THE MUNICIPAL LAW QUARTERLY©

Vol. III, Issue IV

SUMMER

of Massachusetts Municipal Lawyers Association

formerly known as the City Solicitors and Town Counsel Association

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LETTER FROM THE PRESIDENT

Dear Colleagues:

As I enter the last month of service in my tenure as the President of this esteemed organization, I am happy to welcome you to the summer issue of the Massachusetts Municipal Law Quarterly. Past President Stacey Bloom in partnership with Bond Printing & Marketing, a Hanover, Massachusetts family-owned and operated design firm bring the newsletter in its new layout to our members.

These last few months have seen a number of interesting and well attended monthly meetings. In May, at Donatello's in Saugus, John Finnegan put together a program on "Balancing the Need for Collecting Taxes and Dealing with Property Owners in Financial Distress." This month, Nancy Kaplan, General Counsel for the Massachusetts Department of Environmental Protection presented a program at Salvatore's Restaurant in Lawrence, which covered the new organics regulations promulgated by DEP, to encourage composting and anaerobic (and aerobic) digestion of organic materials. DEP will be instituting a ban on disposal of organic materials from entities generating more than 1 ton of organic materials per week effective October 1, 2014. On August 7 at the Publick House in Sturbridge, past President Mark Cerel will be leading a half-day seminar on current municipal law issues. Thereafter, September 10 – 14, the IMLA Annual Meeting will be held in Baltimore. And, back by popular vote, MMLA will hold its annual weekend conference from October 16 - 18, at the Red Jacket Inn on Cape Cod.

As a friendly reminder, 2014-2015 MMLA membership renewals are due. Please visit the MMLA website to download the dues form and submit the same to Jim Lampke. An added membership benefit includes Social Law Library membership as a result of the concerted efforts of Bob Ritchie and Jim Lampke working with the Social Law Library to bring this resource to our membership. The benefit shows the promise of bringing valuable legal research databases to our members at a substantial discount.

My experience as President over the past year has been both humbling and rewarding. I am excited about the opportunities MMLA will have with newly elected leadership of President John Finnegan, and Vice-President Donald Rider. As MMLA expands our organization's rich heritage, I am thankful to all members of the organization, and in particular the dedication of the Executive Board, who make MMLA's future brighter and even more remarkable than its storied past.

Sincerely

Edward M. Pikula, President

Inside this Issue

MUNICIPAL SPOTLIGHT ON: Mary Kaitlin McSally, Esq.

By Peter Mello, Esq., Petrini & Associates, P.C.

1. In what city/town were you born?

I was born and raised in Warwick, Rhode Island.

2. Where did you attend college and law school?

Boston College, Suffolk University Law School

3. What municipalities do you represent?

I am General Counsel to the University of Massachusetts Building Authority ("UMBA"), which is an independent public authority established by Chapter 773 of the Acts of 1960 (www.umassba.net). UMBA's mission is to build and renovate facilities on the University of Massachusetts campuses that could be financed from student fees and charges. While historically such facilities have included student dormitories, dining facilities, and parking garages, in recent years, the role of UMBA has expanded to now include academic buildings, laboratories, athletic facilities, heating plants, and other facilities, as well as providing funding for the repair and renovation of existing campus facilities. In my role at UMBA, I deal with legal issues arising out of the financing, real estate and construction associated with UMBA's projects – which certainly keeps me busy!

4. What is your favorite discipline within your municipal practice? Why?

Construction Law. After clerking with the RI Supreme Court, my first practicing attorney job was in a boutique construction law firm in Washington, D.C. At the time, I had no idea or real interest in or appreciation for what construction law entailed, but jumped at the chance of practicing law in the nation's capital. As a young associate in D.C., I was fortunate to be exposed to legal issues impacting all aspects of construction projects and I became hooked. The role of a construction attorney is exciting, especially in the public sector, in that you provide counsel throughout the life of the project which typically includes planning, bidding and procurement stages at the beginning of a project and continues on through the end of the project providing contract interpretation, project close out, and advice on claims, if necessary. To me, the most rewarding part about construction law is being part of a team that ultimately brings the vision of a project to life.

5. What is one of your proudest moments as a lawyer?

I would have to say that it was being appointed as General Counsel to UMBA in April 2012. I am proud to be associated with UMBA and its planning and delivery of so many critical projects on University's five campuses and be able to contribute to the advancement of public higher education in the Commonwealth. With the expansion of UMBA's role in delivering projects for the University, it has been an exciting to be on the front line of its evolution.

8. What is the most useful advice you could give regarding the practice of law?

I would advise to always be collegial to opposing counsel. The practice of law has certainly evolved from the "gentlemen's practice" it once was, but I have learned that one of the most effective ways that an attorney can serve both their clients and the practice of law is by extending continued courtesy and professionalism to opposing counsel, even when it is not always returned.

6. Have you written or presented to professional groups regarding legal issues? What sorts of issues?

Yes. In my prior role as Deputy General Counsel at the Division of Capital Asset Management and Maintenance ("DCAMM") I worked with a team of DCAMM colleagues and representatives from the Office of Inspector General and the Office of Attorney General to provide state-wide training and outreach to local and state public contracting officials following the implementation of Chapter 193 of the Acts of 2004 ("Construction Reform Law"). In fact, several of those trainings were coordinated in collaboration with MMLA's predecessor, the City Solicitors and Town Counsel Association. Prior to leaving DCAMM, I chaired an industry-wide working group focused on monitoring issues related to the implementation of the Construction Reform Law and making consensus driven recommendations for improvements. In my current role, I continue to

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participate in that process and have served on various panels involving public construction issues in the Commonwealth. In addition, since 2006, I have served as an adjunct faculty member teaching Construction Law in the evenings to students in both the undergraduate and graduate Construction Management programs at Wentworth Institute of Technology.

7. What do you like to do outside of work?

In the winter I spend most of my free time on the ski slopes of Cannon Mountain in Franconia, NH. In the "off season" if I am not watching the Red Sox, I spend time hiking and enjoying the mountains and lakes in that region with my husband and golden retriever.

8. If you were not a lawyer, what would you do for work?

A veterinarian. I love animals, especially dogs, and appreciate from first-hand experience how such unconditional love can make an incredible difference in people's lives.

9. What was your favorite age? Why?

My favorite age was 47. I guess I was a bit of "late bloomer" and it was at that age that I married my husband and best friend, Stephen O'Connor.

10. What is your favorite book?

To Kill a Mocking Bird by Harper Lee. Although Atticus Finch is a fictional attorney, his character in the book has evolved into what many consider to be a model of integrity for lawyers.

PART II: FREQUENT MUNICIPAL FINANCE LAW ISSUES FOR MUNICIPAL COUNSELS

By: Kathleen Colleary, Esq., Chief Bureau of Municipal Finance Law, Division of Local Services, Department of Revenue*

*** The opinions and legal conclusions are those of the author and not necessarily those of the Department of Revenue.**
**** Part I of this article appears in Volume III, Issue III of The Municipal Law Quarterly.**

Deficit Spending. As we know, the general rule is that a municipal department or official may not incur liabilities and spend funds in excess of appropriations made for their use, or other available sources that can be spent without appropriation such as gifts, grants or revolving funds. G.L. c. 44, § 31; G.L. c. 44, § 53A. There are expenses, however, for which spending without an appropriation is not only permitted, but is required, such as debt service. G.L. c. 44, § 16; G.L. c. 59, § 23.

Legal and "illegal" (overdrawn appropriations and grants) deficits must be funded or raised in the next tax rate. G.L. c. 59, § 23. Under accounting standards established by the Director of Accounts (Director) in the Department of Revenue (DOR), an illegal deficit also reduces the community's free cash certification.

Of particular interest to municipal counsel are the following types of legal deficit spending.

1. **Paying Court Judgments, Arbitration or Administrative Body Awards, or Settlements of Claims Against the Municipality.** Except as explained below, an appropriation is needed to pay the award or settled claim. Note that liability for payment is incurred in the fiscal year the award is made or claim settled and a settlement of claims line item and or other appropriate line item for that year, e.g., a salary item for settlement of a wage claim, can be charged for the payment, even if the award or claim relates to other years. If funds are not available from those accounts, the city or town will have to appropriate the necessary funds first.

   a. Final Court Judgments. Final court judgments against a municipality may be paid without an appropriation from any available funds in the treasury (cash flow), G.L. c. 44, § 31, and must be raised in the tax levy unless funded. This does not apply to payments under a settlement agreement unless entered for judgment. The judgment must be final in that no further appeal has or can be taken.

   If within the control of the parties, you should consider the timing of the judgment as it impacts when your client must fund it.

   - If entered between July 1 and the time the current year's tax rate is set, the judgment may xbe raised in that rate assuming there is sufficient

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levy capacity under Proposition 2½. If not funded before the following year's tax rate is set, however, the assessors must raise it then.

- If entered after the rate has been set and through June 30, the assessors must raise it in the following year's tax rate unless funded. If the judgment is over $10,000, the payment must also be approved by the Director.

  For example, a judgment entered between July 1, 2014 and the setting of the FY2015 tax rate may be raised in the FY2015 tax rate, but must be raised in the FY2016 rate if not otherwise funded. If entered after the FY2015 rate is set and on or before June 30, 2015, it must be raised in the FY2016 rate if not funded.

In either case, your client will need to provide DOR with a copy of the judgment and your statement that no appeal can or will be taken.

A city or town may only borrow for one year to pay a court judgment. G.L. c. 44, § 7(11). DOR may increase the allowable term for certain borrowings, but not to pay court judgments. Therefore, if the judgment is substantial and the financial impact is such that your client needs to borrow for a longer term, a special act will be necessary.

b. Industrial Accident Board (IAB) Awards or Orders. The same rules for payment of final court judgments apply to payment of IAB awards or orders. Payment of awards or orders from other adjudicatory boards require an appropriation.

c. Property Tax Abatements. Refunds of abated real estate or personal property taxes whether granted by the assessors, or after successful appeals to the Appellate Tax Board, Appeals Court or Supreme Judicial Court, are paid without appropriation from the overlay account for the year of the tax even if the payment creates a deficit. G.L. c. 59, § 25. Overlay deficits must be raised in the next tax rate unless funded. Interest due the taxpayer on the refund is charged to the treasurer's appropriation for short-term interest, but after an appeal to the Appeals or Supreme Judicial Court, the interest can be treated as a court judgment and paid without appropriation in the manner explained above. *See generally DOR Informational Guideline Release No. 11-101, Overlay and Overlay Surplus.*

Also note that payments of refunds due to abatements or exemptions of other municipal taxes and charges are just credited against those revenues, i.e., they reduce the amount of revenue collected from that source for the fiscal year.

2. Paying Emergency Expenses. Municipalities may deficit spend in response to major natural or man-made disasters or catastrophes, such as storms and fires. G.L. c. 44, § 31 ("… major disaster, including, but not limited to, flood, drought, fire, hurricane, earthquake, storm or other catastrophe, whether natural or otherwise…")

a. Authorization Procedure. In case of an emergency, your client needs to (1) declare, as soon as practicable, a local emergency to public health and safety by majority vote of the selectboard or two-thirds vote of the city council and (2) obtain approval from the Director to pay liabilities incurred without appropriation. Note that an emergency declaration by the Governor will not suffice for this purpose.

Once the declaration is made, the selectboard and mayor should immediately notify the Director by letter. In the meantime, the finance director or accounting officer should contact the municipality's Bureau of Accounts representative and start compiling a schedule of expenses. The representative will work with your client's officials to expedite the approval.

b. Funding Expenditures. This procedure gives your client immediate spending authority until other financing sources can be put in place to cover the expenditures. It may be used to finance employee overtime, contractual assistance, debris removal, emergency repairs or other expenses. Many of the emergency expenses will be covered by federal or state emergency management agency (FEMA/MEMA) reimbursement grants. However, any unreimbursed amounts spent during a fiscal year under the Director's authorization have to be raised in the tax rate unless funded by

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appropriation or borrowing. The same timing rules that apply to final court judgments also apply to emergency expenses. Emergency expenses paid between July 1 and the setting of the rate may but do not have to be raised until the following fiscal year, but those made after the rate is set and through June 30 must be raised the next year.

Your client has two borrowing options to fund the expenses, depending on the type of expenses incurred.

- **"Operating" Borrowings.** Most emergency borrowings must be made under G.L. c. 44, § 8(9). Your client must (1) authorize the borrowing and (2) obtain the approval of the Director. The borrowing may be authorized: (1) in the regular Chapter 44 borrowing manner by two-thirds vote of the legislative body, and in a city with the approval of the mayor if required by charter, or (2) under an expedited procedure by the municipality's treasurer and chief executive officer (selectboard or mayor unless the charter designates another officer as the chief executive). See G.L. c. 4, § 7, Fifth B. The term is two years, but under 2012 legislation, the Director may approve a longer term up to 10 years based on an assessment of the community's ability to pay the debt service while maintaining adequate funding for essential public services. St. 2012, c. 36, § 13.

  As an initial matter, your client will need to submit an **"Emergency Appropriations Borrowing Authorization Certificate"** to the Bureau of Accounts. An opinion from bond counsel is also required if the treasurer is borrowing $500,000 or more through the State House Notes program. The Bureau may request other information particularly if the municipality wants to borrow for more than two years.

- **"Capital" Borrowings.** If the emergency requires capital expenditures, your client can fund them by borrowing under the expedited procedure found in G.L. c. 44, § 8(9A). Capital purposes include, but are not limited to, the acquisition, construction, reconstruction or extraordinary repair of public buildings, works, improvements or assets. The borrowing must be authorized by your client's treasurer and chief executive officer and approved by the Municipal Finance Oversight Board (MFOB). To obtain MFOB approval, your client must show that following the regular Chapter 44 borrowing authorization procedure would be an undue hardship in meeting the emergency. The MFOB's approval of the loan may be for up to the maximum term permitted by law for that purpose. If your client authorizes the capital borrowing in the regular manner, it does not need MFOB approval unless otherwise required by law for that type of borrowing, for example, where it wants to issue the debt as qualified bonds under G.L. c. 44A.

Litigation Proceeds. Congratulations, your client is receiving a large sum of money as a result of a judgment or settlement agreement. Next comes the call to DOR, usually from the accounting officer who has been told that the monies have to be spent for certain purposes, or must be used to reimburse a particular department for prior expenditures, and asks how to reserve the funds so the community can spend them now. Under G.L. c. 44, § 53, however, all receipts belong to the general fund and cannot be spent without appropriation. Moreover, under ordinary municipal finance laws and accounting standards established by the Director, the availability of the proceeds for appropriation depends in large measure when they are received. If received between July 1 and the setting of the tax rate, they can be treated as estimated receipts to support an appropriation from the levy for the proposed purpose. If received later or not budgeted as part of the tax rate, they are not available for appropriation until after the close of the fiscal year and certification by the Director as free cash.

There are many statutes that create exceptions to G.L. c. 44, § 53, but none permits special treatment of litigation proceeds. Without a statutory exception, the proceeds are accounted for as general fund revenue and a prior appropriation is needed, even if the municipality has a legal obligation to spend the amount received for a particular purpose. As an example, municipalities are required by law to spend their Chapter 70 school aid along with a local contribution on schools, but the aid is accounted for in the general fund and appropriated as part of the tax levy.

Although no statute addresses litigation proceeds specifically, if the judgment or settlement concerns a

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claim arising from the operation of a light plant, e.g., a breach of contract by an electricity supplier, or the activities and operation of a facility for which an enterprise fund has been established, then the proceeds may be revenues of the light plant or enterprise rather than the general fund. See G.L. c. 164, § 56 ("… manager of municipal lighting who shall … have full charge of the operation and management of the plant … and the keeping of accounts … All moneys payable to or received by the city, town, manager or municipal light board in connection with the operation of the plant, for the sale of gas or electricity or otherwise…"); (G.L. c. 44, § 53F½ ("…all receipts, revenues and funds from any source derived from all activities of the enterprise…"). Once received, the light plant may appropriate from them for light plant purposes, G.L. c. 164, § 57, but the availability of enterprise fund revenues is the same as general fund revenues. If received between July 1 and the setting of the tax rate, they may be used as estimated receipts of the fund to offset enterprise appropriations. Otherwise, they are not available until the fiscal year closes and the Director certifies them as retained earnings of the fund.

Depending on the situation, municipalities may be able to reserve and appropriate litigation proceeds and other non-recurring general fund revenues for a particular purpose under ordinary municipal finance procedures.

1. **General Distributions.** The Director may revise his accounting standards and policies for determining the availability of funds for appropriation from time to time. G.L. c. 59, § 23; G.L. c. 44, §§ 38 and 43. If a number of communities receive a significant non-recurring general fund distribution or payment, the Director has allowed the receipt to be reserved for appropriation during the fiscal year received. Amounts not appropriated by the end of the fiscal year are then not available until certified as part of free cash.

   If your client is one of a number of communities or districts receiving funds due to some particular case, then this option may be available. An example is the approach taken by the Director several years ago when many cities, towns and water supply districts received payments as a result of a class action products liability lawsuit brought against manufacturers and distributors of gasoline containing MTBE for contamination to public water supplies. Counsel indicated there were no restrictions on use of monies, but the Director thought it advisable to make the proceeds available for appropriation earlier than usual given the significant amounts some communities received. **See Bulletin 2008-13B *In Re: Methyl Tertiary Butyl Ether ("MTBE")*.**

2. **Community Specific Proceeds.** In most cases, just your client is receiving the proceeds and may be able to reserve them using a stabilization fund, or appropriate them earlier after a free cash update. The Director issues an "annual budget bulletin" every March, which generally addresses his policy for a free cash update for non-recurring receipts.

   a. **Free Cash Update.** The municipality may ask the Director to update its free cash certification as of July 1 by any revenues collected through March 31. G.L. c. 59, § 23. The funds are then available for appropriation for the particular purposes immediately upon certification until June 30. Only one update is permitted per fiscal year though and this is not an option if likely to produce a negative free cash balance at the close of the fiscal year.

   b. **Stabilization Fund.** Alternatively, the municipality can establish a stabilization fund for the identified purpose, G.L. c. 40, § 5B, and appropriate from the levy the amount of any proceeds into that fund. The proceeds are then treated as estimated receipts on the tax rate to offset the appropriation. If the proceeds are received and the fund established after the tax rate is set, the appropriation into the fund can be made from free cash, which would be restored by the proceeds becoming part of the free cash certification after the year closes.

MUNICIPAL CASE LAW UPDATE

By: Timothy J. Harrington, Deputy General Counsel
Boston Public Health Commission

The Supreme Judicial Court holds that the recreational use statute won't protect municipalities from liability during parent/teacher conferences.

Wilkins v. City of Haverhill

The Supreme Judicial Court recently held (May, 9, 2014) that the recreational use statute does not protect municipalities from liability when parents are injured on school premises while attending parent-teacher conferences. The court found the statute did not apply because such meetings were not open to the general public.

Here are the facts and procedural history. Ms. Wilkins suffered injuries when she slipped and fell on ice on school property owned and operated by the City of Haverhill ("city"). Ms. Wilkins was on the property to attend a parent-teacher conference. The school admitted during oral argument that the school was not open to the general public at the time of the incident. After Ms. Wilkins filed her suit, the city moved for summary judgment on the grounds the city was immune from suit pursuant to the recreational use statute. The city argued Ms. Wilkins was a member of the general public, was on public property for an educational purpose and was not charged a fee. The Superior Court agreed with the city and granted it summary judgment. The SJC allowed Ms. Wilkins application for direct appellate review.

The SJC reversed and found the recreational use statute did not apply to these facts. The critical issue was the definition of the term, "the public," in the recreational use statute. The court cited to several other appellate decisions that found the recreational use statute only applied when "all members of the general public" had free and equal access to the public property. The court noted examples of school hockey or basketball games that were free of charge and open to the public and not just parents of the students. Conversely, the court found that parent-teacher conferences are not open to the public, but only to a "discrete segment of the general public." The court determined the Legislature intended the immunity to apply only when the general public is invited.

The decision is significant because it limits the scope of the recreational use statute to those events where all members of the public have equal access to the property. There are many other examples where only "discrete segments" of the public may be invited to public property. All kinds of school functions, from field days to school concerts to name just a few, are only open to parents of students and not the general public. Municipal counsel should be aware of this decision when faced with any suits involving injuries at events that may not be open to "all members of the general public."

SUPERVISORS BEWARE: THE MYTH OF AT-WILL EMPLOYMENT

By: Tom Donohue, Esq.
Brody, Hardoon, Perkins & Kesten, LLP

The Town has a probationary at-will employee named Lazy Leo. Six months into his employment, Town Manager Tina decides that Lazy Leo has lived up to his name and terminates him. She is aware of the law and believes that she has the authority to terminate his employment for any reason. Accordingly, she simply tells him "it is not working out." Lazy Leo visits Shady Sam, the lawyer, and they decide to sue. Can he win?

Like most people, juries do not like it when employees are fired, especially if there is no misconduct by the employee. While it is true that an employer can terminate an at-will employee for any reason, even a probationary employee cannot be terminated for an "illegal" reason. So, Leo and Sam file a complaint at the MCAD alleging that Lazy Leo was let go because of his age (41), religion and disability - he claims that he has a fatigue disorder that causes him to appear lazy. These allegations force Tina to change course and outline the real reasons she terminated Leo.

This cautionary tale shows the danger to supervisors who do not give reasons for the termination of an at-will employee. In Massachusetts, the law says that an employer can terminate the employment of an at-will employee at any time for any reason — or even for no reason at all. However, this is never actually true. In the real world of litigation, a jury will punish an employer

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who appears to be unfair and callus by ending an employee's job for no particular reason. Accordingly, a supervisor must provide a solid reason for all discharges, even for at-will terminations.

Critically, the reasons given for a termination must be all of the real reasons and cannot change after the employee is gone. If the employer comes up with new reasons after litigation starts, juries will assume that the real reason for the termination must be unlawful. The employer will be punished in court for not being honest with the jury and fair to the employee.

Another danger of at-will employment is that employees with contracts intending to create at-will employment are often not treated as such under Massachusetts law. Both Massachusetts state and federal courts have determined that employees are generally not considered "at-will" if their employment contracts specify a definite period of time. Even when contracts allow supervisors to terminate employment "at their discretion" a specified time period can give rise to a protected property interest in employment, and thus the "at-will" employee may have a right to notice and a hearing prior to termination.

The fact is whenever an employer is considering terminating an employee, she should not act as if she has the power to do so at her whim, or for any reason or no reason at all. Supervisors must make decisions to terminate as if they will have to prove "just cause."

Remember, all people are in a "protected class" under discrimination laws. Gender, National Origin, Sexual Orientation, and Race are all protected classes under law. All people – even a terminated Caucasian, heterosexual, Anglo Saxon male – can claim discrimination. The supervisor will then be forced to outline valid reasons for the termination.

Bottom line, if employers are fair, act reasonably, make decisions for solid reasons, and give the reasons, the municipality will prevail.

A REVIEW OF "SPEAK WITH STYLE AND AUTHORITY"

By: Jordan L. Shapiro, Esq.
MMLA Past President and former City Solicitor of Malden

With less than 2 percent of filed cases being tried to verdict, the art and craft of jury trials speak to fewer and fewer practitioners, this article begins. "Speak with Style and Authority," by Steven Wisotsky, a tenured professor of law at Nova Southern University in Ft. Lauderdale, Florida and author of Professional Judgment on Appeal, is a lengthy, unique article in the ABA "Litigation" magazine in 2011. Wisotsky does report that appellate advocates are increasingly kept away from the podium, with less than 30 percent of federal appeals receiving oral argument.

This rather unusual article primarily focuses upon "Rules to Speak By" in order to please and persuade. The author notes that lawyers need to be adept at addressing more sophisticated audiences, including other lawyers and professions. Lawyers make presentations to prospective clients, to city and county commissions and board, to bar associations, to CLE seminars, to trade or industry association, and the like. Lawyers argue cases in mediations, arbitrations and administrative hearings. They may even lobby or testify before legislative bodies and regulatory agencies. In all these contexts, the author urges that "lawyers should project commanding, convincing and engaging vocal and physical presence."

He urges that you **Plan your time**. The good speaker "starts out with a definite length of time in mind and then structures and paces the talk to fit comfortably within it." Motion calendars, he writes, are usually 10 minutes or less, oral arguments on appeal, 15 minutes or less, most luncheon talks run 30 minutes or less, and CLE programs tend to be about 50 minutes long. Your job is to decide the appropriate amount of time. You have to bear in mind the sophistication of your audience and other items on the agenda. You should expect to leave time for questions. The author points out that one should contrast how long an oral argument between 12 or 13 minutes can seem without questions from the bench, and how short it can seem with a hot bench. "Keeping your audience engaged is central to your task of pleasing and persuading."

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Prepare. Do not wing it. Do not rely on purely mental preparation of content. Tighter organization and control is the key. Before making a presentation, "choose your main thoughts; make an outline, or list of bullet points. Sequence them appropriately, adhering to principles of primacy and recency. Add in the sub-points... choose your words (and silences) with careful attention to how they will sound when presented to the particular audience. Write out your presentation and rehearse it aloud, in the shower, in the car, whenever you are alone ... Enough will stick in memory to enable you to speak mostly without notes."

Stand. "Standing is a sign of respect. We rise when the judge enters and leaves the room. We rise to meet and greet others."

Stand tall. Good posture facilitates good speaking in several ways. It "helps you to project your voice without strain because your diaphragm has more room to do its work." Researchers have found that "stance reflects on your credibility as a speaker." Thus, the goal is relaxed but erect posture that conveys an aura of composure and command. Slouching is negative. The author quotes one source that suggest:

> *Your shoulders down and relaxed, your chest open, and your head held high with gaze straight ahead [and] you'll send the message that you're both powerful and approachable. On the other hand, closed posture, with shoulders rounded and hands or arms clasped tightly in front of you, will cause you to lose power. Confident, powerful people take their space and don't shrivel when the going gets rough.*

Look good. "Charisma is made of (1) a trial lawyer's looks; (2) a trial lawyer's character; and (3) a trail lawyer's voice." If any of these characteristics is weakened, the lawyer has less charisma and power over the listeners. The goal is to make a good first impression as someone who cares enough to make the effort requires to "suit up." So look your best. Look professional. Groom carefully. Dress well. For men, the uniform remains the dark suit. Dark suits are authoritative. "There is reason why police officers wear dark blue uniforms and judges wear black robes. Brown is out, but charcoal gray works."

Make and keep eye contract. Eye contact is essential to effective communication. Scan the room; in the middle distance, make eye contact with one person to start, then move it slowly to include others. "Like an actor in live theater, pay attention to how the audience is receiving you and adjust your delivery accordingly. The subtle signals you pick up from the audience will tell you what you might need to repeat, emphasize, or downplay ... Eye contact is disrupted by blinking. Fiddling with your eyeglass or cupping your mouth and nose are similarly distracting. Rapid fire blinking — think of Senator John Edwards during the 2004 presidential primaries — is a sure sign of stress and a red flat as to credibility."

Open strong. If you are nervous, calm yourself by slow, deep breathing, in through your nose, out through the mouth. Stand. Wait for the room to go quiet. Breath in, start speaking on the exhale, and begin decisively. Your opening lines should be committed to memory, so there will be no stumbling. The writer noted that one speaker always began with a big booming, "Hello." Another would begin with a simple "good morning" or similar greeting.

Deliver cleanly. Never read a script. Use a minimalist outline (both sides of a 4 x 6 index card should suffice) consisting of single words or short phrases as reminders. You cannot rely on detailed notes and speak naturally and spontaneously. Every time your eyes go to your notes, you break eye contact and subtly convey that you need a crutch and do not have command of your material.

Gesture sparingly. Gesturing while speaking is natural and probably unavoidable. Facial expressions, eye movements, hand and shoulder movements emerge spontaneously. But you don't want to "speak with your hands." To the maximum extent possible, gestures should synchronize with the message in their scale, intensity, and frequency. Convey honesty by holding the hands a body-width apart, waist high, with the palms facing up. By contrast, finger-pointing is often perceived as rude and aggressive. A clenched fist suggests anger. The author says that use of "give, chop, and show" are the three basic gestures in the trial lawyer's repertoire.

Speed up (and slow down). Lawyers are often advised to speak slowly. This may not be good advice: Other things being equal, faster delivery is perceived as more persuasive than slower delivery. The listener tends to learn more from the fast talker. Variation in speed is much more important. Usually, slowing down will convey the desired emphasis.

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Speak up (or down). Variations in volume are important aspects of communication, too. They help to avoid monotone pitch. Shouting is rarely appropriate; raising the volume sharply is easily misperceived as anger or irritation or excessive theatricality.

Pause for effect. Justice Scalia asserted that "the rhetorical device most undervalued and indeed ignored by lawyers is the pause." So, good speakers group their words into natural phrases. Silence can be an "excellent way to frame and emphasize a word, phrase or sentence."

Speak in threes. Triplets are another form or word or phrase grouping. Learn your ABC's; easy as 1-2-3; the good, the bad, the ugly; tic-tac-toe; stop, look and listen.

Use rhetorical devices carefully: Metaphors, quotes, irony, alliteration. Metaphors are powerful because they intensify one thing by comparing it to something dramatically different; heart of a lion, meek as a mouse, salt of the earth. "Quotes likewise can be very effective if the source is credible, the statement is succinct, and well suited to your point. Irony or even broader humor can be risky, or it can be completely appropriate; experience and situational judgment are required."

Shun these words. Certain words you should almost never say. "Myself" is one of them. Unless used in the reflexive sense (I washed and dressed myself), you will be safe simply saying "me." Lawyers frequently stumble on him/her and I/me distinction. There are words that, said correctly, will either confuse people or lead them to think you have erred. "Forte" is a leading contender. A french word, it has only one syllable, unless you mean to indicate loud by saying fot-tay, a two syllable Italian word in musical notation. "Devisive" has no eye sound but sounds like "division" (even though some dictionaries recognize a secondary pronunciation); "pabulum" has three syllables. "With words of this ilk, if you say them correctly, some people will want to correct you. It's better to choose substitutes," says this author.

Practice, practice, practice. There are several keys to better speaking. First, become a good listener. Listen attentively to the vocal nuances of other speakers. Practice speaking aloud. Consider video recording yourself, then watch and listen to the recording with a critical eye and ear. Do it for real. There is no substitute for experience. "Speaking is fundament to the lawyer's professional role and is inherently satisfying as storytelling. Make yourself known to local media producers as one willing to comment on the legal issues of public interest on radio and TV programs. Trying to come up with a quotable, intelligent sound bite is excellent practice in getting to the heart of an issue."

The article is a bit lengthier than my above commentary and contains some really perceptive paragraphs on "use of word paring," "speaking clearly," "harmonizing sound and meaning," "avoiding non-words," and one entitled "Savor the English language." If you wish a free copy, please contact me.

MMLA UPCOMING PROGRAMS

Please join the MMLA for the following programs.

August 7, 2014: Luncheon & half day seminar

This year's program will be on Designation and Use of Public Streets, Sidewalks and Places. Noted speakers will cover topics including: layout and relocation of public ways, private ways, utilities, traffic regulations and use of public facilities.
Location: Publick House, Sturbridge, MA
Time: 12:00 – 5:30 pm

October 16-18, 2014: MMLA Annual Conference

MMLA's Annual Meeting will be at the Red Jacket Beach Resort in Yarmouth, MA. Planning for the event is underway. More information, including registration materials and a list of programs will be on its way soon! Mark your calendars now and join us for this wonderful event.

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