



Opinion


10 'resolutions' for 2020

EDITORIAL


It's an annual tradition for many. The start of a new year offers a clean slate and an opportunity to focus on resolutions for improvement. In that spirit, here (in no particular order) are 10 changes we'd like to see for the local legal community in 2020:

 **Make attorney-conducted voir dire the universal standard for jury selection.** A survey by the Flaschner Judicial Institute found that there has been progress on the use of attorney-conducted voir dire, with 75 percent of Superior Court judges now permitting it. But the goal of jury empanelment is to level the playing field in every case by identifying jurors with attitudes or beliefs that may interfere with their ability to fairly evaluate the evidence. Attorney-conducted voir dire is the best way to achieve that outcome, and it needs to become standard practice.

 **Increase diversity on the Superior Court.** A recent report on bias in the judiciary revealed that people of color are still severely underrepresented on the bench: Just 12 percent of judges court-wide are members of racial or ethnic minority groups. The numbers are particularly grim in Superior Court, which has only a handful of judges of color. Gov. Charlie Baker has made some progress toward improving diversity on the bench, particularly for women, but much more work remains to be done.

 **Pass zoning reform.** Gov. Baker's "Act to Promote Housing Choices" would allow cities and towns to adopt certain zoning measures related to housing development by a simple majority vote. Under current law, a two-thirds vote is required to adopt or amend a zoning law. This allows anti-development sentiments to prevail, even when the majority of


a community board is in favor of a project. The change would be a good start toward addressing the lack of affordable housing in Massachusetts.

 **Revisit confidentiality requirements for the CJC.** The baseline rules for the Commission on Judicial Conduct ensure that complaints, the names of the judges against whom complaints are lodged, and the dispositions of most complaints remain confidential, except in some limited circumstances. That leaves the public forced to trust that the right result was reached. More transparency would allow people to verify that is the case, enhancing respect for the system.


This is a tricky issue, and judges have legitimate privacy concerns. But the federal process for the disposition of complaints against judges routinely makes more information public. For example, in the 1st U.S. Circuit Court of Appeals, complaints, allegations, scope, findings, reasoning and disposition are all made public, along with any suggestions for improvement by a judge. Massachusetts could look to that system for some initial guidance.

 **Enact civil forfeiture reform.** Massachusetts' civil forfeiture scheme has been subject to criticism for years. State forfeiture law lacks due process protections, provides a strong incentive for law enforcement agencies to seek civil forfeiture because they can retain up to 100 percent of seized assets to supplement their budgets, and uses only a probable cause standard of proof in


determining whether seizure property was involved in a crime. Other states are already moving forward with civil forfeiture reform. 2020 should be the year Massachusetts follows suit.


 **Provide a right to counsel in eviction cases.** The disparities in legal representation between landlords and tenants are well-documented. Court data from Fiscal Year 2018 show that 92.4 percent of summary process defendants were unrepresented, while more than 70 percent of landlords had attorneys. That creates a serious imbalance of power, putting tenants at an overwhelming disadvantage. Providing those tenants with counsel would help make the playing field more level.

 **Eliminate medical malpractice tribunals.** The original intent behind the tribunals was a good one: to help weed out frivolous cases against health care providers. But the result was cases that were stalled for months and sometimes years because the system couldn't conduct tribunals in a timely manner. The Supreme Judicial Court tried to mitigate the problems back in 2017 with Superior Court Rule 73. But while the change offered some improvement, the tribunals still aren't worth the trouble.

 **Get an accounting from the Forensic Science Board.** The 2018 criminal reform bill established a 21-member board charged with conducting "a comprehensive audit of the facilities and practices being utilized for criminal forensic analysis in

the Commonwealth and the operation and management of the Massachusetts state police crime laboratories." That's important work, given the recent drug lab scandals. But thus far the board has made seemingly little progress. It's time for a status report on where things stand.

 **Clarify the "garden leave" requirement in the state's noncompete statute.** When noncompete reform finally came to Massachusetts, one of the biggest changes was a requirement that all agreements provide either "garden leave" or some "other mutually-agreed upon consideration." (Garden leave requires that 50 percent of the employee's annualized base salary be paid during the time the noncompete is in force.) Massachusetts is the first state to have such a requirement, and employment lawyers say what form the statute's "other ... consideration" should take remains an open question. The Legislature needs to clarify this requirement.

 **Revisit the medical parole statute.** The statute was enacted to address the increase in inmates serving long or life sentences who are becoming incapacitated with old age. But it's not clear where many of these inmates are supposed to go, if they don't have close family members who can take them in or they need constant medical care. And convicted murderers or rapists can't simply be released to a nursing home. The Legislature had good intentions in making "compassionate release" available, but as is often the case, the devil is in the details. **NEW**

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