A NEW EXPERIENCE

BY ANNA SIMS

Newer lawyers are finding it increasingly difficult to gain trial experience as the opportunities to learn have dwindled. This issue has caught the attention of the Massachusetts Superior Court and led attorneys of all experience levels to seek additional methods to train newer lawyers in the ways of the courtroom.

“Traditionally, becoming a trial lawyer has been a classic apprenticeship. Newer lawyers had to hope for the good fortune of working for a more senior lawyer who would allow them to carry their bags and learn the craft of being a trial lawyer, sort of through osmosis,” said Christopher Kenney, co-founder of Kenney & Sams, P.C. and MBA president-elect.

Kenney recalled how law firms used to run “very involved” summer training programs for second-year law students, programs that would end with several students landing positions in 2018 ANNUAL DINNER Tuesday, April 24

Reception: 5:30 p.m. • Dinner: 7 p.m.
The Westin Boston Waterfront
425 Summer St., Boston

GERGEN TO KEYNOTE MBA ANNUAL DINNER ON APRIL 24

As trials diminish, newer lawyers need additional options to hone courtroom skills

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Now is the time for “we, the lawyers” to focus on what unites all of us as attorneys and as citizens. Legal giants, such as Oliver Wendell Holmes Jr., Louis Brandeis and Moorfield Story, founded the Massachusetts Bar Association more than 100 years ago. Ever since its founding, the MBA has been an inclusive organization, embracing lawyers of all faiths and creeds and all ethnicities and races. All lawyers are welcome to become MBA members.

Today, the MBA remains the only bar association in Massachusetts where every lawyer in the state can feel at home, no matter who you are, where you live, what kind of law you practice or in whatever setting you practice in government, a corporation or non-profit, a private practice, a large firm, a solo practitioner, or anything in between. The MBA welcomes you. This is your bar association.

Today, we live in a time of change. Familiar norms and standards are being challenged almost daily, and some are being swept away. Many in our profession are fearful. Others feel a sense of unease as they watch unusual events unfold before their eyes. They wonder how they should think about the change that is upon us. They look for guidance and grounding.

When times are difficult, the best course is to return to basic values and fundamental beliefs. As attorneys, we know our core principle is the “rule of law,” where no man or woman — no matter how high his or her position — is above the law. This concept is the foundation of our government with its framework of divided power among three co-equal branches. We must embrace our historic bedrock legal principles: separation of powers, due process and equal access to justice for all. Any lawyer who cannot subscribe to these core principles violates his or her oath of office as an attorney. Those lawyers should consider leaving the profession.

We lawyers should be proud of our noble profession. And we need to express pride in all the good our profession does. No other profession so freely donates such large amounts of its talent and treasure for the public good as the legal profession.

The inescapable conclusion is that we attorneys must also be citizens involved in our democracy. As Gandhi said, “You must be the change you wish to see in the world.” Freedom unexercised may be freedom forfeited. The preservation of our rights is not self-executing. We must exercise our freedoms or they will wither and die. The inescapable conclusion is that we attorneys must also be citizens involved in our democracy. As Gandhi said, “You must be the change you wish to see in the world.” Freedom unexercised may be freedom forfeited. The preservation of freedom is in the hands of the people themselves — not of the government.”

BAR SEEN

Thanksgiving.

Friends of the Homeless care packages

This November, the Massachusetts Bar Association teamed up with Friends of the Homeless in Springfield to help provide warmth to those in need. MBA volunteers put together care packages, which included gloves, hats and socks, to help individuals stay warm this winter. The gifts were given out at Thanksgiving.

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United we stand as lawyers

Christopher P Sullivan

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Wednesday, February 28
Mediation & Arbitration Essentials: Part I
Noon-1:30 p.m.
MBA, 20 West St., Boston

March

Tuesday, March 6
The New Audio-Visual Deposition Rule
Good News or Bad News?
4-7 p.m.
MBA, 20 West St., Boston

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

Thursday, March 15
Practicing with Professionalism
8:30 a.m.-5 p.m.
College of The Holy Cross, 1 College St., Worcester
Holiday Inn, 700 Myles Standish Blvd., Taunton

Friday, March 16
2018 Health Law Symposium
8:30 a.m.-3:30 p.m.
MBA, 20 West St., Boston

Thursday, March 22
MBA House of Delegates Meeting
4-6 p.m.
MBA, 20 West St., Boston

April

Wednesday, April 4
MBA Monthly Dial-A-Lawyer Program
5:30-7:30 p.m.
Statewide dial-in #: (617) 338-0610

Thursday, April 12
Second Annual Juvenile & Child Welfare Conference
10 a.m.-5 p.m.
UTEC Center, 35 Warren St., Lowell

Tuesday, April 24
MBA Annual Dinner
5:30-9 p.m.
Westin Boston Waterfront, 425 Summer St., Boston

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Members volunteer at Christmas in the City
On Dec. 18, Massachusetts Bar Association volunteers helped distribute toys at Christmas in the City. For the second year in a row, MBA volunteers greeted families, helped parents select toys for their children and moved merchandise to designated locations. The MBA is proud to partner with Christmas in the City, which brings holiday magic to thousands of Boston-area kids and their families.

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Gergen to keynote MBA Annual Dinner on April 24

The Massachusetts Bar Association is pleased to announce that David Gergen, senior political analyst for CNN, will deliver the keynote address at the Annual Dinner on Tuesday, April 24, at the Westin Boston Waterfront.

"Mr. Gergen brings a keen perspective of the stories and leaders that are shaping our world today, including our government and system of justice," said MBA President Christopher P. Sullivan. "It is truly an honor to have such a respected analyst, journalist, Harvard professor and former White House advisor speak at our Annual Dinner, which is always the highlight of our association year."

In addition to his work with CNN, Gergen is a professor of public service and co-director of the Center for Public Leadership at the Harvard Kennedy School, positions he has held for over a decade. He works actively with a rising generation of new leaders. In the past, he has served as a White House adviser to four U.S. presidents of both parties: Nixon, Ford, Reagan and Clinton. He wrote about those experiences in his New York Times best seller, Eyewitness to Power: The Essence of Leadership, Nixon to Clinton (Simon & Schuster, 2001).

Gergen began his career in journalism in the 1980s. Starting with The MacNeil-Lehrer NewsHour in 1984, he has been a regular commentator on public affairs for some 30 years. Twice he has been a member of election coverage teams that won Peabody awards, and he has contributed to two Emmy award-winning political analysis teams. In the late 1980s, he was chief editor of U.S. News & World Report, working with publisher Mort Zuckerman to achieve record gains in circulation and advertising.

Over the years, he has been active on many non-profit boards, having served on the boards of both Yale and Duke Universities. Among his current boards are Teach for America, The Mission Continues, The Trilateral Commission and Elon University’s School of Law.

Gergen’s work as co-director of the Center for Public Leadership at the Kennedy School has enabled him to work closely with a rising generation of younger leaders, especially social entrepreneurs, military veterans and Young Global Leaders chosen by the World Economic Forum. Through the generosity of outside donors, the Center helps to provide scholarships to more than 100 students a year, preparing them to serve as leaders for the common good. The center also promotes scholarship at the frontiers of leadership studies.

A native of North Carolina, Gergen is a member of the D.C. Bar, a veteran of the U.S. Navy, a member of the Council on Foreign Relations and a member of the U.S. executive committee for the Trilateral Commission. He is an honors graduate of Yale and the Harvard Law School. He has been awarded 27 honorary degrees.

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

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For more information, visit www.MassBar.org/AD18 or call (617) 338-0543.
UPCOMING MBA CLE

WEDNESDAY, FEB. 28
Mediation and Arbitration Essentials: Part I
Noon–1:30 p.m., 20 West St., Boston
Faculty: Samuel A. Segal, Esq., program chair; Eric P. Finamore, Esq.; Conna A. Weiner, Esq.; Michael Zeytoonian, Esq.

TUESDAY, MARCH 6
The New Audio-Visual Deposition Rule — Good News or Bad News?
4–7 p.m., 20 West St., Boston
Faculty: Marc A. Diller, Esq., co-moderator; Rosemary A. Maccio, Esq., co-moderator; Hon. Douglas H. Wilkins; Richard L. Campbell, Esq.; Ian A. McWilliams; Steven H. Schafer, Esq.

TUESDAY, MARCH 20
GPS Monitoring: Your Questions Answered
1–3 p.m., 20 West St., Boston
Faculty: Nina L. Pomponio, Esq., program chair; Sarah Joss, Esq.
Mediation & Arbitration Essentials: Part II — Successful Mediations
5:30–7 p.m., 20 West St., Boston
Faculty: Samuel A. Segal, Esq., Program chair

THURSDAY, MARCH 29
A Criminal Lawyer’s Guide to Practice in the Massachusetts District Courts
1–5 p.m., UTEC Center, 35 Warren St., Lowell
Faculty: Hon. Barbara S. Pearson, program chair; Hon. Mary F. McCabe; Altha McNiel, Esq.; Robert W. Normandin, Esq.

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• The Impact of Recent Marijuana Laws on Public Law (Jan. 24)
• Impactful and Imperative: Tax Reform Law & Divorce (Jan. 23)
• Compliance with the General Data Protection Regulation (Jan. 17)
• Mental Health Issues in Criminal Law & Beyond (Jan. 9)
• Hot HIPAA Topics: Law Firms as Business Associates (Dec. 5)
• Simple Steps to Networking (Nov. 30)
• Practice Launch Pad Series—Weeks 1–10
• Sports Management—Lawyer as Professional Agent (Nov. 8)
• Preserving Privileges in the Business Setting (Oct. 25)
• Maximizing the Value of Expert Testimony (Sept. 26)
• Family Law Lawyer for the Day Training (Sept. 20)
• Estate Planning 101 Series: Trust Basics (Sept. 19)

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Register at MassBar.org/MassBarProfessionalism

UPCOMING MBA CONFERENCES

2018 HEALTH LAW SYMPOSIUM
Friday, March 16, 8:30 a.m.—3:30 p.m.
MBA, 20 West St., Boston

This event is FREE.

MassBar.org/HLSymposium • (617) 338-0530

SECOND ANNUAL JUVENILE & CHILD WELFARE CONFERENCE
Thursday, April 12, 10 a.m.–5 p.m.
UTEC Center, 35 Warren St., Lowell

CONFERENCE PRICING
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MBA members celebrate the holidays

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How (and why) to ace your cover letter

BY DOUG SAPHIRE AND HEATHER HAYES

Employers want to hire bright, interesting people who can communicate well. The cover letter is often a law student’s first written communication with a potential employer. It is always the first writing sample they see. And lawyers are supposed to be great writers, right? So it has to be great.

Think of it this way ... your résumé and cover letter are basic marketing tools, and their combined purpose is to interest the employer in inviting you to interview. Consider your cover letter an opportunity to explain to a particular employer why you should be invited for an interview. Cover letters also allow you to provide descriptive information about particularly relevant experiences that might not appear in your résumé for space-saving reasons.

The structure basics

Your introductory paragraph should indicate what you are applying for and why you are genuinely interested in the employer and/or position. You need to be able to explain, in one to two sentences, why you want this job, not just any job.

It is important for employers to feel that you have an understanding of who they are and what they do; you must demonstrate enthusiasm for an opportunity to work there. What about this employer or position caused you to decide to apply? Try to avoid providing generic reasons for your interest. If what you write can apply to a large number of potential employers, you need to make it more specific for the employer.

Your body paragraph(s) should focus on discussing what you’ve done that’s interesting or relevant, and would make you a great hire. Each body paragraph should start with a topic sentence, which serves to make the argument or claim about your strengths as a candidate that you will support in the rest of the paragraph. Include a few targeted and relevant stories or examples in each paragraph as support. It is extremely important to avoid simply making conclusory statements. Employers are looking for you to relate what you have done to the development of the skills and strengths you possess. For public sector cover letters, you should try to demonstrate commitment to the employer’s mission where at all possible.

Whether you have years of experience or went straight to law school after college, you have already developed skills that will help you be a great lawyer. A good cover letter requires you to think carefully about your strengths as a candidate and find ways to effectively communicate those strengths to the employer. These are some examples to help you start thinking about your strengths and how you might tell your story:

- Worked hard to meet a challenge (driver, dedicated)
- Led a group project or initiative to a successful result (team player, leader, responsible)
- Brought people with diverse opinions together and helped them agree on a plan (collaborative, consensus builder, people-person)
- Wrote and analyzed in prior settings, such as a school newspaper (excel in written communications)
- Became comfortable making presentations to groups (excel in oral communication)
- Researched and analyzed an issue that mattered to you and then took some action as a consequence (applied critical thinking, analysis and research skills)
- The closing paragraph should be relatively short and simple. You want to re-iterate your interest in the position and, if space permits, summarize the reasons why you are a strong candidate. You can also indicate that you would appreciate the opportunity to speak with them further about position. If you are applying to a position out of town and will be in that city in the near future, you should certainly indicate that in your closing paragraph as well. Finally, be sure to thank them for their time and consideration.

The technique tips

There is no sure way to lose the interest of a potential employer than by writing a canned “one size fits all” cover letter. Research the firm or organization. Think about what they seek in a candidate. Then take the time to articulate why you are applying for this particular position. Emphasize your transferable skills and experiences, rather than simply dwelling on what the firm or organization can offer you. This time investment will pay off; a dozen well-written and thoughtfully targeted letters will do you more good in your search than hundreds of form letters mailed out in a blitz.

This may seem simple, but it is important to address the letter to a specific individual if at all possible. Follow any instructions provided in the online posting, as most will include the name of an attorney, recruiter or other contact. If that information is not provided, you should check the employer’s website or call the office directly and ask if someone can provide you the name of the appropriate contact for the position. For large law firms, you can consult the NALP Directory (www.nalpdirectory.org), and for nonprofits, you can try to find an employer profile on PSID.org. You generally want to avoid addressing your letter generically, such as “To Whom It May Concern,” “Hiring Partner” or “Recruit- ment Coordinator” unless the employer specifically requests that or you have exhausted every method of trying to obtain the information.

As with all other aspects of your application materials, you must carefully proofread the address section of your cover letter. Letters are tossed when the name is wrong or misspelled, or when they contain other errors (wrong firm, title, gender, etc.). This is the first rule of a good cover letter: make no typos or grammatical errors!

It is also critical to personalize the text. You should have a clear idea of why you are sending your résumé to this place and express it. Mass mail letters sent in a legal job search can give the impression of laziness and/or lack of focus or sophistication. Remember to include reasons why the employer should choose you, and not just reasons why you have chosen the employer, though that is also important.

What are some other things that help your writing technically? A good writer will review his or her draft and ensure that the letter is written in an active voice, avoids legalese and makes good transitions throughout. Do too many sentences start with “I”? Is your sentence structure varied enough? Don’t be afraid to use some simple sentences!

The last step in editing and revising your letter is to check that you are using the appropriate tone. There is a fine line between professional self-confidence and arrogance. If you are at all uncertain how the tone of your letter will be received, have your Career Services office take a look at your text before you send the letter.

To sum it up, there is no sure way to lose the interest of a potential employer than by writing a canned “one size fits all” cover letter. Research the firm or organization. Think about what they seek in a candidate. Then take the time to articulate why you are applying for this particular position. This time investment will pay off!
litigation departments once they completed their third year of law school.

"I was one of 15 lawyers that started [at a firm] on the same day back in 1990, and the first year was — well, it was essentially all education, teaching us how to walk and talk like litigators and getting into trials," he said. "But there's been a sea change. Summer programs are few and far between now. Many law firms now rely on lateral hiring of experienced lawyers as opposed to taking on a new lawyer in and engaging in the burden and the expense of an apprenticeship program."

Immediate Past MBA President Jeffrey Catalano, a partner at Todd & Weld LLP, gained his early courtroom experience working as an insurance defense attorney at a time when insurance companies would pay for young attorneys to second-seat trials, a practice they discontinued in the late 1990s.

"You can't blame the attorneys for the lack of experience. It's just the way things have evolved. But I do bemoan the fact that there aren't as many well-experienced, learned trial lawyers as there used to be," Kazaroian said. "But I think today, just like in any other day, if you want to be a good trial attorney you can be one. It's a little more difficult nowadays, but there are ways to learn if it's something you really want to do."

Pro bono and more

One such way is for newer lawyers to take on any pro bono work they can find, a suggestion offered by nearly every person interviewed here, as well as ongoing efforts on their own to observe and learn from other attorneys.

Kazarosian, Catalano and Elizabeth Dillon, an associate at Cetrulo LLP and a member of the MBA's Young Lawyers Division board, each recommended CLE classes, including those offered through the MBA, though Kazaroian added that "there's nothing like being on your feet in the courtroom. I don't think there's any experience that's going to substitute for that."

Dillon strongly recommended participating in a Lawyer for a Day program.

"That's really at base what you're just going in for one day — in housing court, family court [or] consumer court, family court [or] consumer court — and you're just representing people for that limited basis," she said.

Dillon and Nicole Paquin, an associate at Boyle & Shaugnessy Law and a member of the MBA's Young Lawyers Division board, felt that they were able to gain ample courtroom experience by starting out at smaller firms where fewer attorneys in the office meant more opportunities for everyone.

Dillon recommended that newer attorneys find small ways to be involved in cases that can lead to serving a bigger role. With a discovery dispute, for example, "if you make it a point to be in charge in the discovery responses and promulgating the discovery, and when you get your answers back, if you take it upon yourself to volunteer to go through all of the responses and figure out what's still missing, then to do the 9C conference and to write a letter to the other side and try to resolve, if it comes to the point that you have to file a motion to compel, you can easily say, 'Can I write the motion to compel?' If you're the one who's writing the motion to compel, it is more likely they will let you be the one to argue the motion to compel," Dillon explained.

She recommended that by starting small and figuring out how to get involved in the case at some level, "you can really build a case for saying, 'Hey, at least let me come with you [to court].'

... Even if you're not the one that gets to argue it, at least you get to go along and watch. And if you do that a few times, people will be more comfortable letting you argue it."

Mentors

Nearly all attorneys interviewed mentioned the importance of mentorship in the careers of newer lawyers, particularly when it comes to gaining courtroom experience.

Kazarosian knows firsthand the influence a good mentor can have on a younger lawyer, as he had "one of the finest mentors a guy could hope for" in Robert Muldoon, a partner at Sherin and Lodgen.

"I've never forgotten how much his mentorship of me benefited my career, and I've always thought it's important for those of us who are partners at law firms now to give back to newer lawyers," said Kenney, who, this summer, will serve as director of the International Association of Defense Counsel Trial Academy, which, for one-week, will provide training on the basics of trial practice.

Paquin agreed that her career has benefited from strong mentorship.

"When I first started I had some more senior attorneys who were good about bringing me along to trial … I found that even when I second-chaired a smaller trial, you can still "often" finds she is the youngest attorney in the room for certain proceedings.

Paquin added that it's not necessarily enough for experienced lawyers to simply put younger attorneys in the room; they have to trust them.

"There's an issue when young attorneys go to certain types of hearings or pre-trial conferences if they don't have full authority in the case to make decisions," she said. "So I think in addition to this issue of needing young attorneys to go out and get trial experience, I think there also has to be some trust that the associates can make decisions. Because without decision-making power, having [younger attorneys] there can just hinder the whole process and frustrate the judge." Catalano believes being a mentor and bringing associates to court is beneficial not just for newer attorneys, but for more experienced ones as well.

"It's helpful to have a second set of eyes, another brain on the case while you're trying it, someone who can look at the jury, take notes, watch the judge, pick up on the nuances of trial that are so, so important," Catalano said.

He also framed the issue of newer lawyers struggling to get courtroom experience as one with potentially wide-ranging consequences.

Nearly all attorneys interviewed, of course, is that folks are not developing the kind of skills that they need to become really good advocates when they get into court and then long-term, you want judges that have reasonable trial experience," he said. "If you haven't had the opportunity to try as many cases, it's a factor in determining your qualifications for the bench."

Regardless of how newer lawyers get their experience, it is imperative they find opportunities to get in the courtroom, said Kenney, who believes that most of the skills necessary to become a great trial lawyer are "intangibles" like confidence, presence, and energy — in other words, things that can only truly be developed by becoming more familiar with a courtroom setting.

Catalano echoed this belief.

"You're going to feel like [the courtroom] is foreign territory until you've had enough trials that you feel like, 'I know what I'm doing here,'" Catalano said. "I once had a partner who said that the day you walk into the courtroom and say to yourself, 'This is my place, this is my home,' is the day you've reached that level of confidence where you really can put on a great trial."
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SAVE THE DATES
Member Appreciation Week
April 9 — April 13

www.MassBar.org/iBelong
MBA participates in ‘This Is Your Court Day’

The Massachusetts Trial Court hosted “This Is Your Court Day” events in nine courthouses across the commonwealth on Nov. 8. The events provided residents in local communities with the opportunity to learn more about the court system; meet the judges, clerks, probation officers, court officers and other employees who serve the community; and answer questions about the kinds of services local courts provide. All events were free and open to the public.

At the John Adams Courthouse in Boston, the event was geared towards Suffolk County senior citizens. Visitors to the courthouse listened to remarks from Supreme Judicial Court Chief Justice Ralph Gants and Trial Court Chief Justice Paula Carey. Alex Moschella, who has chaired the MBA’s Elder Law Advisory Committee, also spoke about elder law services offered through the Massachusetts Bar Association.

Seniors had the opportunity to tour the courthouse and visit informational tables on court-related topics such as guardianship and custody, jury service, elder abuse and tax liens.

Members Helping Members: My Bar Access Q&A

Q: I have another question. This one is a little time-sensitive. Many thanks in advance for any feedback.

Brief facts: Party A and Party B were married out of state. They have one minor child who is less than two years old. About eight months ago, they moved to MA. The “irretrievable breakdown of the marriage” arguably occurred here in MA soon after they arrived. Party A would like to file for divorce. His main concern is that Party B is going to take the child out of MA.

My “million dollar question” is: what is the best way to get an order preventing Party B from taking the child out of MA? More specifically...

1. First, does MA have jurisdiction for the divorce? Neither party has resided in MA for at least one year. However, I think I could argue that MA does have jurisdiction because the breakdown of the marriage arguably occurred here in MA. Do you believe that Party B is going to contest jurisdiction?

2. If MA does not have jurisdiction for the divorce, what are my best options? Keeping in mind that the primary concern for Party A is that Party B is going to take the child out of MA. Would a Complaint for Separate Support be best? Complaint for Custody? And then seek a temporary order that neither party can permanently remove the child pending further order of the court? MA has jurisdiction to make a custody determination because the breakdown of the marriage arguably occurred here in MA. I do believe that Party B is going to contest jurisdiction.

3. Finally, does the removal statute apply? Right now both are married and there is no custody order from a court, so each spouse has equal custody and could take the child out of state. But assuming I do file for divorce (question 1) or file for separate support/custody (question 2), does the removal statute apply? I think the answer to question three is a “no” (although I am hoping it is a “yes!”). According to my research, the removal law applies only if the child was born in MA or has lived here for five years. Here the child was born out of state and has not lived here for the last five years (child is not yet two years old). Any suggestions? The primary concern right now is to prevent Party B from taking the child out of MA.

Many thanks as always.

Mark Scialdone, Law Offices of Mark R. Scialdone, Boston

A: My initial “answer” to your question would be to file a complaint for divorce on the grounds of irretrievable breakdown and a motion for temporary orders seeking the restriction on removal. If they moved here together and have separated since, it will be difficult to argue that the irretrievable breakdown of the marriage did not occur in Massachusetts, so jurisdiction should be available. (If the court were to suggest otherwise at a hearing on a Motion to Dismiss, you could file a Complaint for Custody.)

As to the question of whether the removal statute applies: I think your assessment of the law is correct — it does not — but my experience is that most Probate & Family Court judges would apply it, at least if you get in before a move.

I hope this helps. (Where do I collect my million dollars?)

Best,

Stephanie Goldenhersh, Harvard Legal Aid Bureau, Cambridge

Q:

A: The SJC just issued a case on removal that lays out a nice discussion of Massachusetts removal law and how to analyze removal when there is no pre-existing custody order and also discusses whether sec. 30 applies in various situations (unmarried parents, less than five years resident of MA, etc.). Well worth reading. There’s also a concurring opinion that’s interesting.

Very basically, the standard the court must apply depends on whether there is a primary custodial parent (Yannas “real advantage”) or a shared physical custody situation (Mason “best interests of child”). Where there are no court orders or where there is a court order but the true, actual parenting schedule is different, the court must do a “functional analysis” of the actual facts around the existing parenting plan and determine whether or not it approximates sole physical or shared physical custody. Once that determination is made, the court must apply the appropriate standard. In all cases, the best interests of the child is paramount.

The case is Miller v. Miller, SJC 12298 (Jan. 12, 2018) “We hold that the judge must first perform a functional analysis, which may require a factual inquiry, regarding the parties’ respective parenting responsibilities to determine whether it more closely approximates sole or shared custody, and then apply the corresponding standard.”

We also take this opportunity to emphasize that the best interests of the child is always the paramount consideration in any question involving removal.

Patricia Levesh, Family Law Unit, Greater Boston Legal Services, Boston
NOTABLE & QUOTABLE

OPIOID EPIDEMIC

“Should opioids be banned in court over fears of exposure?” Associated Press, various news outlets, including Worcester Telegram (Dec. 3). MBA Chief Legal Counsel Martin W. Healy was quoted in an article about a Trial Court proposal to ban opioids from courthouses.

DISPUTE RESOLUTION

“Recognizing now more than ever a growing need for dispute resolution,” Massachusetts Lawyers Weekly (Dec. 4). Following up on the MBA’s Conflict Resolution Week events, DR Section Council member Michael A. Zeytoonian wrote an op-ed for Massachusetts Lawyers Weekly about the growing trend toward using dispute resolution processes to resolve conflicts.

SEXUAL HARASSMENT

Weinstein scandal seen as impacting law firm culture,” Massachusetts Lawyers Weekly (Dec. 11). MBA President Christopher P. Sullivan, MBA Vice President Denise I. Murphy and MBA member Carol A. Starkey were quoted in an article on how law firms will respond to sexual harassment.

OBJECTIONABLE SPEECH

“Billerica neighbor’s word may be offensive, but lawsuit would be ‘challenge,’” Lowell Sun (Jan. 15). MBA Past President Marsha Kazarosian was quoted in an article about a dispute between a pizzeria in Billerica and a neighbor, who painted a word on his barn that many have found objectionable.

DEFAMATION

“Hospital can’t shield communications over credentialing,” Massachusetts Lawyers Weekly (Jan. 15). MBA members David C. Harlow and Laura R. Studen were quoted about a U.S. District Court judge’s decision, which found that a surgeon was entitled to discovery of an allegedly defamatory communication between her former employer and another hospital. Neither were involved in the case.

WIRETAP LAW

“Mass. Legislature refuses calls to update wiretap law,” Boston Globe (Dec. 29/Jan. 2). MBA Chief Legal Counsel and Chief Operating Officer Martin W. Healy was quoted in an article about a failed proposal to expand the state’s wiretapping law that would have given prosecutors broader power to conduct wiretaps.

Quoted in the media? Let us know. Email JScally@MassBar.org.
Massachusetts Bar Association volunteers offered free legal advice to 210 Massachusetts residents through Ask A Lawyer on Wednesday, Nov. 29, at the WBZ studios. Ask A Lawyer is a call-in program presented annually by the MBA, WBZ Call For Action, WBZ NewsRadio 1030 and WBZ-TV. Like the MBA’s own monthly Dial-A-Lawyer program, it provides a unique opportunity for Massachusetts residents to speak to a qualified lawyer anonymously at no charge.

Seven volunteer lawyers took phone calls on the Ask A Lawyer hotline from 7 to 9 p.m., answering questions on a range of topics. Staff from the MBA and WBZ Call For Action also helped facilitate calls.

“Many people cannot afford a lawyer or don’t know where to turn, and the Massachusetts Bar Association and our partners at WBZ NewsRadio, WBZ-TV and WBZ Call for Action are committed to closing this justice gap through the Ask A Lawyer program,” said MBA President Christopher P. Sullivan. “With just one phone call, our volunteers provide a much-needed helping hand to those who are facing critical legal issues at home or in the workplace.”

Thank you to the following MBA members who volunteered and answered calls during the Ask A Lawyer event: Jeffrey Barmach, Michael E. Katin (Scheier Katin & Epstein PC), Ian C. Keefe (Adler, Cohen, Harvey, Wikeman & Gukeguzian LLP), Soraya Sadeghi (Law Office of Soraya Sadeghi), MBA Young Lawyers Division Chair Samuel A. Segal (Law Offices of Samuel A. Segal), Stephen A. Smith and Paul F. Zerola (Zerola & Associates PC).

The MBA and WBZ Call for Action revived the Ask A Lawyer program in 2012. It had been a regular program from 1978 until 2005. WBZ Call For Action, in existence for 46 years, is a non-profit telephone information, referral and action service dedicated to resolving people’s problems. A free service, it is a member of the national organization, Call For Action Inc.

MBA president guests on “NightSide”

During the Ask A Lawyer program, Sullivan appeared as a guest on WBZ News Radio 1030’s “NightSide with Dan Rea,” from 8 to 9 p.m. The MBA president spoke with Rea about his own background and the types of programs the MBA provides to lawyers as well as the public. Sullivan also answered callers’ legal questions, and touted the Ask A Lawyer program and the Massachusetts Bar Association’s Lawyer Referral Service.

In addition to his radio appearance on NightSide, Sullivan was featured in a promotion for Ask A Lawyer on WBZ-TV earlier in the week.

Interested in volunteering for the MBA’s monthly Dial-A-Lawyer program? Email LRS@massbar.org.

For more information, visit www.MassBar.org/AD18 or call (617) 338-0543.

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For more information, visit www.MassBar.org/AD18 or call (617) 338-0543.
Apply for the MBA’s $10,000 Oliver Wendell Holmes Jr. Scholarship

The Massachusetts Bar Association is currently accepting applications for its Oliver Wendell Holmes Jr. Scholarship — a $10,000 scholarship that will be awarded this April to a third-year law student attending a Massachusetts law school who is committed to providing legal assistance to underrepresented individuals/communities upon graduating. Awardees will be given leadership opportunities in the MBA.

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

Applicants must submit a completed online application, including three essay questions, along with a letter of recommendation and resume to holmes scholar@massbar.org, no later than February 28, 2018. The MBA may then require a transcript and may conduct an in-person interview of the final applicants to further assess that applicant’s experience, qualifications, and interests. The scholarship will be awarded at the MBA’s Annual Dinner on April 24, 2018, at the Westin Boston Waterfront. Visit www.massbar.org/scholarship to apply today.

Tiered Community Mentoring Program expands to Worcester

The Massachusetts Bar Association’s Tiered Community Mentoring (TCM) Program officially expanded to Worcester with a kickoff event at the Worcester Regional Judicial Center on October 27.

Launched in Boston nine years ago, the MBA’s TCM Program gives high school, undergraduate and law school students access to legal professionals, an understanding of the legal profession and an awareness of the career opportunities available. The 2017-18 academic year marks the first time the program has been offered in Worcester.

After opening remarks from Worcester TCM chair Geoffrey E. Spofford, Hon. Angela M. O’Toole, chief justice of the Probate and Family Court, spoke about the origins of the program and the mentorship cycle of paying it forward.

“You’re going to receive a lot of support here and mentoring. Someday in your future, you need to give it up to someone else,” said Chief Justice O’Toole. “You need to be able to give back what you got.”

Keynote speakers at the event were Hon. Daniel M. Wrenn, associate justice, Massachusetts Superior Court; Worcester County District Attorney Joseph D. Early, Jr.; and Stephanie K. Fattman, register, Worcester County Probate and Family Court. Paying it forward was also a common theme in their remarks.

“Young people need to experience the value of mentorship. Some day, you will be someone’s mentor,” said Wrenn.

Following the presentations, participants broke into groups for a discussion and a public speaking exercise, and they chose their team names.

Participating schools in Worcester are Burncoat High School, Worcester State University, Quinsigamond Community College and Western New England University School of Law.

Powers to receive MBF Great Friend of Justice Award

The Massachusetts Bar Foundation Trustees are proud to announce that Lonnie A. Powers will receive this year’s Great Friend of Justice Award. The award will be presented at the foundation’s upcoming annual meeting when MBF fellows, grantees and friends join together to learn about and celebrate all that the foundation has accomplished over the last year in its efforts to increase access to justice in our state.

The event will begin with a business meeting and close with a cocktail reception. The MBF Society of Fellows will elect officers and trustees for 2018, and will also honor the newest MBF Life Fellows. In addition to the award presentation and keynote address by Lonnie Powers, attorney Anita P. Sharma, executive director of the Political Asylum/Immigration Represen- tation (PAIR) Project, will deliver the keynote address.

Legal Intern Fellowship Program

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

Deadline: Friday, March 16, 2018

Applications for both programs are available online at: www.MassBarFoundation.org
Nominate an attorney for an MBA Outstanding Young Lawyer Award

Nominate a colleague for the Massachusetts Bar Association’s Outstanding Young Lawyer Award, which is given to a young lawyer who has demonstrated outstanding character, leadership and legal achievement, and has contributed service to the community.

The Young Lawyers Division will select one member of the Massachusetts Bar Association who has been in practice for fewer than 10 years and who has made a significant contribution to the legal profession by:

- Providing outstanding legal services
- Enhancing the image of the legal profession
- Serving the ideals embodied by the MBA

Visit www.massbar.org/OYL to make a nomination.

Nominations are due by 5 p.m. on Friday, March 9. The Outstanding Young Lawyer Award will be presented at the 2018 MBA Volunteer Recognition Dinner.

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The case for combining leadership development and transformational change

BY SUSAN LETTERMAN WHITE

Some large companies are facing a severe decline in their ability to create real value for shareholders. Indeed, according to a recent BCG article, “The Transformations That Work — and Why,” this year, 54 percent of large companies are in trouble. They are not good enough and poor leaders have an adverse impact on those they attempt to lead and the organization’s overall effectiveness and profitability. Let’s look at some published research data (from “The Extraordinary Leader,” by John H. Zenger and Joseph R. Folkman) to see why.

Research shows that average leaders, those that fall within the range of 50th percentile to the 70th percentile, have little effect on employee commitment. It’s only those leaders that are in the highest third of effectiveness that create more positive results. A related study found that 13 percent of employees of the worst leaders are highly committed, while 57 percent of employees of leaders in the top percentile of effectiveness were committed.

The goal of a transformation for a for-profit organization is in its name. Research on a mortgage bank demonstrated that poor leaders drove customers away and lost money. Good leaders made a reasonable profit; however extraordinary leaders nearly doubled the profit generated by the good leaders. Research from a communications company showed that leaders in the top 20 percent of effectiveness received substantially better ratings on customer satisfaction, even those the leader does not have direct contact with employees. In a related study of customer satisfaction within the retail industry, despite equal training for store employees, those stores with customer-oriented managers outperformed those with operationally oriented managers.

SUSAN LETTERMAN WHITE

Why the solution is to develop leadership at all levels

Transformation, for most every organization, is now mandatory to survive and thrive. The leaders in place must be able to balance short-term needs for profitability with long-term needs for true revenue growth. Transformations are designed to change strategies, business models, operations processes, structures that organize people and the organization’s culture. They are designed to be against a complex, multifaceted set of challenges in all areas, even the areas that seem static. Leaders are required to understand how to do this and the development of leaders at all levels, who will be able to support the overall organizational goals for transformation.

Transformational change depends on committed employees, increasing profitability and retaining desired employees — especially after an acquisition or merger when there are no guarantees to remaining together. Talent employees are left behind. There are a number of leadership skills involved. Development of some is easier than development of others. Good leaders are not good enough and poor leaders have an adverse impact on those they attempt to lead and the organization’s overall effectiveness and profitability. Let’s look at some published research data (from “The Extraordinary Leader,” by John H. Zenger and Joseph R. Folkman) to see why.

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SUSAN LETTERMAN WHITE

How to design the solution

Successful transformative change is more likely for organizations that are developing leaders at all levels. Since we are conditioned to think linearly, one might jump to the conclusion that the first step must be to develop the leaders before trying to implement the strategy. This isn’t true. Not only can leadership development be done as part of a comprehensive transformation strategy, it is more effective if part of the skill-development process includes working through and addressing active, ongoing adaptive challenges of the person and organization. Adaptive challenges are the type that are found in transformations.

I was personally involved in three transformation initiatives: (1) a law firm that had a long history of being unable to implement a strategic plan for increasing revenue, (2) a non-profit organization that was trying to design and implement a strategy to grow its membership, and (3) a post-merger integration project at a large law firm aimed to reduce resistance at the chiefs, directors and managers leadership level. In each case, the people required to lead and/or implement aspects of the organization’s transformational change, lacked the interest in leading or the necessary leadership skills. This created points of resistance, which in the case of the law firm was so strong that all implementation efforts had been stopped.

In each situation, there was no choice but to develop leadership skills in conjunction with the transformative changes required or the desired growth. Each organization was successful despite common misconceptions that an organization must first develop its leadership bench strength before diving into transformative change. Successful leadership development and moving the transformation forward was possible in each situation because the leadership development efforts resulted in reducing resistance through collaborative efforts to address a real problem the participants were facing.

These situations were not coincidental. Rather, it is common for an organization to recognize its need to grow or change and that part of the problem holding it back is a dearth of skilled leadership. These problems feed on each other.

When leadership development is delivered to peer levels within your organization, there are several key benefits. The first is that participants are able to support and learn from one another as they progress through similar individual change experiences. The second benefit of this cohort design is that peer coaching becomes an available tool to learn and develop for use inside and outside the learning group. When the training is internal, the organization receives an additional benefit because the group is able to explore the organization’s pernicious problems through the different perspectives that arise from different points of view on the organization and the different viewpoints that come with being unique individuals.

Several months after the conclusion of one of these projects, which culminated in a retreat program, the chief human resources officer reflected on the work and said, “[Teams] are working more effectively than a couple of months ago. Whenever you can have folks communicate effectively and candidly about integration and discuss the concerns that people have, it reduces the anxiety that may feel when firms initially merge.” They can’t do that without the right leadership skills. Introducing leadership development into your organization’s strategic growth plan is one of the smartest and most helpful decisions current empowered leaders can make.
Legal service providers are joining the growing ranks of content creators who are utilizing ubiquitous modern channels for connecting with content consumers, including potential clients and referral sources.

So-called “content marketing,” which consists of creating and delivering content to a target audience, is now one of the most effective tools for business development when executed effectively.

According to one recent survey, 80 percent of business decision-makers rely on substantive content more than advertising, and 50 percent say that content can influence their decision to hire a professional service provider. Decision-makers also spend roughly 20 percent of their total internet time surfing for useful content, and they like being able to see how a potential service provider thinks and communicates.

Thus, it is not surprising that so many lawyers have turned to content marketing in the form of blogs, client newsletters, “how to” publications, LinkedIn posts, JD Supra articles, Facebook publishing tools, YouTube videos, and so-called “white papers” that provide thought leadership on issues that involve public policy and law.

What kinds of content do prospective clients like?

In surveys I have done, prospective clients indicated the following are of interest to them:

- Practical tips or action checklists for readers to consider following are of interest to them:
- Industry-specific content about legal problems, solutions and trends affecting their particular industry or professional occupation;
- Practical tips on how to deal with new legislation or court decisions in a way that will prevent or minimize potential liabilities for them;
- Charts or summaries that illustrate all of the key changes associated with legislation, or all of the different regulations or legal decisions interpreting legislation;
- Explanations that make complex legislation or regulation simple and easy to understand.

Legal content creators say they sometimes get stuck on coming up with ideas for fresh content, but the potential number of topics are as unlimited as a writer’s imagination. For instance, content publishers can offer to readers:

- List articles, such as “Five Opportunities Presented by Recent Tax Law Changes,” or “Four Ways to Protect Yourself from Premises Liability”;
- Timely news analyses of major court decisions in a recent term;
- “Keys to Victory” stories, offering practical analyses of how and why headline legal victories were achieved;
- Technology stories that explain how technology can be used to improve the efficiency, quality and cost of legal services; or
- Anniversary stories, examining the impacts of a historical ruling on its anniversary.

Many lawyers already have an abundance of potential publication fodder right in their offices. PowerPoint presentations, trial briefs, research memos, seminar speeches and other work products can be adapted for content marketing.

In fact, most publications can be “repurposed” in one way or another. A blog post can be expanded into an article. An article about an industry can be put into a client alert or newsletter directed at potential clients in that industry. A legal brief that summarizes the law of a complex topic for a judge can be distilled into a chart that demystifies the law for ordinary readers. All of those publications can also be easily posted on Twitter, LinkedIn and other forms of social media that have viral sharing potential.

Legal service providers can also broaden their reach and double their potential content marketing impact by doing “partnered content” with others. For instance, here are a couple of real-life examples of partnered content publications that have proven effective:

- An employment law firm teamed up with an insurance company to write a “desk guide” to risk management and liability prevention for their combined audiences.
- A law firm’s intellectual property group teamed up with some patent brokers to write an advertorial on how to find and exploit valuable patents available for licensing.

Perhaps the biggest problem with content marketing for lawyers is getting the product out quickly. We, as lawyers, tend to be professionally cautious and ponderous. But good content marketers know that nobody wants to read an analysis of a headline case six months after it is newsworthy, and nobody reads the seventh newsletter they receive covering the same “new” legislation.

Lawyers who are frustrated writers just have to shed their legal robes occasionally and energetically seize the opportunity to be the editors-in-chief of their own publications. They can decide which stories to cover, they can add those fresh perspectives they always thought were missing from traditional media, and they can give to the world that which is uniquely them and cannot come from anyone else. They can even win more clients if they’re effective communicators.

BY JOHN O. CUNNINGHAM

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.

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

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

To submit articles or proposals for articles, email: KSadoff@MassBar.org, mail to Massachusetts Law Review, 20 West St., Boston, MA 02111 or call (617) 338-0680.
TECHNOLOGICALLY SPEAKING

Client service with a touch of technology

BY HEIDI S. ALEXANDER

Face it, we are living in a buyer’s market. Clients want more value for less money, they want predictability with respect to costs, and they won’t stand for practice inefficiencies. Moreover, clients ultimately determine the level of your firm’s success. If your client can return to you, refer to you, and boost your reputation, as well as monopolize your precious time, file a bar complaint against you and become your worst nightmare. It’s time to get serious about improving client service. First, you need to put yourself in your client’s shoes. What do your clients want and need? You don’t know? Then solicit client feedback. Develop a client service policy and appoint firm personnel to manage client service. Finally, make the client experience as simple and smooth as possible. You can do this with technology, and you can bet that below I’ll give you some suggestions for the tools to employ.

E-signature

E-signature is here to stay. There is absolutely no need to (1) attach document to email and force your client to download it, 3) print it, 4) sign it, 5) re-scan it and 6) email it back to sender. Instead, use an e-signature service that allows parties to log in, review and authenticate the signer. You simply upload your document for signing to the e-signature platform, 2) enter the recipient’s email address and 3) recipient signs the document electronically and receives a copy of the signed copy to download for their records. You’ve now cut the number of steps in half, saving both you and your client time, money and stress.

- A few popular e-signature providers include:
  - DocuSign (www.docusign.com)
  - EchoSign (www.echosign.com)
  - HelloSign (www.hellosign.com)
  - RightSignature (www.rightsignature.com)

Electronic invoicing

Paper billing is dead. It’s time to move to electronic invoices and payments to streamline invoicing and payment on both sides of the transaction — and improve collections rates. Many of the case management programs now provide the ability to generate an invoice to email to clients. Clients can then pay online with a credit card or e-check from anywhere. That’s it. On the law firm side, the paper trail is applied to trust or operating account and then recorded in a ledger. Now you’ve not only made your client happy with the ease of the process, but you’ve forestalled future questions on your end about who paid for what. To name just a few, Rocket Matter (an MBA Member Advantage), Clio (also an MBA Member Advantage), MyCase, ZolaSuite, CosmoLex, and Leap all offer electronic billing and payments (many through integration with LawPay, another MBA Member Advantage).

Client portals

Client portals offer a way to interact securely and streamline communications with clients. You can find client portals among many other advantageous features in case management programs. Many of the client portals designed by case management programs are built with the customer in mind, providing a easy to use interface that facilitates communication. The client portal is your client’s one-stop-shop for all their case updates, communications, document collaboration, and billing.

Scheduling

Save yourself and your client time by using technology for scheduling purposes. For example, one product that we use at MassLOMAP is Calendly. The way Calendly works is by providing a unique link to send to invitees who can then view your availability and book a time convenient for them. This tool syncs with your Google, Office 365 or iCloud calendar. Once you select a date and time, your invite receives an email confirmation immediately and a reminder notification prior to the meeting. You also receive an email notification that a meeting has been booked and Calendly automatically adds the event to your calendar. You don’t have to do a thing! If your invitee needs to cancel the same link can be used to select another date. Of course, Calendly is not the only calendaring program in town; others include ScheduleOnce, YouCanBook.me, X.ai, Assistant.to, and Timebridge.

Virtual reception

Clients want to think they are your single priority at any given moment. Your availability to clients and a certain personal touch can make all the difference. For example, many clients would still prefer to speak with a live person rather than get your voicemail each time they call. To create that personal touch and demonstrate your attentiveness to the client, you might try a virtual reception service. There are a number of virtual reception services available worldwide, and some can even be trained to handle specific matters. Some include Ruby Receptionist (an MBA Member Advantage), Back Office Betties, Alert Communications, Answer 1, Daybreak Office Solutions.

Start 2018 off right by making client service a priority for your year. Try implementing some of the above technological changes and see if it helps move your clients to the next stage of your relationship with your client. I think I’m actually a very capable lawyer, but I prefer being seen as the “adult” part of executive function to refer to what you might think of as the “adult” part of being a lawyer — that is, I come with some of the other features of ADHD, such as disorganization and forgetfulness, with some of the other effects of ADHD, such as disorganization and forgetfulness, with some of the other features of ADHD, such as disorganization and forgetfulness, with some of the other features of ADHD, such as disorganization and forgetfulness. I would think first of (a) coaching and (b) relying on others who are by nature more organized. The purpose of coaching would be to help you develop and consistently implement techniques designed to compensate for your executive function. Simple examples of such techniques might be daily rituals (e.g., “I always do this first before I leave home.”) As a physician-author Atul Gawande has described, even the most talented surgeons were found to make safety errors and showed vast improvement when they were able to accept the utility of simple checklists to help them remember what tasks to do.

Relying on others may be an even more powerful tool, used in a systematic way. You don’t say whether you work solo or in a firm, but having some one in a position of assistance to organize materials for you, remind you of steps that have not been taken, keep track of scheduling and chronological priorities, etc., can be invaluable.

While software with alert systems can be a boon to lawyers in general, there is a good chance it won’t be sufficient for you, unless utilized by someone else on your behalf. Of course, there are obstacles to developing this kind of constructive reliance. Solo practitioners often feel they cannot afford an assistant (although such a person might well pay for him or herself through increased productivity and timely billing), and lawyers, in general, tend to avoid as-suming a helping position. But if you can find a way past those concerns, the right kind of auxiliary assistance can allow you to focus on your strengths — even a virtuoso concert pianist needs someone else to turn the pages and, probably to remember to bring the sheet music.

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 anonymized and de-identified or expressed by individuals seeking LCLC’s assistance. Questions may be emailed to Dr.Jeff@LCLM.org.
PRIVILEGE TO PRACTICE

Big or small, the rules apply

BY RICHARD P. CAMPBELL

When reading the rules of professional conduct, or reports of disciplinary actions pursued for professional misconduct, or published decisions by the Supreme Judicial Court involving bar actions and suspensions, it is quite easy to aggregate the information and classify the conduct as acts or omissions by solo practitioners or lawyers in small, struggling law firms. It is true, of course, that much of the rules of professional conduct are aimed at large firms or public officials, with near-limitless finances, budgets, and deep support staffs, and fee income that is breathtaking in amount. Milberg LLP was a large Manhattan law firm that held itself out as one of the nation’s leading plaintiff law firms prosecuting class action litigation, and according to the firm, legendary results. (Note: Just before Lawyers Journal went to press in February, the firm announced it was forming a strategic partnership with another firm under the new name Milberg Talder Phillips Grossman.)

The firm’s former website description of its history and practice give a sense of Milberg LLP, noting it was “one of the first law firms to prosecute class actions in federal courts on behalf of investors and consumers,” has a large and varied support staff, and “has been responsible for recoveries valued at approximately $55 billion during the life of the Firm.” Of importance to this article, Milberg identified qui tanactions as one of its specialties of practice. In 2012, Milberg lawyers filed qui tanaction in the U.S. District Court for the District of Massachusetts, originally styled as United States of America, et al, ex rel, Timothy Leystock v. Forest Laboratories, Inc., Civil Action No. 12-11354 –FDS. The Milberg lawyers of record were partners Matthew Gluck and James Shaughnessy, and counsel Alastair J.M. Findes. All three lawyers were admitted to practice in New York. Shaughnessy and Findes were also admitted to practice in one or more additional jurisdictions. None of the three lawyers had ever practiced law in Massachusetts, however. Consequently, David Pastor, a Massachusetts practitioner, filed an appearance as counsel for the plaintiff and moved for the admission of Gluck, Shaughnessy and Findes pro hac vice in accordance with Local Rule 83.5.3. By operation of Local Rule 83.6.1(a), “[t]he rules of professional conduct for attorneys appearing and practicing before [the United States District Court for the District of Massachusetts] shall be the Massachusetts Rules of Professional Conduct adopted by the Massachusetts Supreme Judicial Court.” Local Rule 83.6.1(d) is explicit: “Compliance with Rules Required. All attorneys who are admitted or authorized to practice before this court shall comply with its rules of professional conduct in all matters they handle before this court.”

Surely, a bedrock role for local counsel is the assurance that lead counsel from another jurisdiction is made aware of important substantive laws that may impact preparation and trial of the case. Legal privileges, confidentiality and privacy laws are obvious examples of important substantive state laws. But both local counsel and counsel appearing pro hac vice must meet the mandate of Rule 1.1: “A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness, and preparation reasonably necessary for the representation.”

The preamble to the code instructs that lawyers have a “special responsibility for the maintenance of the public trust and confidence” because among their various roles they are “officer[s] of the legal system.” “[H]uman conduct, the physician-patient relationship” or misrepresentations to be truthful when dealing with others on a client’s behalf … Misrepresentations can also occur by partially true but misleading statements or omissions that are the equivalent of affirmative false statements.” Rule 8.4 (c) deems as “professional misconduct” engaging in “dishonesty, fraud, deceit, or misrepresentation.” So for Judge Saylor, the determination of professional misconduct was not a close call. The self-described world class law firm dripping with money and power employed bad actors, liars, cheaters and defrauders. Their lawyers on the Levitt case were legal grifters, taking advantage of others all in pursuit of fee income. According to a Law360 report on the oral argument, Forest Laboratories lawyer described the Milberg litigation tactics as “egregious,” “shameful,” “dishonesty,” “deceitful,” “false.”

In a written decision issued by Judge Saylor on April 28, 2017, the court found that “the Milberg lawyers engaged in an elaborate scheme of deceitful and unethical conduct in order to obtain information from physicians about their prescribing practices, and in some instances about their patients.” Using their financial resources and impressive staff, the Milberg lawyers employed a physician and medical researcher to contact doctors and determine their practices for prescribing a Forest Laboratories product for a particular type of Alzheimer’s disease. “In order to obtain the cooperation of the physicians, [the retained Milberg employee] falsely represented that he was conducting a medical research study.” The treating physicians “were induced to provide patient medical charts and other confidential medical information.” The Milberg lawyers then used the information derived from this scheme as factual averments in its second amended complaint in order to meet the pleading requirements for specificity contained in Rule 9(b) (pleading fraud).

Assuming their competence, Judge Saylor concluded that the Milberg lawyers knew that “physicians are generally prohibited from disclosing patient information to members of the general public.” He found that “[t]he scheme here was highly intrusive; in fact, it was intended to intrude into one of the most sensitive and private spheres of human conduct, the physician-patient relationship.” And to cap it off, “the Milberg attorneys not only caused physicians to disclose patient information, they then published that information in Forest Blasts Ariya’s ‘Shameful Conduct’ In FCA Suit, Law360, Boston (December 6, 2016, 6:35 PM EST).” It remains to be seen what will happen to these lawyers. Will they lose their right to practice in the United States District Court for the District of Massachusetts? Will the Court’s findings be transmitted to the states where they hold plenary licenses to practice law? Will they be suspended or disbarred? Their conduct is indefensible in my view. I would not want to be in their shoes.

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 & Conroy, P.C., a firm with a national practice, in 1983.
Update from the Judicial Administration Section

BY THOMAS M. BOND AND MICHAEL H. HAYDEN

The Judicial Administration Section (“JAC”) has continued its outreach and developed new programs and seminars in counties outside of Boston. We are the Massachusetts Bar Association.

View from the Bench, Western New England School of Law, Springfield

In June, the JAC put on a “View from the Bench” program in Springfield on the new Superior Court rules at the Western New England School of Law. Many thanks to Judge Mark D. Mason, who led a panel of judges, including Judges Michael Callan, John Ferrara, and Mary-Lou Rup. Nearly 50 people were in attendance.

Norfolk Superior Court, Bathlehem

The JAC also invited a Superior Court judge in October to put on a practical demonstration on panel voir dire. Judge Peter Krupp presided over the program. Four attorneys demonstrated panel voir dire before a panel of mock jurors. Over 100 people attended this program. Much thanks to Judge Krupp, Joe Hurley and Lori Cianciulli, who put together this program.

View from the Bench, Plymouth Superior Court, Brockton

The JAC, led by member Jack Eklund, held a seminar on the new Superior Court rules and practice at the Plymouth Superior Court in Brockton. We appreciate the efforts and participation of Judges Richard Chin, Sharon Donatelle, Mark Gildea and Raffi Yessayan.

View from the Bench, Essex Superior Court, Salem

In conjunction with the Essex County Bar Association, the JAC held another View from the Bench program in January 2018, at the Essex Superior Courthouse in Salem. Many thanks to Judge Timothy Feeley, and to the panel of judges, consisting of Judges Peter Lurait, Thomas Dreschler, Hélène Kazanjian and Salim Tabit. Clerk Carlotta Patten was instrumental in developing the materials and agenda for this program.

The JAC has also held conferences for a long time at MBA headquarters in Boston. We began our new season with Christopher Sullivan at the MBA presidential helm. In September, we welcomed Dean Frank Talty to present to our council on the new MPAJA program at UMass Lowell. We hit the ground running in October with a program in Boston.

View from the Bench program on the new Superior Court rules at the MBA, Boston

The panel was comprised of Judges Douglas Wilkins, Heidi Briger, Anthony Campolo, Mitchell Kaplan and Hélène Kazanjian. We had a packed house, with over 100 people in attendance.

Representing a Leaf and Hearing Impaired Clients

JAC member Nick Carter has organized a program with Massachusetts Commission for the Deaf and Hard of Hearing (MCDHH) that will discuss recent updates and developments in this area. During this interactive program, attorneys will receive advice and practical training on how to meet the communications, access and accommodations needs of their clients.

Judicial Administration Diversity Committee

MBA President Christopher P. Sullivan organized a committee within the Judicial Administration Council, chaired by Tom Bond, to study the lack of diversity on the bench and develop ways to address the problem. Several meetings have been held with Chief Justice Judith Fabricant, Chief Justice Angela Ordoñez, and members of the Black Lawyers, Hispanic Lawyers, Asian Lawyers, Women Lawyers and LGBTQ+ bar associations. We are gathering statistics on the number of minority judges currently on the bench, and will present the following resolution to the MBA House of Delegates at the 2018 Annual Meeting:

"Legal giants Oliver Wendell Holmes, Jr., Louis D. Brandeis, Moorfield Story and other renowned Massachusetts attorneys founded the Massachusetts Bar Association on the principle of inclusion and invited lawyers of all races, colors and creeds to be members of the association. Long ago, the MBA’s House of Delegates adopted a policy positions strongly in favor of equal opportunity and increasing diversity within the legal profession in our commonwealth. The MBA has always advocated that our state court bench reflect the diversity of the citizens of our commonwealth. Although much progress has been made, the goal has not yet been achieved. In fact, sadly, over the last decade, some of those hard fought gains have eroded despite the strong efforts to diversify the bench made by the current governor and several of his predecessors. Anecdotal evidence suggests that our judicial community is less diverse today than it was just 10 years ago.

As members of the legal community and as citizens of our commonwealth, the members of the MBA and its affinity bar associations resolve to take proactive steps in both the short and long term to increase the diversity of our state court bench so that it will more accurately reflect the diversity of our citizens. To accomplish this goal, the MBA is establishing a Judicial Diversity Task Force that will examine the status of the diversity of the judiciary of the Trial Court, investigate the causes inhibiting diversity and explore potential solutions for increasing diversity while maintaining the highest standard of excellence in the Trial Court. We invite our brother and sister bar associations to join us on the task force in our critical quest to explore and address this problem.”

JAC vice chair Michael Hayden and JAC member Nick Carter have been an enormous help on this committee. We appreciate the support of Chief Justice Fabricant, Chief Justice Ordoñez and President Chris Sullivan, who has taken the laboring our in this endeavor.

In 2018, we plan to have programs on electronic discovery, probate and family practice, panel voir dire, and an open forum on promoting diversity on the bench. Stay tuned!

Young Lawyers Division

The all-bark, no-bite pre-suit requirements of 93A

BY JOSEPH A. NETT

A lawsuit in Massachusetts against an insurance company will almost always involve the “bad faith statute” codified as G.L.c. 93A. This famous statute is known to have multiple pre-suit requirements, including a demand letter listing the specific unfair and deceptive practices alleged which is to be mailed thirty days prior to suit being filed. These requirements are followed by attorneys to make sure that their bad faith claims are preserved and, hopefully, to reach an early resolution.

Technically, such requirements, along with the threat of treble damages and attorneys’ fees, are supposed to encourage settlement prior to the lawsuit being filed. However, my experience as a litigation attorney over the past five years has led me to believe that the pre-suit requirements of Chapter 93A have been much more onerous than helpful. In turn, the goal of promoting pre-suit settlement seems to have been lost.

For example, the very language of the statute was interpreted by the Supreme Judicial Court of Massachusetts to require an initial letter for many deserving companies to have the right to a 93A demand letter. The statute states that companies conducting business in Massachusetts are not entitled to such a letter if they do “not maintain a place of business or does not keep assets within the commonwealth.” The court held that having a place of business or assets in Massachusetts really meant that a company needed both in order to give it a right to a pre-suit demand letter. More often than not, companies and/or insurers in today’s society conduct business without necessarily having both a place of business or assets in the state. As a result, out-of-state companies are often out of luck when it comes to receiving a letter and having the opportunity to evaluate such claims before the lawsuit is filed.

Therefore, the goal of the statute in promoting pre-suit settlement is non-existent against such companies and allows plaintiffs to stack on additional claims against said companies without consequences.

For companies that are entitled to 93A letters, the pre-suit requirements of the statute are limited in their protection. Despite the language of the statute stipulating that a failure to file a letter 30 days prior to filing suit will bar such claims from being brought, courts commonly allow plaintiffs to amend their complaint to add a Chapter 93A letter at nearly any point in the litigation. I have even seen 93A letters, and the claims associated with them, to be added to a complaint three years after the lawsuit was initially filed. As such, plaintiffs can file lawsuits alleging 93A claims with little worry of them being dismissed without ever mailing the supposedly required pre-suit letter. This puts an unfair burden on the defendant to protect themselves against claims without knowing, potentially for years, the specific practices alleged against them. This promotes the prevalence of Chapter 93A claims as they can be alleged in nearly every instance without requiring the plaintiff to provide any support for those claims until discovery has commenced or is completed.

The demand letter was supposed to promote pre-suit settlement. Instead, the fact the pre-suit requirements are barely enforced means the goal of the statute has vanished and Chapter 93A claims are almost boilerplate. Enforcing the pre-suit requirements, and requiring demand letters for out-of-state companies, would allow defendants to take such claims seriously and actually engage in pre-suit settlement. Now, while Chapter 93A claims are obviously evaluated when received, often defendants do not even encounter such claims until after the lawsuit has been filed. This clearly does very little to keep litigation out of the courts. Putting more bite into the statute’s pre-suit requirements may seem harsh, but it is the best way to again promote the goal of ending cases before they are filed.

Joseph A. Nett is an attorney with Groelle & Salmon PA. He practices civil litigation in both Massachusetts and New York.
Early termination of probation

BY PETER ELKANN

Until fairly recently, it used to be rare for a probationer to get their period of probation terminated early. Judges would frequently deny the request stating that the fact that someone was already doing so well for the time they had been on probation was expected of them. And, besides, why end probation early if it is working out so successfully? They might also say that the sentencing judge, who originally handed out the sentence and was, therefore, the one possibly most familiar with the case, knew how long they wanted the defendant to be on probation and would have, indeed, sentenced the person to a shorter period of probation if they had seen fit. Recently, however, in the purported interest of public safety, there has been a trend in the opposite direction in favor of presumably giving probationers an incentive to do better and to perhaps actually accomplish a track record of resuming a good, law-abiding life. At this present time in the courts of Massachusetts, early termination of probation is actually being encouraged as a routine action when merited. In fact, as a result of the formation of a number of working groups assembled by Massachusetts Supreme Judicial Court Chief Justice Ralph Gants, a report was issued titled, “Criminal Sentencing in the Superior Court: Best Practices for Individualized Evidence-Based Sentencing,” in March 2016. It suggested, as a best practice, establishing a track record of resuming a good, law-abiding life. The rationale as expressed in the report is that “Studies have also shown that probationers are often more likely to complete their probation successfully when their positive performance is acknowledged or rewarded. Positive reinforcement and the use of incentives can motivate a probationer to succeed, as opposed to probation practices that recognize (and sanction) only failure. As is true in life generally, so too in the context of probation: the prospect of a reward for success is sometimes more powerful than the threat of punishment for failure.”

Before one applies for early termination of probation, they, realistically, should meet two criteria. (1) In the time they have been on probation, they should have successfully complied with all conditions, had no violations of probation, and be up to date on payments. In other words, they should have had a good probation or model probationer. (2) In order to show how successfully they have complied with probation, they should probably not apply for early termination until they have completed, at the very least, half of their period of probation. If, as one has, for example, been sentenced to five years of probation, they should probably not apply for early termination until they have already served two and a half years of it at the earliest. Also, it would be ideal to get one’s probation officer to agree to the request. However, in general, it is generally the policy of most probation offices to either routinely oppose such a request as a standard policy or to stay neutral and leave it up to the judge. However, generally, a judge will need to understand that the probation officer is doing so as a matter of their office policy and not because the probationer did not earn it. Otherwise, it is actually still somewhat helpful for a probation officer to tell the judge that he or she takes no position on it either way but that they will affirm that the probationer has been in full compliance with all the rules and conditions of their probation. The motion for early termination of probation itself should have as much detail as possible explaining not only did the probationer comply successfully with all terms of probation, but also the other positive things going on in their life to show they are currently living a life of stability and responsibility. These might include their employment, family ties and whatever contributions they have made to the community, church or non-profit organizations or private acts of kindness to those around them, even if it means so much as shoveling the snow for free for an elderly neighbor. If the probationer has engaged in counseling, include a letter from the therapist noting their patient’s active engagement in it with some level of assurance that the indications are they are likely to continue living a responsible, law-abiding life. Letters from family and friends can also be included. It’s also key to give a reason why it would be better and in the interest of justice for the person to now get off of probation.

There are a number of reasons why a person might want to apply for early termination of their probation. They may want to move out of state and not go through the difficult and frequently fruitless task of attempting to get another state to accept a transfer through the interstate compact. They may have to travel out of state frequently for work or to attend to a chronically sick family member at the last minute and not always have the time to get permission first. If, as a condition of probation, they wear a GPS monitor, it may greatly limit the hours and places they can go within the state. The monitor may frequently malfunction and give false alarms at their workplace. There is also the expense of the monthly probation fee, as well as taking time off of work to report to person in their probation officer. Or it may just be that, after years of being on probation where they have done everything by the book, they want the judge to understand their progress, and they want to resume a good, law-abiding life of contribution to the community, they may feel they have earned it. If the judge denies the request for early termination of probation, all hope is not lost. Some judges have told the applicant that they would like to see them show just a bit of a longer track record on probation before they will feel comfortable terminating it. Someone who gets turned down for early termination of a five-year probation after completing half of it could ask the judge if they might reconsider after their three years on probation.

This kind of positive reinforcement and incentive can help the probationer succeed in resuming a good, law-abiding life. It would therefore be in the interest of public safety to offer people a chance at an early termination of their probation.

Peter Elkann is a criminal defense attorney, who is a former chair of the MBA’s Criminal Justice Section Council. He also serves as a member of the MBA’s Executive Management Board.

Winter is coming … for dogs, too

BY KAREN RABINOVICI

As we all know by now, winter has made its cold entrance just in time for the new year, and it’s time to bundle up ourselves and our dogs, for those of us not otherwise harming a tethered or confined dog. Another law, Massachusetts General Law Chapter 140 Section 174F, commonly referred to as the “hot car law,” was also passed nearly a year ago. This law prohibits the confinement of any animal in a car “that could reasonably be expected to threaten the health of the animal due to exposure to extreme heat or cold,” and allows law enforcement officers, animal control officers, and firefighters to enter vehicles to assist confined animals, provided such personnel were unable to locate the car’s owner. Although this law is most helpful in the summer, it has its applications in the colder months as well. The MSPCA also reports that for cases in which the conditions or severity are not extreme enough to warrant criminal charges, the issuance of monetary fines has worked as a strong incentive to owners to make the needed changes, improving the lives of dogs. In one example of circumstances warranting a citation, an owner was cited for keeping a dog in an unsanitary area that included drinking water in a dirty bucket that contained algae, and debris that included crumbling platform and other items in disrepair that could have injured the dog. “We are thankful when the legislature recognizes gaps in the existing state laws and works to ensure that animals in our state our protected,” states Kara Holmquist, Director of Advocacy at the MSPCA and chair of the MBA’s Animal Law Practice Group. So, it is important to remember that as the cold season makes its chilly impact on people, it also affects the dogs exposed to our beloved and lengthy New England winters, as reflected in several Massachusetts laws. Of course, all dogs deserve and would prefer to snuggle up cozily with their humans on the couch in front of the fireplace. We can all weather the weather better that way.

Karen Rabinovici is an assistant general counsel for Lahey Health and an avid animal lover.
The law as it stands today: Ajemian v. Yahoo! Inc.

John Ajemian died without a will in August 2006 as a result of a bicycle accident. Among his assets is a Yahoo! Mail email account. Upon their appointment as co-administrators of John’s estate, his siblings, Robert and Marianne, requested Yahoo!'s assistance to access the email account. Yahoo! agreed to provide certain metadata about the emails, but refused to provide access to the contents of the messages, arguing that (1) it was within its rights to do so under the terms of service governing the account, and (2) disclosing the contents of the emails would violate the federal Stored Communications Act. Robert and Marianne filed suit to gain access to the account in September 2009, and the case has been in litigation ever since.

Although the Probate and Family Court initially dismissed the case on the grounds that the forum selection clause in Yahoo!'s terms of service mandated that the suit be filed in California, the Appeals Court vacated the dismissal in 2013, and remanded the case to the Probate and Family Court to determine whether the Stored Communications Act prohibited Yahoo! from disclosing the contents of a decedent’s emails to the representatives of their estate. The Probate and Family Court subsequently granted summary judgment in favor of Yahoo!, which the Supreme Judicial Court recently reversed on the grounds that (1) the Stored Communications Act does not prohibit Yahoo! from disclosing the contents of the emails, and (2) there was an issue of material fact as to whether the terms of service constitute an enforceable contract.

Why fiduciary access is more important than ever

When John Ajemian died in 2006, Facebook was barely two years old and had not yet surpassed 100 million users. When Robert and Marianne Ajemian first filed suit against Yahoo! in 2009, Facebook had only just surpassed 300 million users and Twitter was just beginning to enter the mainstream. As of the writing of this article, Facebook has surpassed two billion users and both Facebook and Twitter have become so influential that Congress has held hearings about their impact on the 2016 federal elections.

Beyond social media, the growth of the internet means that it is now possible to conduct all of one’s banking digitally, without the need for paper checks, save statements or paper bills. In such a situation, the only indication that a person even has an account with a financial institution might be through their emails.

As more and more people access their email exclusively through the internet (as opposed to through a program, such as Microsoft Outlook, which downloads a copy of all emails to the account holder’s personal computer), the ability of a fiduciary to access these accounts becomes increasingly imperative. With no legislation governing access to digital assets by fiduciaries, the ability to gain access to such assets is left to the individual service providers. Some providers now allow some form of fiduciary access, which must generally be setup beforehand by the account holder (e.g., Google’s “Inactive Account Manager” and Facebook’s “Legacy Contact”), but there are still providers, including Yahoo!, which deny fiduciaries access as a matter of policy. Without access to digital assets, fiduciaries may be unable to fulfill their duties.

RUFADAA and the way forward: Balancing fiduciary access with the account holder’s privacy interests

Fortunately, many states have begun to address these issues, mainly by enacting the Revised Uniform Fiduciary Access to Digital Assets Act, or “RUFADAA” (the original Uniform Fiduciary Access to Digital Assets Act, “UFADAA”, was heavily opposed by technology companies and privacy advocates). Under RUFADAA, in- structions would violate an account holder regarding fiduciary access, either through a tool provided by the service provider (such as the Inactive Account Manager and Legacy Contact tools mentioned previously) or through a will, power of attorney, trust, or other written record, are legally enforceable. In the absence of instructions provided by the account holder, the account holder’s terms of service will govern, and if the terms of service are silent on the issue, RUFADAA’s default rules will govern. Thirty-seven states have enacted RUFADAA into law and one state (Delaware) has enacted UFADAA (the principal difference between UFADAA and RUFADAA is that, under UFADAA, fiduciaries are presumed to have access to digital assets unless the account holder explicitly denies them such access). RUFADAA was introduced in an additional six states (plus the District of Columbia) in 2017. Although RUFADAA’s careful balancing of the privacy interests of the account holder with the needs of the fiduciary make it a promising solution to the problem of fiduciary access, it has yet to be introduced in Massachusetts (though two other bills addressing the issue have been introduced).

Unfortunately, unlike such time as the Massachusetts Legislature sees fit to address this issue, many more Massachusetts residents are likely to encounter the situation faced by the Ajemians.

Francis R. Mulé is an associate at Mendel & Associates, LLC, where he practices in the areas of estate planning, estate administration and elder law. He is a director-at-large for the Young Lawyers Division of the Massachusetts Bar Association and a member of the Massachusetts LGBTQ Bar Association.

Update from the YLD

BY SAMUEL A. SEGAL

It has been another great year for the Massachusetts Bar Association and the Young Lawyers Division. The YLD remains committed to providing quality education, networking and community service opportunities to both our current and future lawyers — namely, law students.

To that end, we have already sent representatives from the MBA YLD to our many surrounding law schools during new student orientation in August and September 2017. We introduced the students to the MBA and everything it has to offer, with the added bonus of free membership for law students. Student enrollment in the MBA has soared as a result of these efforts, and we are not stopping with introductions.

In October, the YLD hosted a networking event for law students and young lawyers at Escape the Room Boston. It was a great team-building event, and we look forward to doing another in the future. It was also our first social event of the year and the first to sell out. We will continue this trend! Our next social/networking event will be a joint networking event at 21st Amendment on February 7, 2018.

The YLD also remains committed to the goals of giving back to the community. In September, we host-
Young Lawyers Division

Mastering the security deposit in Massachusetts

BY MICHAEL J. MOLONEY

An interesting challenge for any attorney is the education of a client with respect to a security deposit. All too often a landlord treats the deposit as his/her money when, in actuality, it remains the property of the tenant. The basic laws governing the security deposit can be found under Massachusetts General Law, Chapter 186 Section 15B, in addition to the Massachusetts Attorney General Regulations, set forth in 940 C.M.R. Section 3.17(4). Violations of the security deposit laws can also result in violation of Massachusetts General Law, Chapter 93A. The legal landscape regarding the handling of a tenant’s security deposit is complicated. Attorneys, especially those unfamiliar with landlord/tenant law, can sympathize with this sentiment. Therefore, it is absolutely essential that attorneys representing either landlords or tenants be intimately familiar with the legal significance of security deposits in Massachusetts.

At the inception of a tenancy, a landlord cannot demand a security deposit amount exceeding the first month’s rent. Upon receiving said deposit, the landlord must give the tenant a receipt stating the amount of the security deposit, the name of the person receiving it, the date on which it was received, and the description of the rented premises. A lesser-known requirement provides that upon receipt of the security deposit or within ten days of commencement of the tenancy, the landlord must provide the tenant with a signed statement of the present condition of the premises. The tenant then has fifteen days from receipt of the opportunity to return the statement with additional damages not previously included. In this event, then the landlord, within fifteen days, is obligated to return a signed copy noting an agreement or any disagreement with the additions made by the tenant.

While most landlords understand that the deposit must be held in a bank account, this account must actually be separate, interest-bearing, and be located in Massachusetts. Moreover, within thirty days of possession of the security deposit, the landlord must provide the tenant another receipt indicating the name of the bank, the location of the bank, the account number of the deposit, and finally its total amount.

If the deposit is held for more than one year, the landlord must pay the tenant interest on the deposit at five percent or at the rate paid by the bank if it is less than five percent. If the landlord fails to pay or credit the interest within thirty days of the anniversary of the deposit, the tenant is entitled to deduct the interest payment from the next rent payment.

A key provision that must be noted and understood by advocates for either side, are actions that a landlord must take after a tenant vacates their unit. A landlord must return a tenant’s deposit or balance thereof together with any interest owed within thirty days of the return of possession. A lesser-known requirement provides that upon receipt of the security deposit or within ten days of commencement of the tenancy, the landlord must provide the tenant with a signed statement of the present condition of the premises. The tenant then has fifteen days from receipt of the opportunity to return the statement with additional damages not previously included. In this event, then the landlord, within fifteen days, is obligated to return a signed copy noting an agreement or any disagreement with the additions made by the tenant.

Any noncompliance with these obligations can result in damages ranging from its actuality, it remains the property of the tenant. The basic laws governing the security deposit can be found under Massachusetts General Law, Chapter 186 Section 15B, in addition to the Massachusetts Attorney General Regulations, set forth in 940 C.M.R. Section 3.17(4). Violations of the security deposit laws can also result in violation of Massachusetts General Law, Chapter 93A. The legal landscape regarding the handling of a tenant’s security deposit is complicated. Attorneys, especially those unfamiliar with landlord/tenant law, can sympathize with this sentiment. Therefore, it is absolutely essential that attorneys representing either landlords or tenants be intimately familiar with the legal significance of security deposits in Massachusetts.

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A key provision that must be noted and understood by advocates for either side, are actions that a landlord must take after a tenant vacates their unit. A landlord must return a tenant’s deposit or balance thereof together with any interest owed within thirty days of the end of the tenancy. Further, a landlord may only deduct actual amounts to reimburse for unpaid rent, unpaid tax increases, or for a reasonable amount necessary to repair any tenant caused damage. In the event the landlord does retain a portion of the deposit, then a statement, signed under the pains and penalties of perjury, must be sent to the tenant. This statement must be complete with an itemized list of deductions accompanied by written documentation of the cost of the repairs.

Any noncompliance with these obligations can result in damages ranging from its immediate return up to a landlord being held liable for three times the amount of the security deposit, plus interest, together with court costs and reasonable attorney’s fees. Because this potential liability often far outweighs the benefit of demanding a security deposit, landlords should rethink requesting it and instead considering the course of action of raising the monthly use and occupancy fees. Nevertheless, both sides need to be proactive in advocating issues relating to the security deposit. A vast understanding of these challenging and complicated requirements is an indispensable skill, ultimately benefiting any attorney representing clients in housing related matters.

Michael J. Moloney is a staff attorney at the Fall River Housing Authority focusing in a variety of legal matters including evictions, collections, discrimination complaints, liability claims, procurement laws, contract implementation and policy issues. Moloney is a graduate of Roger Williams University School of Law and Sacred Heart University, and is a member of the Massachusetts bar, the Connecticut bar, and United States District Court, District of Massachusetts bar. A native of Worcester, and now residing in Rhode Island, Moloney is the Plymouth County director for the Massachusetts Bar Association’s Young Lawyers Division and also serves as the YLD Development & Membership chair.
The court found that locking in a set of the vendor's funds as plan investment is not itself a breach of fiduciary duty. Rather, the court viewed the fiduciaries' opting for a bundled package as a rational and competitive business strategy.

Multiple recordkeepers is not a breach
Plaintiffs argued that offering many TIAA-CREF and Vanguard funds increased recordkeeping fees in breach of the fiduciaries’ ERISA duty because each vendor charged its own fees. The court rejected that argument as a plausible claim for breach of fiduciary duty because there were valid business reasons for the fiduciaries’ choices. For example, the court accepted as reasonable allowing each fund vendor to keep the records of its own fund offerings.

Asset-based vs. flat, per participant charges
The court also rejected plaintiffs’ claim that asset-based fees are per se excessive and establish a breach of duty. Noting that a flat fee disproportionately hurts smaller accounts because it is a higher percentage of the balance, and a percentage charge disproportionately affects larger accounts by imposing a larger dollar fee, it is not up to the courts to second-guess how fiduciaries allocate costs among participants. That there are cheaper options available is also not enough to find breach of fiduciary duty.

Too many choices
Offering 78 different investment choices was not unreasonable, said the court, because it provides a reasonable mix and range of investment options. Having duplicative funds in the plan’s different approaches to investing is not a breach of fiduciary duty, even if it did not result in the cheapest fees. The plan structured its investment choices to suit how much guidance any single participant needs for choosing investments. Because of that structure, it was necessary to duplicate funds, and that duplication raises no plausible inference of breach of fiduciary duty.

Institutional vs. retail Shares
Whether a fiduciary may or should offer the cheaper, institutional class of shares of a mutual fund option depends on how much is invested in the fund, and whether liquidity restrictions attach to the institutional shares. There are rational reasons for offering retail shares. The court found that the fiduciaries’ choice of retail shares to allow for a greater variety of choices and fund liquidity are lawful reasons for choosing retail shares.

Underperformance
As long as the fund choices were reasonable when selected, falling below the benchmark is not a per se breach of fiduciary duty in selecting the fund. The court noted that on average, more than half the plan funds exceeded the benchmarks, so one could not conclude the fund choices were imprudent.

No prohibited transaction
The plaintiffs recast some of the facts to allege that fiduciaries engaged in a prohibited transaction. But the court found that paying TIAA-CREF and Vanguard for recordkeeping services does not rise to the level of a prohibited transaction, given the modest fund charges.

The case was dismissed in full for failure to state a claim.

Considerations for fiduciaries
The cases against institutions of higher education are still in very early stages, and provide no strict guidelines for complying with the fiduciary requirements of ERISA when managing 403(b) and 401(k) plans. What does seem clear is that fiduciaries should document carefully the reasons for various actions. Below are points of vulnerability that merit particular attention:

Number of fund choices: There is no magic number of investment choices in a retirement plan. The courts appear to be balancing the need for a plan to offer a wide range of investment choices for different risk tolerances and investment styles against whether the number of funds chosen imprudently raises the cost of the plan. Offering too few funds runs the risk of improperly selecting a benchmark. Offering too many funds increases the risk of improperly selecting a benchmark.

Fees: Courts have held that whether fiduciaries have imprudently driven up the cost of the plan by offering actively managed funds (as opposed to indexed funds), retail shares (as opposed to institutional) and duplicative funds.

Efficiency: Courts have held that offering higher fees because services are enhanced is not a breach of fiduciary duty as long as the fees are reasonably for the services. Thus, establishing the reasonableness of the fee for the services rendered is a fiduciary consideration.

Excessive fees: Whether fiduciaries considered overall costs and different methods of paying fees such as a flat fee approach have been considered in determining fiduciary breach.

Locked-in investment choices: Whether the choice to lock in certain investment choices that cannot be reviewed because of a statute of limitations, or whether the choice allowed the fiduciary to offer a diversity of investment options that would not be available without the lock is an issue a court might consider in determining whether a fund choice that cannot be removed is a prudent investment choice.
Timothy C. Twardowski was elected partner at Robinson + Cole. A member of Robinson+Cole’s Land Use and Real Estate + Development Groups, he works in the firm’s Boston and Providence offices, where he focuses his practice on land use policy, development permitting and real estate. Twardowski represents a national wireless communications provider in permitting matters, and has assisted that client in securing approvals for the installation or modification of wireless telecommunication facilities in dozens of Massachusetts and Rhode Island communities. He also advises a national real estate trade association on state and local land use and real estate-related initiatives and trends across the country.

MBA Honor Roll Firm Todd & Weld LLP recently announced the addition of four partners to the firm. Attorneys Paul Cirel, Ingrid Martin, Daniel Cloherty and Victoria Steinberg join Todd & Weld after many years as partners at Collora LLP, a Boston boutique litigation firm, which recently combined with the global firm, Hogan Lovells. The addition expands Todd & Weld’s capabilities in white-collar defense, government investigations, complex business disputes, employment law and other litigation practice areas, the firm said in a press release.

Ian J. Pinta of MBA Honor Roll Firm Todd & Weld LLP was recently elected to the firm’s partnership. He concentrates his practice on commercial business and general litigation matters, as well as medical malpractice and personal injury litigation. Pinta obtained his law degree cum laude from Suffolk University Law School, and undergraduate degree from Washington University in St. Louis.

MBA Honor Roll Firm Todd & Weld LLP’s Max Stern will have photographs on exhibit at Adelson Galleries Boston (520 Harrison Ave., Boston) from March 2 to April 29. Stern’s images will be showcased in MARDI GRAS INDIANS, a joint exhibition with African American artist Robert Freeman. The exhibition will include eight photographs by Stern that capture the “constant energy and motion — in the moment and from times long past — on full display in the parades of the Mardi Gras Indians.” The exhibition will also include 12 new paintings by Freeman, who pinned Stern’s photographs to the walls of his studio for inspiration as he painted this series.

MBA member Jeremy Y. Weltman has joined Hermes, Netburn, O’Connor & Spearing PC as a shareholder. He represents both individuals and companies across a variety of industries. “I am excited to join such a strong team of attorneys who are committed to providing clients with creative and practical solutions and unsurpassed value. I look forward to continuing to serve clients using my practical, results-oriented approach,” says Weltman.

Dana M. Horton was elected partner at Robinson + Cole. A member of Robinson+Cole’s Insurance + Reinsurance Group, she works primarily in the firm’s Providence office. Horton is an insurance litigation attorney with over 15 years of experience representing and advising insurance companies in large loss property subrogation matters, property insurance coverage disputes and bad faith claims. Horton represents insurers who have compensated their customers for damage pursuant to their property insurance policies, and she pursues recovery from responsible third parties. She also has extensive experience litigating and advising insurers on coverage issues and defends insurance companies in extra-contractual claims and bad faith litigation throughout New England.
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