

M . A . C . D . L

Massachusetts Association of Criminal Defense Lawyers

October, 2015

Dear Members,

I am writing to give you an overview of some of the work MACDL has been doing over the last few months and to let you know of some future undertakings and events planned for the months ahead.

Fall Meeting

Our fall meeting will be held at **Ned Devine's, One Faneuil Hall Marketplace** in Boston on **November 17, 2015, from 5:30 to 8:00 p.m.** This will be a more informal and less expensive get-together than our usual dinner meetings and one which we hope will attract a more diverse audience. Our keynote speaker will be **Professor David Medwed**, who will address **"Bargaining with the Devil: Prosecutorial Overreaching and the Pressure to Plead Guilty."** We will also be honoring Attorney **Leslie O'Brien** and **Angel Echevarria** for their successful partnership, which resulted in Mr. Echevarria's 2015 exoneration of a 1994 murder he has always maintained he did not commit. More details and tickets available on MACDL.com. Hope to see all of you there.

Continuing Legal Education

Earlier this month, MACDL held an event at which retired federal court Judge **Nancy Gertner** spoke on **"Cutting Edge Issues for the Criminal Defense Bar,"** which was held at Ropes and Gray in Boston. Many MACDL members attended the event at no charge and enjoyed delicious appetizers and a cash bar. The annual and very popular (book early!) **Post-Conviction Litigation Seminar** will be held in January of 2017. The exact date and location will be announced soon. We plan to put on another program in the late spring. If you have ideas for a CLE program or want to work on any project, please contact **Lenore Glaser** (lglaser@glaser-law.com) or **Victoria Kelleher** (victoriouscause@gmail.com).

Amicus

(Chairs: **Chauncey Wood** and **David Lewis**)

The Amicus Committee continues to work productively to promote MACDL's voice in significant cases in the SJC and in the First Circuit Court of Appeals. Significant amicus cases decided, or in the pipeline, include:

Commonwealth v. Augustine (SJC-11803) (holding that a defendant has a reasonable expectation of privacy in the historical cell site location information relating to his cellphone and that, therefore, the warrant requirement of art. 14 applied to that information) amicus authors: **Kevin Prussia, Kelly Halford, Liza Lunt, Chauncey Wood.**

Commonwealth v. Brewer (SJC-11819) (the Court rejected our argument that a refusal to grant a potential defense witness immunity to contradict an immunized prosecution witness deprived the defendant of due process of law and a fair trial) amicus authors: **Kristen Brewer, Anthony Biasioli, Chauncey Wood.**

Commonwealth v. Kostka (SJC-11766) (holding that Commonwealth did not make the requisite showing to support compelled DNA sample from an uncharged third party) amicus authors: **B.J. Trach, Laura Caren, Peter Ron Goldstone, Chauncey Wood.**

Commonwealth v. Jones (SJC-11775) (holding that closure of courtroom during a voir dire of a witness pursuant to the rape shield statute was structural error) amicus author: **Brad Compston.**

Amicus briefs filed by MACDL and currently pending:

Commonwealth v. Allegne (SJC-11614) (whether the Court should prohibit police officers from offering defendants a choice to have a custodial interrogation recorded and whether the Court should prohibit trial judges from instructing juries that it is the defendant's right to choose not to have a custodial interrogation recorded) amicus authors: **Kristen Mayer, Maria Carboni, David Derusha, David Lewis.**

Commonwealth v. Boucher (SJC-11605) (whether the SJC should adopt an intent requirement to elevate a murder from second degree to first degree based on extreme atrocity or cruelty) amicus authors: **Paul Nemser, Joshua Daniels, Chauncey Wood.**

Western Mass. Drug Lab Investigation (FARAK)

Members **Randy Gioia** (CPCS), **Luke Ryan** (on behalf of his client) and I have been meeting with members of the Attorney General's office and Special Attorney General Judge Peter Velis (Ret.) to address serious misconduct which occurred over the course of years by chemist Sonia Farak, and also concerns raised regarding the non-disclosure of exculpatory evidence seized from Farak's car, which had been sought by attorneys who had filed discovery requests for exculpatory information. We have made very clear to the Attorney General's office and Judge Velis that we are seeking nothing less than a comprehensive, full, and transparent investigation into problems raised by Farak's misconduct and the subsequent actions of police

and prosecutors involved in the cases arising out of her arrest. For the time being, any “Farak defendant” wishing to participate in the consolidated evidentiary hearing must file a Rule 30 motion by November 10, 2015. For more information concerning this issue, or if you have information to share, contact **Luke Ryan** (lryan@strhlaw.com).

Attorney Access at Massachusetts Correctional Institutions

In response to a campaign to raise awareness of the plight of attorneys, particularly female attorneys, who were illegally searched prior to client visits, the Department of Correction issued new regulations to address the inequity. **Victoria Kelleher** and I testified regarding proposed changes before the regulatory committee. Now, attorneys may no longer be subject to intrusive “pat searches” based on a positive response to metal by a detector. Rather, the rules now require a secondary metal detection procedure, and a “pat search” only based on reasonable suspicion after consent. Alternatively, the attorney may opt for a non-contact visit. As such, attorneys can no longer be subject to intrusive searches without cause such as inspection of pockets, hair, or patting clothing. Some policies related to visitation will still negatively impact attorney visits, particularly female attorneys. For example, female attorneys may still face difficulties due to their professional attire, including dress boots, skirts above the knee, sandals, and sometimes even their suit jackets. Please let **Victoria** know if you are detained or excluded on account of attire.

Unfortunately, other regulations ultimately remained unchanged despite our efforts. For example, law students, paralegals and investigators remain subject to a three day notice requirement, despite attempts by the DOC to extend the period to one week and by MACDL to decrease the lag to 24 hours. And an effort to amend the regulations to allow attorneys to enter the institutions with their computer laptops had no effect.

Overall, however, the new regulations are an improvement. Thanks to all who participated in the fight, particularly **Patty DeJeunas**. As Victoria has noted, “We have enough to deal with getting our clients out of prison; the last thing we need is trouble getting in.” Well said!

Legislative Matters

MACDL continues to work with CPCS, the ACLU, FAMM and other groups for criminal justice reform. In June, past-President **Liza Lunt** and I testified in support of bills to [repeal mandatory minimums](#). We will continue to make this a priority in the coming legislative session and on other fronts. In September, I testified before the Joint Committee on the Judiciary in favor of a bill that would mandate that every city or town have a written policy to be used by police officers consistent with best practices for [fair eyewitness identifications](#). On that same day, I also spoke in favor of a bill that would require **stationhouse interrogations** to be recorded, save for special circumstances, and if not, the statement would be deemed inadmissible. Earlier this month, I submitted testimony in opposition to a proposed bill to reinstitute the [death penalty](#) in Massachusetts. Although this bill does not appear to have any real chance of success, it is critically important that our voice be consistently heard in opposition any time death penalty proposals rear their ugly head, see the Web site.

Membership

As many of you already know, one of my goals as president is to increase MACDL's diversity of membership in terms of gender, race and geographical location. To that end, Membership Chair **Shira Diner** organized membership events earlier this fall in Springfield and Barnstable. It was great to see our members in those regions, and we will continue our road trips in the spring. Please let **Shira** or I know if you would like MACDL to hold a get-together in your area. In the meantime, spread the good word about MACDL to prospective members as that is our best tool for increasing membership.

Judiciary

In response to an invitation for input from the SJC, MACDL, through its hardworking representative **Marty Rosenthal** (along with CPCS and Federal Defenders), submitted proposals for revisions to Rule 3.8 (Special Responsibilities of a Prosecutor). The suggested revisions address numerous issues, including prohibiting prosecutors from expressing an intent to bring charges lacking a good faith evidentiary basis; restrictions on extra-judicial statements by prosecutors and police; the procedures to be followed by prosecutors upon learning that a convicted defendant may be innocent; the prohibition of waivers of post-conviction claims of ineffective assistance of counsel; and other important issues. See the website for the position paper.

MACDL also sought a change in Rule 3.28 so as to establish in the future that in all disciplinary proceedings, Bar Counsel shall have the burden of proof by a preponderance of "clear and convincing evidence," instead of the presently weaker standard of "preponderance of the evidence."

— — — — —

Looking forward to seeing all of you at the fall meeting in Boston on November 17. I'm hoping that you will bring another lawyer who will be encouraged to join. Please contact me with any ideas about how MACDL can become an even stronger and better organization.

Mike Hussey
President
mhuss3x3@gmail.com
508-443-5453