



# THE MASSACHUSETTS CHAPTER OF THE FEDERAL BAR ASSOCIATION

STEPHEN HANSEN • EDITOR

SUMMER 2014

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## OUTGOING PRESIDENT'S FAREWELL

*by Michelle I. Schaffer*

I am incredibly grateful for the opportunity to have served as President of the Massachusetts Chapter of the Federal Bar Association. I am proud to have been part of an Executive Board of individuals of diverse backgrounds, with the uniformly held goal to make our Chapter responsive to the interests and needs of the bar, the bench and the community that the federal court serves. Through the dedication of the Executive Board, the support of the Federal bench and court staff and the receptivity of the members and friends of our Chapter, we were able to accomplish many great things.

We expanded our educational programming significantly this past year. Attendees of our signature "Breakfast with the Bench" series in Boston were treated to informal discussions on a variety of topics led by members of the bench. Similar events were held in Worcester and Springfield. In an effort to appeal to specific practice areas, we held programming on Indian Law and Bankruptcy and are planning an Immigration Law lunch for the fall. We also collaborated with FBA national, other chapters, other bar organizations, the clerk's office and court and our law school chapters to present additional educational events. These included programs on technology in the courtroom, in celebration of the 100<sup>th</sup> anniversary of the Civil Rights Act and informational sessions for those applying for open judicial positions.

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Recognizing that the promise of the future rests in the next generation, this past year we increased opportunities for our younger lawyers--by strengthening the leadership and programming of the Young Lawyers Division--and for our law students, by expanding existing and creating new law school chapters. The Young Lawyers Division held a bi-monthly Brief Bites Lunch Series through which attendees heard from federal practitioners and the bench about federal practice matters. The law school chapters also held several educational and social programs. Our Young Lawyers Division has conducted job interview training at the law schools and we hope to continue to foster tiered mentoring programs in the coming year. Encourage the younger lawyers in your firm to come to an event, to network and socialize and hopefully to become involved with a great committee.

Community outreach has always been a priority for the Chapter. To that end, we again held our Care/Restart Interview Skills Workshop for ex-offenders. In addition, the Chapter and the Criminal Law Section of the National FBA recently jointly funded a new creative writing pilot program for ex-offenders in the CARE and RESTART programs that is being taught by professors from MIT and Pine Manor College. Our Young Lawyers Division held a successful clothing Drive which they expect to hold again in the coming year. Further, we have appointed a Philanthropy Chair to lead the Chapter's works in this area. Consider becoming involved in our Chapter efforts to serve the community.

This past year we rekindled the Chapter Newsletter, publishing four editions chock full of reports on our activities, case analyses and news from the clerk's office. We welcome submissions from our Chapter members. We were extremely proud that our Newsletter was recognized at the FBA National Meeting this year with a 2014 Outstanding Newsletter Award.

We held several social receptions during the year. Our Annual Judicial Reception brought together nearly 400 members of our community, federal and state members of the judiciary, bar leaders, Chapter members and guests to celebrate the distinguished career of

Magistrate Judge Robert B. Collings. We also enjoyed recognizing our fellow Board Member, Clerk Rob Farrell at his swearing-in ceremony at the beginning of the year and the newest members of the Court recently in a Welcome Reception. Almost all our events have some social component to promote opportunities to connect with colleagues and friends and to interact with members of the bench.

Finally, we have made great strides in setting up our federal practice committee structure. The leadership for certain committees is now in place but there still remains significant leadership opportunity. In the coming year, these committees will be a source for programming, publications and social networking for members of our Chapter. Feel free to contact me or anyone on our Board to inquire further.

Reflecting back on this past year, I am very proud of what we accomplished as a Board and as a Chapter. Indeed, at its annual meeting in 2014, the National FBA awarded our Chapter a Presidential Excellence Award "in recognition of its superior chapter activities in the areas of Administration, Membership Outreach and Programming." I want to use this opportunity to extend my gratitude to the Board for their hard work and collegiality, to the bench for so generously giving their time to our activities and to the members of our Chapter for their support. The Chapter is in excellent hands with incoming President Lisa Tittmore, who has exciting plans in place for the coming year. This is a terrific time to become involved with the Chapter!





## INCOMING PRESIDENT'S WELCOME

by Lisa M. Titemore

Greetings to old friends and welcome to new members! I look forward to working with you, and am honored to be President of our chapter this coming year. Thanks to the tremendous effort of many volunteers, and the strong and inspired leadership of our President, Michelle Schaffer, we are fortunate to start our fiscal year with many excellent programs and initiatives both in place and in development for the upcoming year. I want to personally thank Michelle for her incredible ability to quietly and effectively encourage us to maximize our efforts and achieve our goals.

As I write this welcoming message, I have just come from the national FBA annual meeting in Providence, Rhode Island, a gathering of highly talented and devoted federal practitioners from across the country, including many members of our chapter. The Massachusetts Chapter of the FBA is a vibrant and active group empowered to play an active role in achieving the mission of the FBA.

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

While at the annual meeting, I was again reminded of the important work that the FBA does when I heard the FBA's Counsel for Government Relations discuss the organization's leadership on these issues. See <http://www.fedbar.org/Advocacy/Legislative-Update.aspx>. Nationally, the FBA consists of more than 16,000 federal lawyers, including 1,200 federal judges, who work together to promote the sound administration of justice, and the integrity, quality and independence of the judiciary. We were privileged to host the national FBA President, The Honorable Gustavo Gelpi, at a number of Massachusetts Chapter events this past year.

Locally, the Massachusetts' Chapter board is a diverse

group, including attorneys who work in government positions, in private practice, at universities, and members of the federal judiciary and clerk's office. Our membership will continue growing and diversifying as we attract practitioners whose cases bring them more and more into federal court. We will continue developing our expanded geographic footprint with our divisions in Worcester and Springfield, which are active and growing. We also have a role in supporting the new FBA chapters in New Hampshire and Maine, and we look forward to working with our FBA colleagues there and around the United States. Our "Young Lawyers" colleagues are extremely active, including organizing their "Brief Bites" lunch series, and our local law school chapters continue to expand.

We look forward to continuing our successful *Breakfast with the Bench* series, and our highly regarded and well attended Annual Judicial Reception, which will be held this Spring. We have numerous other programs in the works, including the CARE/RESTART job interview skills program which was developed by our chapter and is now run by our "Young Lawyers" and co-sponsored with the Massachusetts Black Lawyers Association. We are working on programming in substantive areas of the law, such as immigration law, and are fortunate to be able to draw on the support of the national FBA and federal judiciary for these events.

I would like to challenge our chapter to continue to think of and implement programs that foster the important mission of the FBA. During this time when discourse is often hijacked by partisan positioning and the very role of government sometimes seems to be in question, we must continue working on core issues such as filling judicial vacancies, funding for the courts, and ensuring the independence of the judiciary.

Judicial independence is critical to allowing cases to be decided according to the rule of law and judicial discretion, even if decisions are politically unpopular or opposed by powerful interests. The rule of law stands in contrast to autocracy and oppression, and current events abroad certainly serve to highlight its vital role. We have an important leadership and educational role to play.

Please contact me with your suggestions and contributions. I look forward to collaborating with you.

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## MASSACHUSETTS CHAPTER RECEIVES RECOGNITION AT FBA NATIONAL MEETING

At the recent FBA National Meeting held in Providence, Rhode Island, from September 5-8, the Massachusetts Chapter was recognized for its contributions to the organization. The Chapter was awarded a 2014 Outstanding Newsletter Award and a Presidential Excellence Award “in recognition of its superior chapter activities in the areas of Administration, Membership Outreach and Programming.” First Circuit Vice President Chris Sullivan received a Presidential Excellence Award for his work in establishing new FBA Chapters in New Hampshire and Maine.

**Pictured (from left):** Past President Matthew Moschella, National delegate Jonathan Handler, Secretary Harvey Weiner, Chapter President Michelle Schaffer, FBA President Judge Gustavo Gelpi, In-coming President Lisa Tittlemore, Chapter Member Terrence Parker, and Co-Vice President of the First Circuit Christopher Sullivan



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## UPDATES FROM THE CLERK'S OFFICE

*by Robert J. Farrell*

### CHIEF MAGISTRATE JUDGE JENNIFER C. BOAL

On June 16, 2014, Magistrate Judge Jennifer C. Boal became Chief Magistrate Judge. Chief Magistrate Judge Boal will serve a term of three years and becomes the ninth Chief Magistrate Judge of the District of Massachusetts. Former Chief Magistrate Judge Sorokin served in that capacity from February 1, 2012 through June 15, 2014 when he was sworn in as a United States District Judge.

### PROPOSED RULE CHANGES

The Judicial Conference Advisory Committees on Appellate, Bankruptcy, Civil, and Criminal Rules have proposed amendments to their respective rules and forms, and requested that the proposals be circulated to the bench, bar, and public for comment. The proposed amendments, Rules Committee reports explaining the proposed changes, and other information are posted on the judiciary's website: <http://www.uscourts.gov/RulesAndPolicies/rules/proposed-amendments.aspx>. The public comment period ends February 17, 2015.

### CRIMINAL JUSTICE ACT BOARD ANNOUNCES APPLICATION DEADLINE FOR BOSTON AND SPRINGFIELD CJA PANELS

The U.S. District Court for the District of Massachusetts Criminal Justice Act Board will accept applications for approximately thirty (30) positions on the present District Court panel list for appointment to indigent cases in Boston and for a limited number of positions on the Springfield panel. Attorneys currently on the CJA panel in Springfield need not re-apply. The application deadline is 5:00 p.m. on October 10, 2014. The notice and application may be found on the court's website at: <http://www.mad.uscourts.gov/attorneys/cja-info.htm>.

### eVOUCHER

The Clerk's Office has implemented a new program for processing vouchers and other documents regarding services and payments submitted by attorneys appointed under the Criminal Justice Act (CJA). Court appointed counsel may now electronically submit all documents

related to their appointment – from requests for authorization of expert services through their final voucher for payment.

The eVoucher program was created by the District of Nevada and is in use in most of the courts of the Ninth Circuit. This year it was adopted by the US Courts' Administrative Office as a nationwide product. The District of Massachusetts is in the first wave of courts to implement the software. Clerk's Office staff spent the summer reviewing and testing the software. The system was activated for attorney use on September 1, 2014. A number of classes (in person and via webinars) were held across the district.

### PUBLIC ACCESS TO THE COURT'S OPINIONS

The United States District Court for the District of Massachusetts is changing the manner in which opinions and other judicial orders are made publicly available. Effective September 15, 2014, opinions and orders will be available via two RSS feeds. The Court's "Recent Opinions" webpage will be discontinued.

The first RSS feed ([https://ecf.mad.uscourts.gov/cgi-bin/rss\\_outside\\_pub.pl](https://ecf.mad.uscourts.gov/cgi-bin/rss_outside_pub.pl)) will be dedicated for opinions and orders designated by the Court for official publication. This replaces the blue bullet indicator previously used on the "Recent Opinions" page. The second RSS feed ([https://ecf.mad.uscourts.gov/cgi-bin/rss\\_outside.pl](https://ecf.mad.uscourts.gov/cgi-bin/rss_outside.pl)) will contain all opinions and orders entered whether or not designated for official publications.

A PACER (Public Access to Court Electronic Records) login will be required to obtain opinions from an RSS feed. Copies of documents designated as opinions under the EGovernment Act are provided free of charge through PACER. Publication services that do not have an existing PACER account should register at:

<https://pacer.psc.uscourts.gov/pscof/registration.jsf>.

In addition to the two feeds, our Opinions Search page is being replaced by the U.S. Government Printing Office's FDsys system which provides free, full-text searching of many government publications, including United States District Court Opinions. Anyone can access FDsys at: <http://www.fdsys.gov>.

## JUDICIAL PROFILES

The FBA held a welcome reception for the newest members of the bench on September 22, 2014. The Massachusetts Chapter of the Federal Bar Association welcomes the following judges to the bench:

### JUDGE INDIRA TALWANI

Indira Talwani was a partner at the law firm of Segal Roitman LLP, where she specialized in litigation in federal and state court at both the trial and appellate level. She also represented individuals and unions in negotiations, arbitrations and other forums. Prior to joining Segal Roitman, she was a partner with the law firm of Altshuler Berzon in California. Judge Talwani began her legal career as law clerk to Judge Stanley A. Weigel of the United States District Court for the Northern District of California.

Judge Talwani served as a senior editor of the American Bar Association and Bureau of National Affairs' treatise on the Family and Medical Leave Act. She also was an adjunct instructor at Northeastern University School of Law, teaching a class on statutory employee benefits. She has lectured for the American Bar Association, the Massachusetts Bar Association, the Bar Association of San Francisco, and for numerous other organizations on labor and employment issues. Judge Talwani has been recognized for various awards, including Best Lawyers in America (2013), Massachusetts Super Lawyers (2012), the Chinese Progressive Association's Workers Justice Award (2012), and Massachusetts Lawyers Weekly's Top 10 Lawyers of the Year (2010).

Judge Talwani graduated from Boalt Hall School of Law at the University of California, Berkeley, where she was selected for the Order of the Coif. She received her B.A., *cum laude*, from Harvard/Radcliffe College.

### JUDGE MARK G. MASTROIANNI

Mark G. Mastroianni served as District Attorney for the Hampden District after being elected in 2010. He campaigned for the position as an independent candidate and served until being selected to fill a vacancy on the federal bench created by the retirement of Judge Michael Ponsor. During his time as District Attorney, he created a cold case unit to generate new leads and address unsolved crimes and he modernized the office's practices for handling forensic evidence and using technology in the

courtroom. Judge Mastroianni also established new community programs to reach a range of populations, from elders to elementary school students. In addition to serving as the chief law enforcement officer for Hampden County and managing an office of nearly 140 employees, Judge Mastroianni remained an active trial attorney, personally prosecuting five homicide cases during his tenure as District Attorney.

Prior to serving as District Attorney, Judge Mastroianni was a sole practitioner. He focused his practice on criminal litigation. He defended individuals in federal district court, as well as the state's trial and appellate courts, on charges ranging from misdemeanors to murder. Judge Mastroianni began his legal career in the Hampden District Attorney's Office as an Assistant District Attorney, advancing from a district court prosecutor to the superior court unit before leaving the office.

Born, raised and educated in Springfield, Massachusetts, Judge Mastroianni graduated from Western New England University School of Law. He received his B.A., *magna cum laude*, from American International College.

### JUDGE LEO T. SOROKIN

The Honorable Leo T. Sorokin was nominated to the United States District Court for the District of Massachusetts by President Barack Obama on December 19, 2013; confirmed by the United States Senate on June 10, 2014; and received his commission on the same day. He graduated from Yale College, *cum laude*, in 1983, and Columbia Law School, in 1991, where he was a Kent and Stone Scholar as well as the Articles Editor of the *Journal of Law and Social Problems*. After his graduation from law school, he served as a law clerk to the Honorable Rya W. Zobel, a Judge of the United States District Court for the District of Massachusetts (1991-1992). He then joined Mintz Levin as an associate (1992-1994). From 1994 to 1997, he served as an Assistant Attorney General under Scott Harshbarger at the Massachusetts Attorney General's Office. During his tenure at the Office of the Attorney General, he served in the Administrative Law Division of the Government Bureau, representing the Commonwealth in a range of civil matters in trial and appellate courts. During his last year in that office, he became the Opinions Coordinator for the Attorney General (1996-1997). In 1997, he joined the Federal Public Defender's Office for the District of Massachusetts as an Assistant Federal Defender, representing indigent defendants in federal criminal prosecutions at trial and on appeal. (*Continued on p. 7*)

## FBA LAW SCHOOL CHAPTERS UPDATE

*By Katherine G. Howells, New England Law | Boston*

He remained in that position until his appointment as a United States Magistrate Judge on April 11, 2005. He became the Chief Magistrate Judge on February 1, 2012.

Judge Sorokin presides over the District of Massachusetts's Court Assisted Recovery Effort, which promotes the development and maintenance of sober, employed, and law-abiding lives by felons under the supervision of the Court. He has served as a faculty member of numerous educational programs sponsored by the United States District Court for the District of Massachusetts, the United States Court of Appeals for the First Circuit, the Federal Judicial Center, the Federal Bar Association, and the Boston Bar Association. In 2009, the Boston Bar Association awarded Judge Sorokin its Citation of Judicial Excellence.

### MAGISTRATE JUDGE PAGE KELLEY

Page Kelley was a public defender for twenty-seven years. She worked for the Massachusetts Committee for Public Counsel Services, the state public defender agency, from 1986 to 2002, as a trial attorney, an appellate attorney, and from 1998 to 2002, as Attorney-in-Charge of the Cambridge Office, where she supervised a staff of thirteen attorneys. In 2002, she was appointed as a Criminal Justice Act attorney to work on the case of *United States v. Flemmi*, and two years later, was hired as an Assistant Federal Public Defender in Boston. She worked there until her appointment as a Magistrate Judge in June, 2014.

She was a frequent lecturer at Massachusetts Continuing Legal Education courses and taught extensively in-house at CPCS. While at the Federal Defender Office, she lectured at national Defender Services conferences. She was an adjunct professor at Suffolk University Law School from 2012-2014, teaching Trial Advocacy. In 2012, she was elected to the American College of Trial Lawyers.

She is the proud mother of Esther Mobley, an Assistant Editor at [Wine Spectator](#) magazine in New York City, Greg Kelley, a senior at Yale College, and Tommy Mobley, a senior at Newton North High School. She shares her life with Charles Rankin, her long-time partner.

Magistrate Judge Kelley was born in Louisville, Kentucky. She received her A.B. from Smith College in 1981 and graduated from Harvard Law School in 1986.

As the law schools begin to gear up for another exciting year, the law student committee of the FBA is already hard at work. Over the summer, we were fortunate to be invited and attend an ABA TIPS Business Litigation Committee event for law students. New England Law | Boston's FBA represented our students at this event and participated in a one of a kind networking opportunity. It is the committee's goal to continue to represent the FBA at law student events like this with other Bar Associations.

The Law School Committee is proud to announce it has successfully established FBA chapters at Suffolk University Law School, New England Law | Boston and Boston College Law. We are still working hard to establish our FBA chapters at Northeastern University School of Law and Boston University.

All law school FBA chapters are managed completely by the students and it is through their hard work and dedication that we have grown so much in our early years. We would like to thank the student managers and executive boards for their hard work in preparing the budget proposals. These proposals required outlining events for the entire academic year, including specifying opportunities for networking with the local board and other law school chapters. These events are intended to introduce FBA student members to the federal practitioners and judges within the Greater Boston area and beyond.

To add to the community and dialogue surrounding the federal practice, the law schools have come together to host an inter-chapter mixer, scheduled for March 2015. This event is open to all law student chapters, the YLD, and members. It is our goal that this will be a unique opportunity for students to meet and network with practitioners in an informal setting. Further, the Law School Committee aims to grow the community and membership within the law school chapters and this event hopes to accomplish that goal.

The New England Law | Boston: FBA will be hosting a "Women in the Federal Practice" event on November 10, 2014 at New England Law | Boston. This event will be co-sponsored with NELB's Women's Law Caucus. Michelle Shaffer, past president of FBA and Lisa Maki, of the City of Boston, have graciously offered their time to this panel. New England Law | Boston is honored that they are willing to attend. *(Continued on p. 8)*

This panel will showcase the successful career paths of our panelists and provide advice to students hoping to enter the federal field. NELB: FBA will follow this event with a Career Services panel entitled, "Federal Jobs" on Thursday, November 13, 2014. This will be the second time NELB: FBA has co-sponsored on an event like this with the Career Services Office. NELB: FBA is looking forward to hosting a great week of showcasing the federal opportunities for our students.

The Law School Committee goals for the year include increasing membership, assisting and establishing student chapters, and organization of multi-chapter events which include FBA: MA and FBA: YLD members.

## **CLE BREAKFAST WITH CHIEF JUDGE BAILEY: BANKRUPTCY TOPICS FOR NON-BANKRUPTCY ATTORNEYS**

*By Jennifer L. Ioli, Sherin and Lodgen, LLP  
and Emily A. Zandy, Day Pitney LLP*

On June 26, 2014, the Massachusetts Chapter of the Federal Bar Association joined together for a CLE Breakfast with Chief Judge Frank Bailey of the Bankruptcy Court. Judge Bailey hosted many attorneys in the library of the John W. McCormack Courthouse at 5 Post Office Square in downtown Boston. During the breakfast CLE, Judge Bailey provided a succinct yet thorough overview of the different chapters of the Bankruptcy Code, explained the differences between the various codes and the frequency with which he sees a particular code issue arise, and provided helpful perspective on navigating various bankruptcy issues and court filings. He then described the different roles and players involved in a bankruptcy action, depending on which chapter of the code was at issue. After the CLE portion concluded, Judge Bailey gave the attending attorneys a tour of his courtroom, and enlightened the group on some interesting historical facts about the building. The CLE was educational and enjoyable. The FBA thanks Judge Bailey for hosting this event!

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**Pictured:** Attendees to the FBA CLE program with Chief Judge Frank Bailey of the Bankruptcy Court on June 26, 2014.



## FBA'S INAUGURAL WOMEN IN THE LAW CONFERENCE

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

I had the pleasure of attending the FBA's inaugural *Women In The Law: Power and Progress* conference in Washington, D.C., on July 11, 2014. This conference was well-attended by attorneys from all over the nation, and packed an impressive roster of esteemed panelists into a one day program without compromising any quality. The program began with opening remarks from the FBA National President, Hon. Gustavo A. Gelpi, and continued with the morning keynote address by Hon. Patricia A. Millett of the United States Court of Appeals for the D.C. Circuit. Judge Millett's remarks were both realistic, providing the statistical numbers of women leaders in the law, and uplifting, providing some of her thoughts on why the statistics are the way they are, and how to continue working toward improving them. She encouraged female law students to apply for clerkships, and to avoid opting out of opportunities out of fear that they are not properly qualified. Judge Millett described the female pioneers in the legal industry as having cleared and plowed a parcel of land, and stated that now it is up to us to plant seeds and make things grow. She stressed the importance of taking time to mentor new attorneys and other young people still in school, building and maintaining relationships, staying active in the community, and striving to provide the best service to our clients.

The next panel featured Mary Elizabeth Gately, co-managing partner of DLA Piper, and Dean Stacy Leeds of Arkansas Law School, who discussed the history of women in the law. It was fascinating to hear about the first women who attended law school and who were admitted to the bar, and then the first women who served on the bench. The perspective of looking back at the history of our profession and realizing where women in the law started compared to their status today was a profound experience.

Then, Chief Judge Loretta A. Preska of the Southern District of New York, Lt. Gen. Flora D. Darpino of the United States Army Judge Advocate General's Corps, and Professor Catharine A. MacKinnon of University of Michigan Law School, each spoke on

the development of domestic law as it affects women. General Darpino provided a fascinating history of women in the Army, and Judge Preska spoke on issues of criminal sentencing for women.

After a quick break to get lunch, the FBA's lunch keynote speaker took the stage. Chief Justice of the Supreme Court of Canada, Hon. Beverley McLachlin, P.C., gave a wonderful and inspirational presentation. She urged the audience to effectively challenge assumptions, and to always respectfully ask for what you need, and not to take "no" for an answer. For instance, the assumption that women are "nice" does not mean that women cannot also be forceful. Justice McLachlin sat next to me before her speech, and it was a special opportunity to get to talk with her at our table.

After lunch, we heard from three more powerful and inspirational panelists who discussed breaking the glass ceiling in the legal profession: Hon. Aida Delgado-Colon, the Chief Judge of the District of Puerto Rico; Dean Camille A. Nelson of Suffolk Law School in Boston; and Michele Roberts, Partner at Skadden Arps (who shortly after the conference became the first female executive director of the NBA Players Association). These three women shared their stories and backgrounds, and they were wonderful to listen to and provided relatable, real world examples which resonated with the audience. It was wonderful to hear about where they came from and how they advanced their careers. The conference finished with a presentation by Professor Nancy B. Rapoport of University of Nevada-Las Vegas Law School regarding how Hollywood affects lawyers' behavior.

This conference provided a unique perspective on being a female attorney, and gave the attendees a wonderful opportunity to gather and learn from each other. During the brief networking breaks during the day, I had the opportunity to meet and converse with many attorneys from all over the nation, both male and female. I am grateful for the opportunity of attending this conference, and I strongly recommend it to anyone who is interested in becoming inspired and networking with amazing practitioners of law next year.

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## MASSACHUSETTS CHAPTER SPONSORS AND CELEBRATES MAINE CHAPTER INCEPTION EVENT

On September 8, 2014 the FBA welcomed the newly formed Maine Chapter with a panel discussion held at the Portland Public Library in Portland, Maine. The panel discussion and reception celebrated the 50<sup>th</sup> Anniversary of the Civil Rights Act of 1964, entitled “The Civil Rights Act of 1964: Then and Now.” The keynote speaker was FBA President, U.S. District Judge Gustavo Gelpi, Jr. Additional panelists included Mary Bonauto, Gay & Lesbian Advocates & Defenders, David Webbert, of Johnson Webbert & Young, and Melvyn Zarr, University of Maine School of Law. The Massachusetts chapter offers a welcome to the new Maine chapter!

*(Pictured from left)* Co-Vice President for the First Circuit Christopher Sullivan, founding member of the Maine chapter Rachel Wertheimer, Massachusetts Chapter Past President Matt Moschella, FBA President U.S. District Court Judge Gustavo Gelpi, and Katherine Gonzalez, Co-Vice President of the First Circuit.



## D. MASS GIVES BOOST TO PLAINTIFFS IN DISABILITY ACCESS LAWSUITS

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

A local business's recent experience may serve as a discouragement to others hoping for a quick dismissal of an increasingly common type of vexatious lawsuit. On Saint Patrick's Day in 2013, Raoul Marradi set out to dine on corned beef and cabbage at the Galway House restaurant in Jamaica Plain. However, Mr. Marradi could neither make it up a front step nor maneuver through a rear entrance in his wheelchair. When he did make it in, he and his dining companion, Anthony Lee, observed a laundry list of "unlawful barriers." Mr. Marradi proceeded to court.

This seemingly ordinary accessibility lawsuit had quite a few quirks, some of which Judge Richard G. Stearns noted in a recent summary judgment decision. *See Marradi v. Galway House, Inc.*, No. 13-10813, 2014 WL 1454266 (D. Mass. Apr. 15, 2014). For one, Mr. Marradi was represented by Todd Shulby, a Florida lawyer notorious for filing similar cases all over the country "with the same stable of plaintiffs." *Id.* at \*1 n.1.<sup>1</sup> His local counsel, Edward Garo, has been counsel in eighty-one such cases, "presumably in concert with Shulby." *Id.* And Mr. Marradi was a plaintiff in seven other near-identical accessibility lawsuits. Some had been dismissed by judges for failure to prosecute. Some had been brought with Mr. Lee.

Several attributes of Title III of the Americans with Disabilities Act, under which this case falls, provide context. The Act deputizes disabled citizens to act as private attorneys general – that is, to bring civil lawsuits against individuals or entities operating "places of public accommodation" in violation of federal accommodations law. There is a virtually infinite number of potential litigants – there are many millions of businesses in the United States and 43 million disabled Americans, by Congress's estimation. There is no requirement that a plaintiff give notice to a business owner of violations to seek voluntary compliance before bringing suit – indeed, plaintiffs who forebear may be beaten to the courthouse by others. And the ADA is nuanced and violations need not be grave to be actionable – although the Galway House suggested that other wheelchair-bound diners

had frequented the establishment, one of Mr. Marradi's complaints was that a bathroom sign was hung on the door, rather than on the adjacent wall as required.

At the same time, these cases can be profitable to plaintiffs. The ADA is one of the federal fee-shifting statutes. Thus, prevailing ADA plaintiffs ordinarily receive their costs *and reasonable attorney's fees*. 42 U.S.C. § 12205. But when defendants prevail, they are ordinarily barred from recovering fees from plaintiffs. *See Mitchell v. City of Moore, Ok.*, 218 F.3d 1190, 1203 (10th Cir. 2000).

Anecdote suggests this balance of incentives is producing an ADA boom. On one day in March 2013, a blind man, Antonio Guimares, filed five class-action lawsuits after he tried to use ATMs at various banks in metropolitan Boston; all were resolved by the end of the year, presumably by settlement. In a case in Mr. Shulby's home jurisdiction – the Southern District of Florida – plaintiff Margaret Leinbach suffered from conditions so serious she requires grab bars to use a bathroom, but claimed she earnestly wanted (and tried) to use the facilities of a martial arts academy.<sup>1</sup> Plaintiffs incorporate advocacy groups and go from state to state, teaming up with the same lawyers and experts. These cases are becoming so prevalent that some judges around the country are devising court practices to ensure that the same businesses are not sued by different plaintiffs with respect to the same violations. Some judges are highly critical of the statute's effect on businesses. *See, e.g., Ass'n for Disabled Americans, Inc. v. Integra Resort Mgmt., Inc.*, 385 F. Supp. 2d 1272, 1278-1285, 1296-1299 (M.D. Fl. 2005).

Rather than defend against the allegations, some defendants are tempted to focus on the plaintiffs for abusing the statute. They look to perhaps the most important of the constitutional requirements for maintaining a federal action – whether the plaintiff has in-fact suffered a redressable injury. The First Circuit has articulated that in the ADA context, a plaintiff must show that the defendant's violations were, and will continue to be, a deterrent to patronizing a public accommodation. *Disabled Americans for Equal Access, Inc. v. Ferries Del Caribe*, 405 F.3d 60, 64 (1st Cir. 2005). As part of that showing, the plaintiff must have concrete and present plans to return rather than a "someday" intention.

The Galway House made such an argument about Mr.

(Continued from p. 11)

Marradi, but it did not go so well. In a matter of first impression, Judge Stearns sided with authority from the Tenth and Eleventh Circuits concluding that “testers” – not *bona fide* patrons of the establishment, but those who are motivated by the possibility of litigation – can be proper plaintiffs. Those courts reason that the language of the ADA must be interpreted broadly to prohibit discrimination against *any* disabled person without qualification – even testers have a right to be free from disability discrimination. In addition, Judge Sterns noted two recent Massachusetts district court decisions reasoning that had the government enforced the ADA directly, it would be likely to use testers to identify non-compliant businesses. *Marradi*, 2014 WL 1454266, at \*3 n.7 (citations omitted).<sup>1</sup>

The decision suggests that not only will courts reject the argument that being a tester negates standing, but they are likely to credit assertions that it effectively confers it. The *Marradi* decision allowed the claim to stand only on a statement in the complaint that the plaintiff “intends to visit the facility again in the near future... but will be unable to do so because of his disability due to the physical barriers to access, dangerous conditions and ADA violations that exist at the property,” as well as the fact that Mr. Marradi actually lived in proximity to the restaurant. *Marradi*, 2014 WL 1454266, at \*4. Rather than demand an articulation of concrete plans, the court looked to the salutary nature and remedial purposes of the ADA, undertaking to resolve all doubts in favor of the plaintiff, even in this “close” case. *Id.*<sup>1</sup>

This will no doubt be a disappointment to defendants that look to older precedent. In *Ferries Del Caribe*, the First Circuit allowed an unadorned statement about intending to return to a non-compliant cruise ship to carry the day, but only the sufficiency of the complaint was at issue and the court disregarded extrinsic evidence. 405 F.3d at 64-65 & n.6. In a factual standing challenge in *Houston v. Marod Supermarkets, Inc.*, the Eleventh Circuit allowed a claim about returning to a supermarket to proceed past summary judgment, but only after an extensive discussion about how the plaintiff’s intent was not sufficiently controverted, was supported by a detailed affidavit from the plaintiff, and was plausible in light of the particular circumstances. 733 F.3d at 1335-37. Other courts have continued to reject claims based in part on the plaintiff’s litigation history. See *Gaylor v. Greenbriar of Dahlonga Shopping Ctr., Inc.*, 975 F. Supp. 2d

1374, 1387-88 & n.9 (N.D. Ga. 2013) (citing authority). The fact the *Marradi* court gave so much weight to boilerplate statements in the plaintiff’s complaint – particularly when the summary judgment standard so frequently cited requires the plaintiff to go “beyond the pleadings” in proffering competent proof – increases the difficulty for defense.

Ultimately, after more than a year of litigation, the Galway House prevailed on another aspect of the plaintiff’s claim – his evidence of the feasibility of remedying the observed barriers was woefully inadequate. But the implication is clear: business owners will be sued by opportunistic plaintiffs over technical ADA violations that might be unnoticeable to all of their actual patrons. That will likely not just irk them, but will appear to be a commonsense ground for seeking judgment in their favor. In Massachusetts, even if honest answers come out in discovery, it is an unlikely way to win. More broadly, having just accepted a litigation motive, we should get ready for an increase in ADA litigation in our courts.

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1 A Florida judge decried Mr. Shulby’s participation in a “cottage industry fueled by the economics of attorney’s fees” and marked by “a small triumvirate of plaintiffs, lawyers, and experts filing large numbers of lawsuits within short periods of time.” *Hoewischer v. Sailormen, Inc.*, No. 3:10-cv-752, 2012 WL 2865788, at \*4 (M.D. Fl. July 11, 2012) (quotations omitted). Mr. Shulby had apparently filed more than 150 ADA suits in that district in just ten months and represented that named plaintiff in 96 cases. *Id.*

2 Ms. Leinbach sued the academy and a large handful of other businesses in the strip mall it occupied over accessibility violations. For disclosure, the author served as a law clerk to the judge who was assigned to that case, *Louisiana Counseling & Family Services v. Shenandoah Animal Hospital at Shendoah Square Davie Florida*, No. 12-cv-60189 (S.D.F.L. filed Feb. 2, 2012).

3 District Judge Dudley H. Bowen, Jr., sitting by designation, penned a compelling dissent in the Eleventh Circuit case, *Houston v. Marod Supermarkets, Inc.*, 733 F.3d 1323 (11th Cir. 2013). He noted that other discrimination laws cannot be practically enforced without testers to uncover shadowy prejudices and that the ADA is producing vexatious litigation. In practice, however, courts have favored a textualist reading, preferring to give effect to Congress’s words over trying to realign the law’s laudatory intentions and its practical result.

4 It nevertheless appears that the Galway House had made a factual standing challenge at summary judgment and presented un rebutted evidence that Mr. Marradi lacked a real and specific intent to return to the premises. That included deposition statements about how often Mr. Marradi eats out, where he goes when he does, and – critically – a statement that he *did not know* if he would ever return.

# SUPREME COURT ESTABLISHES A NEW TEST FOR GENERAL JURISDICTION

By Diana A. Chang, Campbell Campbell Edwards & Conroy, P.C.

The Supreme Court's recent decision in *Daimler AG v. Bauman* reformulated the test to establish general jurisdiction over a foreign defendant. This new test severely curtails a state's jurisdictional reach. In *Daimler AG*, twenty-two Argentinean residents filed a complaint in the United States District Court for the Northern District of California against DaimlerChrysler Aktiengesellschaft, a German public stock company, for violations of human rights allegedly committed by its Argentinean subsidiary during Argentina's "Dirty War." 134 S.Ct. 746, 750-51 (2014). General jurisdiction over Daimler, the plaintiffs argued, existed through the California contacts of Daimler's U.S. subsidiary, Mercedes-Benz USA, LLC. *Id.* at 752.

The Supreme Court granted certiorari to decide whether jurisdiction over Daimler is consistent with the Due Process Clause of the Fourteenth Amendment. *Id.* at 753. In deciding the case, the Court relied on the following facts agreed to by both parties: Daimler's contacts with California were insufficient to establish general or specific jurisdiction and California courts had general jurisdiction over Mercedes-Benz USA. *Id.* at 758. The Court also assumed that Mercedes-Benz USA's activities could be imputed to Daimler for jurisdictional purposes. *Id.* at 760.

In a detailed analysis, the Court first reviewed its decisional law on personal jurisdiction. The Court noted that after *International Shoe Co. v. Washington*, 326 U.S. 310 (1945), two categories of jurisdiction arose: general and specific. *Id.* at 754. Specific jurisdiction must follow the line of precedence set in *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980), and *Asahi Metal Industry Co. v. Superior Court of Cal., Solano Cty.*, 480 U.S. 102 (1987). In contrast, general jurisdiction must follow the precedence set in *Perkins v. Benguet Consol. Mining Co.*, 342 U.S. 437 (1952), *Helicopteros Nacionales v. Hall*, 466 U.S. 408 (1984), and *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 131 S.Ct. 2846 (2011). *Id.* at 755-57.

Prior decisional law held that a court may exercise general jurisdiction over a foreign corporation where the corporation has substantial, continuous, and systematic operations within the state. *Id.* at 754. The Court held that this standard was "unacceptably grasping," *id.* at 761, and it "declined to stretch general jurisdiction beyond limits traditionally recognized," *id.* at 757-58.

The Court explained that general jurisdiction over a foreign defendant, like general jurisdiction over an individual, only exists in the state that can be fairly regarded as its home. *Id.* at 760. For a corporation, these paradigm bases for general jurisdiction are the place of incorporation, its principal place of business, or similar places in which its business is so substantial as to render it essentially at home in that State. *Id.* 760-61.

Accordingly, to establish general jurisdiction over a foreign corporation, the plaintiff must show that the defendant's contacts are so continuous and systematic as to render it "essentially at home in the forum State." *Id.* at 761 (quoting *Goodyear*). In applying this test, courts must appraise "the corporation's activities in their entirety, nationwide and worldwide. A corporation that operates in many places can scarcely be deemed at home in all of them." *Id.* at 762, n. 20. Here, even with Mercedes-Benz USA's contacts attributed to it, Daimler did not have sufficient contacts with California to establish that it was "essentially at home" because Daimler's sizable sales in California were similar to its business operations in many other states. *Id.* at 762. The California courts lacked general jurisdiction.

The Court also briefly noted the transnational context of the dispute and considerations of international comity reinforced its holding that Daimler was not subject to general jurisdiction in the California courts. *Id.* at 763. After-all, this was "a claim brought by foreign plaintiffs against a foreign defendant based on events occurring entirely outside the United States." *Id.* at 750. In a concurring opinion, Justice Sotomayor agreed that the California courts lacked jurisdiction, but disagreed with the Court's test for general jurisdiction. *Id.* at 764 (Sotomayor, J., concurring). Justice Sotomayor criticized this new "proportionality" test for unduly curtailing a State's sovereign authority over foreign corporations operating within its boundaries, unfairly burdening small businesses who do not have the international or national operational presence of large multinational corporations, incorrectly creating dual standards of general jurisdiction for individuals and corporations, and unjustly shifting the risk of loss from multinational corporations to the individual. *Id.* at 772-73 (Sotomayor, J., concurring).

Justice Sotomayor would have followed the two-part jurisdictional analysis outlined in *Asahi* to find that there were sufficient contacts with California to establish jurisdiction, but that the exercise of jurisdiction would have been unreasonable under the circumstances. *Id.* at 764-65. Since the Court's decision on January 14, 2014, twenty-seven United States District Courts and three Courts of Appeals have adopted the Court's new "at home" test for general jurisdiction. At the time of writing this article, neither the United States District Courts in the First Circuit nor the First Circuit Court of Appeals have adopted the Court's decision. Thus it remains to be seen whether and to what extent the First Circuit will use *Daimler AG* to limit its general jurisdiction over foreign defendants.

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