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Dear MSLAW Community,

This year marks the 20th year anniversary of the Massachusetts School of Law. What an amazing journey the past two decades have been. One constant that remains true today has been the dedication, commitment to excellence, and vision of our Deans and faculty. These are the same qualities that our more than 2,000 alumni also possess. This is evidenced by your continued successes and achievements throughout our communities.

This past Fall, the Alumni Relations Office and Career Services collaborated with MCLE and the Massachusetts Bar Association to bring more than a dozen continuing legal education classes to the Massachusetts School of Law. Watch your e-mail for courses on Recent Developments in Family Law, Elder Law Basics, Uniform Probate Code, and a Practical Skills Seminar coming this Spring. We will also be hosting the Family Law Judicial Forum on May 5th. If you wish to be added to the e-mail list, please contact me at mhebert@mslaw.edu.

The Career Services Office will be hosting its 3rd Annual Career Fair on Thursday April 9, 2009 from 11:00 a.m. to 4:00 p.m. Anyone interested in participating may contact me at 978-681-0800 ext. 162. This is a great opportunity to recruit interns, part-time employees, or new associates.

This year is a year of celebration. We hope that you will take the time to reconnect and join us at CLE programs, the Law Day Dinner (this year’s date is Saturday, May 30), a Speaker Series Event, or other special events. Please feel free to contact me at anytime.

Very truly yours,

Michelle M. Hebert, Esq.
Director of Alumni Relations
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The Student Bar Association has made a concerted effort this academic year to partner with other student organizations to better serve both MSLAW and the surrounding community. In the fall, we successfully sponsored, in cooperation with many other MSLAW student organizations, a number of innovative, exciting, and educational events.

This year opened with a BBQ and the annual Used Book Sale held on registration day. The book sale enabled students to buy used books at a reduced price, and the BBQ gave new students a chance to meet and interact with returning students and faculty in a relaxed atmosphere. MSLAW, SBA, BLSA, ACS, Phi Alpha Delta, and the newest student organization, SALSA (Southeast Asian Law Students), combined resources to make these events successful.

In continuing its long-standing Speaker Series, the SBA was able to inform the student body about changes in the Probate Courts and different employment options following law school by inviting Chief Justice of the Massachusetts Probate and Family Court, Paula Carey, and Essex District Attorney Jonathan Blodgett to speak to the MSLAW community. Alumni and practitioners joined students as Chief Justice Carey discussed new programs and other goals of the Probate and Family Courts. Chief Justice Carey and District Attorney Blodgett fielded questions and shared their experiences with the audience. The SBA wishes to thank particularly Phi Alpha Delta and Professor Sullivan for their assistance in arranging for District Attorney Blodgett to speak.

We also had successful social events—including an “ice breaker” with games and music—such as the ever popular Karaoke Night. MSLAW, SBA, BLSA, ACS, Phi Alpha Delta, and SALSA were able to once again combine resources to subsidize these events. We also established a regular practice of selling pizzas and other snacks at lunch and dinner on Tuesdays and Thursdays.

In order to assist first- and second-year students with essay exam taking, the SBA, again in conjunction with Phi Alpha Delta and BLSA, sponsored practice examinations, taken under simulated exam conditions. Faculty who teach many of MSLAW’s required courses submitted exams and answers. Alumni and upper-class students reviewed model answers with the participants in order to illustrate the best way to write law school essay exams.

The SBA continued to forge relationships with organizations in the surrounding community, as the SBA and faculty came together to host its now annual Christmas party for the children of St. Ann’s. Santa Claus again made his annual visit, handing out presents to the children. They were also entertained by Peter Jackson’s Magic Show. We wish to thank the Barristers Club for its help with the St. Ann’s party. The SBA actively assisted MSLAW’s administration with publicizing the Holiday Concert, held also as one of a series of events celebrating MSLAW’s 20th anniversary. Proceeds from the concert, which featured The Drifters, benefited MSLAW’s own Shadow Fund and the Esperanza Academy School of Hope, a middle school that exists entirely on donations. The school provides education to disadvantaged females from Lawrence to assist them in qualifying for admission to better high schools and colleges. And finally, the SBA was able to make a significant financial donation to St. Ann’s, which it will use to upgrade their recreational facilities.

On behalf of the SBA and the rest of the student body, I would like to extend a special thanks to Dean Coyne, Professor Rudnick, Professor Coppola, and Professor Sullivan for sacrificing their time, energy, and resources to help make the first semester successful. We look forward to an equally successful spring. Anyone with ideas concerning activities in which the SBA can be involved should contact me at jeremyewilkins@yahoo.com.

Sincerely,

Jeremy Wilkins
SBA President
Greetings Alumni and Other Members of the MSLAW Community:

Revolution! The phrase that immediately popped into my head when thinking about what I would write was Dickens’ “It was the best of times, it was the worst of times.” It seemed apropos. While it’s not quite the French revolution, we have just elected a black president into office while thwarting the rights of millions to marry or adopt. I tend to think of revolutions as big momentous occasions with a beginning, middle, and climatic ending, like the beheading of a French aristocrat.

As I sat on an airport tarmac over the winter break, I was relieved that I was safe and that I avoided hospitals or homophobic terrorists. I was happy to be returning to Massachusetts—one of the only places where my marriage is recognized. I thought about the airspace that I would travel over, places where my safety and security could be threatened. I thought about DOMA and how it not only gives other states permission to ignore Massachusetts marriages, but that it is an example of federalism gone awry. I realized that revolutions do not always have a defined beginning, middle, or end.

The only time I talked about gay marriage on vacation was with the man that was trying to sell us a timeshare at the resort. The resort offers same-sex couples a deeper-than-typical discount. It seems his brother-in-law lives with his partner in Mexico, which does not recognize same-sex marriage. We informed him, to his surprise, that Spain recognizes same-sex marriage. He initiated the conversation by stating that it was time for Mexico to recognize all marriages. I thought it was odd. We were in a third-world, predominantly Catholic country, talking with a straight man about gay marriage. It seems ironic that in Massachusetts, where same-sex marriage is a legal reality, the legal community still has difficulty accepting or discussing the law as it now stands—whether lawyers agree with it or not.

It occurs to me that we are in the midst of a revolution. For many friends in California, it truly was the best of times and the worst of times this fall: Proposition 8 not only eliminated the right to marry, but also brings current marriages into question. California may be too far away for us to worry about now. However the issue is not settled in Massachusetts or any other New England state, because the federal government does not give Full Faith and Credit to all New England marriages. There are still many unanswered legal questions and laws that contradict one another in an area where there is little precedent. In light of this, I think the Diversity Alliance at MSLAW serves a valuable function. The time to build a supportive network is now. Whom would you call when a client has a question involving same-sex marriage? I ask that you support the Diversity Alliance and that you take advantage of the opportunity to hear upcoming speakers on this topic. To get involved, or for any questions, e-mail glbt@mslaw.edu.

Sincerely,

Troy Daniels
Diversity Alliance President
Family Ties

One of the things MSLAW has always prided itself on is the close-knit nature of the community, particularly the camaraderie that develops among the students, faculty, and staff. Alumni recruit students, and students support each other through what inevitably turns out to be stressful years. Some have taken our “familial” environment to new highs. This issue, we focus on some of the many examples of MSLAW alumni and current students who are related, by blood or marriage, and who attend or attended MSLAW concurrently or consecutively.

Jill Aleshire, Esq. & Lyn Aleshire, Esq.

Jill Aleshire (’07) wanted to be a lawyer since she was three years old. Her younger sister Lyn (’07) decided the law was for her when her father’s business partner embezzled from the family, and she had a chance to observe the justice system first hand in elementary school. The sisters grew up in Winnetka, Illinois, and both attended Southern Methodist University in Dallas, Texas.

While the two sisters went to the same college and belonged to the same sorority, each was able to branch out and do her own thing. During college, Jill worked for the City of University Park as its Human Resources Intern, participating in almost every aspect of the city organization, especially the Court Department. Additionally, she interned with the Dallas County Public Defenders office in the Family Violence Court. Lyn was an active member of the service fraternity and in charge of SMU Rides her senior year.

After Jill’s internship was over, she was certain she wanted to be a lawyer. So she took the LSATs and did well enough to be accepted to a number of more traditional schools, but she chose MSLAW because “I liked the hands-on approach to learning at MSLAW and the fact that they really want you to learn from real experience. Plus, it was another place to see and live that I had not experienced. When you are in school it is the only time that you can move around without affecting your career or your family; you get to see where you fit and where you want to end up.”

Lyn had always wanted to attend SMU but became a bit hesitant to attend when Jill announced that was the school she would be attending as well. But she does admit to following Jill to MSLAW. Jill says they were both a bit “leery” of attending the same school simultaneously. But she recognized that although they had been together from elementary school through college, each had managed to find her own niche and flourish, and thus her concerns subsided. Lyn says she was never “worried,” but she was concerned they would “get on each other’s nerves” with so much togetherness—taking the same classes at the same time. In the end, Lyn says Jill is her best friend, and she welcomed having the support.

From the beginning of law school, the two studied together. Jill says, “Actually, from almost the first week of law school, we had a great study group. There were five of us to begin with first semester, and then second semester there was six of us. We all had our different patterns and ways of remembering things. People might think this would not work very well; however, we would all get together and review our outlines, go over previous tests together, and figure out different answers and thought processes to get through the tests and issues. Our class had a unique kind of unity when it came to law school. Everyone had a study group that they fit in with. We all worked very hard at our studies, so when it came time to let go and relax, we were able to get together and have a good time.” Lyn agrees: “We took almost every class together, so of course we studied together. If we weren’t studying in the
Father and son Tom and Jack O’Donohue share more than marathon-running and holiday dinners. Since 2007 they have been sharing the highs and lows of law school. Son Jack enrolled at MSLAW first. He cannot recall when he first decided that law school was for him, but being an attorney has been a “lifelong goal.” Jack graduated from Trinity College in Hartford in 2005, intending to take a year off before applying to law schools in New England. He attended an MSLAW open house and was so impressed with the school’s mission and faculty presentations that he decided to apply. But Jack had another connection to MSLAW: he is the son-in-law of Rosemary Brodette (’95), who sadly and prematurely passed away in September of 2003. Both his wife and his father-in-law encouraged Jack to apply to MSLAW because they appreciated the education it had afforded Rosemary. He enrolled in the fall of 2006.

Tom, a business software specialist, candidly admits that theirs is the story of “like son, like father.” Although Tom became interested in law school in the mid-’80s, he did not seriously entertain the possibility until Jack came to MSLAW and convinced his father to join him. Initially, Tom was a little hesitant about being at the same law school as his son, but, as he says, “Jack discouraged that kind of silliness.” The two show a bit of healthy competition. Jack acknowledges that his father’s grades in the core courses are better, but he is assured that “he knows the material just as well.” Because Tom is a year behind Jack, the two do not study together, although they do engage in a lively dialog about the law. Jack has given Tom good advice on law school exams and what professors to take, although Dad does not always follow his son’s advice. They did not have any classes together until last semester, when both were in Professor Devlin’s Business Associations class. Tom says that on one quiz and paper, Jack “kicked his butt.” But the jury will be out until final grades are in. Jack says his father should be thankful because “he gets free books” all...
Dan and Aurora Terpollari are taking “for better or worse” seriously: the husband and wife enrolled at MSLAW in August 2007, each leaving the business and financial worlds for careers in law. Dan, who already has an MBA, has wanted to be a lawyer since he was a child. Close to obtaining his CPA certification as well, he wants to combine his legal and business expertise practicing real estate and tax law, and consulting for businesses, both foreign and domestic. Before coming to the U.S. to reunite with his family, Dan, who was born in Albania, speaks five European languages, had been living in Germany, and had started the MBA program in the University of Siegen, Germany. Dan had served as the Director of Logistics for the French Red Cross organization during the Kosovo war crisis. He hopes to be able to utilize his multi-linguistic talents in the practice of law.

Aurora, who was also born in Albania, came to the U.S. about eight years ago as a foreign exchange student, living with an American family in Valliant, Oklahoma. She too has aspired to be an attorney since she was young. Aurora graduated from Worcester State College with a Bachelor’s degree in accounting and finance. After working for a year as an accountant, she decided to go back to school. She considered enrolling in an MBA program, but while both were studying for a portion of the CPA exam, she and Dan decided that law school was an ideal choice.

While searching on-line for LSAT courses, they came across MSLAW and determined it would be the perfect place for them both. It was close to home, reasonably priced, and offered a practical approach to a legal education. And Dan was impressed with the kind of student body MSLAW attracted. Aurora says that “[d]eciding to attend MSL together has been one of the best academic achievements and the smartest decision for both of us.”

Attending school and being married at the same time has its pros and cons, but overall, both are happy with the plan. The toughest part is the expense. Both
Carol Eliadi had always had an interest in law. As a nurse who worked for 20 years in a variety of jobs in the healthcare industry, she knew that there was an overlap between many aspects of law and medicine. For example, she worked for a group of physicians who served as expert witnesses in malpractice cases, and she would assist them in reviewing files and assessing whether the standard of care had been breached.

She chose MSLAW for a variety of reasons. “I needed to continue to work as I had three children, a mortgage, car payments, etc. MSLAW allowed much flexibility in terms of scheduling classes. I took most of my classes in the evening but enjoyed some Saturday classes and some day classes as well. The cost of the program was very reasonable. I liked the location and found the drive to be relatively easy. I also liked the application process, the interview, the on-site essay, and the fact that LSATs were not required.”

One of those three children, Matt, 24, has followed in his mother’s footsteps and is now a second year student at MSLAW. Matt’s route to the law was slightly less obvious. After graduation from UMass-Amherst, he spent time working for an outdoor education program which catered to young people from all walks of life. He was affected by the number of kids he encountered who had suffered injustices in their lifetimes. As much as he loved being outdoors, he knew he would be happier as an advocate for people such as the kids he met in the program. His mother encouraged his desire to be a lawyer—she had always stressed the importance of an education to all three of her children. So it was expected that she would encourage Matt to attend law school. Matt was also familiar with MSLAW. He recalls his mother describing it as “an underdog” in legal education. That was all Matt had to know, as he had “always rooted
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for the underdog.” He anticipated that MSLAW’s reasonable tuition would attract people “who really wanted to be there,” rather than only “those who could afford it.”

Matt says having a mother who has already gone through the program is a double-edged sword. “On the one hand, she knows what I am going through and understands why I am not as available as I used to be, or why I haven’t slept in two days. On the other hand, she doesn’t accept my busy schedule as an excuse to avoid family obligations because she knows that just going to law school is not nearly as grueling as going to school while having a job.”

Matt is enjoying his MSLAW education, although he admits candidly that it didn’t take long for him to realize that there was going to be a tough road ahead. Law school was nothing like any educational experience he had ever had. But soon, he says, “the fog lifted,” and he knew he would make it. The best part of MSLAW thus far? The education and the people he has met.

As for her MSLAW experience, Carol says, “MSLAW exceeded my expectations because I really had no frame of reference upon entering the school. I learned from great teachers, studied very hard, and passed the bar exam on my first try. Had I been disappointed at all, I would not have recommended the school to my son.”

Carol is currently Assistant Dean of Nursing at Massachusetts College of Pharmacy and Health Sciences (Worcester campus). “We have a 16-month second bachelor’s degree program in nursing. Although MCPHS is one of the oldest colleges in Massachusetts, our nursing program is new. In addition to my administrative duties for the program, I also teach research, the nurse and the law, leadership, and fundamentals. We are also very busy developing a graduate nursing program on my campus.” She is frequently consulted by nurses who have issues with the Board of Registration of Nursing or have been the subject of wrongful termination, and works in conjunction with alumnus Frank Ingram (’96). Carol handles the practice standards, and Frank does the litigating.

Carol also volunteers for the Juvenile Court on cases involving medical needs. “I have been involved in bone marrow transplant consents, do-not-resuscitate decisions, medication administration cases, surgical consents, and chemotherapy consents. I am happy to do this for the Juvenile Court (pro bono) as they provided me with such a wonderful learning opportunity as a student.”

In addition to Matt, Carol has a daughter and another son, who is married and has a daughter. She lives in Shrewsbury with a dog and two cats.

Matt has not yet made up his mind what he would like to do after graduation. He wants to experience as many areas as possible before he decides. Yet his decision will most likely be the area that incites the most passion in him. “In order to have a successful career in any capacity, I believe that you need to experience as many areas as possible before he decides. Yet his decision will most likely be the area that incites the most passion in him. “In order to have a successful career in any capacity, I believe that you need to be passionate about what you do. The day you lose the fire is the day you might as well quit. I have to try to find the area of law that ignites the most passion for me, and the area that I can bring the best of me into. I want to advocate for people who feel as though they have no voice in the legal system, who have been dealt a hand that might need some reshuffling. Where that brings me is anyone’s guess.”

continued on next page

Alumni News

John McKinnon (’99) has opened his own office in Campton NH (Waterville Valley) practicing what he calls “little people law” in district court. . . Jenna Koerper Brownson (’05) has gone into private practice after working for CPCS for several years. Her office is in Lowell, and she hopes to focus on representing working families . . . Martha Gill (’07) is serving a year as a Law Clerk to the Justices of the Juvenile Court . . . Ursula Furi-Perry (’06) continues to publish books and articles related to lawyers and paralegals. Her recent publications are 50 Unique Legal Paths: How to Find the Right Job (just published by American Bar Association Publishing. It describes career options for recent law graduates and for attorneys looking for a career change) and Law School Revealed: Secrets, Opportunities and Success! (to be published by Jist Publishing next May. It offers tips and advice for academic success, practical education, balancing law school and the rest of your life, and making the most of your law school experience). She and Professor Coyne are just finishing a book,
Trial Prep for Paralegals, which will be published by the National Institute for Trial Advocacy. It focuses on effectively and efficiently helping one's attorney in preparation for trial. You can read more about Ursula at www.furiperry.com.

Mike Broderick (’04) is the new President of the Young Lawyers Division of the Massachusetts Bar Association. Michael is the Assistant Regional Counsel for the Department of Children and Families Northeast Legal Office in Lawrence.

Susan B. Frankfort (’05) has been named as a board member of the Massachusetts Bar Association Young Lawyers Division (2008-2009) representing Essex County. Susan runs a solo practice on the North Shore of Boston practicing in the areas of Wills, Trusts and Probate of Estates. Susan is also a Pledge Partner of the Massachusetts Bar Association Lawyers Eco-Challenge. Pledge partners make a commitment to making the practice of law more environmentally friendly by implementing “green” practices throughout their law practice and building awareness in the community.

Maureen Mooney (’00), who has been a state rep in New Hampshire was recently named one of the “Best Lawyers in America” for New Hampshire by a top polling firm.

Doug Martin (’02) has been named President-elect of the Massachusetts Black Lawyers Association. Doug practices with the Boston firm of McKenzie and Associates.

Fran Mannella (’07) is Manager of Construction Subcontracting at Babcock Power, a group of companies that deal in the engineering, manufacturing and servicing of generators, boilers and other power producers. Fran has been working at Babcock since his last semester in law school. He was elevated to his present position after he passed the bar exam. Fran is quick to admit that his MSLAW degree went a long way in helping him secure this position—one that combines his 30 years in the engineering and construction business with his new career in law.

Vincent DeVito (’94) has been named partner at the Boston office of Bowditch & Dewey LLP. Vin, an energy and climate change lawyer who will work in the firm’s renewable energy group, previously worked for Pepper Hamilton’s New York office. He is a former assistant secretary of energy for policy and international Affairs at the U.S. Department of Energy.

Roy Melnick (’04) took a position as the Chief of Police of St. John’s, Arizona. He was formerly Chief of Police in Ashland and a member of the Londonderry, New Hampshire police force.

John Bosse (’07) is now a member of the Berkshire District Attorney’s office. John had been working in the office of the City Solicitor of Salem, MA, and will now be living in Pittsfield.

Al Reinhart (’08) is establishing a solo practice in central Massachusetts focusing on intellectual property, compliance, and e-discovery. He also teaches graduate courses in software engineering, IT management, and information security at Brandeis University, is an active volunteer in the IEEE (Institute of Electrical and Electronic Engineers), is involved with the Electrical and Computer Engineering Department at Worcester Polytechnic Institute, and is studying for the Patent Bar exam.

We wonder when he has time to sleep!

Pedro Lara (’98) and his wife, Tena, adopted a son, Ammi Ray Giovanni, on November 21, 2008, National Adoption Day. Ammi is the third child Pedro and his wife have adopted. Judge Sanchez specifically recognized Pedro, who regularly appears before the Judge when practicing juvenile law. As trial panel attorney for CAFL, Pedro also assisted in In the Matter of Hilary, the 2008 SJC case that expanded the right to counsel to include parents in CHINS proceedings.

Maura Richards (’06) practices with the law offices of Mark Gladstone, P.C. in Canton. Maura reports that she practices in the areas of civil litigation and real estate, and she is involved in a number of cases concerning the Bayview Crematory in New Hampshire, based on its mishandling and illegal treatment of human remains.

Eugene Lumelsky (’00) has an office in Shrewsbury, where he practices personal injury, criminal and family law. As one of only a handful of Russian speaking attorneys outside of Boston and its suburbs, Eugene frequently travels all over Massachusetts attending to clients of Russian descent.

Josef Gazzola (’96) is practicing in Natick, where he is embroiled in a number of post-conviction relief cases.

Bill Amann (’00) has joined the firm of Sheehan Phinney Bass & Green PA in Manchester as Of Counsel and where he will be practicing in the area of bankruptcy, real estate and commercial law.

David Laiche (’07) married Kylah Coffey (’08) on November 1, 2008. David is working over at General Dynamics as a contracts administrator reviewing legal documents and proposals for the Department of Defense, and Kylah is a paralegal in New Hampshire.
The long-term financial implications of unconditional and indefinite, life-time alimony awards, as judgments of the Probate and Family Court, often create an unending and unfair economic burden on the obligor. Uniformly, the judiciary, counsel, and clients are affected by alimony factors that are subject to wide interpretation, applied inconsistently from judge to judge and even from case to case, and fail to address societal realities. The current statutes and case law require judges to enter “decisions based on speculative projections of each person’s future expenses and income.”

Awards that provide spousal alimony for indefinite periods of time are common and presume and foster the inability of each party to take fiscal responsibility for his or her future needs in perpetuity. Additionally, they place limits on each party’s post-divorce economic and social recovery. For example, the possibility of an obligee’s co-habitation or engagement in alternative living arrangements where financial support from another individual is available is not reflected in the award calculation, thereby creating an unjust burden to the obligor.

But repairing statutes alone governing alimony is insufficient to solve all the financial problems relating to the dissolution of a marriage. This discourse cannot be conducted in a vacuum when an obligor’s resources are not infinite. Indeed, many times, the payor is not only obligated to pay alimony, but also child support. Typically, child support guidelines “impose the upper limits of financial contribution of a supporting spouse,” and judges may make erroneous assumptions about the payee’s ability to survive post-divorce.

Therefore, public policy and social engineering require an overarching examination of alimony.
ny as a legally cognizable concept. “After all, if marriage is terminable at will, and marital support obligations end upon divorce, what is the justification for imposing continued financial responsibilities upon the parties?”7 Although society has come a long way from the time when alimony was imposed as a punishment on the husband for his wrongdoing,8 judges need to be more flexible in the award of alimony, given the myriad of differing economic, social, and psychological factors at play in marriages today. Many other states have recognized the inadequacy of support statutes that focus on maintaining a spouse’s standard of living during marriage, using unquantifiable factors, and are increasingly using such tools as durational or rehabilitative alimony.9 It is this writer’s theory that faithful adherence to the Massachusetts statute, and indeed, appellate case law construing the statute, has resulted in the inadequate consideration of alternative financial resolutions in certain divorce cases. Probate and appellate court judges should recognize that certain situations merit consideration of something other than lifetime or indefinite alimony awards. Massachusetts judges ought to be encouraged to enter judgments tailored for special circumstances, for example, the dissolution of short-term marriages without an alimony award, rehabilitative alimony for dissolution of mid-range marriages where the parties have potential to lead productive professional lives, and honoring contracts consensually entered into between the parties that are nonetheless inconsistent with statute. The length of a marriage is not and should not be the primary determinate of life-time alimony.10 Family courts should be encouraged to place reasonable time limits on alimony awards, and appellate courts should give deference to these lower courts’ awards, and, to the extent that these goals necessitate a change in the applicable statutes, then the legislature should act accordingly.11

Divorce Trends
Recent national literature suggests the nature of family life has changed dramatically over the past several years, with fewer persons marrying and those who do so, marrying later in life.12 However, in Massachusetts, a dissimilar trend emerged regarding the number of marriages.13 From 2000 to 2004, the number of marriages increased from 37 to 41.5 per thousand.14 Today, the Massachusetts Probate and Family Courts report that in nearly fifty percent of all divorce cases, the parties are self-represented. Eighty percent of divorce cases involve a request for modification of the awards, and the modification process is one in which the parties are more likely to be represented by counsel than in the

7 Collins, supra note 3.
8 See Laufer-Ukeles, supra note 6, at 24 n.109. The author acknowledges where young children are involved, the likelihood that durational awards would be appropriate is diminished considerably.
9 See, e.g., Jennifer L. McCoy, Spousal Support Disorder: An Overview Of Problems In Current Alimony Law, 33 Fla. St. U. L. Rev. 501, 511 et seq. (2005); Mary Frances Lyle & Jeffrey L. Levy, From Riches To Rags: Does Rehabilitative Alimony Need To Be Rehabilitated?, 38 Fam. L.Q. 3 (2004); Frantz & Dagan, supra note 5. Although the trend in many states is towards increased use of short-term alimony, the concept is said to have emerged as a result of the Uniform Marriage and Divorce Act of the early 1970s, and was the subject of some discussion as early as two decades ago. See, e.g., Joan M. Krauskopf, Rehabilitative Alimony: Uses And Abuses Of Limited Duration Alimony, 21 Fam. L.Q. 573 (1988); C.L. Greene, Alimony Is Not Forever: Self-Sufficiency and Permanent Alimony, 4 J. Am. Acad. Matrim. L. 9, 12 (1988); Herma Hill Kay, Equality and Difference: A Perspective on No-Fault Divorce and Its Aftermath, 56 U. Cin. L. Rev. 1, 78 (1987) (cited in Lyle & Levy, supra note 9, at 10, ns.35, 36).
10 See Laufer-Ukeles, supra note 6, at 60, discussing the traditional partnership view of alimony which considered length of the marriage when determining alimony awards.
11 Indeed, this has been recognized as the trend by many participants in and commentators of the family court system. See McCoy, supra note 9.
14 Probate and Family Court Department, Annual Report Statistics, Fiscal Years Ending 2001 to 2006. These reports are available as pdf files from the Probate and Family Court website, http://www.mass.gov/courts/courtsandjudges/courts/probateandfamilycourt/.
divorce action itself at the outset. Nonetheless, a significant number of parties involved in proceedings related to the dissolution of a marriage are left on their own to decipher divorce laws containing criteria that are not clearly defined.

Nationally, more marriages end by divorce than by death, although the divorce rate has been on the decline since it peaked in 1981, and marriages are, overall, lasting longer. Similarly, the number of divorces granted in Massachusetts declined from 18.6 to 14.1 per thousand during the period from 2000 to 2004.

Background: How Alimony has Historically been Awarded in Massachusetts

The methodology used to calculate alimony awards in Massachusetts has remained essentially unchanged since 1974 when Mass. Gen. Laws ch. 208, § 34 was amended. Since that time, our courts have provided numerous interpretations of that provision. In determining the amount of alimony, the court considers:

- the length of the marriage, the conduct of the parties during the marriage, the age, health, station, occupation, amount and sources of income, vocational skills, employability, estate, liabilities and needs of each of the parties and the opportunity of each for future acquisition of capital assets and income.

From a judge’s perspective, the statutory factors are clear. Permanent lifetime alimony may be awarded to plaintiffs under this statute even though the recipient may have the ability to obtain work, can be self-supporting with career or job rehabilitation, and has familial and community support. Massachusetts appellate courts and many trial judges scrupulously apply the statutory factors, rejecting the use of mathematical formulae to arrive at a number, even when those formulae are proposed by knowledgeable experts in the field, such as the formulae proposed by the Honorable Edward M. Ginsburg.

Massachusetts Courts’ Alimony Decisions

Massachusetts’ family courts have been testing the proverbial alimony waters for several decades. In general, an award of both property and alimony upon a divorce is governed by the factors set forth in Mass. Gen. Laws ch. 208, § 34. Case law establishes that every factor must be considered, but Probate Court judges retain discretion in fashioning an award. The overarching consideration in an alimony award is the “[spouse’s] need for support and maintenance in relationship to the respective financial circumstances of the parties....” And “[t]he standard of need is measured by the ‘station’ of the parties, i.e., by what is required to maintain a standard of living comparable to the one enjoyed during the marriage.”

In Massachusetts, a party seeking modification of an alimony obligation must prove a material change in circumstances justifying the amendment. The trial judge has considerable discretion in making that determination, and his or her finding will not be set aside unless the reviewing court considers the change to be insufficient to warrant modification.
determines that the record contains no support for the decision. For example, where Husband sought to reduce alimony due to his failing health and inability to work, the appeals court upheld the trial judge’s determination that Wife, who was not self-sufficient, lacked a college degree, and had a limited work history, was entitled to alimony, albeit reduced, due to overstated expenses. A spouse’s cohabitation alone does not justify downward modification; neither does a substantial increase in the non-custodial parent’s earned income where there is no material disparity in the standard of living in the respective parents’ households.

The Appeals Court has held that an alimony obligation is continuous and ongoing, even when the spouse is not within the physical jurisdiction of Massachusetts courts. Even though Husband moved out of state and owed arrearages, his absence from this jurisdiction did not toll the payment of alimony, particularly where he maintained sufficient contacts with the Commonwealth during that period of time. Where Husband filed a petition to modify by gradually reducing his unallocated alimony and child support payments to his first Wife, on the grounds that he had effectively been forced out of business and the youngest child had been emancipated, the Appeals Court held the trial judge’s allowance of his motion constituted an abuse of discretion and reversible error. The trial judge failed to give appropriate consideration of all relevant circumstances, inter alia, that the Husband owned real property that could be utilized in determining his obligation (even though one property was acquired after the divorce).

Rehabilitational or Durational Alimony in Massachusetts

The application of the factors contained within Mass. Gen. Laws ch. 208, § 34 have permitted awards of durational alimony in Massachusetts but with some significant “circumspection.” A finding that a party is unemployed or under-employed forms one of the bases for durational alimony. In one case, the Husband’s education and experience in the nuclear power industry yielded no prospects for employment, and he was under-employed at that time. The Master who tried the case found that the Husband had the capacity to improve his standard of living, and that formed the basis for the temporary award. However, because the Master’s findings did not reflect how he arrived at the duration and dollar amount, the Appeals Court remanded the case for further consideration of the issue. The Court articulated its concerns about “durational alimony.” “Alimony of limited duration, however, ‘is viewed with some circumspection in Massachusetts . . . We have admonished that ‘an arbitrary limitation on the duration of an alimony obligation to a spouse whose needs are current and predictable is unwarranted when based on an assumption of future events, the occurrence of which is uncertain or unpredictable’ . . . We have also emphasized that ‘[b]efore awarding rehabili-

32 Under this concept, alimony is awarded for a period of time that may correspond with the duration of the marriage, particularly where the union has been short or medium term. Lyle & Levy, supra note 9, at 10.
33 Adlakha v. Adlakha, 65 Mass. App. Ct. 860, 870 (2006)(quoting Bak v. Bak, 24 Mass. App. Ct. 608, 622 (1987). In Rosenblatt v. Kazlow-Rosenblatt, 39 Mass. App. Ct. 297, 299 (1995), the Appeals Court reversed the probate judge’s lump sum award of “transitional” alimony, the purpose of which was “to phase out (or scale down) . . . the financial status [the wife] expected and enjoyed while married to her husband, and to return to being single and economically self-sufficient.” Since the goal of the award was to permit the wife time to re-establish the standard of living she had before marriage, and alimony is designed to permit the spouse to maintain the standard of living enjoyed during marriage, the award was reversed.
ative alimony, the recipient spouse’s realistic prospects for self-sufficiency must be ‘considered with care.’”35

Similarly, the Probate Court awarded a husband alimony from his wife for a total period of two and one-half years, combining the duration of the temporary order with the award entered as part of the judgment of divorce nisi. The Appeals Court held that the judge acted within his discretion because, under Mass. Gen. Laws ch. 208, § 34, the trial judge has broad discretion to determine how much, if any, alimony is to be paid. Here, the judge considered the appropriate factors including Husband’s age, vocational skills, and employability and found that Husband was capable of fully supporting himself and was unemployed by choice. The judge could rightly assume, based upon Husband’s background and skills that, if he conscientiously looked for work, he would be able to meet his needs independently after a brief period of rehabilitative support.36

Likewise, in limiting the duration of Wife’s alimony award to 10 years after a mid-length marriage, the judge considered the wife’s age, health, education, vocational skills, and experience and noted alimony payments for a limited duration are warranted.37 Even though Wife held a B.S. in economics from the University of Pennsylvania, was a non-practicing attorney and a partner in the family-run restaurant business, the appellate court held that the trial judge erred because the possibility for future potential earned income and wife’s expectation of substantial inheritance were too indefinite in time to warrant a durational limitation on alimony.38

Similarly, Husband sought the elimination of the order of alimony because of Wife’s earning capacity.39 After trial, the judge reduced the amount of alimony paid by the husband finding “[Wife] should be expected to perform some gainful employment rather than have [Husband] . . . required to subsidize her avocation and thus, her lifestyle.”40 On appeal, the court held that reduction of the alimony award was an abuse of discretion, absent any evidence of a material change in circumstances since the time of the award.41

The Welfare State

Because alimony is need-based, it has been likened to welfare.42 Advancing this argument further, some have hypothesized that alimony is awarded to save public funds by ensuring that subsistence support for formerly married persons is provided by ex-spouses rather than shifting the burden to taxpayers under some form of welfare program.43 This perspective suggests state-mandated protection for a unique class of persons, i.e.,

35 Id. at 870 (internal cites and footnotes omitted). The Appeals Court noted that this was not a case where the Husband was intentionally underemployed or was involved in some temporary situation such as enrollment in an educational program, where durational alimony might be more apparently appropriate. Id. at 871.
38 Id. at 510.
39 The Wife was a painter. Husband contended this was just a pastime, and she could earn considerably more at another job. The Appeals Court said nothing had changed since the initial award was made, and concluded the record supported the finding that painting was in fact her business. Kelley v. Kelley, 64 Mass. App. Ct. 733, 740-741 (2005).
41 Id. at 742. See also Sampson, 62 Mass. App. Ct. at 369 (the Appeals Court reversed award of alimony to the Wife for three years where order resulted in marked decrease in Wife’s standard of living vis-à-vis Husband’s, and standard both enjoyed during long-term marriage and Husband’s following divorce and Wife’s financial future was unpredictable); Ross v. Ross, 50 Mass. App. Ct. 77 (2000) (the Appeals Court reversed order of alimony until Husband reached 65, 11 years in the future, because, although durational award may be appropriate where a husband and wife of comparable professional and economic status divorce, termination in this case was based on event unrelated to spouse’s financial need).
former spouses, that is not extended to others who stand in equally or perhaps even more compelling relationships to the paying party.\textsuperscript{44} Positing that alimony is a short-term need until such time that the obligee can become self-sufficient moves the argument for alimony from permanent to short-term and rehabilitative.\textsuperscript{45} Life-time or indeterminate alimony awards no longer reflect the nature of many modern marriages and socio-economic trends. Continued judicial adherence to the presumption that such an award is warranted leaves many litigants tied to each other well beyond a reasonable period of time and causes extreme frustration with the legal system.

**Fresh Start or Reinvention?**

Numerous studies have assessed the status of alimony. In 2002, the American Law Institute (ALI) conducted a prominent undertaking on the subject.\textsuperscript{46} Subsequently, the theory of "marital residuals" developed.\textsuperscript{47} Since the publication of the ALI studies, other jurisdictions (including Canada) have passed laws and continue to amend alimony or spousal support legislation. A synopsis of the work of some of these jurisdictions follows.

**ALI Principles of Family Dissolution**

In 2002, the American Institute for Law (ALI) published a major treatise in the area of family dissolution.\textsuperscript{48} It suggested that alimony should be awarded as compensation for losses incurred by virtue of the marriage, rather than to address needs of the obligee spouse, and ought be limited to the following conditions, i.e., when there has been: (1) a marriage of significant duration where the "loss" in living standard is experienced by the spouse who has less wealth or earning capacity; (2) an earning capacity loss arising from attending to the care of a child or children of the other spouse; (3) an earning capacity loss arising from the care of sick, elderly, or disabled third-parties in fulfillment of a moral obligation of the other spouse or spouses jointly; (4) a loss incurred before the spouse realized a fair return from his or her investment in the other spouse’s earning capacity; and (5) an unfairly disproportionate disparity between the spouses in their respective abilities to recover their premarital living standard after a short marriage.\textsuperscript{49}

An award under the ALI method may result in alimony that is fixed (rehabilitative) or indefinite (permanent) and may consider the age of the obligee and the length of the marriage. Numerical details are left to the legislatures.\textsuperscript{50} The advantage to this approach is that it is based upon the marital contribution of each of the spouses, and it reduces the amount of judicial discretion by providing fixed rules.\textsuperscript{51} As one commentator noted, under the ALI approach, alimony and property division become almost fused into one award.\textsuperscript{52} The negatives include: (1) it employs subjective standards requiring judicial intervention; (2) it relies on income expected at the time of dissolution rather than monies as or when received; (3) there is no cogent reason to elevate sacrifices of a career or other opportunities over other similar sacrifices; (4) it provides a five-year minimum period before any income sharing begins; (6) alimony terminates upon remarriage, and (5) it does not consider the parental partnership theory.\textsuperscript{53}

\textsuperscript{44} Id. at 48.

\textsuperscript{45} See Massachusetts Alimony Reform, supra note 4.


\textsuperscript{47} See Collins, supra note 43.

\textsuperscript{48} See American Law Institute, supra note 46.

\textsuperscript{49} Id. at §§ 5.04-05, §§ 5.11-12. See also Philomila Tsoukala, Gary Becker, Legal Feminism, And The Costs Of Moralizing Care, 16 Colum. J. Gender & L. 357, 424 (2007).

\textsuperscript{50} Examples applying the ALI approach are contained in Appendix A.


\textsuperscript{52} Id.

Theory of Marital Residuals

This hypothesis premises that sharing of post-divorce income should reflect the returns flowing from efforts made while the marital joint venture was in operation and continue to pay out the financial fruits of the marriage. Postmarital income, as the author calls it, is “an equitable sharing of residual economic benefits resulting from work done during the marriage . . . The duration of sharing would be set as a function of the marriage . . . and its amount as an ever-decreasing percentage of the differences in the former spouse’s incomes.” Collins likened it to payments a lawyer might continue to receive after dissolution of the partnership, where the work had been performed pre-dissolution, but the remuneration was not received until after the date.

Views of this theory are, as expected, pro and con. On the plus side: (1) judicial intervention is not required; divorcing couples could calculate the amounts each would receive pursuant to a well-settled formula, with the percentages decreasing over time until total financial separation was obtained; (2) transfers continue without reference to either person’s marital status or living arrangements; (3) payment would not factor as a tax consequence to the paying party, nor would it be reportable income by the recipient; and (4) marital fault would not be considered. On the down side, however, this formulaic approach does not consider the actual need of the parties. For examples of how this approach works, see Appendix B.

Durational Alimony in Other Jurisdictions

The New Mexico Experiment

In January 2001, Honorable Deborah D. Walker, presiding judge of the family court, Second Judicial District, Albuquerque, New Mexico, authorized a committee of family-law practitioners and accountants to study the alimony issue and make recommendations to family court judges as to whether alimony guidelines would be appropriate for use in Bernalillo County.

The goal of this committee was to reduce alimony awards to a simple, one-page calculation similar to child support guidelines in Massachusetts. The statutory factors in effect at the time included: (1) age and health of spouses; (2) current and future earnings and earning capacity; (3) good-faith efforts to maintain employment; (4) reasonable needs (standard of living during the marriage, maintenance of medical insurance and appropriateness of life insurance); (5) duration of the marriage; (6) amount of property awarded or confirmed; (7) type and nature of assets; (8) type and nature of liabilities; (9) income producing properties; and (10) agreements entered into in contemplation of the dissolution of the marriage or legal separation.

The committee examined “first wave” reforms or those reforms that allowed for some type of limited time-period alimony, whether transitional or rehabilitative. Next, it reviewed “second wave” reforms whereby states remedied shortcomings resulting from “first wave” reforms. Additionally, the committee reviewed the ALI study and pro-

54 See Collins, supra note 43.
55 Id. at 49-50. The author describes the method by which numerical allocations would be made as follows:

In lieu of “alimony,” “spousal support,” or “maintenance,” a series of postmarital income adjustments (PIAs) would be made between the separating spouses. During a first period immediately following separation, a couple would share equally all disposable income (defined as gross income, less income taxes and Social Security assessments), as it presumably had been during the marriage. Thereafter, the parties would share a decreasing percentage of the difference between their disposable incomes, declining by 10% in each period, with the length of each period—and hence the angle of the decline in transfers—set as a function of the length of the marriage. By the end of a couple’s economic phase-out period, each party would be financially independent, regardless of their current income, perceived needs, past contributions to the marriage, or projected ability to pay. [Footnote omitted]. Id. at 51.
56 Id. at 49.
57 Id. at 65-70.
59 Id. at 29.
60 Id. at 33.
posals, the Theory of Marital Residuals, and alimony guidelines and decisions of the following jurisdictions: California; Pennsylvania; Michigan; Fairfax County, Virginia; Maricopa County (Phoenix), Arizona; Tonopah, Nevada; and Oregon.

In the end, the committee developed a formulaic, one-page worksheet for alimony calculations but did not recommend durational guidelines. Rather, duration was and remains subjective and unique to each case depending upon the purpose and goals of an alimony award. The New Mexico Supreme Court authorized a six-month experiment during which time the guidelines will be used in settlement negotiations.

Today, New Mexico spousal support, as codified, may be rehabilitative, transitional or indefinite. The court considers:

(1) the age and health of and the means of support for the respective spouses; (2) the current and future earnings and the earning capacity of the respective spouses; (3) the good-faith efforts of the respective spouses to maintain employment or to become self-supporting; (4) the reasonable needs of the respective spouses, including: (a) the standard of living of the respective spouses during the term of the marriage; (b) the maintenance of medical insurance for the respective spouses; and (c) the appropriateness of life insurance, including its availability and cost, insuring the life of the person who is to pay support to secure the payments, with any life insurance proceeds paid on the death of the paying spouse to be in lieu of further support; (5) the duration of the marriage; (6) the amount of the property awarded or confirmed to the respective spouses; (7) the type and nature of the respective spouses’ assets, provided that potential proceeds from the sale of property by either spouse shall not be considered by the court, unless required by exceptional circumstances and the need to be fair to the parties; (8) the type and nature of the respective spouses’ liabilities; (9) income produced by property owned by the respective spouses; and (10) agreements entered into by the spouses in contemplation of the dissolution of marriage or legal separation.

Texas

Under Texas law, it is presumed that spousal maintenance is not warranted unless the spouse seeking maintenance has exercised diligence in 1) seeking suitable employment or 2) developing the necessary skills to become self-supporting during a period of separation and during the time the suit for dissolution of the marriage is pending. Therefore, duration of marriage and a strict time limitation for the award form the bases for Texas spousal maintenance.

Spousal maintenance is considered only if:

1) the duration of the marriage is 10 years or greater, 2) the spouse seeking maintenance lacks sufficient property, 3) to provide for the spouse's minimum reasonable needs and the spouse seeking maintenance is unable to support himself or herself through appropriate employment because of an incapacitating physical or mental disability; is the custodian of a child of the marriage of any age who requires substantial care and personal supervision because a physical or mental disability makes it necessary, taking into consideration the needs of the child, that the spouse not be employed outside the home; or clearly lacks earning ability in the labor market adequate to provide support for the spouse's minimum reasonable needs.

Thereafter, Texas puts upper limits on the amount of alimony to be paid. The following factors must be assessed:

(1) the financial resources of the spouse seeking maintenance, (2) the education and employment skills of the spouses, the time necessary to acquire sufficient education or

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61 Id. at 52.
62 Id. at 56.
63 Id. at 66.
65 Tex. Fam. Code Ann. § 8.053. Historically, Texas, a community property state, had no provision for alimony, reasoning it would be inconsistent with their marital property laws. However, in 1995 a restricted form of alimony was passed by the legislature, designed to keep newly divorced persons from having to resort to public assistance. Redman, Domesticity And The Texas Community Property System, 16 Buff. Women's L. J. 23, 30 (2008)
66 Tex. Fam. Code Ann. § 8.051. Eligibility for Maintenance; Court Order.
training to enable the spouse seeking maintenance to find appropriate employment, the availability of that education or training, and the feasibility of that education or training, (3) the duration of the marriage, (4) the age, employment history, earning ability, and physical and emotional condition of the spouse seeking maintenance, (5) the ability of the spouse from whom maintenance is requested to meet that spouse's personal needs and to provide periodic child support payments, if applicable, while meeting the personal needs of the spouse seeking maintenance, (6) acts by either spouse resulting in excessive or abnormal expenditures or destruction, concealment, or fraudulent disposition of community property, joint tenancy, or other property held in common, (7) the comparative financial resources of the spouses, including medical, retirement, insurance, or other benefits, and the separate property of each spouse, (8) the contribution by one spouse to the education, training, or increased earning power of the other spouse, (9) the property brought to the marriage by either spouse, (10) the contribution of a spouse as homemaker, (11) marital misconduct of the spouse seeking maintenance and (12) the efforts of the spouse seeking maintenance to pursue available employment counseling as provided by statute.67

Once the court has determined the maintenance requirement, it may not order maintenance that requires an obligor to pay monthly more than the lesser of $2,500 or 20 percent of the spouse's average monthly gross income.68

Michigan

Michigan’s divorce statute provides that the court may require either party to pay alimony.69 Relevant factors include length of marriage, ability to pay, past relations and conduct, ages of the parties, needs of the parties, ability to work, health, fault, and all other circumstances of the case.70

In the late 1970s, a group of attorneys met to revise alimony and child support guidelines.71 What resulted was a proposed award structure where the worst possible alimony claim (where “everyone agrees’ the assertion is pathetic”) is designated as zero, and the best as 100 where “everyone agrees’ permanent alimony should be a lock.”72 Additionally, duration of the marriage, income (actual or construed) of the claimant, education, age, and number of children of the marriage are also considered. Each of these factors was assigned a range, with the greatest total for all factors being 100. Parties are awarded points depending upon where they fall within the prescribed scale, and the number for each factor is totaled (Sub-definition). The total relates to a period of alimony award (see table below). For instance, if the assertion for alimony is "poor" (where everyone agreed the alimony claim was unsupportable), and the other factors are not compelling, no alimony would result.

Subsequently, a practicing Michigan attorney developed a software product to facilitate his Family Law practice, copyrighted the product as “Alimony Program,” and established Marginsoft to market and distribute the product. The main features of this program include alimony and maintenance recommendations, child support calculations, federal tax and FICA estimators, unallocated support, and defined-benefit pension plan valuations calculators.73 In addition to earnings and assets, other factors include child care, split and shared child custody arrangements, high

<table>
<thead>
<tr>
<th>Sub-definition</th>
<th>Period of Alimony</th>
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<tr>
<td>Under Margin (25-42)</td>
<td>No alimony</td>
</tr>
<tr>
<td>At Margin (25-50 or 42-50)</td>
<td>Possible Award</td>
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<tr>
<td>Short Term Award (50-66)</td>
<td>60 months or less</td>
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<tr>
<td>Long Term Award (60-83)</td>
<td>72 months or less</td>
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<tr>
<td>Permanent Award (73-100)</td>
<td>Permanent alimony</td>
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72 Id.
level earnings, personal tax exemptions, standard and itemized deductions, self-employment earnings, tax credits, and earned income credits.

In 1989 the Michigan Supreme Court Task Force on Gender Issues in the Courts recommended statewide alimony guidelines to increase equity and consistency across the state. This recommendation followed a judicial survey which found that most judges knew of but very few used the guidelines as a presumptive determination . . . [and] considered ["Alimony Program"] a useful tool to analyze and settle cases.

Today, Marginssoft provides the “Alimony Program” to the court systems in Maryland, Washington, Kentucky, and Michigan where the states provide it to their practitioners free of cost. Marginsoft’s website indicates that a Florida version is also available.

Moving Forward in Massachusetts

Current Legislative Actions

In the winter 2006-2007 legislative session, Representative Stephen P. LeDuc, (D), 4th District, Middlesex, introduced legislation, which if adopted, would substantially alter the manner in which alimony awards are made.

Reduced to the simplest of terms, the bill would remove existing Mass. Gen. Laws ch. 208, § 34 factors and instead require that the following be considered or applied: (1) earning capacity, (2) employment counseling and training, (3) ability to self-support within a reasonable period of time, (4) alimony not to exceed 12 years, (5) a declining factor of 10% per year if alimony were payable greater than five years, (6) adjustment with the Consumer Price Index (CPI), (7) recognition of ability to pay, (8) duration of marriage, (9) age and health of the parties, and (10) support given by the non-supporting party to the supporting party for the attainment of education, training, or licensure.

This proposed legislation was last reported as lingering in the Joint Committee on the Judiciary.

Recommendations and Summary

Today, Massachusetts has an opportunity to eliminate the almost exclusive emphasis on permanent alimony awarded to compensate for future need of a party and respond to fundamental fairness, reality, and public policy. Stakeholders, such as lawyers, legislators, and judges, should focus on: 1) whether alimony laws should be restructured to encourage Probate and Family Courts to consider the rehabilitative potential of the obligee; 2) whether alimony should be determined based upon numerous factors, including: duration of the marriage, compensation to parties, and consideration of need; and 3) whether alimony and its relational components should be arrived at using a mathematical formula.

Next, basic tenets that underlie an award of alimony should be adopted. The focus of the courts should shift from alimony awards that are designed to maintain a spouse’s standard of living during the marriage to assisting a spouse in achieving post-divorce financial and psychological independence. Guidelines, whether statutory or by case law, should be adopted to assist a court in identifying: 1) divorces requiring no alimony award; 2) mid-range marriages in which the only alternative punishes the spouse who has foregone professional growth during the marriage in order to focus on the caretaking role. In 1988, Joan Krauskopf criticized the fledgling concept because it required judges to project earning capacity when unknown and unforeseen factors may significantly interfere with the projection. See Krauskopf, supra note 9. Additionally, early cases in which durational alimony was awarded, particularly to women who had been in long-term marriages and out of the workforce for a significant number of years, truly abused the concept and turned many judges off from utilizing short-term alimony in other more appropriate circumstances. See Cynthia Lee Starnes, One More Time: Alimony, Intuition, And The Remarriage-Termination Rule, 81 Ind. L.J. 971, 990 (2006).
alimony ordered would be a rehabilitative component, e.g., support during vocational retraining; 3) limited permanent alimony thresholds, and 4) the ability to revisit alimony when substantive material changes in circumstances are identified.

Divorces Requiring No Award

When parties are self-sufficient with independent means or earning capacity, alimony should not be a consideration. Its goal is not to equalize wealth or earning power, but to equitably distribute assets and hold the parties accountable for their post-dissolution self-sufficiency. The parties would forgo need-based alimony, compensation for contribution or continued support required for rehabilitation. This proposal does not negate any requirement for child support.

Furthermore, the parties would presumptively take what they brought into the marriage and divide what assets were accumulated during the marriage. By operation of law, where antenuptial and post-nuptial agreements are in place, no additional alimony would be awarded, provided the agreement was found to be enforceable.

Key candidates for this option would include short-term marriages, marriages between double-income earners, and those in which the parties have independent sources of income.

Rehabilitative Component

Frequently, alimony is awarded to a spouse of a long-term marriage where there may be children of the marriage who are nearing emancipation. Currently, a judge’s first reaction is to assign permanent alimony. However, if, for example, the non-working spouse 37 years old, and this individual’s ability to become self-sufficient and rejoin the economic marketplace is unlimited, then a short-term alimony award would be appropriate.

Couples make support agreements throughout the term of their marriages, whether spoken or unspoken. A spouse who sets aside career opportunities to raise children or care for a dependent relative suffers the long-term economic consequences. Job skills are outmoded, business contacts are lost, and competition with younger workers may appear daunting. Rehabilitative alimony provides the opportunity for the affected spouse to gain education and training to rejoin the marketplace with the goal of attaining economic and psychological self-sufficiency.

Permanent Alimony Thresholds

Permanent alimony should move from being a presumptive award to being the exception, recognizing that a shift of this magnitude is akin to a cultural tsunami. Therefore, appropriate safeguards must be in place to protect those who are going to be adversely affected by such a monumental change.

Permanent alimony awards would consider the length of the marriage, the age of the parties, their potential for retraining, and their health and socio-economic support that are in existence at the time of the divorce. Permanency should not be considered in order to maintain the marital lifestyle but rather as a secondary position to rehabilitative alimony.

Substantive Material Changes Requiring Alimony Revision

Circumstances change. Children become emancipated. Job retraining yields results. Co-habitation, rather than marriage, as a means to retain alimony, is a common scheme that permits former spouses to take two bites of the proverbial apple. Each of these situations should constitute a substantive material change to any alimony provision, and either party ought to be able to move for an adjustment.

The continuance of a permanent, unrevised alimony award perpetuates unfairness on the obligor. This stifles the obligor’s ability to financially reposition him or herself or may shut out other relational or vocational opportunities. In essence, the award becomes a permanent penalty to the payor and a windfall to the payee. Although we recognize that alimony is a civil matter, it is fair to say that the permanency of today’s alimony award results in incarceration with no chance of parole.

And so, in Massachusetts, the question remains unanswered: “if marriage is terminable at will, and marital support obligations end upon divorce, what is the justification for imposing continued financial responsibilities upon the par-
ties.” Now is the time for the Massachusetts legislature and courts to answer this question.

Appendix A

ALI Applied Examples

Short-term marriage, no children: No claim arises.

Short-term marriage, children: Claim will arise although it will not be a large claim because of the length of the period that spouse took care of child.

Intermediate-term marriage, no children: Dependent on marital duration requirement and parties’ earnings; award may be modest, or spouse may be entitled to award to reimburse for cost of financing education, or awards may be duplicative of II. B. above.

Intermediate-term marriage with children, professional couple: Considers marital duration, marital agreements made as to who would accept child-raising responsibilities and impact of that decision to income earnings and income potential.

Intermediate-term marriage with children, non-professional couple: Depending on duration of marriage, spouse would qualify for award, size would be adjusted.

Long-term marriage without children: Duration and disparity between incomes would result in award to spouse of lesser income.

Long-term marriage with children: Children are emancipated, spouse entitled to substantial award.

Appendix B

Formulaic Expression of the Theory of Marital Residue

The Theory is based upon a series of postmarital income adjustments (PIAs).

- Period One: share all disposable income equally.
- Thereafter, share decreasing percentage of the difference between disposable incomes, declining by 10% in each period, with the length of each period set as a function of the length of the marriage.

Formula: $\text{PIAN} = (H-L) (0.6-N (0.1))$

Where $N$ ranges from 1 to 5 [time periods] and $H$ and $L$ are the higher and lower incomes of the two parties respectively.

- Marriages up to 10 years: $P = 1$ month for each year of the marriage, if $Y < 10$, then $P = Y$
- Marriages 10-30 years: $P = X$ months per year of marriage where $X$ is initialized at 1.0 and increases by 0.05 for each year over 10 that the marriage had continued, up to a maximum value of 2.0, if $10 \leq Y \leq 30$, then $P = Y(1.0 + (Y-10) (0.05))$
- Marriages 30+: Calculated as equal to two months for each year of the marriage, if $Y \geq 30$, then $P = 2.0$

Barbara von Hauzen, Esq. received her J.D. from MSLAW in 2007 and is a member of the Massachusetts Bar. She currently resides in Maryland and will be sitting for the Maryland bar exam this February.


TheReformer

MSLAW Professors Establish Center for Law Student Ethics & Professionalism

By Ursula Furi-Perry, Esq. and Michael L. Coyne, Esq.

There is plenty of information about legal ethics for lawyers, but too few resources on ethics and professionalism specifically for law students. Law school offers students the first chance to learn about ethics and professionalism and practice ethical and professional conduct. As one law review article put it, “the educational process in law school is designed to give students the knowledge, skills, and attitudes they need to operate as professionals...This professionalization process is gradual and continues throughout one’s career. Yet, the starting point in the process is when one begins to understand his or her role as a member of the profession and begins to accept the concomitant professional obligations. This process should start in law school.”1

We started the Center for Law Student Ethics and Professionalism and its website in an effort to offer law students and recent law graduates a comprehensive resource on issues dealing with ethics and professionalism as a law student and beyond. It provides information about some of the areas of susceptibility that students must avoid; examples of repercussions for unethical or unprofessional conduct by law students; and tips for avoiding unethical conduct, presenting a professional image, and overall success in law school.

Professional and ethical conduct as a law student can help students succeed during and after law school and increase chances of employment, while unprofessional or unethical conduct can jeopardize students’ chances to complete their degree and get a job after they graduate. It can even jeopardize a student’s chances of being admitted to the bar.

Still, many students are unaware of or do not fully understand the kinds of conduct that can get them in hot water. These include:

• Plagiarism, cheating, or other academic misconduct
• Other disciplinary issues in law school
• Criminal or unlawful activity
• Dishonesty, false statements, or omissions, whether in law school, on job applications, on bar applications, or elsewhere
• Neglect of financial obligations
• Abuse of the legal process
• Evidence of substance abuse or mental or emotional instability
• Interactions with other law students
• Interactions with law school faculty and staff
• Misconduct in summer associate positions, externships, clinical experience, and other client contact
• Presenting a poor professional image
• Inappropriate networking
• Taking shortcuts
• Poor online presence

We thought it was important for the Center for Law Student Ethics and Professionalism to establish clear guidelines—professional commandments—for law students and new lawyers to follow to reach a high level of professionalism and professional comportment.

The Ten Commandments for Law Student Ethics and Professionalism

1. Be honest! You may be tempted to fib about your grades, your undergraduate years, or other experiences—but don’t. For starters, you may be disciplined for dishonesty by your law school. Plus, your professors—the same people who may be recommending you for externships and employment—can be quick to notice students who are dishonest. By being dishonest just once, you may jeopardize the very reputation you are trying to build for yourself.

2. Stay away from one of the most common

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reasons for academic discipline: cheating. The potential repercussions for cheating include academic discipline (possibly even expulsion); having to disclose and explain that discipline to the bar examiners when you apply to take the exam, which may bar your admission to the bar; and potentially losing out on employment as a result.

3. Don’t plagiarize. According to the Legal Writing Institute’s website, plagiarism is “[t]aking the literary property of another, passing it off as one’s own without appropriate attribution, and reaping from its use any benefit from an academic institution.” Conduct that constitutes plagiarism can range from blatantly taking someone else’s work to improperly quoting your source. Learn your law school’s definitions of and policies on plagiarism, which should be spelled out in your school’s student handbook. This conduct may also bar your admission to practice law.

4. Avoid criminal conduct and any behavior that can get you involved in it. The bar examiners will ask about your criminal background and conduct a character and fitness check. In some states that check your credit when you apply to take the exam, even financial issues may present problems. Think long term before you get involved in criminal conduct—is it worth risking your career before you even start out?

5. Start building your professional network early. Talk with many lawyers, ask them about their careers, and don’t be afraid to ask for career advice. Build relationships with other professionals. Some good places to meet lawyers include continuing legal education seminars, alumni events at your school, and externships.

6. Build long-lasting relationships with your fellow students and professors. Think of your classmates as your first set of colleagues and your professors as the first lawyers with whom you can network. Professors will notice how you treat your classmates. Plus, your law school experience will be greatly enhanced by camaraderie with your classmates, so get together to study and share tips, and engage only in healthy competition.

7. Project a professional image, even as a law student. Today’s professor, mock trial judge, or supervising attorney at that externship could be tomorrow’s employer. Your conduct, speech, dress, correspondence, and overall presence should reflect the same image that you would want to convey to a potential employer.

8. Project a professional image online. Your professional presence extends to the computer: from social networking sites to blogs to e-mail, how you present yourself online can leave an impression with professors and potential employers alike; in fact, law schools and legal employers are increasingly checking on applicants’ online history. A blog about radical political views may turn off potential employers, as may a blog about your stressed-out life or crazy parties. Be mindful of the ideas you post online, as well as the way you present those ideas. An e-mail address like “bigstud23@coolmail.com” may have some attraction as a teenager, but it won’t impress potential employers.

9. Avoid substance abuse and the misuse of alcohol and drugs. According to various studies and professional sources, legal professionals experience higher levels of substance abuse, depression, stress, and suicide than professionals in most other fields. Seek help at the first sign of struggle with substance abuse, stress, or depression: seek out a mental health professional, a hotline for students or legal professionals, or a trusted mentor at your school.

10. Don’t take shortcuts in school. As you must know by now, the practice of law requires diligence, drive, and determination—get a head start by working hard as a student.

The Ten Commandments for Young Lawyer Ethics and Professionalism

1. First, be familiar with what your jurisdic-
Putting for Fido
2nd Annual Golf Tournament Benefits Shadow Fund

Hosted by MSLAW’s Golf Committee, the second annual MSLAW Golf Tournament raised money for the Shadow Fund and the Pediatric Low-Grade Astrocytoma Program, in honor of Rosemary Brodette (’95), an MSLAW alumnus who died of a brain tumor in 2003. The Golf Committee, led by third-year student Denise Eddy, organized a terrific day of golf and sunshine on Columbus Day at Stow Acres Country Club. Last year’s winning foursome took the top prize again, this time taking home flat screen televisions for their efforts. The runners-up didn’t fare so badly, either: they drove home with portable GPS units. WBZ’s Nightside host Dan Rae joined the fun as well, accompanied by his Cavalier King Charles Spaniel, Charlie.
Adjunct Professor Fred Barry takes aim for the 18th hole

MSLAW professors Vietzke, Kitaeff, Colby-Clements, and Starkis, and students Denise Eddy, Kat Mulligan, and Benjamin Simanski

Professor Starkis lines up a putt

Chip Segar studies his next shot

Dan Rae shows good putting form

Adjunct Professor Fred Barry takes aim for the 18th hole
Just about every lawyer employs at least one non-lawyer in his or her law practice. The non-lawyer assistant may be a secretary, part-time receptionist, law student, or even a private investigator.\(^1\) If you are a partner in a law firm, you may know that you have some supervisory responsibilities over lawyer associates who directly report to you. But what you may not know is that, whether you are a sole practitioner, or you occupy a place on the firm totem pole, you have additional supervisory duties over the non-lawyer employees who work with you. And in this case, what you don’t know can hurt you.\(^2\)

### Some Issues Concerning Properly Supervising Non-lawyer Legal Staff

#### Compliance with Rule 5.3

First, attorneys must comply with Rule 5.3 of the Massachusetts Rules of Professional Conduct, which relates to lawyers’ responsibility for the oversight of their non-lawyer staff. Under that rule, a lawyer who has direct supervisory authority over a non-lawyer must make reasonable efforts to ensure that the non-lawyer’s conduct is compatible with the ethics rules imposed on lawyers.\(^3\) Moreover, the Rule imposes ethical responsibility on lawyers for non-lawyers’ misconduct where the lawyer orders, or, with the knowledge of the specified conduct, ratifies the activity involved, or where the lawyer with supervisory responsibility for the non-lawyer learns of the non-lawyer’s conduct, can take reasonable remedial action, but fails to do so.\(^4\)

Remember that while a non-lawyer is not bound by the ethics rules that govern the conduct of attorneys, that same non-lawyer’s misconduct may be imputed to the attorney who’s charged

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\(^1\) This article addresses itself solely to supervision of non-lawyer assistants. It does not cover superintendence of employees who are suspended, disbarred, inactive, disabled, or out-of-state attorneys. The rules that govern employing such individuals in law firms vary from state to state and may be more restrictive than those applicable to individuals who have never been licensed attorneys. Before hiring such individuals, check with your local disciplinary board or the professional conduct rules governing lawyers to ascertain the propriety of employing attorneys falling into these or related categories.

\(^2\) This cautionary phrase has been used in relation to this issue before. See Arthur J. Lachman, *What You Should Know Can Hurt You: Management And Supervisory Responsibility For The Misconduct Of Others Under Model Rules 5.1 And 5.3*, 18 No. 1 Prof. Law. 1 (2007).

\(^3\) Model Rules of Prof'l Conduct R. 5.3 states:

- With respect to a non-lawyer employed or retained by or associated with a lawyer:
  - (a) a partner in a law firm shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that the person’s conduct is compatible with the professional obligations of the lawyer;
  - (b) a lawyer having direct supervisory authority over the non-lawyer shall make reasonable efforts to ensure that the person’s conduct is compatible with the professional obligations of the lawyer; and
  - (c) a lawyer shall be responsible for conduct of such a person that would be a violation of the Rules of Professional Conduct if engaged in by a lawyer if:
    - (1) the lawyer orders or, with the knowledge of the specific conduct, ratifies the conduct involved; or
    - (2) the lawyer is a partner in the law firm in which the person is employed, or has direct supervisory authority over the person, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

\(^4\) Model Rules of Prof'l Conduct R. 5.3.
with supervising the non-lawyer. Ultimately, it is
the lawyer who may be responsible for the non-
lawyer’s mistakes or misconduct, and that respon-
sibility comes in a variety of forms.

The rationale behind holding a lawyer responsible for consequences of a non-lawyer subordi-
nate’s conduct goes beyond the theory behind
general agency law. A client chooses the lawyer,
not the paraprofessional who may be responsible for handling certain critical parts of the represen-
tation. In some circumstances, the errors of the non-professional may result in adverse (potential-
ly irreversible) legal repercussions to the client.5
Additionally, “the ability to delegate is a luxury,”
(and frequently economically advantageous)6 and
with this benefit comes the burden of supervi-
sion.7

Furthermore, while the Rule is generally
described as regulating supervision of non-lawyer
employees, note that the Rule’s language applies
to individuals who are “retained by or associated
with the attorney,” and are therefore not, strictly
speaking, “employees.”8

A genuine question arises concerning whether
the attorney must have knowledge of the subordi-
nate’s conduct in order for discipline to be
imposed. Although the Model and the
Massachusetts Rules both operate using the term
“know” or “knowledge,” some courts (and pre-
sumably disciplinary authorities) look at whether
the lawyer knew or should have known of the
non-lawyer’s violations to determine the lawyer’s
ethical liability.9 Then, actual knowledge of the
subordinate’s wrongdoing is not necessary. It will
be sufficient for disciplinary purposes that the
attorney was aware that he or she was inadequate-
ly overseeing the employee’s conduct. The court
imposed a 90-day suspension in one Arizona case
where a bookkeeper embezzled from the firm’s
operating and trust accounts, and where the
lawyer, who apparently was not aware of the
activities, did not exercise even minimal care over
his trust accounts, the accounts were not audited,
nor did he take any meaningful action to mitigate
the loss after he learned of the thefts.10

Similarly, a Virginia court imposed a 90-day
suspension on an attorney who, after two years of
employing a non-lawyer bookkeeper in her office,
delegated to the assistant virtually all responsibil-
ity for handling bank accounts, save for the right
to sign checks. Because the attorney did not
review bank statements herself, she was not aware
that the employee had embezzled thousands of
dollars, and she made no effort to review the bank
documents even after the bookkeeper suddenly
disappeared. Although the hearing committee
refused to impose discipline because it found the
attorney had adequately trained the assistant and
was justified in relying on the delegation of
authority, the reviewing court was not so kind.
Emphasizing the attorney’s total lack of review of
the bookkeeper’s performance, the court found
the lawyer had not taken “reasonable efforts” to
ensure compatibility of the non-lawyer’s conduct
imposes liability when the attorney knows or
should have known of the conduct and fails to
mitigate it. See also, NY Code of Prof’l Conduct
R. 1-104 (D)(2); D.C. Rules of Prof’l Conduct, R.
5.1. The corresponding Model Rule 5.3 has no
such language. See supra note 3.

10 In re Scanlan, 697 P.2d 1084, 1087-88 (Ariz.
1985). See also In re Disciplinary Proceeding
Against Trejo, 185 P.3d 1160 (Wash. 2008)
(ordering a three month suspension for lawyer
whose assistant embezzled funds from client’s
trust account where attorney knew he was not
adequately reviewing the books and knew that
commingling was occurring); In re Laiche, 885
So. 2d 524 (La. 2004) (disciplinary and attorney
for failure to supervise someone who altered
the date of an accident even though there was
no evidence the attorney ordered the alteration,
but the attorney should have known someone
made the alteration).
with her own ethical obligations, and therefore violated Rule 5.3. Such a finding was justified notwithstanding the lack of evidence that the employee was incompetent or otherwise in need of supervision. By contrast, a court declined to discipline an Idaho lawyer whose legal assistant improperly solicited business, where there was no evidence that the lawyer knew or should have known of the non-lawyer’s unethical conduct.

Particular Substantive Areas of Vulnerability

Many, perhaps most, lawyer discipline cases concerning the obligation to supervise arise out of only a few areas of a lawyer’s practice.

Client Fund Accounts

By far, the most common non-lawyer conduct which results in charges under Rule 5.3 is mishandling of client trust accounts. Lay employees who have signatory authority or other control over client fund accounts and who abuse the power are frequently the source of their employers’ downfall. Although as a theoretical matter, an attorney can delegate to a non-lawyer subordinate responsibility for maintaining the office’s finances, because of the peculiarly critical nature of the fiduciary relationship between a lawyer and the client, as a practical matter, when it comes to the management of trust funds, the duty becomes virtually non-delegable.

Responsibility for Non-Lawyers’ Work Product

The comments to Rule 5.3 state that lawyers are responsible for non-lawyers’ work product. Decisions that have addressed non-lawyers’ supervision in the law office make it clear that any work product handled by the non-lawyer must ultimately be supervised by the lawyer, or the attorney will suffer the consequences. As one disciplinary authority stated, “an attorney may not escape responsibility to his clients by blithely saying that any shortcomings are solely the fault of his employee.”

It’s easy to see how the rule can be breached in the law office. As an example, busy attorneys often entrust their paralegals, secretaries, and

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11 In re Cater, 887 A.2d 1 (D.C. 2005) (The attorney received a total of 180 days suspension because she failed to cooperate with disciplinary authorities as well. This case is not without its critics. See Jonathan Putman, Catering To Our Clients: How In Re Cater Exposes The Flaws In Model Rule 5.3 – And How They Can Be Solved, 19 Geo. J. Legal Ethics 925, 930 et seq. (Summer 2006); In re Bailey, 821 A.2d 851 (Del. 2003) (The court ordered six months and a day suspension for attorney who was responsible for numerous and extensive violations of client’s fund rules; the lawyer knew or should have known of repeated overdrafts in firm operating account, personally ordered payment of personal expenses from that account, and attorney knew or should have known that bookkeeper would use client funds to satisfy overdrafts in operating account because it was the only ready source of funds, even if he did not order employee to make transfer.)

12 Matter of Jenkins, 816 P.2d 335 (Idaho 1991). Accord Mississippi Bar v. Thompson, _ So. 2d _ , No. 2007-BA-00556-SCT2008, WL 2447364 (Miss. June 19, 2008) (finding no evidence attorney knew that assistant, a former jailhouse lawyer, had agreed to represent inmate, where lawyer instructed him he was not to communicate independently with clients, clients whose cases he worked on had to come through the office, and he was identified as a “paralegal” on the letterhead).

13 In re Cater, supra note 11. In virtually all of the following cases, the lawyer disciplined had no actual knowledge of the non-lawyer subordinate’s wrongful conduct, which in many instances amounted to theft. Nonetheless, discipline of a variety of kinds, ranging from admonition to disbarment, was imposed. See, e.g., Trejo, supra note 10; In re Quinn, 184 P.3d 235 (Kan. 2008); Attorney Grievance Com’n of Maryland v. Zuckerman, 944 A.2d 525 (Md. 2008); In re Ponder, 654 S.E.2d 533 (S.C. 2007); In re Anonymous, 876 N.E.2d 333 (Ind. 2007); In re Nalick, 777 So. 2d 1220 (La. 2001); In re Dush, No. BD-2006-033, 2006 WL 4041624 (Mass. St. Bar. Disp. Bd. May 9, 2006); State ex rel. Okla. Bar Ass’n v. Mayes, 977 P.2d 1073 (Okla. 1999).

14 See Model Rules of Prof’l Conduct R. 5.3 cmt. 1.

15 Attorney Grievance Commission of Maryland v. Goldberg, 441 A.2d 338, 341 (Md. 1982) (where the secretary stopped drafting pleadings and removed files and letters referencing work that had not been done from the mail); Croley v. Kentucky Bar Ass’n, 176 S.W.3d 136 (Ky. 2005) (ordering a public reprimand for lawyer who blamed secretary for failure to calendar filing deadlines).
other legal staff with drafting documents, including pleadings and other litigation papers. What if a non-lawyer prepares a pleading or a form letter from the attorney to the client that the attorney signs but does not adequately review? According to a formal bar opinion, that amounts to the failure to supervise the non-lawyer as well as aiding the non-lawyer in the unauthorized practice of law, as an attorney must supervise and control what is done in the attorney’s name.16

Rule 5.3 also applies to supervision of “independent contractors,” such as non-lawyer litigation consultants.17 Independent or “freelance” paralegals, who work for attorneys on a contract basis also fall under the supervisory rule, and if they are inadequately supervised by the attorney for whom they are performing services, they are engaged in the unauthorized practice of law.18

Conduct of Lay Notaries

Conduct of lay notaries is also implicated in the disciplinary process. Just as lawyers who act as notaries must adhere to regulations governing the exercise of this authority, so must lay notaries, and this includes the requirement that the signatory be present before the notary when he or she notarizes the signature.19

The Duty to Implement Systematic and Appropriate Procedures and the Duty to Properly Train Legal Staff on Ethics Rules

Rule 5.3 is fairly specific. A lawyer is obligated to have in place “measures” to ensure that the conduct of lay assistants comports with the ethical obligations of attorneys. Thus, lawyers are responsible for creating and implementing systematic and appropriate procedures regarding the work of non-lawyers, as well as properly training non-lawyers on office procedures and a lawyer’s ethical duties. The comments to Rule 5.3 note that lawyers must give non-lawyer staff appropriate instructions about ethics rules and ethical obligations in the law office, particularly when it comes to confidentiality.20

When a non-lawyer employee is first hired by an attorney, the attorney should review certain fundamental ethical and operational issues likely to arise in the everyday practice of law. These include:

1. Adequately investigating the background of the prospective employee: No matter how impressed you are with the applicant’s paper credentials, remember, you may be responsible for that individual’s conduct (or misconduct), so minimize the chances for the latter by adequately vetting the candi-

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16 See Oregon State Bar Association Board of Governors, Aiding the Unauthorized Practice of Law, Formal Opinion 1991-20; Admonition No. 05-10, 2005 WL 3037051 (Mass. St. Bar. Disp. Bd. 2005) (temporary secretary inadvertently inserted attorney’s name as beneficiary in client’s will; attorney received admonition even though client later acknowledged that she had intended to leave attorney something in will); Admonition No. 05-18, 2005 WL 3037059 (Mass. St. Bar. Disp. Bd. 2005) (attorney received admonition where she accused judge of colluding with opposing counsel because judge mentioned asset in court’s decision that had not been subject of litigation; attorney’s assistant had mistakenly included that asset in papers attorney submitted to court, but she had not reviewed the papers prior to submission).


20 See Model Rules of Prof’l Conduct R. 5.3 cmt. 1.
2. Identifying the client: Particularly where a corporation or business is involved, the non-lawyer must understand who the client is for the purposes of determining such things as confidentiality and conflicts.

3. Communicating basic duties of a lawyer: Confidentiality, loyalty, competence, diligence. Create a confidentiality agreement that defines the employee’s obligation to keep client confidences and have employee sign; explain consequences of unintended disclosure of confidential information (mis-directed faxes, e-mails, etc.).

4. Recognizing and reporting actual or possible conflicts: If the employee has worked in other firms, there is authority for the proposition that a disqualifiable conflict could arise by virtue of a non-lawyer’s prior access to confidential information. Employees must inform attorney when they have worked on matter involving a client of the current employer.

5. Establishing client contact: The employee should not conduct initial client interviews without an attorney and cannot establish the relationship or the fee arrangement.

6. Giving legal advice: The employee cannot give legal advice, no matter how certain the employee is of the accuracy of the advice.

7. Passing on client communications: The attorney must be told of all communications from the client promptly, and messages to the client, whether oral or written (e-mail or snail mail), must be specifically authorized by the attorney and reviewed prior to sending.

8. Tracking dates: The attorney must keep a calendar of dates for filing documents, court appearances, or other events and properly train and supervise employees in keeping the calendar.

9. Communicating with opposing parties: Employees must refrain from communicating with opposing parties represented by counsel.

10. Signing and reviewing documents: Non-lawyers must not be given authority to sign the lawyer’s name to documents, including court or other official papers and correspondence. Lawyers should also refrain from having a signature stamp. In any event, ALL documents sent out under lawyer’s name must be reviewed by attorney.

11. Managing client fund accounts: Do not give the employee authority to manage client fund accounts—just don’t!

12. Reviewing these rules: The attorney should conduct regular meetings with employees to review work and ensure that all of these caveats are followed.

13. Handling mail (if applicable): The non-lawyer must be properly trained on and understand what communications he or she may send out to the client and others. Attorneys should read and approve mail that the non-lawyer drafts to send outside the firm. The non-lawyer should also be instructed about the confidentiality implications of mailing anything outside the firm.

14. Establishing personal client relationships: The attorney should emphasize that the employee must have no personal relationships with the clients, including lending or advancing money.22

Examples of Disciplinary Cases

From docketing deadlines to notarizing documents, courts have disciplined lawyers for failing to implement appropriate procedures or failing to

21 New Jersey’s version of Rule 5.3 includes an express duty to conduct a background check. Bachrach, supra note 17.

22 See also Kate A. Toomey, Practice Pointer: Training And Supervising Non-Lawyer Assistants, 17 Utah B.J. 16 (April 2004) for more advice.
train non-lawyer employees on those procedures.

A lawyer who had in place a protocol requiring, inter alia, regular communications between the assistant and the attorney, but who did not enforce those measures, was disciplined under 5.3(b), and was suspended for nine months. Where a clerical error by the non-lawyer caused the firm to miss the statute of limitations, an Oklahoma court found the error was a result of inadequate office procedures on monitoring cases. A non-lawyer’s failure to mark a date on a calendar resulted in a public reprimand for a Kentucky attorney. An Oklahoma attorney was likewise publicly reprimanded where she asked her paralegal to check on the status of a client’s workers’ compensation claim, and where the paralegal misrepresented to the lawyer that the claim was still pending even though it had been dismissed.

Lawyers must also implement adequate procedures and give adequate instruction on the maintenance of trust accounts or operating accounts. In an Ohio case where a legal assistant misappropriated client funds, the supervising attorney was suspended from practice for six months.

Some have even suggested that a heightened standard of supervision should be used by lawyers in the case of non-lawyer supervision than associate or attorney supervision, because legal staff generally have less training than lawyers.

Avoiding Assisting a Non-Lawyer with the Unauthorized Practice of Law

There’s a three-letter acronym which lawyers and their non-lawyer staff should understand and be aware of: UPL, which stands for the unauthorized practice of law. However, what constitutes the practice of law, hence the unauthorized practice of law, is not clearly defined by the Rules or by law in many states. Rule 5.5 of the Model Rules of Professional Conduct prohibits lawyers from assisting a non-lawyer in UPL, but leaves the definition up to the jurisdiction in which the conduct occurs. There is also the Massachusetts UPL statute, which calls for criminal penalties imposed on those found to be practicing law without a license: a fine of $100 or up to six months’ imprisonment for the first offense, and a fine of $500 or up to a year’s imprisonment for subsequent offenses. The courts of the Commonwealth have been called upon over the years to determine what conduct constitutes the practice of law. In considering whether a lawyer admitted to practice in a state other than Massachusetts was practicing law when, while representing a creditor, he performed certain services for a debtor in a bankruptcy proceeding, Justice Cordy recognized that defining “the practice of law” is not easy, and largely must turn on the facts of the specific case. Significantly, the court stated it had rejected the proposition “that whenever, for compensation, one person . . . performs for another some service

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23 People v. Smith, 74 P.3d 566, 572 (Colo. 2003)
(Court expressly rejected attorney’s lack of knowledge of the subordinate’s conduct as a defense, quoting Restatement Second, Agency § 503, Comment f, §§ 507, 510.)


26 State ex rel. Oklahoma Bar Ass’n v. Simank, 19 P.3d 860 (Okla. 2001).


29 Although Massachusetts Rules of Prof’l Conduct R. 5.5 was recently amended significantly to bring it into line with the Model Rule and the rule in most states by acknowledging the burgeoning growth of multi-district practice, the “definition” of the unauthorized practice of law was neither expanded nor clarified:

a) A lawyer shall not practice law in a jurisdiction in violation of the regulation of the legal profession in that jurisdiction, or assist another in doing so.

b) A lawyer who is not admitted to practice in this jurisdiction shall not:

(1) except as authorized by these Rules or other law, establish an office or other systematic and continuous presence in this jurisdiction for the practice of law; or

(2) hold out to the public or otherwise represent that the lawyer is admitted to practice law in this jurisdiction.


that requires some knowledge of law, or drafts for another some document that has legal effect, he is practicing law.\textsuperscript{32}

The SJC has determined that a CPA, licensed to practice before the IRS, does not engage in the unauthorized practice of law when she or he gives legal advice on tax matters.\textsuperscript{33} But, non-lawyers may not conduct real estate closings in this state.\textsuperscript{34} And the owner of a real estate management company was practicing law when he filed a complaint on behalf of the company against a tenant for, among other things, damage to the property\textsuperscript{35} because “[p]lainly the commencement and prosecution for another of legal proceedings in court, and the advocacy for another of a cause before a court . . . are reserved exclusively for members of the bar.”\textsuperscript{36}

States have adopted a variety of approaches to defining this complex concept. It is simple to identify some conduct as falling within the rubric, as Judge Cordy did above, such as appearing in court or drafting legal documents. Other conduct is harder to categorize. One approach looks at whether the activity is one carried on in the day-to-day activities of a lawyer. Another inquires whether the activity affects the legal rights and requires legal expertise.\textsuperscript{37}

Several cases from other jurisdictions illustrate what constitutes permissible versus impermissible conduct by a non-lawyer. In one case, the support staff of a suspended attorney prepared letters to clients and opposing counsel and drafted proposed pleadings included in some of the latter correspondence.\textsuperscript{38} The attorney’s suspension was extended for 30 days. “The core element of practicing law is the giving of legal advice to a client and the placing of oneself in the very sensitive relationship wherein the confidence of the client, and the management of his affairs, is left totally in the hands of the attorney,” the court stated. “The undertaking to minister to the legal problems of another creates an attorney-client relationship with regard to whether the services are actually performed by the one so undertaking the responsibility or are delegated or subcontracted to another. It is the opinion of this Court that merely entering into such a relationship constitutes the practice of law . . . [t]he conducting of the business management of a law practice, in conjunction with that practice, constitutes the practice of law.”\textsuperscript{39}

A South Carolina lawyer was suspended for 60 days when he engaged in a business relationship with two non-lawyers who provided an “escrow service” and handled real estate closings.\textsuperscript{40} The court found that the lawyer allowed the non-lawyers to cause clients to believe that they were employed by the lawyer’s firm, failed to adequately supervise the non-lawyers during real estate closings, and assisted the non-lawyers in the unauthorized practice of law.\textsuperscript{41}

A Florida lawyer was suspended for one year when he was listed as “managing attorney” of a corporation that was controlled by a paralegal who did immigration work, some of which should

\textsuperscript{32}Id. at 322 (quoting Lowell Bar Ass’n v. Loeb, 315 Mass. 176, 181, 52 N.E.2d 27, 31 (1943). The court in Lowell acknowledged that drafting documents with legal significance is incidental to rendering services in a number of distinct professions, such as an architect, insurance broker, appraiser and auctioneer, and none of them are “practicing law” when they perform such tasks. Id. at 182-183. The court concluded that Attorney Chimko had not practiced law, resting its conclusion, \textit{inter alia}, on its determination that the attorney had not given legal advice to the debtor.


\textsuperscript{34}Massachusetts Conveyancers Ass’n v. Colonial Title & Escrow, Inc., 13 Mass. L. Rptr. 633 (Super. Ct. 2001).


\textsuperscript{36}Id. at 851 (quoting Lowell Bar Association, supra note 32, at 183 and citing Opinion of the Justices, 289 Mass. 607, 612, 194 N.E. 313, 316 (1935) (“practice of law [includes] the preparation of pleadings, process, and other papers incident [to a cause of action], and the management and trial of the action or proceeding on behalf of clients before judicial tribunals”)).


\textsuperscript{39}Id. (emphasis added).

\textsuperscript{40}In re Fortson, 606 S.E.2d 461 (S.C. 2004).

\textsuperscript{41}Id.
have been performed by an attorney.42 A Colorado lawyer was likewise suspended for a year for allowing a non-lawyer assistant to meet directly with clients and enter into fee agreements, as well as for failing to supervise the non-lawyer in filing fraudulent or incorrect immigration documents.43

A two-year suspension was imposed on an attorney affiliated with a corporation that marketed and provided estate planning materials.44 In that case, initial contact was made by non-lawyer corporate employees, and the attorney prepared documents but did not meet with client. The attorney authorized the representatives to use his name, and the non-lawyers explained the different types of wills and trusts.45

A Florida court imposed a six-month suspension on a lawyer who was an independent contractor to paralegal firm; Beach (the attorney) discussed the clients’ legal issues, reviewed pleadings and other documents prepared by them, and sometimes met with the non-lawyers’ customers, for which Beach was paid $75 per case. Frequently, Beach formulated the advice, and the Kings were merely a conduit for the transfer of the advice, but Beach did not supervise any discussions between King and the customer, nor did he participate any further in their relationship.46

Some states have statutes or court rules that define the practice of law47 or specifically allow non-lawyers to assist others with filling out simple factual information on documents, as is the case with title insurers preparing requisite paperwork,48 brokers assisting clients with documents in a real estate transaction,49 or paralegals making oral communications that are reasonably necessary to elicit from clients information that’s needed to complete blanks on a form.50

Notwithstanding the numerous cases addressing the issue, the line between what is and is not the practice of law remains more blurry than a cursory glance may suggest. Suppose that a client asks the paralegal a question which requires a simple factual answer. In that case, the non-lawyer can likely answer the question without repercussions. Suppose that the client asks a question which requires the paralegal to apply the law to the client’s specific facts. Here, the non-lawyer cannot answer, because doing so would constitute the unauthorized practice of law. “Limiting the practice of law to members of the bar protects the public against rendition of legal services by unqualified persons,” read the Comments to Rule 5.5.51 “This Rule does not prohibit a lawyer from employing the services of paraprofessionals and delegating functions to them, so long as the lawyer supervises the delegated work and retains responsibility for their work.”52

In some instances, there is conflicting authority over whether a non-lawyer employee may represent clients at agency hearings and other places, and whether such representation amounts to the unauthorized practice of law. For example, in California, a law firm may delegate authority to a paralegal to make appearances at Workers’ Compensation Appeals Board hearings, and to file related motions, petitions, and other materials.53

42 Florida Bar v. Abrams, 919 So. 2d 425 (Fla. 2006).
44 In re Flack, 33 P.3d 1281 (Kan. 2001).
45 Id.
46 Florida Bar v. Beach, 675 So.2d 106 (Fla. 1996).
47 See, e.g., Tex. Gov’t Code Ann. § 81.101(a) (Vernon 2005) (defining practice of law as “preparation of pleading or other document incident to action or special proceeding or management of action or proceeding on behalf of client before judge in court as well as service rendered out of court, including giving of advice or rendering of any service requiring use of legal skill or knowledge”); Conn. Super. Ct. R. § 2-44A(b)(3) (effective Jan. 1, 2008) (giving extensive examples of conduct that constitutes the practice of law). The Connecticut rule is simply too long to repeat here, but, suffice it to say, leaves very few stones unturned. It expressly permits non-lawyer assistants to engage in the prohibited practices when under the supervision of an attorney, in compliance with Rule 5.3.
48 See, e.g., Ga. Code. Ann. § 15-19-52 (2008). A comprehensive collection of state definitions and other material related to this issue can be found at www.abanet.org/cpr/model-def, including the report of the ABA’s Task Force on the Model Definition of the Practice of Law, which also includes reference to the definition of this concept in various states.
50 See, e.g., Rule 10-1.1(b), Rules Regulating the Florida Bar (2001).
51 Model Rules of Prof’l Conduct R. 5.5 cmt. 4.
52 Id.
By contrast, an Ohio case held that a non-attorney representing a client before the Ohio Bureau of Workers’ Compensation amounted to the unauthorized practice of law.\(^{54}\) Similarly, federal agencies and specialized courts, such as the bankruptcy court, have frequently been called upon to determine whether a non-lawyer’s participation in cases before that tribunal is the unauthorized practice of law. In bankruptcy courts, 11 U.S.C. § 110 permits non-attorneys to undertake certain limited services on behalf of parties in a proceeding in that court. This section does not apply to non-lawyers who act under the supervision of an attorney.

Lawyers’ ethical obligations under Rule 5.5 and the UPL statute deal largely with the duty not to assist a non-lawyer in the unauthorized practice of law. In practice, this means not letting your paralegals and other non-lawyer employees perform tasks which should only be done by the attorney, including giving legal advice, unless you scrupulously supervise their work.

**Miscellaneous**

Generally, lawyers must ensure that the firm’s non-lawyer employees are clear about making their non-lawyer status known to clients and the public. To trained attorneys and non-lawyers, it isn’t difficult to understand the difference between the role of an attorney and that of a paralegal. To the untrained client, that difference isn’t so readily obvious: May a paralegal offer answers to legal questions? May he or she serve as the sole point of contact on legal questions? Is the paralegal a glorified secretary, or can he or she do almost everything that the attorney can? In practice, this means lawyers must be vigilant about ensuring that their non-lawyer employees are clearly presenting themselves to clients and others as non-lawyers.

Courts generally have allowed non-lawyers to be put on firm letterhead and in firm directories, as long as the employee’s non-lawyer status is clearly specified.\(^{55}\) The same goes for business cards; paralegals may have them, so long as their paralegal title is readily apparent. However, it is probably inappropriate for the paralegal to have his or her own stationary that reflects only the firm name and that of the non-lawyer, even if it designates him or her as a paralegal.\(^{56}\)

**Compensation of Non-lawyers**

A final ethical consideration comes up with the compensation of your non-lawyer employees. While non-lawyers may receive a salary and a bonus, they may not share in the profits of the firm.\(^{57}\) Nor may a lawyer “share” or “split” fees with a non-lawyer.\(^{58}\)

In one North Dakota case, an attorney who regularly split fees with his paralegals and even admitted to cashing a retainer check and giving half of the cash to a paralegal was disbarred.\(^{59}\) In that case, the paralegals were allowed to recruit and advise clients, negotiate fee agreements with clients, and perform legal work for clients with little or no supervision by the attorney. One of the paralegals was held out to a client as a licensed attorney practicing with the lawyer.\(^{60}\) The attorney in that case also routinely split fees with the non-lawyer paralegals and candidly admitted cashing a retainer check from a client and giving half of the cash to his paralegal. The lawyer testi-

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\(^{57}\) See Model Rules of Prof’l Conduct R. 5.4

\(^{58}\) Id. See Doe v. Condon, 532 S.E.2d 879, 883 (S.C. 2000). The rule is meant to “discourage the unauthorized practice of law by lay persons and to prevent a non-lawyer from acquiring a vested pecuniary interest in an attorney’s disposition of a case that could possibly take preeminence over a client’s best interest.” Id. (quoting Matter of Anonymous, 367 S.E.2d 17, 18 (S.C. 1988)). The consequences of this conduct can go beyond professional discipline. See Bertelsen v. Harris, 537 F.3d 1047 (9th Cir. 2008) (clients unsuccessfully sought disgorgement of attorneys fees where Rule 5.4 was violated). However, most courts will allow inclusion of a paralegal’s compensation in calculating statutory attorney’s fees. See Missouri v. Jenkins by Agyei, 491 U.S. 274 (1989).

\(^{59}\) In re Nassif, 547 N.W.2d 541 (N.D. 1996).

\(^{60}\) Id.
fied that he considered this a “common sense formula” for compensation for work done.61

Note that for substantive tasks, such as legal research, drafting, or fact-gathering, paralegal time may be billed out to clients at the fair market rate of paralegals in the firm’s vicinity.62 Clerical tasks, like filing, faxing, or photocopying, are not generally billable, whether done by purely clerical workers like secretaries or by paralegals or other non-lawyers whose substantive work can be billed out.

Consequences of the Failure to Supervise

Ethics Sanctions – Massachusetts

The consequences of failure to supervise non-lawyer employees can be dire, both in Massachusetts and in other jurisdictions. For example, the Massachusetts Supreme Judicial Court imposed a two-year suspension on one lawyer who unintentionally misused client funds and improperly associated with a non-lawyer and then limited the lawyer’s practice to representing criminal defendants in District Court upon reinstatement.63 In that case, the lawyer had teamed up with a non-lawyer to handle personal injury actions; the court found that the non-lawyer handled and settled cases, shared legal fees with the attorney, and managed the office with inadequate supervision.64

Ethics Sanctions – Other Jurisdictions

Some courts have imposed the greatest available sanctions on lawyers whose non-lawyers acted unethically. A Colorado lawyer was disbarred for aiding a non-lawyer in the unauthorized practice of law, among other charges, after she misrepresented her law clerk’s non-lawyer status to clients and allowed the law clerk to give legal advice.65 A Louisiana lawyer was likewise disbarred for aiding a freelance paralegal in the unauthorized practice of law.66 And a New Mexico lawyer was indefinitely suspended after failing to supervise his paralegal, who was allowed to maintain a separate office and negotiate settlements with the attorney’s knowledge.67

Sometimes, isolated errors of legal staff which are not known, ratified, or ordered by the lawyer will mean no ethical sanctions imposed on the attorney. For example, in a misconduct case against a Connecticut attorney, the court dismissed the Grievance Committee’s complaint where no evidence was offered that the attorney could have done anything differently to supervise the non-lawyer employee.68 In that case, the attorney hired an investigator who improperly split with the client settlement checks from the client’s personal injury suit; the court found no indication that the attorney knew of the non-lawyer’s misconduct.69

61 Id.
64 Id.
69 Id.
Civil Ramifications

Errors of non-lawyer assistants that arise in the course of civil litigation often have consequences for the lawyer and the client in the lawsuit as well.\textsuperscript{70}

The Massachusetts Appeals Court refused to allow the plaintiff to continue after his automobile case was filed past the statute of limitations, where the plaintiff’s lawyer’s secretary lied about filing the case on time to the supervising attorney.\textsuperscript{71} The court held that the secretary's deliberate act did not constitute excusable neglect nor excused the lawyer’s disregard of his duty to supervise the non-lawyer and monitor the case.\textsuperscript{72}

A Massachusetts federal court likewise refused to set aside a dismissal where the plaintiff’s lawyer’s “busy paralegal” failed to respond to the defendant’s motion to dismiss.”\textsuperscript{73} “A heavy workload and/or inattention of an attorney do not ordinarily constitute excusable neglect. Responding to a motion to dismiss constitutes the practice of law, and the duty to do so cannot properly be delegated to a paralegal,” the court held.\textsuperscript{74} “Thus, it would be particularly inappropriate to find that the paralegal’s heavy workload and inattention constitutes excusable neglect in this case.”\textsuperscript{75}

Further Resources

In addition to opinions and materials by the Board of Bar Overseers, national paralegal associations offer further resources for training non-lawyers on ethical considerations that deal with the supervision of non-lawyers. The National Federation of Paralegal Associations has its own Model Disciplinary Rules and Model Code of Ethics and Professional Responsibility.\textsuperscript{76} The National Association of Legal Assistants also has a Code of Ethics and Professional Responsibility.\textsuperscript{77} Furthermore, the ABA’s Section on Paralegals offers its Model Guidelines for the Utilization of Paralegals.\textsuperscript{78}

The ethics rules mandate careful and thorough supervision of non-lawyer assistants, and the failure to supervise can be one costly mistake for the lawyer. Remember, when it comes to non-lawyer staff, you truly are your paralegal’s keeper.\textsuperscript{78} Constance Rudnick, Esq. is a member of the full-time faculty at MSLAW. She teaches Legal Ethics, Constitutional Law, and First Amendment and is a former member and Vice Chair of the Board of Bar Overseers.

Ursula Furi-Perry, Esq. is an attorney and adjunct professor at MSLAW. She is the author of four books: 50 Unique Legal Paths (ABA Publishing, 2008); 50 Legal Careers for Non-Lawyers (ABA Publishing, 2008); Law School Revealed (Jist Publishing, forthcoming in April 2009); and Trial Prep for Paralegals (co-authored by Michael L. Coyne, forthcoming in 2009 by the National Institute for Trial Advocacy).

\textsuperscript{70} See Pincay, supra note 7. An experienced docket clerk in a large firm erroneously docketed the time for an appeal at 60 days from entry of judgment rather than 30 days as provided by the rule. The supervising attorney relied on the experienced clerk’s determination. The district court judge granted an extension of time to file the appeal. On appeal of that order, a three judge panel of the Ninth Circuit reversed, holding the mistake was not excusable neglect, and the appeal had been filed too late. The Court sitting en banc reversed, reinstating the district court’s decision using an abuse of discretion standard.


\textsuperscript{72} Id. at 611.


\textsuperscript{74} Id. at 349.

\textsuperscript{75} Id.

\textsuperscript{76} See www.paralegals.org.

\textsuperscript{77} See www.nala.org.

\textsuperscript{78} See www.abanet.org/legalassts/modguide.html.
tion’s ethics rules require of you. You may have come a long way from your law school’s ethics class and those many interesting ethical conundrums, but knowing the requirements of legal ethics in the jurisdiction in which you’re practicing is essential—you can’t comport your conduct with the rules if you aren’t familiar with them.

2. Ask for help, training, and guidance whenever you need it, and seek it out from whomever will give it. One of the biggest mistakes you could make as a young lawyer—one that can result in negligent, unprofessional or unethical conduct—stems from performing a task that you don’t have the knowledge or competence to do. Learn to recognize when you need help, and seek that help freely from someone more experienced or knowledgeable.

3. Align yourself with some great mentors on and off the job. Even if your firm doesn’t have formal mentoring, many state, local, and specialty bar associations offer formal mentoring programs.

4. Polish your professional image. This includes the way you dress, speak, write, and present yourself—in person, online, or through correspondence. Keep in mind the image you’d like to project to clients, employers and others as you conduct yourself.

5. Continue your education and professional development. Law school may have taught you to think like a lawyer, but your real training in the practice of law begins when you start to practice. Continuing legal education opportunities, seminars, and web-based learning help you hone your skills and continue learning about your chosen practice area.

6. Continue building your network. Networking will not only increase your chances of getting employment in the future, but also keep you connected and up-to-date with the profession. Join professional organizations, get involved with your local young lawyers’ associations, or attend professional and social events.

7. Be mindful of your conduct, even outside of the firm. Avoid unprofessional, unethical, and especially criminal conduct at all times, and don’t associate with people who engage in any of that; such conduct—at any time—can get you in trouble with your state’s bar overseers or enforcers.

8. Be wary of burn-out. Despite many firms’ efforts to provide better flexibility, it’s no secret that many lawyers work long hours and struggle to find work-life balance. Learn to recognize the signs of burn-out in yourself and cope with stress in healthy ways. Seek help for substance abuse and mental health issues immediately; many state bars and related organizations offer confidential help specifically for lawyers.

9. Don’t take shortcuts on the job. Do the work right the first time to avoid wasting time—not to mention looking unprofessional or lazy in front of your employers or clients. Hone your time management skills.

10. Look for a career path that’s the right fit. Assess your career goals, strengths, and weaknesses and figure out what you’d like to do. Few people start out in their dream jobs. Find what’s right for you. If the 100-hour-a-week job that pays outrageous money and has you traveling the country litigating cases makes you happy, then go for it. If you prefer the 40-hour-a-week associate’s position that pays you well and also leaves time to coach your daughter’s soccer team, then seek that job. Take some time to set your priorities, establish your goals, and figure out the right path for you.


Ursula Furi-Perry is an adjunct professor at MSLAW, teaching Writing & Legal Reasoning and a bar exam essay course. Michael Coyne is the associate dean of MSLAW, who teaches Civil Procedure, Evidence, Case Prep, and Remedies.
Law Day 2008 is MSLAW Day

On May 24, 2008, nearly 400 students, alumni, faculty, trustees, staff, and other guests crammed into a packed function room at Andover's Wyndham Hotel for MSLAW's annual Law Day Dinner Dance. This year, the occasion also marked the start of a series of events celebrating the 20th anniversary of the founding of the Massachusetts School of Law in September 1988.

One of the many highlights of the evening were the remarks of the keynote speaker, Dr. Henry Lee, Chief Emeritus of the Connecticut Forensic Science Laboratory, and Former Commissioner of the Connecticut Department of Public Safety, who rose to fame as a forensic expert in the O.J. Simpson case. His remarks, which were amply punctuated with humor and humility, stressed the need for thorough and unbiased scientific analysis as critical components in proving crimes, while protecting the rights of both the victim and the alleged perpetrator.

Additionally, the SBA, led by President Andy Matthews, and BLSA, led by its President, Alex Ogwu, presented several awards, recognizing individual and group contributions to MSLAW. Professor Diane Sullivan received the Spirit Award, in recognition of her efforts to enhance the image of MSLAW and the SBA. The Bell Award was given to Michelle Hebert, Director of Alumni Relations, for her efforts in support of the SBA. The Ed Becker Perseverance Award, awarded to that person best exemplifying Professor Becker's determined efforts to overcome adversity, went to Rosa Andre Cayo and Marsha Clarke

Anne Hemingway, Darius Greene, Alicia Kenney Monteiro, and William Callanan

Benjamin Simanski, Kathleen Mulligan, Tania Palumbo, Colin Potter, & Jeremy Wilkins
Colon. The Thurgood Marshall Award went to Keynote Speaker Dr. Henry Lee, in recognition of his considerable work to protect the civil rights of both victims of criminal and criminal suspects.

The Thurgood Marshall Award went to Keynote Speaker Dr. Henry Lee, in recognition of his considerable work to protect the civil rights of both victims of criminal and criminal suspects.

Thanks in large part to the diligence of Alumni Director Michelle Hebert, many alumni, particular those in the classes of 1993, 1998, and 2003, celebrating their 15th, 10th, and 5th reunions respectively, were in attendance. The Class of ’93 was well represented by, among others, Doris Stanziani, currently the Clerk Magistrate in the Haverhill District Court, former MSLAW Admissions Director Kathy Enright, Tim Sullivan, and Rob Armano. Raffles and a silent auction completed the festivities, as dancing and revelry continued well into the evening.

The Barristers, MSLAW’s student service organization, received the Community Service Award for its continued work in the community, including serving monthly dinners to residents of the shelter at the YMCA in Lawrence. And Tyrone Scott received an appreciation award for his hard work maintaining MSLAW’s building and grounds.

As MSLAW commenced its celebration of 20 years of providing and reforming legal education, the founders of MSLAW – Dean Velvel, Dean Coyne, Professors Sullivan and Kaldis, former Professor Larry Beeferman, Registrar Louise Rose, and alumni Al Zappala and Dick Ahearn – were honored with a plaque that read as follows:

“It was only through the perseverance that your goals were accomplished, your dreams were realized and the impossible became reality.

We are forever grateful to the founders of the Massachusetts School of Law”

The 2008 Law Day Dinner Dance drew the largest crowd ever for this event. It was a fitting commencement to the celebrations of MSLAW’s 20th year.

Dr. Henry Lee delivers humorous and topical remarks
Cheering families and friends filled the Collins Center to capacity as 158 graduates participated in MSLAW’s 19th Annual Commencement. Professor Thomas Martin called the exercises to order after the traditional procession by faculty and graduates. Dan Rea, Emmy Award-winning journalist and host of WBZ-AM’s “NightSide with Dan Rea,” delivered the Commencement Address. After naming several members of the class of 2008 and noting their diverse backgrounds, Mr. Rea advised students to persevere in the pursuit of justice. He spoke about his 15-year investigation to prove the innocence of Joseph Salvati, who according to a federal court judge was “wrongfully, intentionally and maliciously” convicted by rogue FBI agents for a murder Salvati did not commit. Mr. Rea was commended by Judge Gertner for his dogged pursuit of the truth in the Salvati case both in her written opinion and verbally from the bench.

Nicole Dion and Salvatore Coco also addressed their fellow students. Both thanked their families for supporting them through the trials and tribulations of law school and talked about their memories and the friendships they had formed at MSLAW.

Dean Velvel then conferred an Honorary Degree upon Mr. Rea. Associate Dean Coyne and Assistant Dean Devlin then conferred each member of the graduating class the degree of Juris Doctor.

Following Professor Paula Kaldis’ closing remarks, hundreds of graduates and their families and guests joined MSLAW faculty and staff at the school for a special reception sponsored by the Student Bar Association. Juliette Willoughby (’06) entertained the guests with her jazz vocals.

2008 Graduates

Adams, Crawford
Alfieri, Lisa
Alikonis, Joanna
Amico, David Anthony
Anastos-Nappo, Lisa Ann
Antrop, Paul Ryan
Attridge, Peter D.
Aziz, Julie
Blake, Shelleigh Lynnette
Bohun, Sabrina R.
Bongiorno, Philip
Bowman, Christine E.
Brandano, Shannon Lee
Bruce-Flounory, Angelina
Bull, Patrick
Burch, Jesse
Burke, Christopher M.
Burke, Bethany
Burke, Michael T.
Butka, Tyna M.
Callahan, Laura
Capalbo, Thomas J., III
Carson, Gregory G.
Casey, Kimberley
Cassidy, Reid
Church, Rose
Clark, Kerry Morse
| Clarke, Peter | Guindon, Diane B. | Meloon, Lonny R. |
| Coco, Salvatore | Halloran, Michelle Elaine | Miranda, Peter, III |
| Coffey, Kylah Beth | Hanrahan, Justin M. | Moraski, Paul Richard |
| Contrada, Jonathan | Happel, Jason G. | Morgida, Faith Ansill |
| Corbett, Stacey | Hippi, Maxcelline | Morrison, Damien W. |
| Cormier, Devon M. | Harris, Christie | Morrissey, James John |
| Crawford-Laban, Kymberly | Hassan, Syed Zaid | Mortara, Constance R. |
| Croteau, Michael R. | Hightower, Pamela | Moulton Maria E. |
| Culgin, Joseph Francis | Hoshi, Aya C. | Munroe, Kristofer C. |
| Daley, Thomas | Huang, Ye | Murphy, John K. |
| DiGregorio, Stephen T. | Hull, Tina L. | Nabialczyk, Dr. Malgorzata |
| Dill, Karen M. | Jacobs, Dr. Walter | Njoroge, Elizabeth Mombi |
| Dillis, Gerard P. | Jadach, Rebecca Ann | Noyola, Yanni Gilmar Ortiz |
| Dion, Nicole | Jalbert, Jillian | Noyola, Beata Ortiz |
| DiPaola, Ellen | Kandilian, Nareg | O’Rourke, Stacey Lynn |
| Donnelly, Meghan | Kealy, Glenn | Occena, Daniel |
| Douglas, Nastajha N. | Kearney, Stephen | Oldroyd, Richard H. |
| Douglas, Dean | Kendall, Richard | Partello, Robin |
| Dowling, Paul | Kenny, Robert J. | Pedersen, Deborah J. |
| Ellioian, John | Kent, Denise | Peters, Raymond Wayne |
| Fatalo, Michael T. | Krikorian, Greg | Pickering, Jonathan |
| Ferreira, Roberto | Krivicich, Jessica Lynn | Pungirum, Cesar |
| Foley, James J., Jr. | Lallier, Matthew | Purcell, Cheryl A. |
| Gallagher, Kerry E. | Lambert, Joseph M. | Rafferty, Megan A. |
| Gear, Michael | Latham, James Edward, Sr. | Reinhart, Albert J. |
| Gee, Danny | Leverone, Christopher A. | Ressin, Regina |
| Georgenes, Deanna M. | Lindsay, Christine A. | Reynolds, Kathleen Black |
| Gill, Martha E. | Linnehan, Joseph J. | Richard, Julieanne |
| Gillespie, Kimberly | Lomas, Eric J. | Richards, Heather |
| Godin, James M. | Lopatin, Theodore | Roode, Brian C. |
| Gottlieb, Ephraim | Lucien, Karen Joe | Roy, Kara |
| Graham, Gordon W., Jr. | Lucivero, Liza | Russo, William Tobias |
| Graham, Robert B. | Magliozi, Matthew L. | Ryan, Kara E. |
| Granlund, Robert | Makonis, Linda | Ryan, Kimberly Ann |
| Grant, Sheila | Manahan, Cheryl A. | Sacco, Lauren Marie |
| Greene, Darius | Manakin, Victoria | Santom, Allison |
| | Mason, Philip W. | Sheppard, Marisa |
| | Matthews, Andrew N. | Shola, Jennifer M. |
| | Mazalewski, Jan | Singer, Craig D. |
| | McCaffrey, Lonnie | Smith, April |
| | Michael McCarthy | Smith, Frank |
| | McEntee, Bryan | Spitz, Ryan |
| | | St.James, Justin S. |
| | | Sundberg, Lindsey |
| | | Swanson, Deborah, B. |
| | | Thornton, Chris |
| | | van Raalen, Scott |
| | | von Hauzen, Barbara Maria |
| | | Wagner, Shaun M. |
| | | Watkins, Paul Brian |
| | | Young, Linda M. |
| | | Zook, Daniel |
Court was in session at MSLAW last semester, but this time it was not mock trial practice or nervous students delivering oral arguments as part of their Writing & Legal Advocacy classes. This time it was for real, as three appellate court judges sat in the old courtroom and heard five cases in front of MSLAW faculty, staff, alumni, and students and local high school mock trial teams.

Occasionally throughout the year, the appeals court will hold sessions outside of Boston, in law schools such as Boston University and Western New England College. MSLAW alumni Tina LaFranchi and Paula Colby-Clements thus arranged for the Court to visit MSLAW. LaFranchi, as administrative counsel for the Court, contacted Professor Colby-Clements and asked if MSLAW would be interested in hosting a session. The two then worked together to bring the session to MSLAW, and Colby-Clements invited local high school students to watch the oral arguments. MSLAW students in Writing & Legal Advocacy were particularly interested in the session, as they were conducting their own oral arguments for class that same week.

The cases, which ranged from criminal to family law, will be decided in approximately three to four months, after the entire panel of the appellate bench has a chance to review the opinions and make comments, according to Associate Justice Cynthia J. Cohen. Cohen noted that sometimes the comments result in the entire opinion being rewritten.

The justices (Scott L. Kafker, Joseph A. Trainor, and Cohen) had breakfast with faculty before the sessions and lunch with MSLAW and high school students, during which they answered students’ questions about the judiciary and the legal system.
MSLAW Hosts Global Climate Change Conference

By Kurt Olsen, Esq.

On October 11th, MSLAW held its first annual conference on global climate change. Widely recognized in the scientific community as perhaps the biggest threat ever to face mankind, climate change has begun to capture the public’s attention. However, the conference aimed to inform the public about the nature and extent of the threat, and hopefully, to enable citizens, municipalities, states, and regions to take the actions that need to be taken to ensure that future generations will inherit a world in a marginally habitable state.

To quote from Earth Under Fire, How Global Warming is Changing the World by Gary Braasch: “Let me state the goal clearly: No policy should be promulgated, no ‘program’ initiated, no alliance sealed, no machine designed or built, no land use permitted, no product introduced, no law passed, no politician elected unless the action is a step forward to reduction and reversal of the effect of greenhouse gases.” Braasch published his book in 2007; tragically, few governments have taken steps to meet his challenge. Among those that have, the United States is conspicuously absent. As many of the leaders of the movement to address this most monumental of challenges have said, action to address the issue will have to come from the bottom up because politicians remain blissfully unaware of the gargantuan challenge facing humankind.

The scientists on the panel addressed some of these issues in greater depth, but a recent study from the University of Adelaide in Australia offered a frightening picture of what’s in store for humanity if drastic actions are not taken to address the threat. The Global Carbon Project said in its report that carbon dioxide emissions from mankind are growing about four times faster since 2000 than during the 1990s, despite efforts by a number of nations to rein in emissions under the Kyoto Protocol. Professor Barry Brook, director of the Research Institute for Climate Change and Sustainability at the University of Adelaide in Australia, said CO2 concentrations could hit 450 ppm by 2030 instead of 2040 as currently predicted. They are just above 380 ppm at present. "But whatever the specific date, 450 ppm CO2 commits us to 2 degrees Celsius global warming and all the disastrous consequences this sets in train."

MSLAW’s conference featured 10 panelists who discussed the following topics: It’s Just the Accepted Science, Threats to Biological Diversity & Human Health, Promoting Sustainability at Home and at the Office, Threats to National Security, and Debunking the Industry Deniers. UNH scientist Cameron Wake and Nancy Cole from the Union of Concerned Scientists laid out the science taken for granted by the world’s climatologists and glaciologists. Pat Parenteau from the Vermont Law School and Dr. Ilya Perlingieri explained the threats to both human health and biological diversity. Harvard’s Joe Gregory (who is also an MSLAW third-year student) and MSLAW Professor Kurt Olson offered helpful tips on how to promote sustainability at home and in the office. Dr. Tim McKeown of the University of North Carolina and Dr. John Ackerman of the Air Command and Staff College Department of Distance Learning presented a unique aspect of the threats posed by global warming: the national security implications arising from disputes over resources and increasingly scarce dry land. Finally, Massachusetts State Representative Lori Ehrlich and Lilah Glick from Clean Water Action explained how industries devoted to maintaining a carbon-based economy continue to follow the tobacco industry’s lead in promoting a disinformation campaign designed to mislead the public.

Congratulations to Professor Diane Sullivan and Director of New Media Kathy Villare for earning a Clarion Award for their talk show, “Band of Sisters—American Women at War in Iraq.”
Upcoming Events

Conferences

Third Annual Animal Law Symposium, April 11, 2009
This popular (and FREE!) event drew large crowds the first two times it was held. Attendees will learn about recent developments in the animal law field and discuss issues involving animals in other areas of the law. Presenters in the past have included police dog trainers, animal law practitioners, MSPCA law enforcement officers, and animal rescue volunteers. A special children’s program is planned. Hosted by animal law professors Diane Sullivan and Holly Vietzke and the animal law class.

Legal Education Seminars

Elder Law Basics
February 26, 4 p.m. to 7 p.m.
Contact the MBA (617-338-0500 or www.massbar.org) for fee schedule and to register.

Uniform Probate Code
March 3, 9 a.m. to 12 p.m.
Contact the MCLE (800-966-6253 or www.mcle.org) for fee schedule and to register.

Going Small or Going Solo, Now What?
March 3, 4 p.m. to 7 p.m.
FREE! Open to MSLAW alumni and students only. Contact the MBA (617-338-0500 or www.massbar.org) to register. Space is limited.

Practical Skills Seminar
March 5 & 6, 9 a.m. to 4 p.m.
Contact the MCLE (800-966-6253 or www.mcle.org) for fee schedule and to register.

Family Law Judicial Forum
May 5, 4 p.m. to 7 p.m.
Contact the MCLE (800-966-6253 or www.mcle.org) for fee schedule and to register.

Other

Career Fair
April 9, 11 a.m. to 4 p.m.
MSLAW presents its third annual career fair for students and alumni, featuring more than a dozen employers. Dress professionally. Contact Michelle Hebert (mhebert@mslaw.edu) for more information.
Dean Velvel continues to actively create and produce episodes of *Books of Our Time*, a series of television shows aired on the Comcast Network, highlighting recently published works on topics of interest and importance. His latest shows include:

**The Cult of the Presidency: America’s Dangerous Devotion to Presidential Powers**
*Gene Healy*

Gene Healy, the director of the Cato Institute, discusses how the role of President has been transformed from merely chief of the executive branch of government to, in Healy’s own words, “national guardian and spiritual redeemer…a superhero, responsible for swooping to the rescue when danger strikes.” Healy explains that the Framers did not intend for this office to be all-powerful or to be used, as Teddy Roosevelt said, as a “bully-pulpit,” to whip the masses into support or opposition for a particular cause.

**The Best Sports Writing**
*Pat Jordan*

This compilation of articles written by noted sports journalist Pat Jordan covers the gamut of “sport” in the broadest sense of that word. It includes portraits of mainstream sports celebrities such as Pete Rose, Tom Seaver, Greg Louganis, Roger Clemens and Venus and Serena Williams and ventures far afield with stories on poker and pool, and transsexual tennis player Rene Richards. Jordan candidly evaluates his subjects, and offers behind-the-scene insights into many celebrities who sports fans love to hate. Pat Jordan writes frequently for the *New York Times Magazine*, and has had many of his articles on sports and other topics published in *The Atlantic, GQ, Esquire, Los Angeles Times Magazine, The New Yorker, Playboy, Sports Illustrated*, and elsewhere. His book, *A False Spring*, was named by Sports Illustrated as one of the 100 Best Sports Books of All Time.

**Making Waves and Riding the Currents: Activism and the Practice of Wisdom**
*Charles Halpern*

Charles Halpern, after graduating from Harvard University and Yale Law School, soon tired of generating billable hours at his prestigious Washington law firm, so he set about a career in public service law, establishing the first public interest law firm, becoming founding Dean of the country’s first public interest law school, and the first President of the Nathan Cummings Foundation, which supports community-based programs dedicated to diversity and progressive causes. His book is a story of the development of his life—one devoted to social change, cultural diversity and philanthropy—through a variety of means, including spirituality and meditation.

**Blown to Bits: Your Life Liberty, and Happiness After the Digital Explosion**
*Hal Abelson and Harry Lewis*

In the Preface to this book, the authors say they wrote it because the growth in technology makes things possible that were never before conceivable. “It is now possible, in principle, to remember everything that anyone says, writes, sings, draws, or photographs. Everything. If digitized, the world has enough disks and memory chips to save it all, for as long as civilization can keep producing computers and disk drives. Global computer networks can make it available to everywhere in the world, almost instantly. And computers are powerful enough to extract meaning from all that information, to find patterns and make connections in the blink of an eye.” Abelson, who teaches at MIT and Lewis, who teaches at Harvard, are both longtime members of both academia and the computing field. Together, they help even the most technologically unsophisticated—

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ed reader explore the lengths and breadths of this new computerized world.

Mr. Gatling’s Terrible Marvel: The Gun That Changed Everything and the Misunderstood Genius Who Invented It
Julia Keller

Julia Keller, Pulitzer-Prize winning cultural editor of the Chicago Tribune, scrupulously details the life of one of “the most influential men of the 19th century.” Inventor of many useful items, holder of 43 patents, many of them agriculturally-related, Gatling is most famous for the weapon that bears his name, a gun that could fire repeated rounds without reloading, in essence the first “machine gun.” Although Gatling designed the weapon around 1861 with the Civil War in mind, its predominant uses were following the war by law enforcement and private businessmen, who used the gun as intimidation. Keller credits the United States Patent Office, and the American concept of allowing inventors to own their ideas as they would a piece of real estate, as contribut-

American Creation: Triumphs and Tragedies at the Founding of the Republic
Joseph Ellis

New MSLAW Trustee Joseph Ellis, noted Historian and Professor at Mount Holyoke College, appeared on two shows. The first was a one-day conference on American Creation: Triumphs and Tragedies at the Founding of the Republic. In this work, Professor Ellis focuses on six major events in the early years of our nation’s history, from the signing of the Declaration of Independence to the Louisiana Purchase. He reveals not only on the positive, productive efforts of the founding fathers during this time, but also their failures and foibles, as slaveholders, abusers of Indians and men of personal limitations.

Copies of these and other MSLAW television shows are available online and in DVD and VHS. For copies, contact Kirby Smith at the law school, 978-681-0800, or smith@mslaw.edu.

In Memoriam

Unfortunately, MSLAW has lost several alumni since the magazine’s last publication. We remember fondly:

Brian Leonard (’98), who passed away in April
Steve Grote (’99), who passed away in May
Alfred Pagliocca (’02), who passed away in June
Perry Honeychurch-Hood (’06), who died suddenly in September
Case Note: SJC Limits Application of Community Caretaking and Emergency Exceptions

By Michelle M. Hebert, Esq.


Facts

While on routine patrol, Malden police received an anonymous call about a man wearing a white shirt and jeans, “swinging a baseball bat,” in the area of Ferry and Holyoke Streets. Seconds later, an officer turned the corner of Ferry and Holyoke and observed a man fitting that description leaning into an open trunk of a motor vehicle. The officer observed the unidentified man lean into the trunk after placing a baseball bat up against a telephone pole adjacent to the motor vehicle.

The officer parked and exited his cruiser. The unidentified man noticed the officer and the officer reported that the man then reached into his right pocket and threw an unknown object into the open trunk.

At this time, the officer ordered the man to “stop,” step away from his vehicle, and come towards the officer with his hands out of his pockets. The man complied with the order. Other officers arrived on the scene. The man was identified as Thomas Knowles, who resided at the corner of Ferry and Holyoke streets.

The officer proceeded to search the contents of Knowles’ trunk to determine what was thrown inside, “to make sure it was not a weapon.” The officer observed a small baggy containing some white powder he believed to be heroin and two other bags containing an assortment of pills. Knowles was subsequently placed under arrest.

The defendant filed a motion to suppress the evidence of drugs found in the trunk of his motor vehicle, contending his rights against unreasonable search and seizure under Article 14 of the Massachusetts Declaration of Rights and the Fourth Amendment to the United States Constitution were violated. The District Court denied the motion. The Court of Appeals affirmed.

The Court of Appeals concluded that the defendant was “seized” in the constitutional sense when the officer ordered him to stop and step away from the motor vehicle. Although stating Knowles conduct was not “indicative” of criminal activity, the Court of Appeals ruled the seizure was justified, concluding it was “a reasonable precaution for the officer’s own safety in conducting an investigation to make sure the defendant was not posing a danger to himself or others.” The Court of Appeals viewed this to be analogous to a well-being check as justified under the community caretaking doctrine. The Commonwealth argued that the police were acting under the authority granted within the community caretaking and emergency doctrines.

The Supreme Judicial Court granted the defendant’s application for further review and reversed the lower courts’ decisions.

Legal Analysis

This case involves the application of the community caretaking doctrine and the “emergency” exception as a means of justification for the seizure of Knowles without reasonable suspicion. The SJC ruled that the officer did have a legitimate basis to approach Knowles and make an inquiry, but the officer went too far. The court found that neither the officer’s observations nor the substance of the information provided by the anonymous caller provided enough reasonable suspicion to warrant a seizure.

The Massachusetts Supreme Judicial Court affirmed the Appeals Court’s conclusion that Knowles was “seized” when the officer ordered him to stop and move away from the motor vehicle. Commonwealth v. Barros, 435 Mass. 171, 176, 755 N.E.2d 740 (2001). “A person is seized within the meaning of the Fourth Amendment only, if in view of all the circumstances surrounding the inci-

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dent, a reasonable person would have believed he was not free to leave.” Id. at 744, 174-5, quoting Commonwealth v. Mendenhall, 446 U.S. 544, 554, 100 S.Ct. 1870 (1980). In order for the officer to make a threshold inquiry of the defendant, the SJC held that the officer must be able to demonstrate reasonable suspicion that the defendant was involved in or about to be involved in some sort of criminal activity, citing Commonwealth v. Silva, 366 Mass. 402 405, 318 N.E.2d 895 (1974).

However, then the SJC broke from the appeals court’s decision. The facts supporting the Commonwealth’s contention that the officer had an objective and reasonable concern for his safety did not meet the requisite level of suspicion necessary to justify an investigative stop. The incident occurred in the daytime in an area not reported to be a “high-crime” area. The officer was not outnumbered, Knowles did not act in such a way as to suggest he may be attempting to draw a weapon, nor was there a report that a crime of violence had occurred. The culmination of all these facts simply did not warrant an immediate seizure of Knowles. The Court stated that had Knowles declined to step away, that fact, “would have legitimately heightened the officer’s concern that Knowles presented a danger to his safety and might have tipped the scales in favor of the protective seizure that was employed.” Commonwealth v. Knowles, 451 Mass. 91, 100, 883 N.E.2d 941 (2008).

Community Caretaking

The community caretaking doctrine is a police function which is typically described as a necessary intrusion into an individual’s privacy that society grants police officers in order to be of service to their communities. If the officer is acting out of concern for the well being of the person, rather than on the basis of a suspicion of criminality, then the officer’s actions are not measured by traditional search and seizure standards.


Simply stated, the Commonwealth failed to present facts justifying an inquiry based upon the defendant’s safety or that of the public. Upon arriving at the scene, the officer immediately proceeded to seize Knowles. He made no objective assessment as to Knowles’ well-being. He quickly assessed the situation and subjectively determined this was the man who the caller identified. The officer was not divorced from investigation, detection, or from the acquisition of evidence when approaching Knowles. The officer quickly assumed the role of investigator as soon as other officers arrived on the scene and began searching for evidence of a crime.

Emergency Exception

The SJC also refused to justify the seizure on the basis of an emergency situation. In such cases, probable cause is not needed under either the Fourth Amendment or Article 14 because of the immediate need for assistance for the protection of life or property. In order for the emergency exception to apply, the Commonwealth must demonstrate that authorities had a reasonable ground to believe that an emergency existed and that the actions of the police were reasonable under the circumstances to protect or preserve life or avoid injury. Commonwealth v. Davis, 63 Mass.App.Ct. 89-90, 823 N.E.2d 411 (2005). The emergency exception applies when the purpose of the police action is because of an emergency, to respond to an immediate need for assistance for the protection of life or property. Commonwealth v. Bates, 63 Mass. App. Ct. 217, 219, 548 N.E. 2d 411 (1990). The emergency exception cannot be invoked when the entry is also motivated by an intent to discover incriminating evidence. Commonwealth v. Sondrini, 48 Mass. App. Ct. 704 (2000). Based on the facts, there was no objective evidence presented that the officer was confronted with an emer-

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gency situation and was acting in order to protect and preserve life or property. Knowles was not in a recent car accident requiring the immediate assistance of the officer, he was not trapped in a burning motor vehicle, or struck by another player on the field yielding a baseball bat.

The Court held that the facts did not support the officer’s “order” to step away from the vehicle. The SJC’s decision rests on the fact that the officer had “ordered” rather than “asked” the defendant to step away from the vehicle to discuss the situation. Therefore, Knowles was seized first and placed into custody. Then, a search for evidence of a crime was initiated in his trunk, exceeding what the court has held to be permissible in the absence of reasonable suspicion of criminal activity.

The Supreme Judicial Court concluded that the seizure of Knowles’ property was in violation of the protections afforded under Article 14 of the Massachusetts Declaration of Rights and the Fourth Amendment to the United States Constitution against unreasonable searches and seizures. The judgments were reversed.

Conclusion

Knowles stands for the proposition that, when utilizing the community caretaking doctrine as justification for a stop, police must be cognizant of the explicit function of the doctrine in order to ensure that unconstitutional intrusions upon a citizen’s liberty and constitutional guarantees do not occur. When utilizing the doctrine, police must objectively believe the person’s well-being or the safety of the public are in immediate jeopardy or there is an emergency situation with an immediate need to respond.

Michelle Hebert graduated from MSLAW in 2005. In addition to serving as MSLAW’s Director of Alumni Relations, Michelle practices criminal law, concentrating in search and seizure issues. She is currently enrolled in graduate school at UMass-Lowell pursuing certificate degrees in Forensic Criminology and Domestic Violence Prevention.