



# THE MASSACHUSETTS CHAPTER OF THE FEDERAL BAR ASSOCIATION

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## President's Column

*by Michelle I. Schaffer*

We have had a flurry of activity over the last several months and have exciting events planned for our Chapter. I hope that this summary will entice you to come to an upcoming event, to join a committee in your area of practice or to suggest to us how we can make the Chapter more relevant.

Our Breakfast with the Bench series is a unique opportunity to hear from members of the judiciary on a variety of federal practice topics in an intimate setting that fosters interesting dialogue between the bench and the bar. On November 5, 2013, Judge William S. Young held an open discussion with those in attendance about practice in the District of Massachusetts, directing questions and gathering insights from members of the bar about court practices that work and those that do not. On February 3, 2014, Judge Richard G. Stearns shared his views and answered questions about expert issues that arise in patent and other matters. March 3, 2014 featured Judge Timothy S. Hillman speaking on electronic evidence. Consider joining us on April 2, 2014 when Magistrate Judge Marianne B. Bowler speaks on mediation practices. I am confident that you will leave the program with a new insight and will find value in the interaction with other members of the Chapter.

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On January 16, 2014, we were honored to have the President of the Federal Bar Association, Judge Gustavo A. Gelpi from the District of Puerto Rico and Magistrate Judge Bowler participate in a panel discussion at Suffolk Law School, sharing their career paths and addressing the group on assorted civil and criminal federal practice topics. Our Chapter also has had the privilege in the last few months of co-sponsoring educational programs with New England Law School, Suffolk Law School, the Massachusetts Bar Association and the Boston Bar Association which allows us to bring to our members more diverse programming often at discounted rates.

Our Young Lawyers Division initiated the Brief Bites Luncheon series on December 10, 2013 featuring FBA members Eve A. Piemonte-Stacy and Scott P. Lopez discussing federal civil and criminal career options and on February 26, 2014, Magistrate Judge Judith G. Dein spoke to the group about courtroom etiquette and related matters. The YLD is in the process of planning social events, working with the law schools on interview techniques, and philanthropic work. We encourage those in practice fewer than three years or under the age of 36 to join the YLD and participate in their events. Come experience the social, educational and networking opportunities.

For our members in the Western Divisions, I encourage you to join your colleagues and participate in the events taking place in those divisions. Members of the Springfield Division had the opportunity on December 11, 2013 at the law firm Bulkley Richardson to network and hear from Judge Michael A. Ponsor on the state of the Court and case handling there. The Worcester Division, with the support and participation of Judge Hillman and Magistrate Judge David H. Hennessey has held bi-monthly events for their members with the most recent event being a tour of the courthouse followed by a social gathering in Judge Hillman's chambers.

Upcoming events in the planning stages include a seminar, planned jointly with the Court about the use of Technology in the Courtroom to be held at the Federal Courthouse on April 16, 2014 and a program to celebrate the anniversary of the Civil Rights Act of 1964 to be held on April 28, 2014. Please contact us with your suggestions on educational programming – we want to make this organization responsive to your interests and practice areas.

We were very pleased to have launched within the Massachusetts Chapter the Solace program (acronym for Support of Lawyers/Legal Personnel—All Concerned Encouraged). To that end, our Chapter has joined with other Chapters and organizations around the country to provide a network for those in the community to use email as a means

of reaching out to others who may be in a position to help them in times of need. Thank you for being available to help lawyers, their families and administrative staff around the country through this network.

On December 4, 2013, the Chapter partnered with the Massachusetts Black Lawyers' Association to hold a Job Interviewing Skills Workshop for ex-offenders involved in the Care and Restart Programs. Volunteers provided participants with job interview training through mock interviews. We will be holding a second program in the coming months. I encourage you to take part in this special community service program.

The Chapter is looking to form committees reflective of the practice areas which correspond to National's Sections, to provide networking opportunities and programming for Chapter members in those practice areas. If you are able to take on a leadership role or otherwise would like to become involved in practice area committee work, please contact me. We are hoping over time to establish committees that will include, Admiralty Law, Alternative Dispute Resolution, Bankruptcy Law, Banking Law, Civil Rights Law, Criminal Law, Environment Energy & Natural Resources, Federal Litigation, Government Contracts, Health Law, Immigration Law, Indian Law, Intellectual Property, International Law, Labor & Employment Law, Taxation, Securities Law, Social Security Law, State and Local Government Relations, Transportation & Transportation Security Law and Veterans & Military Law.

Finally, our Annual Judicial Reception honoring Magistrate Judge Robert B. Collings, for his dedicated service to the judiciary, the bar and the community that the Court serves will be held on June 9, 2014 at the Boston Harbor Hotel. Please save the date and plan to join us for this special event. Sponsorship opportunities and individual tickets are available now.

Join your colleagues and get involved in our Chapter activities to help us make a difference. We look forward to seeing you at an upcoming event!

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

## SPRINGFIELD DIVISION: RECEPTION FOR JUDGE MICHAEL PONSOR

by Nathan A. Olin, Connor, Morneau, & Olin LLP

On December 11, 2013, the Massachusetts Chapter of the Federal Bar Association hosted a reception and conversation with District Judge Michael Ponsor at the Springfield offices of Bulkley, Richardson & Gelinas, LLP. The event was organized by Board Member and Springfield designee, Attorney Nathan Olin, of Connor, Morneau & Olin, LLP, with able assistance of Attorneys John Pucci and Jeffrey Poindexter of Bulkley Richardson.

Over forty attorneys and guests joined chapter members for a discussion of FBA issues accompanied by a dialogue with Judge Ponsor about the state of the district's Western Division. According to Olin, the event was a "huge success" which accomplished a variety of goals. "First, we were able to re-introduce the fantastic work of the FBA, particularly the Massachusetts chapter, to many of the region's most prominent federal litigators." Also, Olin continued, Judge Ponsor, who took senior status in 2011, "provided a perfect signature moment; he reflected on his thirty years

on the bench, discussed important transitions taking place in the Western Division, and offered insight and humor as a newly-published fiction writer." Judge Ponsor's first book, *The Hanging Judge: A Novel*, was recently released on Amazon.com and Pucci introduced the judge by reading several of the novel's warm reviews.

In addition to Ponsor, other notable guests included Kenneth Neiman, magistrate judge, Bethaney Healy, the clerk's office divisional chief, Jesse Gomes, supervisor of the Springfield probation office, several assistant United States attorneys, and Barry Ryan, president of the Hampden County Bar Association. Also in attendance was Hampden County district attorney Mark Mastroianni, who was recently nominated by President Obama to fill Ponsor's seat. The late-afternoon dialogue was accompanied by holiday food and drink graciously provided by the reception committee at Bulkley Richardson.

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**Pictured:** Massachusetts Chapter members attend the reception for Judge Michael Ponsor on December 11, 2013. **(left)** Magistrate Judge Kenneth P. Neiman, Francis D. Dibble, Jr. of Bulkley, Richardson & Gelinas, LLP, and Judge Michael A. Ponsor. **(right)** Betsy Stevens, Health New England, Kenneth P. Neiman, United States Magistrate Judge, Jeffrey S. Morneau, Connor, Morneau & Olin, LLP, James C. Duda, Bulkley, Richardson & Gelinas, LLP, Keith A. Minoff, Law Offices of Keith A. Minoff, P.C., and Bethaney Healy, Western Massachusetts Divisional Manager, United States District Court



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## UPDATES FROM THE CLERK'S OFFICE

by Robert J. Farrell

**COURT NEWS:** District Court Judge Rya W. Zobel has advised President Obama that on April 1, 2014, she intends to retire from regular active service as a United States District Court Judge. She also advised the President that she intends to continue to serve as a senior judge.

When Judge Zobel was appointed in 1979, she became the first female judge of the District Court in Massachusetts, and remained the only female judge for fifteen years until 1994. A graduate of Radcliffe College and Harvard Law School, she served as a law clerk to Chief Judge George C. Sweeney before practicing law for a number of years with Hill & Barlow. In 1976, she became a partner at Goodwin, Procter & Hoar, specializing in matrimonial law.

Chief Judge Patti B. Saris said: "Judge Zobel is beloved as a trial judge because of her pragmatism, creativity, fairness and sheer intelligence. Back in the days when only thirteen judges of the federal bench nationwide were female, Judge Zobel was a role model for all young female litigators hoping someday to become federal judges. Her appointment has made a huge difference in the perception of equal justice in the courts."

In 1995, Judge Zobel served as the seventh director of the Federal Judicial Center in Washington, DC, until July 1999. The Center trains federal judges and court employees throughout the United States. She has served as chair of the Judicial Conference Committee on Automation and Technology, the Committee on the Operation of the Jury System and the Committee on Judicial Improvements. She was recently appointed to the Committee on Financial Disclosure.

Judge Zobel has been a member of Harvard University's Board of Overseers, a governor of the Handel and Haydn Society in Boston, a trustee of the New England Deaconess Hospital, and a director of the United Way of Massachusetts Bay. She was an Adjunct Lecturer in Public Policy and Visiting Fellow at the John F. Kennedy School of Government. She won the prestigious Margaret Brent Award for leadership in the profession and mentoring other lawyers.

## SCAM EMAILS ABOUT PHONY COURT CASES CARRY COMPUTER VIRUS

The federal judiciary has learned of an email scam, in which emails purporting to come from federal and state courts are infecting recipients with computer viruses. According to the Security Operations Center of the Administrative Office of the U.S. Courts, the emails are instructing recipients to report to a hearing on a specified day and time. The emails also instruct recipients to review an attached document for detailed case information. When the attachments or links in the email are opened, a malicious program is launched that infects the recipient's computer. Several state courts have reported similar schemes, and also are warning the public about potential viruses.

Unless you are actively involved in a case in federal court and have consented to receive court notifications electronically, you generally will not be served with court documents electronically. If you receive an email regarding a federal court case or matter of which you are unaware that is purported to be from this district court, you should contact the CM/ECF help desk at 866-239-6233 before opening any attachments or links. You may use the court locator ([http://www.uscourts.gov/court\\_locator.aspx](http://www.uscourts.gov/court_locator.aspx)) to find contact information for other federal courts.

**CM/ECF NEWS:** The Clerk's Office has recently created a number of e-learning modules for our CM/ECF users. Those modules may be found at <http://www.mad.uscourts.gov/training/cmecf-training.htm>.

**TECHNOLOGY IN THE COURTROOM:** With the assistance of the Massachusetts Chapter of the Federal Bar Association, the court is planning another "Technology in the Courtroom" seminar set for **April 16, 2014** at the John Joseph Moakley Courthouse in Boston. We will offer sessions on using the court's electronic presentation equipment found in most courtrooms, using the Jury Evidence Recording System (JERS), and a few concurrent sessions on other topics of interest to our bar.

Technology sessions will be scheduled in Worcester and Springfield as well. More information will be made available on the court's website in the weeks to come.

## EVENTS



**(Left)** The Young Lawyers' Division Board hosts the Brief Bites Lunch Series with Magistrate Judge Judith Dein on February 26, 2014. Pictured (from left): Erika Reis, Andrew Jacobs, Michelle Hinkley, Jennifer Ioli, Magistrate Judge Judith Dein and Steve Hansen.

**(Right):** Ken Parker, Michelle I. Schaffer and Shaun Keough attend the 15<sup>th</sup> Annual Walk to the Hill for Civil Legal Aid on January 30, 2014, a joint program sponsored by the Equal Justice Coalition and others.



**(Left)** The Suffolk University Law School Chapter of the FBA hosted a panel discussion with Judge Gustavo A. Gelpi and Magistrate Judge Marianne B. Bowler on January 14, 2014. Pictured (from left): Suffolk University Law School Student Stephanie Alleman, Massachusetts Chapter President Michelle Schaffer, Magistrate Judge Marianne Bowler, Judge Gustavo Gelpi, and New England School of Law Student Kelsey Baran

**(Right):** On February 3, 2014, the Massachusetts Chapter hosted the well-attended "Breakfast with the Bench" with the Honorable Judge Richard G. Stearns on the topic "Trial Practice: Working with Experts from *Daubert* to *Markman* and More." Pictured (from left): Chapter President Elect Lisa Tittlemore, Chapter President Michelle Schaffer, Judge Richard Stearns, Co-Vice President for the First Circuit Christopher Sullivan, and Clerk Robert J. Farrell.

## PROF. ELIZABETH KRONK WARNER DISCUSSES FEDERAL INDIAN LAW

By Jessica Packineau

On November 22, 2013, Hon. Elizabeth Kronk Warner, Associate Professor of Law at The University of Kansas School of Law, presented an introduction to Federal Indian law at a brown bag lunch event hosted by Sherin and Lodgen of Boston. Professor Kronk Warner is a citizen of the Sault Ste. Marie Tribe of Chippewa Indians and is an appellate judge for the Sault Ste. Marie Tribe of Chippewa Indians Court of Appeals in Michigan. She recently served as chair of the Federal Bar Association Indian Law Section and now serves on the Association's board of directors. Professor Kronk Warner has published extensively in the areas of environmental and indigenous law.

Professor Kronk Warner's discussion began with an introduction of the parameters of tribal sovereignty as articulated in the three seminal cases regarding tribes, the "Marshall Trilogy": *Johnson v. MacIntosh*, 21 U.S. 543 (1823); *Cherokee Nation v. Georgia*, 30 U.S. 1 (1831); and *Worcester v. Georgia*, 31 U.S. 515 (1832). These cases establish the doctrinal framework of tribes as "domestic, dependent nations" not subject to state law, but subject to federal authority and thereby retaining limited inherent sovereignty. This semi-sovereign status burdens the federal government with a trustee duty to tribes as "wards" through, for example, holding ultimate title to tribal land leaving the "right of occupancy" with tribes.

Upon this foundation, Professor Kronk Warner addressed the current framework for the criminal and civil jurisdiction that remains with today's 566 federally recognized tribes. For this analysis, an understanding of what constitutes an "Indian" and "Indian Country" is necessary – federal law defines both terms of art. Critically, however, tribal law defining tribal jurisdiction, citizenship and sovereignty also impact the analyses pertaining to any particular tribe. Tribal law, federal Indian policy, decisional law, and intergovernmental relations are dynamic and complex. Hot topics such as sovereign immunity, recent Supreme Court decisions and trends in federal policy towards expanding tribal self-determination (such as the Violence Against Women Reauthorization Act of 2013) were also discussed. Professor Kronk Warner answered questions pertaining to Massachusetts' tribes and the topical issue of gaming. We are grateful that she was able to share her extensive knowledge with us.

## BRING ON THE LAW STUDENTS: ESTABLISHING STUDENT FBA CHAPTERS IN THE GREATER BOSTON AREA

By Kelsey Baran, New England School of Law

Within the past two years, the Massachusetts Chapter of the Federal Bar Association has begun reaching out and establishing a presence in the local law schools. As the academic year began in September 2013, three student chapters of the Federal Bar Association had been successfully founded in the Greater Boston area. By the beginning of the spring semester this January, a fourth law school has tentatively joined the ranks of student FBA chapters. Suffolk University Law School, New England Law | Boston, Northeastern University School of Law, and most recently, Boston College Law School, have established student run executive boards.

The student chapter executive boards are expected to plan and present events, mixers, and roundtable discussions throughout each academic year. These events are intended to introduce Massachusetts law students to the variety of careers that can be found within the scope of federal practice, in addition to highlighting the excellent opportunities and advantages that are associated with being a member of the FBA. Moreover, these events will allow the FBA student members the unique chance to meet and mingle with the practitioners and judges here in the District of Massachusetts, many of whom are also members of the FBA. Most recently, the student FBA chapters have been given the opportunity to attend events hosted by the Young Lawyers Division, which provides an exclusive opportunity to socialize and learn from those who were most recently law students themselves.

The Suffolk Law School Chapter hosted a panel discussion that featured Judge Gustavo Gelpi from the District of Puerto Rico and Magistrate Judge Bowler. Additionally, the New England Law Boston Chapter hosted a Maritime Law Panel Discussion in mid-November featuring Attorney David Smith and Attorney Olaf Aprons, both from Boston. This event focused on the practice of maritime law here in Massachusetts and gave students a greater insight into this very particular form of federal law.

## JUDICIAL BREAKFAST SERIES: JUDGE STEARNS TALKS TRIAL PRACTICE

By Sharona H. Sternberg, Sunstein Kann Murphy & Timbers LLP

On February 3, 2014, the FBA Massachusetts Chapter hosted the well-attended “Breakfast with the Bench” with the Honorable Judge Richard G. Stearns on the topic “Trial Practice: Working with Experts from *Daubert* to *Markman* and More.” Judge Stearns shared insight on the role of experts in Federal Court and the effectiveness of expert reports and testimony.

Judge Stearns noted that experts are often critical to helping judges understand the technical and scientific issues involved in patent cases, particularly with regard to *Markman* decisions regarding patent “claim construction.” Although he expressed skepticism about whether patent claim construction is really an issue of law that should be decided by a judge, Judge Stearns recognized that the more we rely on *Markman*, the more indispensable expert testimony becomes.

Judge Stearns also discussed the practical ramifications of the Supreme Court’s interpretation of the Confrontation Clause with regard to expert testimony. He questioned how many layers of expert testimony are required before being satisfied with the conclusions. He provided an example of DNA testing, asking whether strict adherence to the Confrontation Clause would demand the testimony of the actual person of the lab who performed the testing.

Judge Stearns additionally discussed the pros and cons of taking expert depositions, as they can drive up litigation costs and sometimes can have the undesired effect of assisting an adversary by preparing the expert for cross examination. Expert depositions should also be evaluated regarding whether they create a record of testimony which will allow an adversary to convince the court to permit broader testimony at trial than what otherwise might have been permitted based on the expert’s report alone.

Judge Stearns led a discussion involving the effectiveness of *Daubert* motions and encouraged practitioners to take more advantage of *Daubert* to probe an expert’s methodology and qualifications.

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As the spring semester moves forward the student chapters are planning to host several more events that all FBA members are invited to attend. To kick things off, we held a mixer bringing together all four of the student chapters in the hopes of increasing support and interaction between the individual law school chapters. Additionally, the NELB chapter has plans to host a Patent specific informational round-table event in late March. The Boston College chapter will hold its first informational and welcome meeting. The student chapters are eager for participation and attendance by FBA members, so please feel free to attend any and all student held events!

Aside from the three pre-existing Student FBA Chapters, and the newest fledgling chapter, the Law School Committee plans to reach out to Boston University School of Law, Harvard Law School, and Western New England School of Law in the hopes of establishing student chapters in these institutions as well. Ideally, the Law School Committee would like to establish a foothold in each of these institutions by the end of the academic year so that student chapters can hit the ground running at the beginning of the 2014-2015 academic year.

The Law School Committee is looking forward to continuing on with the success that was achieved during its first year by continuing to expand and promote the message of the FBA throughout the multiple law schools of Massachusetts. If anyone has any suggestions or would like to help at either their alma mater or at any of the participating law schools, please contact Kelsey Baran, Law School Committee Student Representative, at [Kelsey.A.Baran@nesl.edu](mailto:Kelsey.A.Baran@nesl.edu).



## I'VE GOT A HUNCH YOU'RE STEALING MY INVENTION: LOW STANDARDS FOR ALLEGING PATENT INFRINGEMENT

By Joel Leeman, Sunstein Kann Murphy & Timbers LLP

The Federal Circuit, the appeals court for all patent litigations, has given its blessing to the no-frills complaint that has become standard in infringement lawsuits. The court bucks recent judicial trends of mandating more detailed pleadings in support of claims for relief.

Patent litigation, for all its knotty complexities and notoriously high cost, is typically launched with a complaint of surprising sparseness. The patent owner need only say he owns a specific patent and that the defendant is infringing it by making, selling and/or using a device or method that practices the patent. Indeed, an appendix to the rules of civil procedure includes a sampler of complaints for a dozen different situations, all intended, in the words of Rule 84, to “illustrate the simplicity and brevity that these rules contemplate.” Form 18 is a complaint for patent infringement laid out in a mere four paragraphs.

Sometimes, parties on the receiving end of an infringement complaint feel frustration when the lack of detail leaves them wondering how precisely they are thought to be infringing. Two such defendants, Time Warner and DirecTV, persuaded a federal judge in Los Angeles to dismiss an infringement complaint from K-Tech Telecommunications for failure to state a claim. It’s not enough, said the judge, that K-Tech thinks the defendants “must” be infringing. Even though the complaint met the bare-bones criteria of Form 18, the judge faulted K-Tech for not explaining why it believed the two defendants were practicing K-Tech’s patented method rather than some alternative method that did not infringe.

In *K-Tech Telecommunications v. Time Warner Cable*, the Federal Circuit stood up for traditional modes of pleading, holding that the law does not require a patent owner to identify the devices or methods that are believed to be infringing. It follows that a plaintiff need not exclude the possibility that the defendant is using a noninfringing alternative.

This ruling was essential to K-Tech’s ability to sue, because the company did not know where Time Warner and DirecTV’s infringement was happening or through what devices. K-Tech’s patent protected a method of translating digital television signals, and the Federal Circuit was sensitive to the fact that the defendants’ manner of translating signals was not discernible. “A defendant cannot shield itself from a

complaint for direct infringement,” said the court, “by operating in such secrecy that the filing of a complaint is impossible.”

The court’s ruling has significant implications. It is fair play for a patent owner who has a solid hunch that someone is infringing his patent to sue that party, even if he does not know exactly how infringement is occurring. He can try to substantiate his hunch by investigating the defendant’s practices in pretrial discovery. Patent owners have often felt hemmed in by Rule 11 of the rules of civil procedure, which requires a plaintiff to have an evidentiary basis for bringing suit. Going off half-cocked exposes a plaintiff or its attorney to sanctions. The *K-Tech* opinion, along with other precedents, emboldens patent owners to shoot first and ask questions later. The court warns only that a patentee can still be liable for violating Rule 11 if he ignores “easily ascertainable evidence of noninfringement through appropriate pre-suit investigation.”

*K-Tech* also resolves some uncertainty that had lingered in the wake of two U.S. Supreme Court cases that established new rules for the sufficiency of pleadings. In *Bell Atlantic v. Twombly* (2007) and *Ashcroft v. Iqbal* (2009), the Supreme Court authorized federal trial judges to throw out a complaint if it does not set out a claim to relief that is “plausible on its face.” This development has widely been interpreted to require a more detailed recitation of facts, lest the plaintiff see his complaint dismissed. Many commentators worried (or rejoiced) that plaintiffs must now invest resources in pre-lawsuit investigations rather than acquire necessary facts through pretrial discovery.

In *K-Tech*, the Federal Circuit flatly states that, if any conflict exists between the Supreme Court’s pleading guidelines and the minimalistic forms authorized by the rules of procedure, “the Forms control.” The court acknowledges that a patentee remains obligated to alert the defendant to what activity or device is accused of infringement. However, if the patentee has a good-faith reason for believing that infringement has occurred, but does not know how, he can file his lawsuit and search for answers afterwards. *K-Tech* should lower a patent owner’s inhibition over the adequacy of his complaint. A patent owner will feel freer to forge ahead with a lawsuit under circumstances where once he might have held back because he could not say for sure how the patent was being infringed.

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### **BREAKFAST WITH JUDGE STEARNS...**

He noted that the level of disclosure required by judges dramatically varies and urged judges to adhere to Federal Rule 26 more closely to require more rigorous disclosures by experts.

Judge Stearns also spoke about what makes the most effective experts, stating that juries are most convinced by enthusiasm for the subject, credibility, and most importantly, the ability to teach. He explained that he has found that the best experts are often professors who can explain complicated ideas to laypeople without appearing defensive or patronizing. Experts are most credible when they admit what they do not know and are willing to acknowledge possibilities even while explaining why they are remote. Judge Stearns noted that juries are not surprised to learn that an expert is being paid, but juries will be wary of experts who have testified too often on too many different topics.

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### **WORCESTER DIVISION UPDATE: INTRO TO THE COURTHOUSE**

On January 9, 2014, the Worcester Division of Massachusetts Chapter of the FBA hosted a tour of the Federal Court in Worcester. The goal of the tour was to introduce and orient lawyers who do not have significant experience in the Worcester federal court. The attendees, many who learned about the FBA for the first time, were introduced to key courthouse personnel and toured the Clerk's Office, Probation and Pretrial Services, the U.S. Attorney's Office, and the Marshall's Office. The tour concluded with a discussion of federal practice lead by Judges Hennessey and Hillman followed by a reception in Judge Hillman's chambers. The event was extremely well received, and was a terrific opportunity to get acquainted with the Worcester Federal Court.

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### **CARE/RESTART PROGRAMS**

On December 4, 2013, numerous federal practitioners and judges volunteered at the Mock Job Interview Workshop for ex-offenders in the Federal Court's CARE

and RESTART programs. Chief Judge Saris along with Magistrate Judges Sorokin and Hennessy spoke at the event and expressed their appreciation for the FBA's role in coordinating it. The keynote speaker, Vivian Leonard, who is Director of Human Resources at the City of Boston, gave a motivating presentation.

Judge Hennessy - who supervises the RESTART program - followed up with an email after the event to let us know how "helpful it was, especially given the unique challenges the participants face in landing jobs." Our membership came out in record numbers - reflecting a great commitment to service. The Mass Chapter of the FBA partnered with the Mass. Black Lawyer's Association to coordinate the event. Amy Bratskeir and Lisa Maki led our chapter's participation. Look out for another mock interview opportunity - with more probationers this time - coming up in the spring.

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### **BBA-FBA Joint Program: The Art of the Subpoena**

*By Benjamin Stern, Holland & Knight*

On January 7, 2014, the Massachusetts Chapter co-sponsored a CLE with the Boston Bar Association, Federal Practice and Procedure Committee titled "The Art of the Subpoena: Drafting, Responding to and Negotiating the Scope of Subpoenas During Litigation and Government Investigations." Approximately 25 people braved the winter weather to attend the event, which was interesting and informative. The event featured two panels -- one focused on subpoena practice between private litigants, and the other concerning subpoenas from or to government agencies. The audience, which was composed of attorneys of varying ages and backgrounds, was lively and engaged.

The private litigant panel was moderated by Ben Stern of Holland & Knight, and featured Benjamin Brown, Intellectual Property Counsel and Analog Devices, Inc. and Jack Fabiano, of The Fabiano Law Firm. Brown started the discussion by asking the audience to place themselves in the position of a company who received a subpoena seeking documents from many

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years ago. He painted a very visual picture of the state of technology, current events at the time, and even pop culture trends. Given the passage of time and memory, it is often frustrating for companies to search for and collect documents -- even though many companies are trying to do the right thing. For the private attorneys in the audience, he compared responding to a subpoena with filling out time sheets -- something that you need to do, you don't get any "credit for," and which can be a distraction. He urged attorneys issuing subpoenas to companies to "do their homework" and help the company (such as identifying people or specific documents they want), rather than issuing overbroad subpoenas that ask for "the sun, moon, and the stars." Fabiano echoed Brown's sentiments from the practitioner's perspective, suggesting that shorter, focused, and narrowly tailored subpoenas are often the most effective way to get information necessary to your case. Fabiano also bemoaned the practice of some attorneys to issue "kitchen sink" subpoenas. Although he recognized that attorneys cannot always be precise in what they are looking for, he said that requests for "all documents" or using "including but not limited to" formulations are both unhelpful to the recipient of the subpoena and, if challenged in court, may not survive.

The government panel was moderated by Christine Genaitis of Collora LLP, and featured Rua Kelly, Senior Trial Counsel at the SEC, Justin O'Connell, an Assistant United States Attorney, and Danielle Sheer, Vice President, General Counsel and Corporate Secretary of Carbonite, Inc. The discussion started with Danielle explaining that Carbonite, which provides cloud-based backup solutions for individuals and businesses, receives numerous subpoenas from various government agencies. Most seek backups of computers used by individuals and companies being investigated. The number of these subpoenas makes responding very burdensome, both in time and money. One effective strategy Carbonite employs is to post requirements for subpoenas online, so that the issuing agency provides Carbonite with appropriate information to assist in complying. Finally, Sheer developed an internal "play book" that the Carbonite legal staff uses, along with established practices and procedures to streamline the process. Kelly and O'Connell explained, from the government's perspective, why subpoenas to third parties are an essential part of their investigations and often times, grand jury secrecy rules prevented them from providing context and additional information to subpoena recipients.

## THREE THINGS A REAL HOUSEWIFE'S BATTLE CAN TEACH YOU ABOUT PUBLIC RELATIONS STRATEGY

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

One recent high-profile case out of the District of New Jersey serves as a reminder of how to speak publicly about pending cases. While the matter is coming up for trial this April, it is an epic that starts back in 2009 when, seemingly out of nowhere, Teresa Giudice was chosen to be on the eponymous reality television show "Real Housewives of New Jersey."<sup>1</sup> The woman who professed to be unsure of the legality of serving a meatball without sauce almost immediately found herself in a world of legal problems.

First, merely 5 months after purchasing \$120,000 of chateau-style furniture in cash during the season premier, Teresa and her husband Joe filed for Chapter 7 bankruptcy protection, claiming \$11 million in debts.<sup>2</sup> Not long after that came allegations by the bankruptcy trustee of concealing assets and hiding income derived from Teresa's television career, a federal crime. Before an auction to sell their festive belongings was held, they resolved a lawsuit by the trustee, voluntarily agreeing to pay the entirety of their debts.<sup>3</sup> And then, this past July, came a 39 count indictment against the pair in the District of New Jersey, alleging yet more fraud: while in bankruptcy, Teresa failed to acknowledge her Real Housewives income; her husband failed to report \$1 million in income on tax returns over four years; and the two falsified applications to receive loans. A superseding indictment enlarged the total of these loans to roughly \$4.6 million.

Still in the limelight, Teresa and her lawyer have commented about the case. On shows like *Access Hollywood*, *Watch What Happens Live*, and a *Real Housewives* reunion special, Teresa's interviews began with dabs of tears as she discussed her family and staying positive. Then, Teresa denied that the couple ever lived beyond their means and stated that she only understood the nature of the charges from magazines' explanations. Most notably, she posited that *her husband was responsible for handling her finances* (in contrast to recent tabloid reports, however, she will "stand by him to the end").

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THE MASSACHUSETTS CHAPTER OF THE  
FEDERAL BAR ASSOCIATION

Cordially invites you to attend its

**Annual Federal Judicial Reception**

June 9, 2014  
6:00 pm - 9:00 pm  
Boston Harbor Hotel  
Wharf Room, 70 Rowes Wharf  
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(Continued from p. 10)

Her attorney, perched on courthouse steps, did little more than reflect on Ms. Giudice’s personal challenges and stated that she looks forward to the opportunity to clear her name at trial.

**If there is a particularly good reason to speak publicly, you likely cannot:** In our jurisdiction, lawyers must first obtain a client’s consent to speak, unless the information is widely known or has been made available by the client. Mass. R. Prof. C. 1.6(a) & cmts. 5, 5A. Even then, the code of ethical rules governing lawyers – like the ABA model rules adopted by most states – prohibits those involved in litigation or a pre-litigation investigation from speaking publicly if there is reason to believe that publication and material prejudice are substantially likely to result. Mass. R. Prof. C. 3.6.<sup>4</sup> Similarly, the local federal rules prevent lawyers or firms from releasing information that has a reasonable likelihood of dissemination and which would “interfere with a fair trial or otherwise prejudice the due administration of justice.” D. Mass. R. 83.2A.

**These rules are not applicable to parties themselves:** In fact, local federal rule 83.2B – addressed to “litigants in widely publicized or sensational criminal or civil cases” – consists of just one sentence. D. Mass. R. 83.2B. Courts, *sua sponte* or at the request of the parties, can limit discussion that compromises the jury process. *Id.*; cf. Mass Bar Ass’n Ethics Comm’n on Prof’l

**Just because clients can talk about their cases does not make it a good idea:** *Gentile* and *Brown* both noted that appealing to the “court of public opinion” gives some litigants the ability to demonstrate that the matter does not deserve to be tried and thereby obtain a dismissal or a settlement. *See Gentile*, 501 U.S. at 1043; *Brown*, 218 F.3d at 426 n.13. On the other hand, others may find themselves impeached by their own words or harmed by extrajudicial statements of co-defendants – lending support for the theory that these rules protect all parties and the judicial system as a whole. *See Brown*, 218 F.3d at 423-24. This may be especially true for Teresa, who appears in the same indictment as her husband.

In *Bruton v. United States*, 391 U.S. 123 (1968) the Supreme Court recognized that out-of-court statements by a defendant clearly implicating another may result in prejudice that not even jury instructions can cure. Where a defendant takes the stand in court to implicate a co-defendant, the problem is converted to an “antagonistic defense” under *Zafiro v. United States*, 506 U.S. 534 (1993). That precedent recognizes that prejudice occurs where a jury must disregard one defendant’s story to believe the other’s or where a defendant must defend against the prosecutor *and* his testifying co-defendant.

But because of the inefficiencies of holding separate trials, courts set a high bar for complete exclusion of the statements or severance of the charges, raising the stakes of making public comments as a party.

Indeed, Both Teresa and her husband have now asked the court for separate trials on the basis of prejudice of joinder. She claims she would like to testify to her innocence without implicating her husband. Joe has stated that he will provide exculpatory testimony for Teresa, but can only do without incriminating himself if they are separately-tried. The government opposes severance, in part because it asserts that the privilege against adverse spousal testimony is not a fundamental right warranting severance and in part because it considers whether both would testify and what they would say to be speculative. A ruling should be forthcoming. Real drama indeed.

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<sup>1</sup> Before marrying Giuseppe or “Joe,” a contractor with a failing construction business, Teresa is reported to have earned a fashion degree and worked as a cashier at a Macy’s store in the Paramus Park Mall in New Jersey, an associate buyer for the store, and a sales representative for certain accessories brands.

<sup>2</sup> Perhaps only the problem of divorce – roughly twenty have occurred over the life of the franchise – is more endemic than bankruptcy. As just one incredible example, millions watched Teresa fling a set dining table upon her unsuspecting co-star Danielle Staub during the first season finale, prompted by the latter’s reluctance to admit to a prior conviction for kidnapping and cocaine possession. At the time, Teresa was allegedly concealing information in the bankruptcy proceedings, which would give rise to the criminal case against her. Three years after the incident, Ms. Staub not only filed for bankruptcy herself, but was accused of concealing assets during those proceedings.

<sup>3</sup> By this point, even without the discharge, Teresa had produced a cookbook called “Fabulicious,” a line of bellini-inspired pre-mixed drinks under her “Fabellini” label, and a website located at “www.tgfabulicious.com,” where she endorsed a line of hair care products promising to give dry hair the “star treatment.”

<sup>4</sup> The rule on “Trial Publicity” – which has been cited by only two ethics opinions and a handful of cases, notably *PCG Trading, LLC v. Seyfarth Shaw, LLP*, 460 Mass. 265 (2011) – counsels that extrajudicial statements are less suspect where they are in response to information made public by another source. Mass. R. Prof. C. 3.6(c) & cmt. 13. A safe harbor also exists for discussing the basic features of the case, such as the names of the parties, the nature of the claims, the fact that an investigation is under way, and the result of court decisions. *Id.* at 3.6(b) & cmt. 4. Conversely, the risk of prejudice is greater where statements involve opinions of witness credibility, the probative value of physical evidence, evidence that would be inadmissible at trial, and the like. *Id.* at cmts. 5-6, 8, 10. In criminal cases, sensitive topics include any statements the defendant has made, as well as other things likely to suggest guilt – the possibility of a plea bargain, the defendant’s refusal to testify in his defense, discussion of the charges without an explanation that they are mere accusations that must be established, or the attorney’s opinions of guilt or innocence. Mass. R. Prof. C. 3.6 cmts. 5, 7, 9, 11. Because of the threat of incarceration, “prejudice” is viewed more capaciously in the criminal context, although the rules permit discussion of the identity and residence of the accused, information to aid in apprehension of a suspect, details of the arrest, and the names of those involved in performing the investigation. *Id.* at 3.6(b)(7) & cmt. 12.

## VIEW FROM THE BENCH: PANEL DISCUSSION WITH JUDGE GELPI AND MAGISTRATE JUDGE BOWLER

*By Kelsey Baran, New England School of Law and Stephanie Alleman, Suffolk University Law School*

As the law students of the Greater Boston area began arriving back to the city for the beginning of the spring semester and as practitioners were returning from holiday vacations, they were all presented with a unique and exciting opportunity. On the evening of January 16, 2014, the Suffolk University Law School Chapter of the Federal Bar Association held a panel discussion that featured Judge Gustavo A. Gelpi and Magistrate Judge Marianne B. Bowler. The event, which was open to law students and practitioners alike, featured a candid discussion during which the judges discussed their careers in the federal legal system, experiences of sitting on a federal bench, and general advice for practitioners. Those in attendance were given an exclusive look into the world of federal judges that was both insightful and wonderfully entertaining.

The evening began with Judge Gelpi introducing himself as both a U.S. District Court Judge from the District of Puerto Rico and the President of the National FBA. This marked the second year in a row that Judge Gelpi has traveled to Boston and set-aside time to speak with Boston's FBA community, specifically the law students. He explained his career path leading up to his appointment to the federal bench in Puerto Rico. Judge Gelpi also spoke to the specific issues that District Court judges tackle every day and how the dockets in Puerto Rico differ from other districts. Specifically, Judge Gelpi impressed upon the audience how the District of Puerto Rico faces a great deal more criminal cases than many other federal districts.

Following Judge Gelpi, Magistrate Judge Bowler introduced herself and spoke about her career and her path to the federal bench. She explained the evolution of her career as an ADA in Massachusetts' Middlesex County and transitioned to the United States Attorney's office. Judge Bowler then spoke about her 1990 appointment to become a Magistrate Judge in Massachusetts, focusing on some of the cases over which she presided, including her responsibility for handling the widely known DES cases from 2004-2010.

Judge Bowler spoke specifically about her assignment to handle cases that contained a great deal of scientific concepts due to her background in biochemistry and how having a niche brought several unique opportunities to her.

Much of the evening's discussion focused on the electronic case filing system being used in the federal court system. Both Judge Gelpi and Magistrate Judge Bowler told the audience how this system has improved the efficiency of filing paperwork in the federal courts, but also how it has helped the judges to more easily access and process case filings. Both judges expressed the benefits of being able to access motions and documents from any device with internet access at all times of the day and night! However, they did warn everyone that e-filing should not be treated as an informal and hasty way to respond to opposing counsel.

In line with this conversation of properly using the e-filing systems, Judge Gelpi and Judge Bowler took the time to address the issue of civility in the courtroom. Attending law students and attorneys heard about the judicial perspective of attorneys who display a lack of civility towards their fellow counsel, witnesses and the judicial procedures as a whole. They both stressed the importance of portraying a sense of civility in the courtroom, if not camaraderie, to allow for proceedings to run more smoothly and to portray the important image of stability for the benefit of the general public.

Another topic of the event was Alternative Dispute Resolution. The judges spoke about the importance and increasing the usage of ADR techniques – mainly mediation – in civil cases filed in the federal courts. They both impressed upon the audience the importance of attempting to resolve matters using such ADR techniques as a way to reduce litigation time and costs so as to benefit all parties involved in cases. Judge Bowler in particular mentioned the use of ADR when dealing with the DES cases and the success she achieved using mediation in these circumstances.

At the conclusion of the event those in attendance were invited to join Judge Gelpi and Judge Bowler at a reception. During the reception audience members were given the chance to meet the judges and speak with them in a more informal setting. About sixty people attended the event and thirty-five people stayed for the reception. This panel discussion was a great success by providing the Greater Boston legal community the unique opportunity to meet Judge Gelpi and Judge Bowler in a more casual setting.

## JUDICIAL BREAKFAST SERIES: JUDGE HILLMAN ON ADMITTING ELECTRONICALLY STORED INFORMATION INTO EVIDENCE

By Lisa M. Titemore, Sunstein Kann Murphy & Timbers LLP

On March 4, 2014, the FBA's Massachusetts Chapter hosted another well-attended "Breakfast with the Bench" seminar. The program featured comments by the Honorable Timothy Hillman on the topic "Admitting Electronically Stored Information into Evidence."

Judge Hillman shared insights into the issues facing courts and litigants with respect to electronic evidence such as website content, email, SMS/text messages, blogs, chat rooms and social media (e.g., Facebook, Twitter). Providing a somber overview for these issues, it was noted that use of evidence from chat rooms is a "big" issue in criminal prosecutions involving child pornography.

Judge Hillman's comments included extremely informative PowerPoint slides which he used to discuss various hypothetical situations involving the admissibility of electronic evidence centering on a fictitious lawsuit. Providing color for the rules-based discussion, Judge Hillman presented a fact pattern involving a dispute between a "chess master" and the creators of a chess playing computer which the chess master alleged cheated him in a series of chess matches.

Judge Hillman pointed the bar to case law addressing the issue, including *Lorraine v. Markel American Insurance Co.*, 241 F.R.D. 534 (Maryland 2007), which he described as a "tutorial" on electronic evidence. While noting that the case is long (90 pages), he explained that many judges are familiar with the decision and use it when evaluating these issues. The applicability of the Federal Rules of Evidence on relevance, authenticity, hearsay, best evidence and prejudice were all explored as the group considered the challenges created by electronic evidence. Judge Hillman noted that Rule 901 is where the "rubber hits the road" on these issues. Numerous other applicable rules were discussed, including but by no means limited to Rule 902(5), 902(7) and 902(11) relating to self-authenticating for ESI.

Judge Hillman discussed the application of a "totality of the circumstantial evidence" analysis, specifically noting the use of hash values attributed to electronically stored information ("ESI") and "meta data." Judge Hillman noted the expert role

in the use of evidence involving hash values, and noted that this type of authentication came up more often in the criminal context, while the use of meta data was more common in civil cases.

Judge Hillman noted the benefits of stipulations with opposing counsel regarding authenticity as well as the use of Federal Rule of Civil Procedure 36 (request for the adverse party to "admit to genuineness"). Judge Hillman stressed that authentication is a gating issue, and the hearsay rule requires a separate analysis. He noted that he has seen these issues improperly conflated by counsel. While noting that the analysis often can be done on a "gut" level once sufficient experience is acquired, a proper analysis requires going back to the rules of evidence and civil procedure and working it through.

The program provided the participants an opportunity to have specific questions answered with respect to real world application of these issues. Judge Hillman was very generous with his time and willingness to share his experience.

### **SAVE THE DATE!**

The Massachusetts Chapter  
Commemorates the 50th  
Anniversary of the Civil Rights Act

**April 28, 2014 at the Moakley  
Federal Courthouse**

Legal scholars will discuss this  
landmark federal law, the  
progress made, and challenges  
that remain

**Speakers include The  
Honorable Gustavo A. Gelpi,  
FBA President and Civil Rights  
Professor**

Scheduled for 4pm in the Jury  
Assembly Room

*Invitations and details to follow*

## MASSACHUSETTS CHAPTER JOINS WITH MBA IN LAUNCHING SOLACE PROGRAM

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

In February 2014, the Massachusetts Chapter of the FBA, in conjunction with the Massachusetts Bar Association, initiated a program in Massachusetts designed to facilitate the provision of assistance to members of the Commonwealth's legal community in need of help. The program, called SOLACE (an acronym for "Support of Lawyers/Legal Personnel - All Concern Encouraged"), was founded several years ago by the Honorable Jay Zainey, United States District Judge for the Eastern District of Louisiana, and provides a support network consisting of attorneys and other legal professionals and personnel to members of the legal community, including attorneys, court personnel, paralegals, and other support staff.

Participants in the program receive emails from the local SOLACE Program coordinator describing a request for assistance from another member of the legal community; members able to provide the assistance requested may then contact the program coordinator, who will facilitate a connection between that member and the person in need. Likewise, any member who has a need for assistance, or become aware of another in need, can provide the program coordinator with the details, which he or she will then evaluate and, depending on the circumstances, distribute as a request for assistance to other members of the Program.

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

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

## JUDGE YOUNG DISCUSSES IMPROVEMENTS TO COURT MANAGEMENT

*By Christopher Adams and Kelsey Baran, New England School of Law*

On November 5, 2013, the Massachusetts Chapter of the Federal Bar Association held a breakfast series discussion featuring Judge William Young. The presentation of the discussion was entitled "How Can the Courts Do Better?" Judge Young specifically addressed the Massachusetts court system and its procedures, and sought feedback from the attendees regarding their experiences with court management. The discussion focused on the various strengths and weaknesses of the federal and state courts of Massachusetts, emphasizing the unpredictability and inconsistencies in case management systems.

Judge Young posed specific questions to the attendees. For example, he inquired as to the reasons behind the decisions of choice of venue, and specifically, the view of practitioners as to the differences between state court case management and federal court case management, with specific regard to available resources and scheduling. Additionally, Judge Young sought input from attendees concerning enforcement of strict scheduling requirements and the importance of a predictable timetable for cases filed in the federal district courts.

A healthy contingent of attendees acknowledged that the federal system provides more predictability than the state court system, for both plaintiffs and defendants. Attendees also found the federal court to be more adequately staffed, which allows the judges to direct more attention to individual cases. The lack of staffing at the state level was identified as a major concern that causes delays and inconsistency. Ultimately, Judge Young acknowledged that the realities of the present economic climate presented the major challenges for effective case administration in the state and federal courts.

Judge Young offered helpful commentary on filing motions for summary judgment in federal court. He specifically recommended that more litigants cite to *Reeves v. Sanderson Plumbing Products, Inc.*, when making arguments regarding facts necessary to obtain summary judgment. 530 U.S. 133 (2000). The determination in *Reeves* gave a review of the standard for granting summary judgment. *Id.* at 150. In fact, he noted that he has cited to this specific case himself in his decision *S.E.C. v. EagleEye Asset Management, C.A. No. 11-11576-WGY*, 2013 WL 5498182 (Mass. Dist. Oct. 4, 2013).

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