Federal Bar Association
Massachusetts Chapter

Newsletter

IN THIS ISSUE:

President's Column

Announcements/Events
Welcome Reception for Andrew Lelling
Government Relations Update
Jury Improvement Luncheon
Committee Corner
Breakfast with the Bench
Judge Timothy S. Hillman Biography
Ginny Hurley Memorial Scholarship
2017 First Circuit Judicial Conference
Inaugural "Wills for Veterans" Day

Case Notes
-No Bad Faith By TPA Under Chapters 93A or 176D
-Insured's Counterclaim Against Claimaint Did Not Create Conflict of Interest Between Insured and Insurer
-Navigating the Employment-Based Non-Immigrant Visa Process Under the Buy American, Hire American Executive Order
-The Perils of Answering Discovery Requests With Boilerplate Objections in Federal Cases
-New Areas of Liability for Healthcare Providers Relating to EMR

Harrison Kaplan, Editor

WINTER 2018

President's Column

By Harvey Weiner

Six years ago, former Chapter President Susan Weise asked me if I would be willing to serve on the Board of Directors for the Massachusetts Chapter of the Federal Bar Association. I had only joined the Federal Bar Association a few years earlier and only because no other member of my fifty-five lawyer law firm had ever joined. As head of our litigation department, I thought that someone from my firm should be a member. Little did I know that the Massachusetts Chapter is one of the best kept secrets in the Massachusetts legal community. It has a variety of programming and activities that I had not known existed. Moreover, I have interacted with and got to know federal lawyers, court staff, and judges on both a social and a professional level.

We have grown in leaps and bounds in recent years and the Massachusetts Chapter has received many recent National awards, including, most recently, the Presidential Excellence Award and the award for this newsletter. Its growth to one of the larger chapters in existence has been the work of many people. I have been an officer under four presidents, each of whom has contributed enormously to the increased excellence of the Chapter. I congratulate Michelle Schaffer, Lisa Tittemore, Matthew Baltay and Scott Lopez for their efforts, although each would undoubtedly say, that if I have seen further than others, it is only by standing with the shoulders of giants before me. I particularly want to thank my immediate predecessor, Scott Lopez, not only for his efforts and accomplishments over the past year as Chapter president, but also for the mentoring and educating of his successor. And he never missed a meeting!

One of the many jewels in the crown of our Chapter is the nationally recognized Breakfast with the Bench series, which takes place usually six times a year. The National FBA Executive Director has this year singled out this program as the "brilliant idea" to be copied by other chapters. This would not have happened without the extraordinary cooperation of the federal judiciary, particularly Chief Judge Patti Saris. We expanded the program to Worcester last year, and it is hoped under the new leadership of President-elect Jonathan Handler, to have a breakfast in Springfield.

Of special note is the past and future contributions of Judge Timothy Hillman, who has been the Judicial Member on the Chapter Board for many years. The efforts and dedication of Clerk of Court Robert Farrell and of Court Operations Manager Craig J. Nicewicz cannot be overemphasized.

Each new Chapter president comes up with about twenty-five new ideas that he or she wants to implement in the upcoming year. However, we are warned that we will only have time to implement two or three of them. With that in mind, I would like to implement a National program called "Wills for Veterans," to take place in Boston the Thursday before Veterans Day. This is being organized by Chapter member Jim Downey. Secondly, I would like to increase the already strong membership of the local judiciary in the Chapter. Perhaps we can approach 100%. Immediate Past President Scott Lopez, now with apparently too much free time on his hands, will spearhead this effort. However, my main objective is to maintain the Chapter excellence that already exists and can only continue to exist with the cooperation and hard work of the Chapter Officers, Board and members. Come help! Like any other volunteer activity, you will get more out of it than you will put in.

SAVE THE DATE

THE MASSACHUSETTS CHAPTER OF THE FEDERAL BAR ASSOCIATION

Annual Federal Judicial Reception

JUNE 12, 2018
6:00 PM - 9:00 PM
Boston Harbor Hotel, Wharf Room

We will recognize
THE HONORABLE TIMOTHY S. HILLMAN for
his Service to the Judiciary, Bar and Community

THE MASSACHUSETTS CHAPTER OF THE

FEDERAL BAR ASSOCIATION

Invites you to socialize with other federal practitioners at a

WELCOME RECEPTION FOR

Andrew E. Lelling
United States Attorney for the District of Massachusetts

And

Miriam Conrad
Federal Public Defender for the Districts of Massachusetts,
New Hampshire and Rhode Island

JOHN JOSEPH MOAKLEY FEDERAL COURTHOUSE
JURY ASSEMBLY ROOM

THURSDAY, FEBRUARY 15, 2018
4:30 P.M. – 6:00 P.M.
ADMISSION IS FREE

Please RSVP to:
FBARSVP@lawson-weitzen.com

Scott P. Lopez, Esq.
Lawson & Weitzen, LLP
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(617) 439-4990

The mission of the FBA 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.

Government Relations Update

By Nathan A. Olin – National Council Delegate, Massachusetts Chapter

As the FBA National Council Delegate for the Massachusetts Chapter, I am pleased to summarize several pieces of exciting information from our national leaders. First and foremost, immediate past-president Scott Lopez and I were honored to represent the Massachusetts chapter at the September annual meeting in Atlanta. There, we heard from a variety of dignitaries, including former senator Saxby Chambliss and Nina Totenberg of National Public Radio, and met specifically with the outgoing national president, U.S. Magistrate Judge Michael J. Newman, about our chapter's participation in the national civics and Wills for Veterans initiatives.

Scott and I also picked up the "Outstanding Newsletter Award" as well as the "Presidential Excellence Award" for our chapter's activities. As your national delegate, I also happily voted in favor of allowing clerks of court, including Rob Farrell of our district, to finally become official FBA members. In addition, I was honored to accept an appointment to be on the Sections and Divisions Council. In that role, I will be liaising with five national sections (banking, civil rights, LBGT and criminal law) as well as the law student division. Our very own Matthew Moschella (Massachusetts chapter president in 2012-2013) is now chair of the Sections and Divisions Council. Finally, thanks to the tireless work of Scott, current President Harvey Weiner, and many others on the executive board, our chapter was recognized at the national meeting for its three percent annual growth.

In other national news, there has been some interesting politicking around judicial appointments. According to a November 14, 2016 memorandum from West Allen, Chair of the Government Relations Committee, and Bruce Moyer, Counsel for Government Relations, the most important recent development involved the decision of Senate Judiciary Committee Chairman Chuck Grassley to hold a November 29th hearing on the nomination of two circuit nominees, before receiving the blue slips from the home state senators in two states associated with circuit seats. The move departed from Grassley's 2015 commitment to continue the practice of holding confirmation hearings only after blue slips were turned in. In addition, the American Bar Association's evaluation process for evaluating judicial nominees was the subject of a November 15th hearing of the Senate Judiciary Committee. Republicans convened the hearing to study a not-qualified rating that the ABA gave last month to Steven Grasz, an attorney whom President Trump has tapped for an open seat on the U.S. Court of Appeals for the Eighth Circuit. The overriding question for many senators is whether the ABA is a "fair evaluator" of judicial candidates. Your FBA will continue to follow these important issues in the coming months.

Nathan Olin, National Council Delegate, U. S. Magistrate Judge Michael J. Newman, and Past-President Scott Lopez at the FBA 2017 Annual Meeting in Atlanta.

Jury Improvement Luncheon

By President Harvey Weiner

On October 25, 2017, the Mass. Chapter of the Federal Bar Association co-sponsored a luncheon seminar that was part of the national Civil Jury Project of NYU School of Law. Among the judicial panelists were Chief Judge Patti B. Saris, Judge William G. Young and Judge Indira Talwani. Judge Young was the judicial initiator of this Project, which seeks to examine and ameliorate the decline of jury trials, both nationwide and in this District. One of the juror panelists described her initial negative reaction to receiving her juror summons, in part because it indicated that she could be jailed and fined if she did not show up in court. Since the majority of jurors ultimately have positive experiences in performing their service, it was inferred that the initial "invitation" could somehow reflect this positive service aspect.

FBA Board Members Joshua Segal, Cortney Godin, and President Harvey Weiner at the Jury Improvement Luncheon.

Committee Corner

The Massachusetts Chapter of the FBA has a "committee" structure that follows the national "section and division" framework. This means that your FBA membership goes even further. Not only do you have access to all of the national and local publications and programs, you also can link into Massachusetts-only events and connect with other nearby members who share common, practice-specific interests. Some of those events are highlighted elsewhere in this newsletter.

Currently, the following individuals are the chapter's committee liaisons and chairs. Many of these folks have dedicated significant hours to advance the Massachusetts chapter and they are due deep thanks. For more information, please link on the "Officer" tab of the FBA Massachusetts website. If you are interested in leadership opportunities for one of the committees, please contact the coordinator of committees identified below.

Coordinator of Committees
Nathan A. Olin

Bankruptcy Committee
Nathaniel Koslof (chair) Andrea O'Connor (board liaison)

Civil Rights Committee
Karen Blum (chair)
Rob Sinsheimer (board liaison)

Criminal Law Committee
Leonardo Angiulo (chair)
Brian Murphy (board liaison)

Diversity Committee
Rona Yang (chair)
TBD (board liaison)

Employment Law, Social Security and Disability Law Committee
Francesco DeLuca and Mala Rafik (chairs)
Patrick Curran (board liaison)

Environmental Law Committee
Dylan Sanders (chair)
Peter Netburn (board liaison)

Health Law Committee
Michelle Peirce and David Chorney (chairs)
Nathan Olin (board liaison)

Immigration Law Committee
Matthew Maiona (chair) Sara Ward (board liaison)

Intellectual Property Committee
Arthur Shum (chair)
Brandon Scruggs (board liaison)

International Law Committee
Christopher Hart and Thomas Ayres (chairs)
TBD (board liaison)

Philanthropy Committee
TBD (chair)
Amy Bratskeir (board liaison)

Veterans Committee
James N. Downey (chair)
Harvey Weiner (board liaison)

Breakfast with the Bench:

On December 14, 2017, the Mass. Chapter of the FBA hosted a "Breakfast with the Bench" with U.S. Magistrate Judge Judith G. Dein It was a very lively one hour session covering a number of important topics in District Court practice. The Chapter very much appreciates Judge Dein's willingness to share her insights and guidance.

Please save the date for upcoming Breakfasts with the Bench:

- Feb. 7, 2018 at the Moakley Courthouse with **Judge O. Rogeriee Thompson of the First Circuit**. The topic will be Appellate Practice in the First Circuit.

L to R: *Robert Farrell (Clerk of Court); Jonathan Handler (Chapter President-Elect); U.S. Magistrate Judge Judith Dein; Harvey Weiner (Chapter President); Lisa Tittemore (former Chapter President); and Susan Glovsky (Chapter Board Member).*

Biography - Judge Timothy S. Hillman

By Brian Murphy, Board Member

The Massachusetts Chapter of the Federal Bar Association is pleased to be recognizing the Honorable Timothy Hillman at its upcoming Annual Judicial Reception on June, 12, 2018.

On November 30, 2011, Judge Hillman was nominated to the U.S. District Court for the District of Massachusetts by President Barack Obama. Judge Hillman's nomination came with the joint, bipartisan support of Massachusetts Sens. John Kerry (D) and Scott Brown (R). In making the recommendation, the senators wrote, "Judge Hillman has had an outstanding career, from serving in private practice, as counsel to several municipalities in Massachusetts, and finally as a Magistrate Judge in Worcester. His reputation as a thoughtful, fair and honest jurist is widely known."

On June 4, 2012, the U.S. Senate confirmed Judge Hillman's appointment by a vote of 88-1. Judge Hillman's nomination is particularly noteworthy because of its bipartisan support. He was nominated and confirmed in a year when a lack of partisan collaboration left nearly 1 in 10 federal judgeships empty. At his swearing-in ceremony Chief Magistrate Judge Leo Sorokin recognized Judge Hillman for his "years of judicial experience, intelligence, judgement, good humor, compassion, and an unwavering commitment to justice under the law."

Prior to taking the federal bench Judge Hillman spent twenty-three years as a judge in the Massachusetts state court system and as a U.S. magistrate judge. Over the course of his career, Judge Hillman has established himself as a fair, respectful and dedicated jurist, always mindful of the impact the law has on the individuals before him.

Judge Hillman was born in Chicago, Illinois in 1948 but moved to Massachusetts with his family when he was 12 years old. After graduating from Lunenburg High School, Judge Hillman returned to the Midwest for college. He received his Bachelor of Arts degree in 1970 from Coe College in Cedar Rapids, Iowa. Judge Hillman returned to Massachusetts after graduation to attend Suffolk University Law School. After earning his J.D. in 1974, Judge Hillman began his legal career as an assistant district attorney in the Worcester County District Attorney's Office. Tven after leaving the D.A.'s office for private practice, Judge Hillman's career path remained dedicated to central Massachusetts and public service. He served as City Solicitor to the cities of Fitchburg and Eardner gaining trial and municipal law experience. Judge Hillman also served as Town Counsel to the towns of Athol, Lunenburg and Petersham.

In 1991, Judge Hillman was appointed to serve as a justice on the Massachusetts state district court. Judge Hillman was the presiding justice of the Gardner District Court from 1995 to 1997 before serving as the presiding justice of the Worcester Central District Court until 1998. At that time, Judge Hillman was appointed to the bench of Massachusetts Superior Court. In 2006, he was appointed U.S. Magistrate judge where he served until his appointment to the U.S. District Court for the District of Massachusetts.

The Ginny Hurley Memorial Scholarship

Ginny Hurley joined the Clerk's Office of the United States District Court, District of Massachusetts in 1976 as a Deputy Clerk. Through the years her responsibilities grew and she touched the lives of virtually every member of the Court family. From 2003 until her passing, Ginny was responsible for organizing all of the educational programs at the Court for the bench, bar and public. Her title of "Outreach Coordinator" reflected the fact that she was the face of the court, welcoming all who came to take part in the judicial system, including dignitaries from around the world, international and national press, and students from down the street, all with grace and a smile. Ginny was a good friend, teacher and mentor. She was a quick wit, and had the ability to make people laugh.

Ginny derived great satisfaction coordinating the Court's summer programs for high school and college students – the Lindsay and Nelson Fellowship programs. She helped nurture and train the next generation to appreciate and participate in the legal progress. In memory of her tremendous work for these students, the Massachusetts Chapter of the Federal Bar Association has established the Ginny Hurley Memorial Scholarship. This scholarship, for books or tuition expenses, will be awarded annually to all graduating Lindsay and Nelson Fellows.

Donations are welcome. Checks should be made out to **Federal Bar Association – Massachusetts Chapter..**

Please include a note designating the funds for Ginny Hurley Memorial Scholarship..

Donations should be sent to FBA Treasurer Erika P. Reis c/o City of Boston Law Department, One City Hall Plaza, Room 615, Boston, MA 02210.

From L to R: FBA-MA Past-President Scott Lopez, U.S. Supreme Court Chief Justice John G. Roberts, Clerk of Court Robert Farrell.

Left: U.S. Supreme Court Justice Stephen Breyer and Nate Olin.
Right: U.S. Supreme Court Chief Justice John G. roberts and Nate Olin

2017 First Circuit Judicial Conference

By Scott Lopez, Past-President

Clerk Robert Farrell, Nate Olin and I had the privilege of attending the 2017 First Circuit Judicial Conference in Rockport, Maine from October 16-18, 2017. This Judicial Conference was attended by the Circuit Judges of the First Circuit Court of Appeals, many of judges from the United States District Court for the District of Massachusetts as well as Chief Justice of the United States John G. Roberts, Jr., Supreme Court Associate Justice Stephen G. Breyer and retired Supreme Court Associate Justice David H. Souter.

Aside from the memorable opportunity to meet and greet so many wonderful judges, the educational content of the Conference was amazing and included programs on a review of recent Supreme Court cases by University of California, Berkeley School of Law Dean and Professor of Law, Erwin Chemerinsky, the Future of Violence by Harvard Law School's Rita E. Hauser Professor of Human Rights and Humanitarian, Gabriella Blum, a Tech-Effect Sampler by the George Bemis Professor of International Law at Harvard Law School and Harvard Kennedy School and Professor of Computer Science at the Harvard School of Engineering and Applied Sciences, Jonathan L. Zittrain, Crime and Punishment in Black America by Yale Law School Professor of Law, James Forman, Jr, a Conversation with the Chief Justice with Chief Justice of the United States John G. Roberts, Jr. and a upbeat presentation on the works of the iconic artist, Andrew Wyeth, by his only grandchild, Curator and Photographer, Victoria Browning Wyeth. However, the highlight of the Conference was a photo opportunity with Chief Justice of the United States John G. Roberts.

FBA-MA Past-President Scott Lopez and Professor Erwin Chemerinsky

Interested in contributing to the next edition of the FBA Massachusetts Chapter Newsletter?

Please send your submissions to the editor, Harrison Kaplan, at hkaplan@eckertseamans.com.

Inaugural "Wills for Veterans" Day

By President Harvey Weiner

On November 9, 2017, the Thursday before Veterans Day, the Chapter inaugurated its first Wills for Veterans Day. Organized mainly by Major James Downey, the Chapter liaison for the Veterans and Military Law Committee, seven local attorneys who concentrate their practices in estate planning volunteered their services for the day.

FBA-MA President Harvey Weiner and Major James Downey, Chapter Liaison for the Veterans and Military Law Committee

***L to R*:** Rebecca Tunney, Glynis Ritchie, Amy Lonergan, Jason Cotton, and FBA-MA President Harvey Weiner

The estate planning volunteers were Kerry Reilly, Bill Friedler, Nicholas Jorge, Jason Cotton, Glynis A. Ritchie, Rebecca Tunney, and Amy R. Lonergan, the latter three from the Day Pitney law firm. Lynn Girton of Veterans Legal Services volunteered as a witness. Chapter President Harvey Weiner acted as greeter, witness, and gofer. It was held in the JFK Federal Building in Boston. The event was advertised state-wide through the VA, the National Guard, and certain veterans groups and other organizations.

Twenty-three veterans and nine spouses had their wills, durable powers of attorneys, and health care proxies drafted and executed. Two veterans required complex estate plans, which two of the volunteer attorneys agreed to draft pro bono at a later date. Two house-bound disabled veterans telephoned and one of the volunteer attorneys agreed to go out to their respective houses to draft their estate plans. The veterans came from nineteen different cities and towns all over the state, including Springfield, Brockton, Bourne, Duxbury, New Bedford, Peabody, and Boxborough.

All seven attorneys volunteered to do it again next year, when this almost perfect event will be even better because of lessons learned.

NO BAD FAITH BY TPA UNDER CHAPTERS 93A OR 176D

By Jane A. Horne, Peabody & Arnold LLP

A third-party claims administrator did not violate G.L. c. 93A or 176D in its handling of a wrongful death lawsuit brought by the decedent's estate against a nursing home. In a 21-page decision by Chief Judge Patti B. Saris of the District of Massachusetts in *Garricy Calandro, as Administrator of the Estate of Genevieve Calandro v. Sedgwicy Claims Management Services*, she found that Sedgwick Claims Management Services did not commit any bad faith entitling the decedent's estate to damages. Plaintiff Garrick Calandro, as administrator of his mother's estate, alleged that Sedgwick violated c. 176 and c. 93A by failing to investigate and failing make any reasonable attempt to settle the negligence and wrongful death claims involving his 91-year-old mother who died after a fall at a nursing home in Danvers, Massachusetts.

Sedgwick is a third-party administrator (or "TPA") for insurance companies and self-insureds. Hartford Insurance Company, through its subsidiary, Pacific Insurance Company, insured the subject nursing home with a $1 million policy. Hartford contracted with Sedgwick as TPA to undertake certain actions in adjusting claims on behalf of Hartford, including the claim against the nursing home. In August 2011, Calandro filed suit against the nursing home alleging, in part, wrongful death, and demanding $500,000 in settlement. In July 2012, Calandro amended the complaint to add the decedent's physician as a party. In November 2013, Calandro demanded $500,000 total to settle with both defendants. In February 2014, the defendants made a joint settlement offer of $275,000, which was rejected. At all times, Sedgwick (and defense counsel) placed a verdict value on the case of between $300,000 and $500,000, with a 50 percent attribution to each defendant. In May 2014, the defendants extended a joint $300,000 offer. Shortly before trial, the physician settled out separately for $250,000. The underlying case went to trial in July 2014. The jury found that the nursing home had breached its duty of care and had been grossly negligent. It awarded compensatory damages of $1,452,000 million and punitive damages of $12,514,605 million, for a total verdict of approximately $14 million.

The four-day trial before Judge Saris focused on whether liability on the underlying wrongful death claim, vis-à-vis the nursing home, was, at any point, reasonably clear. In order for liability to be reasonably clear in a tort action, each of the following elements must be reasonably clear: (1) breach; (2) causation; and (3) damages. The Court found that liability on the wrongful death claim (whether the nursing home caused the death) was not reasonably clear at any point in the litigation because causation was always fairly disputed. The Court credited trial testimony that Sedgwick attempted to engage in settlement negotiations with plaintiff's counsel one month before trial, but was rebuffed. The Court also credited testimony that on the eve of trial, counsel for the nursing home made an oral offer of settlement of $250,000—which, coupled with the physician's $250,000 settlement, hit the high end of Sedgwick's estimated verdict value. The Court also found that Sedgwick made other reasonable offers of settlement at key stages of the litigation.

The Court declined to decide whether Sedgwick is in the business of insurance, as the term is defined in c. 176D. Throughout the litigation, Sedgwick argued that it could not be subject to c. 176D in any event, as it is not engaged in the business of insurance.

The full text of the decision can be found at *Garricy Calandro, as Administrator of the Estate of Genevieve Calandro v. Sedgwicy Claims Management Services*, No. C 15-10533, 2017 WL 5593777 (D. Mass. Nov. 21, 2017).

INSURED'S COUNTERCLAIM AGAINST CLAIMANT DID NOT CREATE CONFLICT OF INTEREST BETWEEN INSURED AND INSURER

By Scarlett M. Rajbanshi, Peabody & Arnold LLP

On November 15, 2017, a panel of the First Circuit Court of Appeals (Thompson, J.) ruled in the case of *Mount Vernon Fire Insurance Company v. VisionAid, Inc.*, 875 F.3d 716, that no conflict of interest existed between an employment liability insurer and its insured that entitled the insured to independent counsel at the insurer's expense to defend against an age discrimination suit brought by a former employee.

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, VisionAid demanded for the first time that Mount Vernon prosecute a counterclaim against the employee related to his alleged misappropriation of funds. Mount Vernon advised VisionAid that it would defend VisionAid in the Superior Court suit without a reservation of rights, but also informed VisionAid that it would not fund the prosecution of VisionAid's counterclaim because it was beyond its obligations under the Policy. Mount Vernon advised VisionAid that it was free to pursue its misappropriation counterclaim against the employee

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at its own expense. Mount Vernon also declined 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 in the U.S. District Court, Judge Nathaniel Gorton ruled that "an insurer ought not to bear any obligation to prosecute affirmative counterclaims asserted by the insured." Judge Gorton also ruled 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.

VisionAid appealed the U.S. District Court's ruling to the First Circuit, who in turn certified questions to the Supreme Judicial Court of Massachusetts. On June 22, 2017, the SJC (Gaziano, J) ruled that under Massachusetts law, (1) the applicable insurance policy did not require Mount Vernon to pay for prosecution of the counterclaim, and (2) the "in for one, in for all" rule concerning an insurer's duty to defend did not require Mount Vernon to prosecute the counterclaim.

After the case was remanded back to the First Circuit from the SJC, VisionAid argued that even though Mount Vernon had no obligation to fund the prosecution of VisionAid's counterclaim, VisionAid was entitled to independent counsel at Mount Vernon's expense to handle the defense of the former employee's age discrimination claim, rather than panel counsel appointed by Mount Vernon. VisionAid argued that Mount Vernon wanted to "devalue" the counterclaim because VisionAid refused the employee's proposal to settle the age discrimination claim and the counterclaim for an exchange of releases. The First Circuit (Thompson, J.) disagreed, recognizing that both Mount Vernon and VisionAid "… want to crush [the employee's] suit." *See* 875 F.3d at 724. The First Circuit also recognized that "[a] muscular counterclaim will go a long way in making that happen. But a weak one certainly will not." *Id.*

The First Circuit also ruled that even if Mount Vernon wanted to "devalue" the counterclaim, it could not do so because VisionAid's personal counsel would handle the prosecution of the counterclaim, while Mount Vernon's panel counsel would handle the defense of the age discrimination claim. "VisionAid's personal attorney can make sure that no one devalues the counterclaim in any way, shape, or form." 875 F.3d at 725.

The First Circuit also recognized that "… neither Mount Vernon nor [panel counsel] can settle [the employee's] suit- regardless of how low the settlement figure is (even if it is zero!)- without VisionAid's consent." Id. Also,

> …an exchange of release requires VisionAid's signature and because VisionAid's own lawyer will be in the case prosecuting the counterclaim, neither Mount Vernon nor [panel counsel] can push a settlement through without VisionAid's acceptance and assistance.

Id.

The First Circuit also rejected VisionAid's argument that two attorneys could not effectively represent VisionAid in the underlying suit, holding that "… there is nothing unworkable or 'schizophrenic' about having two attorneys representing [VisionAid] in the [underlying] litigation." 875 F.3d at 726. The First Circuit also found that there was no evidence in the summary judgment record to support VisionAid's suggestion that panel counsel will act unethically to harm VisionAid in favor of Mount Vernon.

Navigating the Employment-Based Non-Immigrant Visa Process Under the Buy American, Hire American Executive Order

By Matthew J. Maiona and Sara K. Ward, Maiona Ward

On April 18, 2017, President Trump signed an executive order which dramatically changed the landscape for the employment-based non-immigrant visa process and procedure at both the US Citizenship & Immigration Services (USCIS) service center locations in the US, as well as at US Consulates abroad. The *Buy American, Hire America Executive Order* or BAHA, essentially directs the US Department of Labor, US Department of Homeland Security (of which USCIS and US Customs and Border Protection (CBP) are branches) and the State Department (which includes US Consulates abroad) to "*protect the interests of United States workers in the administration of our immigration system.*" Executive Order No. 13788, Sec. 5(a). As a result of this broad edict, each agency has been left with substantial discretionary power to implement the necessary regulations or procedures to enforce the President's BAHA executive order. The implementation has been noticeable with dramatic upticks in general unpredictability, denials, delays and other such problems.

The Effect of BAHA on H-1B Processing

Global businesses rely upon the ability to move the most talented employees from around the world into highly specialized employment areas in the United States when qualified candidates cannot be located in the United States. Prior to the execution of BAHA, US businesses could rely with a high degree of certainty that their choice of candidate could be placed into the selected position in the United States once the H-1B application was prepared and submitted to USCIS with the designated filing fees. This predictability and certainty which businesses thrive upon to meet customer deadlines and demand, is now gone.

Immigration practitioners expected some negative effects from BAHA because the H-1B program has been a hot button political issue and is specifically mentioned in BAHA: "*In order to promote the proper functioning of the H-1B visa program, the Secretary of State, the Attorney General, the Secretary of Labor, and the Secretary of Homeland Security shall, as soon as practicable, suggest reforms to help ensure that H- 1B visas are awarded to the most-skilled or highest paid petition beneficiaries.*" Executive Order No. 13788, Sec. 5(b). This general authorization under BAHA has lead to immediate results. Since signing BAHA, immigration practitioners and their corporate clients have seen a dramatic increase in the issuance of requests for evidence (RFE) from USCIS, which vigorously attack the H-1B application as to whether or not the offered position is: (1) a specialized knowledge position requiring a university degree; and (2) at the correct wage level, as submitted by the corporation, for the job duties provided.

According to a recent online article by *Reuters*, 45% more RFEs have been issued this year for H-1B petitions in comparison to the previous year and the volume only grew by less than 3% over last year. These RFE challenges have ignored long standing practices along the way and crossed agency lines. For example, the RFE challenge to the appropriate wage level of the labor condition application (LCA) which must be approved by the US Department of Labor before filing the H-1B application with USCIS, has put the immigration practitioner in the middle of the dispute. In the past, the DOL approved LCA was considered to be unfettered proof that the wage level requested by the employer was adequate. However, this is no longer the case and additional steps must now be taken by the immigration practitioner and US employer to prepare for challenges to the wage level going forward. The overall result of these RFEs has been to slow down processing, create uncertainly and put additional demands on the US employer at the least. At the worst, the RFEs can lead to denial of the requested H-1B status and inability to employ the selected candidate at the US employer.

BAHA's Effect on Other Employment-Based Non-Immigrant Visas

The assault on the H-1B visa program has resulted in significant disruption for US businesses. However, as immigration practitioners we have adapted over the past few months to reset our corporate client's expectations to expect long processing delays, a level of uncertainty and excessively long RFEs which request mountains of additional documentation. What was not necessarily expected was that the level of anti-H-1B aggression in BAHA would flow over into other employment-based non-immigrant visa categories. As a result of the broad instructions under BAHA to "protect the interests of United States workers in the administration of our immigration system", the charged agencies have altered their adjudications of the E-1/E-2 (treaty trader/treaty investor), L-1 (intracompany transferees), O-1 (outstanding researchers) and the P (artist or performer) visa programs. Some of these changes are noticeable by the immigration practitioner's experience with adjudications at these agencies, while some agencies have also reduced the changes to writing.

The US Department of State for example, has changed their instructional manual, called the Foreign Affairs Manual or FAM, which is printed for State Department staff who adjudicate visa requests at the consulate. The FAM has been amended to instruct consular officers to consider BAHA directly when adjudicating visa stamp requests for H-1B, L, O, P and E visa status. For example, the change to the FAM in regard to the L visa (the E, H-1B, O, and P also have this same change in the FAM) states as follows: "*On April 18, 2017, the President signed the Executive Order on Buy American Hire American (E.O. 13788), intended to "create higher wages and employment rates*

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for woreers in the united ttates, and to protect their economic interests." The goal of E.O. 13788 is to protect the interests of United States workers in the administration of our immigration system, including through the prevention of fraud or abuse, and it is with this spirit in mind that cases under INA 101(a)(15)(L) must be adjudicated." 9 FAM 402.12-2(e). Each of the other non-immigrant visa categories above also has this same language added to their respective FAM entry.

The result of this new language in the FAM has been unpredictable discretionary decisions on whether or not to issue a visa stamp to a foreign national whom qualifies under the regulations set forth in the Immigration and Nationality Act (INA) and likely was already approved for that visa status by USCIS in the United States. The climate currently is that US businesses cannot assume that even though an employee has been approved for the visa status requested at USCIS, that the individual will be issued a visa stamp at the US Consulate abroad and be allowed to travel to the United States to commence employment. Recent immigration practitioner experience has shown that adjudications can be radically different for the same visa status request from US Consulate to US Consulate and also within the very same Consulate. In short, it is a disaster for US businesses who rely upon having access to the best and brightest talent from all over the world and who rely upon predictability and certainty to fill important positions within the US company. Rather than confidently sending an employee with an approved visa classification notice from USCIS to a visa stamping appointment at a US Consulate abroad, employers are now being warned that the USCIS approved employee could still be denied a visa stamp under BAHA and stranded abroad. Some American Immigration Lawyers Association (AILA) chapters have reported their immigration practitioners informing AILA that visa stamping applicants have been questioned as to, "why an American cannot perform this job?" How does a foreign national employee adequately answer that question? In the worst scenarios, visa stamping applicants have been denied visa stamps or delayed because their answer to that question was not deemed sufficient.

Moving Forward Under BAHA

US employers must now deal with a very uncertain future under BAHA. Once the US employer is able to work its way through the myriad of additional documentary requests which arise under the inevitable RFE during the non-immigrant visa adjudication process, it must come to the sober reali ation that an approval from USCIS is not the final word under BAHA. Once approved by USCIS, the employee will face the unreviewable individual discretion of a US consular officer or a US Customs and Border Crotection inspector who may determine that an American could perform the position of the employee and deny the issuance of the visa stamp or deny admission to the United States. ae have entered the age of constant adjudication and endless reverification. Those employees who are lucky enough to have been approved at every step of the journey must now be well armed with employment verification letters, copies of approval notices and visa packages when they travel abroad. US employers must be advised to prepare a backup plan should this essential employee become stranded in a foreign country. It is up to the immigration practitioner to make certain that the US employers and their foreign national employees are ready for this new age of uncertainty under BAHA.

The Perils of Answering Discovery Requests With Boilerplate Objections in Federal Cases

By Julie Frohlich and Andrea Kramer, Kramer Frohlich LLC

Responding to written discovery requests is one of the joys of civil litigation, said no one ever. It is, however, a large part of the practice. Faced with the onslaught of written discovery, many attorneys interpose a list of so-called boilerplate objections – e.g., vague, ambiguous, unduly burdensome, and overly broad – and then add "subject to" or "without waiving" these objections before providing a substantive response. This approach is problematic in at least two ways.

First, boilerplate objections are not permissible under the federal rules. *See, e.g., Obiajulu v. City of Rochester*, 166 F.R.D. 293, 295 (W.D.N.Y. 1996) ("Such pat, general, non-specific objections, intoning the same boilerplate language, are inconsistent with both the letter and the spirit of the Federal Rules of Civil Procedure"); *Cornell Corr. of Rhode Island, Inc. v. Cent. Falls Det. Facility Corp.*, No. CA 11-491S, 2012 WL 6738283, at *2 (D.R.I. Dec. 28, 2012) ("General or boilerplate objections do not comply with these Rules"); *Walker v. Lakewood Condo. Owners Ass'n*, 186 F.R.D. 584, 587 (C.D. Cal. 1999) ("Boilerplate, generalized objections are inadequate and tantamount to not making any objection at all."); *Mancia v. Mayflower Textile Servs. Co.*, 253 F.R.D. 354, 358 (D. Md. 2008) ("[B]oilerplate objections … persist despite a litany of decisions from courts … that such objections are improper unless based on particularized facts."). In fact, such objections can be sanctionable. *St. Paul Reinsurance Co., Ltd. v. Commercial Financial Corp.*, 198 F.R.D. 508, 517-18 (N.D. Iowa 2000).

A key reason courts disapprove of boilerplate objections is that they violate requirements of specificity in objections. Rule 33 states that "[t]he grounds for objecting to an interrogatory must be stated **with specificity**," while Rule 34 provides that an objection to a document request must "state **with specificity** the grounds for objecting to the request." Fed. R. Civ. P. 33(b)(4) & 34(b)(2)(emphases added). In addition, boilerplate objections run afoul of the "reasonable inquiry" duty embedded in the certification requirement of Rule 26(g), which applies to all responses and objections. This duty "obliges each attorney to stop and think about the legitimacy of … an objection." Fed. R. Civ. P. 26(g) Advisory Committee's Note (1983). The rule was enacted "to bring an end to the … abusive practice of objecting to discovery requests reflexively – but not reflectively – and without a factual basis." *Mancia.*, 253 F.R.D. at 358. Thus, '[i]t would be difficult to dispute the notion that the very act of making such boilerplate objections is prima facie evidence of a Rule 26(g) violation." Id. at 359.

Second, the trend among federal courts is to hold that the objections are waived when a party answers subject to a boilerplate objection, notwithstanding the addition of a phrase like "without waiving or subject to the objections." *See, e.g., Perez v. United States, 2016 WL 304877, at *2 (S.D. Cal. Jan. 25, 2016); Aprile Horse Transp., Inc. v. Prestige Delivery Sys., Inc.*, No. 5:13-CV-15-GNS-LLK, 2015 WL 4068457, at *2 (W.D. Ky. July 2, 2015); *Sprint Commc'ns Co., L.P. v. Comcast Cable Commc'ns*, Nos. 11–2684–JWL, 11–2685–JWL, and 11–2686–JWL, 2014 WL 545544, at *2 (D. Kan. Feb.11, 2014) (joining "a growing number of federal district courts in concluding that such conditional answers are invalid and unsustainable" and listing those courts). *But see R. Fellen, Inc. v. Rehabcare Grp., Inc.*, No. 1:14-CV-2081-DAD-SMS, 2016 WL 1224064, at *2 (E.D. Cal. Mar. 29, 2016) ("[r]esponses that are subject to and without waiving objections are not prohibited"). As one court explained, "[t]he practice of asserting objections and then answering 'subject to' and/or 'without waiving' the objections – like the practice of including a stand-alone list of general or blanket objections that precede any responses to specific discovery requests – may have developed as a reflexive habit passed on from one attorney to another without any attorney giving serious thought or reflection as to what this manner of responding means or could hope to accomplish as to a particular discovery request." *Heller v. City of Dallas*, 303 F.R.D. 466, 486 (N.D. Tex. 2014). *See also Pepperwood of Naples Condo. Ass'n, Inc. v. Nationwide Mut. Fire Ins. Co.*, No. 2:10-CV-753-FTM-36, 2011 WL 4382104, at *4-5 (M.D. Fla. Sept. 20, 2011) ("all a mixed response really says is the counsel does not know for sure whether the objection is sustainable …, but thinks it is wise to cover all bets anyway, just in case"); *Consumer Elecs. Ass'n v. Compras & Buys Magazine, Inc.*, No. 08-21085-CIV, 2008 WL 4327253 at *3 (S.D. Fla. Sept. 18, 2008) ("Such objection and answer ... leaves the requesting [p]arty uncertain as to whether the question has actually been fully answered or whether only a portion of the question has been answered."); *Tomlinson v. Combined Underwriters Life Ins. Co.*, No. 08–CV–259–TCK–FHM, 2008 WL 4601578, at *1 (N.D. Okla. Oct. 16, 2008) (same). For this reason, various federal courts have criticized the practice of answering subject to boilerplate objections as "manifestly confusing (at best) and misleading (at worse)." *See, e.g., Sprint Commc'ns Co.*, L.P. 2014 WL 545544, at *2.

The proper way to interpose objections is to explain the basis for them and then to make clear how the answer relates to the objection. Thus, for example, where part or all of an interrogatory is vague or ambiguous, the responding party must explain how the interrogatory is vague or ambiguous and then explicitly state that the answer is based on a specific, stated understanding of the request. *See, e.g., Heller*, 303 F.R.D. at 488; *McCoo v. Denny's, Inc.*, 192 F.R.D. 675, 694 (D. Kan. 2000) ("If necessary to clarify its answers, the responding party may include any reasonable definition of the term or phrase at issue."). Similarly, where a document request is overbroad in its scope, the responding party must explain *how* the request is overbroad and then respond to the extent possible, specifying the scope of the response. *See, e.g., Consumer Electronics Ass'n*, 2008 WL 4327253, at *2 (explaining how to properly respond to an overbroad discovery request). Likewise, an objection on the

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basis of undue burden must explain the actual burden imposed and then should indicate the part of the request to which it will respond. *See, e.g., Heller*, 303 F.R.D. at 489. *See generally Compagnie Francaise d'Assurance Pour le Commerce Exterieur v. Phillips Petroleum Co.*, 105 F.R.D. 16, 42 (S.D.N.Y. 1984) (noting that objecting party must do more than "simply intone [the] familiar litany that the [requests] are burdensome, oppressive or overly broad").

For these reasons, attorneys handling federal civil cases should not use boilerplate objections and should be wary of answering discovery requests "subject to" or "without waiving" such objections. At the very least, this practice could result in the waiver of the boilerplate objections. Furthermore, failing to explain an objection in the response wastes an opportunity for advocacy since the objection must be included in any motion to compel. Most importantly, using boilerplate objections could result in sanctions.

New Areas of Liability for Healthcare Providers Relating to EMR

By David Chorney and Michelle Peirce, Barrett & Singal

Healthcare providers enrolled in the Medicare and Medicaid Meaningful Use incentive programs ("Meaningful Use") are facing new scrutiny from the federal government regarding their Meaningful Use incentive payments. On June 12, 2017, the Office of Inspector General ("OIG") released an audit report finding that CMS made over $729 Million in Meaningful Use payments to eligible providers that did not meet federal requirements. The OIG believes that the majority of these overpayments are related to improper documentation and/or false attestations of eligible providers. To enforce the Meaningful Use incentive program, currently, CMS undertakes targeted, risk-based audits to assess an eligible provider's compliance with Meaningful Use requirements. However, the OIG has urged CMS to take a more comprehensive review of Meaningful Use incentive payments aimed at all eligible providers under the Meaningful Use program. In addition, the OIG has updated its 2017 Work Plan to include a new objective, to conduct a nationwide review of Medicare's Meaningful Use requirements and hospital electronic medical record incentive payments.

Although there have not been many Meaningful Use incentive enforcement actions to date, going forward, hospitals and eligible providers are likely to face increased scrutiny over Meaningful Use incentive payments, including audits and requests for proof of documentation. CMS and the OIG have both stated that to be eligible for Meaningful Use payments, a hospital or an eligible provider must meet all Meaningful Use requirements. This means that if the hospital or eligible provider fails to have proper documentation on any one of the many Meaningful Use requirements, the eligible provider or hospital will be required to repay all of the Meaningful Use incentive payment. Additionally, eligible providers and hospitals may be liable under the False Claims Act ("FCA") for submitting a fraudulent attestation to the government, and – depending on the facts – for misuse of an electronic records system. The potential consequences for eligible providers and hospitals are significant. For example, eClinicalWorks recently agreed to a $155 Million settlement and the CFO of Shelby Regional Medical Center was criminally convicted and sentenced to 23 months in federal prison for defrauding the government under the Medicare Electronic Health Record Incentive Program.

Repayment Times 3

The FCA imposes civil liability on any person or entity that improperly bills the government. To incur FCA liability, the individual or entity must have (1) knowingly presented, or cause to be presented, to the US Government a false or fraudulent claim for payment or approval; and (2) knowingly made, used or caused a false record or statement to be used to get a false or fraudulent claim paid or approved by the Government. It is clear that a false or fraudulent attestation submitted by or on behalf of an eligible provider would create FCA liability, and the government could use the FCA to recoup three times the amount of the original Meaningful Use incentive payment.

Additionally, the Affordable Care Act ("ACA") imposed repayment obligations on providers that identify overpayments. E2 U.S.C. 1320a-7k and E2 C.F.R. D E01.305. Under the ACA repayment law, providers must return and report an overpayment within sixty days of the provider identifying the overpayment. For purposes of the sixty-day time limit, a provider has not "identified" an overpayment until the provider has or should have, through reasonable diligence, investigated and quantified the overpayment. The sixty-day repayment law creates a quandary for eligible providers and hospitals because identifying a lapse in Meaningful Use compliance, even a minor lapse, means the government will deem the respective Meaningful Use incentive payment(s) to be an overpayment. If the eligible provider or hospital fails to report and return a Meaningful Use overpayment within sixty days, the eligible provider or hospital would risk incurring FCA liability, even if the initial attestation was not a knowing misrepresentation to the government. As a result, if an eligible provider or hospital uncovers, through an internal audit, that it did not meet one of the many Meaningful Use requirement for which it has received an incentive payment, and the eligible provider or hospital decides to keep the incentive payment, the eligible provider or hospital could be liable to payback three times as much as the original incentive payment.

In addition to eligible providers and hospitals, electronic health records vendors are also at risk of FCA liability as seen in the recent eClinicalWorks settlement. FCA liability can attach to a vendor that falsely certifies that its EHR software is Meaningful Use compliant and can be used to achieve Meaningful Use incentive payments. For example, eClinicalWorks, by knowingly falsely certifying its EHR system, caused eligible providers and

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hospitals to submit false claims to the US Government for Meaningful Use incentive payments. Following the eClinicalWorks settlement, OIG officials have publicly insisted that the OIG will continue to go after EHR vendors that may have made false claims or fraudulently obtained certification for their EHR systems being sold to providers as certified Meaningful Use systems.

FCA and electronic claims

Misuse of EHR systems has also been on the OIG's radar and could be the basis of FCA liability for providers. EHR systems often allow providers to cut and paste, auto-populate fields, or insert irrelevant documentation to support a higher reimbursement level. Through cut and paste and auto-population, a provider can easily duplicate the same examination and findings from patient to patient. While this system can save providers time, it can also result in a false record and possibly an increased reimbursement that is not consistent with the actual examination and interaction the physician had with the patient. That claim for payment could create FCA liability.

The OIG may also learn of fraudulent Meaningful Use attestations from the Office of Civil Rights ("OCR"). OCR is currently undertaking Phase II of its HIPAA Privacy Security & Breach Notification Compliance Audits. As part of the Meaningful Use program, eligible providers and hospitals need to conduct security risk analyses to ensure the cyber protection of its electronic records system. If OCR were to find a security risk analysis to be lacking, the provider would not only be liable for damages under HIPAA, but OCR could also refer the matter to OIG for recoupment of any Meaningful Use payments.

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