

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



1999 Gilman Award Honoree Nancy Diehl

Diehl to be Honored, Robinson to Speak at Gilman Award Luncheon

Nancy J. Diehl will be honored as the recipient of the Leonard R. Gilman award at the **April 15, 1999**, FBA luncheon. The Gilman award is presented

annually to an outstanding practitioner of criminal law.

James K. Robinson will be the keynote speaker at the luncheon, which will be held at the Hotel Pontchartrain, beginning at 11:30 a.m. Robinson, former dean of Wayne State University Law School and U.S. Attorney for the Eastern District of Michigan, currently serves as the Assistant Attorney General for the Criminal Division at the U.S. Department of Justice in Washington, D.C.



James K. Robinson, Assistant Attorney General for the Criminal Division at the U.S. Department of Justice in Washington, D.C. to be Keynote at Gilman Award Banquet.

The Gilman Award recognizes excellence, professionalism and commitment to public service, which describe the characteristics of former U.S. Attorney Len Gilman.

Diehl is a Deputy Chief in the Wayne County Prosecutor's Office and serves as Director of the Child and Family Abuse Bureau. She lectures extensively throughout the state and country on issues of domestic violence and child abuse, and has

co-authored four books addressing the special needs of children in the legal system. Among other professional activities, Diehl has served on the Governor's Task Force on Children's Justice, the State Bar of Michigan Board of Commissioners, the Wayne County Child Abuse Protocol Committee, and the Prosecuting Attorneys Association of Michigan Family Law Committee. In addition, Diehl has served on the Advisory Panel for WTVS 56 and the Community Advisory Board for the Junior League of

President's Column

It has been a privilege to serve as the president of this chapter for the past year. As I look at the roster of past presidents on our letterhead, it is clear that an extraordinary group of men and women have preceded me in this job. They have created an organization which is clearly among the most respected bar associations in this state. Of course, the ability of any president to maintain the chapter at this high level of respect is totally dependent on the contributions made by others. These contributions were especially plentiful this year.

Several successful programs were presented by our section and committee chairs. Gary Faria and Lawrence Charfoos were a driving force in creating a seminar on how to build a federal civil practice. Our criminal law section, under the leadership of Barbara McQuade and Margaret Raben, arranged an informal meeting between criminal law practitioners and the three newest federal judges to discuss practice and procedure in their courts. Once again, there were two successful sessions of the New Lawyers Seminar produced by Geneva Halliday, Grant Gilezan, Brian Figot, Christine Dowhan-Bailey and Catherine Wenger.

The Bankruptcy Section, chaired by Julie Teicher and Lynn Brimer, continued its excellent tradition of service to bench and bar by hosting several events, including a lunch with

Judge Shapiro. Our membership has continued to increase as a result of the efforts of Grant Gilizen and Julia Blakeslee. Our

(cont'd on page 2)

INSIDE THIS ISSUE

pg.2
pg.3
pg.3
pg.4-5
pg. 6
pg.7
pg.8

1

President's Column (cont'd)

annual dinner which will be held on May 6, 1999 at the Detroit Institute of Arts, will again be a wonderful evening because of the work of Joanne Klimko. Pamela Zauel has done a tremendous job with the Rules Committee in assuring that our voice is effectively heard on proposed district court rules proposals. Leonard Niehoff's work will assure that the Shanty Creek Bench Bar conference in late October, 1999 is a success.

The McCree Award Committee headed by Joel Shere and John Runyan, with the assistance of Judge Anna Diggs Taylor and Dores McCree, once again chose a person truly worthy of the legacy of Judge McCree. Past President Dan Malone was a driving force behind the Martin Luther King Jr. event at Focus:HOPE.

Michael Palizzi has organized our annual golf outing which will be held on June 18, 1999

Our program chair, Dennis Clark, as done an incredible job in assuring that our four luncheon programs were successful. Co-Chairs Dennis Barnes and Mark Brewer along with the rest of their committee, published four quality editions of our newsletter.

The administrative work so necessary to the survival of the chapter was accomplished by the exceptional duo of Dee Osterman and Barbara Radke. Barb also continued her work coordinating the chapter's court house tour program.

I especially want to thank the other officers, Mark Brewer, Thomas Porter, Brian Figot, Christine Dowhan-Bailey and Dennis Clark and past presidents Dan Malone, Virginia Morgan and Geneva Halliday for their advice and support over the course of this year. I look forward to working with Mark Brewer as he assumes the office of president and hope that he enjoys his year at the top as much as I have enjoyed mine.

In 1961, President Kennedy, in commenting on the Bay of Pigs disaster, noted that success has a thousand fathers while defeat is an orphan. I am pleased to report that no FBA orphans were created this year.

> President, Michael Liebson

Detroit.

A 1978 graduate of Wayne State University Law School, Diehl has devoted her entire legal career to public service. She has served with the Wayne County Prosecutor's Office since 1981, and was appointed Deputy Chief in 1997. Before joining the Prosecutor's Office, Diehl served as assistant corporation counsel for the City of Detroit and staff attorney for the Misdemeanor Defender's Office.

The luncheon will begin with a reception at 11:30 a.m., and lunch will follow at noon. Tickets are \$25.00 for FBA members, \$27 for non-members. Please contact Program Chair Dennis Clark for tickets at (313) 983-4768.

Eastern District Mourns Loss of Judge DeMascio

Last month the bar lost one of its longest serving jurists, Judge Robert E. DeMascio. Judge DeMascio passed away on Tuesday, March 23, 1999 as a result of complications from lung cancer, a disease he had fought for the past year.

Judge DeMascio was born January 11, 1923 in Corapolis Pennsylvania. After moving to Detroit, Judge DeMascio attended Wayne State University and earned his L.L.B. in 1951. He also served in the United States Navy from 1943 to 1946. The Judge entered into private practice in 1951. In 1954, he became an Assistant United States Attorney where he was Chief of the Criminal Division. Judge DeMascio returned to private practice in 1961. In 1967, Judge DeMascio was elected to Detroit Recorder's Court, where he served until his appointment to the federal bench in 1971 by President Richard Nixon.

During his tenure as a federal judge, Judge DeMascio was a member of the Judicial Conference Committee on the Administration of the Bankruptcy System, having been appointed Chairman in 1979. The Judge was also a member of the American Bar, Detroit Bar, Federal Bar, Michigan State Bar and American Judicature Society.

Judge DeMascio took senior status in 1988 but maintained a full and active docket. In 1992, after serving as a federal judge in Detroit for twenty-one years, the Judge moved his chambers to Port Huron, Michigan. Judge DeMascio continued to work steadily until his death, hearing his last case in Detroit on March 9, 1999.

Judges Share Insights with Criminal Law Section at Brownbag Luncheon

The District's newest federal judges joined the Criminal Law Section for an informal discussion of criminal practice at a brownbag luncheon on March 3, 1999. Hon. Victoria A. Roberts, Hon. George Caram Steeh, and Hon. Arthur J. Tarnow shared lunch



Maryann Mahaffey honored at McCree Luncheon. Pictured from left to right are: Maryann Mahaffey, Dennis Clark, Jennifer M. Granholm, Michael C. Leibson, and Dores McCree.

and insights on practice in their courtrooms with about twenty practitioners from the criminal defense bar and U.S. Attorney's Office.

Participants had an opportunity to question the new judges about sentencing, plea and trial issues in their courtrooms.

Criminal Law Section Co-Chairs Margaret Raben and Barb McQuade organized the event, which was held at the Theodore Levin U.S. Courthouse.

McCree Award Luncheon Featured Mahaffey, Granholm

The Federal Bar Association honored Detroit City Council Member MaryAnn Mahaffey in February with the annual Wade Hampton McCree, Jr. Award for the Advancement of Social Justice. The award, named in honor of the former U.S. Court of Appeals Judge and Solicitor General, honors the individual or group who exemplifies the spirit of Wade McCree through a significant contribution to the advancement of social justice.

Attorney General Jennifer Granholm, who presented the award to Ms. Mahaffey, addressed the issue of the treatment of minority groups in the United States, particularly African Americans. Speaking about last year's dragging death of James Byrd, Jr. in Jasper, Texas, she questioned "how could a person be so consumed with hatred that it burns out his heart? What could have happened to that little boy, how did he become an angry dragon that breathes fire, scorching the earth with the heat of racism? What caused such anger, such fear, that would so blind someone, so utterly objectify someone, so that they are not human?" She suggested that "fear is the root of this evil. And fear is often born of unfamiliarity." In light of these recent events and the

trials of those charged with Byrd's murder, Granholm also spoke about affirmative action programs in the United States, particularly in our colleges and universities. Asking whether affirmative action negates the concept of merit, Granholm answered: "No. Colleges <u>do</u> make admissions decisions based on merit -- those who 'deserve' a spot in the class. Merit, however is not, and never has been, determined solely on the basis of grades or test scores. 'Merit' is measured in terms of which students can make a positive contribution to the educational community, which can best use the tools provided by education to excel in later life, and which can add to the overall diversity of the class."

In closing, Attorney General Granholm quoted the head of the NAACP Legal Defense Fund, Theodore Shaw, on his measure of when affirmative action may be considered complete in accomplishing its goals:

(cont'd on page 6)





6th Circuit Should Publish More

A recent article in the New York Times has focused national attention on the United States Courts of Appeals' increasing practice of deciding cases by unpublished opinion (William Glaberson, *Caseload Forcing Two-Level System for U.S. Appeals*, N.Y. Times, Mar. 14, 1999, at 1). The article focuses on a case in the Eleventh Circuit which has called into question that circuit's practice of deciding cases with a simple "affirmed," including no opinion whatsoever. While the Sixth Circuit has not engaged in this more pernicious sort of decisionmaking, the Sixth Circuit's overuse of unpublished decisions has some troubling aspects.

Sixth Circuit Rule 24 governs publication. Unfortunately, however, the rule does not seem to be followed in practice. For example, Rule 24(a) establishes certain criteria for publication, for example, whether the case establishes a new rule of law or applies existing law to a novel fact situation. Yet, the Westlaw database is replete with examples of the Sixth Circuit resolving issues of first impression by unpublished opinion (e.g., United States v. Bandy, 1999 WL 17646; Ronald Mayotte & Assocs. v. MBG Build. Co., 1998 WL 385905; Owen v. Chater, 1997 WL 251918; United States v. Johnson, 1996 WL 711592; Clarke v. Mindis Metals, Inc., 1996 WL 616677; Estate of Vahlteich v. Commissioner, 1995 WL 641318; United States v. Burton, 1994 WL 421733; Allen v. Ford Motor Co., 1993 WL 366538; In re MacLeod Co., 1991 WL 96718; Camvac Int'l Inc. v. NLRB, 1989 WL 65727; Jennings v. Friedman, 1989 WL 54766; Ristenberg v. Broadview Fed. Sav. & Loan, 1988 WL 28803). Rule 24(b), following the listing of criteria for publication, mandates that "[t]here shall be a presumption in favor of publication." This presumption seems unworthy of the name, however, in a system in which the majority of decisions rendered by the Sixth Circuit are unpublished.

Finally, Rule 24(c) provides that unpublished decisions are not binding precedent, and citation to such decisions is disfavored unless there is no published decision on point. The lower courts within the Sixth Circuit, how-

ever, routinely rely on unpublished decisions in resolving the cases before them (e.g., United States v. *Dusenbery*, ____ F. Supp. 2d ____ (N.D. Ohio 1999); Spells v. Cuyahoga Community College, 889 F. Supp. 1023 (N.D. Ohio 1994); Canales v. Gabry, 884 F. Supp. 1167 (E.D. Mich. 1994); Curtis v. Universal Match Corp., 778 F. Supp. 142 (E.D. Tenn. 1991)), as on occasion does the Sixth Circuit itself (e.g., United States v. Davis, ____ F.3d ____ (6th Cir. 1999); Oviedo v. Jago, 809 F.2d 326 (6th Cir. 1987)). Indeed, one district in the Sixth Circuit has gone so far as to suggest that unpublished decisions of the Sixth Circuit are binding on the lower courts in absence of contrary published authority (Capital Leasing of Ohio v. Columbus Mun. Airport Auth., 13 F. Supp. 2d 640 (S.D. Ohio 1998)).

Several problems are created by the failure to adhere to Rule 24's presumption in favor of publication, particularly in novel areas. First, not surprisingly it leads the lower courts to disregard the admonition in Rule 24(c) that such decisions have no precedential effect. A substantial portion of the Sixth Circuit's jurisprudence lies in unpublished decisions, and a lower court cannot be faulted for choosing to follow a Sixth Circuit rule established in an unpublished decision rather than deciding the issue itself as one of first impression. Relatedly, inconsistency occurs because the various lower court judges within the Sixth Circuit give different value to unpublished decisions. The role of an appellate court extends beyond simply deciding the cases before it; it must also achieve consistency among the lowers courts subordinate to it and provide guidance to the lower courts, lawyers, and their clients on what the law is at any given time. The more the court decides cases by unpublished opinion, the less it is able to meet these obligations.

Just as important, the Sixth Circuit's publication pattern leads to a large amount of unfairness for

What Do You Think? In our continuing effort to serve our members as serves as a springboard for constructive discussion among our mem Dennis M. Barnes, Barris, Sott, Denn & Driker, for possible publication the views of the Federal Bar Association or this Chapter. The FBA Ed letters, to publish. litigants. In the age of the electronic database, the lack of "publication" may not be significant for the average civil litigant in the federal courts, as its lawyer will likely have access to these decisions. However, for the pro se litigant, the unfairness is paramount. This problem is readily apparent when one examines the almost complete absence of publication in cases involving issues which are ordinarily pursued by pro se litigants. A quick survey of the Sixth Circuit's 1998 decisions demonstrates this point. (The following numbers were compiled by simply flipping through the court's decisions on the Westlaw database. I freely caution, therefore, that the numbers may be off by one or two through my own counting error. However, they illustrate the point). For example, during 1998 the Sixth Circuit issued 224 opinions addressing habeas corpus issues (including both state and federal prisoners, aliens, and writs of coram nobis). Of these, 194 decisions (or 86.6%) were decided by unpublished opinion. Similarly, of the 194 opinions issues in civil rights cases brought by state and federal arrestees, detainees, and prisoners, 178 (or 91.8%) were unpublished. These are cases which are almost always pursued by pro se litigants without access to the court's unpublished decisions. These litigants are put at an extreme disadvantage relative to their opponents, particularly when the lower courts will rely on the Sixth Circuit's unpublished decisions.

In The Trial, Franz Kafka's doomed hero Joseph K. has a discussion with a painter about the mysterious tribunal's appellate system. The painter informs K. that although earlier cases have resulted in acquittals, "it is very difficult to prove the fact. The final decisions of the Court are never recorded, even the Judges can't get hold of them." To which K. aptly responds, "[t]hen there's no use talking about them." Of course, the current system of publication does not begin to approach the sinister system described in Kafka's novel; it is, however, a useful hyperbole of the dangers which lack of publication entail. The Sixth Circuit, to properly guard against these dangers and fully perform its role of guiding both lower courts and litigants on the state of the law, should more firmly commit itself to its presumption in favor of publication.

and incore spirit of our District's Civility Plan, we hope that this feature mbers. Please send your comments/reactions to our newsletter editor n in future newsletters. The views expressed do not necessarily reflect Editorial Board reserves final discretion on which letters, or portions of

Sustaining Members

We gratefully recognize the following Sustaining Members for their outstanding contributions to the FBA Eastern District of Michigan Chapter.

> Ronald G. Acho, Esquire Joseph Aviv, Esquire Stan Bershad, Esquire Bernard J. Cantor, Esquire Lawrence S. Charfoos, Esquire Hon. Avern Cohn Martin E. Crandall, Esquire Thomas W. Cranmer, Esquire Gary H. Cunningham, Esquire Eugene Driker, Esquire David F. DuMouchel, Esquire Neil H. Fink, Esquire Harold Gurewitz, Esquire Alan C. Harnisch, Esquire Duane F. Ice, Esquire Paul H. Johnson, Jr., Esquire Karen Smith Kienbaum, Esquire D. Michael Kratchman, Esquire William N. Kritselis, Esquire Michele T. LaFlora, Esquire Brian M. Legghio, Esquire Robert J. Lenihan, II, Esquire Richard M. Lustig, Esquire William O. Lynch, Esquire Dan Manville, Esquire Virginia F. Metz, Esquire Hon. Virginia Morgan Mayer Morganroth, Esquire Arvin J. Perlman, Esquire Julia Pidgeon, Esquire Wayne F. Pratt, Esquire Clyde B. Pritchard, Esquire Margaret S. Raben, Esquire Ralph Terrance Rader, Esquire Wallace D. Riley, Esquire Lewis A. Rockwell, Esquire Arnold S. Schafer, Esquire Daniel Share, Esquire Joel M. Shere, Esquire Miriam L. Siefer, Esquire Robert M. Vercruysse, Esquire Brian S. Westenberg, Esquire Rodger D. Young, Esquire Marla G. Zwas, Esquire

5

(cont'd from page 3)

"When white people would trade places with black people and not feel like they're giving something up, then we can say we're done."

Wanted: Volunteers For Federal Pro Bono Project



A (Habeas) Chorus Line to perform at the FBA Annual Dinner.

For the last several years,

the United States District Court for the Eastern District of Michigan has worked with the Volunteer Legal Services Office of the Detroit Metropolitan Bar Association in the operation of a Federal Civil Pro Bono program. The program is authorized by 28 U.S.C. § 1915(d), which provides that "[t]he court may request an attorney to represent any . . . person unable to employ counsel . . ." In interpreting this statute, the United States Supreme Court noted that "in a time when the need for legal services among the poor is growing and public funding for such services has not kept pace, lawyers' ethical obligation to volunteer their time and skills *pro bono publico* is manifest." *Mallard* v. *United States District Court*, 490 U.S 296, 310 (1989).

In recent years, requests for the appointment of counsel for indigent plaintiffs have far exceeded the number of attorneys who have volunteered their services in such cases. Many of these plaintiffs seek injunctive or monetary relief for civil rights claims under 42 U.S.C. § 1983. Some, but certainly not all, of these plaintiffs are inmates.

Members of the bar of the Eastern District of Michigan are invited to volunteer their services to meet this need. To volunteer, please contact the Volunteer Legal Services Office of the Detroit Metropolitan Bar Association. The Office is located at 2100 Buhl Building, 535 Griswold Street, Detroit, Michigan 48226. The phone number is (313) 961-6120; the fax is (313) 965-0842.

Separately from the *pro bono* program, attorneys can also apply to represent indigent criminal defendants in the Eastern District of Michigan, Southern Division-Detroit. Completed applications must be returned by April 30, 1999, to Carol J. McGuire, Administrative Officer, Federal Defender Office, 645 Griswold Street, #2255, Detroit Michigan 48226. Applications are screened a panel of attorneys from une Detroit and Southern Division Bar Associations, and by the District Court.

FBA Annual Dinner To Be Held Thursday, May 6, 1999 at DIA

Mark your calendars - the Chapter will hold its Annual Dinner, honoring the Judicial Officers of the Eastern District, on Thursday, May 6, 1999 at the majestic Detroit Institute of Arts. The cocktail reception will begin at 5:30 p.m. and dinner will be served at 7:00 p.m.. Immediately following dinner, the evening's entertainment will again be provided by *A* (Habeas) Chorus Line, Detroit's own parody troupe, composed entirely of lawyers and law-related personnel. The cost for the evening is \$65.00 per person. Proceeds will be donated to the FBA Foundation. For further information regarding this event, please contact Joanne Klimko, Chairperson of the Annual Dinner Committee at (313) 225-7072.

FBA to Sponsor New Lawyer's Seminar June 8 and 9

The semi-annual Seminar for New Lawyers will be held Tuesday and Wednesday, June 8 and 9, 1999, in Room 115 of the Theodore Levin Courthouse, 231 West Lafayette in downtown Detroit.

This program is a "nuts and bolts" how-to-do-it approach to practice in federal and state courts,

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6

designed to assist recent law graduates in understanding the fundamental procedures followed in those courts. The seminar begins at 8:15 a.m. on June 8 with presentations on practice in Federal court. It concludes on June 9 with state court practice.

Co-chairs for the seminar are attorneys Christine Dowhan-Bailey, Catherine Wenger, Brian Figot, Grant Gilezan, and Geneva Halliday.

The seminar will cost \$65 for members of the Federal Bar Association and \$85 for non-members. Admission includes a reception for the new attorneys on Tuesday, June 8. In addition, a luncheon will be held on Wednesday, June 9, at the Pontchartrain Hotel. The price also includes course materials which contain form pleadings and memoranda expanding on the topics covered by the speakers. A special price of \$109 includes the seminar plus membership in the Federal Bar Association.

Reservation checks should be made payable to the FBA Eastern District of Michigan Chapter, and mailed to New Lawyers' Seminar, Post Office Box 71740, Madison Heights, MI 48071. For questions call Dee Osterman at (248) 548-3450.

FBA Golf Outing to be Held at Cattails on June 18, 1999

The Chapter will be holding its annual golf outing on Friday, June 18, 1999. This year's outing will be held at Cattails Golf Club in South Lyon, beginning

FBA Practice Manuals

Whether you appear regularly in federal court, or only on a limited basis, this manual provides helpful information for your practice. The manual, in substantially similar format to its predecessor, contains updated profiles of the members of the bench, including the Bankruptcy and Magistrate Judges. In addition it contains valuable information on the Judge's chamber and courtroom practices on issues including the applicability of recent amendments to the Federal Rules of Civil Procedure, removal practices, standing orders, temporary restraining orders and preliminary injunctions, pretrial and status conferences, mediation, class actions, pleas and sentences, and trial.

For more information, contact Barb Radke at (313) 234-5210.

CALENDER OF EVENTS

Gilman Award Luncheon

Date: April 15, 1999 at 11:30 a.m. Location: Crowne Plaza Hotel *Contact - Dennis Clark at 313-983-4768*

FBA Annual Dinner

Date: May 6, 1999. Location: Detroit Institute of Arts *Contact - Joanne Klimko at 313-225-7072*

New Lawyer's Seminar

Date: June 8 and 9, 1999 Location: Theodore Levin Courthouse Rm. 115 *Contact - Dee Osterman at 248-548-3450*

FBA Golf Outing

Date: June 18, 1999 Location: Cattails Golf Club in South Lyon *Contact - Michael Palizzi at 313-963-6420*

promptly at 1:00 p.m., followed by cocktails, dinner and awards ceremony. The cost of the event is only \$90 per person, which includes golf with a cart, lunch, drink tickets, and dinner, or \$40 per person for cocktails and dinner.

Please contact Michael Palizzi at (313) 963-6420 for a reservation form *(see page 8 of this newsletter)* or to become a sponsor.



1999 Federal Bar Association Golf Outing

Friday, June 18, 1999 Cattails Golf Club South Lyon, Michigan

Join us as The Eastern District of Michigan Chapter of the Federal Bar Association continues one of its oldest traditions. The best-ball scramble tournament will begin promptly at 1:00 p.m., followed by cocktails, dinner and the awards ceremony. Complimentary lunch and drink tickets are included.

The cost of the event is only \$90.00 per person, and includes green fees, cart, lunch and dinner buffet. If you are unable to join us for golf, please join us for cocktails and dinner at 6:00 p.m. for \$40.00.

Lunch/Golf/Dinner Reservations @\$90.00 per person

Dinner Reservations @ \$40.00 per person	Register a team of two, three or four golfers! (please include payment for all players)
Name	1
Address	2
	3
Phone ()	4

Please return this form and your payment to:(make checks payable to FBA-Eastern District of Michigan Chapter) Michael Palizzi

Miller Canfield

150 W. Jefferson, Ste. 2500 Detroit, Michigan 48226-4430 For questions, call Michael Palizzi (313) 963-6420

Eastern District of Michigan Chapter, F.B.A. P.O. Box 71740 Madison Heights, MI 48071

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