



# THE MASSACHUSETTS CHAPTER OF THE FEDERAL BAR ASSOCIATION

STEPHEN HANSEN | EDITOR

SPRING 2014

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## President's Column

by Michelle I. Schaffer

A heartfelt thank you to all who supported the Chapter's 2014 Annual Judicial Reception held on June 9, 2014. We had a record number of people in attendance including members of the federal and state judiciaries, bar leaders, Chapter members and friends from all over the Commonwealth. Everyone came to recognize and honor U.S. District Court Magistrate Judge Robert B. Collings for his dedicated service to the District of Massachusetts, the bar and our community. We wish Judge Collings well in his retirement from the bench.

This is an exciting time in this District as we greet our newest members of the federal judiciary, U.S. District Court Judge Indira Talwani, U.S. District Court Judge Mark G. Mastroianni and U.S. District Court Magistrate Judge Page M. Kelley and as we follow the transition for Judge Leo T. Sorokin to his new position as U.S. District Court Judge. We look forward to welcoming the new members of the judiciary and providing an opportunity for the bar to become acquainted with them at a reception planned for the Fall.

In partnership with various members of the judiciary, we have had some terrific events in the last several months.

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Our staple “Breakfast with the Bench” series featured a talk by U.S. District Court Magistrate Judge Marianne B. Bowler on mediation practices in April and a conversation with U.S. District Court Judge Rya W. Zobel in June about her observations of the changes to the court over the years since she was appointed to the bench. The Chapter was pleased to work with the Court on the “Technology in the Courtroom” program presented in April which drew well over 300 practitioners. On April 28, 2014, we hosted a celebration of the 50<sup>th</sup> Anniversary of the Civil Rights Act joined by several co-sponsors as we heard from Clerk Robert M. Farrell, U.S. District Court Judge Timothy S. Hillman, U.S. District Court Judge and FBA President Gustavo A. Gelpi, Retired-State Court Judge Gordon A. Martin, Jr. and Attorney Joshua M. Davis offering observations about this monumental Federal Legislation.

The Worcester Division held two roundtable discussions, one in April with U.S. District Court Judge Hillman and his Judicial Intern, Elise Baun discussing the Computer Fraud and Abuse Act and one in June with U.S. District Court Magistrate Judge David H. Hennessy, and Attorneys Brian Murphy and Cory Flashner discussing criminal law in the federal courts. In Springfield, in June, the Chapter hosted an afternoon discussion about “Western Division Transitions” with Magistrate Judge Kenneth P. Neiman and Divisional Chief Bethaney Healy. The Chapter is fortunate and grateful for the collaboration of the Court with us for these programs.

Our Young Lawyers Division has been active holding a Brief Bites luncheon in May with Magistrate Judge Collings, who discussed the changes to the Federal Rules of Civil Procedure. For community based work, the YLD held a very successful clothing drive in April to support Solutions at Work. In May, the YLD held a Spring Mixer at Nix’s Mate where FBA members and friends had a great time networking and socializing.

We now have a LinkedIn page. Consider becoming a member and joining in interesting discussion on topics relating to federal practice.

We are starting to form practice area committees within the Chapter corresponding to the committees in National. Please contact me personally if you have in interest in joining or holding a leadership position within a committee.

Have a wonderful summer.

*Michelle I. Schaffer*  
*President, FBA – Massachusetts*

### **Young Lawyers Division (YLD) Spring Updates**

*By Jennifer L. Ioli, Sherin and Lodgen LLP*

In April 2014, the YLD planned and executed a professional clothing drive throughout Boston. About ten law firms and law schools participated, and we collected more than fifteen large bags of professional clothing and accessories, which we donated to Solutions At Work. The YLD thanks all of you who donated or helped spread the word about the clothing drive!

On May 1, 2014, the YLD held its third “Brief Bites” lunch panel discussion, organized by board members Jennifer Ioli and Christina Ricotta. This Brief Bites event was held in the judicial dining room at the federal court, and featured Magistrate Judge Robert B. Collings. Judge Collings shared his thoughts and perspective on the new Federal Rules of Civil Procedure with the young attorneys in attendance. We were honored to hear from Judge Collings and we appreciate his taking the time to participate in Brief Bites. The Brief Bites lunch program has received positive feedback, and the YLD plans to continue it in the fall.

On May 15, 2014, the YLD held a social event at Nix’s Mate in downtown Boston which was geared toward the YLD but open to all FBA members. The mixer was very successful! We had in attendance 18 FBA YLD members, and 12 non-members. We heard positive feedback from those in attendance: not only was it great to meet new people and reconnect with old friends, but the atmosphere and the food was impressive as well. Next year, the YLD hopes to increase attendance among the entire FBA membership.

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On June 9, 2014, the YLD made a strong showing at the Judicial Reception honoring Judge Collings. Board members Michelle Hinkley, Erika Reis, Steve Hansen, Jennifer Ioli, and Andrew Jacobs attended, as did many YLD members.

In the fall, the YLD plans to continue and grow its community involvement and successful networking endeavors. The YLD is grateful for the efforts of Kelsey Baran, our law student liaison, this past year, and we all congratulate Kelsey on graduating from New England Law | Boston this year. We welcome our new law student liaison, Katherine Howells of New England Law | Boston, who has some great ideas for the YLD's law school activities. We plan to continue our mock interview program at local law schools, and we are excited for the upcoming year.

On June 9, 2014, the Massachusetts Chapter of the FBA held its annual Judicial Reception at the Boston Harbor Hotel. This year's Judicial Reception had more attendees than ever before, and the Chapter was very pleased to welcome members of the federal and state judiciaries, bar leaders, FBA members, and friends to honor U.S. District Court Magistrate Judge Robert B. Collings. U.S. District Court Chief Judge Patti B. Saris and U.S. District Court Judge Leo T. Sorokin spoke on Judge Collings' behalf, and Judge Collings gave a wonderful address to the audience highlighting his experiences on the bench and thanking those who have supported him through the years. Many of Judge Collings' former law clerks and staff attended the reception, as well as his family members and friends. Judge Collings invited his young grandson to make an appearance on stage during his speech. The FBA presented Judge Collings with a chair in honor of his service on the bench engraved with the notation: "The Massachusetts Chapter Of The Federal Bar Association Presents This Chair To The Honorable Robert B. Collings In Recognition Of His Outstanding Service To The District Of Massachusetts". Additionally, the Judicial Reception honored the contributions and efforts of the Chapter's Past President, Matthew C. Moschella of Sherin and Lodgen LLP. The FBA is grateful to all who helped make this wonderful event possible.

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**Pictured:** Young Lawyers Division members attend the YLD Brief Bites Lunch Series with speaker Magistrate Judge Robert B. Collings on May 1, 2014. **(from left)** Michelle Hinkley, Christina Ricotta, Erika Reis, Jennifer Ioli, Magistrate Judge Collings, Kevin Hall, Charles Hieken, and Peter Antonelli.



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## UPDATES FROM THE CLERK'S OFFICE

*by Robert J. Farrell*

In the past few months, three new district judges, Indira Talwani, Mark Mastroianni and Leo Sorokin took the oath of office to serve on the bench for the United States District Court for the District of Massachusetts. In addition, former Assistant Federal Public Defender Page Kelley has been sworn in to fill the magistrate judge position vacated by the elevation of Judge Sorokin.

Judge Talwani is a graduate of Harvard-Radcliffe College and received her J.D. from Boalt Hall School of Law at the University of California. Judge Talwani was a partner in the Boston law firm of Segal Roitman, LLP. Prior to that, she served as a law clerk to Judge Stanley A. Weigel of the United States District Court for the Northern District of California, and was a partner with the litigation firm of Altshuler, Berzon, Nussbaum, Berzon and Rubin in San Francisco.

Judge Mastroianni is a graduate of Western New England School of Law and American International College. He was the Hampden County District Attorney for three years prior to joining the bench. From 1995 to 2011, Judge Mastroianni was in private practice as a sole practitioner with a practice in criminal defense.

Judge Sorokin is a graduate of Columbia Law School and Yale College. He served as a U.S. Magistrate Judge from 2005 until his appointment as a District Judge. Judge Sorokin served as a law clerk to Judge Rya W. Zobel from 1991 to 1992. He was previously employed as an Assistant Attorney General for the Commonwealth of Massachusetts and as an Assistant Federal Public Defender from 1997 until 2005.

Magistrate Judge Kelley is a graduate of Harvard Law School and Smith College in Northampton, MA. She has been an Assistant Federal Public Defender in Boston since 2004. She was an active participant in this court's re-entry programs, CARE and RESTART, from 2009 through 2013. Judge Kelley was a state public defender for 16 years, and served as the Attorney-in-Charge of the Cambridge Office of the Massachusetts Committee for Public Counsel Services from 1998-2002.

Chief Judge Saris said, "We are excited to have our new colleagues. It is a time of great transition for the court. We are looking forward to their energy and new ideas. The court is in the process of randomly redistributing the caseload to the new judges in Boston, and returning cases back to Springfield."

### **MAGISTRATE JUDGE MARIANNE B. BOWLER REAPPOINTED**

The Judges of the United States District Court for the District of Massachusetts have reappointed Magistrate Judge Marianne B. Bowler to a new term that commenced on May 6, 2014, upon the recommendation of a Merit Selection Panel appointed pursuant to the Order dated August 15, 2013.

Judge Bowler was first appointed to be a United States Magistrate Judge by the Court for an eight-year term that commenced on May 7, 1990. She was reappointed to successive terms beginning in 1998 and 2006. From 2002 to 2005 she served as Chief Magistrate Judge for the District.

Chief Judge Saris stated: "Mimi Bowler is a star magistrate judge. She is nationally known for her ability to manage complex civil litigation, particularly cases involving difficult medical issues. Rare is the tangled, contentious litigation dispute she can't settle. We are pleased to reappoint her."

Judge Bowler chairs the Court's Committee on Alternative Dispute Resolution and has herself conducted over 350 mediations in a wide range of civil cases. She is serving her second term as a member of the Committee on International Judicial Relations of the Judicial Conference of the United States. As part of her committee responsibilities she has lectured in Egypt, India, Kuwait, Serbia and the United Arab Emirates. She frequently speaks on patent law and on alternative dispute resolution and mediation as a method of reducing clogged civil dockets in developing countries. Judge Bowler serves as the president of the Boston IP Inn of Court, and in 2012 she was awarded the Distinguished Public Service Award of the Boston Patent Law Association.

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## SPRINGFIELD DIVISION HOLDS “WESTERN DIVISION TRANSITIONS” DISCUSSION

*By Nate Olin, Morneau & Olin, LLP*

On June 3, 2014, the Massachusetts Chapter of the Federal Bar Association hosted an afternoon discussion about “Western Division Transitions” with Magistrate Judge Kenneth P. Neiman and Divisional Chief Bethaney Healy at the United States District Courthouse in Springfield. The event was organized by Board Member and Springfield designee, Attorney Nathan A. Olin, of Connor, Morneau & Olin, LLP. Also in attendance was then-judicial nominee — and now United States District Judge—Hampden County District Attorney Mark Mastroianni.

Several dozen local attorneys joined in the discussion which was also attended by numerous members of the clerk’s office staff. After opening remarks by Attorney Olin, Ms. Healy discussed the myriad changes occurring in her office, including the hiring of a new docket clerk for the magistrate judge. Melissa Calderon joined the clerk’s office staff on June 2, 2014, after a long career working in a similar capacity at the United States District Court for the District of Puerto Rico and was thrilled to continue her career in Springfield. Ms. Healy also spoke about new procedures and staff responsibilities accompanying the official appointment of Judge Mastroianni.

Following Ms. Healy, Magistrate Judge Neiman described his recent announcement to retire on January 5, 2015, which will be his twentieth anniversary on the bench. Judge Neiman led a rousing and informative discussion of the magistrate judge position, described his typical civil and criminal activities, and discussed how the magistrate judge position in Springfield has evolved during his tenure. He then described the process by which magistrate judge vacancies are filled and how he envisioned such procedures would unfold in Springfield over the next several months.

The seminar ended with news that Mastroianni had just received an affirmative “cloture” vote at the United States Senate which meant that his nomination would receive a full vote the following morning. Judge Mastroianni indeed received an affirmative Senate vote on June 4 and was sworn in during a private ceremony on June 9. Members of the Springfield branch of the FBA chapter hope to be a part of formal ceremonies honoring Judge Mastroianni later this year.

## CHAPTER CELEBRATES 50<sup>th</sup> ANNIVERSARY OF THE CIVIL RIGHTS ACT

*By Amy Bratskeir, City of Boston Law Department*

On April 28, 2014 the Massachusetts Chapter hosted a meaningful and well-attended celebration of the 50<sup>th</sup> Anniversary of the Civil Rights Act. Rob Farrell, Clerk of Court for the District of Massachusetts, gave a warm welcome and started the event with historic video clips from the Civil Rights Era. U.S. District Court Judge Hillman spoke to the import of public accommodation rights in the Civil Rights era and introduced our three guest speakers: U.S. District Court Judge and FBA President Gustavo A. Gelpí; Retired-State Court Judge Gordon Martin, Jr.; and Attorney Joshua M. Davis of Goulston & Storrs.

Judge Gelpí, who encouraged our chapter to host this event, emphasized that the Civil Rights Act is an important – if not the most important – way for the public to petition the courts and government for change. Judge Martin captivated us with stories of his work advocating for the voting rights of Mississippians in the 1960s when he worked for the Civil Rights Division of the U.S. Dept. of Justice. Josh Davis regaled us with his quick wit and extensive grasp of the past, present and future of civil rights as they pertain to employment law. He transformed us into law students and clarified that the Supreme Court seems to be narrowing the application of civil rights laws, particularly in the employment law arena. The MA Bar Assoc. and Federal Litigation Section of the FBA sponsored the event along with a great array of co-sponsors: the Asian American Lawyers Assoc. of MA; Lawyers’ Committee for Civil Rights and Economic Justice; MA Assoc. of Hispanic Attorneys; MA Black Lawyers Assoc.; MA LGBTQ Bar Assoc.; the WBA of MA; and the NH and RI Chapters of the FBA. Chapter members Howard Friedman and Amy Bratskeir organized the event.

## JUDICIAL BREAKFAST SERIES

### JUDGE RYA ZOBEL

*By Jordana Goodman, Sunstein Kann Murphy & Timbers LLP*

On June 3, 2014, the Massachusetts Chapter of the Federal Bar Association hosted the ever-popular “Breakfast with the Bench” featuring The Honorable Rya W. Zobel. The conversation focused around the topic “Looking Forward and Looking Back: An Open Discussion Regarding Best Practices in Federal Court Litigation.” True to the open discussion format, Judge Zobel answered questions from the bar openly and candidly.

Judge Zobel discussed the noticeable differences in Massachusetts federal court practice since she was appointed to the bench in 1979. When she began her work as a judge, Massachusetts had many more cases concerning bank robberies, illegal gambling, and the National Motor Vehicle Theft Act (commonly referred to as the Dyer Act). In more recent years, the types of cases have changed. On the criminal side, they now see more drug, gun, fraud, and child pornography cases. On the civil side, they now see more patent cases. Additionally, they now see many more *pro se* cases. Although she recently moved to “Senior Status,” she noted that she has not transferred any of her cases, but she has opted to not take any new child pornography or *pro se* cases.

With regard to patent cases, Judge Zobel expressed her enjoyment of these cases, and lauded the tutorial, a non-evidentiary presentation where parties explain the content of the technology to the judge. Generally taking place before a *Markman* hearing, this allows the judge to gain a better understanding of a specific technology before rendering a decision. Judge Zobel also noted that patent suits generally end after a *Markman* hearing, either in settlement or summary judgment. Judge Zobel noted that in her experience, juries usually get the result in patent cases right and jurors often ask insightful questions. She also commented that she permits jurors to ask questions of the expert witnesses in patent cases.

Technology for the courtroom has also progressed, both with the ability to display and recreate evidence and with the capacity to record and stream courtroom events. Judge Zobel cautioned lawyers using new technology in the courtroom, as malfunctions can slow the trial and distract the jurors.

Judge Zobel responded favorably to a question about the use of “cameras in the courtroom.” She noted that, though videos of jury members and lawyers “playing to the camera” could certainly be concerning, the images would be able to inform the public of court proceedings in real time. Robert Farrell, Clerk of Court, noted that there were over 600 people who came to the courthouse to see the Whitey Bulger trial. The District of Massachusetts, along with thirteen other federal trial courts, is currently participating in the three-year “Cameras Pilot Project in the District Courts,” which evaluates the effects of cameras in courtrooms by permitting courts to record and publicly provide videos of civil proceedings.

Judge Zobel observed that the court is in transition, with many new judges coming onto the court. She noted that there are a number of new Magistrate Judges joining the court as well, as the current Magistrate Judges will be moving into other roles or retiring.

With respect to advice for lawyers, Judge Zobel highlighted the importance of knowing the evidence and the law in each case. She also suggested thinking more about using conferences with the judges more effectively. Judge Zobel noted that diversity in the courtroom, particularly with regard to female attorneys, has improved over her years as a judge. Massachusetts has also improved diversity with regard to jury members by selecting jurors using the resident list, rather than the voting list.

Further, Judge Zobel discussed her learning experiences over the years – both at the District Court and provided by periodic trainings from the Federal Judicial Center. She enjoys the overall collegial atmosphere of the Massachusetts Court, engaging in regular discussions with her colleagues. Judge Zobel credited Judge Tauro with making the court collegial. She also noted that recent budget cuts have substantially impacted judges’ ability to communally engage in further legal and general educational opportunities. Judge Zobel expressed that lawyers have a role in encouraging Congress to fully fund the courts.

To all, she left the lesson of continued education: “The more informed you are, the more helpful you can be!”

# FBA JUDICIAL RECEPTION



**(Left)** The Executive Board of the Massachusetts Chapter of the FBA at the Annual Judicial Reception on June 9, 2014. **(Right):** U.S. District Court Judge George A. O'Toole, Jr., U.S. District Court Chief Judge Patti B. Saris, and Massachusetts Chapter Treasurer Scott Lopez. **(Below Left):** Magistrate Judge Robert B. Collings addresses the attendees at the Judicial Reception; **(Below Right)** Magistrate Judge Collings receives assistance from his grandson during his speech.



**(Below Left):** FBA Executive Board Members Harvey Weiner, Lisa Tittmore, Michelle I. Schaffer, Matthew Baltay, and Scott Lopez; **(Below Right):** Mary Collins looks on during Magistrate Judge Collings' speech.



**(Below)** Judge Leo Sorokin speaks at the Annual FBA Judicial Reception held on June 9, 2014. Judge Sorokin recently took the oath of office to serve as a District Court Judge for the District of Massachusetts.



**(Below)** Massachusetts Chapter President Michelle I. Schaffer congratulates Magistrate Judge Collings for his years of service on the bench.



Massachusetts Chapter Members celebrate the 50<sup>th</sup> Anniversary of the Civil Rights Act. **(From left)** Chris Sullivan, Howard Friedman, Lisa Tittmore, District Judge Gustavo A. Gelpi, Robert J. Farrell, Amy Bratskeir, Michelle I. Schaffer, and Joshua Davis. **(Seated)** Retired Judge Gordon Martin, Jr.

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Judge Bowler is a graduate of Regis College and Suffolk University Law School, cum laude. She has also been awarded honorary degrees by both institutions. After law school, she clerked for two years in the Massachusetts Superior Court before being appointed an assistant district attorney in Middlesex County. Thereafter, she served for twelve years in the Office of the United States Attorney for the District of Massachusetts, where she handled both criminal and civil cases. Her tenure with the Department of Justice also included a year in Washington where she served as the director of the civil and appellate programs at the Attorney General's Advocacy Institute.

### **MAGISTRATE JUDGE KENNETH P. NEIMAN TO RETIRE**

United States Magistrate Judge Kenneth P. Neiman has advised the Court that he intends to retire on January 5, 2015, the twentieth anniversary to the day of his swearing-in in 1995. Magistrate Judge Neiman has served in Springfield for these last twenty years and was Chief Magistrate Judge for the District of Massachusetts from January 2006 through December 2009.

Judge Neiman graduated Tufts College in 1967 and Harvard Law School in 1971. He was a partner in the Northampton firm of Fierst & Neiman from 1981 through 1994. While there, he received the Massachusetts Bar Association's Community Service Award for Outstanding Pro Bono Service. Prior to the private practice of law, Judge Neiman served as a legal services attorney with the Center on Social Welfare Policy in New York from 1971 to 1973 and with Western Massachusetts Legal Services from 1973 to 1981. He has also been an adjunct faculty member at Western New England University School of Law and served on the editorial board of the *Federal Courts Law Review* (1999-2006).

Chief Judge Patti B. Saris said: "We will miss Ken Neiman, who has been key to the administration of justice in Springfield. His ethic of hard work and sheer intelligence have been critical in ensuring that the Springfield court has been running smoothly as we awaited the confirmation of our new federal judge. His

warmth of personality will be missed."

District Judge Michael Ponsor said: "Serving the people of Western Massachusetts with Ken Neiman for the past twenty years in the federal court has been both an honor and a pleasure. He is an outstanding colleague and a wonderful man."

A public notice for the appointment of two Magistrate Judges to fill the vacancies caused by the retirements of Judge Neiman and Judge Collings has been posted to the court's website.

### **FBA LAW SCHOOL CHAPTERS UPDATE**

*By Katherine G. Howells*

We would like to thank the previous liaison, Kelsey Baran, for her great efforts over the past year in maintaining and developing successful Federal Bar Association Chapters in Greater Boston law schools. Kelsey Baran recently graduated from New England Law | Boston and I had the privilege of knowing her as a mentor in not only my studies at New England Law | Boston, but also in preparation of the duties involved with being her successor. I am excited to take on her role as Law Student Committee Liaison and will work diligently to increase membership and establish new chapters throughout the local law schools.

After its introduction at Suffolk University Law School in 2012, the Committee successfully branched out and established the New England Law | Boston chapter, which has grown exponentially in its early years. Over the past year, Kelsey worked to establish burgeoning FBA chapters at Northeastern University School of Law, Boston College Law School and Boston University University Law School.

The student chapters of the FBA are managed completely by the students, with the assistance of valued FBA resources. The executive boards of the student chapters are responsible for organizing and submitting a yearly budget, which includes the preparation and planning of all events for the academic year.

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These events are intended to introduce FBA student members to the federal practitioners and judges within the Greater Boston Area and beyond. The Law School Committee goals include increasing membership, assisting and establishing student chapters, and organization of multi-chapter events which include the Massachusetts Chapter's Young Lawyers Division members and membership at-large.

To add to the interest and dialogue surrounding the growth in Intellectual Property and Patent Law issues, the New England Law | Boston FBA hosted a Round Table Lunch on these topics with District Court Judge William G. Young in April. This event was well attended and NELB: FBA would like to express their gratitude to Judge Young and the Massachusetts Chapter for this unique opportunity.

Northeastern University, Boston College and Boston University are still working hard to develop their respective student chapters and the Committee aims to be a resource. It is our goal that together we can establish successful FBA student chapters, which will lead to increased membership and involvement in the student chapters and the Massachusetts Chapter as well.

### **WORCESTER DIVISION ROUNDTABLES**

*By Kenneth C. Pickering, Mirick, O'Connell, DeMallie & Lougee, LLP*

The Worcester Division hosted two roundtable discussions held at the Federal Court in Worcester, MA. On April 9, 2014, Judge Timothy S. Hillman and his Judicial Intern, Elise Baun, discussed the Computer Fraud and Abuse Act and its interpretation in the employment law context. On June 11, 2014, Magistrate Judge David H. Hennessy, Brian Murphy and Cory Flashner discussed Criminal Law in the federal courts. The roundtable discussions have proven to be a great opportunity to hear from practitioners and judges. More roundtables are planned for the fall.

## **JUDICIAL BREAKFAST SERIES** **MAGISTRATE JUDGE MARIANNE B. BOWLER**

*By Lisa M. Tittlemore, Sunstein Kann Murphy & Timbers LLP*

On April 2, 2014, at the FBA's MA Chapter's "Breakfast with the Bench" seminar, Magistrate Judge Marianne Bowler discussed "Settlement and Mediation Advocacy: Effective Techniques." The meeting was held, as usual, at the John Joseph Moakley Federal Courthouse, in the Judges' Dining Room.

Magistrate Judge Bowler discussed the history of the Massachusetts federal court mediation program, crediting District Judges Mazzone and Skinner with developing the program. Currently, Magistrate Judge Bowler, District Judge Sorokin, Magistrate Judge Hennessy (Worcester), Magistrate Judge Neiman (Springfield), Magistrate Judge Boal, and Magistrate Judge Dein all participate in the program. Magistrate Judge Bowler stated that the program sees 250-300 mediations per year, a large percentage of which are settled. She personally has mediated over 600 cases.

Magistrate Judge Bowler discussed her own experience and background in Admiralty cases and explained that she handled a number of mediations in this practice area. She also sees many cases involving intellectual property, civil rights and personal injury. She noted that in intellectual property cases, she will dig right into the technology. She feels that she needs to get to the merits in order to resolve cases. Magistrate Judge Bowler referred to her Courtroom Clerk Brendan Garvin as a key person administering the court's mediation program.

The breakfast discussion covered many practical areas relating to mediation, including the timing of when to mediate. Magistrate Judge Bowler explained that the "when" of mediation varies and is very case dependent. During mediation, she encouraged counsel to set forward their strongest points and avoid sounding hostile.

Magistrate Judge Bowler's own practice is to mediate cases from 2-6 pm, and she has settled many cases, including cases that are simultaneously proceeding to trial and mediation. *(Continued on page 11)*

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She mentioned that she settled a case that was being handled by Judge Young *during* trial. She explained that she requires parties to be present during mediation and sometimes it is helpful to include others, such as an expert. In civil rights cases, she expects the police chief or town representative to be present, but not the officer involved.

She said that she has two main rules: 1) it is not over until she says it is over; and, 2) counsel are not to negotiate separately in the hallway during the negotiation as she wants to be involved. She explained that she will value the case as part of the process, and will discuss this with the parties during the mediation. She wears her judicial robes during the mediation session, which gives the parties an opportunity to feel like they had their day in court.

Magistrate Judge Bowler noted that while Judge Sorokin will call counsel for the parties in advance of the mediation to seek information or background on the case, she usually does not. She assured us, however, that it is fine for counsel to contact her with questions and she is open to “anything that will work.” Mediation is an “open field” and nothing is on the record.

Magistrate Judge Bowler encouraged attorneys to think hard about settlement in every case, noting that even if the attorney loses the work by settling the case, “a happy client will come back.” She encouraged attorneys to think creatively about settlement, and referred to a case she mediated in which the resolution involved a school naming a room after a child who had died, giving the parents some comfort in a horrible situation.

The breakfast discussion provided the participants an opportunity to have specific questions answered by this experienced jurist. Magistrate Judge Bowler provided a lively and interesting presentation, and there was significant interest and questioning from the members of the bar.

As a parting thought, Magistrate Judge Bowler observed that “resolution with certainty has its benefits.”

## CHAPTER MAKES PROGRESS ON SOCIAL MEDIA INITIATIVE

*By Andrew Jacobs, Murphy & King, P.C.*

Consider this: a decade ago, a Harvard sophomore was incorporating Facebook, color screens had just come to BlackBerry devices (which could display the text of e-mails, but could not so much as tell you where you were), and a national expert in law firm marketing was suggesting “html e-newsletters,” content for PDA devices (remember those?), and a good web bio for your website.<sup>1</sup> Today, 64 percent of the Am Law 50 have Facebook pages, 94 percent are on Google Plus, 90 percent Tweet, 100 percent use LinkedIn, and their reach is being measured by meaningful gauges.<sup>1</sup> At the same time, traditional webpage traffic is absolutely collapsing under the weight of specific page referrals from social media – the New York Times reports losing half of its homepage traffic in the past two years alone.<sup>1</sup>

There is no doubt that we are building and interacting with brands – those of both firms and individual professionals – like we have never done before and in ways previously unimaginable. If you have made the transition from yellow to web pages but not to social media, marketing gurus would like to have a word with you.

The Massachusetts Chapter of the FBA has made it easier for you to increase your personal visibility by creating a group on LinkedIn, a (mostly) free business-oriented social networking service. On the networking end, LinkedIn allows you to find colleagues and clients you already know and add them to your “network,” or you can make introductions, apply for jobs, or conduct company research. On the marketing end, you maintain a profile page that others can see, which allows you to show off your accomplishments, endorsements, and recommendations. LinkedIn is part CV, part newsletter, and part wide-reaching marketing firm. It can guide you based on sophisticated data it collects (such as how to make your profile more visible) or provide recommendations of where you should work or who you should know.

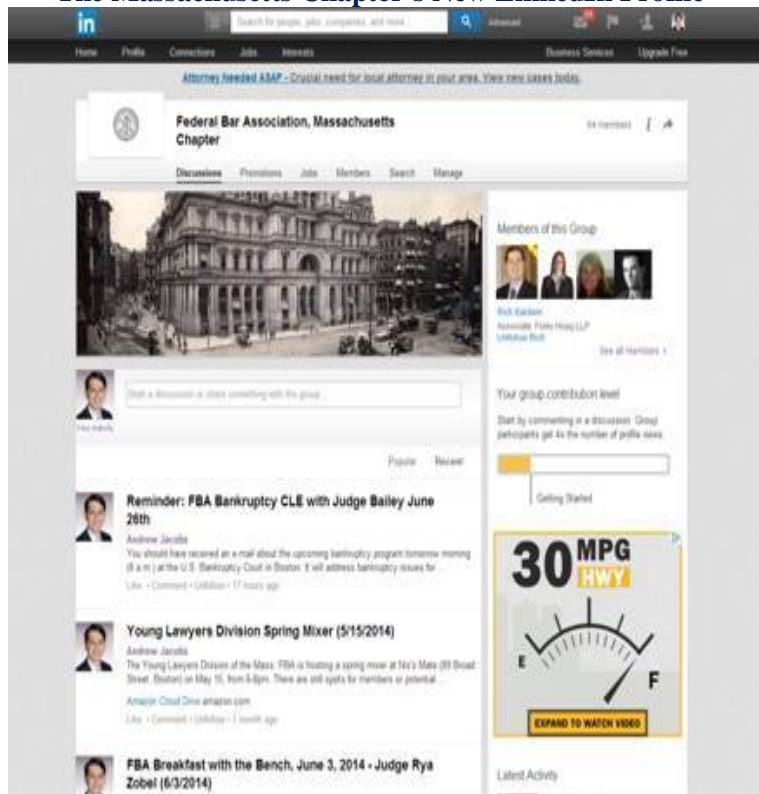
Although the national Federal Bar Association has its own profile, it has been left to individual chapters and sections to determine the extent of their LinkedIn presence. By forming an invitation-only group, the Massachusetts chapter has created a forum for discussion that is visible to the public and has allowed chapter members to connect in the

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virtual world. Group members can write posts and automatically receive digests of discussions by e-mail. And your affiliation with the FBA becomes evident from a logo placed in the “groups” section of your profile. To sign up for LinkedIn for free, go to [www.linkedin.com](http://www.linkedin.com). To join the Massachusetts chapter of the FBA’s group, search for the “Federal Bar Association, Massachusetts Chapter” on LinkedIn’s website and click “Join.” To date, approximately 20% of chapter members have joined.

- <sup>1</sup> See Larry Bodine, *Ten Suggestions to Improve Your Online Marketing Presence*, N.J. L.J., Nov. 8, 2004, at 31.
- <sup>2</sup> Good2BSocial, *The Social Law Firm White Paper*, available at <http://good2bsocial.com/the-social-law-firm-white-paper/> (last visited June 25, 2014).
- <sup>3</sup> Derek Thompson, *What the Death of Homepages Means for the Future of News* (May 15, 2014, 3:10 PM), <http://www.theatlantic.com/business/archive/2014/05/what-the-death-the-homepage-means-for-news/370997/>.

### The Massachusetts Chapter’s New LinkedIn Profile



## SUPREME COURT REJECTS INDUCEMENT LIABILITY WHERE THERE’S NO DIRECT INFRINGER

By Kerry Timbers, Sunstein Kann Murphy & Timbers LLP

The issue of “divided infringement” -- where multiple parties “share” infringement by performing different steps of a method claim -- has vexed the courts of late, with the Federal Circuit see-sawing between two very different interpretations of the patent law. The Supreme Court has recently entered the fray, unanimously delivering the blunt criticism that the Federal Circuit, which handles all patent infringement appeals, “fundamentally misunderstands what it means to infringe a method patent.”

The bottom line from the Supreme Court, in *Limelight Networks v. Akamai Technologies*, is that there is no infringement, direct or by inducement, unless one party performs every step of the method, either itself or through control of another, such as by contract. The patent asserted in *Limelight* claims a method for delivering electronic data using a content delivery network (CDN). The patent calls for, among other things, certain components of a website, like music or video files, to be “tagged” for storage on certain servers within the CDN. This increases the speed of accessing files.

The alleged infringer, Limelight, operated a CDN and performed all but one step of the patented method. It left to its customers, however, the task of tagging the files they wanted placed on Limelight’s servers. The claimed method was performed in its entirety, but no one actor performed all the steps.

There is good precedent for rejecting the idea that Limelight could be charged with direct infringement. The Federal Circuit held in 2007 and 2008, in *BMC Resources. v. Paymentech* and *Muniauction v. Thomason*, that there is no direct infringer unless a single actor performs all the method steps himself, or all the steps are performed on his behalf by another who is controlled by the alleged infringer.

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The question in *Limelight* was whether Limelight might be guilty of *inducing* infringement, even in the absence of a direct infringer, because it encouraged or instructed the customer to perform the missing step, thereby ensuring every method step would be performed, albeit not by a single actor. Both *BMC Resources* and *Muniauction* answered no -- to have inducement, you must first have a direct infringer.

In 2011, when Akamai's case against Limelight first came before the Federal Circuit, a three-judge panel of that court further tightened the standard, making clear that mere directions or instructions to another entity -- absent a legal obligation of that entity to perform the steps -- is insufficient to establish direct infringement, and without that, there could be no inducement.

*Akamai v. Limelight* went up to an *en banc* review, where the court did a complete about-face. By a 6-5 margin, the court made new law in holding that when multiple entities collectively practice all steps of a patented method, that is sufficient infringement to support a claim of inducement. In doing so, the court explicitly overruled *BMC Resources*. The language-parsing was byzantine, with the Federal Circuit seeming more intent on justifying a result than finding the law.

The majority opinion did not go unanswered. Judge Linn, writing for four of the dissenting judges, asserted that the "single actor" rule of *BMC Resources* is the correct rule. Linn, who had written the panel decision in *Akamai* endorsing the "single actor" rule, was joined in dissent by Judge Prost, who had also voted for that rule in *Muniauction*, *BMC Resources*, and the *Akamai* panel decision, and by Judges Dyk and O'Malley.

Judge Linn proved to be right, at least from the Supreme Court's perspective. A unanimous Court held that there could be no inducement without a direct infringer. It assumed without deciding, as the Federal Circuit had below, that *Muniauction* was correct in holding that there can be no direct infringer unless a single actor performs or controls the performance of each step in the patented method.

The Court acknowledged the Federal Circuit's concern that "a would-be infringer" could "evade liability by dividing performance of a method patent's steps with another whom

the defendant neither directs nor controls," but put the blame for that squarely on the Federal Circuit: "Any such anomaly, however, would result from the Federal Circuit's interpretation of [direct infringement] in *Muniauction*."

The Court declined to review the merits of *Muniauction* and the standard for direct infringement, stating that "on remand, the Federal Circuit will have the opportunity to revisit" the direct infringement question "if it so chooses." The Court's ruling restores the rule for divided infringement to what it was in 2007, forcing patent practitioners to make sure that different types of claims are used to protect inventions and to think twice about whether more than one actor is required to make or use the entire claimed invention.

This will be especially true for method claims involving distributed computer and telecommunications systems used by multiple actors. Patent attorneys may have to focus on drafting claims for only the parts of such systems that are used by a single actor.

## **SUPREME COURT: LANHAM ACT CLAIMS NOT PREEMPTED BY FDCA LABELING REQUIREMENTS**

*By Mark S. Puzella, Fish & Richardson P.C.*

On, June 12, 2014, the Supreme Court issued a decision addressing the question of whether a private party may bring a Lanham Act claim against a competitor challenging as deceptive advertising information contained in a food label that is regulated by the FDCA. *POM Wonderful LLC v. Coca-Cola Co.*, No. 12-761, 2014 WL 2608859, --- S. Ct. --- (June 12, 2014). The case should cause branding professionals in the food and beverage industries to review their labels and advertisements for compliance with the Lanham Act — reliance on compliance with the FDCA is not enough.

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The facts present a fairly straight-forward false advertising claim: Coca-Cola's Minute Maid brand sold a juice product with a label bearing the words "pomegranate blueberry" in all capital letters, on two separate lines. Below those words, was the phrase "flavored blend of 5 juices," but in much smaller type. According to the Court, POM alleged that the label "misleads consumers into believing the product consists predominantly of pomegranate and blueberry juice when it in fact consists predominantly of less expensive apple and grape juices." *Id.* at \*6. The trial court granted partial summary judgment to Coca-Cola, finding that compliance with the FDCA labeling requirements precluded challenges to the label. The Court of Appeals for the Ninth Circuit affirmed in relevant part.

The Supreme Court, in a unanimous opinion (Justice Breyer took no part), reversed and remanded for several reasons. First, the Court found that the courts below were wrong to rely on preemption. The preemption aspects of the FDCA are, by their terms, limited to state laws and do not reach competing federal laws such as the Lanham Act and its false advertising provisions.

Second, the Court found that the text of the Lanham Act and the FDCA do not evidence a Congressional intent to bar POM's claims:

By its terms, the Lanham Act subjects to suit any person who "misrepresents the nature, characteristics, qualities, or geographic origin" of goods or services. 15 U.S. C. §1125(a). This comprehensive imposition of liability extends, by its own terms, to misrepresentations on labels, including food and beverage labels. No other provision in the Lanham Act limits that understanding or purports to govern the relevant interaction between the Lanham Act and the FDCA. And the FDCA, by its terms, does not preclude Lanham Act suits. In consequence, food and beverage labels regulated by the FDCA are not, under the terms of either statute, off limits to Lanham Act claims.

*Id.* at \*8. The Court found support for this conclusion in the complementary aspects of the scope and purpose of the statutes.

Third, the Court found that the defendant's claim that preemption is proper given Congressional desire for national uniformity in food labeling was belied by the limited nature of the FDCA's preemption language, which expressly limited preemption to state, not federal, laws. In addition, the Court dismissed uniformity concerns as illusory. *Id.* at \*10 ("The variability about which Coca-Cola complains is no different than the variability that any industry covered by the Lanham Act faces.").

Finally, the Court was not persuaded by the Government's implicit claim that the FDCA regulations may be a "ceiling on the regulation of food and beverage labeling" for the same reasons that Coca-Cola's preemption arguments fail: the statutes are complementary.

The Court's decision is important because it identifies a potential new front in false advertising litigation. Companies that sell products governed by FDCA labeling requirements and have relied solely on compliance with the FDCA in their pre-marketing review run a significant risk of similar litigation. Branding professionals need to review their labels (and any other marketing) to assure compliance with the Lanham Act separate from compliance with FDCA regulations. It is highly likely that in competitive and mature markets participants will be reviewing competitors' labeling with renewed and increased scrutiny.

## **SUPREME COURT SINKS NAUTILUS, REFORMULATES "DEFINITENESS" REQUIREMENT FOR PATENTS**

*By Tom Tuytschaevers, Sunstein Kann Murphy & Timbers LLP*

In yet another rejection of prevailing norms for determining patent validity, the U.S. Supreme Court refined the standard by which courts assess the clarity of patent claims. Until now, a patent claim was deemed insufficiently clear, and therefore invalid for indefiniteness, only if a court found the claim language to be "insolubly ambiguous."

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In its June 2 decision in *Nautilus, Inc. v. Biosig Instruments, Inc.*, the Court held that a patent is invalid for indefiniteness if its claims fail to define the scope of the invention with “reasonable certainty.” This lower standard will make patent claims easier to invalidate, and may portend a surge of indefiniteness defenses in patent litigation.

A patent is a property right that allows the owner to exclude others from using an invention and, “like any property right, its boundaries should be clear.” To that end, U.S. patent law requires that a patent include “claims particularly pointing out and distinctly claiming the subject matter” that the inventor regards as the invention. A claim that does not meet these criteria fails to meet the law’s “public-notice function” because it fails to define the scope of the patent owner’s right to exclude, and is therefore invalid for being “indefinite.”

However, the courts have recognized that written language is an imperfect tool. The limits of written language are sometimes evident in patent claims that, by definition, describe a new invention, something that has never previously been described. Fittingly, courts have acknowledged that absolute precision in patent claims is unattainable. The issue in *Nautilus* focused on “just how much imprecision [the law] tolerates.”

Biosig patented a monitor useful for measuring a person’s heart rate while exercising, for example on a treadmill. Such measurements are challenging because it is difficult to distinguish the electrical signal produced by the heart (an “ECG” signal) from electrical signals produced by other hard-working muscles (“EMG” signals).

Biosig realized that a user’s heart signal appears differently at the user’s left hand than at the user’s right hand, while muscle signals appear the same way at both hands. Biosig capitalized by developing a circuit that measures the heart and muscle signals at both hands using two pairs of electrodes - one pair for each of the user’s hands. The patented Biosig circuit subtracts one of the measurements from the other to cancel out the muscle signals and leave only the heart signal.

Biosig’s patent claims required that each pair of electrodes include a “live electrode” and a “common electrode” and that the live electrode and common

electrode be “in a spaced relationship with each other.”

Biosig accused Nautilus, through its StairMaster line of exercise products, of infringing the Biosig patent. But Nautilus convinced the trial court that the term “spaced relationship” was fatally indefinite, because Biosig did not disclose “what precisely the space should be” or even provide parameters “for determining the appropriate spacing.”

The Court of Appeals for the Federal Circuit reversed the trial court’s decision. That court had customarily held that a claim is indefinite only when it is “not amenable to construction” or is “insolubly ambiguous.” Nautilus did not appeal the trial court’s claim construction, so the Federal Circuit upheld the validity of the Biosig claims because it found that the claims were not “insolubly ambiguous.” Nautilus appealed to the U.S. Supreme Court.

The Supreme Court found fault in both the form and substance of the “insolubly ambiguous” standard. In an ironic twist, the Supreme Court found that the phrase “insolubly ambiguous” is, itself, unacceptably indefinite. Although the Court does not “micromanage” the Federal Circuit’s choice of words, it found that the lower court’s “terminology can leave courts and the patent bar at sea without a reliable compass.”

As for substance, the Court disparaged the “insolubly ambiguous” standard *per se*: “To tolerate imprecision just short of that rendering a claim ‘insolubly ambiguous’ would diminish the definiteness requirement’s public-notice function and foster the innovation-discouraging ‘zone of uncertainty’ against which this Court has warned.”

To its credit, Nautilus had convinced the Supreme Court that the Federal Circuit’s “insolubly ambiguous” standard failed to provide the courts with appropriate guidance in determining whether a patent claim is indefinite.

However, Nautilus failed to convince the Court to adopt a much lower standard whereby a claim is indefinite and invalid merely if “readers could reasonably interpret the claim’s scope differently.”

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Nautilus's proposed threshold was simply too low for the Supreme Court, because "some modicum of uncertainty is the 'price of ensuring the appropriate incentives for innovation.'"

Rather, the Court cited its 1902 decision in Carnegie Steel Co. v. Cambria Iron Co., for the proposition that "any description which is sufficient to apprise [steel manufacturers] in the language of the art of the definite feature of the invention, and to serve as a warning to others of what the patent claims as a monopoly, is sufficiently definite to sustain the patent."

Ultimately, the Court held that "a patent is invalid for indefiniteness if its claims, read in light of the specification delineating the patent, and the prosecution history, fail to inform, with reasonable certainty, those skilled in the art about the scope of the invention."

The Supreme Court declined to apply its revised standard to the facts in the *Nautilus* case, and instead remanded the case with instructions that the Federal Circuit reconsider whether the Biosig claims are indefinite.

Nevertheless, *Nautilus* should induce patent drafters to avoid drafting patent applications with indefinite claims--indeed, the court expressly says that "the patent drafter is in the best position to resolve the ambiguity"-- and help the public understand the proper scope of an issued patent's right to exclude.

As a practical matter, the decision reinforces the need for inventors to educate their patent attorneys about all pertinent aspects of their inventions. Armed with that information, attorneys are better positioned to draft comprehensive patent applications that provide a solid foundation for broad claim scope.

For patent attorneys, *Nautilus* highlights the value of drafting a range of claims, from the broadest claims supported by the text and figures of the application, to narrower, more easily defensible claims. The broadest claims provide the greatest scope of protection for the invention, and allow for broad assertion of infringement, while the narrower claims provide strong fallback positions. Taken together, these approaches operate to increase the value of the patent asset.

## DISTRICT COURT PRESENTS COURTROOM TECHNOLOGY SEMINAR

On April 16, 2014, the U.S. District Court for the District of Massachusetts, in conjunction with the Massachusetts Chapter of the Federal Bar Association, offered an educational seminar on using Technology in the Courtroom. Presided over by District Court Judge George O'Toole, Judge Dennis Saylor, and Judge William Young, the seminar focused on in-court presentation of evidence and the Jury Evidence Recording System ("JERS"). The judges offered practical observations on the effective use of courtroom technology.



Practitioners attend the Technology in the Courtroom Seminar on April 16, 2014 at the John Joseph Moakley Courthouse.



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