



# Federal Bar Association

Massachusetts Chapter

Christopher E. Hart, Editor



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# Newsletter

JUNE 10, 2015

## President's Column

By Lisa M. Tittlemore



How different New England can be in a few short months! Since my last President's Column, record breaking mounds of snow have been replaced by 90 degree weather. Meanwhile, the FBA MA Chapter continued throughout all with interesting and illuminating panels, receptions, brown bag lunches, our popular "Breakfast with the Bench" program, as well as preparing for our **June 10 Annual Federal Judicial**

**Reception honoring Judge Nathaniel M. Gorton.** The Judicial Reception will be held at the Boston Harbor Hotel, Wharf Room, from 6-9 pm. We look forward to seeing you there.

Our *FBA MA Committees* are busy planning events, including a very successful program on April 8, 2015, on Litigating Section 1983 Cases in Federal Court featuring Judge Timothy Hillman and Suffolk Professor Karen Blum. We welcome your participation and suggestions for activities. The formation of additional Committees is being considered, so please let us know if there is a subject area you would like to see included:

Committee	Chairs	Board Contact
Criminal Law Committee	Michael Ricciuti and Kimberly West	Scott Lopez <a href="mailto:splopez@lawson-weitzen.com">splopez@lawson-weitzen.com</a>
Immigration Law Committee	Matthew Maiona and Sara Ward	Jonathan Handler <a href="mailto:jihandler@daypitney.com">jihandler@daypitney.com</a>
Intellectual Property Committee	Brandon Scruggs and Bo Han	Lisa Tittlemore <a href="mailto:ltittlemore@sunsteinlaw.com">ltittlemore@sunsteinlaw.com</a>
Diversity Committee	Erika Reis and Raquel Webster	Michelle Schaffer <a href="mailto:mschaffer@campbell-trial-lawyers.com">mschaffer@campbell-trial-lawyers.com</a>
Bankruptcy Committee	John La Liberte and Keri Wintle	Jon Mutch <a href="mailto:JMutch@robinskaplan.com">JMutch@robinskaplan.com</a>
Civil Rights Committee	Karen Blum and Michelle Hinkley	Howard Friedman <a href="mailto:hfriedman@civil-rights-law.com">hfriedman@civil-rights-law.com</a>
Philanthropy Committee	Amy Bratskeir and Sara Colb	Patrick Curran <a href="mailto:patrick.curran@ogletreedeakins.com">patrick.curran@ogletreedeakins.com</a>
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Social Security and Disability Law Committee	Mala Rafik and Terrence Parker	Martin Rooney <a href="mailto:mjr@curleylaw.com">mjr@curleylaw.com</a>
Health Law Committee	Michelle Peirce and Jason Drori	Ken Pickering <a href="mailto:kpickering@mirickoconnell.com">kpickering@mirickoconnell.com</a>
Aviation Law/Transportation Law and Security Committee	Dave Bannard and Christopher Howe	Jack Schecter <a href="mailto:JCSchecter@mintz.com">JCSchecter@mintz.com</a>

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## President's Column

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The FBA MA Young Lawyers Division and FBA MA Law School Chapters continue to be hard at work putting on events, including the YLD's terrific Spring Networking Reception in May.

At the FBA National level, the FBA continues its important work advocating for the needs of the federal courts. Our Chapter President Elect, Matthew Baltay, attended the FBA National Capitol Hill Day on April 30, 2015, where FBA members met with their Senators and Representatives to educate them on issues of interest to the federal bench and bar (see <http://www.fedbar.org/Advocacy/2015-Capitol-Hill-Day-Recap> for more information). As a whole, the FBA's efforts continue to be focused on achieving the important mission of the FBA. Please contact me with your suggestions and contributions. I look forward to collaborating with you.

*The mission of the Association is to strengthen the federal legal system and administration of justice by serving the interests and the needs of the federal practitioner, both public and private, the federal judiciary and the public they serve.*

## The FBA (Massachusetts Chapter)'s SOLACE Program

*By Patrick M. Curran, Ogletree, Deakins, Nash, Smoak & Stewart, P.C.*

In 2014 the Massachusetts Chapter of the FBA (in conjunction with the Massachusetts Bar Association) initiated a program in Massachusetts designed to facilitate the provision of assistance to members of the Commonwealth's legal community in need of help. The program, called **SOLACE** (an acronym for "Support of Lawyers/Legal Personnel - All Concern Encouraged"), was founded several years ago by the Honorable Jay Zainey, United States District Judge for the Eastern District of Louisiana, and provides a support network consisting of attorneys and other legal professionals and personnel for members of the legal community, including attorneys, court personnel, paralegals, and other support staff. Participants in the program receive emails from the local SOLACE Program coordinator describing a request for assistance from another member of the legal community; members able to provide the assistance requested may then contact the program coordinator, who will facilitate a connection between that member and the person in need. Likewise, any member who has a need for assistance, or becomes aware of another in need, can provide the program

coordinator with the details, which he or she will then evaluate and, depending on the circumstances, distribute as a request for assistance to other members of the Program.

Judge Zainey has had tremendous success with the SOLACE program in his district, and he has helped to implement it in other districts where it has provided invaluable assistance to members of those legal communities. The Massachusetts Chapter's participation in the SOLACE Program – and its efforts to get the Program started here – will provide an enormous benefit to Chapter members and to others in the legal community, by giving them not only a source of assistance in times of need but also with an opportunity to help others in need.

If you become aware that a member of the Massachusetts legal community is in need of assistance – or if you experience a need for help yourself – please contact the local SOLACE Program coordinator by e-mail at [mass.solace@gmail.com](mailto:mass.solace@gmail.com).

### EXECUTIVE OFFICERS:

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Christopher E. Hart

*Full listing on page 13*



THE MASSACHUSETTS CHAPTER OF THE  
FEDERAL BAR ASSOCIATION

Cordially invites you to attend its

**Annual Federal Judicial Reception**

**June 10, 2015**

6:00 pm - 9:00 pm

Boston Harbor Hotel

Wharf Room, 70 Rowes Wharf

Boston, Massachusetts 02110

The Massachusetts Chapter will proudly recognize:

**The Honorable Nathaniel M. Gorton**

For his Dedicated Service to the Judiciary,  
the Bar, and the Community that the Court serves

To reserve tickets, please contact:

Debora Corbett

Brody, Hardoon, Perkins & Kesten, LLP

699 Boylston Street, Boston, MA 02116

617-880-7134 \* dcorbett@bhpklaw.com

\$85 - individual tickets (FBA members)

\$100 - individual tickets (non-FBA members)

\$ 850 Firm Sponsors \* \$1,500 Corporate Sponsors  
(10 tickets and FBA recognition of sponsorship at event)

Please make checks payable to: **FBA Mass. Chapter**

## Clerk's Update

By Robert M. Farrell

Judge Douglas P. Woodlock announced in January that he would assume senior status on June 1, 2015. Senator Elizabeth Warren and Senator Edward Markey reconvened the Advisory Committee, chaired by former District Judge Nancy Gertner, to consider applications for the vacancy created by Judge Woodlock's change in status. Applications were due by February 23, 2015.

*Here are some suggestions you may find helpful when using CM/ECF:*

### UPDATING CONTACT INFORMATION:

If you have any changes to your contact information (firm affiliation, street address, phone number and email address), be sure to update your information in the court's CM/ECF database as soon as possible. To do that, log into CM/ECF, click on Utilities on the blue menu bar, and then on Maintain Your Account (for firm and street address), and/or Maintain Your E-Mail to update your email address.

### ADDING CASES OF INTEREST:

Attorneys may update their accounts to include docket numbers for other cases (in this court's database) that are of interest to that attorney. Do that by following the instructions above to access the "Maintain Your E-mail" screen. Click on your email address and add the docket number of any case in which you want to receive email notice of case activity. Be sure to click on "Submit all changes" on the left side of the screen.

*Using the search function to find the proper entry*

### ADDING SECONDARY EMAIL ADDRESSES:

Attorneys may add additional email addresses to receive the same notices as the attorney. Follow the instructions above to access the "Maintain Your E-mail" screen but this time click on the link to "add new e-mail address."

Additional information on these and other functions in CM/ECF, in the form of e-learning modules, may be found on the court's web at <http://www.mad.uscourts.gov/training/cmecf-training-info.htm>.

## FBA YLD Update

By Jennifer L. Ioli, Sherin and Lodgen LLP

:: The **Younger Lawyers Division (YLD)** has had a very active spring season. On April 16, 2015, YLD Board Members Jennifer Ioli, Nicole O'Connor, and Shannon Phillips represented the FBA at Suffolk University Law School's Graduate Career Launch. There, we received word that all of the graduating Suffolk law students with whom the FBA met through its mock interview program had secured employment.

:: For the second year in a row, the YLD's Professional Clothing Drive was a huge success, with a large number of donations and increased participation. Thank you to all who participated and made donations to Solutions At Work!

:: The YLD's Brief Bites lunch series returned on May 8, 2015, with a brown bag panel discussion featuring Assistant United States Attorneys Justin O'Connell and Brian Pérez-Daple. The panelists discussed government investigations and subpoenas with a full audience of attorneys.

:: On May 18, 2015, the YLD's membership drive event drew a crowd of nearly forty young attorneys, many of whom were new to the FBA. Thank you to all who assisted in organizing this event and to all who attended. We hope you join us at future events!

:: This summer, the YLD Board plans to continue its activities. Among other things, several YLD members will join the greater FBA in attending the Judicial Reception on June 10, and in volunteering with youth campers at a mock trial of "Goldilocks", to be hosted by Judge Frank Bailey at the Bankruptcy Court in July.

## Upcoming Events:

- **June 10:** Annual Judicial Reception, at the Boston Harbor Hotel, Wharf Room, from 6-9pm.
- **June 25: Federal Bar Association – Worcester Division**  
The next lunch and learn event will be June 25, from 1:00 to 2:00 in Magistrate Judge Hennessy's Jury Room. Come learn what the judges hear about evidence issues! The FBA will present a webinar produced by the Federal Judicial Center on the Federal Rules of Evidence titled, "Significant and Recurring Evidence Issues at Trial." The webinar will last one (1) hour. A box lunch will be provided. Please RSVP to [kpickering@mirickoconnell.com](mailto:kpickering@mirickoconnell.com).

## FBA Seminar on Federal Civil Rights Litigation

By Howard Friedmen, Law Offices of Howard Friedman, P.C.



On April 8 the civil rights committee of the Massachusetts FBA held a seminar on litigating federal civil rights cases. Our speakers were Professor Karen Blum of Suffolk Law School, a co-author of the treatise "Police Misconduct: Law and Litigation," and Judge Timothy Hillman, who trains new magistrate judges on handling civil rights cases. It was well attended, with a mix of lawyers who represent

plaintiffs and lawyers who represent defendants, along with some law students and recent law school graduates.

Professor Blum discussed the elements of an action under 42 U.S.C. § 1983. She addressed a topic that seems to befuddle many lawyers in § 1983 cases – the difference between bringing a case against a defendant in his individual capacity and his official capacity. Judge Hillman confirmed this presents a problem for judges, too. Simply put, an individual capacity suit is against the person sued; a judgment would enter against that person. An official capacity suit is actually a claim against the employer. To further confuse the unwary, an official capacity suit is necessary in an injunctive action against an official. Lawsuits for money



From L to R: Professor Karen Blum, Howard Friedmen, Michelle Hinkley, and Judge Timothy Hillman.

Photos courtesy of Drew Glassroth.

damages are generally individual capacity claims; judges prefer claims against a government entity be made explicitly. Finally, Professor Blum discussed the complex law of qualified immunity.

Judge Hillman started with a discussion of problems he sees in civil rights cases in his court, followed by suggested changes. Perhaps in an overreaction to *Iqbal*, he finds too many complaints are prolix. He would prefer more succinct pleadings, with short and plain statements of the claims as described in Rule 8. Judge Hillman used a series of slides to address common discovery disputes in civil rights cases and polled the audience for their views, then he revealed the case law. It was informative and fun.

## Capitol Hill Day

By Matthew C. Baltay, Foley Hoag LLP

On April 30, 2015, FBA members convened in Washington, D.C. to meet with lawmakers to discuss issues of importance to the federal judiciary and the FBA. The four issues the FBA focused on in sessions with lawmakers were (1) the need for continued adequate funding for the federal judiciary; (2) the need for the Senate to consider all federal court judicial nominees without delay; (3) concerns over currently-proposed federal legislation, the Law Abuse Reduction Act (H.R. 758, S. 401), that would needlessly restrict judicial discretion and require judicial imposition of mandatory sanctions in certain circumstances; and (4) consideration of an Article 1 immigration court. After meeting in the Judiciary Hearing Room in the Rayburn House Office Building for a briefing, FBA members fanned out across Capitol Hill to meet with their respective lawmakers. Massachusetts Chapter President-Elect Matthew Baltay met with Senator Warren's and Senator Markey's office and Congressman Lynch's office and had positive discussions with all three on these issues.



Jennifer Wagner, of Senator Markey's office and the judiciary portfolio, and FBA MA's Matthew Baltay at Senator Markey's office on Capitol Hill Day.

# FBA's Breakfast with the Bench Series

By Matthew C. Baltay, Foley Hoag LLP

The FBA holds monthly breakfasts with the bench. Each breakfast features a judge or magistrate judge from the First Circuit or District of Massachusetts. Breakfasts are open to the bar and are held in the Judges' dining room in the Moakley Courthouse.

The FBA thanks the judges for their participation in the series.

Recent breakfasts include:



**March 25, 2015**

*Chief Judge Sandra L. Lynch and Judge David J. Barron*

Chief Judge Lynch and Judge David Barron delivered a comprehensive overview of First Circuit caseload and practice including efforts to issue written decisions within 60 days of argument. They also provided observations regarding appellate practice, including that at oral argument, it is often most effective for counsel to spend less time on the background and move directly to the main arguments. The Court is generally strict about waiver of arguments and the need for counsel to signal what the strong arguments meriting attention are. Additionally, the judges explained that excerpting material from the record below in the appellate briefs is often useful. A lively interactive discussion with the group ensued at which various topics were raised, including cameras in the courtroom and a pending proposal to reduce appellate brief word limit from 14,000 to 12,500 words.



**April 16, 2015**

*Judge Marc L. Wolf*

Judge Wolf provided an insightful historical overview of the judges comprising the District of Massachusetts court, of the recent announcement of five judges in the past two years to transfer to senior status, and of the role, caseload and activities of judges on senior status. Judge Wolf also addressed certain initiatives of his and of the Court, including with respect to enhancing the diversity of the jury pool and exploration of an international anti-corruption court. An interactive discussion followed that touched on numerous topics, including the trend of declining jury trials and involvement of junior lawyers in court proceedings.



**May 27, 2015**

*Judge Denise J. Casper*

Judge Casper provided a recap on her first four-and-a-half years on the bench and her courtroom practices. Judge Casper also addressed Court programs and initiatives and her role as education coordinator and liaison. Judge Casper also addressed the perception of the declining jury trial while noting that there have been four trials in the opening months of 2015 in her Courtroom and that there were seven active trials underway in the Courthouse as of the date of the breakfast. Judge Casper also addressed newer lawyers at the breakfast including a group of summer associates and provided pointers. Judge Casper then fielded questions from the group on summary judgment practice, oral argument and the jury trial (including the observation that the jury watches and sees everything that goes on in the courtroom).

## First Circuit Clarifies Defamation Law and Expressions of Opinion but Avoids Public Official/Private Action Issue

By Daniel Urman, Assistant Teaching Professor, Northeastern University

A case that began as a confrontation between local police officers and off-duty federal customs officials led to a lawsuit and a reminder about the long odds for plaintiffs to succeed in a defamation claim. The 1st Circuit ruled in his favor, but Defendant John Bartels, Dalton Police Chief, probably regrets calling the Inspector General to complain about a negative encounter with two federal employees. The employees, who were not formally sanctioned by their employers after the complaint and investigation, probably regret the lawsuit itself. A simple apology from both parties after their emotionally charged confrontation could have saved a lot of time and money.

In *Piccone v. Bartels*, issued in May, the 1st Circuit unanimously affirmed District Court Judge Mark Wolf's grant of summary judgment on behalf of the defendant, Dalton Police Chief John Bartels. Plaintiffs Colleen Piccone and Peter Quaglia brought suit against Bartels based on defamation and interference with advantageous business relations ("IABR"). The 1st Circuit had the opportunity to examine how the "actual malice" standard applied to public officials in purely private actions (here, the events involved a child custody suit involving a Plaintiff's brother). Ultimately, the Court did not reach the public official issue, ruling that Bartels did not defame the Plaintiffs because he expressed an opinion based on disclosed non-defamatory facts. The case demonstrates the relatively high bar for defamation claims, as long as the statement in question is presented as a point of view and not an indisputable conclusion.

### Background

Colleen Piccone serves as Deputy Associate Chief Counsel to Customs and Border Protection ("CBP") in New York. Peter Quaglia, her boyfriend, is the Special Agent in Charge of CBP's Internal Affairs office in New York. In early 2008, the Dalton Police and Massachusetts Department of Social Services ("DSS") began investigating Piccone's brother Louis for child abuse. During the investigation, Louis and his wife, Elena, left the state with their three children. The Dalton Police Department issued arrest warrants for Louis and Elena, and the local Family Court issued an order granting DSS temporary custody of the three children.

At this time, Colleen Piccone applied to the Family Court to request temporary custody of Louis and Elena's children at Louis and Elena's Dalton home. Plaintiffs traveled to Dalton on February 1, 2008 to attend a hearing related to the custody application. A court official, William Gail, informed them that the house needed a functioning carbon monoxide detector to be considered suitable for children. After purchasing a detector, Plaintiffs drove to Louis and Elena's home to install it. This is when the confrontation with Bartels took place.

When Piccone and Quaglia arrived at Louis and Elena's home, they encountered Bartels and a fellow Dalton Police Officer, Jeffrey Coe. Bartels and Coe were at the home to investigate Louis and Elena's whereabouts. Put simply, the interaction did not go well. Bartels demanded that Plaintiffs identify themselves, and Plaintiffs responded in kind. At first, Bartels refused to allow Piccone and Quaglia to enter the home. Only after speaking to the court official, William Gail, did Bartels allow one of them to enter the home. Bartels permitted Quaglia to enter the home, and when Bartels attempted to follow him inside, Quaglia insisted that Bartels remain outside. Quaglia installed the detector and then he and Piccone left for the courthouse.

Later that same day, Bartels spoke about the encounter with a state trooper, who encouraged Bartels to "make calls to the federal agency, get someone fired, do something." Bartels did just that, and called DHS and spoke with Matthew Carbone, an agent with the Office of Inspector General at DHS, to complain about defendants' conduct. The 45 minute conversation centered around two main themes: 1) plaintiffs' alleged unprofessional behavior toward him and 2) Bartels' belief that plaintiffs knew the current whereabouts of Louis and Elena and/or their children. The call led DHS to launch investigations into Piccone and Quaglia's actions. DHS did not ultimately take any action against either plaintiff.

Plaintiffs brought suit in January 2011 alleging that Bartels' statements were defamatory, injured plaintiffs' reputations, and hampered their professional advancement. While the initial suit named the Dalton Police Department and Town of Dalton as additional defendants, plaintiffs amended their complaint to contain Bartels as the only defendant. Judge Wolf granted summary judgment on behalf of Bartels for the claims of slander and IABR.

### First Circuit Analysis

The Court ultimately concluded that neither of the two categories of Bartels' statements were actionable under Massachusetts defamation law. The Court noted that an individual expressing his or her opinions "typically do not

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give rise to liability since they are not susceptible of being proved true or false.” 1st Amendment case law suggests, “in the defamation context, an expression of ‘pure opinion’ is not actionable.” Statements cannot be defamatory if the speaker is clearly expressing “a subjective view, an interpretation, a theory, conjecture, or surmise,” instead of claiming to possess objectively verifiable facts. The key is that the speaker expresses the non-defamatory facts underlying his opinion. The panel concluded that Bartels’ statements constituted non-actionable opinions, because the Defendant fully disclosed the non-defamatory facts upon which his opinion was based.

### Unprofessional Conduct

During Bartels’ conversation with Carbone, he repeatedly said that he found Plaintiffs’ behavior “unprofessional.” For example, Bartels suggested that Plaintiffs “could have made things a little bit easier on us” and avoid officers raising their level of aggression. The Court noted that expressive phrases, even used in a pejorative and unflattering way, constitute protected opinions. The 1st Circuit has rejected defamation claims based on statements ranging from a newspaper critiquing a theater production as “fake” and “phony,” a description of a clothing store as “trashy,” and a sales pitch as a “scam.” In other words, a description of a person’s behavior as “professional” or not is a subjective personal judgment.

The Court further noted that the term “professional” can involve a technical or ethical standard of a profession, and a statement could imply the existence of undisclosed defamatory facts about a sufficiently objective standard of conduct. Plaintiffs did not make any such allegations in this case, but even if he had, Bartels explained the circumstances of the encounter, providing a factual basis for his opinion of the plaintiffs’ conduct. By disclosing non-defamatory facts about the confrontation, Bartels allowed Carbone to form his own impression.

### Knowledge of Family’s Location—closer question

The Court acknowledged that Bartels’ statements about Plaintiffs’ possible knowledge of the family’s whereabouts were a somewhat closer call. This involved more of a factual determination—whether or not Plaintiffs knew the family’s location. Had the defendant not fully disclosed the facts underlying his judgment, the defamation claim might have survived, leading to a discussion of the public official/private action issue. However, Bartels’ conversation with Carbone included several non-defamatory facts that formed his opinion. First, Bartels noted that Piccone’s New York home had been searched in the previous month, so she was probably aware

of the outstanding arrest warrants for the missing parents. Bartels also noted that the plaintiffs had a desire to “get the kids situated” so the parents could resolve the criminal matters. He also mentioned that the plaintiffs attended the custody hearing, and suggested that they would not try to secure custody without knowledge of the family’s whereabouts.

The Court emphasized the key role of Bartels’ disclosure of the non-defamatory facts. By sharing them, Bartels allowed Carbone to make his own independent judgment based on the information he received. Had Bartels’ suggested that “only one conclusion was possible,” he could have been potentially defaming the Plaintiffs. The 1st Amendment generally protects statements of opinion where a speaker “outlines the facts available to him, thus making it clear that the challenged statements represent his own interpretation of those facts,” and allowing the listener to form his own conclusions. The Court deemed Defendants’ statements speculative, frequently referring to portions of the call transcript. Bartels acknowledged that he did not possess concrete facts to confirm his suspicion that Plaintiffs might have known the family’s whereabouts. Bartels was careful to couch his statements as speculation.

While Bartels may not have defamed Plaintiffs under the applicable standard, this is not to suggest that Bartels had virtuous intentions. The Court noted that Bartels’ conversation with Carbone presented a one-sided description of his unpleasant interaction with Plaintiffs. Bartels’ conversation with the state trooper, which led to the DHS call, suggests a vindictive motive. Still, the Court noted that even unjustified, unreasonable, or derogatory opinions do not constitute defamation, provided they are based on disclosed or assumed non-defamatory facts.

### Actual Malice

Judge Wolf’s summary judgment opinion below noted that the malice component of the claims were unique in at least two respects. First, the statements Bartels made concerned the Plaintiffs’ private conduct, not their official actions. Second, Bartels’ statements were not public, but were instead made through a telephone call to the DHS Inspector General’s Office. Ultimately, Wolf decided that the information provided to a government inspector constituted part of the “free flow of information” required by the First Amendment.

In a lengthy footnote, the 1st Circuit discussed the applicability of the actual malice standard. The relevant portion of the statute states that a defendant “in an action for **writing** or **publishing** a libel may introduce in evidence the truth of the matter contained in the publication as libelous; and the truth

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shall be a justification unless actual malice is proved." The district court cited a 1943 case for the proposition that this statute does not apply to an action for slander. Furthermore, the district court indicated that even if the statute applied to slander, Plaintiffs' status as public officials barred recovery. The 1st Circuit agreed that actual malice only applies to libel so it did not reach the question regarding public figures involved in private actions.

### Libel v. Slander

The libel/slander distinction in the MA statute appears somewhat irrelevant in this case. The call between Bartels and Carbone was recorded and eventually transcribed. This probably helped Bartels, because it provided evidence of his nondefamatory factual statements. If, following his conversation with the trooper, Bartels had been unable to reach anyone by phone, he may have filed a written complaint to the DHS Inspector General, or written a letter. The letter might not have involved the nuance captured in the phone call, because the DHS agent asked several specific questions about the basis of Bartels' conclusions. His intent would have been identical, and he might have reached the same audience, but the case could have turned out differently. In the age of social media and additional channels for publication (Facebook, Twitter), legislatures might need to amend the definitions of writing and publishing.

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## Insurer's Duty To Defend Does Not Include Prosecution of Insured's Counterclaim

By Scarlett M. Rajbanshi, Peabody & Arnold LLP

In March 2015, the U.S. District Court for the District of Massachusetts (Gorton, J.) ruled in the case of *Mount Vernon Fire Insurance Company v. Visionaid, Inc.* that an employment liability insurer had no obligation to pay for the prosecution of a counterclaim the insured brought against a former employee who had sued it for age discrimination.

The insured, Visionaid, Inc., alleged that it fired its former employee for poor performance, insubordination and suspicion that the employee had misappropriated company funds. The former employee filed suit at the Massachusetts Commission Against Discrimination ("MCAD") alleging age discrimination. Visionaid put its employment liability insurer, Mount Vernon Fire Insurance Company ("Mount Vernon") on notice of the suit and Mount Vernon appointed panel defense counsel to defend Visionaid. When the former employee removed his

age discrimination suit from the MCAD to the Superior Court, Mount Vernon continued to defend Visionaid but for the first time issued a reservation of rights letter. At the outset of the Superior Court case, Visionaid demanded for the first time that Mount Vernon prosecute a counterclaim against the employee related to his alleged misappropriation of funds. In response to this demand, Mount Vernon withdrew its reservation of rights and informed Visionaid that it would not fund the prosecution of Visionaid's counterclaim because doing so was beyond its obligations under the Policy. Mount Vernon advised Visionaid that it was free to pursue its misappropriation counterclaim against the employee at its own expense. Mount Vernon declined also Visionaid's demand that it pay for Visionaid's personal attorney to defend the age discrimination suit, Mount Vernon's position being that appointed panel counsel was fully capable of representing Visionaid's interest in the suit. Visionaid disagreed and argued that panel counsel had a conflict of interest to the extent that Visionaid's counterclaim posed an obstacle to settling the employee's age discrimination suit.

After cross-motions for summary judgment were filed, District Judge Nathaniel Gorton ruled that "an insurer ought not to bear any obligation to prosecute affirmative counterclaims asserted by the insured." Judge Gorton based his ruling on the policy language, "which only provides coverage for claims first made against VisionAid." He noted that this ruling "does not run afoul of the 'in for one, in for all' rule prevalent in Massachusetts" as that rule "is simply not implicated when the insured seeks affirmative relief."

Judge Gorton ruled also that Mount Vernon's appointed panel counsel did not have a conflict of interest and could adequately defend Visionaid against the age discrimination claim while Visionaid's personal attorney prosecutes the counterclaim. He noted that "there is nothing inherently impractical or unwieldy about VisionAid relying on its own separate counsel to assert the counterclaim."

Visionaid has appealed Judge Gorton's decision. Briefs in the appeal will be filed this summer.

Interested in contributing  
to the Newsletter?  
Contact Christopher Hart at  
[chart@foleyhoag.com](mailto:chart@foleyhoag.com).

## District Court Playing Important Role in Development of Alien Tort Statute Jurisprudence

By Elizabeth Holland, Consulting Expert on International Humanitarian Law, International Association of Professionals in Humanitarian Assistance and Protection (PHAP)

The U.S. District Court for the District of Massachusetts is poised to continue its contribution to the developing body of Alien Tort Statute (“ATS”) jurisprudence. The District Court, in *Sexual Minorities Uganda v. Scott Lively*, No. 12-cv-30051, is expected to address later this year (or early next year) whether a certain set of activities – namely, those undertaken by a U.S. citizen, acting mainly within the United States, but targeting individuals and groups abroad – would satisfy the jurisdictional requirements of the ATS, which were recently curtailed by the Supreme Court in *Kiobel v. Royal Dutch Petroleum*, 133 S. Ct. 1659 (2014). The ATS is a federal statute dating back to 1789, which states “The district court shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.” 28 U.S.C. §1350.

In *Sexual Minorities Uganda* the Plaintiff, an umbrella organization located in Uganda that advocates for equal treatment of lesbian, gay, bisexual, transgender and intersex (“LGBTI”) people in that country, brought suit in federal court against Scott Lively, an American citizen residing in Springfield, Massachusetts. The suit alleges that Lively, an attorney, author and minister, worked in concert with a number of other individuals for over a decade to “help[] coordinate, implement, and justify strategies to dehumanize, demonize, silence and further criminalize the LGBTI community in Uganda.” (Memorandum and Order Denying Defendant’s Motion to Dismiss, Aug. 14, 2013). In denying Lively’s motion to dismiss the District Court recognized that the type of activity alleged falls within the (narrowed) limits of the ATS recently established in *Kiobel*. Though it may appear as a given that an American citizen who lives in the United States and carries out activity in the United States that allegedly violates international law (though the primary aim and effect of these activities is abroad) should be liable to suit in a U.S. court, the Supreme Court’s 2013 decision in *Kiobel* introduced a degree of uncertainty.

In *Kiobel*, the Supreme Court applied the presumption against extraterritoriality set forth in *Morrison v. National Australia Bank*

*Ltd.*, 130 S. Ct. 2869 (2010), barring petitioners’ suit seeking relief for violations of the law of nations. The petitioners, Nigerian nationals residing in the United States, brought suit against Royal Dutch Petroleum and Shell Transport and Trading Company, both companies incorporated in the Netherlands and England, respectively. The suit alleged that the companies aided and abetted Nigerian military and police who targeted people in the Ogoniland area of Nigeria who protested the environmental effects of the practices of a joint subsidiary of the companies. The suit alleged that Nigerian forces attacked villages, beating, raping, killing and arresting residents, and destroyed or looted property, and that the defendants aided and abetted these atrocities by providing, *inter alia*, food, transportation and compensation. In concluding that jurisdiction under the ATS is restricted by a presumption against extraterritoriality, and deciding that the facts of the case were such that petitioners’ suit was barred, the Supreme Court effectively proscribed “foreign cubed cases.” “Foreign cubed cases” are those in which a foreign plaintiff sues a foreign defendant for acts committed on foreign soil. What the decision left open, however, was what conditions are necessary to overcome the presumption against extraterritoriality.

In an opinion authored by Chief Justice Roberts, the Court recognized in *Kiobel* that there are circumstances under which the ATS provides jurisdiction in cases with international elements, but such claims must “touch and concern the territory of the United States . . . [and] must do so with sufficient force to displace the presumption against extraterritorial application.” This raises the question, without providing an answer or guidance, as to how directly a claim must “touch and concern the territory of the United States” to support jurisdiction under the ATS. Indeed, in his Concurrence Justice Alito recognized “[t]his formulation obviously leaves much unanswered,” and in a separate Concurrence Justice Breyer noted that the Court “leaves for another day the determination of just when the presumption against extraterritoriality might be overcome.”

The District Court in *Sexual Minorities Uganda* provided guidance on what type of claim might fall within the narrow category recognized by the Supreme Court as having a close enough link to displace the presumption against extraterritoriality. In its denial of Lively’s motion to dismiss the District Court stated “[a]n exercise of jurisdiction under the ATS over claims against an American citizen who has allegedly violated the law of nations in large part through actions committed within this country fits comfortably within the limits described by *Kiobel*.” The Court was clear that “[t]he fact that the impact of Defendant’s conduct was felt in Uganda cannot deprive Plaintiff of a claim.”

The District Court explained that in determining whether the extraterritorial presumption would bar the claim against Lively for aiding and abetting the tortious activity, the relevant question is

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“whether Plaintiff has alleged that substantial ‘practical assistance’ was afforded to the commission of the crime against humanity from the United States.” The Court answered the question in the affirmative, pointing to the fact that dating back almost a decade Lively engaged with associates in Uganda on concrete methods and tactics to deprive the Ugandan LGBTI community of its basic rights, including communicating with and advising individuals in Uganda regarding draft legislation that would have imposed the death penalty for homosexuality. Thus, notwithstanding Lively’s occasional trips to Uganda, the fact that Lively is an American citizen, resides in the United States, and is alleged to have conducted much of the activity in question within the United States, appears sufficient for jurisdiction under the ATS.

The First Circuit affirmed the District Court’s denial of Lively’s motion to dismiss in December. Discovery is currently underway and

is slated to wrap up in the Fall, and summary judgment motions are scheduled for late 2015. Thus, the District Court is poised to provide additional elaboration after discovery has concluded as to what factual predicate is sufficient for jurisdiction under the ATS, considering the narrowing that took place in *Kiobel*. The fact that the District Court, even at the motion to dismiss stage, recognized that activity in the United States – even if aimed at a target abroad – may be enough for jurisdiction under the ATS represents an important step in delineating what satisfies the “touch and concern” requirement established by the Supreme Court. It will be interesting, both for this circuit and others, to see what activity – if any – the District Court recognizes as sufficient for jurisdiction in this post-*Kiobel* landscape.

## 5th Circuit Keeps President Obama’s Executive Actions On Hold Nationwide.

By Sara Ward,  
Maiona Ward Immigration Law

On November 20, 2014, the President announced a series of executive actions in an effort to modify enforcement priorities and to focus attention on national security threats, those with criminal convictions, and recent unlawful entrants. Additionally, the President authorized the Department of Homeland Security (DHS) to expand its use of deferred action to provide temporary protection from removal for millions of undocumented immigrants currently in the United States. The executive action called for the expansion of the current Deferred Action for Childhood Arrivals (DACA) program, as well as the creation of a new deferred action program, Deferred Action for Parental Accountability (DAPA).

Under deferred action, DHS will not place undocumented immigrants who meet certain requirements into removal proceedings. Deferred action is not a visa or a green card and it is not a path to citizenship. However, an individual with deferred action is protected from removal temporarily and is eligible for an employment authorization document.

In *Texas v. United States*, litigation affecting implementation of the program nationwide, 26 states challenged the President’s authority to implement the expanded DACA and the new DAPA programs by filing a lawsuit in the U.S. District Court for the Southern District of Texas. In February 2015, a preliminary injunction temporarily blocked the implementation of the expanded DACA and DAPA programs until the Court is able to rule on whether the President has the authority to implement these programs.

The United States filed an appeal and in March, the 5th Circuit Court of Appeals agreed to expedite the appeal of the preliminary injunction. On April 17, 2015 the 5th Circuit held a hearing on

whether it should stay the preliminary injunction issued by the District Court. In a 2/1 split decision, a three judge panel of the 5th Circuit refused to lift the injunction placed on President Obama’s immigration executive actions last February.

The Administration has decided that it will not file an emergency request to the Supreme Court to lift the preliminary injunction blocking the expanded DACA and DAPA, and instead will focus on the appeal of the injunction itself at the 5th Circuit, which is expected to proceed with oral arguments in July 2015. At this point, the expanded DACA and DAPA programs are on hold as we wait further litigation in the months ahead.

## A “Solution” in Search of a Problem? The Innovation Act of 2015 & Trends in Fee-shifting in Patent Litigation

By Jack C. Schechter and Robert J. L. Moore, Mintz, Levin, Cohn, Ferris, Glovsky, and Popeo P.C.

On February 5, 2015, Rep. Robert Goodlatte (R-VA) introduced H.R. 9, entitled the “Innovation Act.” Among other things, the bill would direct courts to award attorneys’ fees and litigation-related expenses to prevailing parties absent a finding that “the position and conduct of the nonprevailing party or parties were reasonably justified in law and fact or that special circumstances (such as severe economic hardship to a named inventor) make an award unjust.” Creating a presumption in favor of fee-shifting may well discourage some patent owners from asserting their patents. However, it is unclear that codifying such a measure is necessary to realize the bill’s goal of curbing patent abuse. At the same time, as currently drafted the bill would not impede some of the worst examples of patent abuse.

Under 35 U.S.C. § 285, courts already have the authority to penalize parties bringing non-meritorious claims of patent infringement and to compensate those parties unjustly targeted by such claims. Though once a rare occurrence, the past several years have seen courts award fees with increased regularity. In 2012, parties in district court patent matters moved for attorneys’ fees one hundred twenty-four (124) times, prevailing at least in part 35% of the time. By 2014, the number of such motions had increased by 66%, to two hundred six (206). These motions were granted at a similar rate – 37% – to the 2012 motions, resulting in an 85% increase in the number of granted motions for fees over this two year span. Under the April 2014 Supreme Court opinion in *Octane Fitness, LLC v. Icon Health & Fitness*, this trend promises to continue or even accelerate, with or without the passage of the Innovation Act. There, the Supreme Court unanimously overturned the Federal Circuit’s *Brooks Furniture Mfg. v. Dutilhier* standard for fee awards under 35 U.S.C. § 285. Under the old Federal Circuit test, a case merited fee-shifting only where the party from which fees were sought engaged in sanctionable litigation-related misconduct “in subjective bad faith” and/or where said party’s litigation positions were “objectively baseless.” The Supreme Court read no such test into the statute and returned to the district court the discretion to award fees based on “a totality of the circumstances.”

Moreover, the bill focuses on shifting litigation fees and costs, to the exclusion of the most obvious and glaring examples of patent abuse, which occur pre-suit. For instance, while the bill states that “it is an abuse of the patent system and against public policy for

a party to send out purposefully evasive demand letters to end users alleging patent infringement[,]” and while the bill seeks to increase the sanctions one might face when litigating in the wake of such demand letters, a patent owner engaged in such questionable practices would face the desired reckoning only in the event that it opted to litigate its infringement allegations. The Act would do nothing to prohibit patent holders with no intention or reasonable basis for bringing an infringement claim from sending unsophisticated entities non-meritorious demand letters en masse and collecting an aggregate of nuisance license fees from the naïve few – perhaps the epitome of “patent abuse.”

Not only is the fee-shifting provision of the Innovation Act of questionable necessity and unlikely to affect the most odious forms of patent abuse, the provision would likely deter a significant number of meritorious claimants from asserting their infringed patents. The Act would amend 35 U.S.C. § 285 to provide for joinder of interested third-parties to satisfy an award of fees. In other words, the bill would render third-parties with an interest in a patent assertion program liable for attendant attorneys’ fees awards to the extent that the asserting entity is unable to satisfy the award. This could adversely affect the available avenues through which patent owners, including small inventors, universities, and start-up practicing entities, can enforce their patents. This provision of the Act may be aimed at non-practicing entities (“NPEs”) that purchase patents from a seller and embark on an assertion program, with proceeds divided among the NPE and the seller, but swept in are the small inventors, universities, and start-up practicing entities that cannot afford the significant costs – including, potentially, fee awards – associated with bringing an action to enforce their patent rights. Those lacking the financial backing to absorb those costs would be effectively barred, or at least limited, in their options to bring infringement actions, leaving only established players with the wherewithal to prosecute infringement claims.

The likelihood that the Innovation Act will become law is uncertain, though its chances of passage are better than those of its virtually-identical predecessor from 2013, H.R. 3309. That bill, after passage by the House of Representatives, failed to make it out of Senate committee. The relatively meager turnover in the House since voting on the last bill suggests that passage by the House of this version is possible. The Senate is considering an alternative, the Protecting American Talent and Entrepreneurship Act (“PAT-ENT Act”), which resembles the Innovation Act in several ways but would not create a presumption in favor of fee-shifting as presently drafted. Finally, while President Obama has in the past, notably in his 2014 State of the Union Address, indicated support for the general idea of reforming the patent system to reduce litigation, whether he will sign into law a version of the Innovation Act that manages to pass both Houses of Congress will largely depend on the precise contours of the bill with which he is presented.

## EXECUTIVE OFFICERS

### President

Lisa M. Tittlemore  
Sunstein Kann Murphy & Timbers LLP  
125 Summer Street  
Boston, MA 02110-1618  
(617) 443-9292 |  
ltittlemore@sunsteinlaw.com

### President Elect

Matthew C. Baltay  
Foley Hoag LLP  
Seaport West  
155 Seaport Boulevard  
Boston, MA 02210  
(617) 832-1262  
mbaltay@foleyhoag.com

### Vice President

Scott P. Lopez  
Lawson & Weitzen, LLP  
88 Black Falcon Avenue, Suite 345  
Boston, Massachusetts 02210 (617) 439-4990  
splopez@lawson-weitzen.com

### Secretary

Harvey Weiner  
Peabody & Arnold, LLP  
Federal Reserve Plaza  
600 Atlantic Avenue  
Boston, MA 02210  
(617) 951-2054  
hweiner@peabodyarnold.com

## BOARD MEMBERS

Jack C. Schechter  
Mintz, Levin, Cohn, Ferris, Glovsky and Popeo,  
P.C.  
One Financial Center  
Boston, MA 02111  
(617) 348-3083  
jcschechter@mintz.com

Leonard H. Kesten  
Brody Hardoon Perkins & Kesten, LLP  
One Exeter Plaza  
Boston, MA 02116  
(617) 880-7100  
lkesten@bhpklaw.com

Susan M. Weise  
City of Boston Law Department  
City Hall Room 615  
Boston, MA 02201  
(617) 635-4040  
susan.weise@cityofboston.gov

Peter Levitt  
U.S. Attorney  
1 Courthouse Way, Suite 9200  
Boston, MA 02210

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Jonathan I. Handler  
Day Pitney LLP  
One International Place  
Boston, MA 02110  
(617) 345-4734  
jihandler@daypitney.com

### National Delegate

Jack C. Schechter  
Mintz, Levin, Cohn, Ferris, Glovsky  
and Popeo, P.C.  
One Financial Center  
Boston, MA 02110  
(617) 348-3083jihandler@daypitney.com

### Immediate Past President

Michelle I. Schaffer  
Campbell, Campbell, Edwards &  
Conroy One Constitution Plaza  
Boston, MA 02129  
(617) 241-3102  
mschaffer@campbell-triallawyers.com

### Past President

Matthew C. Moschella  
Sherin and Lodgen LLP  
101 Federal Street  
Boston, MA 02110  
(617) 646-2245 mcmoschella@sherin.com

William J. Rocha  
General Counsel and V.P. Human Resources  
Gold Medal Bakery, Inc.  
21 Penn St.  
Fall River, MA 02724  
wjrocha@rkmc.com

Benjamin M. Stern  
Holland & Knight  
10 St. James Avenue, 11th Floor  
Boston, MA 02116  
(617) 305-2022  
Benjamin.Stern@hkclaw.com

Howard Friedman  
Law Offices of Howard Friedman, P.C.  
90 Canal Street, 5th Floor  
Boston, MA 02114  
(617) 742-4100  
hfriedman@civil-rights-law.com

Cornelius J. Moynihan Jr.  
Nixon Peabody LLP  
100 Summer St  
Boston, MA 02110  
(617) 345-1315  
cmoynihan@nixonpeabody.com

### Co-Vice-President for the First Circuit

Matthew C. Moschella  
Sherin and Lodgen LLP  
101 Federal Street  
Boston, MA 02110  
(617) 646-2245  
mcmoschella@sherin.com

### Co-Vice-President for the First Circuit

Oreste R. Ramos  
Mendez & Alvarez LLC  
Popular Centre, 19th Floor  
209 Munoz Rivera Avenue  
San Juan, San Juan, Puerto Rico  
(787) 274-4937  
oramos@pmlaw.com

Lisa Skehill Maki  
City of Boston Law Department  
One City Hall Plaza, Suite 615  
Boston, MA 02201  
617.635.4022  
Lisa.Maki@boston.gov

Peter C. Netburn  
Hermes, Netburn, O'Connor & Spearing, P.C.  
265 Franklin Street, 7th Floor  
Boston, MA 02110  
617.210.7720  
pnetburn@hermesnetburn.com

Miriam Conrad  
Federal Public Defender  
51 Sleeper Street, 5th Floor  
Boston, MA 02210  
617-223-8061  
Miriam\_Conrad@fd.org

Raquel Webster  
National Grid  
40 Sylvan Road  
Waltham, MA 02451  
781.907.2121  
raqueljw@gmail.com

**HONORARY BOARD OF DIRECTOR MEMBERS:**

Virginia Hurley  
Outreach/Training Coordinator  
US District Court for the District of Massachusetts  
1 Courthouse Way  
Boston, MA 02210  
(617) 748-9166  
Ginny\_Hurley@mad.uscourts.gov

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US District Court for the District  
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1 Courthouse Way  
Boston, MA 02210

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(508) 860-1544  
kpickering@mirickoconnell.com

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Nathan A. Olin  
Connor, Morneau & Olin, LLP  
73 State Street, Suite 310  
Springfield, MA 01103  
(413) 455-1730  
nolin@cmolawyers.com

**JUDICIAL MEMBER:**

The Honorable Timothy S. Hillman  
US District Court for the District  
of Massachusetts  
Donohue Federal Building  
595 Main Street  
Worcester, MA 01608

**PHILANTHROPY CHAIR:**

Amy Bratskeir  
City of Boston Law Department  
City Hall – Room 615  
Boston, MA 02201  
(617) 635-4017  
Amy.Bratskeir@Boston.gov

**YOUNGER LAWYERS DIVISION:**

Michelle Hinkley, Chair  
City of Boston – Law Department  
1 City Hall Square, Room 615  
Boston, MA 02201  
(617) 635-3238  
Michelle.Hinkley@cityofboston.gov

Steve Hansen, Chair-Elect  
Campbell Trial Lawyers  
One Constitution Center, Third Floor  
Boston, MA 02129  
(617) 241-3073  
shansen@campbell-trial-lawyers.com

Erika Reis, Vice-Chair  
City of Boston – Law Department  
1 City Hall Square, Room 615  
Boston, MA 02201  
(617) 635-4042  
Erika.Reis@cityofboston.gov

Christina Ricotta Cryts, Treasurer  
Nixon Peabody  
100 Summer St,  
Boston, MA 02110  
(617) 345-1000  
cricotta@nixonpeabody.com

Jennifer Ioli, Secretary  
Sherin and Lodgen LLP  
101 Federal Street  
Boston, MA 02110  
(617) 646-2182  
jLloli@sherin.com