The Massachusetts Bar Association will honor Sen. Will Brownsberger (D-Second Suffolk and Middlesex) and Rep. Claire D. Cronin (D-11th Plymouth) with Legislator of the Year Awards at the April 24 Annual Dinner.

The MBA’s Legislator of the Year Award is presented annually to state or federal legislators who have distinguished themselves in public service through outstanding contributions to the legal profession, courts and administration of justice.

“As chairs of the Joint Committee on the Judiciary, Sen. Brownsberger and Rep. Cronin have always been accessible and open to input from the organized bar, and we are incredibly grateful for their steadfast commitment and contributions to improving the administration of justice in Massachusetts,” said MBA Chief Legal Counsel and Chief Operating Officer Martin W. Healy. “This year in particular we salute their leadership as their work together has brought meaningful, sweeping criminal justice reform to the commonwealth.”

Sen. Will Brownsberger
Will Brownsberger is the state senator for the Second Suffolk and Middlesex District, representing Belmont and Watertown and parts of Allston, Brighton, Back Bay and Fenway. He has served as Senate chair of the Joint Judiciary Committee since 2014.

Prior to his 2011 Senate election, Brownsberger served as state representative for the 24th Middlesex District for five years, and before that, as a Belmont selectman for three terms. From 1992 to 1998, Brownsberger served as a Massachusetts assistant attorney general under Scott Harshbarger, working as asset forfeiture chief in the Narcotics and Special Investigations Division, and as deputy chief prosecutor in the Public Protection Bureau.

In 2001, Brownsberger became a defense attorney in private practice.

Learn about the 2018 MBA President’s Award honoree, the Access to Justice Awards and the Oliver Wendell Holmes Jr. Scholarship on page 6.
The past can point to the best way forward

The word “attorney” means one who can act on another’s behalf. As attorneys, we are always acting for others. We serve our clients, our judicial system and our profession. We do not serve ourselves. Our ethical rules call upon us to represent “others” even when they are unpopular or even despised by the public at large.

There is no better example of this truth than Massachusetts’ very own John Adams. As a young attorney, John Adams represented the “others.” He took on the unequaled and extremely unpopular task of representing the British soldiers accused of perpetrating the Boston Massacre in 1770. Adams did so when few, if any, Boston attorneys would defend the hated “Redcoats.” And defend them Adams did, quite successfully. The jury of Boston citizens acquitted all the British soldiers of any, Boston attorneys would defend the hated “Redcoats.” And defend them Adams did, quite successfully. The jury of Boston citizens acquitted all the British soldiers of

In 1776, significant differences existed among the various colonies. Some were slave holders and some were free. The various colonies aligned themselves with different religions. Pennsylvania was Quaker, and Maryland was Catholic, while other colonies were aligned with several Protestant sects. At that time, in Newport, Rhode Island, the Touro Synagogue was just 13 years old, but it served a growing Jewish community in the state. The ethnic populations of the colonies were also quite different. English, German, Irish and Scots-Irish, French, Dutch, Native Americans, and freed and enslaved Africans all lived together in these colonies. Despite these differences, the Declaration of Independence begins with the famous words, “We hold these truths to be self-evident, that all men are created equal.” And even though Africans and Native Americans were probably not then understood to be included in that phrase, the overriding principle was that despite all the differences among the various religions and ethnic groups, more united them than divided them.

What united those early Americans was an unshakeable faith in the novel idea that what united those early Americans was an unshakeable faith in the novel idea that one person must commit to follow these core foundational ideas of freedom and equality. And core beliefs mattered more than ethnicity, race or religion. To be truly American, a person must commit to follow these core foundational ideas of freedom and equality.

In Massachusetts, we still refer to our state as the “commonwealth.” The very name “commonwealth” speaks to the common good, our shared common interest and everything that unites us. Those early Americans saw themselves as one united people who could confidently rule themselves without the necessity of kings or oligarchs.

In Massachusetts, we still refer to our state as the “commonwealth.” The very name “commonwealth” speaks to the common good, our shared common interest and everything that unites us. Those early Americans saw themselves as one united people who could confidently rule themselves without the necessity of kings or oligarchs.

Lawyers are not exempt from these forces, trends and questions. As a learned profession, we must emulate John Adams. We need to revert to the basic values and our core common beliefs in what it means to be an American. We must be the leaders who put our profession, our state and our nation on the right path. We must stand up for the “rule of law,” not only for our rights, but even more importantly, for the rights of “others” that are guaranteed by the Constitution of the United States. Every one of us took a simple oath to do just that when we first became attorneys. Today, we can do no less.
### April

**Wednesday, April 18**  
Estate Planning 101 Series: Guardianship Basics  
4:30-7:30 p.m.  
MBA, 20 West St., Boston

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

**Thursday, April 25**  
Mediation & Arbitration Essentials: Part III  
5:30-7 p.m.  
MBA, 20 West St., Boston

### May

**Wednesday, May 2**  
Second Annual Dispute Resolution Symposium  
8 a.m.-3:30 p.m.  
Suffolk University Law School, 120 Tremont St., Boston

**Wednesday, May 2**  
MBA Monthly Dial-A-Lawyer Program  
5:30-7:30 p.m.  
Statewide dial-in #: (617) 338-0610

**Friday, May 4**  
39th Annual Labor and Employment Spring Conference  
9 a.m.-4:30 p.m.  
Cranwell Resort, Spa & Golf Club, 55 Lee Rd., Lenox

**Tuesday, May 8**  
Increasing Diversity in the Law Firm  
4-7 p.m.  
MBA, 20 West St., Boston

**Thursday, May 10**  
Third Annual Complex Commercial Litigation Conference  
1-5 p.m.  
Hyatt Regency Boston, 1 Avenue De Lafayette, Boston

**Tuesday, May 15**  
Affordable Housing Law and Policy  
3-6 p.m.  
MBA Western Mass. Office, TD Bank Center, 1441 Main St., Suite 925, Springfield

**Tuesday, May 15**  
Here Come the Drones  
Noon-1:30 p.m.  
MBA, 20 West St., Boston

**Thursday, May 17**  
MBA House of Delegates Meeting  
4-6 p.m.  
MBA, 20 West St., Boston

**Friday, May 18**  
2018 Family Law Spring Symposium  
9 a.m.-4:30 p.m.  
Cranwell Resort, Spa & Golf Club, 55 Lee Rd., Lenox

**Tuesday, May 22**  
Managing Dispute Risk In Business Agreements  
5:30-7:30 p.m.  
MBA, 20 West St., Boston

**Tuesday, May 22**  
MBA ‘Lawyers Have Heart 5K’  
5-9 p.m.  
Blue Hills Bank Pavilion, 290 Northern Ave., Boston

**Wednesday, May 23**  
View from the Bench: E-Discovery  
4:30-6 p.m.  
MBA, 20 West St., Boston

**Thursday, May 24**  
Mediation on Trial  
4-7 p.m.  
MBA, 20 West St., Boston

**Thursday, May 31**  
Practicing with Professionalism  
8:30 a.m.-5 p.m.  
College of The Holy Cross, 1 College St., Worcester

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UMass Lowell’s new program helps modernize courts

**BY MIKE FLAIM**

This past year, the University of Massachusetts Lowell began offering an MPA in Justice Administration. One person intimately involved from the beginning of this new program — the only one of its kind in New England — is UMass Lowell’s Assistant Dean and Pre-Law Advisor Dr. Frank Talty. He explained the motivation for the applied graduate degree, and why he believes it will be a boon to the modernization of the Massachusetts courts.

**How did this program come about?**

First, some historical context: I was a civil litigator and chaired the MBA’s Judicial Administration Section in 2001 to 2003, which was during a time when the professionalization of the court system was being called for. In March of 2003, J. Donald Monan released his report to Chief Justice Margaret Marshall, The Voting Committee on Management in the Courts. Its purpose was to “provide for the modernization of the 21st century the organizational frame and the managerial know-how needed to deliver the justice the people of Massachusetts deserve.”

This began the conversation. In 2005, I moved over to higher education, and I considered my dissertation at Northeastern, which was on how people use the Massachusetts courts. I kept going back to what the needs were in terms of more in the modernization of the courts. As they did after the Monan report. Overwhelmingly positive; lawyers know where the management pressure points are. The bar can play a significant role in the professionalization of the courts, as they did after the Monan report.

**Who is the program geared toward? Are there certain professions that the school had in mind when putting it together?**

An MPA in Justice Administration is a new program rolled out this past year, for the 2017-2018 academic calendar, designed for professionals. Two groups of potential students are the focus: early- to mid-career professionals in the justice system and undergraduate students who may want to pursue a career in justice administration. There are also lots of external organizations that work with the justice system, and we’re looking to train people in basic administration skills, with a more public, non-profit focus.

Looking over the curriculum, are there any specific courses being taught now (or in the next semester) that you think really stand out?

Yes. Every semester we offer Managing Justice Organizations and Management of Courts. We will begin offering Justice Information Systems this fall and coming after that will be courses in Alternative Dispute Resolution, Specialty Courts and Access to Justice. A number of these courses were developed after consultation with the Trial Court, Chief Justice Paula Carey and then-Administrative Director of the SJC and now teaches our Managing Justice Administrations course. He was able to gather a group of terrific professionals from all walks of justice as an advisory group: sheriffs, police, attorneys, judges, etc.

**What set ours apart, particularly the Justice Administration option, is that ours is leveraged by our work with other as-**

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**You’ve recently met with the MBA’s Judicial Administration Section Council. What was the feedback from the section council?**

Overwhelmingly positive; lawyers know where the management pressure points are. The bar can play a significant role in the professionalization of the courts, as they did after the Monan report.

**How long is the program in terms of students?**

We’re purposely starting slow to make sure that the quality is high, but student interest has been wonderful. This past semester (fall, 2017), we’ve had between 18 and 30 students. In the spring of 2018, we’ll have approximately 50 enrolled.

**How much does this MPA program cost?**

For part-time students that paid by the class, the current rate is $1,725 per three- credit class. There is a flat-rate tuition for students who elect to do the program full-time depending on whether the student is a Massachusetts resident or an out-of-state resident. If a manager wants an employee to take a course, that person can do so with our matriculating – it’s not all-or-nothing. What’s more, transfer credits are accepted, as are GRE waivers.

**How long does it take to complete? Are there full- and part-time options?**

Yes, both part- and full-time options are available. Full-time, the course takes two years to complete. It’s 39 credits, and consists of a core sequence, which is accounting, budgeting, data analysis and leadership. Then there’s the flexible core, which features program evaluation, policy analysis, grant writing and advanced data analysis. Finally there is the option-specific core, which for Justice Administration consists of managing justice administration and administration of courts courses.

**MBA hosts reception launching Student Loan Bankruptcy Assistance Project**

Unmanageable student debt is a growing social problem in the Commonwealth. For many low-income borrowers, student debt prevents them from taking care of themselves and their families. The Bankruptcy Code provides for the discharge of student debt — only upon a showing of “undue hardship” on the student borrower and his or her dependents.

Recognizing that the student borrowers most likely to be eligible for an “undue hardship” discharge in bankruptcy will not have the resources to hire a trial lawyer, the Massachusetts Bar Association, in partnership with the Massachusetts Attorney General’s Office and the Greater Boston Chamber of Commerce’s Student Debt Working Group, has established a panel of pro bono attorneys and law firms willing to represent student borrowers in adversary proceedings seeking to discharge student debt in their bankruptcy cases.

The MBA hosted a reception to launch the Student Loan Bankruptcy Assistance Project on Wednesday, Jan. 24. Reception remarks were provided by program co-chair Francis C. Morrissey; Attorney General Maura T. Healey; John Rao, National Consumer Law Center; and Jim Rooney, CEO, Greater Boston Chamber of Commerce.

Are you an attorney interested in providing pro bono services to student loan borrowers seeking to discharge student debt in bankruptcy? Visit www.massbar.org/studentloan to learn more about the program and to contact program co-chairs Francis C. Morrissey and Michael J. Fencer.
UPCOMING FREE MBA CLE

**WEDNESDAY, APRIL 18**

**Estate Planning 101 Series: Guardianship Basics**
4:30–7 p.m., 20 West St., Boston
Kevin G. Diamond, Esq., program co-chair; Evelyn J. Patson, Esq., program co-chair; Hon. Anthony R. Nesi (ret.); John G. Dugan, Esq.

**TUESDAY, MAY 8**

**Increasing Diversity in the Law Firm**
4–7 p.m., 20 West St., Boston
Nicole Paquin, Esq., program chair; Hon. Angela M. O’Doherty

**TUESDAY, MAY 15**

**Here Come the Drones: Navigating the Law while Using Drones in the Health Care Sector**
Noon–1:30 p.m., 20 West St., Boston
Kathryn R. Raffine, Esq., program chair

**TUESDAY, MAY 22**

**Managing Dispute Risk in Business Agreements: How Transactional Lawyers and Litigators Can Work Together**
4:30–7:30 p.m., 20 West St., Boston
Maria T. Davis, Esq., program co-chair; Matthew J. Ginsburg, Esq., program co-chair; Conna A. Weiner, Esq., Lisa A. Romeo

For more information or to register, visit [MassBar.org/LEConference](http://MassBar.org/LEConference) or call (617) 338-0530.

**UPCOMING MBA CONFERENCES**

**SECOND ANNUAL DISPUTE RESOLUTION SYMPOSIUM**
WEDNESDAY, MAY 2, 8 A.M.–3:30 P.M.
Suffolk University Law School Conference Room, 120 Tremont St., Boston
Sponsored by the MBA’s Dispute Resolution Section

**39TH ANNUAL LABOR & EMPLOYMENT LAW SPRING CONFERENCE**
Friday, May 4, 9:30 a.m.–3 p.m.
Suffolk University Law School, 120 Tremont St., Boston
Sponsored by the MBA’s Labor & Employment Law Section

**THIRD ANNUAL COMPLEX COMMERCIAL LITIGATION CONFERENCE**
Thursday, May 10, 1–5 p.m.
Hyatt Regency Boston, 1 Avenue de Lafayette, Boston

**2018 FAMILY LAW SPRING SYMPOSIUM**
Friday, May 18, 9 a.m.–4:30 p.m.
Crane Well Resort, Spa & Golf Club, 55 Lee Road, Lenox

**2018 COURSE DATES**
May 31—College of the Holy Cross, Worcester
July 12—Social Law Library, John Adams Courthouse, Special Collections Room, Boston
Sept. 27—UMass Lowell Inn and Conference Center, Lowell
Oct. 19—Western New England University School of Law, Springfield

Registration is $50 and includes:
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Register at www.MassBar.org/FLSymposium or (617) 338-0530.

Register at www.MassBar.org/LEConference or (617) 338-0530.

Register at www.MassBar.org/ComCom or (617) 338-0530.

Register at www.MassBar.org/DRSymposium or (617) 338-0530.

Register at www.MassBar.org/CLESymposium or (617) 338-0530.

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KEYNOTE ADDRESS

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Chief Justice, Probate & Family Court

**EVELYN F. MURPHY**
The Wage Project Inc.

**HON. SCOTT L. KAFFER**
Associate Justice, Massachusetts Supreme Judicial Court, Boston

**HON. ANGELA M. ORDOÑEZ**
Associate Justice, Associate Probate & Family Court

**DOUGLAS STONE**
Co-founder, The Stone Group

**EVELYN F. MURPHY**
Founder, The Wage Project Inc.

**HON. ANGELA M. ORDOÑEZ**
Co-chair, Legal Studies Program, Springfield College

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MBA members ..............................................$99
Non-members .............................................$160

MBA members ..............................................$75
Non-members .............................................$160

A special rate of $159 is available to AFCC, MBA law students, new (2017) admittees and law students. To register, contact MBA Member Services at (617) 338-0530 or enter the promo code provided to your association.
Morrissey to receive President’s Award at Annual Dinner

The Massachusetts Bar Association will honor attorney Francis C. Morrissey with the MBA President’s Award at the 2018 MBA Annual Dinner on April 24. The President’s Award is bestowed upon those individuals who have made a significant contribution to the work of the MBA, to the preservation of MBA values, to the success of MBA initiatives, and to the promotion of the MBA leadership role within the legal community of Massachusetts.

Morrissey, a partner at Morrissey, Wilson & Zafiropoulos, is being honored for his role in the MBA’s Student Loan Bankruptcy Assistance Project, which launched this year. Recognizing that unmanageable student debt is a growing social problem in the Commonwealth and that the students most likely to be eligible for an “undue hardship” discharge in bankruptcy will not have the resources to hire a trial lawyer, the MBA’s Student Loan Bankruptcy Assistance Project matches distressed student borrowers with attorneys and law firms willing to represent them on a pro bono basis in bankruptcy.

“Frank is a superb lawyer and a truly special person. He has done an incredible amount of good for our profession, and we are especially grateful for the dedication he has shown to the Massachusetts Bar Association over the years,” said MBA President Christopher P. Sullivan. “His strong leadership as chair of the MBA’s newly launched Student Loan Bankruptcy Assistance Project is indicative of the passion he brings to every endeavor. When it comes to the MBA, Frank is all-in, and our community is all the better for it.”

Long active in the MBA, Morrissey has served in a number of leadership roles in the organization. He is the current chair of the Complex Commercial Litigation Section’s Bankruptcy and Insolvency Litigation Committee, and he previously chaired the Business Law Section Council and served as an active member of the MBA’s House of Delegates. He is also an MBA delegate to the American Bar Association’s House of Delegates and a Massachusetts Bar Foundation fellow. In 2013, Morrissey led the MBA’s successful efforts to update Massachusetts’ version of Article 9 of the Uniform Commercial Code, which governs secured transactions.

In addition to his MBA service, Morrissey teaches bankruptcy and commercial law at Boston University School of Law and New England Law | Boston. Morrissey has also served, by appointment of the Supreme Judicial Court, as vice chair of the Clients’ Security Board, and he recently started his third term as a hearing committee member for the Board of Bar Overseers.

Access to Justice Award Winners to be honored on April 24

Six attorneys and one law firm will be honored at the Massachusetts Bar Association’s April 24 Annual Dinner. The Access to Justice awards are bestowed upon those attorneys and law firms dedicated to helping others and enhancing the legal profession. 2018 honorees include:

**Rising Star**
- Kathryn Condon Grace
- MetroWest Legal Services

**Legal Service Attorney**
- Annette R. Duke
- Massachusetts Law Reform Institute Inc.

**Pro Bono Law Firm**
- Nigro, Pettepet & Lucas, LLP

**Pro Bono Publico Attorney**
- James T. Van Buren

**Defender Award**
- Maryellen Cuthbert
- Law Office of Maryellen Cuthbert

**Prosecutor Award**
- Sara A. Colb
- Attorney General’s Civil Rights Division

**Lifetime Achievement Award**
- Dick Bauer
- Greater Boston Legal Services

BU Law student wins Oliver Wendell Holmes Jr. Scholarship

Third-year Boston College Law School student Mario N. Paredes is the recipient of the Massachusetts Bar Association’s 2018 Oliver Wendell Holmes Jr. Scholarship. The $10,000 scholarship, established in 2015, is given to a third-year law student in Massachusetts who is committed to public interest law upon graduation, has a proven record of hard work and academic accomplishment, and has demonstrated integrity and honesty. The scholarship will be presented at the 2018 Annual Dinner.

The MBA thanks its Annual Dinner sponsors. See page 7. Looking for more 2018 MBA Annual Dinner information? Visit www.massbar.org/AD18, or call (617) 338-0543.
2018 ANNUAL DINNER

Tuesday, April 24
Reception: 5:30 p.m. • Dinner: 7 p.m.
The Westin Boston Waterfront
425 Summer St., Boston

Thank you to our sponsors

For more information, and a full list of sponsors, visit www.MassBar.org/AD18 or call (617) 338-0543.
Powers delivers keynote at 2018 MBF Annual Meeting

Attorney Lonnie A. Powers was honored with the Massachusetts Bar Foundation’s Great Friend of Justice Award at the 2018 MBF Annual Meeting. Powers, who has led the Massachusetts Legal Assistance Corporation since its founding in 1983, will retire in August 2018. Below are his remarks from the event.

Thank you for recognizing me as a Great Friend of Justice. It is a wonderful honor that causes me to remember all the Great Friends of Justice that I have been privileged to know through the years. I speak first as a friend to friends who have led me, taught me and shown me what it means to live a life dedicated to justice. For a moment let us pause to remember our own list of such friends – so many who walked that path toward a more just commonwealth but who are not here to continue the journey with us. So many who have pointed the way for us to follow.

Thank you. Remembering them and their examples has caused me to reflect on what justice means to me and why it is and has been so important.

Our own lived experiences have shown that children have an innate sense of fairness. That desire for fairness, for everyone to be treated well, is probably the foundation of justice. But in a world of more than 7 billion people on this planet, we can hardly rely on an inchoate sense of what is fair for one or a small number of people to guide a community.

Maya Angelou said, “Because equal rights, fair play, justice, are all like the air: we all have it, or none of us have it.” That is the challenge of the treatment for each of us, how can we make sure that people are treated fairly, especially the people without power, money or a handy army or police force to take care of them? Do we do, or try to anyway, through the law. The law is a set of rules that among other things allocates power among and between the people and organizations that shape our lives and it is the mechanisms of the law that regulate the use of power. When power gets out of balance, we can use the law as a lever to move things back into balance.

This legal leverage can be used unjustly – to foster oppression and injustice as well as to foster fairness and justice. That is a lesson we have to learn and relaim so that we are externally vigilant to push against the misuse of the law.

Growing up in the South in the 50s and 60s, I saw, or could have seen more clearly had I been willing to look, how the law could be used to subjugate one group of people because of the color of their skin. How the law could be and was used to steal from renters and share croppers like my grandfather the money they earned by endless hours of backbreaking toil and to deny them any redress.

Massachusetts has long recognized the moral basis of justice. Our Supreme Judicial Court was, in just one example, the first court in this country to declare slavery forbidden by the Constitution of the Commonwealth. But lest we get too complacent, remember that that same court approved the segregation of the Boston Public Schools.

Having a moral basis for justice does not ensure that injustice will not continue; all around us, there are ample examples of injustice, of the failure to live up to the fairness justice requires.

To be reminded one has only to pause when walking toward the public entrance to the State House to gaze on the seated figure of Mary Dyer who was hanged on Boston Common because she refused to be silent about her religious faith or look at the painting of Chief Justice William Stoughton in the House Chamber as he publicly re- pented of his role in convicting innocent girls and women of witchcraft.

Those past examples from the past are echoed in the economic disparity that is ever more visible all around us, in the bodies of the dead black men and women who have been the victims of those sworn to enforce the law and in the divisive public policies espoused by many people in high public office – policies and pronouncements that exacerbate economic disparity and social tensions.

What then to do in the face of such bleakness? As lawyers, as those who love justice, we can strive every day to use the levers the law gives us to right the balance of power in favor of fairness, while realizing that this is a struggle with which we cannot rest, for the forces of opposition are strong and ever striving to tip the balance in their favor.

There is something more we can do – something more personal – something that all the great religious faiths teach: to love one another and to live out that love.

One of the core commandments of Judaism is “Love your neighbor as yourself” (Leviticus 19:18).

“I will not enter paradise until you have faith, and you will not complete your faith until you love one another.” (Prophet Muhammad)

“Love the whole world as a mother loves her only child.” (Buddha)

We all have our favorite or most meaningful expressions of that central truth. For me it is theparable attributed to Jesus of the Good Samaritan who found a man by the side of the road, robbed, beaten and bleeding. It is important that he took the man to inn and paid for his food and care instead of passing him by. Most important is that he got down, down off his horse, down on the ground by the dirty, bleeding man whom he had never seen before and picked him up. That act of love, of compassion, says more about how we must live as champions of justice than any amount of money. The Samaritan may have paid to have the man cared for.

I am humbled and so very grateful to be called a Great Friend of Justice in this company, in the memory of so many who have done so much for justice before us.

Thank you – let us be about our business of seeking justice.

Judicial Task Force, BBO speaker highlight January HOD meeting

The establishment of a Judicial Diversity Task Force and a presentation from the Board of Bar Overseers were among the highlights of the Massachusetts Bar Association’s House of Delegates meeting in Boston on Jan. 25.

MBA President-elect Christopher A. Kenney recounted the successful Student Loan Bankruptcy Discharge Program and the related reception, and announced that CNN Senior Political Analyst David Gergen will deliver the keynote at the MBA’s Annual Dinner on April 24.

Continuing a tradition of guest speakers, the HOD meeting featured a Board of Bar Overseers report from BBO General Counsel Joseph Berman, who talked about the BBO resources available to lawyers, from its ethics hotline to Lawyers Concerned for Lawyers to the Law Office Management Assistance Program (LOMAP). Berman also noted that the Supreme Judicial Court was reviewing a new rule that would clarify the term “client files” and address questions on their storage and transferability.

The HOD then took action on proposals from section and committee members, ultimately voting to:

• Support, in principle, the American Academy of Matrimonial Lawyers’ proposed Uniform Family Law Arbitration Act;

• Support the establishment of a Judicial Diversity Task Force to examine the status of diversity in our courts and explore ways to increase diversity;

• Approve the nominees for the 2018 Access to Justice Awards; and

• Reaffirm the MBA’s previous support for portions of criminal justice reform legislation that are relevant to the interests of children and young adults. (Prior to the vote, portions of the Juvenile & Child Welfare Section’s proposal that had not to do with addressed previously by the MBA were exclud- ed from the vote and tabled for further input from the MBA’s Criminal Justice Section.)

The meeting concluded with a presentation by Boston #StandWithImmigrants, an organization that is seeking to raise awareness and funding for its Share A Family project, which projects faces of im- migrants onto buildings and other public spaces around Boston.

Top: Joseph Berman addresses the House of Delegates. Bottom: MBA President Chris Sullivan welcomes HOD members.
Harvey Weiner elected MBF president

The Massachusetts Bar Foundation has elected as its new president Harvey Weiner, senior counsel to Peabody & Arnold, LLP, where he has practiced civil litigation for more than 47 years. Weiner will lead a board of 22 members, made up of lawyers and judges from across the commonwealth, all dedicated to increasing access to justice in Massachusetts, especially for low-income and vulnerable individuals and families.

Weiner first became a Foundation Fellow in 2005, and has been an active member in many ways, including participating in the Foundation’s annual grant application review process and serving in various officer roles for the Board of Trustees.

In addition to his distinguished career as a civil litigator, Weiner is extremely active in both bar and community organizations. Weiner is past co-president of the Boston Inn of Court and past president of the Massachusetts Municipal Lawyers Association. He is president of the Massachusetts Chapter of the Federal Bar Association and served two terms on the Massachusetts IOLTA Committee. He also served as Millis Town Counsel in Norfolk County for more than a decade. He is a Life Fellow of the American Bar Foundation and an Oliver Wendell Holmes Life Fellow of the MBF.

Weiner served as a U.S. Army Captain in the Vietnam War, where he was awarded the Bronze Star (m). He is a U.S. Department of Veterans Accredited Attorney and is admitted to the U.S. Court of Appeals for Veterans Claims. He is also a certified mediator, particularly for veterans’ issues.

He has been a frequent participant in the MBA’s Veterans’ Dial-a-Lawyer program and is a Life Fellow of the American Bar Foundation and an Oliver Wendell Holmes Life Fellow of the MBF. Weiner will lead a board of 22 members, made up of lawyers and judges from across the commonwealth, all dedicated to increasing access to justice in Massachusetts, especially for low-income and vulnerable individuals and families.

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It was a dark and stormy night — really. This year’s MBF Annual Meeting shared the evening with the third nor’easter to hit Boston in less than two weeks. We were thrilled to see so many foundation fellows, grantees and friends who braved the storm and joined us at the Federal Reserve Building to celebrate all of last year’s MBF accomplishments.

Highlights from the event included remarks delivered by Anita P. Sharma, executive director of the Political Asylum/Immigration Project, who spoke about her organization’s work that is supported by the MBF. This year’s Great Friend of Justice Award was presented to Lonnie A. Powers, the longtime executive director of the Massachusetts Legal Assistance Corp., who also delivered the evening’s keynote address.

At the business meeting held that same evening, the MBF also elected its 2018–19 officers and trustees.
MLAC statement on Trump proposal to eliminate legal services funding; increased need in MA

On Feb. 12, President Donald Trump released his budget for Fiscal Year 2019, which calls for elimination of the Legal Services Corporation (LSC) and several other federal programs that provide vital safety net services to low-income people here in Massachusetts and across the United States.

LSC provides funding to civil legal aid programs in every state in the country, including Massachusetts, which received approximately $5 million this year.

“The elimination of funding for LSC, coupled with cuts to other programs that help poor and elderly residents secure food, heat, housing, employment, economic opportunity, and safe workplaces, would have devastating and long-lasting consequences on the stability of individuals, families, and communities across our state and our country,” said Lonnie Powers, executive director of the Massachusetts Legal Assistance Corporation. “Concerned threats to federal funding highlight the need for robust state and local support.”

In testimony before the Joint Committee on Ways and Means on Feb. 13, Powers requested a $5 million increase in state funding for a total appropriation of $23 million. He also highlighted the heightened need for civil legal aid due to expected reductions in safety net programs, rising uncertainty related to changes in federal immigration policies, and an influx of families fleeing hurricane damage in Puerto Rico.

“Young and misinformation are widespread in immigrant communities and the harm experienced as a result is significant. Children are afraid to go to school, fearing that their parents will be taken away, medical appointments are postponed or avoided altogether, and victims of crime are afraid to call the police,” Powers said. “Legal aid programs are a crucial source of information and education about immigrants’ rights.”

Additionally, since the devastation wrought by Hurricane Maria in Puerto Rico, approximately 2,400 students who evacuated the island have moved to Massachusetts and enrolled in public schools. “Many of these families arrived here with nothing and need assistance in obtaining employment, housing, and other basic needs, and our programs are already working with some of these families,” Powers said.

In Fiscal Year 2017, the state’s $18 million investment in civil legal aid yielded $59.2 million in economic benefits and savings to the commonwealth, including $17.7 million in new federal revenue secured for clients through work to obtain disability benefits, nutrition assistance benefits (SNAP), and Medicare coverage; $17.2 million in state savings on foster care, shelter, and healthcare for people who are homeless and victims of domestic violence; and $23.4 million in additional benefits secured for clients, including child support, recovered wages, and debt relief. Civil legal aid boosts the economy, making increased state funding for MLAC a fiscally responsible decision.

“Civil legal aid programs provide assistance to people with extremely low incomes of just a little more than $31,000 for a family of four, and who face complex legal problems related to housing, individual rights, employment, and education,” Powers said. “We can easily measure the economic impact of this work. But civil legal assistance also provides profound and long-lasting benefits that change lives and improves the strength and health of families and our communities. It is a wise investment with both short- and long-term benefits.”

Supreme Court Counties - Tort

Barnstable – Middlesex

Housing Court Divisions – Small Claims

Eastern

Northeast

Central

Western

Superior Court Counties - Tort

Barnstable – Middlesex


Massachusetts Trial Court Chief Justice Paula M. Carey and Trial Court Administrator Jonathan Williams have released the first Massachusetts Trial Court Annual Diversity Report for Fiscal Year 2017 and the Massachusetts Trial Court Report on the Access and Fairness Survey for Fiscal Year 2017.

“We have made a commitment to improve the quality of justice in the commonwealth by addressing issues of diversity, equity and inclusion,” said Trial Court Chief Justice Paula M. Carey. “We are mindful that this effort must be integrated into our overall mission of delivering justice with dignity and speed. We look forward to working with internal and external partners as we lead this essential commitment for the 21st century courts.”

“We believe in the importance of a workforce that reflects the diversity of the communities we serve,” added Trial Court Administrator Jonathan Williams. “Trial Court departments are gradually becoming more diverse but we recognize the need to expand recruitment in partnership with bar associations and community organizations.”

Carey reappointed chief justice of Trial Court

The Justices of the Supreme Judicial Court recently announced the reappointment of the Honorable Paula M. Carey as Chief Justice of the Trial Court, pursuant to G. L. c. 211B, §6. The reappointment will be effective on July 16, 2018, when Chief Justice Carey’s first five-year term expires.

In considering Chief Justice Carey’s reappointment, the Supreme Judicial Court surveyed many colleagues in the judiciary who have worked closely with her over the past five years. Supreme Judicial Court Chief Justice Ralph D. Gants announced: “We found universal praise for her leadership, her willingness to listen and to collaborate, her intelligence and ability to ‘get it,’ her remarkable energy and work ethic, and her courage in dealing with tough problems. We are grateful that she is willing to embark on a second term as Chief Justice of the Trial Court.” The Chief Justice of the Trial Court is the policy and judicial head of the Trial Court, which includes the Boston Municipal, District, Housing, Juvenile, Land, Probate and Family, and Superior Courts, the Office of the Commissioner of Probation, and the Office of Jury Commissioner. The
AARON HERNANDEZ UNCOVERED
“Aaron Hernandez Uncovered,” Oxygen (March 18). MBA Chief Legal Counsel and Chief Operating Officer Martin W. Healy appeared in the Oxygen channel’s two-part documentary series, “Aaron Hernandez Uncovered.” Healy explained how defense attorney Jose Baez was able to discredit the testimony of Alexander Bradley, the star witness of the prosecution in the double-murder trial against Hernandez, the latter of whom was ultimately acquitted.

PUPPY DOE
MBA Past President Marsha Kazarosian was interviewed by WBZ NewsRadio 1030 (March 27) about the Polish national who was convicted of animal cruelty and sentenced to eight to 10 years for torturing a dog known as “Puppy Doe.”

BODY CAMS
“Evans: Body cams ‘positive;’ Walsh: ‘Yes’ to fund them,” Dorchester Reporter (March 14). Charu Amrita Verma, a member of the MBA’s Criminal Justice Section Council, testified on behalf of the MBA at a recent hearing of Boston City Council’s Committee on Public Safety in support of police-worn body cameras.

DNA
“Local detectives look to new DNA technology to solve decades-old murders,” KIRO-7, Seattle, Wash. (Feb. 28). MBA Executive Management Board member Peter Elikann, who is a former chair of the MBA’s Criminal Law Section, offered a defense attorney’s perspective on new technology that purports to use DNA to help resolve unsolved murder cases.

GRAND JURY
“Bar: Grand jury ‘best practices’ a step forward,” Massachusetts Lawyers Weekly (March 26). MBA member Randy Gioia was quoted in a story on a Supreme Judicial Court panel’s recommendation of six best practices to promote fairness in the grand jury process. One of three defense lawyers on the appointed panel, Gioia said the best practices should direct grand jurors “not only to investigate criminal activity, but also … to protect people from unfounded prosecutions.”

STUDENT LOAN PROGRAM
“Alexander Holmes v. National Collegiate Student Loan Trust: Don’t co-sign your children’s student loans,” Condemned to Debt: The Student Loan Crisis (March 7). The MBA’s Student Loan Bankruptcy Assistance Project was singled out for praise in a blog post by University of Louisiana at Lafayette Professor Richard Possey, who said student-loan debtors benefit greatly from the services of a lawyer, faring much better than those without representation. Under its new program, the MBA matches distressed student borrowers with attorneys and law firms willing to represent them on a pro bono basis in bankruptcy.

Quoted in the media? Let us know. Email JScally@MassBar.org.
A legacy of quiet success at Murphy, Hesse, Toomey & Lehane LLP

Lehane LLP
A legacy of quiet success at Murphy, Hesse, Toomey & Lehane LLP

What types of law does your firm handle?
Our firm handles:
• Employment law, including all private and public sector employment matters and related litigation, at every staff level and the entire employment process from hiring through termination, discipline and harassment, wage and hour, employment agreements, personnel policies/employee handbook, attendance/alcohol and drug abuse, health and safety, immigration, employee benefits/EIRA, workers compensation, non-competes, regulatory compliance and training.
• Labor law, including negotiation of private and public sector collective bargaining agreements, unit determinations and elections, unfair labor practices, workforce reductions, plant closings, employee discipline and termination, grievance and interest arbitration;
• Education law, including special education, student discipline and related litigation;
• Public/municipal law, including land use, environmental and related litigation;
• Transactional business law/corporate/real estate and related litigation;
• Independent investigations/reviews; and
• Litigation before all federal and state courts and other dispute resolution matters (mediation and arbitration).

Any particular areas of specialization where the firm has made a name for itself?
MHTL has a national reputation for excellence in representing employers in all their workforce needs, from hiring and complex employment issues to major workforce restructurings and reductions in force. We have conducted many internal reviews on sensitive matters ranging from sexual harassment to fiduciary audits to criminal activity and fraud. We have negotiated hundreds of private and public collective bargaining agreements and handle all litigation, including specialized litigation, such as workplace liability and EIRA litigation. Our immigration practice benefits from having attorneys fluent in Spanish and Portuguese.

We are also known throughout New England for the strength of our education law practice. This includes representation of public and private schools at all levels, from K-12 to colleges and specialty schools.

What firm attribute do clients find most attractive?
Quiet success and victories. Our team of skilled practitioners, with expertise across a wide variety of legal fields, has a reputation for competitive cases in a professional and efficient manner. Our focus is on delivering the highest quality legal advice while keeping our clients’ interests at the forefront at all times. Put another way, we offer personalized, timely and efficient service by experienced attorneys who get results for the client without showboating.

MHTL’s remarkable stability in its partnership, philosophy, approach and commitment to diversity has allowed it to maintain its continued excellence since its founding in 1986.

Describe a recent “win” or client success story that the firm is proud of.
Our attorneys regularly handle high-profile and sensitive internal reviews related to harassment and other employee misconduct. In the past month, for example, MHTL attorneys have assisted multiple clients in addressing claims of sexual harassment — focusing in each particular case on the needs of the client while also handling sensitive communication and law enforcement coordination, two issues that often surround these cases. MHTL also focuses on providing governance, process, training and other preventive measures to help avoid future problems.

Tell us about the firm’s pro bono activities.
The firm is actively involved in pro bono representation through bar association work such as the Lawyer for the Day program and through direct service to a variety of non-profit institutions. MHTL attorneys have served on the Massachusetts Bar Foundation, both as local area reviewers and on the Foundation Board. They have also worked with the Board of Bar Overseers, and some have done reduced-fee or no-fee work through the Women’s Bar Association, the Pension Assistance Project and others. The firm has also partnered with the local district attorney in Norfolk County to provide pro bono legal prosecutorial assistance. And members of the firm have donated countless hours of pro bono legal service to a large variety of not-for-profit institutions.

Are the firm or its members involved in any charitable or civic organizations?
The firm is proud to be involved in multiple community, business and charitable organizations. Many of our attorneys serve or have served on hospital, social service, education and foundation boards, frequently as officers or chairs. Almost all of our attorneys lend their time and expertise to a variety of non-profits, including everything from the United Way to local PTAs.

Prime example of the firm’s consistent support by legal and support staff for Christmas in the City from its inception in 1989, and St. Mary’s Center for Women and Children since its founding in 1993. Other organizations we support include the Quincy Community Action Center, DOVE and the Quincy School Partnership.

Anything to announce in the coming year?
The firm is continuing to grow and expand our areas of expertise and offerings, such as through the recent hiring of experienced professionals across a variety of legal fields, including criminal and complex litigation. For example, our already deeply experienced internal investigations group has recently expanded by adding an attorney whose experience with law enforcement and public safety officials enhances our offerings in that area. Of course, the #MeToo movement is keeping members of this group as well as some of our employment attorneys busy, so this is a current major focus for the coming year.

Name something about the firm that people might be surprised to learn.
MHTL enjoys celebrating the holidays. For example, in addition to our all-staff holiday party, MHTL invites Santa every year to a party for the children and grandchildren of the staff. We also set aside a room for the many elves on staff who buy and wrap hundreds of Christmas presents for needy children, which we contribute through Christmas in the City, Quincy Community Action Program, and St. Mary’s Center for Women and Children.

Our staff and partners have varied interests. Examples: One partner goes to Africa each year to work on pro bono development projects. Another holds the 500-hour certified Kripalu yoga teacher certification. Another plans to spend his retirement primarily on his sailboat.

Why is it important to have all the lawyers in your firm members of the MBA?
Our firm also believes strongly in the values of professional excellence and personal integrity. We believe that belonging to and becoming active in our professional association is a duty and an honor. Accordingly, many of our attorneys serve or have served on MBA section councils (Labor & Employment, Elder Law, Dispute Resolution, Health Law and Public Law), various committees, the House of Delegates, the Executive Management Board, the Fee Arbitration Board, and the Massachusetts Bar Foundation; many of our attorneys also participate in various bar activities.

In what way do you find the MBA beneficial to the lawyers in your firm?
We strongly value the educational, leadership and networking opportunities offered by the MBA. The MBA helps our newer lawyers in so many ways, including expanding their networks and their knowledge base and providing leadership opportunities.

Are there any specific MBA programs you find particularly helpful to your firm?
The education, networking and leadership opportunities through the various sections have been particularly beneficial.

What would you like to see more of at the MBA?
Leadership programs for newer attorneys; programs where attendees can get to know some of the regulars; and judges — again, very useful for newer attorneys; regional brown bags and after work networking opportunities; and more coordination with local specialty bar associations.

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

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

Mock Trial teams compete in Regionals and Sweet 16 Trials
The Massachusetts Bar Association’s Mock Trial Program held its Regionals and Sweet 16 Trials on Sunday, March 4, at Clark University in Worcester. Thirty-two teams and more than 600 students competed in 24 trials. The remaining teams then competed in the Elite Eight and Final Four trials on Wednesday, March 14, at Joseph Moakley U.S. District Court House in Boston, before advancing to the State Championships at the State House in Boston on March 25. The Mock Trial Program is administered by the MBA, with support from the Massachusetts Bar Foundation and the law firms of Morrison Mahoney LLP.
Hundreds ‘walk’ for increased legal aid funding

The 19th Annual Walk to the Hill drew an enormous crowd to the State House to ask legislators to expand civil legal aid funding. Advocates, including the Massachusetts Bar Association, are seeking a $5 million increase in the Massachusetts Legal Assistance Corporation’s fiscal year 2019 budget appropriation, for a total appropriation of $23 million.

In his opening remarks, Equal Justice Coalition chair Louis Tompros contrasted a few cringe-worthy lawyer jokes with the hundreds of lawyers in attendance to make a point that unflattering stereotypes assigned to the legal profession are entirely undeserved in the commonwealth. But he stressed that the resources to handle legal aid needs are still lacking. He said: “Last year, MLAC programs handled 22,911 cases, helping over 83,000 low-income people from across Massachusetts. ... More than 60 percent of people who need a lawyer and qualify for civil legal aid are nonetheless turned away; there just is not enough funding to meet the need. That’s why we’re here.”

Tompros then introduced Supreme Judicial Court Chief Justice Ralph Gants, who gave further statistical evidence for the dire need for more civil legal aid funding, but developed another argument to strengthen the case for its expanded funding. “Legal aid programs provide the training that allows pro bono attorneys, including many in this hall, to learn what they need to know when they volunteer to help those in need,” Gants said. Boston Bar Association President Mark Smith followed Gants’ remarks by pointing out, “For every dollar invested in civil legal aid, between $2 and $5 is returned to the commonwealth.”

MBA President Christopher P. Sullivan picked up the theme Chief Justice Gants introduced when he said, “The immigrant crisis and its ensuing chaos will demand much more civil legal aid.” He doubled down on the association’s commitment to providing justice for all. “The MBA is very proud of its advocacy on behalf of civil legal aid, particularly the work we’ve done in partnership with MLAC and the Equal Justice Coalition,” Sullivan said. “As the preeminent voice of the legal profession, the MBA also believes that we, the lawyers of our commonwealth, must be the voice for our most vulnerable citizens.” He concluded his remarks by urging attendees to tell legislators “to protect our values by adequately funding civil legal aid.”

Before the gathered attorneys dispersed to speak with legislators for expanded funding, the audience heard the stirring personal account of Danielle Flint, a young single mother of three who thanked Greater Boston Legal Services for obtaining a successful resolution for her seven-year legal battle to obtain disability benefits for one of her daughters, who has sickle cell disease. Recounting an interaction with Tammarielle Doucette, her GBLIS attorney, Flint said: “I told her I have no more fight left in me. ... She looked me straight in the eye and told me, ‘You worry about your daughter, let us take care of the legal stuff.’”

Flint earned a standing ovation when she said: “I stand before you as a success story because the project never gave up on me; they never stopped fighting for my family. They allowed me to be a parent. I didn’t have to learn how to be a lawyer on top of learning this complicated illness. Instead I could go to school, get my education to provide stability for my family. Today, I have my master’s degree in social work. I am a licensed clinical social worker. ... I’m here today to say ‘thank you’ again to GBLIS and to ask you to support civil legal aid so that other families like mine can get the help they need.”

Complex Commercial Litigation Section hosts discussion on close corporations

The Complex Commercial Litigation Section hosted a lively question and answer bench/bar roundtable on Jan. 11, which featured panelist Jessica Kelly of Sherin & Lodgen LLP (pictured left), program co-chair Courtney Shey Winters of Peabody & Arnold LLP (pictured second from left), program co-chair Lindsay M. Burke of Kenney & Sams PC (pictured third from left), panelist Hon. Janet L. Sanders of the Business Litigation Session (pictured third from right), panelist Sean T. Carnathan of O’Connor, Carnathan and Mack LLC (pictured second from right), and panelist Richard J. Rosenweig of Gouldston & Storrs. The panelists addressed a number of timely questions concerning close corporations.

CAREY REAPPOINTED CHIEF JUSTICE OF TRIAL COURT

Chief Justice of the Trial Court has authority over all matters of judicial policy and appoints the departmental chief justices, oversees caseflow management and the establishment of programs and procedures to continuously improve access to justice by all segments of the Commonwealth’s population. The Chief Justice works closely with Trial Court Administrator Jonathan Williams to govern the Trial Court. Trial Court Administrator Williams began his five-year appointment in May of 2017.

“I am humbled and grateful to be reappointed as Chief Justice of the Trial Court by the Justices of the Supreme Judicial Court, and appreciate the confidence they continue to place in me,” said Chief Justice Paula Carey. “I am so proud of the work done by the Massachusetts Trial Court. There is no more noble mission than the delivery of justice and every day the men and women of the Trial Court dedicate themselves to this goal. I am grateful for the opportunity to lead them as we expand access to justice and enhance public safety.”

In 2011, court reform legislation replaced the single position of Chief Justice for Administration and Management with two new positions of Chief Justice of the Trial Court and Trial Court Administrator. The Trial Court is comprised of 380 judges and more than 6,300 employees who work in 99 courthouses throughout the state.

Prior to her first appointment as Chief Justice of the Trial Court in May of 2013, Chief Justice Carey had served as Chief Justice of the Probate and Family Court since 2007. She was first appointed to the Probate and Family Court in 2001 as a circuit judge and then served as an associate justice in Norfolk County.

In 2011, Chief Justice Carey received the Boston Bar Association Citation of Judicial Excellence, the Haskell Freedman Award from the Massachusetts Academy of Matrimonial Lawyers, the MCLE Scholar-Mentor Award, and the Middlesex Bar Association’s Distinguished Jurist Award. She is also a recipient of the Massachusetts Association of Women Lawyers Distinguished Jurist Award in 2009, the MBA’s Daniel F. Toomey Excellence in Judicature Award in 2006, and the Massachusetts Judges Conference Probate and Family Court Judicial Excellence Award in 2004.

Prior to her appointment as a judge, she co-founded the firm Carey and Mooney, PC, a family law practice. While in private practice, she chaired the Family Law Section of the Massachusetts Bar Association and served on the Family Law Steering Committee of the Boston Bar Association. Chief Justice Carey graduated magna cum laude from New England Law | Boston.
blawging for business

by john o. cunningham

lawyers who want a cost-effective means of promoting their expertise should consider publishing their own legal blogs. there are now many free or low-cost tools to help lawyers launch their blogs, and many practitioners have already garnered large followings through the blogosphere.

attorneys who like to write should also consider the following:

1. a well-visited blog with regularly refreshed content will turn up higher in search rankings than static websites, and if linked to a site, can boost its ranking.
2. surveys have shown that 90 percent of print and electronic news reporters scout the blogosphere for quotable experts and information.
3. many prospective clients find legal blogs when looking for legal information pertinent to their concerns, and more than half of corporate in-house lawyers read one or more legal blogs.
4. blog posts have the potential for viral dissemination.
5. blogs offer a chance for lawyers to display their understanding of what is most important to prospective clients and referral sources.

some lawyers get stuck on what to write, but blog fodder is abundant. trial briefs, speeches, client alerts, video material that is potentially intriguing to readers who are potential clients, thought leaders, social media followers, and media members.

the types of blog posts that lawyers can write are limited only by their imaginations. some popular kinds of posts include:

• list articles, which often have titles such as “seven keys to victory,” “five factors in negligence,” listing steps, elements or factors pertinent to a subject of interest.
• timely news analyses, which provide expert commentary on news events from a legal perspective.
• analyses of big legal developments, such as recent verdicts, legislation or regulations.
• anniversary stories, looking back on the legal implications of a historical event upon its anniversary.
• forward-looking predictions of legal issues or concerns associated with developing technologies, such as drones, driverless cars or evolving social media platforms.
• editorial opinion pieces that provide commentary on a court decision, statute or regulation.
• pieces that offer practical tips for preventing legal troubles, or taking advantage of opportunities created by changes in law.

no matter what the topic is, the keys to publishing a post that will be frequently read, favored and forwarded are as follows:

1. make sure the content is relevant, meaningful and preferably useful to the target audience of your blog.
2. adjust the length of every blog post to fit the relative complexity of its main subject, and break up longer posts with subheads, bullet points or numbered steps.
3. keep in mind that readers want lawyers to demystify things rather than complicating them, so a good legal blogger should follow the mantra of henry david thoreau: “simplify, simplify, simplify.”
4. publish content promptly in proximate time to its relevance.
5. provide links to related stories and pertinent authorities so that more readers will flock to the blog and more publishers are likely to link back to it.
6. publish regularly, at least once a week, because nobody wants to bookmark or favorite a publication that comes out irregularly only when the publisher feels like it.
7. write a headline that screams out “read me,” and follow it with a killer lead sentence that grabs the reader into the story. open with a knockout punch and don’t “build a case” as if writing a legal brief.
8. include some relevant graphs, charts or pictorials if you have them. studies show that pictorial information improves the chances of viral dissemination.
9. write in plain english or at least decode the legalese for readers who are not lawyers. the target audience should be far broader than just the members of the local bar.
10. reach definite conclusions and give readers “straight talk” without any hedging. readers say they hate it when lawyers put disclaimers on everything, and hedge by saying, “on the one hand, this, and on the other hand, that.”

perhaps the most important advice i can offer to lawyer-bloggers is to have fun and write about topics within your expertise that are of passionate interest. think of yourself as a publisher with a global digital megaphone who gets to decide what is covered and what is important to say. if you tackle the task of blogging with enthusiasm and energy born from your natural interests, it will energize both you and your writing.

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.
Artificial intelligence – it’s not just a passing fad

BY HEIDI S. ALEXANDER

At its core, artificial intelligence aims to mimic the cognitive functioning of humans to complete tasks that traditionally could only be accomplished by humans. In doing so, AI can do these tasks faster and with greater precision. For a law firm, this creates efficiencies and provides better, faster, and more reliable service to clients. While there is a lot of hype surrounding AI and, I confess, much unscrupulous behavior by law firms to convince AI’s benefits and how to use it in practice. Turning a blind eye certainly won’t benefit your law firm, nor will it help stop the robot lawyers from world domination.

During this period, counseling and intervention strategies — not that there is any physical presence of the client and then using that information to draft a legal document, Docubot does the work for you. This chatbot resides on your website and through a Q & A interface interacts with the user (a client) to prepare a legal document that can then be reviewed by a human attorney.

Docket Alarm. This program makes it easy to monitor your court filings by giving you central access to federal and state court filing systems. You can receive automated alerts on court filings via email. Docket Alarm’s real AI functionality, however, is in its predictive outcome technology which analyzes aggregate data in the platform to give lawyers insights on how judges have ruled on similar matters, which parties settle most and at what stage, and other helpful strategic case data.

Expect to see more of these types of products on the market and expect that your competitors will start using them if they haven’t already. Some firms are even building their own AI platforms tailored to their practice and clients. AI is no longer the future; it is the present. Whether you are a solo practitioner or large firm partner, it’s time to get hip to AI.

BY HEIDI S. ALEXANDER

Managing the managing partner

I am contacting you on behalf of several lawyers at our small law firm in southern Massachusetts. The situation we face is that our managing partner has become more like a ghost. Although instrumental in starting this firm and formerly central in its operations, he changed after he was widowed over a year ago. He looked somewhat frail, since that time he has shown much less interest in the firm’s activities. At this point, he is essentially unavailable to his fellow attorneys and clients. We know that he is well enough to continue traveling, and spending parts of the year in warmer climates, and occasionally he communicates via text. But he seems to be oblivious or indifferent to business climates, and occasionally he communicates via email.

This iPhone app uses AI to automatically capture, analyze, and prepare reports on time spent on client-related work, and applies AI to sort and file emails. Zero helps recover lost billable time, saves hours spent processing emails, and reduces errors in email filing.

Docketbot by ILAW. Rather than spend the time asking a series of questions to your client and then using that information to draft a legal document, Docketbot does the work for you. This chatbot resides on your website and through a Q & A interface interacts with the user (a client) to prepare a legal document that can then be reviewed by a human attorney.

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Walking the line: When zealous representation turns into unprofessional conduct

BY RICHARD P. CAMPBELL

Every working day brings a dizzying array of difficult challenges to active lawyers across the entire spectrum of law practice specialties. Personal and business finance; firm organization and management; injury, illness and emotional anxiety; and family health and happiness envelop our daily lives as we also carry out our duties to our clients. This complex collage of ordinary human stressors constitutes the real world in which we carry out our daily professional lives. There is nothing easy about the practice of law, and the day-to-day pressures of ordinary life make it all the more difficult. It is against this backdrop that we examine the tightrope between zealous representation and unprofessional conduct. The disciplinary cases involving Andover criminal defense lawyer Paul A. Farina (SJC No. BD-2017-078) and Brockton plaintiff personal injury lawyer Glen R. Vasa (SJC No. BD-2016-066) are instructive.

First, let’s look again at a few seminal rules of professional conduct. Rule 1.1 mandates that a lawyer have the requisite legal knowledge, skill, thoroughness, and preparation necessary to provide competent representation to a client. Rule 1.2 directs a lawyer to seek the lawful objectives of her client through reasonably available means permitted by law and the code of professional conduct. And, of course, as all active lawyers have embedded in their psyches, Rule 1.3 commands pursuit of the client’s rights and interests zealously and with reasonable diligence and promptness. For a criminal defense lawyer, the “state” (or the “government”) is anathema to her client’s interest. Similarly, for a plaintiff personal injury lawyer, “insurers” (of all types) are the perceived financial enemies of the client. As Mr. Farina and Mr. Vasa learned, however, other Rules temper blind zealotry and personal concerns.

Paul Farina represented a client in the Lawrence District Court on street drug (heroin) trafficking charges. Farina’s client pled guilty to a lesser charge of possession with intent to distribute a Class A substance. He was sentenced to probation through June 9, 2017, conditioned on four affirmative tasks: (1) he had to undergo a drug evaluation; (2) he had to seek follow-up treatment for drug-related problems; (3) he had to remain drug free as proven by random drug screening; and (4) he could not leave the commonwealth. Farina’s client did not do well.

He was arrested on Jan. 31, 2017, (roughly five months short of the termination of his probation) in New Hampshire (i.e., outside of the commonwealth) for selling a Class A substance (once again heroin) and for falsifying physical evidence. His client communicated with Farina after his arrest, thereby investing him with knowledge of the client’s physical presence out of Massachusetts, incarceration, and criminal charges on drug violations. As Justice David Lowy concluded, Farina “knew that his client’s arrest on new charges and his presence in New Hampshire violated the terms of his Massachusetts probation.” Farina formalized his knowledge of these circumstances by filing an appearance pro hac vice in the Salem, N.H., District Court on Feb. 1, 2017.

Farina took actions on behalf of his client to orchestrate the procedural status of both the nascent New Hampshire criminal complaint and the extant Massachusetts probation. In New Hampshire, Farina caused the criminal matter to be advanced to Feb. 6, 2017, whereupon the client secured his release after posting cash bail in the amount of $20,000. On Feb. 7, 2017, Farina appeared in the Lawrence District Court and filed a written motion to terminate his client’s probation early, averring that his client was “gainfully employed and had paid all of his probation fees.” Farina brought the motion to the attention of his client’s probation officer and secured his agreement. Farina chose to remain silent on the New Hampshire criminal action.

That same day, Farina presented the motion in open court and at sidebar represented to the court that his client was doing “very well.” He was employed in the family business, and had a need to travel as part of that business. When the court directed an inquiry to the client about ongoing treatment for drug abuse issues, Farina spoke for the client and told the court that his client “took care of those issues a long time ago.” The court allowed the motion. When the probation officer learned of the New Hampshire criminal action a short time later and confronted him about it, Farina “protested surprise.” The court rescinded the order terminating probation, revoked the client’s probation, and sentenced him to jail for one year. Justice Lowy found that Farina was aware of material facts (his client’s physical presence in New Hampshire and his arraignment on serious drug charges) prior to his actions in the Lawrence District Court and knowingly concealed those facts from both the probation officer and the court. The SJC suspended Farina from practicing law for 15 months.

Farina violated Rules 3.3(a), 4.1, and 8.4(c), (d), and (b). By concealing material facts (including the specifically violating facts of the probation officer and the district court, and by affirmatively informing the district court that his client was doing well and had put behind him his drug-related problems, Farina made “false statement(s) of material fact or law to a tribunal.” Rule 3.3(a). He also “engaged in conduct involving dishonesty, fraud, deceit, or misrepresentation” that was “prejudicial to the administration of justice.” Rule 8.4(c) and (d). In his profession to the probation officer of ignorance about the New Hampshire criminal action, Farina “made a false statement of material fact” (and as well “failed to disclose a material fact”) to a third party. Rule 4.1. He also engaged in conduct “that adversely reflect[ed] on his fitness to practice law.”

Glen Vasa was disbarred in part for misusing client funds. But, his conduct toward an insurance company is most relevant to this column because it involves a lawyer’s duties toward a third person who is not his client and in fact has a financial interest directly adverse to his client. Vasa represented a low-level worker for a staffing company that leased its employees to Home Depot. His client was injured on the job and, as a result, collected workers’ compensation benefits. The workers’ compensation insurer had a statutory lien on the proceeds of any monetary recovery that Vasa secured for his client. In the process of reaching a settlement for his client, Vasa negotiated a reduction of the comp lien (to $85,000). Vasa deposited the settlement proceeds in his IOLTA account and later distributed funds to his client. He chose, however, to forgo payment of the workers’ compensation insurer. Justice Geraldine Hines found that his misuse of settlement proceeds “to which a third party was entitled” violated both Rule 1.15(b) (segregation of trust property, including funds “belonging in part to a … third party”) and Rule 8.4(c) (conduct involving dishonesty, fraud, and deceit), (d) (conduct that is prejudicial to the administration of justice), and (b) conduct that adversely reflects on an attorney’s fitness to practice law.

What are the takeaways from the Farina and Vasa disciplinary opinions? The first might be that zealous advocacy may never blind a lawyer toward candor to a court and its officers. The second might be that a lawyer knows what he knows. Once invested with knowledge of facts and circumstances pertinent to a tribunal or a third party, a lawyer’s duty of candor and truthful communications takes hold and provides the only appropriate pathway for further actions. The last might be that a lawyer’s traditional adversaries (the “commonwealth” in criminal actions and the “insurance company” in civil actions) are entitled to honest dealing. In the end, we are officers of the court.
Massachusetts Supreme Judicial Court limits impact of landmark identification case

BY CHRISTOPHER W. SPRING

Introduction

A trio of Massachusetts Supreme Judicial Court decisions delivered in the last three years has fundamentally changed the rules regarding the identification of criminal defendants at trial in Commonwealth versus witnesses. While two decisions issued on the same day three years ago, in Commonwealth v. Crayton, 470 Mass. 255 (2014), the Massachusetts Supreme Judicial Court considered the circumstances under which a commonwealth witness will be permitted to identify a criminal defendant in front of the jury when the police failed to conduct an identification procedure prior to trial. The defendant in Crayton was convicted of two indictments charging him with possession of child pornography after he allegedly viewed illegal images on a public computer at a Cambridge library. Two students, in eighth and ninth grades, respectively, were studying in the library when they peeked over a man’s shoulder and saw an underaged naked girl on the computer screen he was viewing. The students notified a library employee who was able to determine the man had used another person’s library card to sign onto the computer. Meanwhile, the man logged off and left the library. While nobody knew the man’s identity, a description of his physical characteristics was shared with other library employees.

A subsequent investigation by library management and the police led to the discovery of videos on the subject’s computer depicting an underaged girl masturbat-

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BY RICHARD C. VAN NOSTRAND

The Tax Cuts and Jobs Act passed by Congress on December 22, 2017, includes a surprising provision that may have a significant impact on settlements of sexual harassment and other claims. Under Section 13607 of that act, the Internal Revenue Code provision relative to the deductibility of expenses in carrying on a trade or business was amended to read:

Payments related to sexual harassment and sexual abuse — no deduction shall be allowed under this chapter for (1) any settlement or payment related to sexual harassment or sexual abuse if such settlement or payment is subject to a nondisclosure agreement, or (2) attorney’s fees related to such a settlement or payment.

The amendment (which becomes Section 162(q) in the tax code) took effect immediately. Its sponsor, Sen. Robert Menendez, quoted in a recent New York Times article, articulated the reason for the amendment as follows: “I think most Americans would be outraged to know that they are subsidizing sexual predators in the tax code.”

Unfortunately, Sen. Menendez’s simplistic view ignores the realities of our adversarial system and that many, many sexual harassment claims are settled where there is a legitimate dispute as to whether sexual harassment ever occurred. As every mediator will tell virtually every litigant, settlement has the benefit of controlling the outcome and risk; eliminating further expense, delays and inconvenience; and avoiding the crucible of an unpredictable trial. Unquestionably, there is a strong public policy that favors settling lawsuits over the contested determination of whether a claim has merit.

Ignoring those other factors that drive settlements, Sen. Menendez’s comment equates the confidential settlement of a sexual harassment claim with an admission of sexual predation. As one who almost exclusively represents employers, I would be loathe to encourage my clients and their respective clients with the impact of confidentiality provisions upon the settlement of employment claims.

Settlement of sexual harassment claims

The problem. This amendment to the tax code unquestionably comes into play in a case that directly involves a sexual harassment or sexual abuse claim. Counsel on each side of the aisle must be prepared to advise their respective client accordingly.

On the employer side, the inclusion of a provision by which the claimant agrees to keep the existence and other claims. Under Section 13307 of that act, the IRS and a taxpayer, and result in guidance from the IRS against the taxable portion of the settlement. Given that impact, the employee should make the determination as to whether to insist on some equivalent benefit as part of the settlement in return for the inclusion of the confidentiality provision.

Needless to say, this amendment is likely to make settlement negotiations even more difficult as each side attempts to shift the negative effect to the other.

A two agreement approach and attendant risk. A possible approach that has been suggested by some to try to preserve some measure of confidentiality of such settlements without sacrificing tax deductibility is to utilize two separate settlement agreements. In this approach, the employer and the employee would execute two agreements — one releasing claims for sexual harassment and sexual abuse and the other releasing all remaining claims against the employer other than those for sexual harassment and sexual abuse. Both would have confidentiality provisions, but the lion’s share of the total consideration to be paid would be loaded into the second agreement. The sexual harassment settlement agreement would be supported by a more modest percentage of the total consideration. Arguably, only that part of the settlement governed by the tax code amendment and, therefore, only that modest amount and the attorney’s fees of both the employer and employee associated with that settlement would be non-deductible.

While disproportionate consideration would not jeopardize the enforceability of the two settlement agreements from a contractual perspective, the approach is not without its limitations. It does not appear within the scope of this amendment to envision the IRS rejecting certain deductions in a situation where a sexual harassment claim with inflammatorily pleaded facts is settled for $5,000 while all other employment-related claims which may not have ever been asserted are simultaneously settled for $195,000. Because of reporting requirements relative to both settlements, it would not likely be a difficult investigatory task by the IRS to trace the bread crumbs and disallow the deductions.

Blanket releases of all employment-related claims

The problem. Even in a case in which no sexual harassment or sexual abuse claims are expressly asserted, the amendment can be a trap for the unwary. If the settlement agreement contains a nondisclosure provision, it can potentially have the same unfortunate tax ramifications if the release in the settlement agreement sweeps too broadly. This arises as a result of the prevalent practice of trading the settlement payment for a comprehensive form release without identifying any claims specifically.

In virtually every settlement of a claim made by an employee and even in the documentation surrounding severance payments where no claims have been made, it has been common practice for employers to include a broad release of any and all claims arising out of the employment relationship, and to include a nondisclosure provision. This broad release, which by its nature sweeps in potential claims of sexual harassment or sexual abuse, may also trigger the non-deductibility provision of the tax amendment. Various ideas have been floated to try to avoid unhappy unintended consequences.

Express disclaimer and attendant risk; employee representation. In such cases, one approach that should preserve the deductibility of the employee’s attorney’s fees related to the settlement would be for the employer to use only a broad form release without identifying any claims specifically. This approach would be for the employer to use only a broad form release without identifying any claims specifically. This approach would potentially jeopardize deductibility for both the employer and the employee.

Complicating the problem

Questions, questions and more questions. Because of the brevity of the amendment, numerous questions arise about how its language will be interpreted by the IRS or the courts. The answers to these questions will be critical for the advice attorneys give their clients, whether or not management. Some of those questions include:

• Will the IRS take an aggressive approach to this exclusion?
• How will it interpret the word “any” in “any settlement or payment related to sexual harassment or sexual abuse”?
• How will the phrase “related to” be interpreted in practice?
• Will a claim for retaliation for asserting a sexual harassment claim be interpreted as “related to sexual harassment or sexual abuse” even if the underlying claim lacks merit?
• If the two agreement approach is adopted, how likely is it the IRS will “look behind the curtain” at the claims asserted, the settlement payment and attorney’s fees amounts and the deductions taken?
• Must a claim first be expressly asserted by the employer before the exclusion will apply?
• If so, must that expressly asserted claim be for sexual harassment or sexual abuse?

Will this provision apply to agreements required in return for the payment of severance where no claims have been made?

How broadly will the phrase “nondisclosure agreement” be interpreted?

Will a non-disparagement provision prohibiting the disclosure of negative statements about the employer also trigger the non-deductibility penalty?

Is clarification forthcoming? By the enactment of the Tax Cuts and Jobs Act, Congress has dramatically increased the workload of the IRS. Any clarification from that agency on how this relatively minor provision will be interpreted is likely not to be coming soon. Similarly, it will undoubtedly take quite some time for this issue to materialize on tax returns. It is likely that the IRS and a taxpayer, and result in guidance from the courts. Absent such guidance, counsel for employers and employees alike should be cautious in their

If the time period to assert such a claim has expired, the employer may consider this potential exposure sufficiently slight to adopt this approach. If that limitations period has not run, this could result in an employer believing it bought peace only to find itself in the midst of a subsequent war.

A potential work-around for that problem could be including an express representation by the employee that he or she had not experienced any sexual harassment or sexual abuse during the course of employment. If that representation is accurate, the employee should not be hesitant to sign it. While not as good as a release, such a representation is of benefit to the employer due to its deterrent value, or alternatively, its potential to flush out a claim about which the employer has remained silent.

Exclusionary the omission and attendant risk. In some iterations of this type of agreement, the release language contains the specific delineation of every possible type of employment-related claim (e.g., release of claims arising under any federal, state, or local law relating to employment, discrimination, retaliation, harassment, breach of contract, fraud, identity theft, tortious interference, emotional distress, or any common law claim). Another approach would be for the employer to use only a broad form release without identifying any claims specifically. A variation of that theme where a litigant of specific types of claims are identified would be to omit “sexual harassment,” “sexual abuse,” “harassment,” “abuse” or similar words from that list. If the IRS takes an aggressive approach, however, either form of release (broad or specific) could potentially jeopardize deductibility for both the employer and the employee.
**Pay equity preparation: Considerations for compliance and self-evaluation**

BY MAURA D. MCLAUGHLIN

On July 1, 2018, the Massachusetts Pay Equity Act (the Act), which amends the existing equal pay provisions of M.G.L. c. 149, § 105A, advances the goal of pay equity between employees of different genders through a number of mechanisms. In addition to the prohibition of “comparable worth,” increased transparency around employee wages, limits on inquiries about wage and salary history, penalties for violation of the law, and the ability to avoid or limit liability through a self-evaluation of pay practices.

As the effective date draws nearer, employers are looking to take steps to ensure compliance with the law and minimize liability under the statute. This article sets out an overview of the provisions of the statute, takes a look at how to perform a self-evaluation of pay practices, and other steps employers can take to prepare for the Act’s effective date.

### Introduction and overview

The centerpiece of the Act is the requirement that employees of different genders may not be paid a salary or wage rate less than that paid to its employees of a different gender for comparable work. Comparable work is defined as “work that is substantially similar in that it requires substantially similar skill, effort and responsibility and is performed under similar working conditions.” The Act sets out six permissible reasons for a variation in pay among different-gender employees performing comparable work, if the pay discrepancy cannot be explained by one of these six reasons, it is unlawful.

Another feature of the Act designed to end persistent pay disparity is the prohibition on employers seeking information about a prospective employee’s wage or salary history, either from the prospective employee or from a prior or current employer, before making an offer of employment with an employer (although an employer may confirm wage history information which an applicant voluntarily discloses). The Act also seeks to increase wage transparency by making it unlawful for an employer to prohibit employees from inquiring about, discussing or disclosing information about either the employee’s own wages or about any other employee’s wages. An employer may, however, “prohibit a human resources employee, a supervisor, or any other employee whose job responsibilities require or allow access to other employees’ compensation information, from disclosing such information without prior written consent from the employee whose information is sought or requested.” The Act requires that the evaluation was reasonable in detail and scope, is not entitled to an affirmative defense but will not be liable for liquidated damages (although still responsible for the actual damages and attorneys’ fees).

Evidence of a self-evaluation and steps taken to remedy a pay gap cannot be used against an employer as evidence of any violation of the Act or Massachusetts anti-discrimination laws that occurred (a) prior to the two years of completion of the audit; or (b) within five years of completion of the audit; or (c) within two years of completion of the audit if the employer can show a good faith implementation of steps to address gender-based pay inequities.

### Self-evaluation of pay practices

The Act provides little detail about what an employer’s self-evaluation of pay practices should look like. The evaluation can be of “the employer’s own design, as long as it is reasonable in detail and scope in light of the size of the employer.” The Act also says that employer self-evaluations “may be consistent with standard templates or forms which may be issued by the attorney general.” No forms or templates have been published as of the drafting of this article, but future guidance from the Attorney General’s Office may prove to be a helpful tool.

A while self-evaluation will not be a one-size-fits-all proposition, a self-evaluation needs to identify where there is a gender-based gap in pay for comparable work; lead to an understanding of why pay disparities are occurring; and set the stage for eliminating unlawful differentials.

**Determination of comparable work:** One starting point of a self-evaluation is an evaluation of which employees are likely to be performing comparable work by looking at the statutory factors of skill, effort, responsibility and working conditions. “Skill” includes the capability and aptitude needed to perform the job, including any specialized proficiency developed through training, education and/or experience. An assessment of whether work is substantially similar in skill looks at the functions in question actually required, not those skills that an employee or candidate may possess that don’t meaningfully relate to the job. “Effort” refers to the amount of physical and/or mental exertion necessary to performing a job, including manual or heavy labor. “Responsibility” may refer to the extent to which the employee works without supervision; whether, and to what degree, the employee performs supervisory functions; and the impact the employee’s performance of his or her job has on the employer’s business.

Any failure to pay employees equally for comparable work but other elements of compensation such as signing bonus, profit-sharing, tuition stipends, paid vacation and similar items. For elements of compensation which may be offered to all employees but only some employees will receive (such as overtime work, health benefits, 401(k) participation) the benefits must be available to employees equally.

Data to be gathered will vary for each employer, but may include items such as:
- Employee identifier (name/ID)
- Gender
- Job Title
- Job Grade
- Location
- F/T/P status
- Exempt/non-exempt status
- Type of pay (hourly, salary, etc.)
- Benefits eligibility
- Bonus eligibility
- Date of Hire
- Date into position/grade
- Supervisor/reporting relationship
- Necessity of travel
- Shift/work schedule
- Licensure/certifications
- Performance ratings (if a basis for compensation decisions)
- Contract/CBA information
- Total compensation

**Wage analysis:** Once the information is gathered, em- ployers need to analyze employee wages and identify any pay disparity for employees performing comparable work. For smaller employers or groups of employees, it may be possible to compare the employees individually, reviewing the factors such as experience, performance ratings and tenure with the employer. For larger employers, groups of employees may need to focus on ensuring that employees performing comparable work are placed in appropriate pay bands or grades, and performing statistical analyses to see if pay for different-gender employees is equal once statistically- permissible factors accounted for.

Understanding any wage gap are pay differentials for permissible reasons? Any variance in wages for different-gender employees performing comparable work must be explained by one of the exceptions in the law, namely:
- (i) a system that rewards seniority with the employ - ers, provided, however, that time spent on leave due to a pregnancy-related condition and protected parental, family and medical leave, shall not reduce seniority; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production, sales or revenue; (iv) is the geographic location in which a job is performed; (v) a system that rewards education, training or experience to the extent such factors are reasonably related to the particular job in question and consistent with business necessity; or (vi) travel, if the travel is a regular and necessary condition of the particular job.

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- (i) a system that rewards seniority with the employ - er, provided, however, that time spent on leave due to a pregnancy-related condition and protected parental, family and medical leave, shall not reduce seniority; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production, sales or revenue; (iv) is the geographic location in which a job is performed; (v) a system that rewards education, training or experience to the extent such factors are reasonably related to the particular job in question and consistent with business necessity; or (vi) travel, if the travel is a regular and necessary condition of the particular job.
In 2012, Massachusetts passed an Act for the Humani-
tarian Use of Marijuana (MMA), which allows qua-
lified individuals to use medical marijuana. Its pas-
sage has resulted in some confusion. On one hand, the 
MMA protects disabled individuals who use medical 
marijuana. On the other, the Controlled Substances Act 
(CSA) deems marijuana illegal. Many employers want 
to comply with employment laws and reasonably acco-
modate disabilities. At the same time, many employers 
do not want to condone criminal behavior or employ 
individuals who are impaired while working. This article 
explains the relevant landscape by: (1) discussing the 
context in which federal and state medical marijuana 
has developed; (2) identifying employment-related ques-
tions that employers may have to consider; and (3) 
deriving in part on marijuana's illegality under the CSA. 
Courts weighed in, and an early mover was the 
Massachusetts Supreme Judicial Court. In 
Barbuto v. Mass. Port Auth., a job applicant who suffered from Crohn's 
disease and irritable bowel syndrome accepted a position 
as a longshoreman. The plaintiff's use of medical marijuana was not 
undue hardship. The SJC reasoned that the MMA makes a qualifying patient's 
medical marijuana law and an employer may have to accom-
modate an employee's or applicant's use of medical 
marijuana. Under what circumstances an employee can prevail 
Darwin, the SJC evaluated a motion to dismiss. It 
did not make an ultimate liability determination. In fact, 
there are no published Massachusetts decisions reflecting 
that an employer might be able to prove that medical 
marijuana use would impair an employee's performance, 
create an “unacceptably significant” safety risk, or 
violates the employer’s “contractual or statutory obligations.” At 
Id. at 467-68. In addition, the SJC concluded that the 
MMA does not create a private right of action or give rise 
to a claim of wrongful termination in violation of public 
employment. At id. 470. Questions remain 
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Medical marijuana and employment in Massachusetts

BY ARIEL D. CUDKOWICZ, ANTHONY S. CALIFANO AND TIMOTHY J. BUCKLEY

In 2012, Massachusetts passed An Act for the Hu-
manitarian Use of Marijuana (MMA), which al-
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explains the relevant landscape by: (1) discussing the 
context in which federal and state medical marijuana 
has developed; (2) identifying employment-related ques-
tions that employers may have to consider; and (3) 
deriving in part on marijuana's illegality under the CSA. 

An early consensus formed when courts in other 
states addressed employer versus employer rights re-
garding medical marijuana. It turned out that consistent 
that employees were not required to tolerate employee use of 
marijuana. They did so under different but relat-
ted circumstances. The SJC held that their states' medical marijuana laws did not require the employer to accommodate medical marijuana use, and a lack of accepted safety standards. 21 U.S.C. § 812(b).

The Americans with Disabilities Act (ADA) is also in 
play. 42 U.S.C. §§ 12101 et seq. The ADA requires 
reasonable employment accommodations for individu-
als with disabilities. 42 U.S.C. § 12112(a)-(b). The ADA 
does not consider individuals who use illegal drugs to be 
quid individuals with disabilities by allowing appli-
cants to bring a civil action against an employer. How-
ever, the Massachusetts Fair Employment Practices Law 
(CAP) does not make an ultimate liability determination. In fact, 
there are no published Massachusetts decisions reflecting 
that an employer might be able to prove that medical 
marijuana use would impair an employee's performance, 
create an “unacceptably significant” safety risk, or 
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SJC reached a different result 
In 2017, the Massachusetts Supreme Judicial Court (SJC) ruled that the Massachusetts Medical Use of 
Marijuana Act (MMA), which allows qualified individuals to use medical marijuana, is not pre-
empted by the federal Controlled Substances Act (CSA). The SJC held that an employer could be liable for disability discrimination under Chapter 151B by declining to accommodate an employee's off-duty use of medical marijuana.

In Babcock, a job applicant who suffered from 
Crohn's disease and irritable bowel syndrome accepted a position 
with a longshoreman. The plaintiff's use of medical marijuana was not de-
termining the ADA's prior guidance. In that memo-
randum, Sessions told U.S. attorneys across the country that 
she should use their discretion when making deci-
sions about the prosecution of marijuana-related crimes and "weigh all relevant considerations, including federal law enforcement priorities set by the attorney general, the seriousness of the crime, the deterrent effect of crim-
inal prosecution, and the cumulative impact of particular crimes on the federal enforcement policy."

The SJC further concluded that, even if accommodating medi-
cal marijuana was facially unreasonable, "the employer here still owed the plaintiff an obligation under [Chapter 151B], before it terminated her employment, to partici-
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**SECTION 2: REVIEW**

**PUBLIC LAW**

**Field sobriety tests and operating a motor vehicle under the influence of marijuana**

**BY JEFFREY A. HONIG**

In the recent case of *Commonwealth v. Gerhardt*, the Supreme Judicial Court took a major-league swing at the use of field sobriety tests (FSTs) by law enforcement to prove that a suspect is under the influence of marijuana. Correctly pointing out the obvious, that FSTs were designed to test alcohol sobriety, the court found that modern science has not quite embraced the idea of using such methods to determine marijuana impairment. To the extent that an FST has any use at all, it is to provide a controlled opportunity for observation of a driver. An officer may testify as to the general demeanor, appearance and behavior of a suspect while performing such tasks and true activities as the horizontal gaze nystagmus test, the nine-step walk and turn test, and the alphabet and counting tests.

The court was so antagonized by the use of the term “field sobriety test” that it ordered a re-branding of the FST to fit its ruling in *Gerhardt*. Henceforth, when using an FST to measure a suspect’s observable conduct, it must be referred to in court as a “roadside assessment.”

Just in case there was any neat left on the bone of the FST, the court went on to issue a model jury instruction, which advises, “The roadside assessments are not scientific tests of impairment of marijuana use. A person may have difficulty performing such tasks for many reasons unrelated to the consumption of marijuana. Even if the defendant performed the roadside assessments, standing alone, is never enough to convict a defendant of operating under the influence of marijuana.”

In light of *Gerhardt*, one must wonder whether the use of “roadside assessments” has any value at all to law enforcement. A review of cases that support the conviction of operating a motor vehicle while under the influence of marijuana demonstrates that proof of such impairment need not require the suspect to step out of the motor vehicle. For instance, in *Commonwealth v. Rosado*, the police officer observed that there was a strong odor of marijuana in the car. The defendant’s eyes were red, his speech was slow, his answers to questions odd, and he laughed at inappropriate times. When asked by the officer whether he had any marijuana in the motor vehicle, the defendant stated, “If there was, I would have smoked it.” At least the defendant had a sense of humor, but it did him no good. The Appeals Court upheld his conviction for driving under the influence of marijuana.

Clearly, state legislators are concerned, and for good reason. The public has embraced the use of marijuana for recreational purposes, but there is no general consensus among scientists as to what effect such use might have on an individual’s ability to safely operate a motor vehicle. Recent legislation establishes a commission to study the issue. In the meantime, law enforcement and the courts are left a bit in the lurch when it comes to assessing, with any degree of certainty, the evidence that will meet the legal definition of “impairment.”

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**Quick takeaways from the Law Practice Launchpad Series**

**BY NICHOLAS R. SYLVIA**

If you are looking to take the big leap and start your own law firm, the Practice Launchpad Series was a great resource. This 10-week “boot camp” was put on by the Massachusetts Bar Association and the Massachusetts Law Office Management Assistance Program (LOMAP). It is aimed at recent graduates and bar exam takers who are thinking about starting their own firm or for those who are actually in the planning stages. If you missed it there is no need to worry, as all of the sessions were recorded and stored on the MBA’s online, on-demand archive.

Here are some useful takeaways from the series:

1. Your operating plan should be the heart of your overall business plan.

An operating plan is an essential section of any business plan. It should serve as a roadmap for how you will regularly conduct business and the template for how you provide legal services. An effective plan will prevent you and your employees from reinventing the wheel each time you take an action. Having a sensible and reliable plan greatly contributes to an owner’s ability to avert liability for malpractice. Clients will know they are in good hands if you can provide a clear explanation of what exactly you are going to do for them, outlining all of the steps you will take along the way. With your operating plan, if you can choreograph as much as you can ahead of time, you will be on the road to running an efficient, profit-generating machine.

2. Effective marketing connects those who have a need with those who can fulfill that need.

To market effectively, you have to put yourself on the radar of those in need. If you are looking for a certain type of clientele, you need to put yourself in their headspace. Ask yourself questions like: what is it that my ideal client is looking for, and where are they likely to look? In advertising your service, it’s important to make sure the message that you convey is less about you and more about how your firm can meet the prospective client’s specific needs. Some great ways to get your service on the periphery of the consumer are the following: having a website, maintaining social media accounts, blogging, taking advantage of search engine optimization tactics, and becoming involved in the community.

3. Networking means more than just showing up to the event.

It’s easy to go to the big yearly event, try to have an elevator pitch for the inevitable question, “What do you do?” Ask yourself what makes your firm unique and be sure to convey your passion for it. Once you make a connection, it’s critical that you foster that relationship by staying in touch. Stay tuned for the MBA to have follow-up programs and promotions for the Practice Launch Pad Series. In addition to the topics covered above, the series covers the following topics: Business Planning; Business Financing; Operations Management; Technology; Marketing & Networking; Community Involvement; and Growing your Expertise.

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**SEXUAL HARASSMENT SETTLEMENTS AS TAX POLICY**

Continued from page 19

advice, but thorough in their identification of the risks associated with confidentiality provisions in the settlement of employment claims.

The recent tax bill has certainly stirred considerable debate about its economic merits. It is probably safe to say, however, that not many of us anticipated that the current revelations about sexual harassment would also become part of that tax bill’s landscape. Now that it has, yet another tax conversation will need to be incorporated into the settlement negotiations of employment claims.

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**MEDICAL MARIJUANA AND EMPLOYMENT IN MASSACHUSETTS**

Continued from page 21


**Conclusion**

At bottom, this area of the law is developing. While the SIC has answered some important questions about employer and employee rights and obligations when it comes to medical marijuana use, others remain unanswered for the law develops. Interested parties should proceed with caution.

Ariel Cudkoziczwicz and Anthony Califfano are partners and Timothy Buckley is an associate in the Labor and Employment department of Seyfarth Shaw LLP. All three attorneys work out of Seyfarth Shaw’s Boston office and focus their practices on the representation of management regarding a broad spectrum of employment-related issues, including employment law counseling matters and the defense of lawsuits concerning employment.

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This means that employers will no longer be able to rely on reasons such as the employee’s starting salary (or salary from a previous job) or better negotiating skills. Employers should anticipate that when relying on a “system” of seniority, merit or measuring earnings, they will need to show that there is a meaningful structure or practice — and not just an attempt to explain previously made pay decisions. Any system an employer will point to as a supportable reason for a pay discrepancy should have objective criteria, be in place before pay decisions are made, and be applied to employees of both genders in a consistent and unbiased fashion. The more objective and standardized the factors going into the performance evaluation process are, the more it will look like a defensible system and not like an after-the-fact justification.

Reasonable progress toward eliminating gender-based pay disparities: Discovering that there are differences in pay of different-gender employees performing comparable work can be troubling, but the Act contemplates that such disparities may be found to exist. The Act does not require immediate eradication of any wage gap, but “reasonable progress … towards eliminating wage differentials based on gender for comparable work.” What “reasonable progress” will be may vary in each case, but will likely take into account factors such as the extent of the wage disparity identified, how promptly the employer responds to the issue, and the employer’s size and available resources to start remedying the wage gap. In short, an employer will likely need to show that it understands where in the organization there are gender-based disparities, and that it is taking remedial measures as an important and time-consuming process, demanding effort and attention from already busy human resources personnel. Involve those stakeholders whose engagement will be necessary to support the audit process — and whose bottom line may be impacted by remedial efforts.

At the outset of any self-audit, employers should consult with counsel about aspects of the audit such as how to determine where employees are performing comparable work within the organization, what type of analysis is appropriate for the employer’s size and structure, what documents and witnesses will support the audit if challenged in litigation, and creating a strategy for remedial measures.

Additional best practices

Training: Managers, supervisors, and employees involved in the hiring/recruitment process should be trained regarding the Act’s salary history, pay transparency and non-retaliation provisions. Hiring and recruiting personnel need to be aware that they may no longer ask an employee’s pay history prior to an offer of employment with compensation. If an employee does disclose salary history information, recruiting and hiring personnel should still follow best and regular practices with respect to the point in the hiring process in which a candidate’s current or former employer will be contacted. Managers, supervisors and human resource personnel should also be trained that they do not need to give any employee’s pay information to a third party, whether another employee or an outsider (unless that information is a public record, as defined by statute). While employees are free to discuss their pay, managers, human resources and other employees with a reason to know wage information should continue to maintain confidentiality. Likewise, supervisory personnel should be instructed not to engage in any retaliation against an employee who has made a wage inquiry.

Review of policies, handbook and employment applications: Employers should make sure that application forms, job postings and other documents associated with the hiring process do not contain any statements or questions that seek an employee’s wage history. Employers should also review handbooks and internal policies to remove any statements that prohibit employees from discussing their wages.

In addition, employers should review and revise existing job descriptions to capture key factors about the skill, effort, responsibility and working conditions (and locations) involved. While a job title or job description alone does not determine or control what is “comparable work,” having detailed and accurate job descriptions can be a helpful step for employers assessing what positions may entail comparable work. Well-crafted job descriptions can be a good way to capture what distinguishes one position from another and can be helpful for other workplace issues, such as capturing duties and responsibilities for overtime exemption purposes and identifying essential functions of a position for reasonable accommodation analysis under disability law.

Footnotes

1. This article is intended for general information purposes only and should not be construed as legal advice or a legal opinion on any specific facts or circumstances.

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Building Expertise. Making Connections. Advancing Careers
BY AMANDA ZURETTI, ESQ.

On Monday, March 5, 2018, Gov. Charlie Baker filed House Bill No. 4284 to make clarifying amendments to M.G.L. c. 94G and M.G.L. c. 94I. On Friday, March 9, 2018, the Cannabis Control Commission (Commission) posted its final regulations to be promulgated as 935 CMR 500.00 (Regulations) and filed them with the Office of the Secretary of the Commonwealth for publication on March 23, 2018. The Commission has supplemented the Regulations with guidance for municipalities (Guidance) dated Jan. 9, 2018, March 16, 2018 and March 21, 2018 to “assist municipalities by addressing questions related to the regulation of marijuana establishments.” The Regulations and the Guidance can be downloaded from the Commission’s internet website: https://mass-cannabis-control.com/documents/

The Regulations provide important interest to municipalities pertain to the license application process [935 CMR 500.101-500.102]; host community agreements [935 CMR 500.101]; security requirements and school buffer zones [935 CMR 500.110]; and the assurance to cities and towns that “Marijuana Establishments and marijuana establishment agents shall comply with all local rules, regulations, ordinances, and bylaws” and that “Nothing in 935 CMR 500.000 shall be construed so as to prohibit lawful local oversight and regulation, including fee requirements that do not conflict or interfere with the operation of 935 CMR 500.000.” [935 CMR 500.170].

On April 1, 2018 the Commission began accepting applications for adult use marijuana establishments. On June 1, 2018 the Commission will issue its first marijuana establishment licenses. Between now and June 1, 2018, municipal officials who see a place for marijuana establishments in their cities and towns must decide how to regulate them in a way that makes sense for their constituents.

Lawful local oversight and regulation of adult use marijuana establishments

Overview


A few communities, including those that voted “yes” on Question 4 of the 2016 state election ballot, banned adult use marijuana establishments using a two-step process which requires both a ballot question in an annual or special election and the enactment of a local bylaw or ordinance in M.G.L. c. 94G, § 3(a)(2)(ii). Other communities decided that marijuana establishments are welcome and chose not to impose any local limitations on such establishments.

Local controls available to cities and towns

Middle ground for communities who voted “yes” on Question 4 but may be to impose rational controls on mari-juana establishments by:

1. accepting M.G.L. c. 64N, § 3 to impose a local sales tax of up to 3 percent “upon sale or transfer of mari-jana or marijuana products by a marijuana retailer operating within the city or town to any other person who is not a marijuana establishment operator.”
2. enacting or amending general by-laws or ordinances to regulate the time, place and manner in which marijuana establishments may operate [M.G.L. c. 94G, § 3(a)(1)]
3. enacting or amending zoning by-laws or ordinances to regulate the time, place and manner in which marijuana establishments may operate [M.G.L. c. 94G, § 3(a)(1)]
4. limiting the number of marijuana retailers and/or limiting the number of any type of marijuana establishments [M.G.L. c. 94G, § 3(a)(2)(ii)-(iii) [H.B. 4284] M.G.L. c. 54, § 58A];
5. implementing a local licensing process that does not conflict with the state laws and regulations governing marijuana establishments. Guidance dated Jan. 9, 2018 at p.7 and March 16, 2018 at p. 18; and
6. drafting sound host community agreements to meet local needs [M.G.L. c. 94G, § 3 (5)(d)] [H.B. 4284];
7. adopting Board of Health regulations M.G.L. c. 111, § 26-33]; and
8. ensuring that they have appropriate wastewater reg-ulations [M.G.L. c. 83, § 10].

Learning the language: “marijuana establishment” and “marijuana retailer”

For many municipal officials and their counsel, the process for enacting meaningful local by-laws, ordinances or regulations begins with mastering the language of the Statute. M.G.L. c. 94G and 935 CMR 500.00. One source of confusion is that while the terms “marijuana establishment” and “marijuana retailer” are frequently used interchangeably, these terms have distinct meanings under the statute and regulations.

“Marijuana Establishment” means a Marijuana Cultivator, Craft Marijuana Cooperative, Marijuana Product Manufacturer, Marijuana Retailer, Independent Testing Laboratory, Marijuana Research Facility, Marijuana Transporter, or any other type of licensed marijuana-related business, except a medical marijuana treatment center.”

“Marijuana Retailer” is one category of marijuana establishment, i.e., “an entity licensed to purchase and transport cannabis or marijuana product from Marijuana Establishments and to sell or otherwise transfer this product to Marijuana Establishments and to consumers. Retailers are prohibited from delivering cannabis or mari-juana products to consumers; and from offering cannabis or marijuana products for the purposes of on-site social consumption on the premises of a Marijuana Establishment.”

Ballot question to limit the number of marijuana retailers or the number of types of marijuana establishments under M.G.L. c. 94G, § 3 (a)(2)(ii)-(iii)

A second source of stress for municipalities is the se-queencing of the ballot question and adoption of a by-law or ordinance to limit the number of marijuana retailers or the number of the several types of marijuana establish-ments as required by M.G.L. c. 94G, § 3(a)(2)(ii)-(iii) and M.G.L. c. 94G, § 3(5)(e).

These statutory sections require that a proposed by-law or ordinance imposing either or both of the limitations re-ferred to in M.G.L. c. 94G, § 3(a)(2)(ii)-(iii) be presented to the voters of the municipality on an annual or special election ballot prior to it being presented to town meeting or to a city council for vote. A ballot question must be referred to a city council within 35 days after an annual or special election ballot prior to it being presented to town meeting or to a city council for vote. A ballot question must be referred to a city council within 35 days after an annual or special election ballot prior to it being presented to town meeting or to a city council for vote. A ballot question must be referred to a city council within 35 days after an annual or special election ballot prior to it being presented to town meeting or to a city council for vote.

While cities that have completed the M.G.L. c. 40A, § 5 process may be able to enact zoning ordinances spe-cific to adult use marijuana prior to June 1, 2018, towns specific to adult use marijuana prior to June 1, 2018, towns may be taken until the Planning Board has reported to a city council with six months to do the same. Further, the adoption of zon-ing ordinances that limit the number or type of marijuana establishments may be taken until the Planning Board has reported to a city council with six months to do the same.

Because the process for limiting the number or type of marijuana establishments may be taken until the Planning Board has reported to a city council with six months to do the same, acceptance of a general by-law requires only a simple majority vote and a review of an existing general by-laws or ordinances may reveal that the existing framework requires minimal amendment.

For example, public smoking by-laws and ordinances may be amended to prohibit public ingestion (i.e., smoking, eating and vaping) of marijuana and to provide for noncriminal disposition of violations of ordinances and by-laws pursuant to G.L. c. 49, § 21D. General ordinances and by-laws may address hours of operation and impose controls on signage that are “not more restrictive than those applicable to retail establish-ments that sell alcoholic beverages within that city or town.” [M.G.L. c. 94G, § 3 (4)]. They may also prohibit marijuana establishments from allowing smoke, vapor, or aroma from being emitted from their premises, may restrict the issuance of entertainment licenses, and may restrict “licensed cultivation, processing and manu-facturing of marijuana that is a public nuisance.” [M.G.L. c. 94G, § 3 (4)]. Thus, the adoption of a by-law or ordinance that would not be an appropriate vehicle to “establish a civil penalty for violation of an ordinance or by-law enacted pursuant to [M.G.L. c. 94G, § 3 (4) and 5]”

Because the process for limiting the number or type of marijuana establishments may be taken until the Planning Board has reported to a city council with six months to do the same, acceptance of a general by-law requires only a simple majority vote and a review of an existing general by-laws or ordinances may reveal that the existing framework requires minimal amendment.

Regulating the “time, place and manner of mari-juana establishments operations” through gen-eral by-laws, Municipalities may control “time, place and manner of marijuana establishment operations” pursuant to M.G.L. c. 94G, § 3. Acceptance of a general by-law requires only a simple majority vote and a review of an existing general by-laws or ordinances may reveal that the existing framework requires minimal amendment.

Regulating the “time, place and manner of mari-juana establishments operations” through zoning by-laws and ordinances.

Both procedurally and in terms of policy and plan-ning, the enactment of zoning by-laws or ordinances pursuant to M.G.L. c. 40A, § 5 can be arduous. New zoning by-laws or ordinances, or amendments to them, require Planning Board public hearings which may be held up to 90 days after a proposed new law or ordinance is submitted to the Planning Board. Therefore, no vote may be taken until the Planning Board has reported to a board of selectmen or city council or until 21 days after the close of hearings if the Planning Board does not issue a report. A city council has 90 days to vote to adopt, amend, or reject a zoning ordinance. Town meeting has six months to do the same. Further, the adoption of zon-ing ordinances that limit the number or type of marijuana establishments may be taken until the Planning Board has reported to a city council with six months to do the same.

While cities that have completed the M.G.L. c. 40A, § 5 process may be able to enact zoning ordinances spe-cific to adult use marijuana prior to June 1, 2018, towns that intend to do so in upcoming town meetings may not be able to do so if their by-laws fail to receive approval from the Attorney General’s Municipal Law Unit. Towns may also be mindful that the Attorney General’s Municipal Law Unit has consistently approved moratoria under town by-laws extending to Dec. 31, 2018 but is reluctant to extend such moratoria into 2019. See, e.g., Middleborough v. Attor-ney General’s Oct. 3, 2017 approval of a zoning moratorium under warrant Article 30 of the Town of Clinton’s. 27
annual town meeting of June 5, 2015 — Case # 8546, the Municipal Law Unit approved a moratorium lasting three days, June 27, 2015, and extended to three years.

Should an adult use marijuana establishment seek to locate in a municipality where there is neither a zoning ordinance nor an appropriate regulatory body, the local government must follow the ballot process established in G.L. c. 38B (lawyers, public affairs, public education, health and human services, and local licensing).

As a final note, the Regulations at 935 CMR 500.105(22) provides sufficient oversight of marijuana establishments, it is conceivable that local police depart-
ments and licensing boards could develop marijuana licensing programs that are more restrictive than state standards so long as such a program does not conflict with M.G.L. c. 94G and the Regulations.

Although communities may determine that the Responsible Vendor training program in 935 CMR 500.104(14) provides sufficient oversight of marijuana establishments, it is conceivable that local police depart-
ments and licensing boards could develop marijuana licensing programs that are more restrictive than state standards so long as such a program does not conflict with M.G.L. c. 94G and the Regulations.

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Conclusion

Cities and towns have a significant role to play in shaping how marijuana establishments will grow in Massachusetts. While it is not possible to completely predict how conflicts may be resolved, it is clear that municipalities will need to ensure that local policies are consistent with state and federal requirements. In addition, local authorities will need to be aware of the potential for civil and criminal charges related to marijuana establishments. Cities and towns need to work with their local police departments and licensing boards to ensure that regulations are in place to protect the public and ensure the legal operation of marijuana establishments.

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Dispute Resolution

Just how important is neutrality in mediation?

BY JEANNIE KEMPTHORNE

For the past 20 years, at least, commentators have ques-
tioned the ability of the United States to act as an "hon-
est broker" between Israel and its various conflict part-
ners in the Middle East, given its longstanding special relationship with Israel. The country was trained with argent in
the United States as its mission to Jerusalem in December
2017. Like many, Columbia University professor Rashid Khalidi asks a timely question: does it not seem that Israel's most fervently partisan supporter and supplier of
money and arms can be a mediator. The United States is not neutral: It is a party to this conflict, fully on the side of
Israel.

Much closer to home, Lawrence Susskind, of the Con-
sensus Building Institute at MIT, argued in his keynote
speech at the New England Association for Conflict Resolu-
tion's Annual Conference in September that a mediator
neutrality requires "absolute diligence" and that, even in
troubled times like these, neutrals should avoid po-
litical or issue activism in order to preserve "neutrality" so
as to be "available" to serve as a mediator if the occasion
arises. Professor Susskind, as many of us in attendance in-
terpreted his remarks, was not advocating not having views on
controversial issues; rather, he counseled against making
those views public. This idea proved extremely provocative
at the conference, and I confess to being among those who
questioned his central tenet: Why can't a mediator be
expected to have no opinions on important public issues in
order to enter the fray as a neutral? How far does this reason-
ning go? Should we abstain from voting? From contribut-
ing to non-profits that lobby for change?

The United States' role in "mediating" many conflicts around
the world, when in fact it is a stakeholder with de-
cided views on acceptable outcomes and the ability and will-
ingness to strongly-arm and push recalculating parties to the
conflict, surely challenges any ordinary notion of neutrality.
On the other hand, Professor Susskind's model of the neutral
as a political remitante, silent on the pressing public issues
of the day lest he be disqualified from acting as a mediator in
an as-yet-inchoate dispute, lies on the other end of the spec-
trum, as he himself acknowledged in his remarks.

Surely, whether a mediator may express views on con-
troversial subjects and take action in support of those views,
and nonetheless remain effective as a neutral, depends on the
immediacy of the connection between the public statements
and the mediator's role; on the parties' perception of
their neutrality; and on the mediator's adherence to his or
her own concept of what neutrality is. It is clear that opinion
sharing can have a huge impact on the dynamic of the negotiations
and the effectiveness of the mediator: the bias in favor of
settlement. A neutral's push to achieve settlement may dis-
tinctly favor one side over another whose interests may best be
served by not settling — for example, in cases where one
party's claims have no merit, or where reputational interests
may be paramount, or where breaking a significant stand-
off at the negotiating table may serve incon-
clusively or worse. As Padría O'Malley, University of Massa-
chusetts professor and founder of the Forum of Cities in Trans-
mition, questions the discipline of neutrality, the powerful documen-
tary about his life and work, and why should he push resolution
if the parties themselves do not want resolution?

Most of the time, the bias towards settlement aligns with
the parties' expectations and hopes. After all, the reason the
parties have engaged a mediator, usually, is that they share
a desire to end the dispute. But not always. In court-ordered
conciliation and other contexts where the participation of the
mediator is mandatory, one or both of the parties may not be all that interested in resolution. They may have other
objectives and interests, which the mediator or concili-
ator must discern and respect. In my experience, this prin-
ciple has been given short shrift in training for court con-
clitors, who are taught, like a mantra, that their job is to settle
cases.

All of this begs the question: What is the purpose of me-
 diator neutrality? What sort of neutrality is really required?
I think the answer is highly dependent on context and the expectations of the parties.

Clearly, the need for mediator neutrality is not as acute
or sensitive as for arbitrators or judges. There is a gaping
chasms between helping the parties come to an agreement and
deciding the dispute for them. Because judicial and arbitra-
tion decisions are all but final, it is imperative that judges and
arbitrators not only disclose all potential biases and financial
interests, but also abstain from deciding matters where such
biases and financial interests are lurking. Needless to say,
part contact between the parties and an arbitrator or judge
is universally considered inconsistent with neutrality and is
appropriately forbidden.

In mediation, the situation is different. Because the par-
ties themselves will devise an agreement (or not), rigid ad-
herence to familiar notions of judicial or arbitral neutrality is
unnecessary and should not be ethically required. Notably,
one-sided communications between one party and the me-
diator are par for the course and are entirely proper — even
though they may give rise to serious doubt in the minds of the
mediator, a doubt that an alert mediator must rec-
ognize and address.

In the view of process-oriented mediators, the funda-
mental value of mediation is to provide a space for parties
to come together. Veteran family mediator John Fiske es-
pouses this view: "[The most important thing we do is give
people a place to talk.]" He questions the need for neutrality.
Citing Bernard S. Mayer's book, Beyond Neutrality: Con-
fronting the Crisis in Conflict Resolution, he points to the
ville elder as mediator: "It's a totally different model. The
mediator seeks out someone who is wise, not neutral." Trust,
in his view, is key: "If you connect with the parties, they are
going to trust you."

It seems to me that he is right. Strict neutrality is not es-
sential to the integrity of the process, so long as the parties
are able to advance their own interests and do not rely on the
mediator to evaluate or reframe communications. The per-
anti questions, I suggest, are whether the mediator's bias, or prior relationship with a party or its counsel, or her interest
in the outcome either (1) affects the parties' ability or willing-
ness to engage in the settlement process, or (2) affects the mediator's even-handedness in conveying information, evalu-
ating the risks of non-settlement (if applicable), and
transmitting offers.

More succinctly: Is the mediator in fact trustworthy? Can
the mediator be trusted to list the parties' interests, emotions, and story, and how fairly and accurately the mediator acknowledges and reframes the par-
ties' presentations.

The parties' evaluation of the mediator's trustworthiness
continues throughout the proceeding. It isn't a hurdle cleared
at the outset and then left behind as the parties proceed down
the course. It's a touchstone that the parties come back to
over and over again. Trustworthiness is always in play, al-
ways being adjusted throughout each public and private
interaction throughout the mediation. And not just the par-
ties. The mediator, too, must be constantly alert to whether
the dispute or the dynamic is pushing buttons that trigger
an emotional or other response jeopardizing the mediator's
ability to function as a disinterested neutral.

When, if ever, should the mediator disclose her bias or
interest in the outcome? In practice, I suspect that disclosure
is usually limited to prior contacts with counsel or a party.
Beyond that limited sort of disclosure, I tend to think the less
said the better. So long as the mediator is able to maintain the
discipline of neutrality in practice: to faithfully adhere to
promises of confidentiality, to treat each party and counsel
with respect, to listen carefully with both discernment and
empathy, and not to advocate for an outcome favorable to
one side over the other, her personal opinions, in my view,
are her private affair. If those opinions begin to surface in un-
acceptable ways, the parties themselves can take corrective action by withdrawing from the process. If the mediator's subjective ability to perform her role is affected, she can and should take a break and re-center or withdraw.

Whether the United States was ever "neutral" with re-
spect to conflict in the Middle East is doubtful, of course,
but it might nonetheless have served as an effective facilita-
tor, notwithstanding its obvious stake in the outcome and its
bias toward resolution. But now, having handed Israel a clear
win on an issue that was vitally important to both sides, the
United States has compromised its stature, not as a disin-
terested neutral — it was never that — but as a trustworthy
participant in the peacemaking process.

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tices in Salem. She is the founder of Good Neighbor
Mediation Project, and is a member of the Massachusetts Dispute
Resolution Services panel. She has served as a court conciliator in Essex Superior Court for many years.

Young Lawyers Division and Dispute Resolution Section host mediation series

On Feb. 28, the MBAs Young Lawyers Division and Dispute Resolution Section hosted Part I of a three-part series on Mediation & Arbitration Essentials. This first session focused on lawyer-to-lawyer negotiation and the use of mediation before, or instead of, litigation or arbitration. Panelists included (from left) Eric P. Finimore, Michael Zeytoonian, Conna A. Weiner, Samuel A. Sagel (program chair) and Hon. Patricia E. Bernstein (ret.).
The lawyer/mediator dance in divorce mediation

BY CYNTHIA T. RUNGE

Perhaps because of my dual legal and mediation training, I’m always curious about how mediators and attorneys function in the context of a divorce mediation, especially when they, too, are trained in both roles. I spoke with several attorneys who are also mediators to get their thoughts about how mediators and lawyers effectively (and sometimes ineffectively) interact in divorce mediations.

Self-determination

Like most mediators, I believe in the parties’ right to self-determination. In other words, I think people have the right to make their own decisions about their own lives. Even though I tell my mediation clients that they should obtain their own respective counsel to review their agreement, I recognize that they may not. In fact, some folks simply do not want to deal with lawyers because of the perceived added conflict of bringing a lawyer into the process, and/or because of the cost. Susan DeMatteo, a divorce mediator and family and collaborative attorney with a practice in Reading, says, “The reality is mediation is less expensive. People may not want to spend the money to hire a lawyer to review their agreement (in addition to paying for mediation). Mediation is preferable to working out the terms of a (litigated) agreement on the courthouse steps.” Thus, when mediating, or acting as counsel for one of the parties, it is important to remain focused on what the client wants to do.

Maureen Reilly, a trial attorney and divorce mediator in Boston, also represents clients in mediations. “In Superior Court, lawyers make presentations to the mediator. Typically, this is not the case in a family law mediation. In fact, the divorce mediator wants to hear from the parties, so the parties can also hear each other.” Letting the parties have the opportunity to talk and listen to each other is one of the key components to having an effective divorce mediation. John Fiske, an accomplished family mediator and mediator trainer in Cambridge, says his favorite definition of mediation is: “All we do is give people a place to talk.” It is not about what the lawyers argue to the divorce mediator.

Getting the agreement approved

What do you do as a mediator if you think that a provision the parties want to include in their agreement might not be approved? Most mediators have a strong sense of obligation to ensure that the parties’ agreement will be approved by the court and will raise their concerns with the parties. Fiske cautions that, “Mediators should not hide behind the judge and tell the parties, ‘Oh, the judge won’t let you do this.’” In instances where parties want to include an unusual provision in their agreement, Fiske tells his clients, “Go to court with the agreement you want… If the judge tells you that you will have to address the provision another way, then you might need to do so if you want to get divorced.” In other words, if the parties are going to do something unusual in their agreement, it is important for them to understand what they are getting and what they are giving up, and to be able to explain the reasons(s) for their decision.

Some practitioners believe that mediated agreements are scrutinized more heavily than negotiated agreements. DeMatteo disagrees and says, “I think judges use the same standard whether the agreement is mediated or not. Judges are going to look at the guidelines and be consistent under the law. They are looking for precision, and we as mediators should be doing that.” DeMatteo adds, “Judges may spend more time with pro se parties, some of whom may have filed mediated agreements.” Thus, the issue may not be that mediated agreements are scrutinized more; rather, it could simply be that many parties who have mediated agreements also appear in court pro se.

Can mediation-friendly attorneys zealously represent their clients?

What does it mean to be a “mediation-friendly” attorney? For Reilly, it means “honoring the parties’ right and ability to determine the best course of action for themselves.” If DeMatteo has a concern about a provision in a mediated agreement, she will make sure her clients are fully informed and that the client has made reasoned decisions, while still honoring the intent of the agreement between the parties, if possible. Being “mediation-friendly” doesn’t change any of a lawyer’s ethical obligations to her client.

Fiske says he learned early on from a knowledgeable family services officer that figuring out whether or not a case is going to settle has everything to do with who the lawyers are. The lawyers are the “wildcard.” In some instances, a lawyer may totally derail a mediation and the agreement that the parties wanted gets lost. Fiske notes that Massachusetts Rule of Professional Conduct 1.2 states, “...A lawyer shall abide by a client’s decision whether to accept an offer of settlement or not. Nevertheless, it seems that some lawyers don’t follow the rule and may push the client to go with the lawyer’s advice instead of trying to work with what the parties want to do.

If a lawyer needs to be sure that a client understands what he/she may be entitled to under the law and what the client is agreeing to, lawyers must also abide by a client’s decision to settle or not. Fiske also points out that the SJC rules define various functions for the lawyer: “As advisor, a lawyer provides a client with an informed understanding of the client’s legal rights and obligations and explains their practical implications. As advocate, a lawyer zealously asserts the client’s position under the rules of the adversary system.” (Preamble 2, Rules of Professional Conduct.) Generally speaking, a “mediation-friendly” attorney is an advisor less zealous than the litigator and more comfortable with letting the parties make their own informed choices within the general light of the law.

Conclusion

The above snippets are footnotes to a much larger discussion about how mediators and lawyers interact in the context of divorce mediations. Continuing the dialogue and thinking about these issues and others can only help us to more effectively assist our divorcing clients.
Before discussing the value of early mediation, let’s start with three questions to ask yourself and discuss with your clients about resolving disputes:
1. How quickly does your client need to get the dispute resolved?
2. Is most of the relevant information needed to resolve this dispute available or ascertainable?
3. Are the parties trustworthy enough and willing to exchange all relevant information voluntarily and without delays?

If the answer to question 1 above was as soon as possible or in less than six months, and the answers to questions 2 and 3 were both yes, then it’s worthwhile to keep reading about early mediation. This is especially true if preserving the relationship between the disputing parties is important. If your client wants the dispute to drag out over at least two years and you, your client and/or the other side in your dispute prefer to play old school “big in court” with trial on the horizon, then you think is key information and disclose it at that pivotal “Hollywood moment” in your trial, you can stop reading now. But if the interests of informed consent, please do advise your clients that they will be in this litigation for a couple of years or more, they’ll be spending a lot of money on fees and costs, and that the chances of having their “day in court” and seeing that “Hollywood smoking gun moment” in a trial are less than 3 percent.

Here’s some quick general information about mediation. Mediation is an effective way of resolving disputes that are right for mediation. It is a voluntary process in which the parties agree upon a neutral person (usually a lawyer) trained as a mediator to help them, and their lawyers, if they have lawyers, work toward resolving their dispute. The mediator facilitates the negotiation process with the goal of reaching a mutually acceptable settlement. The mediator cannot give either side legal advice and cannot ultimately determine the outcome. There are cases for which a more evaluative-style mediator is better; other cases call for a more facilitative style. Often both are helpful. The dispute is resolved when the parties reach an agreement as to the elements of the settlement, and the terms of their agreement are reduced to a written settlement agreement.

There are different styles of mediating, some variations on the structure and the timing of the mediation. This timing and structure of the mediation is vitally important to the parties, but they are rarely consulted about structure or timing before the mediation takes place. This is where we go back to those initial questions to determine if and when early mediation should be utilized.

The traditional litigation track with mediation at the end

For most lawyers, especially litigators, mediation is part of the litigation process. They see it as a step that follows other procedural steps like the pleadings, discovery and motion practice, but before trial. After these steps are completed, lawyers will often suggest using mediation to settle the case. This is an alternative to going to trial and leaving the matter up to an unpredictable jury to decide. This is often the first time the lawyers have a meaningful discussion with their clients about the mediation option. By this time, a few things have happened that would also make clients receptive to mediation:
1. The clients, who were probably all pumped up and ready to go to war with the other side when they first came to the lawyers, are now emotionally weary of the matter and don’t want any more of their energies, resources or emotions drained by this process, and want to get it over with;
2. The clients have come to realize that their case was not the “slam-dunk” case they thought it was at the beginning;
3. The clients do not want to spend any more time, money and energy on this case, having already spent thousands of dollars and waited two years or more, with trial set six months or more in the distance that will likely cost thousands more;
4. The clients are concerned about an unpredictable jury deciding this case based on things other than facts and the law that might sway the jury a certain way.

This late mediation is usually a full-day event with the mediator shuttling between the parties for most of the day in a caucusing-style negotiation process, controlled by the mediator. This creates another factor in this traditional all-day mediation structure. Around 4 p.m. or so, or close to what is perceived as the end of the day, there is an unspoken, unconscious but noticeable stress the parties feel to get the matter settled that day. They do not want to leave the all-day negotiation without having a settlement. This is not a pressure coming from one side or the other, but one that is inherent in this type of all-day mediation process, especially when one or more of the parties traveled a great distance to get to the mediation. And so around 5 p.m., at the end of the day, the parties feel they have to settle. And they usually do.

The features and value added of early mediation

An alternative, in the right cases, is to approach mediation differently, and use it earlier in the life of the dispute: at the beginning, nearly two years earlier than traditional mediation. Instead of an all-day event with that inherent pressure at the end to settle without an optimum resolution, consider a mediation process done over several shorter sessions, each with a clear purpose and structure. This is one of the features of early mediation that may be appealing to your clients:
1. The parties engage in the mediation before any complaint has been filed, before the court system is involved and before the civil procedure process is initiated.
2. The mediation takes place over three (or more as needed) shorter sessions (approximately 1.5 to 2 hours each), each designed to accomplish specific things and with a clear agenda.
3. This a completely confidential process and there has been no public (court) filing.
4. The parties, assisted by the mediator and advised by their lawyers (if they have lawyers), are the decision makers, and have control over the outcome.
5. The parties control the tempo and the scheduling of the mediation sessions to fit into their time frame for resolving the matter and their personal schedules, and for maximum productivity.
6. Any necessary exchange of relevant information needed to resolve the matter through this structured negotiation is discussed, mutually decided upon in the first mediation session, and exchanged before the second session.
7. Ample opportunity for considering each party’s needs and interests, including giving each party the chance to be heard and to listen to the other party (i.e. “getting your day in court”) in a structured, controlled setting is given to the parties in the second (and if needed additional) mediation session.
8. The parties may bring into the mediation process any expert opinion assistance they need to resolve the matter. Unlike litigation, they jointly agree to hire one neutral, independent expert, he share the cost and they have the value of an expert resource available to them throughout the mediation.
9. The agreed upon options for resolution are discussed and decided upon in the third mediation session, and then are reduced to a written resolution agreement.
10. This type of mediation process takes only as long as the parties need it to and is faster, less expensive, more efficient, more creative in developing solutions and less draining upon the parties’ resources, time, energy, and emotions than litigation or arbitration.

Concluding thoughts

In both scenarios, the traditional style of mediation and the early mediation, most cases get resolved through mediation. The difference is that in the traditional, litigation-based setting, the mediation session comes by default rather than by design, after two years of prepar ing for a trial that rarely happens and may not result in the best possible resolution. The clients have spent thousands of dollars and likely have damaged or destroyed any important relationships. In early mediation, the resolution is reached by intention and design because the parties and the lawyers pursue a negotiated resolution from the outset and design the process for that purpose. The earlier approach preserves a key business or personal relationship, and avoids the draining of the clients’ resources, energies and emotions. These factors lead to a more creative, complete and desirable outcome.
MBA members Christopher B. Parkerson and Michelle I. Schaffer have been appointed to the board of directors of Campbell Campbell Edwards & Conroy PC. Both Parkerson and Schaffer have trial practices representing national and international corporations in product liability, toxic exposure, premises liability and commercial matters.

Ian J. Pinta has been elected to the partnership at MBA Honor Roll Firm Todd & Weld LLP. Pinta will continue to concentrate his litigation practice on complex business disputes, as well as medical malpractice and personal injury litigation.

Paul E. White, a member of the MBA’s Complex Commercial Litigation Section Council, has joined Posternak Blankstein & Lund LLP’s Litigation Department as a partner whose national practice focuses on retail, manufacturing and automotive sectors. White also handles multi-party commercial litigation that includes complex contract disputes, commercial lease disputes and catastrophic injury claims.

Elizabeth E. Olien has joined MBA Honor Roll Firm Todd & Weld LLP as a litigation associate, and will concentrate her practice on complex business disputes, general commercial litigation and employment law matters. Olien has experience handling all aspects of commercial litigation matters, including developing litigation strategy, discovery, and drafting motions. Prior to becoming an attorney, she was a management and technology consultant in the Washington, D.C. office of Accenture, helping clients develop new business processes to increase efficiency and decrease costs. Olien is a 2013 graduate of Boston College Law School, and a 2005 magna cum laude graduate of Virginia Tech.

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