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Massachusetts Association of Criminal Defense Lawyers

August 7, 2008

Dear Fellow MACDL members:

Many of you are probably still in disbelief about the untimely loss of our friend and leader, Richie Egbert. I hope you have had an opportunity to read the Lawyer's Weekly article about Richie. I think it captures the high level of respect the legal community had for him. [Click here](#) to read the story.

For those of you that were unable to attend the funeral it was incredibly moving. Shannon McAuliffe, Richie's wife and fellow MACDL member spoke beautifully about his zest for life and love of his family. Joe Balliro, a dear friend of Richie, also spoke eloquently about Richie and his commitment to our profession and association.

Be advised that the Board of Directors will be meeting next week to discuss a fitting memorial for Richie. We have received many suggestions and offers of support from organizations such as MCLE and Lawyer's Weekly. I am confident we will conduct a fitting tribute that will appropriately honor our friend.

Anyone that knew Richie can attest to the fact that he held MACDL close to his heart. To be sure, MACDL will persevere. In honor of Richie, Kevin Reddington has agreed to serve on our Board of Directors. Elliot Weinstein has also stepped up and assumed Richie's responsibilities on the Strike Force.

Jessica's Law Alert

Some of you may have been on vacation recently and missed the latest legislation that has drastically increased penalties for sexual assault of children. The Governor has now signed the Massachusetts' version of the so-called Jessica's Law. It includes a whole host of new mandatory minimum sentences, for aggravated forms of indecent assault and battery on a child under 14, and rape of a child. New MACDL member Kevin Mitchell has summarized the changes. The three page summary can also be [found here](#). I encourage you to print out a copy of it and keep it available. It is a simple way to fully understand the significant statutory changes.

As the SJC has said in the past when reviewing new legislation, the draftsmanship is not a model of clarity. Under the statute there are several ways sexual assault of a child can

become aggravated. For example, if the defendant was a mandated reporter, he is subjected to mandatory minimum sentences. The theory is that if someone takes advantage of a position of trust, he should be held to a higher standard and face more stringent penalties. However, due to the sloppy manner in which the statute was drafted, it does not necessarily require the sexual assault have occurred in the midst of the so-called trusted relationship. Rather a fair reading of the statute is that if a social worker, medical professional or teacher commits a sexual assault on a child, then it meets the definition of aggravated.

So if someone is employed as a teacher and is accused of sexual assault on a child, even if the child was not a student, the statutory penalties might apply. (Interestingly, the drafters decided to not include parents or guardians who are not mandated reporters as being in a position of trust).

Another aggravating factor is whether the defendant had a weapon with him at the time of the assault. This includes any dangerous weapon listed in all sub-sections of c. 269 sec. 10. However, the statute does not require the weapon actually have been used in the course of the assault, or that the alleged victim even knew the defendant had a weapon.

The law also expands the use of prosecutor's powers to issue administrative subpoena power to gather computer information such as IP addresses from internet providers. Furthermore, it lowers the standard necessary for the Commonwealth to obtain these records.

Possible rule change regarding expiration of stay pending appeal

For the past two years, I have served on the SJC's Standing Advisory Committee for the Rules of Criminal Procedure. Be advised that the Court has recently published for comment a proposed rule change that passed through the Advisory Committee. The rule change addresses a problem that arose *Commonwealth v. Ly*, 450 Mass. 16 (2007).

Ly concerned a defendant who was released pending appeal pursuant to Mass.R.Crim.P. 31. While his conviction was subsequently affirmed, he remained free for sixteen years because no one took any steps to revoke the stay of execution. The issue in *Ly* was whether the defendant could be remanded to serve his sentence given the long period of delay. In the opinion, the Court noted that "(n)either the rule, nor our cases, indicate whether, in the normal course of events (now or then), the clerk's office informally notifies the district attorney of its receipt of the rescript, or whether the district attorney must bring the matter to the court's attention by way of a formal motion to revoke the stay of execution of sentence." 450 Mass. at 19.

The proposed change would automatically result in the expiration of the stay once the appeal became final. The problem with the proposed change is that it creates as many problems as it answers. For example, what happens once the defendant's bail status changes? It does not require a warrant issue, and also does not require the defendant

surrender. So action still must be taken by the Commonwealth to bring him back before the trial court to impose the sentence.

Be advised that several members of the Committee, including myself, Chris Skinner (CPCS), Judge Jay Blitzman (Juvenile Court), Clerk Magistrate Gary Wilson (Suffolk Superior Court) and Clerk Gil Lima (Appeals Court), have issued a minority reports opposing the rule change. It was our view, that the situation in was an aberration. A rule change is, therefore, unnecessary and may very well create more confusion.

For a copy of the notice from the SJC with the proposed rule changes, and the minority reports, [click here](#). Feel free to send comments to the SJC regarding this proposed rule change.

Attacks on trial lawyers

In the past, MACDL has refrained from supporting candidates for public office. This position remains unchanged. However, I would like to bring to your attention a recent development that is very disturbing. Over the past year, MACDL member Ed O'Reilly has been quietly waging a campaign for US Senate against John Kerry. Senator Kerry has apparently taken a page from Kerry Healy's unsuccessful campaign for Governor and decided to attack criminal defense attorneys. This issue was first raised at our last semi-annual meeting in June. Lawyer's Weekly has picked up on it as was well in a recent profile on Ed. Lawyer's Weekly reports:

"Days after O'Reilly's impressive performance at the convention, the State House News Service quoted Ron Bersani, whose late granddaughter inspired the anti-drunk-driving measure known as "Melanie's Law," criticizing O'Reilly for representing drivers operating under the influence.

"I find it offensive that people who do what he does for a living try to take a higher moral ground by saying they're defenders of the Constitution," Bersani said. "I think they've got blood on their hands. They're profiting by putting people at risk."

The State House News Service report noted that Bersani had "had some contact with Kerry's campaign" before the story was written.

O'Reilly is convinced that Bersani's comments were prompted by the Kerry campaign. His reputation for defending drunk drivers is not widely known, he says, and the State House News Service story was a vehicle for making it part of the public record."

[Click here](#) to read the entire Lawyer's Weekly article.

Finally, I hope all of you are having a nice summer. Please remember to re-new your membership when it becomes due, and encourage fellow criminal defense attorneys to join us. We are only as strong as our membership.

Sincerely,

A handwritten signature in black ink, appearing to read "Randy S. Chapman". The signature is written in a cursive style with a large initial "R" and a distinct "S" and "C".

Randy S. Chapman

President