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Message from the Chapter President

Over this past year, the Massachusetts Chapter of the Federal Bar Association has engaged in an ambitious schedule of continuing education programs, opportunities to meet and socialize with members of the federal bench, and networking events with other federal court practitioners. Building on the momentum created over the last several years, the Massachusetts Chapter has this year officially established a Younger Lawyers Division (“YLD”), a section open to those members of the Federal Bar Association who are 36 years of age or younger or who have been practicing for three years or less.

The YLD provides a great opportunity for younger lawyers to become involved in the operation of the Massachusetts Chapter and to socialize and network with their peers within the Commonwealth. The addition of many young lawyers to the Massachusetts Chapter has made it an even more dynamic bar association whose agenda younger lawyers will be able to shape for many years to come. If you have never been a member of a bar association, this is the time to join the FBA because this is an organization in which

you can have an immediate impact. If you have been a member of the FBA in the past, but your membership has expired or is up for renewal, I urge you to renew as soon as possible so that you do not suffer any lapse of the benefits of membership.



This year, the Massachusetts Chapter has sponsored several continuing education programs which have attracted large crowds and received positive reviews from attendees. United States Magistrate Judges Dein and Sorokin have graciously contributed their time and expertise to develop a three-part series on federal court practice for new attorneys. This series of seminars, sponsored by the YLD of the Massachusetts Chapter, has received rave reviews. The first installment of the series, Discovery and Motion Practice, was held at Goulston & Storrs on March 24, 2006, the second session, Summary Judgment and Pre-trial Issues, was held at Nixon Peabody on

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Interview with the Honorable F. Dennis Saylor, IV



During a recent interview with FBA Executive Committee member Kate Cook, United States District Court Judge F. Dennis Saylor, IV (pictured to the left) shared some invaluable words of wisdom and insights for federal court practitioners.

appearing before you?
A. Of course, attorneys coming to court for anything from a scheduling conference to a trial should always be prepared. My first instinct is usually to look at the relevant statute or rule and to see what it says; it's surprising how often counsel has

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Q. Do you have any tips for attorneys



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A Message from the Chapter President - Continued from page 1

June 27, 2006, and the third installment, Trial and Post-Trial Issues, was held in September at Sherin and Logden. More than 100 lawyers have attended each of these sessions.

The Massachusetts Chapter is grateful to Goulston & Storrs, Nixon Peabody and Sherin and Logden for hosting and sponsoring this series. We also greatly appreciate the time Judges Dein and Sorokin devoted to this endeavor.

On May 4, 2006, the Massachusetts Chapter, along with the Center for Advanced Legal Studies ("ALS") at Suffolk University, the Flaschner Judicial Institute and the Macaronis Institute for Trial and Appellate Advocacy, sponsored a program entitled, "Ensuring a Fair Trial: How to Get a

Representative Jury". The Honorable Nancy Gertner of the United States District Court for the District of Massachusetts chaired this program. Distinguished faculty included the Honorable William Young and the Honorable Reginald Lindsey, United States District Court Judges for the District of Massachusetts, the Honorable Nonnie S. Burnes and the Honorable Peter M. Lauriat of the Commonwealth of Massachusetts Superior Court, Professor Jeffrey Abrahamson from Brandeis University, Professor Pamela Carlin from Stanford University Law School, Professor Frank Rudy Cooper from Suffolk University Law School, James McAlear, the Jury Administrator of the United States District Court for the District of Massachusetts, Pamela J. Wood, the Jury Commissioner of the
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The Honorable Judith G. Dein and the Honorable Leo T. Sorokin speaking at the Young Lawyer's Division seminar.



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A Message from the Chapter President - Continued from page 2

Commonwealth of Massachusetts,
 Massachusetts State Senator Stanley
 C. Rosenberg, G. Thomas Munster-
 man, the Director of the Center for
 Jury Studies at the National Center for
 State Courts in Williamsburg, Virginia,
 and Attorneys Patricia Garin, Judith
 Mizner, and William Newman. The
 focus of the seminar was how to ob-
 tain a representative proportion of
 minorities in a jury pool, an issue
 which has been the subject of renewed
 debate throughout the country since

Judge Gertner's decision in United
 States v. Green.

On December 12, 2006, the
 Massachusetts Chapter and Suffolk
 Law School's ALS combined efforts
 again to sponsor a seminar entitled
 "Electronic Discovery Under the New
 Federal Rules," which took effect on
 December 1. I had the privilege of co-
 chairing this seminar with Jeff Follett
 of Foley, Hoag. We were fortunate to
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A View From the Bench —Continued from page 1

neglected to do that. Counsel should
 try to get to the point; I tend to want
 to get to the heart of the matter fairly
 quickly. I have a bit of a bias toward
 trying to find a practical solution to
 problems, at least where I have dis-
 cretion to do so. I try not to be
 overly reflexive, however, and cer-
 tainly I don't think that every prob-
 lem requires a down-the-middle com-
 promise.

Q: Are there particular types of cases
 you enjoy?

A: I usually find them all interesting
 in their own way, and I certainly don't
 dislike or disfavor any category of
 cases. Some courts, for example,
 have not always been user-friendly to
 ordinary business litigation disputes.
 I think the litigants in a business dis-
 pute are entitled to use the process of
 the courts, no less than plaintiffs in
 civil rights or discrimination or per-
 sonal injury suits. I firmly believe
 that everyone is equal in a court of
 law, and that the purpose of the
 courts is to resolve disputes within
 their jurisdiction fairly and promptly,
 regardless of who brought the suit or

its subject matter.

Q: You recently issued a judicial or-
 der encouraging new or young law-
 yers to practice in federal court, what
 prompted you to do that?

I issued the order for several reasons.
 First, I wanted to state as clearly as I
 could that I welcomed junior attor-
 neys to practice and appear in my
 court. Second, I have become con-
 cerned that the courts have become
 increasingly unfriendly to new law-
 yers, often in an institutional way.

Many judges, for example, insist that
 senior attorneys be present for all
 court appearances, even minor events
 such as scheduling conferences. This
 is unfair to the client, who has to pay
 top dollar for the senior attorney, and
 to the junior attorney, who usually
 does the bulk of the work in writing
 the motion and researching the issues
 and would benefit most from the in-
 court opportunity. It's reflected in
 little ways, as well. For example,
 sometimes judges make jokes or

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Employees Returning From Military Service: What Are Employers' Obligations?



According to the U.S. Department of Labor, over 500,000 members of the National Guard and Reserve have been mobilized since September 11, 2001. There are nearly 1.2 million reserve and National Guard members, many of whom have been called to active duty. Under the United Services Employment and Reemployment Rights Act (USERRA), these service members have certain rights to reinstatement in their former positions when they return to civilian life after military leave. Every employer, large or small should understand its obligations to employees returning from the service. The following summarizes USERRA's general provisions:

Scope:

Every employer, public or private, regardless of size, must comply with USERRA. USERRA covers anyone in military service, whether on active or reserve duty or in training, full-time or part-time.

Right to Reinstatement:

Employers must reinstate service members to the positions they would have occupied had they not taken military leave. Employees also are entitled to pay raises and promotions they would have received had they not taken military leave.

Leaves of Absence 90 Days or Less: The service member must be returned to the position he or she would have occupied had employment not been interrupted.

Leaves of Absence Over 90 Days: The employer must assign the employee to the job he or she would have occupied, or a similar job with similar seniority, status and pay.

Qualifying for Reinstatement:

To qualify for reinstatement, service members generally must satisfy the following conditions:

- (1) Must have given advance notice of military service to the employer;
- (2) Leave of absence(s) does not exceed 5 years;
- (3) Service member is honorably discharged; and
- (4) Service member applies to return to employment in a timely manner.

Limits to Reinstatement:

An employer is not required to reinstate a service member if it can show one of the following:

- (1) That the employer's circumstances have so changed as to make reemployment impossible or unreasonable,
- (2) That reemployment would impose an undue hardship on the employer, or
- (3) The position from which the employee leaves existed for a brief, non-recurrent period that is not reasonably expected to continue.

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Compensation and Benefits An employer is not required to pay service members during military leave, but must reinstate all attending rights and benefits of the position when service members return.

Discharge for Cause Only: Service members cannot be discharged, *except for cause*, for 6-12 months after returning to work, depending on the length of service.

Discrimination Prohibited: No employer may discriminate or retaliate against past, present or future service members based on their participation in the armed services.

Notice To Employers:

As of January 18, 2006, employers must notify all employees of their rights and duties under USERRA (this can be done with a posting).



Darl Develario Andrews is an Associate at Sherin and Logden LLP.



Margaret Paget is a Partner at Sherin and Logden LLP.

A View From The Bench, *continued from page 3*

comments about how many attorneys are sitting at the table in court. This has often led to firms to seating only the senior lawyer at the table, or maybe the senior lawyer and in-house counsel. The junior attorney is left at the office or, if he or she is lucky, sits in the back of the courtroom. Why does the judge care how many lawyers there are? And why shouldn't the junior lawyers be welcome? Third, I am concerned that new attorneys have fewer and fewer opportunities to gain litigation experience. There are lots of reasons for that phenomenon, but I think the courts ought to play an active role in trying to counteract the trend. Fourth, I had a hunch that the junior lawyers would often be just as good as the more experienced ones. It's turned out to be true. Junior attorneys' arguments on motions are often superior to those of the senior attorneys. You can tell the junior attorney has probably spent the previous night pacing around in his or her apartment rehearsing and perfecting the argument. They deeply care about the issues and have thought long and hard about them. And, of course, they're usually grateful for the opportunity.

Q: As a member of the FBA's newly founded Younger Lawyers' Division I must disclose that we have celebrated your order and welcomed it. You were in private practice at Goodwin Procter for many years, what is the most important thing you know now that you wish you would have known when you were a private practitioner?

A: I wish I had had a better appreciation for the court system—not just the judges, but also the court clerks, the law clerks, and the other staff. I am particularly sympathetic to my counterparts in the state court system. It is terrible how starved the state court is for resources, and remarkable how much they accomplish despite this. Practicing lawyers are focused on filing their briefs, making their arguments and winning the case -- and rightly so. But it is important to appreciate how overwhelmed the state court system is, and to try to support efforts to direct more resources to those courts.

Q: What has been the most challenging aspect of serving as a federal district court judge?

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NATIONAL FBA EVENT

January 26, 2007: Public Service Career Fair

Register Online: <http://www.fedbar.org>



A View From the Bench: The Honorable F. Dennis Saylor – Continued from page 5

A: The biggest challenges come when lawyers fail to provide adequate representation to their clients—for example, when they miss a deadline or fail to comply with a procedural rule. When lawyers fail in their responsibilities, the judge has to decide whether and when to protect the client from the lawyer's errors.

I don't enjoy it when the sins of the attorneys are visited on the client. On the other hand, rules are rules, and I can't break them or stretch them beyond recognition just because I feel sympathetic. Unfortunately, I spend a disproportionate amount of time sorting out how to handle these types of problems.

Q: How often does oral argument change your view of how to rule on a case?

A: I haven't made a decision before oral argument, although I might have come to some tentative thoughts about the issues presented. I always try to keep an open mind, but it's not all that often that my thinking makes a complete 180 degree turn.

Q: Much has been made about whether the current system for summoning jurors to the federal court in Boston sufficiently ensures a representative and diverse jury pool. What is your opinion on the issue, and to what extent is the experience different in Worcester?

Q: The biggest single issue is the demographics of the population from which the jurors are drawn. For example, the Eastern Division of the District of Massachusetts is less than 7% African-American. That means that even in a perfect system, a typical Boston federal jury panel of 40 to 60 persons would have three or four African-Americans and a typical jury of 12 would have only one. Lawyers often think that if the system were better, the panels would be one-quarter or one-third African-American, but that's just not true.

That doesn't mean that we can't do better. There are two other potentially significant issues. First, there is a problem with maintaining up-to-date resident lists. We live in a highly mobile society, and there is some evidence that minority jurors tend to be more mobile and therefore less likely to have an accurate address on file. Judge Gertner also found in the *Green* case that certain cities and towns

with higher minority populations were not keeping their resident lists up to date. Second, there is a longstanding problem of lower summons response rates in minority communities, even when summonses have been properly served.

We're working on the first issue; we can never fix it entirely, but we can make some improvements, we think. The second issue is a lot more difficult to resolve. At the end of the day, until the rate of response to jury summonses more accurately tracks the demographics, we won't achieve a representative jury pool. The jury pool in Worcester has proportionally fewer minorities than the jury pool in Boston, but we face the same issues.

Q: How has your life changed since you became a judge?

A: My job satisfaction couldn't be higher -- this is a great job. I never work on anything that is unimportant or meaningless. My commute is a bit long, but it's a very small price to pay.

Q: Is there anything else that you would like the FBA of Massachusetts to know about you?

A: I try to be respectful of counsel, including their schedules, vacations, and personal commitments. I also, of course, try to be respectful of the litigants. I expect in return that counsel will be respectful to the court -- to be prepared, to adhere to deadlines, and to follow the rules.



Kate Cook is an Assistant Corporation Counsel with the City of Boston Law Department.

For more information about FBA Benefits and Services, contact the FBA website at:

<http://www.fedbar.org/join.html>



BRIEFLY SPEAKING

THE WORKPLACE RELIGIOUS FREEDOM ACT

Congress is currently considering an amendment to Title VII of the Civil Rights Act of 1964, entitled the “Workplace Religious Freedom Act of 2005.” The proposed legislation increases an employer’s obligation to accommodate an employee’s religious observance or practice. Currently, employers are not required to accommodate employees’ religious practices if doing so imposes more than a *de minimus* economic or non-economic burden. Under the proposed Act, however, an employer would be required to accommodate employees’ religious observances unless to do so imposes “significant difficulty or expense.” Any accommodation would also have to “remove the conflict” faced by employees between their job requirements and religious observances.



Matthew C. Moschella is an associate at the law firm of Sherin and Lodgen LLP.

NEW CASE OF INTEREST: BURLINGTON NORTHERN & SANTA FE RAILWAY CO.V SHEILA WHITE, 126 S.CT. 2405 (2006)

The Supreme Court has recently held that the scope of the retaliation provision of Title VII (sexual discrimination) extends beyond “discriminatory actions that affect the terms and conditions of employment”, *id.* at 2412-2413 or “beyond workplace-related or employment-related retaliatory acts and harms.” *Id.* at 2414. “An employer can effectively retaliate against an employee by taking actions not directly related to his employment or by causing him harm outside the workplace.” *Id.* at 2412. The anti-retaliation provision seeks to prevent harm to individuals based on “what they do, i.e. their conduct of opposing some em-

ployment practice; not on who they are, i.e. their status.” *Id.* at 2412. The retaliation however, must produce an “injury or harm – an action that would have dissuaded a reasonable worker from making or supporting a charge of discrimination.” *Id.* at 2415. Retaliation does not include the “petty slights, minor annoyances and simple lack of good manners,” *id.* that are part of the normal work environment. The retaliation provision is not a “general civility code for the American workplace.” *Id.* The standard is a reasonable person objective standard and is tied to the challenged retaliatory act, not the underlying conduct that forms the basis of a Title VII complaint. *Id.* Also, read *Noviello v City of Boston*, 398 F.3d 76 (1st Cir. 2005) for a decision in the First Circuit that accurately predicted this outcome.

USEFUL LINKS

Federal Bar Association

<http://www.fedbar.org>

FBA Membership Information and Application

<http://www.fedbar.org/membership.html>

U.S. Court of Appeals, First Circuit

<http://www.ca1.uscourts.gov>

U.S. District Court, District of Massachusetts

<http://www.mad.uscourts.gov/default2.html>

U.S. Bankruptcy Court, District of Massachusetts

<http://www.mab.uscourts.gov>



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have the Honorable F. Dennis Saylor, IV, United States District Court Judge and the Honorable Robert B. Collings and the Honorable Timothy S. Hillman, United States Magistrate Judges, participate as panel members. Other members of the panel included Martha Mazzone, Vice President and Associate General Counsel of Fidelity Legal Enterprise Services, Paul Robertson of Redgrave, Daley, Ragan & Wagner and Sarah Worley, a member of the Chapter's Executive Committee and a partner in Pre-Trial Solutions, Inc. This exceptional panel offered valuable insights on the new electronic discovery practice that we must all embrace, or at least understand.

The Massachusetts Chapter has also sponsored several events with the federal judges during the past year. In March 2006, the Chapter hosted a reception in the Jury Assembly Room at the Moakley Courthouse with the Honorable Mark Wolf, the new Chief Judge of the District of Massachusetts, who offered his thoughts on current issues facing the Court. The event attracted many federal court practitioners, including United States Attorney Michael Sullivan and many members of his office. On April 27, 2006, the Massachusetts chapter, along with the Massachusetts Bar Association and the Worcester County Bar Association, sponsored a dinner at Union Station in Worcester, celebrating the career of the Honorable Charles B. Swartwood, III, Chief United States Magistrate Judge of the District of Massachusetts, on the occasion of his retirement from the bench. At this event, attended by more than 200 people, I was pleased to present Judge Swartwood with an FBA chair on behalf of the Massachusetts Chapter to congratulate him on his many years of service to the federal judiciary. I was particularly pleased that, as part of his very gracious remarks, Judge Swartwood urged all lawyers in attendance to become members of the Federal Bar Association, if they were not members already. I could not have said it any better myself!

On July 11, 2006, the YLD held its Second Annual Summer Kickoff Event for associates and summer associates. This event was held at Ropes & Gray. The Honorable Michael A. Posner, United States District Judge for the District of Massachusetts was the YLD's honored guest. In his remarks, Judge Posner noted that membership in bar associations like the Federal Bar Association are a part of civic life and part of being a professional.

During the last year, the Massachusetts Chapter has also reinstated its popular, "Breakfast with the Federal Bench" series. In December 2005, we hosted a breakfast centered on appellate issues at the federal courthouse with the Honorable Sandra Lynch, United States Circuit Judge for the First Circuit Court of Appeals. In June 2006, the Chapter hosted a breakfast with the Honorable Robert Somma, United States Bankruptcy Judge for the District of Massachusetts, who addressed the new Bankruptcy Act. The Chapter plans additional breakfasts on federal law topics beginning early in 2007. Current topics under consideration for the breakfast series include immigration, admiralty and federal criminal law topics. If you have other topics that you would like addressed in the "Breakfast with the Federal Bench" series, please let us know.

Finally, the Massachusetts Chapter asks you to save **Wednesday, January 24, 2007** for its annual judicial reception for the federal court. This year's event will take place at the Seaport Hotel in South Boston from 6 pm to 8 pm on January 24th. At the reception, the Massachusetts Chapter will honor Judge Patti B. Saris for her many years of service to the judiciary and the Bar. For information concerning tickets and firm sponsorships of this event, please contact Lori Doherty at ldoherty@goulstonstorrs.com. You may also monitor the Chapter's website at <http://www.fedbar.org/Massachusetts.html> for more information on this and other upcoming events.

This is a period of great activity and much excitement in the Massachusetts Chapter of the Federal Bar Association. With the addition of so many of new, enthusiastic members, the Chapter is infused with new energy and fresh ideas. We encourage you to join us.

I wish you and your families all the best for a joyful holiday season and a healthy and prosperous New Year.

Neil V. McKittrick is a Director at the law firm of Goulston & Storrs. President of the Massachusetts Chapter of the Federal Bar Association.



NEW RULES REGARDING ELECTRONIC DISCOVERY

The new rules regarding electronic discovery in the federal district for Massachusetts took effect **December 1, 2006**. The new rules affect several different areas, including Rules 16 and 26 (f), Rule 16(b), Rule 34 and Rule 37 of the Federal Rules of Civil Procedure. Excellent materials regarding these new changes are available through Suffolk University Law School's Center for Advanced Legal Studies, including a comprehensive manual entitled, E-Discovery Under The New Federal Rules. For more information on how to obtain these materials, please contact 617-573-8627 or www.law.suffolk.edu/als.

Save the Date!

Annual Judicial Reception

January 24, 2007

The FBA's Annual Judicial Reception will be held on Wednesday, January 24, 2007 from 6 pm to 8 pm at the Boston Seaport Hotel. The event will honor the Honorable Patti Saris for her service to the Federal Judiciary and the Federal Bar Association.

For more information or any questions, contact:
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From the
DISTRICT COURT

Proposed Amendment of Local Rule 204

Pursuant to the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (Pub. L. No. 109-08, 119 Stat. 23) and the exigent need for numerous changes to the rules governing bankruptcy cases, the Judges of the United States District Court determined to amend Local Rule 204 to allow the bankruptcy court to promulgate local rules as needed. The court has determined pursuant to 28 U.S.C. § 2071(e) that there is an immediate need for this amendment to the Local Rules. Comments on the amendment to Local Rule 204 were due by October 16, 2006.

The proposed Amendment reads as follows:

“Pursuant to Rule 9029(a) of the Federal Rules of Bankruptcy Procedure, the judges of the bankruptcy court for the District of Massachusetts are authorized to make and amend rules of practice and procedure as they may deem appropriate, subject to the requirements of Fed. R. Civ. P. 83. A certified copy of any rules and/or amendments as adopted by the judges of the bankruptcy court, together with

a copy of the notice and all comments received regarding the rule, shall be provided to the Clerk of the District Court within 14 days of the date adopted. Once each year, the judges of the district court will review all changes to the local rules of the bankruptcy court. If, after review, the judges of the district court determine that modifications need to be made to any rule, a report will be provided to the judges of the bankruptcy court by March 31.

Adopted May 6, 1997; effective August 1, 1997; Amended effective September 15, 2006.

We invite submissions of articles for publication in future newsletters.

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Electronic Filing Mandatory in Western Division

The Court has announced that Local Rule 5.4 shall apply to the Western Division of the United States District Court for the District of Massachusetts. Local Rule 5.4 makes man-

datory, with limited exceptions, the electronic submission of all filings in the District Court “unless exempt or otherwise ordered by the court.” This rule takes effect January 1, 2007.