

Issue Update

PRESIDENT'S MESSAGE

Strength in Numbers

We have kicked off our annual membership drive, during which we ask our members to renew their commitment to the MDLA and seek new members to join our ranks. More members means more resources to train new defense lawyers at the MDLA's Associate Division meetings, educate experienced defense lawyers at our excellent CLE programs, and expand networking opportunities for referrals among defense lawyers and camaraderie among members of the bar.

BENEFITS OF MDLA MEMBERSHIP

We are aligning the MDLA more closely with its parent organization, DRI, to ensure that we are the voice of the local defense bar. DRI offers many resources to our members, including an expert witness data bank, discounts to vendors and litigation support companies, and legal education opportunities to keep our members on the cutting edge of legal issues.

One of the hallmarks of the MDLA has been its excellent CLE and training programs. Today's Associate Division program was no exception. The Associates Division held its first "How to Survive and Thrive as a New Associate" program this morning at the Suffolk University Law School. Division co-chairs Matt Moschella and Dave Lemasa presented an excellent program to approximately 40 new defense lawyers. The program was a panel presentation with the first half being made up of MDLA partners, and the second half being staffed by senior associates. Newer lawyers were given a crash course on law office etiquette, managing legal secretaries and support staff, and meeting partners' expectations. The attendees gave the program rave reviews, and we intend to make it an annual part of the Associates Division curriculum.

Associates of all levels are welcome to participate in the Division's year-long brown-bag luncheon series, which will focus on the development of trial skills (openings, direct exam, cross exam, and closings), and will culminate with each associate assuming responsibility for a *pro bono* summary process case through the Volunteer Lawyers Project.

The MDLA also has an active agenda of social and networking opportunities scheduled for this year. Our mid winter social in January will be a conclave of defense bar leaders from throughout New England, and will include an interesting CLE on a timely topic of interest. This spring we will sponsor the "Women in the Courtroom" program, which will focus on the unique challenges women trial lawyers face. We are also bringing back the Justice Cup, a charity golf tournament against our friends from the plaintiff's bar. The MDLA's flagship event, our annual

Continued on page 2

Upcoming
Events

Associates Division Seminar
December 1, 2006
Suffolk University Law
School

Winter Social
January 2007

Annual Meeting
May 2007

Inside This Issue

Article pg 2

MDLA Lawyer of
the Year Recipients pg 4

MDLA Past Presidents pg 4

MDLA Officers
and Directors pg 5

Associates Division
Seminar Registration pg 6

MDLA Application pg 7

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President's Message Continued

meeting and seminar, will take place in May, with a full educational program in the morning, followed by a luncheon and an address from a justice of the Supreme Judicial Court. The meeting will conclude with the announcement of the MDLA's Defense Lawyer of the Year.

RENEW YOUR MEMBERSHIP TODAY!

MDLA membership is the best "bang for the buck" of any bar association in Massachusetts. The board of directors has voted to maintain the current dues at \$100.00 per member again this year. We also offer an incentive to recruit other members of your firm. For every four paid members, another member of your firm becomes a member for free. Please look into signing up five (or more) attorneys from your firm today.

Your firm's MDLA dues statement will be arriving in the mail in the next few days. I would encourage all of you to renew your membership and also encourage attorneys in your firms who are not members to join. There will be an application included with the dues statement, but for your convenience, there is an application included on the last page of this newsletter. Please print this, photocopy it, and circulate it among members of your firm. We are hoping to have all of our existing members renew, and to expand our membership by at least 10% this year.

Please feel free to call me or our Executive Director, Julie Petersen, at any time with any suggestions, questions, or concerns about the MDLA. We are at your service.

Best regards,
Chris Kenney

RECENT DEVELOPMENTS IN ARBITRATION

*By MATTHEW C. MOSCHELLA
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The Massachusetts Supreme Judicial Court recently issued two decisions illustrating the substantial deference Courts give the arbitration process. Both cases concern multi-jurisdictional practice in the area of arbitration and one case concerns whether arbitrators can award monetary discovery sanctions, even if the arbitration agreement contains no such provision.

The Court refused to vacate the arbitration award in each case simply because the prevailing party's counsel was not licensed to practice law in Massachusetts. In each case, however, the Court avoided resolving the issue of whether such representation actually constituted the unauthorized practice of law in Massachusetts. Additionally, in one of the cases, the Court upheld a \$271,000 discovery sanction imposed by an arbitration panel.

The Superadio Ltd. Pnt. v. Winstar Radio Productions, LLC, arose when one party to a net-

work agreement for advertising sales filed an arbitration demand against the other for unpaid revenues. 446 Mass. 330 (2006). The agreement included an arbitration clause which provided that any disputes concerning the contract would be governed by Massachusetts law and would be arbitrated under the American Arbitration Association's ("AAA") rules before a AAA panel in Boston, Massachusetts.

After the defendant counterclaimed for breach of the network agreement and its counsel filed his appearance, the plaintiff objected to defense counsel's appearance because he was not licensed to practice in Massachusetts. AAA rejected the plaintiff's argument.

During discovery, the plaintiff failed to comply with certain discovery obligations. The panel ordered the plaintiff to either (1) respond to the dis-

Continued on page 3

Recent Developments Continued

covery by a date certain or (2) pay the defendant \$1,000 per day until the plaintiff produced the discovery or until the date of the hearing, whichever occurred first.

The panel found for the defendant on its counterclaim, but concluded that the defendant could not establish its damages because the plaintiff had failed to comply with its discovery obligations. The panel sanctioned plaintiff \$271,000 (\$1,000 a day from the day following the discovery deadline to the date the hearing commenced).

The Superior Court confirmed the award. The Appeals Court reversed the portion of the lower court's decision concerning sanctions, but upheld the portion concerning the out-of-state lawyer. On further appellate review, the Supreme Judicial Court upheld the discovery sanctions and confirmed the award, refusing to vacate the award simply because defense counsel was not licensed to practice in Massachusetts. The Court reasoned that even if the challenged practice was unauthorized, it was not a sufficient ground to vacate the arbitration award.

Two Justices dissented from the portion of the decision concerning sanctions, reasoning that the sole mechanism for enforcing arbitration discovery orders is for the arbitrator or the party seeking the information to seek judicial enforcement of an arbitrator issued subpoena. The dissenting Justices further reasoned that arbitrators lack the power of contempt, which underpins the ability to award monetary discovery sanctions.

The second case, *Mscisz v. Kashner Davidson Securities Corp.*, 446 Mass. 1008 (2006), arose when a securities broker-dealer filed a statement of claim with the National Association of Securities Dealers ("NASD") demanding arbitration against three of its customers. NASD selected Massachusetts as the forum based on its policy of selecting the hearing location closest to the customer's residence at the time the dispute arises.

The customers moved to disqualify opposing counsel because counsel were not licensed in Massachusetts. The panel denied the motion. The customers brought the issue before a Single Justice, who also rejected their claim.

The arbitration panel issued a substantial award for the broker-dealer after the hearing. The customers then appealed the Single Justice's ruling to the full bench of the Supreme Judicial Court. Relying on *Superadio*, the Court rejected the customers' challenge.

Conclusions

◆ Courts are willing to give the arbitration process substantial deference as shown in these cases where the Court allowed arbitrators to invoke powers traditionally reserved for the Court and noted that even if the Rules of Professional Conduct had been violated, the awards would stand.

◆ The substantial deference courts give the arbitration process is likely to encourage even more litigants to forego the public judicial system and resort to private, closed doors, proceedings to resolve disputes.

◆ Massachusetts courts will not vacate an arbitration award solely because counsel for the prevailing party is not licensed to practice in Massachusetts.

◆ An attorney who is unlicensed to practice in Massachusetts but nonetheless appears in a Massachusetts arbitration may be subject to discipline by the Board of Bar Overseers.

After *Superadio*, counsel should consider whether a failure to seek sanctions in arbitration where appropriate raises the risk of future claims by clients.

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MDLA Past Presidents

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2004-2005	Kenneth Griffin Griffin & Goulka
2003-2004	Eileen P. Kavanagh Litchfield Cavo
2002-2003	Barbara Hayes Buell Bloom & Buell
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2000-2001	Brian P. Voke Campbell Campbell Edwards & Conroy PC
1999-2000	Christopher A. Duggan Smith & Duggan
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1994-1995	Daniel J. Griffin, Jr. Martin Magnuson McCarthy & Kenney
1993-1994	James M. Campbell Campbell Campbell Edwards & Conroy PC
1992-1993	Thomas E. Peisch Conn Kavanaugh Rosenthal Peisch & Ford, LLP
1991-1992	Lee Stephen MacPhee Morrison Mahoney
1990-1991	Peter J. Black Meehan, Boyle, Black & Fitzgerald, P.C.
1989-1990	Scott J. Tucker Tucker, Heifetz & Saltzman

Recipients of the Defense Lawyer of the Year Award 1992-2005

2006	John A. Donovan, Jr Donovan Hatem, LLP
2005	John P. Ryan Sloane and Walsh, LLP
2004	Robert A. Curley, Jr. Curley & Curley, P.C.
2003	Francis J. Lynch, III Lynch & Lynch
2002	Patricia A. Barbalunga Moriarty, Donoghue & Leja, P.C.
2001	Richard P. Campbell Campbell Campbell Edwards & Conroy
1998	John P. Fitzgerald Cogavin & Waystack
1997	William J. Dailey, Jr. Sloane and Walsh, LLP
1995	Raymond J. Kenney, Jr. Martin Magnuson McCarthy & Kenney
1994	John A. Wickstrom Tashjian, Simsarian & Wickstrom
1993	Lee Stephen MacPhee Morrison Mahoney LLP

If you know of any others, or can help fill in the blanks please e-mail the names of the recipients to jpetersen@massdla.org



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THE MASSACHUSETTS DEFENSE LAWYERS ASSOCIATION PRESENTS
THE ASSOCIATES DIVISION SEMINAR

On Friday, December 1, 2006, the Massachusetts Defense Lawyers Association will present its Associates Division Seminar which will focus on the management of expert witness related issues, including retention, development of opinions, expert discovery, Daubert/Lanigan related strategies including summary judgment motions, motions in limine, expert voir dire, and other expert related motion practice at trial. The program will be conducted at Suffolk University Law School and will run from 1:00 p.m. to 5:00 p.m., after which there will be a reception for attendees and the speakers in the Faculty Dining Room at the law school. Tuition is \$45 for current MDLA members and \$60 for non-members.

We hope that you can take this opportunity to attend a seminar focused on a rapidly developing area of trial practice, and to socialize with colleagues and friends.

REGISTRATION FORM

MANAGEMENT OF EXPERT WITNESSES:
RETENTION THROUGH TRIAL

1:00 P.M. - 5:00 P.M., FRIDAY, DECEMBER 1, 2006
SUFFOLK UNIVERSITY LAW SCHOOL
120 Tremont Street
Boston, Massachusetts

NAME: _____
 First Middle Initial Last

LAW FIRM/OFFICE: _____

STREET ADDRESS: _____

CITY: _____ STATE: _____ ZIP CODE: _____

TELEPHONE #: _____ FAX #: _____

EMAIL ADDRESS: _____

_____ Current MDLA Member \$45 _____ Non-member \$60

Please fax registration to: (toll free) 1-866-574-2461

Please bring a check made out to MDLA to the seminar (no-shows will be billed)



APPLICATION FOR MEMBERSHIP

1. Name: _____
2. Year Admitted to Practice in Massachusetts: _____
3. Firm: _____
4. Office Address: _____

- Office Telephone _____
6. E-mail Address: _____
7. Are you a member of the Defense Research Institute (DRI)? (Yes or No) _____
8. Do you certify that more than fifty percent (50%) of your professional time is devoted to matters related to the defense of civil matters on behalf of individuals or corporations? (Yes or No) _____
9. If you are employed by an insurance company, self-insured business or business, state:
 - a) Your position or title: _____
 - b) The nature of your responsibilities: _____
 - c) Percentage of time devoted to handling of claims or lawsuits: _____
10. If accepted to membership, do you agree to abide by the By-Laws of the Association? (Yes or No) _____ (Please refer to the By-Laws available on the website at <http://www.MassDLA.org>)
11. MDLA Member Sponsor (if any): _____

Signed: _____ Dated: _____

Please enclose \$100.00 for the first year's annual dues. Make your check payable to Massachusetts Defense Lawyers Association and return your completed application and check to MDLA, c/o Julie Petersen, Executive Director, 276 Washington Street, Suite 308, Boston, MA 02108 - Tel. 866-574-2461 (jpetersen@massdla.org).

One Membership benefit is a website listing of members searchable by name, office location or area of practice. Please indicate below your areas of practice for your listing.

- Insurance Litigation Commercial Litigation Intellectual Property Litigation
 Labor and Employment Litigation Medical Malpractice Product Liability
 Professional Liability Trademark Litigation Business Litigation Other
 Please do not list me on the MDLA website.