



# FBA newsletter

Vol. 4 No. 1  
Fall 1997

*Federal Bar Association - Eastern District of Michigan Chapter - 38 years of service to our Federal Bench and Bar*



## FBA State of the Court Luncheon

In her first year as Chief Judge of the United States District Court for the Eastern District of Michigan, the

Honorable Anna Diggs Taylor will offer her comments and observations on the state of the Court at the chapter's annual State of the Court Luncheon. The luncheon will be held on Wednesday, October 1, 1997 at the Pontchartrain Hotel, beginning with a reception at 11:30 a.m., followed by lunch at 12:00 noon. Tickets to the luncheon are available at \$25 per person for FBA members and \$27 per person for non-FBA members. For tickets, please contact our Program Chair, Christine Dowhan-Bailey, at the U.S. Army Corps of Engineers, Office of Counsel, Box 27, Detroit, MI 48231-1027; telephone number (313) 226-6822.

## Gilman Award Luncheon Memorable

On April 27, 1997, the Eastern District of Michigan Chapter of the Federal Bar Association hosted its annual Leonard R. Gilman Award Luncheon at the Doubletree Hotel. The luncheon honored Assistant United States Attorney Ross G. Parker, the 1997 recipient of the Leonard R. Gilman Award. The award, named in memory of former U.S. Attorney Leonard R. Gilman, is presented annually to an outstanding practitioner of criminal law who emulates Lenny Gilman's aggressive yet compassionate style of advocacy and his excellence, professionalism, and commitment to public service.

Ross Parker was appointed to the U.S. Attorney's Office in January 1978. He began in the Controlled Substance Unit and, from 1981 through 1989, was the Chief of that unit. In 1989, U.S. Attorney Leonard Gilman promoted him to Chief of the Criminal Division. U.S. Attorney Stephen Markman appointed Parker Chief Assistant U.S. Attorney in

## A New "Beginning"

Our Chapter proudly marks its 38<sup>th</sup> year of service to both its members and this federal District. Our traditional benchmarks are and will continue to be those of service, collegiality, communication and professionalism. As we kick off another FBA year, I enthusiastically welcome each of you, share the following observations, and extend an invitation.

While another new year of activities gets underway, we are hardly starting from scratch. Looking back, our Chapter has a rich history of service; and the army of dedicated members who have served it well in the past have passed on as their collective legacy one of the strongest and best run FBA chapters in the country. Our Chapter thrives because of their extraordinary efforts. In particular, I want to recognize the tremendous leadership and tireless effort that the Honorable Virginia M. Morgan provided our Chapter while serving as last year's President. Thank you, Judge Morgan, for a job well done.

As we look forward, our challenge is to build on that unbroken chain of dedication and commitment. To prepare for that task, our Chapter Officers have worked hard this past Summer to craft a clear, achievable Action Plan for our upcoming year together with a Directory of Chapter Leadership, a detailed schedule of events, and an operating budget. We believe that these efforts will help to maximize the time and talents that our active members can offer our Chapter in reaching its goals. It is my expectation that our Board will approve and adopt the Action Plan at our September 16, 1997 meeting and that I will present a copy of it to Chief Judge Taylor at our October 1, 1997 State of the Court Luncheon. Copies of our Action Plan, schedule of events, and Directory may be obtained from my secretary, Nedra Coleman, (313) 983-6925. As of October 1, 1997, internet surfers can review our Action Plan at [HTTP://WWW.FEDBAR.ORG](http://WWW.FEDBAR.ORG). It is my hope that these documents will provide our members with a clear vision of what our Chapter will accomplish, when it will be accomplished, and most importantly, how to get involved in chapter activities.

Our State of the Court luncheon featuring Chief Judge Anna Diggs Taylor will take place on Wednesday, October 1, 1997 at the *Pontchartrain Hotel*. Please take note of the change in venue and plan to attend and bring a friend/prospective

### INSIDE THIS ISSUE

U.S. District Court Eastern District Examines Jury Selection Plan	pg.2
Point/CounterPoint	pg.4-5
Eastern District Officer Listing	pg.6
Calendar of Events	pg.7

(cont'd on page 2)



## **A New "Beginning"** (cont'd)

member. This luncheon provides a splendid opportunity to network and to be updated by Chief Judge Taylor on recent developments of note in our District.

An important service our Chapter provides is to share useful information about federal practice. We do so in many ways. By way of example, our recently updated and expanded Practice Manual is a substantial informative, practical guide to the judges and magistrate judges in this District. It contains very useful information for any federal practitioner whether she/he appears in court regularly or occasionally. For more information on this invaluable reference, call Thomas Porter at (313) 568-5423.

Another important source of information for our members is this quarterly Newsletter, which is currently under consideration for national recognition. It not only enables members to obtain useful information but also offers an opportunity to share information. In that regard, consider writing a letter to our Editor regarding Point/Counter-Point issues. What are *your* views on the issue? Other members may benefit from them. Moreover, if you desire to submit other information for possible inclusion in our next Newsletter (e.g. announcements), please direct it for consideration to Mike Leibson at (313) 226-9615. The submission deadline for our second issue is November 1, 1997.

Finally, our Chapter will make a concerted effort to provide opportunities for all members to participate in the activities set forth in our Action Plan. If you are interested in getting involved in a Chapter section or committee, please contact one of the co-chairs directly, introduce yourself, and *volunteer*. Our Action Plan will help to position our Chapter for an enjoyable and very successful year of service to our members and our federal district bench. The Action Plan, while important, it is only a first step. Success mandates a team effort. In the final analysis, our Chapter will achieve only as much as its members are willing to contribute. Marian Wright Edelman reminds us that,

*"... Service is the rent each of us pays for living—[it is] the very purpose of life and not something you do in your spare time or after you have reached your personal goals."*

Won't you help pay the rent? I urge you to review our Action Plan, find something in it that interests you, and then get involved.

Thank you for caring enough to get active and to do what you can to improve our Chapter. I look forward to seeing you at our October 1<sup>st</sup> luncheon.

DANIEL P. MALONE  
President

(Gilman cont'd from page 1)

September 1989. He served in this position until May 1994, and he is currently assigned to the Controlled Substance Unit.

Honorable Ann Williams, United States District Judge for the Northern District of Illinois, was the keynote speaker for the luncheon. Judge Williams, who grew up in Detroit, received her law degree from Notre Dame Law School in 1975. She was hired by Leonard Gilman as an Assistant United States Attorney in 1984, but never served in that position, being sworn in as a U.S. District Court Judge in 1985, at the age 35. Judge Williams was the youngest federal judge in Chicago history, and the first African-American woman appointed in that district. Judge Williams's talk was personal and inspirational.

## **United States District Court of the Eastern District of Michigan Examines Its Jury Selection Plan**

On August 20, 1997, the Jury Plan Subcommittee held an open meeting for the purpose of allowing discussion and comment concerning the Eastern District's current system of selecting jury pools. Representatives of various legal associations attended the meeting including the Federal Bar Association, the NAACP, the Wolverine Bar Association, and the Criminal Defense Committee. Tom Cranmer, speaking on behalf of the Criminal Defense Committee, congratulated the subcommittee for having an open meeting where legal associations and the judiciary could interact to address the issues concerning the current jury selection plan.

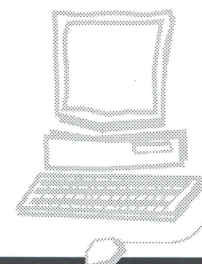
The subcommittee was formed to consider whether the court's current jury selection plan, which was intended to produce racially balanced jury pools requires revision to avoid legal challenges to its validity, and whether additional affirmative steps should be taken to achieve this goal. The problem of underrepresentation of minorities on juries in the Eastern District of Michigan was recognized as early as 1982. The Court has implemented various jury selection plans to alleviate this problem. Under the current jury selection plan, juror questionnaires are sent out to district residents randomly selected from voter registration and driver license lists. The responses are then used to

(cont'd on page 3)

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(Jury Selection cont'd from page 2)

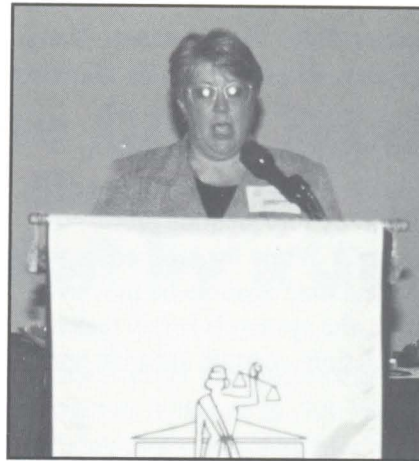
assemble a "wheel" of qualified persons to serve as jurors. If the racial balance of the wheel does not resemble the district's population, potential jurors in the over-represented group are dropped from the wheel. Until recently, potential jurors who were dropped from the wheel due to its racial imbalance were permanently removed. Now, potential jurors' names are retained and "recycled" to call for future service.

The problem of "dropping" potential jurors of an overrepresented group was discussed by United States District Judge Gerald Rosen in a recent opinion, USA v. Latonya Green, No. 95-CR-81082 (June 23, 1997). In that case, an African American woman convicted of bank robbery moved for a new trial claiming that she was denied her right to a trial by a jury drawn from a fair cross section of the community in violation of Jury System Improvement Act, 28 U.S.C. § 1861, and the Sixth Amendment because qualified white jurors were excluded from jury service under the district's jury selection plan. Judge Rosen denied Green's motion for a new trial because it was not timely. Although Judge Rosen did not rule on the constitutionality of the district's current jury selection plan, he did note a potential constitutional flaw with the plan. In footnote 25, Judge Rosen noted that the flaw "is in the premise that in order to insure a fair representation of minorities on its juries, the Plan had to attempt to achieve statistical purity by having its Qualified Wheel perfectly mirror the census minority population in the Eastern District." Judge Rosen reasoned that "this clearly is not required by either the statute or the Sixth Amendment and, although census population figures may provide a statistical ideal, the law does not require that a court's jury selection plan meet this ideal, particularly where, in order to meet that ideal, the equal protection rights of other racial groups may be implicated."

The subcommittee will continue to examine the issues surrounding the district's current jury selection plan. The subcommittee's report will then be examined by the Court at its September or October meeting.

## October "Brown Bag" With The Criminal Law Section

The Criminal Law Section will continue its popular "Brown Bag" series on October 16, 1997 at noon in room 115 of the Theodore Levin Federal Courthouse. This session will focus on the substantial revisions to the laws governing federal proceedings brought pursuant to 28 USC §§ 2254 and 2255. Whether you represent state or federal petitioners or respondents, you'll want this update! Watch for the Criminal Law Section mailing, or call Margaret Raben (248) 540-6400 or AUSA Kris Dighe (313) 226-9713 for more information.



## Annual Dinner A Hit!

The chapter held its Annual Dinner on May 2nd at the Pontchartrain Hotel. A (Habeas) Chorus Line performed many new hits. Last year's President, Hon. Virginia M. Morgan (above) makes some pre-dinner comments. Below, she is pictured visiting with various chapter members.



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**Yes!**

**Richard A. Rossman, Esq.  
Pepper, Hamilton & Scheetz**

The Seventh Amendment provides that "in Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved..." U.S. Const., Amdt. 7. While for most cases the jury system has proven time and time again to be the most effective means to true justice, the system is sorely tested by the modern complex civil action—certain antitrust and patent actions, for example.

The April 23, 1996 unanimous decision of the United States Supreme Court in Markman v. Westview Instruments, Inc., 116 S. Ct. 1384 (1996), suggests the Court shares the growing concern about the ability of juries to handle complex litigation.

The Markman Court was faced with deciding whether the construction of a patent should be determined by the court or whether, under the Seventh Amendment, questions of patent construction are properly decided by juries. In making its determination, the Court discussed the role of the jury in determining the scope of patent claims and whether interpretations of claims had historically been assigned to jurors. In addition to citing some authority for the position that, in the past, patent claims were interpreted by the judge, Justice Souter argued that, where historical considerations were unclear, functional considerations were relevant to the outcome.

In determining whether "one judicial actor is better positioned than another to decide the issue in question", the Court found that "...judges, not juries, are the better suited to find the acquired meaning of patent terms."

In balancing the interests of having jurors determine the demeanor of witnesses and reflecting community standards against the interest of having the most capable person interpret the complex questions presented in patent litigation, the Court found that credibility determinations "are much less significant than a trained ability to evaluate the testimony in relation to the overall structure of the patent." Where issues as complex as interpretation of patent claims are involved, jurors are less capable than judges because "[t]he construction of written instruments is one of those things that judges often do and are likely to do better than jurors unburdened by training in exegesis."

The earlier decision of the Supreme Court in Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579, 113 S. Ct. 2786 (1993), perhaps foreshadowed Markman when the Court provided trial judges with more authority to limit the types of scientific evidence which can be admitted in

**Point**

**CounterPoint**

federal trials. Under Rule 702, the trial judge must make a preliminary assessment of whether the underlying reasoning or methodology for the proffered expert's evidence is scientifically valid.

These columns are intended to present the statements of the "best argument" on each side of the issue presented. They do not represent the views of the Federal Bar Association, which generously gave the space.

In writing for the Daubert majority, Justice Blackman concluded, "We recognize that in practice, a gatekeeping role for the judge, no matter how flexible, inevitably on occasion will prevent the jury from learning of authentic insights and innovations. That, nevertheless, is the balance that is struck by the Rules of Evidence designed not for the exhaustive search for cosmic understanding but for the particularized resolution of legal disputes."

Are the Court's decisions in Daubert and Markman a trend? It is too early to tell. But they do reflect an awareness on the part of the Court that a rigid application of the Seventh Amendment right to a jury may be difficult to justify as certain types of litigation become increasingly complex. There is little doubt that some issues raised in civil trials are too complex for juries. At least these recent Supreme Court decisions suggest the Court will be open to expanding the "gatekeeper" role of trial judges as a means to the end of finding a "particularized resolution of legal disputes."

**No!**

**John R. Runyan, Esq.  
Sachs, Waldman, O'Hare,  
Helveston, Bogas & McIntosh, LLP**

*"Trial by jury, which is one of the forms of sovereignty of the people, must be seen in relation to the other laws establishing that sovereignty.*

*Composition of the jury in the United States.  
Effect of the jury system on the national character.  
Education it gives to the people.*

*How it tends to establish the magistrates' influence and spread the spirit of the law."*

**What Do You Think?** In our continuing effort to serve our members and this feature serves as a springboard for constructive discussion among our co-chairs Michael C. Leibson, Assistant United States Attorney and Editor in future newsletters. The FBA Editorial Board reserves final discretion.



## Topic

# Are Some Civil Trials in Our District Too Complex to be Heard and Decided by a Jury?

ended to provide brief  
ents" on behalf of both sides of  
ot necessarily reflect the views of  
on or of the authors, who  
of their time.

Although these words might have been written in an editorial response to the backlash over last year's Simpson verdict, they were not. They were written over 150 years ago by Frenchman Alexis de Tocqueville in his insightful study of the young American government, Democracy in America. de Tocqueville plainly understood what many of those who assail the jury system in this country do not: that the jury is above all a **political** institution, for however great its influence on the outcome of lawsuits, its influence on the fate of society itself is even greater.

Of particular importance, in deTocqueville's view, was the role of civil juries. deTocqueville recognized that civil juries instill some of the habits of the judicial mind into every citizen and that these habits best prepare people to be free. He also understood that jury service teaches jurors equity in practice and spreads respect for the courts' decisions, the idea of right and the rule of law. Finally, deTocqueville emphasized that juries invest each citizen with a sort of magisterial office: they make each citizen feel that s(he) has duties toward society, that s(he) shares in its governance and teach each individual not to shirk responsibility for his own acts.

The recognition that juries serve an important political function, as well as a judicial one, is not without significance in determining whether some civil trials are too complex to be heard and decided by them. The significant political and educational benefits weigh heavily in favor of leaving even complex and technical determinations in the hands of laypersons in the jury box, even if that entails additional work for the advocates and judge in presenting the case clearly. In addition, as Rich Rossman apparently concedes, the fundamental constitutional inquiry is not whether judge or jury is better suited to determine a particular issue, but "whether the particular trial decision must fall to

the jury in order to preserve the substance of the common-law right as it existed in 1791," at the time the Seventh Amendment was adopted. Markman v. Westview, 517 U.S. \_\_\_, 116 S.Ct. 1384, 134 L.Ed.2d 577, 583-584 (1996); see also, International Brotherhood of Teamsters v. Terry, 494 U.S. 558, 565 n. 4, 110 S.C. 1339, 108 L.Ed.2d 519 (1990).

Finally, there are several practical answers to the suggestion that some civil trials may be too complex for jury resolution. In Dairy Queen v. Wood, 369 U.S. 469, 82 S.Ct. 894, 8 L.Ed.2d 44 (1962), a complex trademark infringement action in which the Supreme Court unanimously upheld the right to trial by jury, the Court noted that Federal Rule of Civil Procedure 53(b) authorizes a District Court "to appoint masters to assist the jury in those exceptional cases where the legal issues are too complicated for the jury adequately to handle alone." Id. at 478. In Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993), the case involving the admission of novel scientific evidence cited by Mr. Rossman, the Court indicated that "(v)igorous cross-examination, presentation of contrary evidence and careful instruction on the burden of proof" were the appropriate antidotes for "shaky" scientific testimony. 125 L.Ed.2d at 484. In addition, after noting that Merrell Dow seemed overly pessimistic about the capabilities of the jury and the adversary system generally, the Court emphasized that where the trial court concludes that the evidence presented supporting a position is insufficient to allow a reasonable juror to conclude that the position more likely than not is true, the court remains free to direct a judgment under Rule 50(a) or to grant summary judgment under Rule 56. Id.

In summary, the jury in this country is above all a political institution. Jury service fulfills several important political and educational functions, as well as assisting in the resolution of disputes. Those who suggest that some civil trials are too complex to be heard and decided by a jury are likely oblivious to its political function, as well as its judicial role. Finally, there are several practical solutions to the suggestion that some cases are too complex for jury resolution, such as the use of masters under Rule 53(b).

In the spirit of our District's newly adopted Civility Plan, we hope that our members. Please send your comments/reactions to our newsletter-Dennise M. Barnes, Barris, Sott, Denn & Driker, for possible publication on which letters, or portions of letters, to publish.



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## Calendar Of Events

### FBA State of the Court Luncheon

October 1, 1997 at 11:30 a.m.

Location: Pontchartrain

Contact: Christine Dowhan-Bailey (313) 226-6822

### Intellectual Property Section - Lunch and CLE Seminar (see page 8)

October 9, 1997 - 12:00 noon-3:30 p.m.

Contact: William Abbatt (810) 358-4400

### Criminal Law Section - "Brown Bag" Lunch

October 16, 1997 at 12:00 noon

Location: Levin Courthouse room 115

Contact: Margaret Raben at (248) 540-6400

### Government Practice and Corporate Counsel Section - Americans with Disabilities Act and Its Implications for Government

October 23, 1997

Contact: J. Kent Cooper (Ameritech)

### Investiture & Reception for Hon. Eric Lee Clay

October 24, 1997 12:30 p.m.

Location: Levin Courthouse

### Newsletter No. 2 - all materials due

November 1, 1997

Contact: Dennis Barnes (313) 965-9725

### FBA Rakow Luncheon

November 19, 1997

Location: Pontchartrain

Contact: Christine Dowhan-Bailey (313) 226-6822

### Membership Committee - Brown Bag Lunch for new Chapter members

December 3, 1997

Contact: Pam Zauel (313) 995-3110

### New Lawyers' Seminar

December 9-10, 1997

Contact: Grant Gilezan (313) 568-6789

### Martin Luther King, Jr. Gathering

January 19, 1998

Contact: Daniel P. Malone (313) 225-7032

### McCree Award Nominations Due

January 20, 1997

Contact: Joel Shere (313) 663-6535

### FBA McCree Luncheon

February 18, 1998

Location: Pontchartrain

Contact: Christine Dowhan-Bailey (313) 226-6822

### Gilman Award Nominations Due

March 1, 1998

Contact: Thomas Cranmer (248) 258-1202

### FBA Gilman Luncheon

April 16, 1998

Location: Pontchartrain

Contact: Christine Dowhan-Bailey (313) 226-6822

### Membership Committee - Recruitment Drive For Government Attorneys

April 23, 1998, 4-7 p.m.

Contact: Grant Gilezan (313) 568-6789

### Annual Dinner (Detroit Institute of Arts)

May 1, 1998

Contact: Julia Blakeslee (313) 961-8380

### Sixth Circuit Judicial Conference

May 12-15, 1998

Asheville, NC

Contact: James Higgins (513) 564-7200

### FBA Golf Outing

June 12, 1998

Contact: Michael Lavoie (313) 225-7060

### New Lawyers' Seminar

June 9-10, 1998

Contact: Catherine Wenger (313) 225-5575

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The revised and updated 1997 FBA Federal Practice Manual for the Eastern District of Michigan is available for purchase. The Manual is written by experienced local federal court practitioners based on individual input from each of our District's jurists and their staffs. It provides a practical and useful description of the views and rules of each of our District Judges, Magistrate Judges and Bankruptcy Judges on practice and procedure in his or her courtroom. The purchase price is \$50.00 plus \$5.00 for postage. Contact Barb Radtke in Magistrate Judge Virginia Morgan's chambers, in Room 651 of the Theodore Levin United States Courthouse (313-234-5210), checks made payable to the Federal Bar Association, Eastern District of Michigan.

## **Practice and Procedure Before the Federal Circuit**

Thursday, October 9, 1997  
River Place Hotel  
1100 River Place, Detroit, Michigan 48207

11:30 a.m. Registration and Refreshments  
12:00 - 2:00 p.m. Luncheon with address by Judge Paul R. Michel of the United Court of Appeals for the Federal Circuit  
2:00 - 3:30 p.m. Panel Discussion with Judges of the Federal Circuit and the Eastern District of Michigan, with Frank A. Angileri, Esquire as moderator

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