment is not a new phenomenon, but this issue may finally be getting some of the attention it deserves. Recently, thanks to social media awareness campaigns, such as #MeToo, as well as the courageousness of high-profile and public complainants, sexual harassment in the workplace has garnered the attention of media and businesses alike. Indeed, even Congress is taking action to mandate sexual harassment training for its members; up until now training was optional.

Law firms are no exception when it comes to sexual harassment in the workplace. Like any business, not only must law firms adhere to minimum standards imposed by law to limit legal liability, but they should also consider how to most effectively prevent and respond to sexual harassment. From an organizational perspective, ignoring or not adequately responding to sexual harassment can have negative consequences for the firm, including decreased employee...
Massachusetts Attorney’s Oath of Office

January 17, 1977, was a bitter cold winter day in Boston. I had come here on that day to be sworn in as a brand new member of the Massachusetts bar. As I entered the “New Courthouse” that housed the Supreme Judicial Court, I wasn’t thinking about all the many outstanding lawyers who so skillfully practiced their craft in the courts of this commonwealth. That list is far too long to fit in this limited space, but includes greats, such as John Adams, who wrote the Massachusetts Declaration of Rights, which was the model for the United States Constitution; Daniel Webster; Rufus Choate; Oliver Wendell Holmes, Jr., the United States Supreme Court Justice who famously defended First Amendment rights against criminal prosecution; and, of course, Louis D. Brandeis, the “People’s Lawyer” who helped develop the concept of the right to privacy before he, too, became a Supreme Court Justice. Brandeis and Holmes were critically important founding fathers who helped create the Massachusetts Bar Association. As Massachusetts lawyers we should take pride in the history of our profession in the commonwealth.

No, on that day, I wasn’t thinking of any great Massachusetts lawyers. My wife and I were expecting our second child any moment. And I was under strict orders to get back home as soon as I possibly could. Perhaps because I was so preoccupied, I don’t remember too much about that day, except that John E. Powers, clerk of the Supreme Court, swore in my small group of a dozen or so new lawyers in his office. I do remember he told us that our reputations as lawyers were more important than any client could ever be. That was great advice and something I hope none of us ever forget.

The swearing in event was simple and so efficient that it was over almost before it began. With my mind on my wife and the new child who would arrive the next day, I was not reflecting on the ancient Massachusetts Attorney’s Oath of Office, which I had just taken. As Maura Doyle, the clerk of the Supreme Judicial Court for Suffolk County now tells all new lawyers being sworn in, it is the oldest attorney’s oath in the country.

Several years ago, as an MBA officer, I began speaking at the new admittees swear-in ceremonies, which are now conducted with great pomp and circumstance in historic Faneuil Hall. The old hall is always packed with the new attorneys to be, and with their families and friends filling each and every seat. As part of those ceremonies, SJC Clerk Maura Doyle educates the soon to be attorneys about the oath and its history, including that Maine also claims ownership of the oath.

The oath is short, only 90 words long, but it certainly provides a clear road map for how Massachusetts attorneys swear they will conduct themselves. The new attorneys swear they “will to do no falsehood, nor consent to the doing of any in court.” The oath also binds the attorneys not to “sue any false, groundless or unlawful suit” nor to consent or help anyone trying to do so. The attorneys promise they won’t cause delays by “lauce [money] or malice.” Finally, the ancient oath requires the attorneys to conduct themselves “with all good fidelity” toward the courts and their clients — simple, yet powerful promises.

Now that oath is on my smart phone and every few weeks, especially when I’ve had a hard day, I read it. The oath reminds me of the solemn promises I made so long ago. Reading it always makes me realize what a noble profession the law is. Reading the oath brings me right back to what is most important in our work.

In the current era of “fake news,” “alternative facts” and the over-zealous advocacy practiced by some, it is helpful to remember how we have all sworn to conduct ourselves in this ancient and honorable profession we love.

I solemnly swear that I will do no falsehood, nor consent to the doing of any in court; I will not willingly or willingly promise or sue any false, groundless or unlawful suit, nor give aid or consent to the same; I will delay no man for lurece or malice; but I will conduct myself in the office of an attorney within the courts according to the best of my knowledge and discretion, and with all good fidelity as to the courts as my clients. So help me God.

Massachusetts General Laws Chapter 221, Section 38

The oldest attorney’s oath in the United States

Young Lawyers Division members celebrated Halloween with an Escape the Room event. From left: Frank Mule, Kate Connolly, Nour Alhuuda Sulaiman (bottom), Monica Shah (top), Cassandra Gomez, Kaire Colwell (bottom), Nicole Paquin (top), Meghan Slack and Gary Bloom.
Healy Honored By Mass. Judges Conference

Massachusetts Bar Association
Chief Legal Counsel and Chief Operating Officer Martin W. Healy was honored by the Massachusetts Judges Conference (MJC) in Worcester on Nov. 9, at the MJC’s 2017 Annual Meeting. Healy was given a Special Recognition Award for his “support, advocacy and leadership to improve the administration of justice,” according to the inscription on the award. Healy is only the third individual who is not a sitting or retired judge to be recognized by the MJC since it began giving awards in 1996.

“This is a truly meaningful award to be recognized by members of the judiciary, many of whom I have been fortunate to work with over the past 29 years as a member of the bar,” Healy said, calling it one of the top honors of his career, along with Juvenile Bar Association’s Francis G. Poitrast Award and Massachusetts Lawyers Weekly’s Lawyer of the Year. “This one is very special to me, and I give thanks from the bottom of my heart.”

Healy said he was “moved” by the MJC’s award, which was unannounced and came as a complete surprise to him. He was attending the dinner as an MJC supporter and to honor Massachusetts Speaker of the House of Representatives Robert A. DeLeo, who received the MJC’s President’s Award at the annual meeting.

“I was touched to be honored the same night as Speaker DeLeo, who was so deservedly recognized for his exemplary support of the administration of justice and appropriate judicial compensation,” Healy said. “I’ve worked with him very closely over the years, and he has been a personal mentor to me. It was nice to share the evening with him.”

The MJC, which is celebrating its 35th year as an advocacy organization for Massachusetts judges, also honored several judges at its annual meeting. Superior Court Judge Richard J. Chin and retired Supreme Judicial Court Justice Geraldine S. Hines each received a Judicial Excellence Award. The MJC also gave a Special Recognition Award to Superior Court Judge Mark D Mason, who is a former MBA president.
News from the Courts

U.S. Bankruptcy Appellate Panel for the First Circuit relocates to Moakley Courthouse

Chief Judge Joan N. Feeney of the United States Bankruptcy Appellate Panel (BAP) for the First Circuit has announced that, effective Nov. 20, the BAP has relocated to the John Joseph Moakley United States Courthouse in Boston.

Beginning Nov. 20, unrepresented parties may file documents by mail at the address below or in person at the Clerk’s Office for the United States Court of Appeals for the First Circuit.

All telephone numbers and email addresses for the BAP and its staff will remain the same. Effective Nov. 20, the mailing address for the BAP is:

John Joseph Moakley U.S. Courthouse
1 Courthouse Way
Suite 3-620
Boston, MA 02210

For additional information, please contact Susan J. Goldberg, circuit executive, at (617) 748-9614.

Supreme Judicial Court Chief Justice Ralph D. Gants speaks at event announcing Pro Bono Fellows


“Since the start of the program in 2012, there have been 95 Access to Justice Fellows who have devoted more than 70,000 hours of pro bono service to 60 partner organizations,” Chief Justice Gants said. “It is an extraordinary contribution to the pro bono effort, and moreover has changed the vision of what it means to be transitioning from one practice to another. These fellows are accomplished and talented individuals who are leaving practices in law, including several jurists.”

The Access to Justice Fellows Program, a project of the Massachusetts Access to Justice Commission and the Lawyers Clearinghouse, provides senior lawyers and retired judges the opportunity to work on year-long pro bono legal projects. This year’s fellows will work on a range of projects involving environmental, bankruptcy and consumer protection law, legal guardianship aid for Boston Public School students with special needs, accessibility of court forms, increasing access to justice in the trial courts for pro se litigants, corporate and strategic planning assistance to nonprofits, work to reduce recidivism of young men on the South Shore, and representation of indigent asylum-seekers and detained immigrants, among others.

The 2017-2018 Access to Justice Fellows are:

- Arlene Bernstein - Volunteer Lawyers Project
- Hon. Patricia Bernstein (ret.) - Justice Bridge Legal Center
- Stephanie Biggs - Volunteer Lawyers Project
- Margaret Brill - Citizen Schools
- Hon. Cynthia Cohen (ret.) - Massachusetts Access to Justice Commission
- Nina Crimm - Massachusetts Appleseed Center for Law and Justice
- Mike Elefante - SouthCoast Chamber of Commerce
- Irene Freidel - PAIR (Political Asylum/Immigration Representation) Project, Massachusetts Access to Justice Commission, Massachusetts Rivers Alliance
- Hon. Rudolph Kass (ret.) - Greater Boston Legal Services
- Lisa Lopez - KIND (Kids in Need of Defense)
- Paul Newman - Volunteer Lawyers Project/SEERV (Settlement and Early Resolution Volunteers) Project
- Kathleen Parker - Justice Bridge Legal Center
- Steve Parker - Veterans Legal Services
- Diane F. Paulson - Jewish Family & Children’s Service
- Win Quayle - Conservation Law Foundation
- Sarah Reynolds - Greater Boston Legal Services
- Stephen Richmond - MetroWest Legal Services
- Tom Shapiro - Justice Bridge Legal Center
- Paul Statzler - Justice At Work
- Evelyne Swagery - Boston CASA (Court Appointed Special Advocates for Children)
- Toni Wolfman - Greater Boston Legal Service

The program continues to support all Access to Justice Fellows as they perform important pro bono work, remain active members of the legal community, and help people and groups in need.
MBA volunteers offer free legal advice to Western Mass. residents

Residents of Berkshire, Franklin, Hampden and Hampshire counties received free legal advice thanks to local volunteer attorneys from the Massachusetts Bar Association at the semianual Western Massachusetts Dial-A-Lawyer call-in program on October 18, hosted by Western New England University School of Law.

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

Earlier in the day, Dial-A-Lawyer volunteer Diana Velez Harris promoted the program as a guest on the MassAppeal TV show in Springfield (WWLP 22News).

“It’s a great first step for anyone that is having an issue because these issues tend to be overwhelming, and they can be all-encompassing,” noted Velez Harris on the show. “It’s a great resource for anybody who doesn’t know where to begin.”

Started in 1994, the MBA’s Western Massachusetts Dial-A-Lawyer program is in its 23rd year.

The program is co-sponsored by Western New England University School of Law, The Republican, El Pueblo Latino, the Massachusetts Association of Hispanic Attorneys and the Hispanic National Bar Association.

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

- Kristi A. Bodin, Kristi A. Bodin, Esq., Amherst
- Hon. Henry J. Boroff (ret.), Western New England University School of Law
- Corey M. Carvalho, University of Massachusetts Legal Services, Amherst
- Kevin Chrisanthopoulos, Robinson & Donovan PC, Springfield
- Beth D. Cohen, Western New England University School of Law, Springfield
- Michele A. Feinstein, Shatz, Schwartz and Fentin PC, Springfield
- Kelly A. Koch, Bulkley, Richardson & Gelinas LLP, Springfield
- Stephen R. Manning, Stephen R. Manning, PC, East Longmeadow
- Amy J. Megliola, Siddall & Siddall PC, Springfield
- Jeffrey S. Morneau, Connor, Morneau & Olin, LLP, Springfield
- Amy J. Megliola, Siddall & Siddall PC, Springfield
- Stephen R. Manning, Stephen R. Manning, PC, East Longmeadow
- Amy J. Megliola, Siddall & Siddall PC, Springfield
- Jeffrey S. Morneau, Connor, Morneau & Olin, LLP, Springfield
- David W. Ostrander, Ostrander Law Office, Northampton
- Edward M. Pikaia, City of Springfield, Law Department, Springfield
- Daniel M. Rothschild, Bulkley, Richardson & Gelinas, LLP, Springfield
- Barry M. Ryan, Doherty, Wallace, Pillsbury & Murphy PC, Springfield
- Stephen A. Smith, Law Office of Stephen A. Smith, Millis
- Diana S. Velez Harris, Johnson, Sclafani & Moriarty, West Springfield
- James B. Winston, Winston Law Offices, Northampton
- Amy J. Megliola, Siddall & Siddall PC, Springfield
- Kevin Chrisanthopoulos, Robinson & Donovan PC, Springfield
- Barry M. Ryan, Doherty, Wallace, Pillsbury & Murphy PC, Springfield
- Stephen A. Smith, Law Office of Stephen A. Smith, Millis
- Diana S. Velez Harris, Johnson, Sclafani & Moriarty, West Springfield
- James B. Winston, Winston Law Offices, Northampton
- Gregory A. Wolf, Law Office of Gregory A. Wolf, Esq., Pittsfield

MBA members answer callers’ questions.
Welcome Back Member Reception

The Massachusetts Bar Association hosted a 2017-18 “Welcome Back” Member Reception at its Boston office on Wednesday, Sept. 27, to celebrate the start of the new association year.
Judicial Education in the Trial Court

BY CHIEF JUSTICES PAULA M. CAREY, JUDITH C. CUTLER, PAUL C. DALEY, JUDITH FABRICANT, AMY L. NECHEM, ROBERTO RONQUILLO, JR., ANGELA M. ORDONEZ AND TIMOTHY F. SULLIVAN

As the chief justices of the Trial Court and its seven departments, among our highest priorities is ensuring that our diverse and experienced judges bring varied backgrounds to apply for appointment to the bench. In the course of that effort, we sometimes hear potential applicants question whether they are qualified, because their experience does not include all aspects of the work of any Trial Court department. We respond that the diversity of work we do is evidence that virtually no judge brings experience with all of it; all new judges learn on the job, as do all judges throughout their careers.

That raises the question of what training we provide. The answer is: a lot. Each department, in conjunction with the Trial Court Judicial Institute, has a carefully designed two-year curriculum for new judges, along with regularly scheduled educational conferences, seminars, and peer observation for all judges at all stages of their careers.

Each Trial Court department conducts educational conferences for all its judges at least twice a year. In addition, each new judge travels three times a year, meeting with judges and outside experts in fields of particular relevance to the work of that department. Department conferences are geared toward increasing substantive knowledge, sharpening judicial skills, and heightening awareness of developing legal issues; conferences also provide judges with an opportunity to share experience and ideas informally, and to develop collegial relationships.

Judges at all levels of experience in all departments also attend a wide variety of educational programs offered by the Trial Court Judicial Institute, the Flaschner Judicial Institute for the Superior Court, and bar associations and other entities aimed at judicial education organizations. Each department encourages judges at all levels of experience to participate in peer observation on a regular basis. In addition, and perhaps most important, each department of each Trial Court department provides informal consultation, mentorship, and support for each other throughout our service.

Training for new Trial Court judges has three principal components: mentorship, orientation, and classroom-type presentations. The mentorship component follows uniformly across all departments. Each new judge is assigned a mentor, bar associations and other entities aim at judicial education organizations. Each department encourages judges at all levels of experience to participate in peer observation on a regular basis. In addition, and perhaps most important, each department of each Trial Court department provides informal consultation, mentorship, and support for each other throughout our service.

The chief justice of the new judge’s department assigns a trained mentor to a judge as soon as possible after confirmation, before the new judge comes on board; the chief selects the mentor, who usually is a judge from the new judge’s background. The new judge’s mentor is assigned to consult with the new judge on aspects of the work of particular relevance in that department. In the Superior Court, for example, the chief selects the new judge to share early draft decisions with the mentor, so as to receive feedback on writing style and tone in the new judicial role. Sometimes the mentor also acts as a shadow judge for a part of a trial. The mentor is available whenever the new judge needs advice, consultation, or further assistance in a particular subject, the faculty coordinator or the mentor’s work will arrange it.

In the Superior Court, orientation lasts two weeks and takes place in Suffolk County, where the Court has the largest number of civil and criminal sessions for the new judge to observe and, where the administrative office is based. A designated “faculty coordinator,” a member of the Education Committee, is individually crafted by a “faculty coordinator,” a member of the Education Committee.

During the four-week period, the new judge travels to a number of different courts of varying sizes and populations around the state, both urban and rural, and sits with a multitude of experienced judges. The program includes several subject-specific days (e.g., abuse prevention, sentencing, mental health, probation) to ensure that the new judge becomes familiar with the essentials of the daily business of the District Court. Although the format is fairly standard, the new judge may request additional emphasis on a particular aspect of the work of a court in which he or she did not receive full exposure or training to the topic. The orientation also includes meetings with key court and administrative personnel, in order to go over the role of the Clerk-Magistrate, the Chief Probation Officer and the registrar of the Registry of生效的 reasons, the new judge feels that he or she still needs further instruction in a particular subject, the faculty coordinator or the mentor’s work will arrange it.

The District Court holds a “bring-back session” once or twice each year for all new judges who have been on the bench for several months. The passage of time after the end of orientation and prior to the bring-back ensures that each of the new judges will have a number of questions. The new judges spend the day with the Education Committee, whose members serve as faculty for the session, discussing any and all questions that the new judges wish to raise. The Probate and Family Court Chief Justice meets with the new judge to plan an individualized orientation process in light of the new judge’s background and particular needs. The new judge then begins a ten-day orientation period, which includes traveling to various locations within the Commonwealth to observe the various functions of the Probate and Family Court divisions.

The Probate and Family Court Chief Justice meets with the new judge to plan an individualized orientation process in light of the new judge’s background and particular needs. The new judge then begins a ten-day orientation period, which includes traveling to various locations within the Commonwealth to observe the various functions of the Probate and Family Court divisions. The new judge meets the judges in each location, and sits with each judge to observe how various case types are handled. During the orientation period, the new judge also receives an orientation to the administrative staff, or in some instances by video recording, on a list of topics in areas of substantive law and procedure, as well as administrative matters. The orientation also includes meetings with key administrative staff to discuss court policies, resources, and the roles of various personnel. The training programs include educational programs and classroom-type sessions.

In the Juvenile Court, upon the appointment of a new judge, the Chief Justice selects three judges, in addition to the mentor, with whom the judge will second-seat for a four-week observation period. The program also includes a general overview and training of the new judge upon the judge’s prior legal practice and experience. Each newly appointed judge is also assigned to spend some time in the clerk’s office and the probation department of his or her court of appointment, to gain a better understanding of how those offices function. Each new judge also meets with administrative staff to learn about administrative practices, policies, and resources, and the role of administrative personnel. The new judge is also encouraged to tour a DYS facility, so as to gain a better appreciation of how the DYS operates and how it interacts with the juvenile courts.

In the Boston Municipal Court (BMC), the new judge meets with the Chief Justice and a member of the department’s New Judge Education Committee to determine the focus of the initial training, taking into consideration the new judge’s prior legal experience. The new judge is then assigned to observe other BMC judges in all divisions of the BMC. This observation and training period usually takes four weeks to complete. Each new judge also spends one day each month with the Security Department, the Office of Court Interpreter Services and the BMC Administrative Staff, where the new judge learns about and is exposed to administrative policies and responsibilities. Further, ongoing training is also available to a new judge as needed and when requested.

A new judge of the Housing Court travels during the first several weeks to several of the eighteen different locations where the Housing Court conducts sessions, to observe veteran judges handling a broad range of procedural and substantive matters in civil and criminal sessions. The new judge also meets with the Chief Justice and Deputy Court Administrator to learn about the Court’s policies and procedures.

In the Land Court, orientation begins with a meeting between the new judge and the Chief Justice, to review Land Court practices, procedures, and expectations, and to outline the orientation program, which the new judge’s assigned mentor supervises. After meeting all six other judges on the Administrative Office staff, the new judge spends a two-week period observing each of the other judges preside over various events, including case management conferences, pretrial conferences, status conferences, motion hearings and trials.

Classroom-type sessions for new judges include programs provided by the Trial Court Judicial Institute as well as more targeted programs provided by individual court departments for their own new judges. All new Trial Court judges attend the Judicial Institute’s annual two-day “Essentials for New Judges” program, which covers topics including security, working with interpreters, judicial writing, contempt, selected evidence issues, substance use issues, race and implicit bias, and working with self-represented litigants. In addition, all new judges attend annual full-day Judicial Institute programs on judicial ethics, evidence, domestic violence, mental health, and the Judicial Response System. The larger departments supplement these programs with their own sessions on areas of substantive law and procedure of particular importance to their work.

In the District Court, a “bring-back” session occurs once or twice each year for all new judges who have been on the bench for several months. The passage of time after the end of orientation and prior to the bring-back ensures that each of the new judges will have a number of questions. The new judges spend a day with the Education Committee, whose members serve as faculty for the session, discussing any and all questions that the new judges wish to raise. The program allows for an easy-going exchange in a relaxed setting.

In the Superior Court, at intervals of about one to two years depending on the number of judges, presents an intensive three-day program known as “New Judge School,” with presentations from experienced judges, selected staff, and outside speakers on substantive and procedural topics that are critical to the day-to-day work of Superior Court judges. Also, in conjunction with the Flaschner Judicial Institute, each year a committee of Superior Court judges plans a series of evening seminars geared to the needs of new Superior Court judges, open to all Superior Court judges and to judges of other Trial Court departments when the topic is relevant to their work.

The District Court conducts quarterly educational programs in each region, while the Boston Municipal Court (BMC) schedules regular brown bag lunch meetings of judges to address relevant and timely legal topics. The Probate and Family Court provides special programs for its judges throughout the year, and every third year its judges are invited to attend a two-day conference known as the Freedman Retreat, sponsored by the Flaschner Judicial Institute, to discuss new, novel, complex, troubling, or interesting issues they face on the bench.

The training programs the Trial Court and its departments provide for new judges, and for all judges, reflect a substantial commitment of time, energy, and effort from many experienced judges and staff. We make this commitment because we accept collective responsibility for the quality of our service to the public. Our new judges express their strong appreciation, and make the same commitment to future colleagues. For lawyers who may be considering applying for appointment to the bench, you can rest assured that, if your judicial career is successful, whatever your background, you will find your new colleagues ready to help you make a successful transition, and develop both the substantive knowledge and judicial skills you will need throughout your career.
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Tiered Community Mentoring Program kicks off ninth year

MBA President-elect Christopher A. Kenney welcomes participants to the kickoff of the 2017-18 Tiered Community Mentoring Program at Suffolk University Law School.

The Massachusetts Bar Association’s Tiered Community Mentoring (TCM) Program began its ninth year with a kickoff event at Suffolk University Law School on Oct. 19. After welcoming remarks from MBA President-elect Christopher A. Kenney and an overview of the program from Hon. Angela M. Ordoñez, chief justice of the Probate and Family Court, mentors and mentees listened to a presentation on the Discovering Justice Program from Marieljane Bastien.

The event also featured a presentation on “The Art and Importance of Networking,” given by Quaime V. Lee, associate director of professional and career development at Suffolk University Law School. Following the presentations, participants broke into groups for a discussion and a public speaking exercise, and they chose their team names.

The TCM Program has also been extended to Worcester for 2017-18. The event also featured a presentation on “The Art and Importance of Networking,” given by Quaime V. Lee, associate director of professional and career development at Suffolk University Law School.

Clients’ Security Board awards lowest amount of reimbursements in 28 years

BY MIKE VIGNUEUX

The Clients’ Security Board (CSB) of the Supreme Judicial Court (SJC) of Massachusetts awarded the lowest amount of reimbursement funds since 1989 to clients defrauded by their lawyers in fiscal year 2017.

The recently released CSB “Annual Report to the Supreme Judicial Court Fiscal Year 2017” shows that the total awarded this year to 47 claimants ($500,701.48) was the lowest amount since 1989 ($146,720.06). The 2017 report covers claims made between September 1, 2016 and August 31, 2017.

In addition, the amounts awarded in both 2017 and 2016 ($846,842.96) fell below the $1 million mark for the first time since 1992 ($968,894.77). So are the last two years enough data to suggest a downward trend? Not so fast, notes D. Ethan Jeffery, chair of the CSB.

“When examining the total annual awards for fiscal years 2016 ($846,842.96) and 2017 ($500,701.48) one might be tempted to conclude that lawyer misappropriation is vanishing from the Commonwealth,” writes Jeffery in the report. “That would be a misrepresentation of the data for two reasons. First, two years don’t make a trend. Second, a quick glance at the Total Awards column on p. 3 shows that for the 23 years between 1992 and 2015, the median annual amount awarded is $1,963,555 (2001). These figures should keep us from the temptation of either complacency or alarm.”

Another important data point to emphasize is that just two years ago in 2015, the CSB awarded the highest amount of reimbursement funds ever ($2,949,085.20). Jeffery mentions in the report that there are “multiple variables contributing to lawyer misappropriation” making it difficult to predict award amounts from year to year. He also references five reform measures implemented in recent years which may contribute to the lower totals of the last two years:

• Banks notifying the Office of Bar Counsel when a check issued from a lawyer’s trust account is dishonored;
• Insurance companies notifying injured-party payees when the insurers issue checks to the payee’s lawyer;
• The energetic program offered by the Office of Bar Counsel to educate lawyers on the revised trust accounting rules;
• The consulting services offered by the Law Office Management Assistance Program established by Lawyers Concerned for Lawyers; and
• The mandatory Practicing with Professionalism course now required by SJC Rule 3:16 for new lawyers.

The CSB, established in 1974 by an order of the SJC, is responsible for reimbursing clients whose lawyers have misappropriated their money. In contrast to most other states that cap the reimbursement amount at a certain level, the CSB in Massachusetts reimburses 100 percent of the client loss with no statute of limitations. The CSB is funded by the commonwealth’s attorneys who pay into the fund through annual Board of Bar Overseers (BBO) registration fees.

Offending lawyers must be prosecuted by the Office of Bar Counsel before the CSB can take action on claims. In 2017, just 26 lawyers lost $59,687 in the state (0.04 percent) defrauded their clients.

“The vast majority of attorneys in Massachusetts practice law in accordance with the highest ethical standards,” said MBA Chief Legal Counsel Martin W. Healy. “We welcome recent reform measures that have been made, such as the implementation of the Practicing with Professionalism course, which the MBA is proud to offer statewide. For the very rare instances in which there has been defalcation of clients’ funds by lawyers in Massachusetts, the work of the CSB is essential in ensuring full reimbursement.”

Three attorneys—Paul D. McCarthy of North Andover ($72,901.58), David Fleury of Taunton ($58,783.90) and Paul C. Dick of Amesbury ($55,964.92)—combined for more than $187,000 of defalcations in 2017 or more than 37 percent of the overall amount awarded.

In contrast to 2016, the highest amount of reimbursement came in the fiduciary category with a total of $124,061.39 (24.78 percent) through four awards. The trusts and estates category was next with 11 awards totaling $115,941.75 (23.16 percent). The highest number of awards (16) came in the unearned retainer category totaling $107,145.54 (21.40 percent).
What actions should law firms take?

Massachusetts prohibits sexual harassment in the workplace. See M.G.L. c. 151B. Under Chapter 151B, employers are liable for the conduct of their employees and agents, and that includes sexual harassment. Liability exists even if the employer does not know or have reason to know that sexual harassment is happening in the workplace. Employers who feel responsible for enforcing the law are responsible for addressing complaints and keeping track of the information, which is critical to manage risk and handle difficult situations.

Here are five steps law firms should take to mitigate the possibility of sexual harassment in the workplace:

1. A Written Sexual Harassment Policy. If you have six or more employees, you are required under Massachusetts law to have a written sexual harassment policy that is good practice for firms of any size. Under Chapter 151B, the policy must include:
   a. an explicit statement that sexual harassment in the workplace is unlawful and reporting sexual harassment will not be met with retaliatory action;
   b. the consequences of committing sexual harassment;
   c. the internal procedures for reporting sexual harassment, including the address and phone numbers where employees can reach you for questions or complaints. Also, include a more specific understanding of sexual harassment and retaliation; and
   d. the contact information for state and federal employment discrimination agencies.

2. Conducting Workplace Sexual Harassment Trainings. Workplace trainings are not required under Massachusetts law, but they are encouraged. Be cognizant that these trainings can make people feel uncomfortable, and you may find resistance. It can be helpful to acknowledge that discomfort but also focus on the training's importance and attitude toward the subject matter. Nonchalant attitudes during a training can discourage reporting and have the opposite of the intended effect of the training. Think of this as an opportunity to model openness and assurance that your firm will properly handle complaints. While training is great for new employees, don’t forget to conduct regular trainings for existing employees (managers should not be exempted). For smaller firms, there are trainings that are designed for small businesses and not cost prohibitive. However, be careful not to rely solely on online trainings; engagement, role play, and communication can all help to increase the effectiveness of the training.

3. Be Aware of Office Activities. Functioning in the roles of an employer and an attorney simultaneously can be a challenging balance. For instance, if a senior associate in a law firm harasses an employee. Furthermore, the employer may have liability even if the employer does not have direct authority over the person who was harassed. For instance, a senior associate in a law firm may haras, or other issues. If you are not frequently available on site, consider workarounds, such as having office hours for employees or designating a manager who has the capacity to make this happen.

4. Rapidly Respond to Incidents. If you suspect an incident of sexual harassment, or if an incident is reported to you, you must respond immediate — no matter how minor or how credible you think the issue is. You must also apply your policies uniformly, and treat all employees exactly the same. A nonchalant attitude during a training can discourage reporting and have the opposite of the intended effect of the training. Think of this as an opportunity to model openness and assurance that your firm will properly handle complaints. While training is great for new employees, don’t forget to conduct regular trainings for existing employees (managers should not be exempted).

5. What should your sexual harassment policy contain?

As outlined above, there are some minimum requirements for materials that should be included in a sexual harassment policy. If a law firm is a business, there are some unique considerations that might arise because of your particular practice area. For example, your policy may dictate that disseminating sexually suggestive images or videos is an example of sexual harassment, but what happens when that activity is suggestive image or video evidence in a case that one of your employees is working on? You need special examples of proper conduct or even additional procedures for how to handle cases that might have a harassment component to them? It may be difficult for employees uninvolved with the incident to have a meaningful discussion without feeling uncomfortable. Providing them with examples of appropriate versus inappropriate conduct in these situations can help them to better navigate the matter.

Describe the Duties of Employees and the Consequences of a Violation

Be clear that employees are expected to immediately report any sexual harassment. Regardless of whether they are a) the subject of the harassment, b) a witness to the conduct or c) learned of the conduct after-the-fact. This should be an affirmative obligation on all employees (including managers). While it may be prudent to reserve the rights of the employer to use discretion when issuing warnings, initiating trainings, suspending or terminating, it is also important to provide assurances that, at the least, a minimum corrective action will be taken when a violation is determined to have occurred. This encourages reporting.

Be thoughtful about whether to include a statement on the consequences of reporting information that the employer may investigate a complaint. While false or malicious complaints should be taken seriously, including specific language on false reporting may discourage people from reporting if they feel they may not be deemed credible. On balance, you may want to more broadly refer to the discretion of the employer to handle information that is provided and later determined to be false, encouraging everyone in any stage of an investigation to be truthful at all times.

Describe the Procedures for Reporting

What should your sexual harassment policy contain? Consider including a sample Reporting Form in your policy to make it easy for employees to know what information they should provide. Also, include multiple reporting options (e.g., reporting to the alleged violator) to whom reports can be made with their physical addresses, phone numbers, and e-mail addresses. Ideally you will include multiple options for different levels of severity of the violation. Consider making it clear that the report should be made to someone in reporting to one gender or the other. Remember to update your policy when reporting contact information changes.

Provide the Contact Information for Discrimination Agencies

The final requirement in Chapter 151B, Section 3A, is that the policy should identify the relevant federal (EEOC) and state (Massachusetts Commission Against Discrimination) employment discrimination agencies. Make sure you update the policy at least annually, as contact information for these offices can change.
Optional Recommended Inclusions

While Chapter 151B only requires the above list of included information, there are some additional elements that can maximize the effectiveness of your policy. Consider if there are any unique features of your firm that require additional consideration. In addition, two typical inclusions follow:

• Preamble – You may want to include some language as to why this policy is important to your firm and what its purpose is both to the firm and employees. If employees perceive that your firm values and takes the policy serious, they may be more willing to report when there is an incident.

• Description of the Investigation Process – Simply describing how to make a complaint and the consequences thereof does not provide employees with much understanding of the investigative process. While you may not want to bind yourself to any particular investigative actions, you can generally describe what a complainant might expect during the investigation (i.e., private interview with the reporter, person alleged to have violated the policy and any witnesses). This, again, will help reduce anxiety of employees and encourage those who have been harassed to report.

Length of the Policy

It is possible to include all of the requirements above in one page policy, but consider whether that gives enough specificity and weight to the importance of these policies. On the other hand, you can develop procedures, you need not reinvent the wheel. The MCAD provides a sample policy on their website. The Law Office Management Assistance Program (LOMAP) also has sample workplace policies and other human resource materials available at www.masslomap.org/start-up-kit/start-up-kit-operations/staffing.

While these policies and procedures can provide a starting point, your policy should be adapted specifically to your firm and its internal procedures. For further assistance and support, consider engaging an employment law firm and/or human resource consultant that specializes in the area of employee handbooks and workplace trainings.

The ongoing prevalence of sexual harassment in the American workplace is obvious given all the recent news surrounding this issue. If you are listening to this news and reading the experiences that people are sharing as part of the #MeToo movement, you may be wondering what you can do to help. Updating your firm’s sexual harassment policy is a good first step to show that you want this issue to be taken seriously and that you support the belief that this type of conduct should be #NoMore.

WRAP-UP AND RESOURCES

The reasons for having a comprehensive sexual harassment policy are numerous, and include not only limiting liability, but also improving the firm’s bottom line by building a positive workplace culture. To get started drafting your own policy and developing procedures, you need not reinvent the wheel. The MCAD provides a sample policy on their website. The Law Office Management Assistance Program (LOMAP) also has sample workplace policies and other human resource materials available at www.masslomap.org/start-up-kit/start-up-kit-operations/staffing.

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Members Helping Members: My Bar Access Q&A

Q: Landlord serves a notice to quit upon Tenant and then file and presents the eviction. Judgment enters for the Tenant/Defendant “for possession of the premises.” Landlord does not appeal, but wants to file a subsequent action in another court of proper jurisdiction. Leaving aside the question of a rebuttable presumption of a retaliatory eviction, the new eviction being filed within 6 months of the judgment, must landlord serve a new Notice to Quit? Case law appears to be blank on the issue. I would argue that the Judgment for the Defendant only gave “possession” to the Defendant, but it neither established nor re-established any tenancy; therefore, no new Notice to Quit is necessary. Interested if anyone knows of a case on point.

David Lucas, Lucas Law Group LLC, Melrose MA

A: Unfortunately for the landlord, the judgment for the tenant will present a problem during the next eviction. Even if no new notice to quit is needed, the judgment for the tenant in the eviction action is Res Judicata and will bar the landlord from evicting the tenant unless a new theory that was not alleged in the first action and could not have been alleged in the first action is alleged in the second action.

Anthony Tomasiello, Anthony N. Tomasiello Jr., Attorney and Counsellor at Law, Worcester
The first House of Delegates meeting of the Massachusetts Bar Association’s 2017-18 year, held on Sept. 27 at the MBA’s Boston office, provided an opportunity for HOD members and MBA officers to get acquainted with one another, as new MBA President Christopher P. Sullivan discussed some of the priorities for the MBA and upcoming programs, including the Oct. 26 State of the Judiciary Address.

Sullivan touted the MBA’s work on two issues that have taken center stage in recent months — immigration and criminal justice reform — and pledged to continue working closely with the MBA’s section councils and affiliated bar associations. He also welcomed members of the MBA’s second Leadership Academy class, several of whom were in attendance.

Following brief reports from President-elect Christopher A. Kenney and Secretary Hon. Thomas J. Barber, MBA Chief Legal Counsel and Chief Operating Officer Martin W. Healy gave a legislative update on the state’s budget, which was passed over the summer. He also announced that former MBA President Robert W. Harnais had been handed the gavel as the new chair of the Joint Bar Committee on Judicial Appointments this year.

UMass Lowell Assistant Dean Frank Talty, Ph.D., was invited to the podium, where he spoke about his school’s new Master of Public Administration (MPA) in Justice Administration program. He was followed by Criminal Justice Section Chair Georgia K. Critsley, who presented his report on where the coalition is now on legal aid funding and what is needed going forward. Tompros, a partner at WilmerHale, urged the members of the MBA Committee on Judicial Appointments this year.

Sullivan promoted his report to the Season” reception sponsored by the Hampden County Bar Association (HCBA) President Travaun Bailey provided an update on the association’s recent activities in western Massachusetts. Immediately following the meeting, MBA members Lee Gartenberg and Peter Ellikan in the successful passage of both criminal justice bills. A six-member conference committee appointed by both the House and Senate will now begin discussion to reach a compromise measure.

Sullivan, presiding over his second HOD meeting as president, began the meeting by welcoming members and thanking them for making the trip to western Massachusetts. In his president’s report, Sullivan praised the launch of the MBA’s new website, which went live in October. “It’s clean. It’s modern. It’s fast. We did it the right way,” remarked Sullivan.

He also announced the development of a statewide training program by the MBA and the Massachusetts Law Reform Institute to be held in January, which will address best practices concerning the recent statewide expansion of the Housing Court. In addition, Sullivan noted the formation of an ad hoc MBA committee, which will be tasked with addressing diversity within the Massachusetts judiciary.

To conclude the meeting, Hampden County Bar Association (HCBA) President Travaun Bailey provided an update on the association’s recent activities in western Massachusetts. Immediately following the meeting, MBA members had the opportunity to attend a “Toast to the Season” reception sponsored by the Hampden County Bar Association at the Springfield Sheraton.

The next House of Delegates meeting will be held on Jan. 25, 2018, at the MBA’s Boston office.

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**House of Delegates meets in Boston and Springfield**

**BY JASON SCALLY AND MIKE VIGNEUX**

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STATEMENT OF OWNERSHIP

BY MIKE FLAIM

The Massachusetts Bar Association hosted its annual State of the Judiciary Address on Thursday, Oct. 26, at the John Adams Courthouse. MBA President Christopher P. Sullivan welcomed the crowd of esteemed judges, lawyers and government officials by ruminating on the courthouse’s namesake and founding father John Adams, who “designed a system of government where the executive, the legislature and the judiciary need to work together if anything meaningful is to be accomplished.” This introduction harkened back to his President’s Reception in September, in which he emphasized the rule of law. He then introduced Chief Justice Ralph D. Gants, who received an emphatic welcome.

After acknowledging all those who make the operation of the courts possible, Gants expressed his belief that the “judiciary today has never been more thoughtful, more willing to explore better ways to do things we have always done, and more focused on addressing the problems that plague our commonwealth.”

He pointed to the July 1 expansion of the Housing Court as a recent success, but also noted that other courts need to be augmented, as well, “especially our drug courts,” Gants said, “which are so desperately needed at a time when we are losing more than five people every day to opioid overdoses.”

The SJC chief justice also announced that Trial Court Chief Justice Paula Carey and Probate and Family Court Chief Justice Angela M. Ordoñez have already begun the process of finding innovative ways to address certain issues in the Probate and Family Court, including self-represented litigants and the burdens placed on Probate and Family Court judges. Retired SJC Justice Margot Botsford has volunteered to help out and offer a “fresh perspective,” he added.

Gants made particular mention of the need for more attorneys to step up to handle care and protection cases at the Juvenile Court. He received a burst of applause from the audience after he said the Legislature should consider an increase from $55 to $80 for bar advocates who take on such cases.

The crux of his remarks focused on the fight against mandatory minimum sentences. Gants recalled the words of former SJC Chief Justice Edward Hennessey who, in 1980, said, “I opposed then and continue to oppose a system of mandatory sentencing totally eliminating judicial discretion to consider mitigating and aggravating circumstances.” In this vein, Gants urged that more focus be turned toward criminal justice reforms to curb the recidivism rate and thus reduce the overall crime rate.

Trial Court Chief Justice Paula M. Carey, who spoke after Gants, also addressed the recidivism rate in her remarks. She also reiterated the importance of the Trial Court’s mission to deliver “justice with dignity and speed.” New Court Administrator Jonathan S. Williams, recently featured on the MassBar Beat podcast (www.massbar.org/massbarbeat), finished the evening by calling attention to the $2 billion in deferred renovation costs the state’s court facilities face. He outlined a plan to consolidate facility footprints by optimizing the number of courthouses and making better use of technology.

Mike Flaim is a freelance writer and an associate editor with The Warren Group, publishers of Massachusetts Lawyers Journal. He can be reached at mflaim@thewarrengroup.com

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Bench/bar leaders gather for State of the Judiciary

BY MIKE FLAIM

Attendees at the reception following the State of the Judiciary Address at the John Adams Courthouse in Boston.
Todd & Weld LLP celebrates 25 years of superior trial advocacy

What types of law does your firm handle?

Todd & Weld LLP is a trial firm that handles virtually all types of litigation, arbitration, mediation, and dispute resolution. Areas of expertise include commercial litigation, including business, real estate and labor and employment; civil rights law; construction litigation; family law and related litigation; First Amendment and media law; government investigations and criminal defense; medical negligence; and personal injury law.

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

We are a firm of trial lawyers. Our mark has been made in notable courtroom battles involving civil and criminal cases, and over the years we have obtained on behalf of clients numerous substantial verdicts and noteworthy appellate rulings.

What firm attribute do clients find most attractive?

We are dedicated to providing the highest level of litigation advocacy at a reasonable cost.

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

We have obtained numerous recent successful results for clients, some of which include obtaining a $4 million medical malpractice verdict in Norfolk Superior Court (Whiting v. Sikka, et al.); persuading the Supreme Judicial Court on behalf of a client to reverse a substantial verdict involving an Islamic cemetery in Dudley. Attorneys from the firm represented the Islamic Society of Greater Worcester and facilitated a settlement of the contentious dispute. Our Family Law attorneys work on a variety of pro bono matters, including participating in Lawyer for a Day programs in the Probate & Family Court, participating in the Attorneys Representing Children (ARC) program, and acting as divorce conciliators.

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

Many of our lawyers are active with charitable and civic organizations reflecting diverse interests and demonstrating a commitment to giving back to the community, including church-related leadership positions; Health Law Advocates, Inc.; Massachusetts Children Trust; Transformative Culture Project; Featherstone Center for the Arts; Copley Society of Art; Austin Jones Foundation; J. Owen Todd Charitable Foundation; Project Adventure, Inc.; and Donald A. Towle Foundation.

Anything to announce in the coming year?

Founded in 1992, to be a superior trial advocacy firm, Todd & Weld is celebrating the firm’s 25-year anniversary. We are proud of the team that has successfully achieved that mission for 25 years.

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

Todd & Weld has two past presidents of the MBA in its partnership ranks (Elaine Epstein and Jeffrey Cat-alano), and four fellows in the American College of Trial Lawyers.

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

The MBA membership is essential to the professional growth for our lawyers. It offers an array of opportunities to stay current on substantive law, establish strong professional ties with fellow members of the bar, support collegiality, develop leadership skills, and have input on important issues impacting the bar and society as a whole.

In what ways can you find the MBA beneficial to the lawyers in your firm?

Many of our firm’s attorneys are deeply dedicated to the MBA in terms of being a part of a number of section councils and arranging or attending panel discussions and seminars. We find that the MBA, as the preeminent voice of the legal profession, weighs in and takes a leadership role on many important matters that benefit our clients and the profession as a whole, including not just legal education, but its stance on matters that affect access to justice. In that role, the MBA has served the interest of many of our clients through its advocacy for a fairer and just legal system, whether that is hard to highlight any one particular program. We encourage the MBA to aggressively get the word out to its members via all possible means so that more people can take advantage of the free CLE offerings and other great events.

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

Keep it up! We appreciate the MBA’s ongoing advocacy on all justice related matters and its efforts to educate the bench and bar on advances and challenges in the legal profession. We also appreciate that it strives to make practicing law more enjoyable and collegial through its many social events. We hope that continued outreach to younger lawyers will grow its ranks.

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.

Morrison Mahoney LLP reprises role as primary Mock Trial sponsor

For the second year in a row Morrison Mahoney LLP has signed on to be the primary law firm sponsor of the Massachusetts Bar Association’s Statewide High School Mock Trial Program. With its $5,000 donation, Morrison Mahoney LLP joins the Massachusetts Bar Foundation as the main sponsors of the 2018 Mock Trial season.

“Over the next few months, thousands of high school students across Massachusetts will get a firsthand look at our legal system through Mock Trial’s incredible immersive learning experience. This would not be possible without the generous support of Morrison Mahoney LLP,” said MBA President Christopher P. Sullivan. “I offer my sincere thanks to Morrison Mahoney LLP Managing Partner Scott Burke and his law firm colleagues for their ongoing commitment to our Mock Trial Program.”

First organized in 1985, the Mock Trial Program’s tournament places high school students in a simulated courtroom to assume the roles of lawyers and witnesses in a hypothetical case. Thousands of students at more than 125 schools across the commonwealth are participating. More than 100 lawyers across the state will serve as volunteer coaches and judges.

Just the facts

<table>
<thead>
<tr>
<th>Firm Name:</th>
<th>Todd &amp; Weld LLP</th>
</tr>
</thead>
<tbody>
<tr>
<td>Year founded:</td>
<td>1992</td>
</tr>
<tr>
<td>Location:</td>
<td>Boston</td>
</tr>
<tr>
<td>Number of attorneys:</td>
<td>40</td>
</tr>
<tr>
<td>Managing partner:</td>
<td>Christopher Weld Jr.</td>
</tr>
</tbody>
</table>

MBA President Christopher P. Sullivan with Morrison Mahoney LLP Managing Partner Scott Burke

improve the lives of our citizens. It also serves an important role in ensuring that our judges and attorneys are the most professional, qualified, and dedicated in the entire country. We feel very fortunate to have the MBA work tirelessly to improve our commonwealth and feel privileged to have our attorneys be a part of that.

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

The MBA provides so many useful programs during the year that it is hard to highlight any one particular program. We encourage the MBA to aggressively get the word out to its members via all possible means so that more people can take advantage of the free CLE offerings and other great events.

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## 2017–18 SECTION COUNCIL AND DIVISION CHAIRS

### BUSINESS LAW
- **Chair:** Jonathan D. Plaut
  - **Vice Chair:** Maria T. Davis
  - **Law Office:** Goodwin, Procter & Hoar, LLP
  - **Location:** Boston

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- **Chair:** Eric P. Finamore
  - **Vice Chair:** Paul J. Kleinhans
  - **Law Firm:** Goodwin, Procter & Hoar, LLP
  - **Location:** Boston

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- **Chair:** Margaret H. Paget
  - **Vice Chair:** Meghann H. Slack
  - **Law Office:** Kurker Paget LLC
  - **Location:** Waltham

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  - **Law Agency:** Attorney General’s Office
  - **Location:** Boston

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  - **Location:** Boston

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  - **Law School:** Northeastern University School of Law

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### REAL ESTATE LAW
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  - **Vice Chair:** Nancy Weisman
  - **Law Firm:** Weisman & Sams
  - **Location:** Leominster

### SOLE PRACTITIONER & SMALL FIRM
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  - **Vice Chair:** Barry J. Bisson
  - **Law Office:** Ribiero, Bisson & Abbey
  - **Location:** Fall River

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  - **Vice Chair:** Michael D. Ready
  - **Law Firm:** Sweeney, Ready & O’Neill
  - **Location:** Wareham

### WORKERS’ COMPENSATION
- **Chair:** Samuel A. Segal
  - **Vice Chair:** Michael D. Molloy
  - **Law Firm:** Segal & Molloy
  - **Location:** Newton

### YOUNG LAWYERS DIVISION
- **Chair:** Andrew P. Cornell
  - **Vice Chair:** Andrew Cornell
  - **Law Firm:** Cornell & Cornell
  - **Location:** Cambridge

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**Access to Justice**

- **Chair:** Raymond A. Yorke
  - **Vice Chair:** Andrew Cornell
  - **Law Firm:** Cornell & Cornell
  - **Location:** Cambridge

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**Massachusetts Lawyers Journal**

**NOVEMBER/DECEMBER 2017**

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**MASSACHUSETTS BAR ASSOCIATION**

**1911 Massachusetts Avenue**

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**REAL ESTATE LAW**

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  - **Vice Chair:** The Law Office of Michael S. Rabieh
  - **Law Firm:** Belmore
  - **Location:** Belmont

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- **Chair:** Richard W. Cole
  - **Vice Chair:** Anuj Khetarpal
  - **Law Agency:** Attorney General’s Office
  - **Location:** Boston

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**CRIMINAL JUSTICE**

- **Chair:** Georgia R. Covlin
  - **Vice Chair:** Pauline Quirk
  - **Law Firm:** Covlin & Quirk
  - **Location:** Boston

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**DISPUTE RESOLUTION**

- **Chair:** Brian R. Jerome
  - **Vice Chair:** Sarah E. Worley
  - **Law Firm:** Worley & Worley LLP
  - **Location:** Boston

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**FAMILY LAW**

- **Chair:** Lloyd M. Godson
  - **Vice Chair:** Kimberly M. Joyce
  - **Law Firm:** Godson Legal Group PC
  - **Location:** Lynnfield

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**HEALTH LAW**

- **Chair:** Donald Whitmore
  - **Vice Chair:** Kathryn M. Rattigan
  - **Law Firm:** Robinson + Cole LLP
  - **Location:** Providence

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**JUDICIAL ADMINISTRATION**

- **Chair:** Thomas M. Bond
  - **Vice Chair:** Michael H. Haydon
  - **Law Firm:** Morrison & Tryon
  - **Location:** Boston

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**JUVENILE & CHILD WELFARE**

- **Chair:** Brian R. Pariser
  - **Vice Chair:** Valerie Torpey
  - **Law Firm:** Torpey, Mercado & Shuster
  - **Location:** Cambridge

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**LABOR & EMPLOYMENT LAW**

- **Chair:** Margaret H. Paget
  - **Vice Chair:** Meghann H. Slack
  - **Law Firm:** Kurker Paget LLC
  - **Location:** Waltham

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**LAW PRACTICE MANAGEMENT**

- **Chair:** Dmitry Lev
  - **Vice Chair:** Anne E. Stoddard
  - **Law Firm:** Leviton, Matthews & Stoddard
  - **Location:** Watertown

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**LAW STUDENT**

- **Chair:** Alvin Carter
  - **Vice Chair:** Dianira Leal
  - **Law School:** Northeastern University School of Law

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**PROBATE LAW**

- **Chair:** Kevin G. Diamond
  - **Vice Chair:** Maureen E. Curran
  - **Law Firm:** Diamond Litigation Group
  - **Location:** Quincy

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**PUBLIC LAW**

- **Chair:** Kerry T. Byon
  - **Vice Chair:** Susan Anderson
  - **Law Office:** Office of the Treasurer
  - **Location:** Boston

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**REAL ESTATE LAW**

- **Chair:** Michael D. Haddix
  - **Vice Chair:** Nancy Weisman
  - **Law Firm:** Weisman & Sams
  - **Location:** Leominster

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**SOLE PRACTITIONER & SMALL FIRM**

- **Chair:** Val C. Ribiero
  - **Vice Chair:** Barry J. Bisson
  - **Law Office:** Ribiero, Bisson & Abbey
  - **Location:** Fall River

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**TAXATION LAW**

- **Chair:** Marianne Sweeney
  - **Vice Chair:** Michael D. Ready
  - **Law Firm:** Sweeney, Ready & O’Neill
  - **Location:** Wareham

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**WORKERS’ COMPENSATION**

- **Chair:** Samuel A. Segal
  - **Vice Chair:** Michael D. Molloy
  - **Law Firm:** Segal & Molloy
  - **Location:** Newton

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**YOUNG LAWYERS DIVISION**

- **Chair:** Andrew P. Cornell
  - **Vice Chair:** Andrew Cornell
  - **Law Firm:** Cornell & Cornell
  - **Location:** Cambridge
Hundreds attend Conflict Resolution Week celebrations

From October 16-20, the Massachusetts Bar Association’s Dispute Resolution (DR) Section presented a series of events around the state in honor of Conflict Resolution Week. More than 400 people attended Conflict Resolution Week programs, including judges, lawyers, DR professionals, students, parents, teachers and other members of the public.

Governor Charlie Baker issued a proclamation recognizing October 19 as Dispute Resolution Day in Massachusetts. The day was celebrated with a reception at the Adams Courthouse, which featured a keynote address by Kenneth Feinberg (One Fund Boston, September 11 Victim Compensation Fund), and remarks from Supreme Judicial Court Chief Justice Ralph D. Gants and Trial Court Chief Justice Paula M. Carey. Other highlights included the Oct. 20 screening of The Peacemaker, a documentary film about international Irish peacemaker Padraig O’Malley.

The full list of Conflict Resolution Week events included:

- Oct 16: Western Mass. Court Connected Dispute Resolution Programs, Hampden County Hall of Justice, Springfield
- Oct 17: Youth Mediation and Juvenile Justice Panel, Massachusetts School of Law, Andover
- Oct 18: Beyond the Courthouse, Dispute Resolution Options for Families in Transition, Ventress Memorial Library, Marshfield
- Oct 19: Conflict Resolution Day Reception, Adams Courthouse, Second Floor, Boston

The MBA thanks our Conflict Resolution Week co-sponsors: Berkshire County Bar Association, Commonwealth Mediation, Franklin County Bar Association, Hampden County Bar Association, Hampshire County Bar Association, Harvard Program on Negotiation, IAMG, Juvenile Court Department, Massachusetts Collaborative Law Council, Massachusetts Dispute Resolution Services, Northeast Mediation and Arbitration, Sarah E. Worley Conflict Resolution PC, The Mediation Group, and the Trial Court Standing Committee on Dispute Resolution.

Western Mass. Court-Connected Dispute Resolution Programs Reception participants (from left) Timothy M. Limone (ADR Coordinator for the Trial Court), Brad Gordon (Executive Director, Berkshire Regional Housing Authority, Mediation Program, Pittsfield), Lynn McGillin (Hampden County Bar Association), Eric Govein (Dean, Western New England University School of Law), Joselyn Austin (Assistant Judicial Case Manager, Hampden Probate & Family Court), Kristine Bordieri (Assistant Judicial Case Manager, Hampden Probate & Family Court), Oren Kuehan (Hampden Probate Mandatory Mediation Pilot, Amherst Mediation), Hon. Mark D. Massie (Hampden Superior Court), Ronald Wnekowski (Assistant Chief Probation Officer, Hampden Probate & Family Court), Lee Florian (Executive Director, Dispute Resolution Services, Springfield), Deanne Zandell (Chief Housing Specialist, Western Housing Court), Hon. David G. Sox (Hampden Probate & Family Court, Chair of the Trial Court Standing Committee on Dispute Resolution), Sen. Eric P. Lesser (First District Probate & Family Court), Hon. Ralph D. Gants (Chief Justice, Supreme Judicial Court), Hon. Amy L. Nechtem (Chief Justice, Juvenile Court Department), Hon. Mark D Mason (Hampden Superior Court), Ronald Waskiewicz (Assistant Chief Probation Officer, Hampshire Probate & Family Court), Oran Kaufman (Hampden Probate Mandatory Mediation Pilot, Amherst Mediation), Hon. Ralph D. Gants (Chief Justice, Supreme Judicial Court) and Martin D. Mason (Hampden Superior Court), Kristina Bordieri (Assistant Judicial Case Manager, Hampden Probate & Family Court), Amy Koenig (Chief Probation Officer, Berkshire Probate & Family Court), Martin W. Healy (Chief Legal Counsel, MBA) and Martin D. Mason (Hampden Probate & Family Court), Oran Kaufman (Hampden Probate Mandatory Mediation Pilot, Amherst Mediation), Hon. Mark D. Massie (Hampden Superior Court), Ronald Wnekowski (Assistant Chief Probation Officer, Hampden Probate & Family Court), Lee Florian (Executive Director, Dispute Resolution Services, Springfield), Deanne Zandell (Chief Housing Specialist, Western Housing Court), Hon. David G. Sox (Hampden Probate & Family Court, Chair of the Trial Court Standing Committee on Dispute Resolution), Sen. Eric P. Lesser (First District Hampden & Hampshire), Lee Ochilbine (The Mediation and Training Collaborative, Greenfield), John Gellatrick (Chief Probation Officer, Hampden Probate & Family Court), Bette Bibelioski (Chief Probation Office, Franklin Probate & Family Court), Amy Koenig (Chief Probation Officer, Berkshire Probate & Family Court).

Michael Zythoovan (Conflict Resolution Week Chair), Brian Jerome (MBA Dispute Resolution Section Chair), and Martin W. Healy (Chief Legal Counsel, MBA) with Governor Charlie Baker’s proclamation of Oct. 19 as Dispute Resolution Day.

Martin W. Healy (Chief Legal Counsel, MBA), Hon. Ralph D. Gants (Chief Justice, Supreme Judicial Court) and Christopher A. Kenney (MBA President-elect) at the Conflict Resolution Day Reception.

At the Conflict Resolution Day Reception, Thomas Sander (left) accepts the MBA Public Service Award from Hon. John C. O’Toole (Ret.) on behalf of his father, Frank E.A. Sander, Emeritus, at Harvard Law School.

The Peacemaker film screening participants (from left) Michael Zythoovan (Conflict Resolution Week Chair), Polly Hamlin (Senior Event Planner, Harvard Program on Negotiation), James Donn (Filmmaker), Padraig O’Malley (Subject of the film The Peacemaker), Susan Haskel (Managing Director, Harvard Program on Negotiation), Brian Jerome (MBA’s DR Section Chair) and Joanna Kamphousos (MBA’s DR Section Council).
The Massachusetts Bar Foundation believes there is a role for every lawyer and judge in our organization. But it’s not just individuals in the Massachusetts legal community who support our efforts to increase access to justice for all — law firms continue to play an increasingly significant role in strengthening our capacity to help the organizations that are working hard to provide legal assistance to vulnerable clients facing issues including eviction, domestic violence, immigration, and many other circumstances threatening their safety and well-being. We thus are proud to acknowledge Nutter as one of our major partners in our work.

Nutter has helped pave the way for law firms to engage in pro bono work since its earliest days. Its co-founder, Louis D. Brandeis, who later became a renowned justice of the U.S. Supreme Court, devoted so much of his time to acting as unpaid counsel for causes of reform that he became known as the “People’s Attorney.” Nutter continues that tradition today, remaining deeply committed to social justice and principled causes. There are numerous ways in which Nutter has strengthened the MBF. Nutter currently is one of the two law firms contributing at the Silver Partner level in the MBF’s Law Firm and Corporate Partnership Program. In addition, 13 Nutter attorneys are members of the MBF Society of Fellows, where they not only make generous financial contributions to the foundation, but also volunteer their time to serve on MBF grant review committees, helping to allocate critically needed funds to nonprofit legal aid organizations throughout the commonwealth. David C. Henderson, a Nutter partner, currently serves on the MBF Board of Trustees, playing a crucial role in guiding the foundation so that it may continue to be a resource to the community for many years to come. Retired Nutter partner Daniel J. Gleason previously served in that capacity for years. “Louis Brandeis’ commitment to community service and the creation of a just society continues to inspire us at Nutter to this day. In many ways, these values — a standard of excellence both for client service and for commitment to the community — are the bedrock on which Nutter was built. I am proud of Nutter’s commitment to supporting the MBF in its important mission,” said Deborah J. Manus, managing partner of Nutter.

The MBF welcomes other law firms to stand with us by joining our Law Firm and Corporate Partnership Program. Visit www.MassBarFoundation.org to learn more.

Cohen, Ware honored with President’s Awards at grantee receptions

The MBF recently presented President’s Awards to attorneys H Theodore Cohen, Esq. of Cambridge and Robert C. Ware, Esq. of Williamstown. Given annually, the MBF President’s Award recognizes exceptional MBF supporters for their commitment to increasing access to justice for the most vulnerable in Massachusetts. The awards were presented at two recent events honoring grant recipients as well as MBF supporters. Thank you to all who attended.

The MBF 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
New MBA president emphasizes the ‘common good,’ rule of law at swearing-in ceremony

BY MIKE FLAIM
Kicking off its 106th year, the Massachusetts Bar Association welcomed Christopher P. Sullivan as its newest president in an official ceremony and reception atop Boston’s Prudential Tower on Sept. 13.

Supreme Judicial Court Chief Justice Ralph D. Gants administered the presidential oath of office to Sullivan, following introductory remarks from MBA Chief Legal Counsel and Chief Operating Officer Martin W. Healy, who praised Gants and Sullivan for their leadership and celebrated the strong bond between bench and bar.

With the entirety of the city directly below and sightlines extending far beyond Boston’s borders, the panoramic views from the reception suggested a sense of interconnectedness that presaged the theme of Sullivan’s keynote remarks.

“Here in Massachusetts, we still refer to our state as the ‘commonwealth,’” the new MBA president said. “The very name speaks to the common good, our shared common interest and everything that unites us. Today, however, we live in a time of division. We are told that we should be ‘polarized’ and different from us and perhaps inferior to us.”

Sullivan recalled Massachusetts’ own John Adams and the fact that Adams represented the British soldiers accused of perpetrating the Boston Massacre in 1770. “We as attorneys serve our clients, our judicial system and our profession,” he elaborated. “We do not serve ourselves. We are called upon to represent ‘others’: even when they are unpopular or even hated by the public at large.”

Following this emphasis on the importance of lawyers being “men and women for others”—a motto of the Jesuit ethos that so thoroughly informs his character—Sullivan also laid the keystone for his upcoming year at the helm of the MBA: the return to the rule of law.

His remarks throughout the evening drew many knowing, appreciative nods as he set his goals for the year, and this sense of purpose-driven solidarity extended long after his speech had concluded. When asked about his excitement for the upcoming year under Sullivan’s leadership and programs, which are offered FREE to members? The Education portion of our site has been updated to make it easier for you to find upcoming seminars/conferences, ePublications and MBA On Demand programs. We also now provide a repository of tips to help faculty plan upcoming seminars, in addition to information on how to get credit for your MBA CLE program attendance in other states.

PUBLICATIONS: Lawyers Journal, Section Review and Massachusetts Law Review articles, ethics opinions and the latest MassBar Beat podcast episodes are under Publications.

ADVOCACY: Browse our Advocacy section to find all of the MBA’s reports and amicus briefs, information about how to become a judge and details about the MBA’s ongoing legislative efforts.

PUBLIC: If you are member of the public looking for community programs, the Public section provides an overview of available services.

RESOURCES: We encourage you to bookmark the new Resources page for quick links to important benefits (like Fastcase, My Bar Access, Lawyer Referral Service and the MBA’s Insurance Agency), a list of upcoming education programs, information on how to make the most of your MBA membership and more.

MEMBER PROFILE: Log in to your Member Profile and add your headshot, change your email/mailing preferences, and find the CLE programs you have registered for.

SEARCH: Can’t find something? We also updated our Search functionality throughout the site. We think you’ll like how our filters can really help you customize what you are looking for.

EVENTS: Our Events calendar has a few new features, too. You can now subscribe to events by section and download those events to your personal calendar.

See the MassBar refreshed on our new website

The Massachusetts Bar Association unveiled a new and easier-to-navigate website in October. Our refreshed site more effectively highlights the programs and benefits that are important to our statewide members and others who are interested in what the MBA has to offer. As an added bonus, we are now mobile-friendly, so you can easily review our website on the go.

Need help finding something? Here is a guide to help introduce you to the new MassBar.org.

MEMBERSHIP: Looking for member services and discounts, or how to get more involved at the MBA? The Membership section is where you will find information about the MBA’s membership advantages, member groups (you can join as many as you want for FREE) and volunteer opportunities.

EDUCATION: Interested in our CLE programs, which are offered FREE to members? The Education portion of our site has been updated to make it easier for you to find upcoming seminars/conferences, ePublications and MBA On Demand programs. We also now provide a repository of tips to help faculty plan upcoming seminars, in addition to information on how to get credit for your MBA CLE program attendance in other states.

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MBA NEWS: See the MBA News section for more information about what is going on at the MBA (and with our members). Want to hear directly from fellow members about the benefits of an MBA membership? Throughout the site, read testimonials from current members on why they choose to belong.

ABOUT THE MBA: Need to contact MBA staff? Interested in learning more about our current leadership team? Visit About the MBA (located in our site’s footer).

You can find this guide and more helpful information right at www.MassBar.org.

Our goal with this new website is to provide easier access to the many tools and opportunities available through the MBA. We hope you like what you see. Questions/comments about the site? Contact MBA Member Services at (617) 338-0530, or email us at sitefeedback@massbar.org.
NOTABLE & QUOTABLE

MARIJUANA

“State eyes flight rule,” Boston Globe (October 26) — MBA member Christopher Poreda was quoted about a federal regulation, which could provide a legal basis for moving marijuana from the mainland to Martha’s Vineyard and Nantucket.

“Court: Roadside drunken driving tests not valid for pot,” WBZ NewsRadio 1030 (September 19) — MBA Chief Legal Counsel Martin W. Healy was interviewed about an SJC ruling that field sobriety tests cannot be used as conclusive evidence that a driver was operating under the influence of marijuana. The interview was also picked up by High Times magazine.

SEXUAL HARASSMENT

“Johnson makes rare speech as Fidelity deals with harassment,” Bloomberg (October 24) — MBA Vice President Denise I. Murphy provided commentary in a story about harassment at the workplace.

EXPERT TESTIMONY

“Expert testimony comes at a price,” Cape Cod Times (October 8) — Former Chair of the MBA’s Criminal Justice Section Peter Elikann provided insight for a story on the use of experts during criminal trials.

CONFLICT RESOLUTION

“Western Massachusetts court-connected dispute resolution programs honored,” MassLive.com (The Republican) (October 17) — Michael Zeytoonian, chair of the MBA’s Conflict Resolution Week Committee, was quoted in a piece recognizing the work of 15 court-connected dispute resolution programs in Western Massachusetts.

DRUG-FREE PROBATION

“Case asks if it’s constitutional to require someone on probation to remain drug-free,” WBUR (September 24) — MBA Chief Legal Counsel Martin W. Healy was interviewed about a case before the SJC that will determine if it’s constitutional to require someone on probation to remain drug-free. He also spoke with the Associated Press (October 2) about the same case; the article was picked up nationally by several publications.

BRAIN INJURIES

“Medical advances sharpen battles in brain injury cases,” Massachusetts Lawyers Weekly (October 9) — MBA Past President Douglas K. Sheff; Grace V.B. Garcia, a member of the MBA’s Executive Management Board; and MBA member William L. Keville Jr. were quoted in an article about advances in medical technology in proving the existence of brain injuries.

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

One of the most common reasons for inadvertent disclosure of client data or loss of client data is stolen and lost laptops or devices. Even an amateur cyberteam can easily extract the contents of an unencrypted hard drive. If you have not encrypted the hard drive of your laptop, you should do so today. Encrypting your laptop is a simple process and should not impact your work. Once you turn on hard drive encryption, each time you log off your computer, the entire contents of your hard drive are encrypted. When you log back in, the contents are unlocked for use. The activation process for both Mac and Windows computers is quite straightforward.

Hard drives

Mac computers use FileVault to encrypt the hard drive. This is native to your Mac; that is, there’s no need to buy a third-party product. You can find FileVault in System Preferences > Security & Privacy. Click the lock in the lower left-hand corner to make changes to the settings and then click “Turn on FileVault.” You’ll be prompted to either select to use your iCloud account to reset your password or create a recovery key. Either way, you’ll need that information to access your data in case you ever forget your computer login.

For Windows computers, all you need to do is install Windows BitLocker Drive Encryption. These include the Pro, Enterprise, and Core (Windows 10) editions of Windows. If you only have Windows Home, upgrading to Pro costs $80. It’s well worth it just for hard drive encryption! Access BitLocker from your Control Panel > System and Security. Turn on BitLocker to encrypt your hard drive and save your recovery key.

For tips on encrypting your Mac hard drive, see https://www.lawtechtoday.org/2015/01/how-to-encrypt-data-on-your-mac-in-a-few-simple-steps/ for Mac users and https://support.microsoft.com/ for Windows users.

Files and folders

File and folder encryption can be helpful for a couple of reasons. First, if you’re encrypting your entire hard drive, you could decide to only encrypt a certain folder with sensitive client data. If you are diligent in storing your sensitive files in one folder, this is a fine option. The problem, however, is that many times a file on your computer may not be located in just one place. For example, say you receive an email with a sensitive client file attached, which you then open using Outlook on your desktop. That attachment is automatically saved somewhere on your local hard drive. Furthermore, if you download the document to your desktop or downloads folder and forget about it, that file will reside in yet another place on your hard drive. If you’ve only encrypted one folder and not your entire hard drive, that file can likely be accessed in an unencrypted area of your hard drive. Second, encrypting a file or folder is a simple way to secure data and email it to a recipient.

Mac

Word for Mac allows you to encrypt any Word document via Preferences > Security. Create a password to secure the document. You can also use this feature for PDFs and other applications or devices that support encryption. To encrypt a PDF, go to File > Export with Password. Create a password for the PDF and then set the password to require a password. When you export the file, a pop-up will open asking you to input the password.

Windows

Encrypt Word documents from within Microsoft Word by selecting File > Info > Encrypt with Password. For PDFs (also works with other file formats), right-click on your document and then select Advanced > Encrypt content to secure data. The same right-click method also works for encrypting folders.

Smartphones

Smartphones are highly susceptible to inadvertent disclosure of client data because of the high rates of lost or stolen devices. Fortunately, encryption on your smartphone can be easily retrieved with iPhones, as long as you use a passcode or Touch ID (iPhone 5s or later) the contents of your phone are automatically encrypted. To boost security, it is advisable to change the default four-digit passcode option to a longer alphanumeric code. Android models starting with 6.0 (and some 5.0 phones) ship with encryption turned on by default. To ensure that encryption is activated, check in Settings > More > Security.

Phone Calls

Most attorneys are neither thinking about nor have concerns with the interception of client calls. But, if you have a high-profile case that may be a target for interception, it’s worth looking at your options. FaceTime, a native iPhone app, encrypts audio end-to-end, however you have to call another iPhone user for encryption to work. Similarly, iMessage on the iPhone encrypts text but only when texting iPhone to iPhone. Two third-party applications – Signal and Open Whisper Systems and What’s App – have become popular for encrypted calls and texts, both are available for iPhone and Android.

Sharing Documents

Below are four different methods you can use to securely share files over the Internet.

1) Encrypt individual files or folders and send via email.

As noted above, you can encrypt individual files and folders and attach those to an email. Then, either call or text the recipient with the encryption key (i.e. password) (just don’t send the password in the same email as your attachment), secure the files with only information that the recipient would know (i.e. Social Security number) and alert them, or secure the files with a pre-agreed upon password.

2) Use a secure cloud storage program and share the link with the recipient.

There are many available and all work similarly, it’s just how difficult it is to use both on the sender and recipient’s end.

If you’ve made it to this point in the article, I have complete confidence that you can implement any of the aforementioned solutions. The (hopefully minimal) time and resources will be well spent in comparison to the cost of a potential data breach in your practice.

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 law practice management and technology. She is the author of the ABA Law Practice Division’s, Evernote: A Guide to the Popular Digital Organizing Program. She frequently makes presentations to the legal community and contributes to publications on law practice management and technology. She is the author of the ABA Law Practice Division’s, Descartes as a Law Practice Tool, and serves on the ABA’s TECHSHOW Planning Board. Heidi previously practiced as a small firm and owned a technology consulting business. She also clerked for a Justice on the highest court of New Jersey and served as the editor-in-chief of the St. John’s University Law Review. A native of Minnesota, former collegiate hockey midfielder for the Amherst College Women’s Ice Hockey Team, and mother of three young children.
What it takes to win a client

BY JOHN O. CUNNINGHAM

Great rainmakers don’t sit in their office waiting for the phone to ring. They know that winning over new clients is all about court- ing them with public appearances, personal visits, phone calls, notes, social media posts, newsletters, content marketing and other forms of outreach.

Of course, courting a client is not the same as stalking one. Daily contacts or aggressive overtures are not only ineffectual, they can be unethical. So effective legal marketing is not about getting in someone’s face.

On the other hand, a single meeting with a prospect without any follow-up is almost always just a waste of time. According to one study, less than two percent of professional sales come after one initial contact, and 80 percent of sales come only after five or more contacts, touches or impressions (touches and impressions come through content marketing, advertising or other forms of outreach that actually get through to a prospect).

Other frequently quoted studies have concluded that buyers make service purchases, on average, only after seven to 12 contacts, touches or impressions (-touches and impressions come through content marketing, advertising or other forms of outreach that actually get through to a prospect).

It is hard to believe, but I think the best advice on how to do this comes from a song by 38 Special: “Hold on loosely but don’t let go.” A lawyer should make a courteous follow-up to any initial meeting, and every month or two, should reach out to prospective clients by sending to them a birthday or congratulato- ry note, adding them to a free newsletter list, sending to them a link to a story about their favorite hobby or interest, taking them to coffee or lunch when it’s mutually convenient, or volunteering a referral to them when it solves a professional need.

Some forms of outreach can and should have bits of information about the legal provider’s competence, experience and current relevance. It is fine to share news of noteworthy recent victories, awards and pro- fessional forms of recognition.

But the “sales stuff” should be like toppings on the dessert, only enough to compliment the flavor and not enough to dominate it. Otherwise, there is a risk that the prospective client views the outreach as self-cen- tered and egotistical. In the words of one of my former corporate clients, “If someone is always talking about their awards and recognitions, it sounds like ‘I love me’, and that’s a turnoff.”

For those who are willing to make patient but persis- tent efforts at making personal connections with their prospects, there is a payoff. The well-cultivated prospect will eventually become a client, a referral source, a source of business information, or just a good friend.

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

Character and fitness after admission to the bar

BY RICHARD P. CAMPBELL

“How many times have we sat next to a person with a mouth, unrefined, ill-mannered, rude and belligerent in all that he does? We ask ourselves questions. Were they not the same when they did this neanderthal come from? Did his parents fail to teach him the basics of civil intercourse? Or the opposite, did he learn to be like this from his parents? With infinite wisdom (in my judgment), Robert Fulghum informed us that we learned the basic tenets of a lawyer’s life in kindergarten. “Most of what I really need to know about how to live and what to do I learned in kindergarten. Wisdom was not at the top of the grade-school mountain, but there in the sandpile at Sunday school. These are the things I learned: Share everything. Play fair. Don’t hit people. Put things back where you found them. Clean up your own mess. Don’t take things that aren’t yours. Say you’re sorry when you hurt somebody. Wash your hands before you eat. Put your right hand up if you want something said. Cheese, marmalade, cookies, and cold milk are for you. Live a balanced life: Learn some and think some and draw and paint and sing and dance and play and work every day some. Take a nap every afternoon. When you go out into the world, watch out for traffic, hold hands, and stick together. Be aware of wonder.” Robert Fulghum, All I Really Need To Know I Learned In Kindergarten (Ballantine 2004).

Sadly, some lawyers do not live balanced lives. Some do not play fair. Some, dominated by greed and materialism, take things that do not belong to them. Some hurt others knowingly, callously indifferent to the suffering they cause. With more than 55,000 individuals holding licenses to practice law, it is axiomatic that at least a few lawyers fit this bill. The question at hand, therefore, is whether lying, cheating, unscrupulous lawyers are at risk of losing their license to practice law even where their bad behavior takes place outside of courtrooms (or the context of litigation) or interactions with clients as retained counsel. What are the limits of the court’s oversight of a lawyer’s character and fitness to practice law? Let’s take a look.

It is, no doubt, obvious that applicants for admission to practice law are subject to an evaluation of their fitness and character. Rule V (Character and Fitness Standards for Admission) of the Massachusetts Rules of Professional Conduct mandates that the Board of Bar Examiners report to the court “as to the character and good moral qualifications of each candidate for admission who has passed the written examination.” In carrying out its mission, the board “considers good character to embody that degree of honesty, integrity and discretion that the public and members of the bar have a right to demand of a lawyer.” A record manifesting a significant deficiency in the honesty, trustworthiness, diligence or reliability of a candidate may constitute a basis for denial of a recommendation for admission. Engaging in any conduct which would have subjected the candidate to discipline if he/she had already been a member of the bar would weigh strongly against a determination of good character and fitness.

Among several “essential” attributes of good character and fitness to practice law, the court cites to the ability to conduct oneself with respect for and in accordance with the law, to avoid acts which exhibit disregard for the rights or welfare of others, and to use honesty in financial dealings on behalf of oneself, clients and others. Play fair, don’t hurt others, don’t take things that are not yours. Sounds familiar.

Now fast-forward to years after admission to the bar; will the court evaluate a licensed lawyer’s character and fitness as embodying that degree of honesty, integrity and discretion that the public and members of the bar have a right to demand of a lawyer? Will it consider lawyer conduct manifesting a significant deficiency in honesty, trustworthiness, diligence or reliability as grounds for suspension or disbarment? Will the court look at conduct unconnected to lawyering?

The bar disciplinary opinions In Re Evan A. Greene (BD -2014-107) and In Re Barry D. Greene (BD – 2015 – 106) demonstrate the answer is unequivocally affirmative. The opinions also show that bad behavior is often learned at home from the family. Barry Greene (the father) and Evan Greene (the son) were lawyers admitted to practice in the commonwealth and operated a law firm known as Portner & Greene (in Need- ham). They held themselves out to be specialists in real estate transactions (and, apparently, in bankruptcy, lia- gation and estate planning). In addi- tion to practicing law for clients, the Greenes ran a business that involved the purchase and leaseback of dis- tressed residential real estate prop- erties (all of which had untapped, available equity) from unobserv- ed consumers who were unable to meet their ongoing mortgage debts. The insolvent homeowners were not clients; the Greenes did not represent them. (“Bar Counsel’s petition for discipline was not based on any as- sertion that the individuals received legal advice from the respondent.”) As the court reported in its decision, “[t]he firm was not involved in an at- torney-client relationship with any of the homeowners involved.” Instead, in exchange for a “substantial” fee, mortgage brokers with knowledge of the distressed homeowners referred the homeowners to the Greenes for what might be described as workouts as they tried to remain in their homes. The Greenes “arranged to purchase the homes” and then lease them back to the homeowners with an option to purchase in a year in an amount equal to the pur- chase money mortgage plus closing costs. During the lease period, the rents were calculated on the carrying costs of the Greenes’ purchase money mortgage (which they borrowed from one of the banking clients) and, accordingly, surpassed more than the monthly pay- ments on the homeowners’ underly- ing mortgages (which the homeowners demonstrably could not meet in the first place). (“The transactions were oppressive because the homeowners were desperate to avoid imminent foreclosure and [the Greenes] took advantage of [their] superior bargaining position.”)

In other words, the Greenes constructed a financial scheme that doomed the homeowners to failure from the outset and assured the Greenes access to (and conver- sion of) the homeowners’ equity in the distressed property. (“The lease/ buy-back options were high-risk and likely to fail because the homeowner- s’ lease payments were higher than the mortgage payments they dem- onstrably could not afford.”) All of the homeowners defaulted on their lease-option monthly payments. What was theirs became the Greenes. The court, clearly motivated by the “selfish” actions of lawyers using superior knowledge and bargaining positions over “desperate and vulner- able” victims, indefinitely suspended the son and suspended the father for two years from the practice of law. As Justice Spina wrote in In Re Evan A. Greene, Evan A. Greene’s conduct was “beyond distasteful.” “Sadly the respondent’s use of his professional skills was motivated by greed” in that he “used his professional train- ing and experience to devise a so- phisticated plan that took advantage of unsophisticated homeowners in financial distress. …” The court up- held the finding (among others) that Evan A. Greene violated Rule 8.4 (c) (conduct involving dishonesty, fraud, deceit, or mis-representation). Lawyers may, of course, engage in business transactions outside the traditional practice of law just as Evan Greene and his son Evan did. Personal liability for unfair and decep- tive practices pursued by such lawyers in those extra-judicial busi- nesses will be governed by the tenets of G.L.C. 93A, §§ 9 and 11 where the Courts insist that “[t]he objectionable conduct … attain a level of rascality that … raise[s] an eyebrow of some- one innured to the rough and tumble of the world of commerce.” Levings v. Forbes & Wallace, Inc., 8 Mass. App. Ct. 498, 504 (1979). Lawyers may not reasonably expect, however, that they can engage in unfair and decep- tive business practices and maintain the privilege of practicing law.

“It doesn’t matter what you say we believe - it only matters what you do.” – Robert Fulghum, All I Really Need To Know I Learned In Kindergarten.

Richard P. Campbell is a fellow of the American College of Trial Lawyers and a past president of the Massachusetts Bar Association. He founded Campbell Campbell Edwards & Coneey, P.C., a firm with a national practice, in 1983.
The therapeutic relationship

It was very helpful to me when I met with a clinician at LCL. Those couple of meet-
ings really helped me identify what issues I needed to address in order to be a more successful lawyer and also a more contented person. Since LCL offers consultation but not ongo-
ing therapy, I accepted referral to a therapist near my home who came recommended and who takes my HMO. But my experience with her has not felt the same as my LCL experience. After three visits, I still don’t feel that she “gets” me, and she seems sort of removed. Perhaps this is how people do CBT, which I thought was the type of therapy I wanted, or maybe it’s because she’s less lawyer-specialized.

The poor connection that you’ve experi-
enced probably has little to do with the therapist’s treatment model or experience with law. But it is an addition, one that I don’t define or measure, that relates to the therapeutic relationship. Although many more studies are done purporting to show that this therapeutic modality is better than that one, there is a considerable body of research indicating that the relationship factor makes a bigger difference than the treatment approach.

At LCL, we do, of course, try to match you to a therapist, taking into account a number of factors including type of therapy. And certainly, all other things being equal, it helps when a therapist under-
stands your work culture/environment (that’s one of the reasons to come to LCL in the first place). Most of the therapists to whom we refer have had several lawyers among their patients/clients, but of course it would be unreasonable to expect most of them to be lawyer specialists. Besides, most of the prob-
lems that lawyers face are human problems shared by individuals in many walks of life.

The research suggests that, on the whole, those therapists who forge the best connection, and who get the best results, tend to be those who are high in qualities like empathy, genuineness, and warmth. But, interestingly, a therapist who is experienced by one person as high in these qualities may not strike the next person in the same way. That varia-
tion may reflect differences in the patient or client’s personality (self-critical individuals, for example, tend also to feel more critical of the professionals they see). In addition, the client’s ways of relating may bring out different sides of therapist’s interper-
sonal self. I have found that, when these relation-
ships don’t click, the feeling of discomfort usually goes both ways.

When I’m making a referral to a clinician whom I know (which is ideal, but not always possible giv-

en the realities of reliance on managed care), I do my best to visualize these two people in the same room, and get a picture of how they would relate. That is, more often than not, a successful method. But if, after a few sessions, you still feel that some-
thing is off—that you are not understood or respect-
ed, or that the therapist seems too detached, I want you as my LCL client to contact me, review what went awry, and try another referral. Please don’t be embarrassed to get back in touch with your LCL clinician (or whoever referred you); in addition to getting a better outcome for yourself, you are help-
ing us—when we learn that a particular therapist is eliciting unsatisfactory responses from multiple lawyers, we take them off our referral list.

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.

Tips, deadlines and reminders for Medicare and Medicaid

BY JO BABIARZ

Here is some general information about upcoming health insurance application deadlines and insurance gaps.

As with anything, the devil is in the details, so make sure you read all the fine print. A portion of this information comes directly from the 2017 Elder Law Education Pro-
gram, “Taking Control of Your Future: A Legal Checkup,” eighth edition; Alex MoscHELLa, Esq. Chair of the MBA El-
der Law Advisory Committee (published by the MBA and the Massachusetts Chapter of the National Academy of El-
der Law Attorneys). Other resources are listed at the end.

The Medicare Part D enrollment deadline is December 7, 2017.

People must separately enroll in Part D (Prescription Drug Coverage). The open enrollment period for 2018 be-
gins October 15, 2017 and ends December 7, 2017. People can make selections online, but do so carefully — do not assume that plans can be switched mid-year.

For 2018, CMS calculates the standard initial deduct-
able ($405), initial coverage limitation (yes, there is a donut hole) is $3,750. Per CMS calculations, if a person purchases medications of less than $312 per month, the person will not enter the donut hole. If the person does enter the donut hole, the total estimated costs are $5,000, which costs more than $600 per month.

It pays to use the Medicare Part D Plan Finder to shop for insurance coverage. Tip: The pharmacist can print out a list of medications. Input that list in the U.S. government website, at MedicarePlanFinder (do not use a commercial insurance calculator), and run the program. Compare plans and pharmacies to arrive at the best price.

Be patient — there can be significant differences.

Mind the gap

There is a 12-month gap between being eligible for Medicare (65) and full retirement age for Social Security Benefits (66 or later). If a person chooses to work until full retirement age, there is that issue of health care — to take Medicare or not to take Medicare. A person cannot stay on an employer’s plan, if the employer has fewer than 20 em-

ployees, but must go on Medicare. Otherwise, the person can choose between the employer plan and Medicare. If the person stays with the employer, be sure there is contin-
uous health insurance coverage and collect all paperwork to avoid the late enrollment penalties.

Note: Part B premiums are means-tested, using the ad-
justed gross income earned two years prior to the Part B application. For example, 2017 Part B premiums are based on 2015 AGI. Part B premiums can be lower if paid by de-
ductions from social security retirement benefits, but there are significant financial consequences for filing for social security benefits before full retirement age.

Massachusetts insurance open enrollment and waivers

There is a different time period for this — pen en-
rollment starts November 1, 2017 and ends January 31, 2018. These dates do not apply if a person becomes eli-

gible for MassHealth at any time, or when a person quali-

fies for subsidized health insurance under the MAHealth Connector.

Useful websites include:

- https://q1medicare.com/q1group/MedicareAdvantage-
PartDBlog.php?blog-A-preview-into-2018-CMS-re-
leases-finalized-2018-Medicare-Part-D-prescription-
drug-coverage-parameters&blog_id=61&frompage=18

- Donut-Hole Calculator: https://q1medicare.com/

- PartDPartCoverageGapCalculator2018.php

- Calculate Part B Premium: https://www.mass.gov/your-

   - medicare-costs/part-b-costs/part-b-costs.html

- MassHealth info: http://www.mass.gov/ant/budget-

   - taxes-and-procurement/oversight-agencies/health-policy-

   - commission/patient-protection/health-insurance-open-

   - enrollment-and-waivers.html

Jo Babiarz is a lawyer, educator and author. She is fascinated by all things health care.
Once upon a time, a primary care provider likely kept your chart in an untidy pile on his desk for a week or more after your last visit, until he had time to complete his charting. Then it went to an unsecured file cabinet behind the front desk. If you wanted a copy, you had to wait for someone to pull that chart and photocopied each page, by hand. No one would ever want to steal the chart, because it would never be used afterwards and also because they would have to drive to your doctor’s office late at night and break in with a crowbar. If you decided to sue your doctor, your lawyer would ask to see the original chart, and make additional copies of any missing pieces not produced (and there always were). The storied “doc- tor’s handwriting” was the blow that killed the defense of many a health care provider when key entries were illegible — including to the doctor himself when reviewed years later in the context of litigation.

Those days are long gone. The American Reinvestment and Recovery Act required most health care providers to have “meaningful use” of electronic health records (“EHR”) in place by 2014 in order to maintain reimbursement for electronic transactions. By 2015, most states required “meaningful use” or “EHR competence” for physicians to renew their licenses. See, e.g., MGL c. 112 sec. 2: 243 CMR 2.01 (13). So, what do these requirements mean for discovery in civil litigation involving health care providers and institutions? It means the genie is out of the bottle, and not going back in.

The scope of discovery has included electronic data, platforms, and embedded data (“metadata”) for several years. Counsel, too, are now required to have basic competence in dealing with electronic mediums. (https://blog-public.bbl.core.windows.net/web/bflgr1-21.pdf). All litigants are familiar with the use (and occasional abuse) of the “litigation hold” for electronic data. The current Massachusetts Rules of Civil Procedure include specific standards for the scope and process of electronic discovery, and have since 2014. See Mass. R. Civ. P. 26(f). As the ways in which society in general, and health care providers in particular, manage electronic data evolves, so too do the problems and complexities of electronic discovery.

What does the advent of the cloud server mean? Whether you are an adversary party notifying an opponent that your client is taking steps to execute a hold to control data, or attempting to execute a hold yourself, the involvement of a cloud server raises the question of who owns the hardware, the software, and who is responsible for executing and enforcing the hold.

The cloud does not exist. When you put data in the cloud, you are simply renting space on someone else’s server. Cloud servers are owned and operated by vendors, who generally have a contractual relationship with the owner of the data, and not with the customer. Vendors, contracts, and the cloud are not forever ours. In the case of electronic discovery, vendors may have the responsibility for litigation holds and data preservation the contract gives them. However, some cloud vendor contracts carve out the “ownership” of electronic discovery. Vendors may hold the responsibility for litigation holds and data preservation back to the end-user, by contractual term. As an example, there are “hold” functions within Microsoft Office 365 that will allow the end-user to lock individual mailboxes. There is also a “protect” function which allows an administrator at a higher level to prevent override or alteration of the lock. Many litigation holds, however, include in their scope, execution or as yet to be created back-ups.

What are back-ups, and why do they matter in the context of discovery? Your server, including your e-mail server, makes copies of your e-mails and back-ups at regular intervals so that information can be recovered in the event of a data loss. In litigation, you or your opponent may want to compare back-ups generated over time, or compare the original document on a back-up to the final document. As an example, think about a discharge report in a medical malpractice case: someone might want to see the content of the note 1) as dictated, 2) as transcribed, and 3) as signed, and compare changes over time. Microsoft Office 365 back-ups are not available to the user end. Microsoft Office Exchange Server is the most common application, although Sharepoint and Lync are also in use. Microsoft does perform “traditional back-ups” on these servers, however those back-ups are used only for internal purposes at Microsoft and only if they experience an “internal catastrophic event”. There is no function that allows an end-user of Microsoft Office 365 “to access back-ups,” and no mechanism for those end-users to back-up their own mailboxes. (Article published online at searchdatabackup.techtarget.com by Brien Posey, MCSE, September 2012). If your hold includes a cloud server with limited e-discovery capacity, or contractual limits on that capacity, your ability to execute or enforce the hold may be limited by the vendor terms.

Many jurisdictions, such as Massachusetts, have e-discovery rules and standards that address situations in which subject material is “unavailable,” and define that term. See Mass. R. Civ. P. 26 (f). However, that does not resolve the question of who “owns” the data. Some courts can be unforgiving.

An Ohio case involved data on a cloud server. Counsel represented that back-ups copies of the data were “unavailable,” because the vendor owned the server and therefore the data and the server and had declined, by contract term, to release it. The court held that because the defendant was not contractually prohibited from seeking those e-mails or backups, the requirement that document that documents were “unavailable” were inaccurate and constituted a lack of due diligence (there were some other “bad facts” in this case not relevant here, which may have affected the ruling of the court). Importantly, for our purposes, the court also noted “[t]he same would be true, of course, for other web-based applications; just because, for example, emails in a Google or Outlook account might be kept on a server owned or maintained by the email provider, it does not mean that the information in those emails belongs to the provider — just the opposite.” Information, of course would broadly include back-ups and metadata. The case seems to set out an affirmative duty to attempt to obtain data from vendors on demand; the scope of that duty is unclear. Brown v. Tellermate Holdings (S.D. Ohio, July 1, 2014).

When executing or evaluating a litigation hold, determine as soon as possible who is actually in physical possession of the data — then think about possession, custody and control for purposes of discovery. If you are executing the hold and believe back-ups may be within the scope of reasonable e-discovery in your matter, identify the host server and vendor as soon as possible. If a cloud server is involved, obtain the service contract for review. Get on the ground with your client as quickly as you can and document carefully what will be available, and what won’t. Consider whether efforts to secure back-ups — such as a subpoena to the vendor — may be admissible to demonstrate due diligence (even if you believe the vendor will fail to comply). Explore mechanisms for preserving data that parallels what would be on back-ups. If they are unavailable, and involve e-discovery experts early if the size and/or complexity of your case warrant it. Approach opposing counsel early to set voluntary e-discovery parameters and constrain costs (encouraged in most jurisdictions), and remember: your client may “own” a chunk of the cloud she can’t readily access.

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just or speedy.” The court found that the board “abused the procedures that gov-
ern adjudicatory proceedings” and that it “failed to construe and apply the adjudi-
catory rules governing its proceedings to pro-
vide a just and speedy determination.”

Since the board’s decision suspending the practitioner was “based on unlawful pro-
cedure,” the court in Weiner reversed the decision and ordered the board to dismiss the complaint.

The physician in our case study has not yet suffered the multiple “false starts and stops” which transmogrified the ad-
ministrative process in Weiner. But still, in anticipation of further delay, there are sev-
eral arguments he may wish to consider.

Three years. When the three-year an-
niversary of the fateful transfer arrives, the physician could contend that the three-
year SOL for medical malpractice actions should bar the disciplinary action against him. The policy behind the med-mal SOL is to prevent the loss of evidence and fad-
ingen memories of witnesses from hindering a fair trial. As the court in Wang noted, “witnesses may disappear and the passage of time itself may well dim or even eradi-
cate the memory of the witnesses and thus preclude the construction of an adequate record.” Although the board is not bound by the med-mal SOL, the physician may argue that these same policies apply — particularly where witness testimony var-
est from or contradicts the contemporane-
ous record.

Four years. After four years, the phy-
sician could contend that the case is barred by the SOL set forth in G.L. c. 260 § 5A, which governs consumer protection ac-
tions. Since professional licensing boards are essentially consumer protection agen-
cies and since professional licensing statutes and regulations constitute laws that are “intended for the protection of consumers” — the physician should argue that the “essential nature” of board disci-
plinary actions renders them subject to the four-year limitations period applicable to consumer protection actions. Anawan In-
surance Agency v. Division of Insurance, 459 Mass. 592 (2011) (“The essential na-
ture of the right asserted determines the appropriate statute of limitations”). This contention might not be successful as a policy argument.

Six years. At six years, the physician could argue for dismissal on the basis of the medical board’s own “staleness” reg-
ulation which provides: “Except where the Complaint Committee or the Board determines otherwise for good cause, the Board shall not entertain any complaint arising out of acts or omissions occurring more than six years prior to the date the complaint is filed with the board.” 243 CMR 1/3(16) (“Stale Matters”).

Not all boards have a staleness regu-
lation. But it is possible to argue before the dental board or the nursing board, or a similar licensing authority, that the BRM regulation vindicates a worthwhile policy. Stale evidence is not reliable evi-
dence. The use of stale evidence is preju-
dicial because it would require the physi-
cian — and every witness — to attempt to remember events that occurred so many years ago. Since the medical board itself considers a matter “stale” if the mistake occurred beyond six years, the physician should argue that the regulation precludes the board from instituting the disciplin-
ary proceeding. This argument is likely to fail, however, because the regulation gives the board discretion to “entertain” a complaint whenever it finds there is “good cause” to do so.

Seven years. At seven years, the phy-
sician could argue for dismissal on the basis of the med-mal statute of repose, which is seven years from the date of the alleged mistake. The statute of repose is based upon the policy of “quieting” claims and sounds in the nature of proce-
dural due process. In this regard, the phy-
sician should argue that the legislative in-
tent and social policy behind the statute of repose should serve as a bar to the board’s prosecution. Naturally, he will have to find a way to distinguish the Wang case.

In any case involving undue delay, a lawyer can argue that discrepancies in evidence should be construed against the enforcement authority that waited so long to prosecute the case. Had the practitioner known a complaint was coming, she may have preserved, threw away, or identified witnesses she would later forget. She may have even asked a lawyer to interview witnesses and memo-
rize their testimony. And even where records do exist, those notes do not con-
stitute a comprehensive explanation of everything the doctor saw and considered and cannot explain why she made a par-
ticular decision. This is an even greater problem for older charts, created before electronic medical records became the standard.

None of these arguments will prevent a licensing board from imposing disci-
pline over something that happened in 1970 if it wants to. They are policy argu-
ments that may go to the weight or ad-
missibility of the evidence. They are not a hard line preventing dilatory prosecution and a hard line is what is needed.

A hard line

Professional licensure cases impli-
cate constitutionally protected rights. And the right to prompt administrative action implicates due process. The time has come for the Massachusetts legisla-
ture to enact a statute of limitations gov-
erning disciplinary proceedings against licensed healthcare professionals. Given the danger of dimmed memories and lost evidence, boards should be subject to a flat bar on disciplinary actions. When a case involves an alleged deviation from the standard of care, boards should be held to the three-year SOL in medical malpractice cases, particularly since the policy reasons are the same. With limited exceptions, prosecutions should be barred if the prosecution does not commence within five years after the alleged events.

Until this happens, the courts should pro-
vide clear guidance as to how long prac-
titioners must wait for the boards to com-
mence disciplinary proceedings against them.

The Massachusetts Bar Association is currently accepting nominations for officer and delegate positions for the 2018–19 membership year.

Nominees must submit a letter of intent and a current resume to MBA Secretary c/o Gwen Landford by 5 p.m., on Friday, Feb. 23, 2018, to be eligible.

To submit a nomination, mail or hand-deliver the information to:

MBA Secretary
Massachusetts Bar Association
Attn: Gwen Landford
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.

www.MassBar.org

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Mail order orthodontics

BY JOEL ROSSIN

Want to fix your teeth for a fraction of what you’d pay an orthodontist? How is that possible? By not paying an orthodontist.

Online providers will remotely guide you to take your own impressions and put on your own “aligners.” For $7.98, Amazon.com will even sell you a box of elastic “gap bands” that are supposed to pull teeth together. One of the biggest players is Smile Direct Club (SDC), a Tennessee company that provides services in Massachusetts.

The Board of Registration in Dentistry has received two complaints against SDC for the unlicensed practice of dentistry. The American Association of Orthodontists filed the first one in April. I filed the second one in August on behalf of the Medicaid Orthodontists of Massachusetts Association.

How SDC Operates

The SDC website asks you to enter your zip code. If you can successfully accomplish that task, you get a message that says, “Congratulations! You’re a great candidate.” If you want a more detailed evaluation, you can take a “free 30-second smile assessment.” You look at six drawings and choose the one you think looks like your teeth.

There are no wrong answers. Everyone who orders one gets an “at-home impression kit.” If you are not sure you can take accurate impressions at home, you can “book a scan” at the “Smile Shop” in Boston. Eventually, you receive a series of “invisible aligners,” which you insert yourself. You do not get X-rays and never see an orthodontist.

I called SDC and spoke with a guy named Andy. “Is there anything I can do to make you smile today?” he asked.

I wanted to know whether I could see an orthodontist at the Smile Shop. “We never have an orthodontist there,” he said. “We have a dental professional.”

“I have that with a license?”

“You have to do the dental work.”

“What about dental technicians?”

“Dental technician” is not a thing. You can be a dental assistant or hygienist, but there is no license in Massachusetts for a “dental technician.”

SDC charges $95 for an impression kit, $1,850 for aligners, and $99 for a retainer. This is on the lower end of what orthodontia costs but not the bargain it seems. MassHealth pays $1,200 for banding, $90 per adjustment of what orthodontia costs but not the bargain it seems.

The SDC website asks you to enter your zip code.

Some patients write that the treatment has exacerbated bone pathology, extra teeth in the bone, and so forth. Patients may not realize what they are giving up when they order without getting X-rays. There is no dental screening for issues like periodontal disease, or they can order aligners on the Internet and hope for the best.

Dissatisfied Customers

The only information publicly available on SDC’s outcomes (apart from what is on the SDC website) is based on voluntary reviews. The Better Business Bureau lists 126 customer complaints. Not all the online reviews are bad, but some customers say the product doesn’t work. Charges are improper and customer service is terrible. One consumer writes:

“I would NEVER RECOMMEND THIS COMPAN- NY. I’d rather spend money to see a real dentist and have the proper care. I filed a complaint with the Massachusetts Dental Society and that did nothing.”

Another consumer writes on RealSelf.com:

“I am annoyed by their customer service. I honestly wished I had paid the extra $1,500 (after insurance) to get Invisalign through my primary dentist because it would’ve saved me that much frustration. I did not get the impression at any time using SmileDirectClub that there was actually a dental profes- sional anywhere checking in on my progress.

“Some patients write that the treatment has exacerbated a malocclusion or that they received bad medical advice. For example, a Ripoff Report user writes: “I noticed they were moving teeth that were straight (that are now totally misaligned).” Two Yelp users had similar complaints:

“I was given a 7-month treatment plan, which was de- layed to a full year due to people forgetting to send my aligners, sending the wrong aligners... they even told me they had lost some because some one else’s aligners. Many weeks can be added for each aligner that is delayed or messed up. All of this would have been fine I guess if they just straightened my smile. My two front teeth are still bucked out and protruding and my smile looks crooked. They told me there’s nothing they can do and my teeth are in ‘optimal’ position. Well I went to an orthodontist con- sultation and he immediately said I have protrusion and they can fix it, even with clear aligners. This company let me down.”

Another consumer complains:

“Caused damage to my teeth. I called customer alignment. I can no longer bite all the way down. They also refused a full refund. Now I have a damaged “alignment” and will have to pay more at a dental office to fix the damage… Save your money and your smile and pay to see a real dentist in person.”

A customer reports to DentalBuzz.com that her online provider (not SDC) did not screen her for TMJ and told her, incorrectly, that hers was a simple case:

“It isn’t worth the money when you’re going to get saddled with further orthodontic treatment and bimax jaw surgery, in addition to chronic pain, from something like this — trust me, I know, because I’m living it. Thankfully a real orthodontist has taken me on as a patient … after this horrible experience.”

Harm to the Public

People may not realize what they are giving up when they forgo professional treatment. For example, here is an actual comment on Amazon regarding whether orthodontic gap bands (not an SDC product) provide a lasting improvement:

“They can go back the way they were most of the rea- sons for this is poor high-gen all you have to do is try a list of things that work. Crush them with a bar of soap but always use LISTERINE it won’t happen in week o 1 month but it will happen sooner or later depends how bad it is and you will notice i talk for personal experience because those rubber things they only go to give gum infections that all you paying for and believe me you don’t want that it re- ally hurts i know believe me i know.”

Online patients report skin rashes or allergic reactions. There is no dental screening for issues like periodontal disease, bone pathology, extra teeth in the bone, and so forth. Par- tients do not get any kind of basic evaluation, a cancer screen, or the identification of lesions that should be treated before orthodontia begins. Proper screening may un- cover unseen, un-diagnosed issues that may result in loss of teeth, gum recession, or bone tumors that if not discov- ered may become immediately serious or even fatal.

There may be impactions or cranio-facial abnormali- ties that may become worse under the online treatment, dentists say. Other problems may be discovered during treatment by an orthodontist, which remain hidden in an online case, for example: posterior open bites, lack of ro- tational control, or poor bite management.

Nor is anyone following the patient as an orthodontist would. As one of my clients pointed out, “The orthodon- tist in real time modifies the appointment periodicity as a function of the patient’s behavior and responsiveness to treatment. Furthermore, there are adverse oral conditions that may arise during treatment. These include root resorption, soft drink related decay under aligners, gingi- val recession, traumatic occlusion, gingival impingement, and the loosening of dental restorations.” When no ortho- dontist is involved, these problems go unnoticed.

Unlicensed Practice

It’s illegal to “directly or indirectly practice or attempt to practice dentistry” without a license. G.L. c. 112, § 52.

Some patients are seeking orthodontic treatment if they “offer or enter- takes by any method to diagnose [or] treat, any deficien- cy, deformity or other condition of the … teeth, gums, or jaws.” G.L. c. 112, § 50.

Under the regulations of the Board of Registration in Dentistry, only a licensed dentist can write an orthodontic prescription. Only licensed dentists can perform final posi- tioning and attachment of orthodontic bands and bands. Patients must provide specific informed consent for ortho-dontic procedures.

Dr. Burris says on the SDC website that he has “di- agnosed and treated” hundreds of SDC cases. If SDC is diagnosing and treating patients, then it is practicing dentistry. And because it has a Boston office, SDC is provid- ing services in the commonwealth.

What Can We Do About It

If an orthodontist opened a storefront where “dental technicians” scanned a patient’s mouth, teeth, and bone to provide aligners for the patients to install themselves — without com- plying with any of the other regulations — that orthodon- tist would probably hear from the Board of Registration in Dentistry. But SDC is not a licensed dentist — it’s a corporation — and the board does not feel it has jurisdic- tion to impose a sanction.

But the board does not just sanction licensed den- tists. It is legally required to investigate complaints of the unlicensed practice of dentistry. If it finds that there is reasonable cause for a violation, the board must issue a “shall forthwith file a written report of the same with the attorney general who shall, within three months follow- ing receipt of such report, notify the board in writing of the action taken with respect to such violation.” G.L. c. 112, s. 43.

By using words like “forthwith” and setting a three-month time limit for the attorney general, the legislature is saying that unlicensed practice must be dealt with quickly. But after six months, the board has not taken any action on the complaints. In the meantime, Massachusetts residents have a choice. They can hire a licensed profes- sional, or they can order aligners on the Internet and hope for the best. ■

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The American jury trial — a cornerstone of our system of civil and criminal justice — and an essential part of the bedrock of our democracy. Our high courts routinely extol its virtues as “the sacred” method for resolving factual disputes, the “most important means by which laypeople are able to participate in and understand the legal system,” and as bringing “the rules of law to the touchstone of contemporary common sense.” Dalis v. Buyer Advertising, Inc., 418 Mass. 220, 222, 636 N.E.2d 212, 214 (1994).

On a more concrete or “micro” level, however, a jury trial can be a blessing or curse. Depending on the nature of the claims, who or what your client is, and what sort of witnesses you are stuck with, trying to get a jury can be a treat you anticipate with relish, or a looming nightmare you attempt to avoid at all costs.

Chapter 93A claims emphasize this stark duality, as the prospect of double to treble damages, automatic attor- neys’ fee award, and amorphous legal elements, ratchet up the boom or bust of a jury trial.

Where Chapter 93A Massachusetts juries come from

Since the Supreme Judicial Court decided Nei v. Bur- ley, 388 Mass. 307, 315, 446 N.E.2d 674 (1983), there has been no right to a jury trial in Chapter 93A cases in Massachusetts state courts. In Nei, decided in 1983, the SJC emphasized Chapter 93A’s sui generis character, finding that it “created new substantive rights in which conduct heretofore unlawful under common and statutory law is now unlawful.” Id. These “new substantive rights” failed to trigger the jury trial right because they swept 93A liability within the narrow exception drawn in Mas- sachusetts’ jury trial grant in Article XV of the Massa- chusetts Constitution’s Declaration of Rights.

Article XV provides that “[i]n all controversies concern- ing property, and in all suits between two or more persons...the parties have a right to a trial by jury...except in cases in which it has heretofore been otherwise used and practiced.” See id., art. XV, Massachusetts Decla- ration of Rights. The exception is interpreted to apply to those cases in which a court of equity in either England or Massachusetts would have exercised jurisdiction in 1780. See Dalis, 418 Mass. at 222, 636 N.E.2d at 214.

The rule set down by Nei has largely remained intact in the intervening 34 years — with respect to the Constitutional right to a jury trial. But, as Judge William G. Young of the U.S. District Court has pointed out, Nei’s practical effect is more debatable because the SJC recog- nized the presiding judge’s right — under Mass. R. Civ. P. 39(c) — to refer 93A claims to a jury as a “matter of discretion, although not of constitutional right.” See In re Acushnet River & New Bedford Harbor Proceedings re Alleged PCB Pollution, 712 F. Supp. 944, 1010 (D. Mass. 1989) (Young, J.), citing Travis v. McDonald, 397 Mass. 230, 233-34, 490 N.E.2d 1169 (1986), et al.

The federal courts look to U.S. Constitution

In the federal courts, the Seventh Amendment of the U.S. Constitution decides the right to a jury, even where the claim at issue arises under a state’s substantive law. Still, since Nei, the courts of the First Circuit have largely followed Nei in confining Chapter 93A jury trials to “advisory” status. The Wallace case is the standard- bearer here. See Wallace Motor Sales, Inc. v. American Motors Sales Corp., 780 F.2d 1049, 1063-1067 (1st Cir. 1986). In Wallace, the First Circuit held that “the reason- ing employed by the [SJC] in Nei is determinative of the seventh amendment issue,” and that Chapter 93A claims are not “suits at common law,” entitled to a jury trial un- der the seventh amendment. As in the state courts, fed- eral court judges could refer a 93A claim to a jury, but could then choose whether to accept its verdict, make contradictory findings, and/or render an ultimate decision without any regard to the jury’s role.

There were two problems with the First Circuit’s reli- ance on Nei and denial of a 93A jury right:

First — it ran counter to the Court’s pre-Nei view of the issue. When Chapter 93A was first enacted, it referred to claims brought “in a court of equity.” See Mass. Eye and Ear Infirm. v. QLT, Inc., 495 F. Supp. 2d 188, 193-194 (2007) (Young, J.), citing Capp Homes v. Duarte, 617 F.2d 900, 902 n. 2 (1st Cir. 1980).

Second — in Wallace, the parties had stipulated that there was no right to a jury trial on the 93A claims, and thus, as of 2007, “[t]he First Circuit had[n] never square- ly decided the question.” See Mass. Eye and Ear, 495 F.Supp. at 194.

Cut to 2014, a year in which two different panels of the First Circuit went opposite directions on the issue. In Frappier v. Countryside Home Loans, Inc., 750 F.3d 91, 97-98 (1st Cir. 2014), the court reasoned that “chapter 93A claims are lawsuits to seek both legal and equitable re- lief...and...in light of the importance of the nature of the remedy under federal law, a litigant seeking legal re- lief in federal court under chapter 93A may be entitled to a jury.” Regardless of any contrary language in Wallace,” the court concluded, “the question remains an open one in this circuit.” Almost simultaneously, across the hall, a second panel found the question to be decidedly shut.

Baker v. Goldman Sachs & Co., 771 F.3d 37, 59 n.5 (1st Cir. 2014), the court proclaimed that “[t]here is no right to a trial by jury for claims brought under ch. 93A.”

So confusion reigned, until June of 2017, when the First Circuit provided at least partial clarity in deciding an appeal of Full Spectrum Software, Inc. v. Forte Automa- tion Systems, Inc., Case No. 1:12-CV-40098-TSH, a case in which the jury trial issue appeared to be squarely tred up. The District Court had referred a chapter 93A claim to the jury for a full and binding determination over the defendant’s objection, and the defendant directly chal- lenged this appeal.

In a limited ruling, the First Circuit held that a 93A defendant has the right to a jury trial in Federal Court, where (i) its claim includes some aspect of “deception” that ren- ders it analogous to a common law fraud or deceit action; (ii) a legal, as opposed to equitable remedy is sought; and (iii) the claim is not of a type that Congress has decided should be decided by non-Article III courts (such as with- in a bankruptcy matter). Full Spectrum Software, Inc. v. Forte Automation Sys., Inc., 858 F.3d 666, 675-677 (1st Cir. 2017). Significant to the decision was that the defen- dant failed to fully argue that “an undifferentiated chapter 93A claim is analogous to a claim that would have been tried in a court of equity in late 18th-century England and not the one that would have been tried in a court of law.”

Id. at 858 F.3d at 677.

Less than a full resolution of the issue, but clearly a boost for those in favor of a jury trial right for Chapter 93A claims in Federal Court — and a bit of instruction for those who are not.

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In the balance: The right to jury trial on Chapter 93A claims in federal court

BY MICHAEL J. LEARD

I. Contacting Chambers

Q. Do you prefer counsel to communicate directly with you? If so, under what circumstances?

A. I prefer counsel to communicate with the session clerk. The session clerk may be contacted via telephone or email.

Q. Do you prefer, require or prohibit courtesy copies of pleadings, motions and memoranda to be sent directly to your chambers?

A. Typically, it is not necessary to provide me with courtesy copies. Where I believe a courtesy copy will be useful, the session clerk will contact counsel to re-quest a copy.

Q. The Frequently Asked Questions section of the Business Litigation Session (BLS) website indicates that “in any motion (summary judgment, temporary preliminary injunctive relief, etc.) with a particularly voluminous record, counsel is encouraged to sup- ply electronic copies” to the court. In such a case, should counsel email electronic copies to the session clerk?

A. As with courtesy copies in general, counsel should provide me with electronic copies only upon request.

As a general practice tip, I prefer that counsel include a table of contents for any longer legal memoranda, including those concerning motions to dismiss and motions for summary judgment. As a lawyer, I always thought it was good...
No lawyer would dispute that “[l]oyalty and independent judgment are the lawyer’s duties in the lawyer’s relationships to a client,” Mass. R. Prof. C. 1.7, cmt. 1, or that a lawyer owes every client “the full panoply of duties that attend the lawyer-client relationship, chief among which is a duty of undivided loyalty,” Bryan Corp. v. Abrano, 474 Mass. 504, 516 (2016). But these tenets raise the following question: What obligations does a lawyer’s duty of undivided loyalty actually entail?

As codified in Massachusetts Rule of Professional Conduct 1.7, the duty of loyalty certainly prohibits lawyers, absent informed written consent, from simultaneous representations of clients with direct adverse interests and from representing the lawyer’s responsibilities to other clients or non-clients. But the duty of loyalty is not necessarily satisfied only by compliance with the rules, and Rule 1.7 does not represent the outer bounds of the duty of loyalty where a concurrent conflict exists. The Supreme Judicial Court’s decision in Bryan Corp. v. Abrano shows that the undivided duty of loyalty requires lawyers factoring actual and potential conflicts to refrain from any conduct that would undermine the “sense of trust between the lawyer and client that promotes the lawyer’s ability to competently represent the client’s interest.” 474 Mass. at 511.

The Bryan Corp. case presents a vivid illustration of the pitfalls that face business litigators who attempt to negotiate concurrent conflicts. In affirming the disqualification of a law firm for “the violation of both its duty of loyalty to the [client] and rule 1.7’s prohibition against the simultaneous representation of clients whose interests are adverse,” the SJC held that before agreeing to an engagement, firms must identify actual and potential conflicts and, where appropriate, decline representation. 474 Mass. at 515. The court has put the bar on notice that the ways in which lawyers and firms address concurrent conflicts involving organizational clients will be closely scrutinized.

Facts: In March 2014, Bryan Corporation engaged a law firm to defend it in a lawsuit brought by one of the company’s former consultants. While this litigation was pending, the same lawyers from the firm agreed to represent the company’s two minority shareholders, who were also two of the company’s three directors, as well as the husband of one of those shareholders. The company had a dispute with the company and its majority shareholder over the payment of the company’s 2014 year-end profits. The husband worked for the company.

During the course of the representation, the lawyers asserted that they could represent the two minority shareholders as long as they constituted a majority of the board of directors. If they left the board, the lawyers said that a conflict might arise warranting their withdrawal as the company’s counsel in the lawsuit with the former consultant. The law firm did not disclose to the majority shareholder (who was the third director) that it had been engaged by the minority shareholders or that the firm might withdraw from representing the company. On the day that this representation began, July 1, the minority shareholders began demanding that the company pay them their share of the 2014 year-end profits in the form of wages. On July 15, 2014, a shareholders meeting was held to elect new directors. The minority shareholders “did not re-nominate themselves to the board, instead nominating three other people.” 474 Mass. at 507. On July 21, the law firm, while still representing the company in the suit by the former consultant, sent a demand letter to the company’s president and the majority shareholder, asserting claims on behalf of the minority shareholders against the company and the majority shareholder, among others.

On July 23, 2014, the law firm sent a letter to the husband of one of the minority shareholders (who, with his spouse and brother-in-law, were now the firm’s clients) stating that a conflict had developed and it was resigning as the company’s counsel. The firm had foreseen this scenario during the initial consultation. The shareholder’s husband gave the firm permission to withdraw and the firm withdrew as the company’s counsel eight days later.

In November 2014, the minority shareholders sued the majority shareholder alleging, among other claims, violations of the Wage Act and breach of fiduciary duty. The law firm represented one of the minority shareholders in this lawsuit. The other minority shareholder and her husband retained new counsel to represent them in the lawsuit filed in November 2014. The company was to be formally named as a party to the action, but the complaint referred to the company as “a defendant” four times. The complaint also alleged that “the company had the legal obligation to pay” the wages that the plaintiffs were seeking.

The company filed a separate action against the minority shareholders seeking to recover excessive year-end distributions that they had received between 2008 and 2013 in the form of wages. After the law firm appeared on behalf of one of the minority shareholders, the company moved to disqualify the firm arguing that the dual representation of the company and the minority shareholder violated Rule 1.7 or, alternatively, Rule 1.9. The minority shareholder moved successfully to consolidate the actions, contending that they presented “mirror image” claims. After consolidation, the trial court disqualified the firm.

The SJC’s decision: The SJC affirmed the disqualification order and held that the law firm “acting as a reasonable lawyer, should have known at the time it agreed to represent [the minority shareholders] that their interests were adverse to, or were likely soon to become adverse to, those of the company, and, in these circumstances, both the duty of loyalty and rule 1.7 required it to decline representation, or at least seek the informed consent of the company.” 474 Mass. at 510. The SJC identified violations of Rule 1.7 and the duty of loyalty as independent, albeit related, grounds for disqualification. In this respect, Rule 1.7 "function[s] in furthering the lawyer’s duty of loyalty, which forms the bedrock of the attorney-client relationship.”

The SJC catalogued the law firm’s violations of the ethical rules and the duty of loyalty. The court held that the law firm violated Rule 1.7 “which encompasses a lawyer’s duty to anticipate potential conflicts and, where appropriate, decline representation.” Citing to the allegations in the minority shareholders’ own complaint, the court found that they were directly adverse to the company as of the date on which the law firm agreed to represent them, which was also the date on which the minority shareholders began demanding that the company pay them alleged wages.

Further, the court ruled that even if the parties were not directly adverse on July 1, 2014, the law firm should have declined the representation because it was aware of the potential for a conflict and it even advised the minority shareholders that if a conflict were to arise, the firm would terminate its pre-existing representation of the company.

At that point, the SJC could have ended its analysis. Instead, it noted in its Opinion that “the court identified three additional ethical violations.

First, the court stated that the manner in which the law firm terminated the representation of the company was “largely improper” because it communicated the termination decision to the husband of one of the minority shareholders (who was also its client), and not to a disinterested company official. The court cited comment 10 of Rule 1:13, which states in part that where there is a conflict between an organizational and a constituent, the organization’s law firm “cannot provide legal representation for that constituent individual.” The law firm’s failure to do so, and its communication terminating its role as company counsel to another of its clients whose interests were adverse to the company, were held to be breaches of the duty of loyalty.

Second, the firm violated Rule 1.7 by continuing to represent the company after July 15, 2014, without obtaining the company’s informed written consent, as required by Rule 1.13(c).

Third, the SJC found that “it was improper for [the law firm] to withdraw prior to the completion of the [consultant’s] action, and the development of the conflict does not justify the firm’s actions.” 474 Mass. at 515. The court held that “a firm may not undertake representation of a new client where the firm can reasonably anticipate that a conflict will develop with an existing client, and then choose between the two clients when the conflict materializes.” Id. at 516. Notably, the court rejected the law firm’s argument that once it acknowledged the conflict of interest, Rule 1.16(b) allowed it to withdraw from representing the company while continuing to represent the minority shareholders so long as “withdrawal could be accomplished without material adverse effect on the interests of the [company].” Mass. R. Prof. C. 1.16(b)(1). This means that a lawyer or firm may not enter into a new engagement that risks creating a conflict with an existing client, and then use the resulting conflict as a cover to terminate the less favorable client.

Bryan Corp. is a reminder that “in cases of doubt, counsel must resolve all questions against the acceptance of employment whenever such acceptance may impinge upon the interests of [their] present and former clients.” Mailer v. Mailer, 390 Mass. 371, 375 (1983). This is especially true in disputes where the line between an organizational and an adversen constituent is not clear. In these circumstances, lawyers should take care to avoid taking any actions that would undermine the sense of trust between the lawyer and an existing client.

By Eurytipids Dalmanieras

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advocacy to include a table of contents in my briefing so that the judge had a summary of the salient points of my argument in one place. As a judge, the table of contents serves as a roadmap when preparing for oral argument or writing a decision. I encourage counsel in the BLS to incorporate tables of contents in their briefing.

II. BLS Procedural Orders & Formal Guidance

Q. In the BLS, judges sit for six-month sessions; however, do you have the discretion to retain control over a case after your six-month session? If yes, how would you proceed?

A. I do not have a standing order or guidelines for the discovery of ESI; however, my practice is to approach ESI-related issues practically. For example, I understand that the production of metadata is such that producing metadata will be critically important, and others where the costs of producing metadata would outweigh the benefits. My preference in controversial situations is to require all parties to file a proposed tracking order in advance of the court's decision to focus on costs. I encourage counsel to focus on the areas of discovery they believe will matter most in their initial discovery requests, and to request supplementary information as needed.

Q. Do you require counsel to request such relief via motion?

A. Counsel must submit such a request in writing, by letter or motion. I again encourage counsel to confer with one another regarding case management issues and sending me a proposed motion.

Q. The BLS’s “Procedural Order Regarding Partial Dispositive Motions” requires the moving party to request permission in advance of filing a partial dispositive motion, at which, the “Court will decide … whether to permit such a motion.” What considerations do you take into account when deciding whether to permit the filing of a partial dispositive motion?

A. My approach to partial dispositive motions is similar to what I believe motivated the creation of the Pre-Trial Conference, which is an expansion of partial dispositive motions that exhaust significant time and resources of the parties as well as the court, but do not materially focus or streamline the case. Where a partial dispositive motion is likely to materially limit the scope of discovery, increase the ability of the parties to engage in meaningful settlement discussions, or condense the length of trial, then it may be worth pursuing the motion. On the other hand, where a partial dispositive motion is unlikely to change the posture of case, the resources of the parties and the court may be better served on a less disruptive partial dispositive motion that you can dismiss claims under M.G.L. c. 93A can often have a significant impact on how the parties approach settlement, timelines, and costs.

Q. The Frequently Asked Questions section of the BLS website indicates that “[s]oon after the pleadings are closed, every BLS case is called in for a Rule 16 conference.” Is there a particular period of time after the close of pleadings within which you typically set Rule 16 conferences?

A. I try to schedule the Rule 16 conference sooner rather than later, although I have no firm timeline within which to do so. If my Rule 16 conference has yet been scheduled and counsel believe that a conference would be useful, I would encourage counsel to contact the session clerk and request a conference.

Q. The standard Notice of Scheduled Appearance for BLS Rule 16 Litigation Control Conference Conferences is one page in length. As a judge, the table of contents serves as a roadmap when preparing for oral argument or writing a decision. To do so, do you require or prefer the parties to file a proposed tracking order in advance of the conference?

A. If a party has proposed a tracking order in advance of the Rule 16 conference so that I may better engage with the parties at the conference. Typically, the proposed tracking order need not be filed more than a few hours in advance of the conference; however, should the proposed order address particular complex issues, I would prefer the proposed order be filed further in advance of the conference.

Q. Do you have a required format to which the parties’ proposed tracking order must adhere?

A. No. I do not have a required format or the proposed tracking order, from my perspective, the most important areas to include in the proposed order are:

- (1) the pre-trial schedule and (2) the scope of discovery.
- I would suggest that counsel include in the proposed order all relevant deadlines up to the final pre-trial conference.
- If you do not have a standing order or guidelines for the discovery of ESI, however, my practice is to approach ESI-related issues practically. For example, I understand that the production of metadata is such that producing metadata will be critically important, and others where the costs of producing metadata would outweigh the benefits. My preference in controversial situations is to require all parties to file a proposed tracking order in advance of the court’s decision to focus on costs.
- I encourage counsel to focus on the areas of discovery they believe will matter most in their initial discovery requests, and to request supplementary information as needed.

Q. Do you require counsel to submit their voir dire questions to you in advance for approval?

A. I do not have a standing order or guidelines for the discovery of ESI; however, my practice is to approach ESI-related issues practically. For example, I understand that the production of metadata is such that producing metadata will be critically important, and others where the costs of producing metadata would outweigh the benefits. My preference in controversial situations is to require all parties to file a proposed tracking order in advance of the court’s decision to focus on costs.
- I encourage counsel to focus on the areas of discovery they believe will matter most in their initial discovery requests, and to request supplementary information as needed.

Q. Do you impose time limits on counsel? If so, how much time do you permit?

A. In most cases, I have not needed to impose time limits on counsel for oral arguments. Generally, my impression is that counsel in the BLS understand the need to be efficient, and I understand that the time it takes to determine potential jurors for each prospective juror. In situations where I believe the process is lagging, I will first remind counsel of the need to be efficient. Should the process continue to drag, I will then impose time limits.

IV. Exhibits

Q. Do you require or prefer trial exhibits to be pre-marked?

A. To the extent that the parties agree that particular exhibits should be pre-marked. Counsel are encouraged to raise any material disputes with respect to exhibits at the final pre-trial conference.

Q. As a related practice point, less is more with respect to exhibits. Often, a large number of documents are admitted as exhibits, however, during closing arguments and/or post-trial briefing, counsel focus on only a fraction of the exhibits. There is no need to create a voluminous record of documents that will have no influence on the ultimate outcome.

Q. Is there a marking system you prefer?

A. Exhibits I through whatever. We don’t have “plaintiffs” exhibits and separately marked “defendants” exhibits.

Q. Do you have any practices or take any precautions before allowing a party to introduce confidential and/or proprietary documents of the opposing party?

A. As the motion practice stage, it is not uncommon for documents to be characterized as confidential. So long as an adequate showing is made consistent with the applicable impoundment procedure, I would not hesitate to impound a document.

In a public trial, it is the right of public to review the evidence. Public trial rights protect the rights of not only the parties, but also the public. It would be rather unusual to admit evidence at trial but have it kept hidden from the jury. Typically, legitimate concerns regarding disclosure can be solved through appropriate reduction.

V. Conclusion

Q. Any additional advice for business litigation practitioners who appear before you?

A. Don’t bury your lede. Some cases in the BLS can be factually and legally complicated, but the best lawyers find a way to sort through the complexity and distill the relevant facts and law to their essence. This concept applies equally at the motion stage as well as at trial. We have opening statements at trial for a reason. It is very difficult for the fact finder to absorb and make sense of days worth of evidence without context — which is why the opening should provide. Lawyers should do the same thing when arguing a motion to a judge; explain the essence of your clients’ position up front, and then explore more details as appropriate and in line with the judge’s holding a roadmap for the judge and jury is essential for effective advocacy.

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Judicial interview conducted by Michael J. Leard, an attorney at Cetrulo LLP, whose practice focuses in the areas of commercial litigation, products liability and pharmaceutical litigation. Leard serves on the board of directors for the Massachusetts Bar Association’s Young Lawyers Division, and is a member of its Complex Commercial Litigation Section.
Dispute Resolution

Snacks with a view

BY MICHAEL A. ZEYTOONIAN

I bring sustenance in the form of snacks to each mediation and, where feasible, also take a view of the scene of the dispute, doing both at no expense to the parties. At the start of the first mediation session, for example, I bring snacks so I understand that nourishment fosters a sense of community, stimulates communication, and tends to calm people making them more conciliatory, in other words, easier to work with to achieve a result.

I also believe that visiting the scene helps me visualize their positions and demonstrates how serious I am about helping them. I must admit that my altruism is tempered by a Machiavellian motive of imposing a subtle sense of obligation on the parties that will result in their being more receptive to what I have to say.

Snacks

Some of my mediations are pro bono as I serve as the “judicial mediator” for parties with limited means at the Middlesex and Norfolk Superior Courts. One morning, my court mediation concerned a serious dispute between Indian (from India) and Caucasian neighbors where my view the previous day revealed a “spite fence” between their properties with video cameras pointing at one another’s homes. My wife commented that the Indian people would often partake in the ritualistic chocolate covered biscuits that I bring to mediations, in that they would not eat the same “junk food” that I eat. So, I called my daughter-in-law who is of Indian descent and asked her what Indian people snack on. Naina told me to buy Lorna Doones that I picked up on my way to the courthouse and placed on the table (along with the biscotti) at the plenary session. You would have thought that I had brought the “Crown Jewels.” It made a visual connection and I am sure that it contributed to my credibility and the resulting settlement.

At first I brought Dunkin’ Donuts to mediations and quickly learned that after an hour people were reluctant to eat unwrapped food. That led to my bringing individually wrapped snacks to munch on all day, for example, biscotti from BJ’s. In a dispute between Chinese parties concerning a chartered tour bus accident, I asked a Chinese physician friend what the parties would snack on and she suggested apples, not only because they are a popular food, but also because the word “apple” in Chinese also means “peace.” The parties sincerely appreciated my effort but did not eat the apples then and there, and, at my insistence, left with some. (To my mind, the gesture worked.) Yesterday I brought apples, handpicked by me last weekend, to a mediation and no one ate an apple. My wife says that apples are too messy to eat in public. That never stopped me. I bring the biscotti because they are individually wrapped and won’t be deemed unsanitary.

For variety I also include packets of Lorna Doones. With so many people, with or without Celiac Disease, now eating gluten free diets, I plan to add a gluten free offering at all future mediations.

A view

The taking of a view prior to the mediation is most effective when I can surprise all of the parties and counsel as to how the plenary session will go and talk about what I have done in preparation for the mediation. In a dispute over removal of a wall in Littleton, at the plenary session the lawyers agreed that never had they worked with a mediator who went to the scene. This gave me great traction at the mediation. For an upcoming mediation this week, I took a view of the interior of the home where the disputed work was performed and here quite obviously everyone knew my view in advance of the mediation session.

Very early on a Sunday morning last Spring, my wife joined me on a view of a private road that was central to a boundary dispute between neighbors in Plymouth County. Tensions ran high that the Brockton Superior Court had issued an order restraining “drive by staring” by a party who allegedly harassed the other party from his vehicle. Well, the stare was at his post and didn’t hesitate to follow us in his vehicle as we walked on the disputed private road. When I identified myself he seemed to disappear into thin air knowing full well that he was violation an order of the court.

Conclusion

My food for thought on bringing snacks and taking a view is simply to do it. There is everything to gain and nothing to lose other than a minimal financial expense and the investment of a couple of interesting hours.

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What is your goal? Winning or fixing?

BY MICHAEL A. ZETTOONIAN

What do you want? It’s a pretty simple question, really. It reminds me of what Noah (Ryan Gosling) repeated asked Allie (Rachel McAdams), his love interest in The Notebook. She kept hemming and hawing as to how difficult her situation was, having to choose between two good men, and that there was no easy answer. But he stayed laser focused on what he wanted. You would have thought that he had brought the “Crown Jewels.” It made a visual connection and I am sure that it contributed to my credibility and the resulting settlement.

People who want to win usually also want the other side to lose. If even they don’t want the other side to lose, that is the result when one side wins. This goal opens the door of the adversarial process. This is not the land of “everybody gets a trophy.” The law’s adversarial civil procedure is not designed to achieve a win-win result. It is designed for two or more parties involved in a dispute to find a way to determine who is right and who is wrong, who is liable for what happened, who must pay the other and their properties with video cameras pointing at one another’s homes. When I identified myself he seemed to disappear into thin air knowing full well that he was violation an order of the court.

Conclusion

My food for thought on bringing snacks and taking a view is simply to do it. There is everything to gain and nothing to lose other than a minimal financial expense and the investment of a couple of interesting hours.

Michael A. Zeytoonian is the founding member of Dispute Resolution Council, LLC, in Southborough. A lawyer, mediator and ombudsman, Zeytoonian is the past chairman of Massachusetts Bar Association Alternative Dispute Resolution (ADR) Committee and currently a member of the MBA Dispute Resolution Section Council.
Fake news and the phantom advisor: Interesting times in mediation

BY PROFESSOR DWIGHT GOLANN

Over the last 30 years, dispute resolution has become part of the legal landscape. We teach dispute resolution throughout our education system and, in the Commonwealth of Massachusetts, we have codified it. Rule 8 requires that we discuss it with our clients in order to certify to the courts that we have done so. For lawyers, mediation has become routine. For litigants, it is not.

Mediation is a strange animal. For most litigants, mediation is a first for them. Typically, they have been engaged in a lawsuit for years, have been working with their attorney for years — gathering documents, answering interrogatories, preparing for depositions, and worrying — and then they come to mediation. They meet a total stranger in the form of the mediator and, over the course of a few hours or perhaps a day or two, they are expected to make a leap of faith to trust a process that is completely alien to them. The outcome of this process may involve the most important financial decision of their life. It’s not surprising that litigants find the mediation experience to be unnerving and sometimes overwhelming. Whenever I walk into a doctor’s office, I feel as though all of the people there know more about medicine than me, but I’m still suspicious about their process. Are they really listening to me? They say they have my best interest at heart, but what they are suggesting sounds sketchy and they won’t guarantee me an outcome. I’m surrounded by experts in their field, but somehow I feel unbalanced.

That is how I think mediation looks through the eyes of some litigants. After a lot of anticipation, litigants come to mediation with the hope that the case will be resolved. They have talked to their attorney about what to expect from the process and maybe they have agreed on some acceptable outcomes. Then they arrive at mediation to find that there has been a change of counsel on the other side, or a change with respect to the decision-maker, or a development in the evidence that changes the other party’s — or their own — perspective. Suddenly, decisions are being made on the fly and options are being discussed that were never anticipated to be part of the discussion. Here are some things I have heard from mediators: “What do you mean we are conceding liability? When did that happen?” “Why are you telling me now that my claim for lost earnings is weak? You never said that before!” “You were always so confident when we talked about my case: why are you suggesting that we give up so much now?”

Every mediator has heard some variation of these questions, in simple cases and complex matters. On occasion, in instances when there has been a really significant shift in positions or perspectives, a litigant may even turn to the mediator and ask, “What do you think? Does that sound right to you?” There is great training offered in how to handle those questions.

What we haven’t trained for (yet) is this: “You’re fake news!”

I have heard this several times over the last few months, sometimes directed at attorneys and twice directed at me. In all instances, the proclamation came from a litigant who heard something that they really didn’t like. They heard that it was said, but more of a flash in the pan. Recently, I attended the National Academy of Distinguished Neutrals retreat in Toronto and heard a recounting there of the same experiences from many of my colleagues across the country. Some reported a heightened level of mistrust directed at them and at the process of dispute resolution. Others described scenes in which litigants turned on their attorneys, their experts, and anyone else who was perceived as diminishing their expectations. In each case, those advisors, too, were accused of being “fake news.”

In his piece entitled “Americans Have Lost Faith in Institutions,” Bill Bishop observed that “Donald Trump’s most damaging legacy may be a lower-trust America,” and he cited some of the most popular targets of the president’s fake news campaign: politicians, scientists, judges, teachers, and others (Washington Post, March 3, 2017). There are anecdotal reports of financial advisors, realtors, dentists and lawyers being called “fake news” by their own patients or clients. One of the hardest things about any job is imparting disappointing news. It is human nature to want to please, but sometimes we can’t tell people what they want to hear. This has always been the case but, recently, expressions of disappointment have turned into accusation. In this case, the mediator translates into “fake news.” “That change of nomenclature doesn’t make the circumstance any better, but the catchy label somehow feels empowering.”

Compounding that problem in the world of dispute resolution is the specter of the phantom advisor. The phantom advisor is never physically present at mediation, but wields tremendous power nonetheless. For years, the phantom advisor was a parent or other relative, a neighbor, a well-meaning friend, or other trusted advisor who cared deeply about the litigant but was not a trial attorney. When I started practicing law, the phantom advisor might weigh in by telephone. Later, it was by email, and now they often offer their counsel by text. I don’t want to sound dismissive of the phantom advisor: if their input is important to the litigant, then it should be important to the mediator. Mediators are accustomed to answering questions that originate with the phantom advisor. It’s natural for litigants to trust people they are related to or have known for years and the influence of the phantom advisor should not be disregarded.

What is more troubling is the coupling of the “fake news” proclamation with the remote phantom advisor who joins the equation via the internet. Personally, I find Facebook to be an efficient way to keep up with pictures of my friends’ kids or their travels. In my workday, I learn that more and more people rely on Facebook and other social media platforms for news, advice, guidance and counsel. Litigants reference Facebook when they report big verdicts they have learned about, or when they speculate about how jurors will view their case. I sometimes watch litigants discount their own attorney’s opinion because they “saw something different on Facebook.” It’s frustrating to watch this dynamic play out. We know that Facebook won’t be there to try a case or to help out the litigant in the aftermath of a verdict. We also know that lawyers who are trying to do their best work for their clients are demoralized when their good advice is cast aside in favor of wisdom imparted by anonymous sources who have no connection to a case.

The antidote to the challenges posed by the cries of “fake news!” and the influence of the phantom advisor is thorough preparation of litigants for mediation. Knowing that a client has never been to mediation before, a lawyer can avoid a lot of problems by explaining in detail exactly who is expected to be present at the mediation; how the process will work in a step-by-step description; what the client can expect in terms of the pace and scope of mediation; what the attorney can anticipate in terms of the other parties’ positions; and what surprises might pop up. If the client’s position has been extremely rigid to date and the case is now headed to mediation, it’s a fair bet that to settle the case, the client may need to adopt a more flexible position. It is a discussion that should take place before the mediation session. Lawyers should also share with their client what they can expect from the mediator.

At the end of the day, mediators and lawyers hope that their clients find the mediation process to be productive, satisfying and dignified. If lawyers prepare their clients thoroughly for the mediation process and mediators create a respectful and professional atmosphere for some serious conversations to take place, we can resurrect some of the institutional trust that has been eroded and eventually eradicate the fake news battle cry from the arena of dispute resolution.

How to deal with yawning gaps in bargaining positions

BY PROFESSOR DWIGHT GOLANN

Too often in mediation, lawyers confront a familiar dilemma: Both sides have made offers and then offered concessions — but a huge gap remains between them. Everyone is frustrated, and no one wants to make a serious move in the face of the other’s intransigence. Impasse looms.

One way I’ve found to get past these standstills is a technique I call “confidential listener.” This device involves having the mediator, at each side privately how far it will go to get an agreement, then giving everyone a verbal assessment of the real gap between them. This allows each side to know and exchange an immediate signal about their willingness to compromise, without making a large “public” concession. Effectively ap-
Is what you mean the same as what they hear?

SUSAN LETTERMAN WHITE

It is impossible not to communicate to other people when you and others are in the same proximity, whether that is face-to-face, on the phone, through writing or a virtual connection. The measure of good communication is when what you say matches what they hear and has the outcome that matches your intention. The communication process can make it challenging to create good communication.

Communication between two people is a two-way process of: (1) perception, (2) reflection or meaning-making, and (3) responding. Since people often start with very different perceptions of the same event, it’s no surprise that they often reach different conclusions about what it means and what to do. Every step in the communication cycle is vulnerable to deterioration from the previous step. Take steps to maintain the integrity of messages and good communication.

The Communication Cycle

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<th>A’s Intention</th>
<th>B’s Expression of Intention</th>
<th>B’s Attached Meaning</th>
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There are ways to create good communication through listening and checking for understanding. In a back-and-forth fashion, we essentially negotiate a shared understanding. When we do this explicitly, we are able to create an intentional, cooperative understanding. We do this using a few key principles of productive communication.

Principles of productive communication

People communicate for the purpose of expressing and addressing wants, needs, expectations, interests and concerns. Before I can help you, you can help me, or we can work together to help each other or another person or entity, we need a shared understanding of the full situation and mutual trust and respect. Productive communication builds mutual understanding and develops relationships, solves problems and develop new ideas. There are six principles that are the foundation of productive communication:

- Communicate purposefully
- Listen to understand
- Suspend judgment
- Identify interests
- Seek out options for solutions
- Design solutions

“Communicate purposefully” means that you have a clear intention of how you want your communication to affect another person. Questions to ask yourself before you communicate include:

- What is your purpose?
- What are the messages you want to send?
- To whom is each message directed?
- How can you best convey your message?

“Listen to understand” means that you listen to another person without planning your response. After carefully listening to the person’s interests, you ask questions to check whether or not your perception of the communication is what the person intended to communicate to you. Statements to understand are open-ended questions or requests for clarification and begin with:

- Let me see if I understand, you said...
- Did you mean...
- Tell me more about...
- Can you elaborate on that?

“Suspend judgment” means that you are curious to discover what information and assumptions are behind a person’s statements. You refrain from stating your position or arguing and instead you state your interests. You wonder why something communicated is important to the person communicating. Questions to show curiosity and suspend judgment are:

- Why is that important?
- Why is that a concern?
- Why does that matter?
- What leads you to that conclusion?

“Identify interests” means identifying goals, wants, needs, expectations, concerns, and hopes.

- Disclose your interests.
- Listen for and acknowledge the interests of others.
- Clarify your understanding of others’ interests.
- Look for and identify shared interests.

After everyone has had an opportunity to identify their interests and once everyone understands the interests of others, it’s time to seek out options for solutions. Look for and identify possible options.

“Designing solutions” means jointly discussing the options and how each satisfies interests. Look for fairness, reasonableness and the ability to implement the solutions. Do you need to add in time management or accountability processes for ideal solution implementation?

The purpose of these principles is to improve the quality of communication by moving away from assumptions and rushing to a judgment in favor of developing a shared understanding that what you intend is also understood.
Choosing the right clients is crucial for the success of your legal practice. In an ideal world, we would like to accept every prospective client who walks through our door with a lucrative case. In reality, all clients are not created equally, and it is important that you do not create unnecessary obstacles for your firm. Although this list is not exhaustive, here are five types of clients to avoid:

The client who does not value your time.

We have all been there: multiple phone calls, emails and text messages from the same client asking questions that have already been answered. Unless the prospective client was late to the consultation, or created their own agenda, it may be difficult to determine whether a client will value your time. Explain your process regarding communication with the prospective client, and state clearly in the engagement letter any consequences for excessive communication (this is especially important if you are charging your client a flat fee for your services).

The client who thinks he or she is the attorney.

Have you had a client who started their sentence with “you’re the lawyer, not me, but…”? I have. This type of client will repeatedly tell you that they are not lawyers and have not learned the law, but will adamantly and confidently advocate for a different position than what you advised. Because clients are emotionally invested in their case, it can be difficult for them to see the strategy and steps needed to reach their desired outcome. While all clients can be shortsighted at times, be wary of the prospective client who thinks they know it all; you may regret taking their case when they decide not to follow your advice.

The client who has unrealistic expectations.

Many clients have unrealistic expectations about the value and outcome of their case. While they may believe that their lawsuit is worth $5,000,000 or a change in custody should be granted, this value and outcome may not be realistic within the parameters of the law. It is crucial to explain to the prospective client the possibility of not reaching a desired value or outcome. If a prospective client has unrealistic expectations and is unwilling to accept anything but their desired outcome, this may cause many problems down the road. The client will not value your time, may attempt to be the attorney, and if still not satisfied, may terminate your representation.

The client who has had multiple attorneys.

Be wary of the client who has hired and fired multiple attorneys before coming to your office. This type of client may never be satisfied with the work you produce. Ask the prospective client the reason for changing counsel. If they are unable to provide a reasonable answer, i.e. their attorney moved out of state, it may be in your best interest to politely decline representation.

The client who focuses too much on fees.

It is important to recognize and understand any financial concerns of the client. However, your worth, value and the success of your business are important. Explain to the prospective client the value that you will bring to their case, and be specific about the types of services that you provide for the fee that is charged. If a prospective client focuses too much on fees, this may be a sign that they will ask you to take shortcuts through the process to reduce their fees, or they may be late with payments.

Choosing the right client is imperative to the success of your business and your overall well-being. Keep track of any warning signs that you may notice when speaking with a prospective client, and weigh the pros and cons prior to deciding to represent them. You will be able to spend your time and energy more efficiently, and in turn, provide better representation to your clients.

Michelle E. Lewis focuses her practice on Estate Planning and Family Law Litigation. Michelle is a member of the Law Practice Management Section Council.
F. FREITAS

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into the juvenile justice system, thereby harsh school discipline practices push unstable housing. These unequal and employment, increased incarceration, and consequences thereafter change students’ trajectories from learning, it has long-lasting effects of unequal academic experiences with the juvenile justice system. More concerning, however, is that the burden of this excessive discipline most dramatically fell upon children of color and those with disabilities, widening an already large disciplinary and academic achievement gap that has persisted for decades. Indeed, at the middle school and high school level, black children are suspended at almost three times the rate of white children. Despite representing only 15 percent of students, black students comprised 35 percent of students suspended once, 44 percent of students suspended more than once, and 36 percent of students expelled. More than 50 percent of students arrested in school or referred to law enforcement as a result of school-involved incidents were black or hispanic.

Disabled students face little better, being disciplined nearly twice as often as those without disabilities. Indeed, although students receiving services under IDEA represent only 12 percent of students nationwide, disabled students make up more than 20 percent of students suspended once, 25 percent of students suspended more than once, 25 percent of students expelled, and 23 percent of students arrested in school or referred to law enforcement. Perhaps more startling, although students receiving services under IDEA or Section 504 represent only 14 percent of students nationwide, they represent more than 75 percent of students physically restrained in schools by adults.

Not only are disabled students and those of color excluded from school frequently, they are excluded for longer periods of time, even for the same offense. Indeed, decades of research now confirms that the racial and disability status disparities in school discipline demonstrated by the data are not the result of more frequent or more serious misbehavior. What many have attempted to explain these disproportionalities in school discipline in terms of socioeconomic status, cultural differences and structural inequality, a considerable number of studies have challenged all of these hypotheses, finding that none of these factors fully explains the disproportionality reflected in the data. Rather, these alarming disciplinary disparities are becoming increasingly understood in the context of implicit bias. Generally defined, implicit bias refers to the involuntary and unconscious attitudes or stereotypes that influence and determine our actions and decisions. Since they are without intentional control, we act on them without awareness and even when it unintentionally or directly conflicts with our conscious intentions or explicit beliefs. Implicit bias is the byproduct of men- tal associations that have been formed through messaging that we are exposed to daily. Through increased understanding, awareness, and acknowledgment of how implicit bias drives disproportion- ationate school discipline, school systems can craft the tools necessary to reprog- ram implicit associations, redraft clear and objective school discipline policies/practices that target decision points that are vulnerable to bias, and implement larger structural change to combat bias-related responses.

The U.S. Department of Education has encouraged schools to rely less on exclusionary forms of discipline, imple- ment preventative approaches and to be more vigilant against discipline disparities. By keeping students learning in the classroom rather than removing them for misconduct, educators can disman- tle the “school to prison pipeline” and avoid negative retaliatory that begins when a student is suspended, loses classroom time, falls behind in his/her coursework and eventually drops out. Evidence-based strategies that prevent discipline referrals include strengthening student engagement and motivation, improving teacher-student relationships through restorative practices, and promoting regular attendance. Teacher coaching, tailoring the learning envi- ronment to each student’s needs, struc- tured academic interventions in the disciplinary system that focus on positive behavioral support, and connecting families with appropriate community supports have also proven effective in preventing disciplinary exclusion and successfully reshaping stu- dent discipline. Legislative responses at the state and local level, federal bills currently in the Massachusetts House and Senate propose eliminating the ability to prosecute students for dis- turbing a school assembly, decriminal- izing minor offenses, instituting memo- randa of understanding between schools and police and raising the minimum age of juvenile court jurisdiction to prevent the prosecution of very young children; all issues which are correlated with the overrepresentation of racial minorities and those with disabilities in the juvenile justice system through school referrals.

Research has consistently shown the most efficient and effective process for addressing an outcome within a com- plex system is to define, measure, and address an outcome within a com- plex system is to define, measure, and address an outcome within a com- plex system is to define, measure, and address an outcome within a com- plex system is to define, measure, and address an outcome within a com- plex system is to define, measure, and address an outcome within a com- plex system is to define, measure, and address an outcome within a com- plex system is to define, measure, and address an outcome within a com- plex system is to define, measure, and address an outcome within a com- plex system is to define, measure, and address an outcome within a com- plex system is to define, measure, and address an outcome within a com- plex system is to define, measure, and address an outcome within a com-plex system is to define, measure, and address an outcome within a com-plex system is to define, measure, and address an outcome within a com-plex system is to define, measure, and address an outcome within a com-plex system is to define, measure, and address an outcome within a com-plex system is to define, measure, and address an outcome within a com-plex system is to define, measure, and address an outcome within a com-plex system is to define, measure, and address an outcome within a com-plex system is to define, measure, and address an outcome within a com-plex system is to define, measure, and address an outcome within a com-plex system is to define, measure, and address an outcome within a com-plex system is to define, measure, and address an outcome within a com-plex system is to define, measure, and address an outcome within a com-plex system is to define, measure, and address an outcome within a com-plex system is to define, measure, and address an outcome within a com-plex system is to define, measure, and address an outcome within a com-plex system is to define, measure, and address an outcome within a com-plex system is to define, measure, and address an outcome within a com-plex system is to define, measure, and address an outcome within a com-plex system is to define, measure, and address an outcome within a com-plex system is to define, measure, and address an outcome within a com-plex system is to define, measure, and address an outcome within a com-plex system is to define, measure, and address an outcome within a com-plex system is to define, measure, and address an outcome within a com-plex system is to define, measure, and address an outcome within a com-plex system is to define, measure, and address an outcome within a com-plex system is to define, measure, and address an outcome within a com-plex system is to define, measure, and address an outcome within a com-plex system is to define, measure, and address an outcome within a com-plex system is to define, measure, and address an outcome within a com-
Hon. Anne M. Geoffrion (ret.) has announced the establishment of Geoffrion Dispute Resolutions. She can be reached at P.O. Box 584, Wilbraham, MA 01095, (413) 279-1954, or geoffriondr@gmail.com.

MBA Honor Roll firm Todd & Weld LLP has announced that Christopher Weld Jr. was inducted as a Fellow into the American College of Trial Lawyers, one of the premier legal associations in North America, at its annual meeting held recently in Montreal. Weld, a Founding Partner of Todd & Weld LLP, has more than 30 years of experience in business litigation matters that frequently involve issues of substantial value. A 1981 magna cum laude graduate of Boston College Law School, Weld serves as the firm’s Managing Partner.

Todd & Weld LLP has also announced that Lauren M. Bussey and Julianna Zitz have joined the firm as associates. Bussey will concentrate her practice on family law matters and related litigation. She represents clients in a broad range of domestic relations matters, including divorce, modification, child custody and parenting plans, asset divisions and prenuptial agreements. Zitz will focus her practice on family law matters where she counsels family law clients in a variety of areas, including divorce, prenuptial agreements, child custody and related litigation.

Thomas C. Thorpe has joined Todd & Weld LLP as a litigation associate. Thorpe represents clients in a wide variety of personal injury matters, including cases involving traumatic brain injuries, medical malpractice, premises liability, and products liability. Prior to joining Todd & Weld, Thorpe worked at a civil litigation law firm with a focus on personal injury matters.

The MBA extends its condolences to the family and friends of MBA member Stephen Phillips, who recently passed away after a prolonged battle with cancer. Phillips received the MBA’s Pro Bono Publico Award in 2014 for his many hours of pro bono work on behalf of hospice patients in western Massachusetts.

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

Get further connected with fellow MBA members by sharing your noteworthy professional and personal accomplishments. There is no cost to participate. Announcements accepted for consideration include individual professional accomplishments (new jobs, promotions, recent accomplishments or awards*, etc.) and personal news (weddings, engagements, birth announcements, and other notable outside-of-work accomplishments). Honor Roll Firm announcements are also encouraged.
Document creation shouldn't be arduous

Document creation shouldn't require additional labor. When you can quickly and accurately merge data into your legal documents, you'll save up to 7 hours per week per staff member. With the extra time, your firm is empowered to increase its productivity and profitability.