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SUMMER

of Massachusetts Municipal Lawyers Association

formerly known as the City Solicitors and Town Counsel Association

This is a publication of MMLA and is not intended as a legal advice, which requires consultation with an attorney.

LETTER FROM THE PRESIDENT

Dear Fellow MMLA Members:

It is hard to believe that nearly a year has passed since my election as President of the Association. While I am saddened that this will be my final President's letter to you, I am delighted to have been given the opportunity to serve the Association. During the last quarter, the Association was pleased to have brought you the Annual Program on Public Construction which, this year, focused on "Cross Training" for the municipal lawyer. The program was held at the CBS Scene Restaurant, located at Patriot Place in Foxborough. Both the venue and the program were very well received by the attendees. The program featured a panel of respected lawyers in the public construction field, who examined an engrossing slate of topics designed to help municipal lawyers and their clients get "in shape" for the 2015 bidding and construction season. The program was moderated by Christopher J. Petrini, Esq., and included presentations on: Construction Procurement ABCs, by Peter Mello, Esq. and Christopher Brown, Esq. of Petrini & Associates, P.C.; House Doctor Services for Public Construction Projects, by Angela Atchue, Esq., Senior Legal Officer, City of Boston Property and Construction Management Department; A Decade of Reform- The Construction Reform Act of 2004, by Christopher Petrini, Esq. of Petrini & Associates, P.C. and Brian O'Donnell, Esq., of the Association of General Contractors, Matthew Feher, Esq. of Burns & Levinson, and Jeffrey Nutting, the Town Administrator for the Town of Franklin. In addition to the fantastic presentations, the participants each provided attendees with valuable forms and informational materials.

In addition to the Construction Program, the Association also held its Annual Business Meeting and Election of Officers. I am pleased to report that current Vice-President Donald V. Rider, Jr., City Solicitor for the City of Marlborough has been elected as President of the Association for the upcoming year. Don has been invaluable in his role as Vice-President, and I know that he will continue in this tradition of excellence in his new role as President. I am also very pleased to report that Henry C. Luthin, First Assistant Corporation Counsel to the City of Boston has been elected as Vice-President. Henry's continued contributions to the Association are very much welcomed, as is the continued support of the City of Boston. Jim Lampke has again been elected as Treasurer and Executive Director of the Association (a position which we may make a lifetime appointment, with – or without – his consent!). I am grateful for Jim's assistance and support during my term. The Association's meetings and conferences would not be possible without his yeoman's efforts.

In addition to our newly elected officers, we are also welcoming some new faces to the Executive Board. Among these are Brandon H. Moss, of Murphy, Hesse, Toomey & Lehane, LLP, who is just coming off a term as Chairman of the Association's Amicus Committee. Joining him are Ellen Callahan-Doucette, City Solicitor of the City of

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Inside this Issue

Woburn, and Matthew G. Feher of Burns & Levinson LLP, who is also the current Chairman of the Association's Legislative Committee. I am pleased to welcome these new Board members and thank them for their past contributions. I would also like to thank Kevin Batt and Irene Schall for their efforts while serving on the Executive board. While their presence will be missed in the boardroom, I am hopeful that they will remain active in the Association.

Finally, I would like to thank the other members of the Executive Board, as well as our Past-Presidents, and committee members, who continue to contribute their valuable time and expertise to the Association. Their persistent efforts allow the Association to continue to bring quality educational programs to its members, as well as providing a unified voice for the Cities and Towns in both the legislative and judicial arenas. This is truly the most collegial association of which I have the privilege of being a member, and am proud and honored to have been given the opportunity to serve as its President. As always, I hope to see you at future meetings.

Very truly yours,

John D. Finnegan, President

MUNICIPAL SPOTLIGHT ON: Christine Griffin, Esq.

By: Peter Mello, Esq., Petrini & Associates

1. **In what city/town were you born?**
   I was born in Boston, but grew up in Hanover, Massachusetts.
2. **Where did you attend college and law school?**
   I went to Harvard University for my undergraduate degree and to the University of Chicago Law School.
3. **How did you become interested in municipal law?**
   When I was in law school, I worked as a summer associate at a Boston law firm that did a lot of municipal work. I really liked the municipal cases that I worked on. Over the years, I have been lucky in that I have been able to continue to work regularly on municipal matters while also mixing them in with other areas of practice, including employment law and commercial litigation.
4. **What municipalities have you represented?**
   While I was in private practice, I worked for a variety of communities on the North Shore, the South Shore and in the Metro West area. I was also an Assistant City Solicitor in the City of Quincy and I am now the Town Solicitor in the Town of Randolph.
5. **What is one of your proudest moments as a lawyer?**
   When I was only a few years out of law school I had the opportunity to work on a large civil rights case involving several men who had been wrongfully convicted of murder. Evidence had been discovered years later which caused the convictions to be over turned. I was part of a team of lawyers who successfully sued the FBI on behalf of these men and their families, for civil damages. It was an incredible team effort and I was proud to have been a part of it.
6. **What is your favorite discipline within your municipal practice? Why?**
   I really enjoy the process of crafting new ordinances and by-laws. Whenever a new ordinance is proposed, I am excited to see how other Cities and Towns have handled the issue and to try to craft something that is tailored to my particular client. Having practiced as a litigator for years, I also still love appearing in Court and I look forward to every opportunity where I get to appear and advocate for my client.
7. **What is the most useful advice you could give regarding the practice of law?**
   The legal profession is filled with so many different types of opportunities to have a successful career. You have to take your time and find the path that is best for you.

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8. **What do you like to do outside of work?**
   My husband and I like to travel, so we get away when ever we can. I also love to read and garden and spend time with my family.

9. **When you are driving to court to argue an important motion, what might you be playing on the radio?**
   Usually, I have to admit, I am listening to Kiss 108!

10. **What is your favorite book?**
    I love mystery novels and read them all the time. Agatha Christie got me hooked, but now I read just about any mystery novel that comes my way.

MUNICIPAL CASE LAW UPDATE

By: Tim Harrington, Esq.,
General Counsel, Boston Public Health Commission

DaRosa, et al. v. City of New Bedford
SJC-11759
May 15, 2015

As our members are aware, the Supreme Judicial Court recently held in eRosa v. City of New Bedford that opinion work product prepared in anticipation of litigation or trial is covered by the policy deliberation exemption as codified in G.L. c. 4, Section 7 (26)(d). Attorney Shepard Johnson represented the City, while Attorneys John Davis and John Wilusz filed an amicus brief on behalf of the Massachusetts Municipal Association. Attorney Brandon Moss also filed an amicus brief on behalf of the MMLA. This write-up will not do justice to the countless hours they spent in securing a significant legal victory for all government counsel across the state. The brief will provide a synopsis of the facts, the decision's holding and reasoning, and highlight additional points that will be useful for our membership. (Unless otherwise noted, all quotations below are taken from the SJC's decision.)

This case arose from costs associated with the environmental cleanup of an ash dump that New Bedford ("City") operated until the 1970's. Abutters to the site brought a claim under G.L. c. 21E and additional common law claims against the City in October 2008. After the plaintiffs filed their suit, the City hired Andrew Smyth of TRC Environmental Corporation ("TRC") to review the plaintiff's claims and determine if third parties could be legally responsible for the cleanup. During his work, Smyth drafted two letters to the City and created a fifty-two page evaluation report. The report discussed the "sources of soil contamination in the relevant area of the city." The City eventually brought third party claims against ten other parties.

During discovery, the third party defendants requested production of the TRC documents, including the two letters and the evaluation report. When the City claimed the documents constituted work product, the third party defendants moved to compel their production. The Superior Court ordered production of the documents because it found they did not fall into an exemption under G.L. c. 4. Section 7 (26). However, the Court also noted the documents would normally qualify as work product and would be subject to the "heightened standard for disclosure as codified in Mass.R.Civ.P. 26(b)(3)." After the City petitioned a single justice of the Appeals Court for interlocutory review, the SJC granted direct appellate review.

Another Implied Exemption? The SJC began its analysis by noting that in General Electric . v Dep't of Envtl. Protection, 429 Mass. 798 (1999), the Court did not specifically reach the issue of whether G.L. c. 4, Section 7(26)(d) ("Exemption d") protects from disclosure documents that are typically considered work product in the litigation arena. However, the SJC flatly declared it no longer holds the view that there are no implied exemptions in the public records act, or that all government records constitute public records unless they fall into an exemption. The Court looked to two well known decisions where it found implied exemptions to the public records law. The first is Suffolk Construction Co. v. Division of Capital Asset Mgt., 449 Mass. 444 (2007) , where the Court found withdrawal of the attorney client privilege was not required by the public records law. The second is Com. v. Fremont Inv. & Loan, 459 Mass. 209 (2011), where the Court found public documents shielded by a court-ordered protective order are not subject to disclosure under the public records law. While the instant case does not give rise to an additional implied exemption, it is interesting the Court spent some time affirmatively overruling that portion of General Electrical that said records are public unless they fall squarely into an exemption. Other scenarios may arise where municipal counsel may have legitimate reasons to argue certain documents are impliedly exempt from disclosure. The DeRosa decision gives counsel at least a footing to make such arguments when legitimately necessary to carry out the work of the municipality.

Continued onto page 4

Exemption d. Instead of finding another implied exemption for work product, the Court found that opinion work product will fall into the policy deliberation exemption. The Court noted the purpose of Exemption d was to foster and protect the "open, frank interagency and intra-agency deliberations regarding government decisions." Similar to the federal Freedom of Information Act's deliberative process privilege, inter or intra-agency documents may be withheld under Exemption d if they are "1) predecisional…and 2) deliberative, actually…related to the process by which policies are formulated." DeRosa quoting Grand Cent. Partnership v. Cuomo, 166 F.3d 476, 482 (2d Cir. 1999).

The Court essentially had no qualms about fitting opinion work product safely into the policy deliberation exemption. It reasoning deserves to be quoted in full:

> *"A decision made in anticipation of litigation or during litigation is no less a 'policy' decision and is no less in need of the protection from disclosure provided by exemption d simply because it is made in the context of litigation... If anything, the need for nondisclosure of materials relating to the government's preparation for litigation is even greater than the need for nondisclosure of deliberative materials in other contexts, because litigation is an adversarial process, where the disclosure of these materials might be used to the detriment of the government by its litigation adversary."*

Opinion Work Product vs. Fact Work Product. The Court then turned to the distinction between opinion work product and fact work product. The Court examined Exemption d's language regarding reasonably completed factual studies or reports. Based upon that language, the Court concluded that fact work product prepared in anticipation of litigation that is not part of a reasonably completed study or report is covered by Exemption d. Fact work product prepared in anticipation of litigation or trial that is part of completed report but "interwoven with opinions or analysis leading to opinions" is also covered by Exemption d. Other fact work product not falling into these two buckets must be produced as public records, even if they would have been protected from disclosure under Rule 26.

Some final points to be cognizant of when faced with similar scenarios:

Regarding fact work product that may not be covered by Exemption d, a government agency must produce such documents in response to discovery requests, as opposed to requiring an opposing party to file a public records request for them;

Exemption d normally allows government agencies to withhold documents only while the policy is being developed. However, in Footnote 16, the Court notes that "the deliberative process is always ongoing and incomplete during the course of the litigation, because every decision relevant to the litigation may be revisited. . . We leave open for another day the question whether opinion work product might no longer be protected once the litigation is concluded."

The Court also confirmed that documents produced by an outside vendor qualify as intra-agency materials deserving of the protections of Exemption d. "Where a memorandum or letter received by the government was prepared at the government's request by a consultant hired by the government to assist it in the performance of its own functions, it is both "textually possible' and 'in accordance with the purpose' of exemption d to regard the documents as an 'intra-agency' memorandum or letter."

Coupled with the Suffolk Construction decision, DeRosa provides government counsel with a more even playing field in litigation matters. As a practice pointer, government counsel can cite to this decision and Exemption d in any contracts with outside vendors hired to assist with litigation matters. Such contracts should state that the purpose of the contract is to assist with litigation and that the contract and any work product created pursuant to the contract shall be exempt from disclosure under G.L. c. 4, Section 7 (26)(d).

A REVIEW OF "HOW NOT TO REGRET YOUR DIRECT– EXPLORING THE HUMAN STORY"

By: Jordan L. Shapiro, Esq., former City Solicitor, City of Malden and past president of the Massachusetts Municipal Lawyers Association

This month's review comes from the ABA Litigation magazine, Vol 41 No. 2, Winter 2015, written by Benjamin Riley, Esq., a San Francisco lawyer with the law firm of Martko, Zankel, Bunzel & Miller. This article begins with observation: "Regret. How often do we look back and wonder whether we could have done things better, worked harder, been clearer, obtained a better result?" The author suggests that focusing on presenting a "power and persuasive direct examination" is the challenge for many trials.

Preparing a witness thoroughly for direct examination is as important as the preparation for argument and cross examination. The author advises the reader to "step back after all the hard preparation and let the witness be the star....listen to the witness, get to know the witness, and weave your examination around his or her human story." The author believes that "the most important lesson for a great direct examination is to listen during the preparation sessions. Listen hard." Although you may have already prepared the witness for deposition and the author thinks that if you take the time to listen to the witness's entire story again, you may hear parts of the story you didn't previously during deposition preparation. The witness may have important testimony you've never heard that reinforces other themes in the case. Thus, you can add entire new areas to your direct examination outline that will "buttress other parts of your case and establish for the jury who the witness is and why he or she is important and believable."

Of course, the article urges you to reiterate to the witness that the witness should tell the truth and only speak from personal knowledge. The author advises that your witness "needs to trust you–you want the witness to explain his or her unique and important story in the most compelling way possible."

An attorney must also spend time with the witness reviewing key exhibits that will form "the backbone of the examination." Again, the author notes that "It always amazes me how many important things I learn from witnesses the night before they testify at trial– sometimes after years of litigation."

Additionally, the author advises attorneys to review the likely testimony that will be offered by other witnesses. It is the job of the attorney to help the witness through any questions or misunderstandings in advance of trial. Identify those documents and areas of testimony on which the witness "has important additional information...avoid repetition. Don't force things. If an area is important to the case but not central to the witness's story, save it for someone else

After preparing the witness's, an attorney can begin working on "nuance and style." Attorneys need to hone the direct examination so that you only have to introduce subjects and then ask when, what and why. The author does not recommend that attorneys write out questions as it tends to promote attorneys reading and not listening to the witness's answers. Instead, outline the key topics and expected areas of testimony, grouped chronologically or by major topic. It should be a synopsis of expected testimony, not just the questions. It is best to use simple, open-ended questions to elicit the witness's testimony.

Because you have not written out your questions, your examination will closely follow and react to the witness's testimony. Have an outline of "expected testimony" on a checklist. You have to listen to the witness's testimony to be sure the witness doesn't say something different than what you thought he or she said, "all because you weren't listening closely enough and thought you had everything scripted."

Lawyers preparing witnesses will offer many suggestions and even criticisms of the witness's word choice, clarity, demeanor, etc. "Witness strength and confidence are essential; hubris and condescension are deadly." If the witness has "distracting ticks or mannerisms," an attorney should videotape the preparation session so the witness can watch his or her testimony and see the distracting aspects and work to minimize them. Teach the witness to make eye contact with the jury.

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In preparing a witness for cross examination the author reminds attorneys to again remind the witness to tell the truth and only draw from personal knowledge. "An honest answer that a particular topic is outside someone's personal knowledge is always better than trying to stretch recollection in an attempt to be helpful." Sometimes multiple preparation sessions are necessary to make the witness comfortable with their testimony and word choice, so that the testimony "will not appear defensive or troubling."

The author suggests letting the witness see the courtroom. You should let the witness see you standing at the far end of the jury box when you ask questions. That way, while looking at you, the witness is also looking at the jury.

The article advises attorneys to begin the direct examination with the personal information about the witness--their education, residence, expertise, and maybe even family matters. Asking questions to a witness such as "why was that important to you?" or "are you saying the Plaintiff never raised any objections to the termination of the contract? Did you find that important? Why?" were the author's very good suggestions for young litigators.

When you're done, thank the witness for the testimony and have a seat. As cross-examination proceeds, "you can remain relaxed, knowing your witness is fully prepared and should do fine. If necessary, follow up with redirect, but keep it short to reinforce and comfort and show confidence you have in the witness."

The author concluded with a story about preparing a witness for seven hours for a one hour examination. The witness "thought I was being too tough and asking her to do too much....But when she walked into the courtroom, her head was high and she ended up being a stellar witness. She breezed through cross examination with a matter-of-fact attitude because she was fully prepared and comfortable in what she knew and she realized that as long as she stuck with her home bases she would be fine....Afterward, she said I was her new 'life coach.' 'You were pretty tough on me,' she said, 'but you built me up and gave me the confidence and tools I needed. I feel great.'" No regret there, the author concluded.

Overall, I found the article to be "off the top of the head" of the litigator, but believe there are helpful suggestions for newer litigators, and refreshers for more experienced lawyers.

Final Tips

"If attorneys decide that their fact witnesses may also qualify as non-retained experts, it is critical that they pay attention to Rule 26's summary disclosure requirements."

You also need to study the opponent's disclosures promptly and carefully, or "you could miss your opportunity to raise an appropriate challenge," the author warns.

PART II[1] – REAL ESTATE TRANSACTIONS BY THE COMMONWEALTH THROUGH THE DIVISION OF CAPITAL ASSET MANAGEMENT AND MAINTENANCE (DCAMM)

By: Carol Kemp, Esq.
Deputy General Counsel, DCAMM

OUTLINE OF DCAMM CHAPTER 7C REAL ESTATE DISPOSITION PROCEDURAL REQUIREMENTS

If there is existing general legislation that substantively authorizes DCAMM to dispose of state property subject to M.G.L. c. 7C, ss. 32-38, the procedural steps set forth in M.G.L. c. 7C, ss. 34-38 are as follows:

1. The state agency having care and control of a property determines it no longer needs a property and notifies the secretary of its executive office of that determination.
2. The secretary, working with DCAMM, determines if another agency within that secretariat needs the property. If not, the property is determined to be surplus to the needs of agencies within that secretariat.

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1. PART II of Real Estate Transactions is continued from the spring edition of the Quarterly..

3. DCAMM then polls all other executive offices to determine if there is a current or foreseeable need for the property by any of their agencies.
4. If DCAMM's Commissioner determines that there is no current or foreseeable state agency need for the property, DCAMM then sends notices to the local agencies/officials of the town/city, county and legislative delegation where the property is located. The notices inquire if any public agency has a current or foreseeable "direct public use" for the property.
5. If DCAMM's Commissioner determines that there is no current or foreseeable direct public use for the property, DCAMM declares the property surplus to public agency needs and available for disposition.
6. If the property exceeds two (2) acres, DCAMM holds a hearing in the municipality where the property is located to determine if any conditions or restrictions should apply to the property's disposition. The hearing must occur no sooner than 30 days and no later than 35 days after notice is published in the Massachusetts Secretary of State's Central Register. Published weekly notice for four (4) consecutive weeks preceding the hearing in newspapers with sufficient circulation is, also, required.
7. DCAMM commissions an appraisal to determine the value of the property for its current "highest and best use" and its "highest and best use" considering any restrictions placed on the property.
8. Advertisement of the availability of the property and the request for proposals must be placed in the Central Register thirty (30) days prior to the opening of proposals. The same advertisement must also appear each week for four (4) consecutive weeks in newspaper(s) with a circulation sufficient to inform the affected locality. The last publication must occur at least eight (8) days prior to the opening of proposals.
9. DCAMM selects a proposal based on the criteria described in the request for proposals.
10. If the property exceeds one (1) acre, one hundred twenty (120) days prior to sale, DCAMM notifies local agencies (notice period may be shortened by waiver of local officials or in case of emergency).
11. Sixty (60) days prior to the sale of one (1) or more acres of real property, DCAMM holds a public hearing for the purpose of disclosing the conditions or reasons for the proposed disposition.
12. A disclosure statement identifying all parties with an interest in the transaction must be filed with DCAMM by the designated purchaser or lessee.
13. Upon execution of the documentation or agreement completing the transaction, DCAMM must retain all proposals, leaving them available for inspection by the public until expiration of the agreement, or six (6) months form the date thereof, whichever occurs first.
14. DCAMM must place a notice in the Central Register indicating the purchaser or lessee and the amount of the transaction. The notification must include a justification for any disposition at a price less than the determined value, and the difference between the determined value and the price received.

UPCOMING MMLA PROGRAMS

Date: Thursday, August 6, 2015

Topic: Annual August Luncheon Meeting, Awards Ceremony and seminar

Location: The Publick House in Sturbridge

Time: 11:30am - 6:00pm

Overview: Please join MMLA on Thursday, August 6, 2015 for its Annual August Luncheon Meeting, Awards Ceremony and seminar. This year's seminar is" Municipal Development/Redevelopment: Opportunities and Pitfalls: How to Best Use Development/ Redevelopment Techniques and Avoid Problems; Maximize the Benefits for Your Community." The meeting begins at 11:30 and concludes at 6:00 p.m. and will be held at The Publick House in Sturbridge.

Date: September 17, 18 and 19

Topic: MMLA Annual Weekend Meeting and Conference

Location: Red Jacket Inn, Yarmouthport

Overview: MMLA Annual Weekend Meeting and Conference - September 17, 18 and 19 at the Red Jacket Inn in Yarmouthport. Don't miss this annual favorite where we gather to learn, network and relax. More information on programs is coming soon. Mark your calendars now.

Don't Forget!!! Membership and Dues Forms for the 2015 - 2016 Membership year have been sent out. Please send them back as soon as possible. Remember- You must be current on your dues to participate on the Listserve and also for the Social Law Library special membership deal that makes you a SLL member with access to all of their electronic platforms and dart bases. If you did not receive your dues form, please contact Carol or Jim at the MMLA Office.

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To access the latest information, updates, announcements and news please visit the MMLA's website **massmunilaw.org**. Additionally, MMLA members enjoy a **Members Only Section** and can view **The Municipal Law Quarterly**, along with **Upcoming** monthly meetings, programs and seminars. To join MMLA, go to **massmunilaw.org** and complete the **MMLA Membership Form** or call 781-749-9922 for more information.

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