

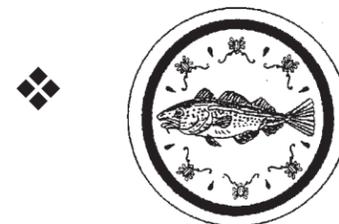


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# BARRISTER

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WINTER 2007

## PRESIDENT'S MESSAGE

As we begin a New Year, I wish you all much success, health and happiness both professionally, but more importantly, on a personal and family level. It is not lost on me that the unrequited support of our families often provides us the impetus to succeed at our chosen profession. For that we should all be thankful.

Coinciding with this New Year, and every New Year, is the admittance of new lawyers to the roll of attorneys for the Commonwealth of Massachusetts. We all remember the excitement of our swearing in ceremony..... and then wondering "what do I do now?". In the spirit of welcoming our newly admitted Cape attorneys, I ask that you extend a hand to our newest colleagues, Judges and past presidents at a reception which is to be held on Thursday, January 25, 2007 at the Barnstable Tavern. Festivities should begin at about 5:15 p.m., and your attendance would be greatly appreciated.

In other news, much work and progress continues in our efforts for the installation of a B.C.B.A. website. It is the intention of the Executive Committee that our website be up and running by the end of January, 2007. Once online, we welcome any suggestions by members regarding the content of said site.

I would also like to inform members that we are in the early stages of planning our "Second Annual" pilgrimage by motor coach to Fenway Park for a Red Sox Game. Presently, we are seeking tickets for the Red Sox vs. San Francisco Giants game on Friday, June 15, 2007 at 7:00 p.m.. More information will be provided in early spring.

In closing, it is with much sadness I must report on the recent, sudden passing of Attorney Herb Bober. Herb was a man of integrity, honor and great compassion. It has been my personal experience that Herb voluntarily handled many difficult, contentious Probate Court Cases not only with competence and experience but also a smile and a sense of humor. He will be missed, and our condolences go out to his family.

## MARK YOUR CALENDARS FOR THE NEXT ANNUAL MEETING!

The next annual meeting of the Barnstable County Bar Association is scheduled to occur on Thursday, June 7, 2007 at the Ridge Club in Sandwich. Further details will be provided to BCBA members as soon as they become available.



## A FOND FAREWELL FROM JUSTICE SMITH

The Barnstable County/Town of Plymouth Juvenile Court continues to address some of the most intransigent and difficult problems in our society. The families before our court frequently are lacking in housing, education, family supports and many advantages other folks take for granted. Many struggle for sobriety. Frequently, the most disadvantaged in these situations are the children.

Our Probation Department is headed by John Millett, who has had many years of experience in Bristol County dealing with these problems. Our court is a "county court" with sites in Edgartown, Nantucket, Orleans, Falmouth and Plymouth as well as Barnstable. Janet McFarlane is the Assistant Chief Probation Officer in Barnstable, Lonnie Welchman in Falmouth and Orleans and Larry Dullea in Plymouth. Each brings special expertise to their supervision of probationers. Our probation officers meet with the probationers at school as well as in the court. The Probation Officers go at night to check on the compliance with court ordered curfews.

Charles Andrade is our Clerk-Magistrate. Ed Lake is the First Assistant Clerk in Plymouth and David Bowie is the Assistant Clerk in Orleans. They hold hearings at various sites to best serve the public. Their staff assists the public in many ways as well as carefully managing the paper work and the computer records of the court.

Our Court Clinic, headed by Robert Fleming, PhD., does magnificent work. Many troubled families come to our sessions. Some individuals require hospitalization or other immediate intervention. Youngsters are often "referred to the Court Clinic" for an evaluation of their needs and recommendations of how to fulfill those needs. The clinicians frequently perform great service in securing insurance allocations and placements for youngsters' needs. The Court Clinic and the Probation Department meet

*(Continued on Page 3)*

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The next deadline to submit  
articles for the Barrister is  
March 30, 2007  
for the Spring 2007 edition.  
Please send materials as e-mail  
attachments to attorney Dan Neelon at  
dneelon@neelonwilder.com.

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## BROKER ISSUES

*(Continued from Page 6)*

proper account and distribution of such money" if the transaction is "either consummated or terminated". In the absence of signed, more detailed escrow terms, the question of what a "proper distribution" would be is subject to dispute (such as whether a buyer is entitled to a return of his deposit upon demand if the seller clearly materially breaches the agreement and the buyer wants to pursue damages, or whether the breaching seller's signature on a release is required, thus pressuring the buyer not to exercise his rights by refusing to return the buyer's own money to which the seller no longer has any rights). Regarding escrow account interest, paragraph (a) provides that an

"escrow account may be interest or non-interest bearing...", thus making a depositing broker's agreement to an interest-bearing escrow advisable where material. The referenced regulations do not address any inconsistencies between listing agreements and concessions reflected in purchase and sale agreements but not signed by the brokers.

It is important to note that the concern about certain practices of "some brokers" does not apply to most brokers. The "10% rule" applies to most professions, and most concerns about contracts with professionals arise only because of that "ten percent."

*-Daniel P. Neelon, Esq.*



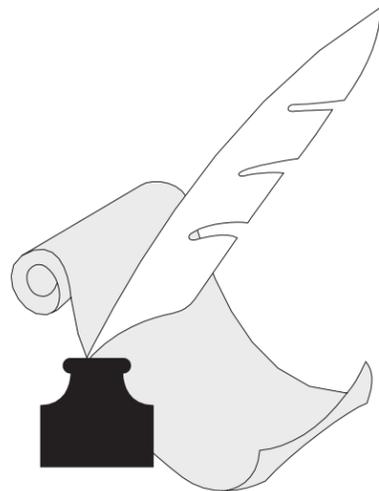
## A FOLLOW-UP ON BROKER ISSUES

This Newsletter's last edition included an editorial entitled, "Buyer Beware... of the Non-Signing Broker?", which essentially discussed concerns about "some Cape Cod brokers'" refusals to sign standard form purchase and sale agreements that provide for a broker signature and have clauses with obligations and representations of the broker(s), based on the assertion that brokers are not supposed to be parties to the agreements (which explicitly provide for their signature and state covenants and representations made by the broker). Apart from this assertion's inaccuracy, the editorial addressed at least two concerns about the result: (1) the lack of a written agreement signed by all parties governing the application and release of the deposit, or whether interest accrues on it; and (2) inconsistencies between signed listing agreements requiring payment of a certain commission, and subsequent commission concessions promised by brokers who refuse to sign the purchase and sale agreement reflecting those concessions.

Ed Sweeney, Jr., Esq., of Ardito, Sweeney, Stusse, Robertson & Dupuy, which represents the Cape Cod & Islands Association of Realtors® and the Cape Cod & Islands Multiple Listing Service, points out that 254 CMR 2:00(10), [Client Funds], (a) and (b), cover some of these issues. In fact, those provisions require a broker to deposit funds received into a bank escrow account and to keep a record of funds so deposited. Such provisions do prohibit a broker from simply taking the funds for some other purpose, and the editorial was not meant to suggest that there is a known problem with Cape brokers absconding with deposit funds. We appreciate Ed's contribution and hope that other BCBA members will contribute their thoughts on matters of interest.

In further follow-up, it appears that the narrower concerns expressed in the editorial are not clearly addressed by the referenced regulations. For example, paragraph (a) only requires a broker to "make a

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## INEQUITIES

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whether by dictatorship or simply the relative "tyranny" of a democratic majority. In less radical terms, unenthusiastic justices ultimately could produce slow and uncaring processes resulting in citizens' loss of faith in the legal system and a greater propensity for self-help, both civil and criminal.

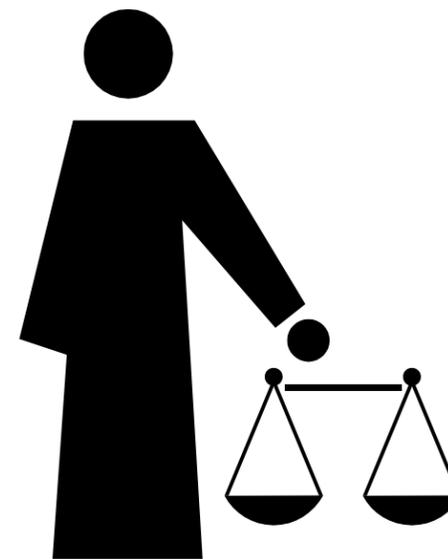
In Massachusetts, we are blessed with what U.S. District Court Judge William G. Young once described in a seminar as one of the finest judiciaries in the country. At this point in time, it would not be reasonable or accurate to suggest that the legislature's relative disinterest in judicial compensation has harmed the quality of judicial decisionmaking in the Commonwealth. However, common sense suggests that a continuing failure to provide levels of compensation commensurate with that provided by numerous other states relative to the cost of living may erode that quality over the long term, to the detriment of all Commonwealth citizens.

In this Newsletter's next issue, we will examine some of the causes of the apparent, relative lack of legislative concern about keeping Massachusetts justices fairly compensated, and possible methods of addressing those causes. Any contributions to this discussion would be welcome.

*-Daniel P. Neelon, Esq.  
(with Jenny C. Wilder, Esq.)*

## CONGRATULATIONS TO TWO NEW JUSTICES

The Barnstable County Bar Association extends its congratulations to the Hon. Robert A. Welsh, III and the Hon. Kathryn E. Hand, who have been appointed as District Court justices. The Hon. Kathryn Hand has received an appointment as an Associate Justice of the Barnstable District Court. The Hon. Robert A. Welsh, III, formerly an Assistant District Attorney for Barnstable County, has received an appointment as an Associate Justice and reportedly will be "riding circuit".



## FAREWELL

*(Continued from Page 2)*

with parents, school personnel, the Department of Social Services and youngsters in our CHINS diversion sessions. Most CHINS applications never come before a judge. They are "diverted" to appropriate service providers to deal with the problem of truancy, stubbornness, runaway or school offender. In this behind-the-scenes work our court performs a tremendous public service in finding help for youngsters and families in the earlier stages of presentation of problems. The Probation Department is beginning a project to find and help youngsters in the elemen-

tary schools presenting early unaddressed problems with attendance, learning disabilities or discipline.

Again in the fall of 2006, in collaboration with the Court Clinic and DSS, the Probation Department continued an Anger Management Program set up for teens in the Barnstable area who are violent at home. This thirteen week anger management group is unique in that the parents also participate in weekly group sessions and about half of the groups are held jointly. Court Clinician, Brenda Levesque, LICSW, facilitates the parent group, and therapist Jean Gilson, LCSW, facilitates the teen group. We believe that the parents' involvement is crucial because it not only supports and encourages their teens in using their newly learned skills, but the parents also learn new ways to respond to angry and stressful situations. Responses by both parents and teens from the prior two group sessions have been positive. Additionally, we have received many inquiries from outside agencies about our program.

I am honored and privileged to have served as a judge along with Judge Kathryn White and Judge Louis Coffin in the Barnstable County/Town of Plymouth Juvenile Court. I admired Chief Justice Francis Poitras when he presided in the Boston Juvenile Court as well as on Cape Cod and I wanted to emulate his dedication to the principles of the Juvenile Court. I have hoped to improve the lives of the children and families who came before me.

I want to express my appreciation for the attorneys who practice regularly in the Juvenile Court. Their camaraderie, cooperation with each other and their high standards are noteworthy; I hold in high regard their dedication and consistent commitment to the law and to the special mission of the Juvenile Court.

Thank you all for the wonderful experience of working with you.

*-Carol Gibson Smith, First Justice  
Barnstable County/Town of  
Plymouth Juvenile Court*

## CONTINUING INEQUITIES IN JUDICIAL COMPENSATION

Despite the recent 15% state-wide increase in judicial pay, it appears that Massachusetts justices still are not compensated fairly relative to the cost of living and to judicial compensation in other states with similar levels of judicial workload and case complexity. The following table provides the judicial compensation recently reported for Massachusetts justices and for the justices of the states of Florida, Illinois and Texas.<sup>1</sup>

CATEGORY	MA	FL	IL	TX
<b>COST OF LIVING FACTOR<sup>2</sup></b>				
	124.0	102.6	97.1	89.5
<b>TRIAL JUSTICES</b>				
	\$129,694	\$139,497	\$157,824	\$125,000-\$140,000
<b>CHIEF TRIAL JUSTICE</b>				
	\$135,087	N/R	N/R	N/R
<b>APPELLATE JUSTICES</b>				
	\$135,087	\$148,524	\$171,991	\$137,500-\$145,000
<b>CHIEF APPELLATE</b>				
	\$140,358	N/R	N/R	\$140,000-\$147,500
<b>SJC JUSTICES</b>				
	\$145,984	\$160,375	\$182,739	\$150,000
<b>SJC CHIEF JUSTICE</b>				
	\$151,239	\$160,375	\$182,739	\$152,500

<sup>1</sup> Massachusetts salaries were reported by the SJC Public Information Office this month. Information for Florida and Illinois was reported in the National Center for State Courts' *Survey of Judicial Salaries*, Vol. 31, No.1, July 1, 2006 (the "National Survey"). Information for Texas was reported by San Antonio attorney Jeff Akins based on research on official websites. The compensation ranges in Texas include the base state salary (the lowest figure in each range) and a statutorily permitted county-by-county supplement (which cannot cause the salary to exceed the highest figure in each range).

<sup>2</sup> The Cost of Living Factor is from ACCRA and is provided in the National Survey. That factor reportedly reflects the average cost of goods and services, averaged among each state's reporting jurisdictions.

In each case, with one possible exception (some Texas trial judges), the other states' justices are paid more than their Massachusetts counterparts. Yet, the cost of living in each of those other states is markedly less than in Massachusetts. The Massachusetts cost of living factor is 20.9% higher than Florida's, 27.7% higher than Illinois', and 38.5% higher than Texas' cost of living factor. Thus, in order to achieve buying power parity with a Texas appellate justice earning \$142,000 annually, a Massachusetts appellate justice would have to be paid 38.5% more than \$142,000, or \$196,670—an increase of \$61,583, or 45.6% over the current \$135,087 salary. In order to match the purchasing power of an Illinois Supreme Court justice earning \$182,739 annually, a Massachusetts Supreme Court justice would have to earn 27.7% more than that, or \$233,358, an increase of \$87,358, or 55.6% more than their current \$150,000 salary. In order to match their Florida counterparts earning \$139,497, Massachusetts trial court justices would have to earn 20.9% more than that, or \$168,651, an increase of \$38,958, or 30%, over their current \$129,694 salary.

An examination of the median cost of homes in different areas of these states also demonstrates how Massachusetts justices cannot afford to live as well on their salaries as their counterparts in other states. For example, the median price of a home in Austin, Texas, is \$171,250<sup>3</sup>, and an appellate court justice there earns approximately \$142,000. The median home cost in the Boston-Quincy area is \$428,940 (2.5 times as much as in Austin), and an appellate justice there earns \$135,087. The median home cost in Chicago is \$280,740, about 35% less than the Boston-Quincy median, but the Chicago trial court justice earns 21.7% more than a Boston trial court justice.

<sup>3</sup> The median home price information in this paragraph was provided in the December 25, 2006 edition of *Fortune* magazine.

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## INEQUITIES

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There is little question that we are underpaying our justices, notwithstanding the recent 15% pay raise. Indeed, even the request by the Massachusetts Judges Council for a 30% pay raise (that preceded the ultimate 15% pay raise) was less than needed to match the pay of justices in the three comparison states, relative to living costs. In an article by Scott Allen in the June 18, 2006 edition of the *Boston Globe*, former gubernatorial candidate Kerry Healey was quoted as complaining that incurring the cost of judicial pay raises was an example of wasteful spending. Even the 15% compromise reached with legislators (at, presumably, an approximate \$8 million annual cost, assuming approximately 370 justices) required extensive effort and convincing. Recent press coverage suggests that Governor Patrick is considering restoring, in one fell swoop, somewhere between \$300 million and \$400 million of budgetary items cut by his predecessor.

One wonders whether the judicial branch of government suffers from a comparatively low prioritization by the other branches of state government and our citizens, and what the potential long-term consequences of that low prioritization could be. Throughout the multi-year judicial salary debate, there have been some indications of certain legislators attempting to keep judicial compensation low in order to punish the judiciary for legal and administrative decisions unpopular with those legislators. These attempts at punishing a judiciary for its independence and at forcing concurrence with individual legislative views obviously can weaken the judicial branch of government, by driving talented people away, by rendering existing justices less interested and enthusiastic about their work, and, at the margin, by making justices less willing to interpret and enforce the law consistent with their consciences, when the results would be unpopular with elected officials. At the extreme, history tells us that governments with weak judicial branches can become tyrannical,

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