CAFL News

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Your place for CAFL news, updates, training notices and more.

Good News For Our Clients From Congress

In the wake of *Care and Protection of Walt*, we want to let you know of some additional good news on the family preservation/reunification front. When Congress enacted legislation regarding the federal budget this month, it also made significant changes in federal child welfare policy by passing The Family First Prevention Services Act. Perhaps the most important change relates to funding for family preservation services. Since 1980, Congress has provided billions of dollars to states through Title IV-E of the Social Security Act to reimburse them for the cost of out-of-home care – but only a tiny fraction of that amount for family preservation services. The new legislation gives states the option of using IV-E funding to pay for some of the costs of mental health treatment services, substance use disorder prevention and treatment services, parenting skills training, parent education, and individual and family counseling. The new legislation could significantly increase the availability of important services and – ideally – reduce the likelihood of court intervention for many families.

The Family First Act also specifically authorizes funding for residential treatment programs for substance use disorder for parents that allow children to be placed with them. In addition, the bill imposes significant new restrictions on the use of residential treatment programs for children who are removed from their homes. These restrictions should make it less likely that children will be inappropriately placed in residential settings and that children who require residential placement are not housed in them any longer than necessary. It's not yet clear when these provisions will take effect in Massachusetts, as states have the option of delaying their implementation. But regardless of when they are implemented, these changes may ultimately yield significant benefits for our child and parent clients.

Update from Deputy Chief Counsel Mike Dsida on the Attorney Shortage in Springfield

As you may know, earlier this month, the Legislature enacted a bill – which the governor promptly signed – that provided CPCS's governing board (the Committee) the authority to declare an emergency in any county in which there are not enough attorneys available to handle care and protection assignments. The legislation further authorized the Committee to increase the rate of compensation for attorneys who meet certain criteria to $75 per hour for new C&P assignments in any county that is the subject of such an emergency declaration. The Committee promptly invoked that authority for Hampden County to address the chronic shortage of attorneys there. CPCS's Chief Counsel Anthony Benedetti also invoked another provision of the new law to waive the 1,800-hour cap and allow Hampden County attorneys to bill another 200 hours on care and protection cases there this fiscal year (up to a total of 2,000 hours).

The impact of these steps has been remarkable. As of mid-February, there were 125 individuals who were awaiting the assignment of counsel. Thanks to the increase in the hourly rate and the cap waiver, that backlog has now disappeared completely. Even though the rate increase only lasts until June 30 and only applies to Hampden County, this was a major step forward for our clients – and our lawyers. Our hope is that we can build on this win and secure better compensation –on a permanent basis – for all of our private attorneys and for staff in the future.

"True peace is not merely the absence of tension; it is the presence of justice."
Martin Luther King, Jr., *Stride Toward Freedom*, 1958

INSIDE THIS ISSUE:

Training Notices

REGISTRATION OPEN FOR CPCS ANNUAL CONFERENCE

The CPCS Annual Training Conference will be held on Tuesday, May 15, 2017, 8:00-5:00 at DCU Center, 50 Foster Street Worcester.
You should have already received an email with instructions to register.

REALITIES OF HUMAN TRAFFICKING IN MASSACHUSETTS:
Featuring the Polaris Project

March 6, 2018, 5:30-7:00, Boston Bar Association, 16 Beacon Street, Boston
Approved for 1.5 hours CAFL CLE credits

Using data created from the national human trafficking hotline, this training will shed light on different forms of human trafficking that are the most common in Massachusetts. Presenters will discuss how attorneys "can be part of the safety net for survivors." Register here: https://www.bostonbar.org/

TRAINING FOR CAFL APPELLATE ATTORNEYS

March 8, 2018 2:00-4:00 p.m., Worcester Law Library, 184 Main Street, Worcester

Come learn about: Appellate implications of C&P of Walt; conflict between trial and appellate counsel for children; making the most of your "Procedural History"'; how to raise unpreserved issues on appeal and more! CAFL appellate attorneys only. Approved for 2 hours of CLE credit for the CPCS Children & Family Law Appellate Panel. Please contact Katrina Rusteika (krusteika@publiccounsel.net) with any questions.

WHOSE CASE IS IT?
Child Custody Jurisdiction Under the MCCJA

March 8, 2018 1:00- 3:00 PM
CAFL Staff Office Conference Room, 184 North Street, Pittsfield
2 CLE CAFL credits
Please register in advance to CAFL Resource Attorney: dstorrow@comcast.net

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CPCS IS ACCEPTING APPLICATIONS FOR THE CHILDREN AND FAMILY LAW APPELLATE PANEL CERTIFICATION TRAINING

The Committee for Public Counsel Services is accepting applications for the Children and Family Law ("CAFL") Appellate Panel Certification Training. Admission to the training is by application only. All admitted applicants must attend the three-day CAFL appellate training program on **May 1, 2, and 3, 2018 in Worcester**. Completed Applications must be submitted by **March 23, 2018**. The application can be found at the following link: CAFL Training Unit—Appellate Panel Application Page.

News and Information

Massachusetts Attorney General Sues Mental Health Center for Unlicensed and Unsupervised Patient Care

On January 9, 2018, the Massachusetts Attorney General's office filed a lawsuit against South Bay Community Services --an agency that provides mental health and substance use disorder counseling in 17 facilities throughout the Commonwealth. The agency serves adult and children clientele. In a statement, the Attorney General's office alleges that, "all of the 17 clinics named in the complaint featured significant gaps in licensing and supervision of therapists during the relevant time period. " South Bay has also been accused of fraudulently billing the state for tens of millions of dollars.

If you have clients who are being treated through this agency, you may want to discover or confirm the licensure of their providers, as that may affect your client's ability to assert a privilege. If an adverse party was counseled by an unlicensed South Bay therapist, you might have access to information that otherwise would be unavailable had the provider been licensed. Also, if you represent a client on appeal where the judge relied on testimony from a South Bay therapist or expert to terminate parental rights, and your client is appealing that judgment, the Attorney General's allegations might give rise to a motion for relief from judgment.

To verify the licensure of a social worker or mental health provider on your case go to the Massachusetts Division of Public Licensure website at: https://www.mass.gov/orgs/division-of-professional-licensure. You may also want to consider filing a motion for leave to obtain formal discovery of the provider's credentials and background.

For more information about this recent lawsuit against South Bay, see: https://www.bostonglobe.com/business/2018/01/09/state-sues-mental-health-care-company-over-improper-medicaid-payments/2HrS28QUhz1hwR54164ZdJ/story.html

Proposed Changes to Department of Early Education and Care Regulations

The Department of Early Education and Care (EEC) has proposed amendments to its regulations defining the "standards for licensure or approval of agencies" offering child placement and adoption services. These regulations address the requirements for both private foster care, adoption agencies and DCF. The regulations have not been updated since 1999. EEC hopes that the new regulations will reflect best practices for documentation during licensure, pre-adoption and foster care placement training requirements, in depth home studies, and "enhanced pre- and post adoption services."

For more information about the proposed regulations , click here: https://www.sec.state.ma.us/spr/sprpub/122917b.pdf

News and Information

Long-Awaited Guidance on School Stability for Foster Children Released

In January, DCF and the Department of Elementary and Secondary Education issued a joint guidance to local school districts and DCF staff on implementation of the provisions in the 2016 federal Every Student Succeeds Act (ESSA) related to foster children. The Guidance, and a cover memorandum summarizing the Guidance, are available on the DESE website at http://www.doe.mass.edu/sfs/foster/. For more information about ESSA's foster care provisions, the Massachusetts Children's Law Center has a great page devoted to this topic on their website at http://www.clcm.org/schoolstability.html.

ESSA requires that children in foster care continue to be enrolled in the school they were attending before their removal from home (or move to a new placement), unless doing so is not in their best interests. If it is determined that remaining in the "school of origin" is not in the student's best interest, the child must be enrolled immediately in the school where they are living, without waiting for records from the old school. An older federal law, the Fostering Connections to Success and Increasing Adoptions Act of 2008, imposed similar obligations on DCF. The new Guidance details the responsibilities of DCF, DESE and local schools to ensure school stability for children in foster care under both laws. Most importantly, the Guidance provides that:

- While DCF and local schools must work collaboratively to arrange transportation for children to their school of origin, "absent other agreements between districts and DCF, *the district of origin is responsible for providing transportation."* Guidance at p.6.
- The child and parents should be able to "participate meaningfully in the [best interest] decision making process." Guidance at p.4.
- In determining whether it is in the child's best interests to stay in the school of origin or enroll in the new school, DCF and the school may *not consider the cost of transportation."* Guidance at p.4.
- If the school district disagrees with DCF's best interest determination, a dispute resolution process is available at DESE.
- The DCF Area Director is the designated Point of Contact (POC) required by ESSA to work with the local school districts to support foster children in school. Each school district also must designate a foster care POC to ensure school stability for foster children. (See the DESE website for a list of school POCs.)

In the News: Services for Mothers with Opioid Use Disorder

On January 29th, the Boston Globe featured an article titled New Mothers Overcoming Addiction Face a World of Obstacles. (by Felice J. Freyer). This article highlights how after a baby is born, life for mothers suffering from opioid use disorders can be difficult. The therapeutic support systems regularly in place before the baby is born suddenly become unavailable. For that reason, the Boston Medical Center has created a post-partum program specifically designed to provide opioid abstinence support to new mothers. BMC launched its SOFAR Clinic (Support Our Families through Addiction and Recovery) with the hopes that it will bridge the recovery gap for mothers who are leaving other programs and caring for a newborn. This article describes how supportive services are so important after the baby is born. Indeed, the "'first year is a critical time for the child, probably as important as the months in the uterus,' said Dr. Zev Schuman-Olivier, a psychiatrist and medical director for addictions at the Cambridge Health Alliance." Programs like this can be enhanced with mobile recovery technology that new mothers can use remotely and even receive opioid replacement medication. The Globe article quoted Doctor Goodman of the Dartmouth Institute for Health Policy, who reminds us that the child's well-being depends on the mother's. "The goal," she said, "is a healthy mother and healthy baby together."

Evidentiary Tip

There's No Such Thing as Child Hearsay

"Moose told Dog, and Dog told Frog, and Frog told Kitty, and Kitty told me."

Hearsay is hearsay. We often hear attorneys in the courtroom talk about "child hearsay" as if children's out-of-court statements have a special set of rules. However, a child's out-of-court statement should not be admitted for the truth unless the proponent can show that it satisfies the black-letter rules governing the applicable hearsay exception. What does that mean in our cases?

A child's statements are not admissible as statements of a party opponent or "admissions." The leading case on this issue is *Care and Protection of Sophie*, 449 Mass. 100 (2007). In *Sophie,* the Supreme Judicial Court held that the children's out-of-court statements to a 51B investigator that their father hit them were not admissible as statements of a party opponent. *Id*. at 108–10. The SJC's rationale was simple: a statement of a party opponent is only admissible against the party who made the statement. The children's statements could be admitted against them, but they couldn't be admitted against the father, because he didn't make them. And because courts cannot take children away from parents without evidence admitted against the parents, it is nonsensical to admit the children's statements. The SJC reasoned that, "[i]n the contest of this litigation, the two parties wrestling for custody are the department, acting as *parens patriae*, and the natural father." The children's statements had no probative value because they were not admissible against their father. *Id*. at 107–08 (citing *Flood v. Southland Corp.*, 416 Mass. 62, 71 (1993)).

Sophie does not mean that children's out-of-court statements are never admissible. Some statements might not be hearsay because they aren't offered for the truth. Or the child's statements might satisfy some other hearsay exception. Common exceptions include "excited utterances" and "state of mind." Certain statements by children under 10 may be admissible under G. L. c. 233, §§ 82, 83 (the child sexual abuse hearsay statutes). Sections 82 and 83 require that the court hold an evidentiary hearing and make specific findings.

Attorneys must be vigilant when the "state of mind" hearsay exception is applied. The state of mind exception admits a statement for the limited purpose of proving the person's then existing state of mind at time the statement was made. This exception does not admit the statement to prove the underlying event. How do we see this in action? If the child says, "I am afraid of my mother because she yelled at me," the statement can be admitted to show that the child was afraid of the mother at the time she made the statement. It cannot be used as evidence to prove that her mother actually yelled at her.

It is also important to remember that statements by children in a document should be treated the same as an adult. Counsel should look for objectionable hearsay statements made by a child contained in a court investigator's report, DCF document, social media or any other written record.

So what do you do when a child's out-of-court statements are offered in evidence against your client? OBJECT! And remind the court that there's no such thing as "child hearsay." There are only common law and statutory hearsay exceptions, and they must comply with the rules.

Announcements

The SJC Issues New Trial Court Rule VI: Uniform Rules for Permanency Hearings

The new Rule is the result of a collaborative effort by a committee of judges and lawyers from the affected Trial Court Departments, CPCS, DCF, The Children's Law Center, and DYS. You can find the new Rule at https://www.mass.gov/doc/amendments-to-trial-court-rule-vi-uniform-rules-for-permanency-hearings-effective-march-1-2018. It becomes effective on **March 1, 2018**. Also on March 1, Juvenile Court Standing Order 1-18 goes into effect. The Standing Order details various processes for permanency hearings including notification, scheduling and appointment of counsel. See Standing Order 1-18. The CAFL Training Unit will send out a longer, more detailed memorandum on the Rule.

The Rule includes numerous provisions intended to comply with federal law and to ensure that families are active participants in permanency planning and permanency planning hearings. The Rule seeks to ensure that DCF is making reasonable efforts to provide services tailored to achieve reunification or another goal previously determined by the judge. The new Rule provides an excellent check list of what DCF should be doing for our clients outside of court, and what DCF and the judge should be doing in court at permanency planning hearings. It is another great tool to have in your toolbox, to use along with the SJC decision in *Walt*, and the DCF Permanency Planning Policy. Some highlights of the Rule are:

- DCF must include in all Permanency Reports more detailed information about services and supports provided to the child and the parents; for youth 14 and older, the Report must include information about specific, additional or specialized services to help with their transition to adulthood (changed from age 16).
- All children have the right to attend permanency hearings; there is a presumption that youth age 14 or older will attend.
- For youth and young adults leaving DCF custody or care, the Report must include a transition plan, personalized at the direction of the youth, and the judge has the authority to retain jurisdiction until he or she is satisfied with the plan and its implementation.

Payment of CLEs and Waiting Time & Announcing the Newly Revised Assigned Counsel Manual

In June, CAFL announced the return of compensation for continuing legal education (CLE's) and waiting time (beyond 1 hour). CPCS will pay for up to eight (8) hours of required CLEs to attorneys who bill at least 600 hours for CPCS assignments per fiscal year. How and when do you get paid for CLEs? First, you must bill at least 600 hours. CPCS will track the number of required CLE hours taken (even before the 600 hour threshold is reached), but payment will occur only after the 600 hour threshold is met. Once the threshold is met, your qualified CLE hours will be released to the Accounts Payable Unit. The Accounts Payable Unit processes eligible CLEs quarterly. How much waiting time can you bill? Attorneys may bill actual time spent waiting in court for up to one hour per client, for up to 3 hours per day.

Also, on January 17, 2018, the Committee approved the new Assigned Counsel Manual. Both the content and the functionality of the manual were updated. All divisions of CPCS upgraded the search function, fixed hyperlinks, and updated all statutory and case law references. Please check it out and give the search function a try (click Control F). You can find more details on the compensation of Continuing Legal Education (5.39) and Waiting Time (5.26) in the Assigned Counsel Manual https://www.publiccounsel.net/wp-content/uploads/2018/01/Assigned-Counsel-Manual-January-2018.pdf.

Legal Updates

Hasouris v. Sorour, 16-P-1269
Keywords: Evidence, Prior recorded testimony, Unavailability, Privilege against self-incrimination
Case Summary by: Katy Krywonis, CAFL Training Unit

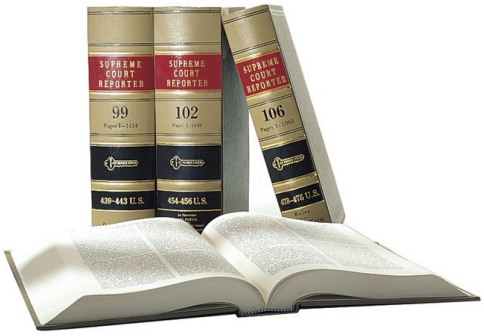
This case provides a good overview of the prior recorded testimony hearsay exception and discusses how to navigate asserting the privilege against self-incrimination. The Appeals Court held that a witness' prior recorded testimony (here, a deposition transcript) can be used at trial where the judge determines that the witness is unavailable. This may be relevant in cases where a witness testifies under oath and is cross-examined in one proceeding and is unavailable to testify at a subsequent proceeding.

Prior recorded testimony hearsay exception: The prior recorded testimony of a person may be admitted where the person is now unavailable, the testimony was given in a proceeding addressing substantially the same issues as in the current proceeding, and the party against whom the testimony is offered had a reasonable opportunity and similar motivation for cross-examination of the person during the prior proceeding. The exception applies in both criminal and civil actions.

Unavailable: There are a number of bases for finding that a witness is unavailable. For example, a witness may be physically unavailable because they are deceased, missing, or out of state and cannot be secured for trial. A witness who is considered incompetent is likewise unavailable. A witness who validly invokes the privilege against self-incrimination is unavailable. Opposing counsel may challenge whether the witness is unavailable in the sense required, and then the judge must decide.

Invoking the privilege against self-incrimination: When a witness declares an intent to invoke the privilege against self-incrimination and the party intending to call the witness challenges whether the privilege has been properly invoked, the trial judge must determine whether the witness has established "a real risk that his answers to questions will tend to indicate his involvement in illegal activity, and not a mere imaginary, remote, or speculative possibility of prosecution." The witness must assert the privilege in response to particular questions, and the possible incriminatory potential of each question, or area which the prosecution might wish to explore, must be considered. A witness may not make a blanket assertion of the privilege (unless the court determines that the privilege extends to the entire testimony).

Here, the witness invoked his privilege against self-incrimination. In pretrial motions and hearings, he "unequivocally indicated" his intent to assert the privilege if called to testify. Then, when he did not appear for trial when subpoenaed, counsel reported that the witness was "gravely ill" and in any event, would assert the privilege. The trial judge subsequently found the witness unavailable and admitted the deposition transcript in evidence. The Appeals Court said that was okay. However, the Appeals Court did not determine whether the witness *validly* invoked the privilege because his deposition testimony was independently admissible pursuant to Mass. R. Civ. P. 32(a)(3)(D). If you have a case that sounds like this, you should read the full opinion, available here.



Legal Updates (continued)

Millis Public Schools v. M.P. SJC 12384 (2018)
Key words: Children requiring assistance, truancy, willful conduct

On February 6, 2018, the Massachusetts Supreme Judicial Court decided Millis Public Schools v. M.P., in which a child challenged a Children Requiring Assistance (CRA) adjudication. The child, M.P., was not attending school due to her serious medical and mental health issues. Nevertheless, the adjudication was based on the trial judge's finding that M.P. had "willfully" failed to attend school. The SJC vacated the adjudication and remanded the case for dismissal. In this landmark decision, written by Associate Justice Lenk, the SJC held that M.P. was not a habitual truant because her failure to attend school was not "willful."

In interpreting the requirement for willful conduct, the SJC reviewed the legislative history of the CRA (and predecessor CHINS) statute and explained that the laws were enacted to prevent children from becoming involved in the juvenile justice system. Ultimately, the SJC held that "a child 'willfully fails to attend school' when he or she acts purposefully, such that his or her behavior arises from reasons portending delinquent behavior." The trial judge must examine "[e]ach child's purpose or reasons for missing school … in order to determine whether the absences are willful *beyond a reasonable doubt*." (Emphasis added.) The SJC noted that even in cases where a child's truancy is willful, services and interventions should be tried before court involvement: "The design of the CRA statute, with its emphasis on community-based resources, indicates that the Legislature envisioned a deliberate set of escalating measures, in which court intervention would be *the last alternative*." (Emphasis added.) The decision can be found here: Millis Public Schools v. M.P.

Legal Practice Tip: What is a U visa and How Can It Affect Your Case?

By: Jennifer Klein, Esq., CPCS Immigration Impact Unit

When working with undocumented clients, it is always important to think about the possible pathways to lawful status that might exist. For some, a U visa might be that pathway. U visa status was created by the Victims of Trafficking and Violence Protection Act of 2000. It is designed to provide lawful status to noncitizen crime victims who are assisting, or are willing to assist, the authorities in investigating crimes. A U visa allows a person who is otherwise undocumented to remain in the United States for up to four years. After three years in U visa status, a person is eligible to apply for a green card. Anyone applying for a U visa may also include certain family members in the application. For example, a parent applicant may include their child in the application. During the period of time that a person is covered under the U visa, that person is eligible to work legally in the United States.

A person is eligible for a U visa if they meet the following basic requirements:

- S/he has suffered substantial physical or mental abuse as a result of having been a victim of certain criminal activity. The list of crimes includes, among other offenses: rape, domestic violence, prostitution, murder, felonious assault, and obstruction of justice;
- The criminal activity occurred in the United States and/or violated the laws of the United States;
- S/he possesses credible and reliable information concerning such criminal activity; and
- S/he has been helpful, is helpful, or is likely to be helpful in the investigation or prosecution of a crime.

A U visa application has two parts. First, the applicant must cooperate with a state or federal official involved in a criminal prosecution and the applicant's cooperation must be certified. The official verifies the type of criminal activity perpetrated against the applicant and attests to the fact that the victim has been, is being, or is likely to be helpful in the detection, investigation, or prosecution of that criminal activity. However, the certifier does not convey any form of legal status to the victim. The U visa certification does not provide individuals with a U visa; rather, certification of the form is only a required element in a U visa petitioner's application to U.S. Citizenship and Immigration Services (USCIS). The second step requires that once the certification is granted, the U visa applicant must submit an application to federal immigration officials. USCIS administers the program and grants or denies U visas.

This month's practice tip: If you have a client who is also the victim of a crime and is cooperating in the prosecution of that crime, the client can request that DCF or the district attorney certify a U visa application. For example, if you have a state intervention child custody case where there is also a collateral criminal case (i.e., if DCF became involved due to domestic violence between the parents and one parent is testifying against the other in the criminal case), then you should explore whether DCF or the district attorney is willing to certify for a U visa. In these instances, it is best to assist your client in finding an immigration attorney to represent them with regard to the U visa. You can contact the CPCS Immigration Impact Unit for assistance (iiu@publiccounsel.net). You will also want to know if any witness in your case is being certified for a U visa for their cooperation with state officials and their testimony against your client. You can use information that a witness is seeking a U visa to impeach their testimony--to show that they have an incentive to testify in a way that helps the Commonwealth. If you expect that a witness on your case may be gaining immigration benefits because they are acting as a cooperating witness for the Commonwealth, file a written discovery motion to confirm this. Seek an order requiring DCF to disclose any U visa negotiations between any agent of the Commonwealth and all witnesses on your case. In your discovery motion, ask for this disclosure in circumstances where the U visa certification has already been made or has only been discussed. Sometimes the Commonwealth will wait to certify the U visa status until after the testimony has been proffered so asking for all information pertaining to U visa applications is better than seeking only certifications.

Spotlight Service of the Month: The Eva Center

Runaway and homeless youth face a significant risk for sexual exploitation, as do people with a history of sexual abuse, dating violence, low self-esteem, and minimal social support. See The National Center on Safe Supportive Learning Environments. In our cases, we see women, men and children who have been sexually exploited. Services that are specifically tailored to support these clients can be difficult to find. The Eva Center is a great resource for sexually exploited women to seek safety, shelter, and help; the center can also help clients locate additional service providers throughout the Commonwealth. While their focus is on working with women, the center will help men who have been sexually exploited, as well. The Eva Center does not provide direct services to children. A good resource for a child client who seeks support and services is My Life, My Choice, an organization that works with sexually exploited children.

What can the Eva Center do to help our adult clients? The Eva Center's mission is to help sexually exploited women create an exit plan and to provide supportive services. This includes emergency and long-term housing options and immediate access to safety. The Eva Center partners with many shelters in Massachusetts, mostly Boston, to help seek safe housing for sexually exploited people. Individuals are available 24/7 for on-call emergency responses. The "24 hour safelink" number is 1-877-785-2020.

Beyond housing, the Eva Center provides help in searching for educational and employment opportunities to allow women to gain some economic security, one of the biggest barriers to escaping the cycle of sexual exploitation. The Eva Center partners with many organizations to assist women in developing skills for school, work, and life.

The Eva Center also provides support for women who are arrested on charges related to sexual exploitation. The Eva Center's goal is to persuade the court to allow women to engage in services to exit this lifestyle. Seeking help and disclosing this type of trauma can be very difficult for any client. Consulting with CPCS social workers, or a privately retained social work expert, may be helpful. Attorneys on the CAFL private panel can reach out to Meg Grant, the social work coordinator, for more information or by visiting: https://www.publiccounsel.net/cafl/professional/social-servicessocial-work/.

In addition to providing 24/7 assistance, the Eva Center seeks to provide training on issues related to prostitution and sex trafficking, information and resources about services, the complex process of "exiting out," best practices, and models for court based interventions. Please see their website at www.evacenter.org for information on trainings. The next training is on **April 27, 2018**, at the John Adams Courthouse, which provides an evidence based look at Boston's Sex Trade.