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FBA newsletter

Fall 2005

Federal Bar Association - Eastern District of Michigan Chapter - 48 years of service to our Federal Bench and Bar

State of the Court Luncheon September 8th

The Chapter will kick off its annual Luncheon Program on Thursday, September 8th, at the Hotel Pontchartrain. The reception will begin at 11:30 a.m., with the luncheon following at 12:00 noon.

The featured speaker will be Chief Judge Bernard A. Friedman, who will deliver the annual "State of the Court" address. On behalf of the Court, Judge Denise Page Hood will honor *pro bono* attorneys.

Tickets are $25 for Chapter members, $30 for non-members, and $20 for judicial law clerks. Law firm sponsorships are still available for this luncheon and the three luncheons to be held in coming months.

To register online for the luncheon, visit the Chapter's website at www.fbamich.org and click on Events and Activities. For more information, contact Program Chair Elisa Angeli at (313) 496-7635 or e-mail her at angeli@millercanfield.com

From Court Administrator Dave Weaver

Proposed Amendments to Local Rules

The Court recently approved for publication and comment, a number of proposed amendments to the Local Rules. Several of the proposed amendments are significant. The proposed amendments to LR 5.1.1, Filing and Service by Electronic Means,

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Special Insert

President's Column

Julia Caroff Pidgeon

President's Column

Mission statements—those fruits of organizational soul searching—define the goals of an organization in terms of values that are to guide its activities. Without projects to animate these values, a mission statement becomes little more than the adornment of a plaque, the standard caption on agendas or the masthead of an organization's newsletter.

Our Chapter's mission statement has three goals: professionalism, service and social responsibility. Professionalism encompasses the promotion of education, civility and ethics within the federal bench and bar. Our activities should provide service to the federal bench and bar. We advance social responsibility through the administration of justice in the federal court and involvement with the community as attorneys. Pro bono representation of litigants in the federal court is an activity that fulfills all three goals of our mission statement: professionalism, service and social responsibility.

This year we are undertaking a project to train and support a group of our members to provide the court with a reliable corps of attorneys willing to meet the need for pro bono representation. Pro bono representation is needed primarily in cases filed by prisoners contesting the conditions of their incarceration, but also includes employment and other civil claims.

The court usually requests pro bono assistance in prisoner cases that have survived a dispositive motion. These cases accordingly are more likely to go to trial. Members, especially newer members, would have the opportunity to greatly enhance their pro-

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WINNER National FBA 2003 AND 2004 Outstanding Newsletter Award

President's Column (continued)

fessional skills by having an actual trial - often a jury trial - in federal court. This is an experience that most young practitioners, especially those with civil commercial practices, would otherwise not likely have.

The program would provide a significant service to the court, by providing a corps of volunteers readily available to answer the court's request for pro bono services. By finding competent representation for prisoners with claims regarding the conditions of their incarceration or other civil litigants unable to hire counsel to press their civil claims in federal court, we advance our third goal of social responsibility.

Although our Chapter has recognized for years that we should be addressing the need for pro bono representation, we have not fully met this responsibility, leaving the Court to rely on the same small group of practitioners to answer repeatedly the Court's requests for assistance in these cases. Attorneys often express reluctance to take these cases because of their lack of expertise in the subject matter and uncertainty regarding the representation of an unconventional client, such as a prisoner.

We are addressing these concerns by providing training, pleadings and support under the guidance of our Pro Bono Committee Co-chairs, Oakland County Circuit Judge Mark Goldsmith and Dan Manville, a faculty member of Wayne State Law School's Civil Rights Litigation Clinic. Dan is a respected expert in prisoner rights litigation, having handled many of these case, written several manuals on the subject. He is currently directing the Prisoner Support Adjustment Project at Wayne State Law School.

The Pro Bono Committee is developing a training program to give volunteers an overview of pro bono litigation, to be followed by bi-monthly seminars on specific issues. The overview will address such practical concerns as funding for depositions and malpractice coverage, substantive and procedural issues, and client relations.

A website will be launched where pro bono volunteers can access model pleadings and briefs. Mentors with experience in handling these cases will be available to the volunteers for advice and assistance. With this support, our members should feel confident in their abilities to take a pro bono assignment.

In the next few months, we will be asking you either directly or through your firm, to attend pro bono training and commit to taking a case. From those members who have often answered the court's request, we hope that you will be willing to serve as mentors. The demands of practice are many, and the time to represent a litigant pro bono often must squeezed from what little free time is left. The law, however, is our profession, and as professionals we are bound to serve the needy and so assist the court and our profession in the administration of justice. Please answer the request to handle a case pro bono with a "Yes" - our Chapter stands behind your effort.

Weaver (continued)

would make electronic filing mandatory as of December 1, 2005. On a related note, the Court has already approved mandatory training in the use of the Case Management / Electronic Case Files (CM/ECF) system. Attorneys will not be provided with a login and password unless they (or a designated staff member) complete a training course either at the Court or on-line. The on-line course will be available on October 3, 2005 which is also the date mandatory training will begin.

The proposed amendments to LR 83.31, Conduct in Federal Court Facilities would allow attorneys to carry cellular phones and equivalent communication devices (including PDA's) into federal court facilities and to use them in designated areas. Pending consideration of the proposed amendments, the Court approved an Administrative Order for a six-month period to determine if the provisions of the proposed amendments are workable. Several attorneys have already had their cellular telephones confiscated and have been fined for using them outside of the designated areas.

The Court will consider the proposed amendments at a future meeting this Fall. I encourage you to visit our web site at www.mied.uscourts.gov often for updated information.

Electronic Filing

The use of the electronic filing system continues to increase. Overall, the number of electronic filings fluctuates between 30% - 40% of all documents. As I noted above, the Court has approved a proposed amendment to the local rules that will make electronic filing mandatory. When this occurs, it will eliminate the burden of maintaining both a paper and electronic filing systems. Please, if you are not registered to e-file, do so now!! If you are registered, please don't wait! We want and need you to e-file! The Court's official CM/ECF website can be accessed at www.mied.uscourts.gov. The site has all of the information and resources an attorney needs to register, receive training and start e-filing today!

Court Artifacts Exhibit - Update

The Court Artifacts Exhibit opened on May 2, 2005 in the Court Historical Society exhibit space on the first floor of the Theodore Levin U.S. Courthouse in Detroit. The display was an instant success and will be expanded in the near future. If you have not seen it, please take the time on your next visit to the Courthouse.

Remember, if you have *any* questions or comments, please send them to me at mie_fba@mied.uscourts.gov.

Hiring Foreign Nationals: Is Perm The Permanent Solution?

Thomas R. Williams, Kerr, Russell and Weber, PLC

Background

One of the most common methods for foreign nationals to immigrate to the United States is through employment sponsorship by a U.S. employer. Generally, this requires the employer to first test the labor market. Under Section 212(a)(5)(A) of the Immigration and Nationality Act (INA or Act)[1], certain aliens may not obtain immigrant visas to come to the United States in order to engage in permanent employment unless 1) the Secretary of Labor has first certified to the Secretary of State and to the Secretary of Homeland Security that there are not sufficient U.S. workers willing, qualified and available to perform the work, and 2) the employment of the alien will not adversely affect the wages and working conditions of U.S. workers similarly employed.

The process of obtaining this certification from the Secretary of Labor, commonly referred to as the labor certification process, has traditionally involved filing an application with the local state employment service stating the minimum qualifications for the job, the proposed wage and the qualifications of the alien. The employer must sign a Form ETA 750, Part A, and the alien signs Form ETA 750, Part B. In many instances, the position to be filled is the same one already occupied by the alien in one of several nonimmigrant or temporary classifications. The case can be filed with a request for recruitment instructions, or a reduction in recruitment (RIR) can be requested if the employer has already engaged in good faith recruitment efforts and has been unable to locate U.S. workers to fill the position.

As a result of years of backlogs, the processing time for labor certification applications has grown exponentially, and in many states the processing time is currently in excess of five years. Employers and qualified foreign nationals alike have been frustrated by these daunting time frames.

PERM to the Rescue

On December 27, 2004, the Department of Labor (DOL) published its final and long awaited PERM regulation[2]. PERM is an acronym for Program Electronic Review Management program. The final rule deleted the language of 20 CFR Part 656 and replaced the part in its entirety with new regulatory text which became effective on March 28, 2005. The PERM program holds the promise of reducing a three-to-five-year process to a matter of a few weeks. If employers and their attorneys follow the steps carefully, current experience is showing a good likelihood of certification of the application in as few as two or three weeks.

PERM is an attestation/audit program. Employers make a series of attestations that they have followed specific steps to recruit U.S. workers but were unable to fill the position with any willing, qualified, and available applicants. The employer then electronically files with DOL the attestation form, ETA 9089, and in a matter of a few days or weeks, a determination is made to approve the case, invoke an audit of the employer's records, or deny the case. All preliminary steps must be followed carefully and correctly to avoid an audit or an outright denial. DOL's primary concerns are that there is no fraud, that the employer is a bona fide business entity, and that there is a genuine job opportunity available to qualified U.S. workers.

Because of the scope of this topic, only a brief synopsis of the most significant changes brought about by PERM will be covered here.

Prevailing Wage Determinations

The most fundamental obligation of employers in the labor certification process is to offer at least the prevailing wage so as not to undercut the labor market. Under PERM, State Workforce Agencies (SWA's) now use a four level system for determining prevailing wages based on experience and education. This is a significant improvement over the prior more restrictive system of choosing between two very divergent levels. Employers must also now pay 100% of what is determined to be the prevailing wage, while employers could pay 95% under prior regulations.

The first step in the PERM process is obtaining a prevailing wage determination (PWD) from the SWA. PWDs remain valid no less than 90 days and no more than one year from the date of the determination. Filing a new PWD may be done at any time. Filing an alternative second PWD will be considered as a new request and a new review period will be initiated.

Pre-Filing Recruitment Steps

1. Posted Notice

The employer must post notice of the job opportunity for at least ten consecutive business days in the place of intended employment. The notice period is between thirty and 180 days prior to filing. Unlike other methods of recruitment, the notice must contain the offered wage, but it may contain a wage range so long as the lower level of the range meets or exceeds the prevailing wage. The notice must state that any person may provide documentary evidence bearing on the application to the Department of Labor. This has not changed from the traditional labor certification posting requirement.

2. Job Order

The employer must place a job order with the SWA for a period of thirty days. The employer itself must place the order using an identifier. The order must be placed for

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PERM (continued)

thirty days. A direct order to America's Job Bank is not sufficient to meet this requirement.

3. Print Advertisements

The employer must place two print advertisements on two different Sundays in a newspaper of general circulation in the area of intended employment. Both ads must be placed more than thirty days, but not more than 180 days before filing. If the ad appears under an inappropriate heading, it will be deemed a failure to make good faith recruitment of U.S. workers. The ad need not state the salary nor a detailed listing of duties and requirements.

4. Three Additional Recruitment Steps for Professional Jobs

Applications for professional jobs require additional recruitment efforts. Three additional recruitment steps must be taken and these include: 1) job fairs; 2) employer's own website; 3) job search website other than employers; 4) on-campus recruiting; 5) trade or professional organizations; 6) private employment firms; 7) an employee referral program if it includes identifiable incentives; 8) a notice of a job opening at a campus placement office if the job requires a degree but no experience; 9) local and ethnic newspapers to the extent that they are appropriate for the job opportunity; and 10) radio and television advertisements. A web page generated in conjunction with the print ad counts as a website other than the employer's.

A professional job is one for which the attainment of a bachelor's or higher degree is the usual requirement for entry level. DOL has published a list of professional occupations in Appendix A to the PERM rule, and if the occupation appears on that appendix, the employer must follow the recruitment regimen for professional occupations.

Recruitment Report

Following the recruitment period, the employer must prepare a recruitment report that describes all recruitment steps taken and the results. The recruitment report must include the number of hires and numbers of U.S. workers rejected along with the lawful job related reasons for rejection.

An applicant's failure to meet the employer's stated minimum requirements is a lawful reason for rejection. However, if a worker lacks a skill which could be gained during a reasonable period of on-the-job training, the lack of that skill is not a lawful basis for rejecting an otherwise qualified worker.

Record Retention

All supporting documents including all copies of advertisements, resumes received and the recruitment report, must be retained for 5 years from the date of filing.

Filing the PERM Application

Using a new form, ETA 9089, employers can file either electronically or by mail to the appropriate ETA processing center. Faxing is not allowed. DOL has made clear that electronic filing is preferred. To electronically file, employers will go to the ETA website located at http://www.plc.doleta.gov. They can complete the form on-line and file it. Passwords and identifiers are assigned to individuals. If the ETA 9089 is certified, the employer must sign the form upon receipt from DOL. The original signed ETA 9089 then accompanies the Form I-140 when it is filed with the Department of Homeland Security for the next stage in the permanent residence process.

No supporting documentation is filed with the ETA 9089. The employer must maintain all supporting documentation in the event an audit is required or the certifying officer requests certain documents.

Outstanding Issues

Although PERM holds great promise for eliminating the multi-year backlogs in the labor certification process, many questions and issues still remain unanswered. The following are but a few of the open issues.

1. Filing Fees

At present, there are no fees for filing a PERM application. However, in liaison meetings with the American Immigration Lawyers Association, DOL has indicated that it plans to seek filing fees in fiscal 2006 in order to recoup operating costs. The amount of any such fees is unknown at present.

2. Conversion of Pending Cases

Pending cases which were filed under the traditional method of filing labor certification applications may be converted to PERM cases. However, all re-filed cases must comply with all the requirements of the PERM final rule including recruitment and prevailing wages. If a case is not converted, it will continue to be processed through backlog reduction centers located in Philadelphia and Dallas.

If a pending application is withdrawn, it may be re-filed under PERM as long as the re-filed application is for the "identical job opportunity." This term is defined as an application with the same employer, same alien, same job title, same job description and minimum requirements, including changes which were required by a SWA prior to PERM's effective date.

If the applications are not found to be identical, then the re-filed application will be processed under the new filing date and the original application date will be lost and cannot be used for any other application.

Given the importance of preserving the original filing date in order to preserve a variety of benefits such as seventh and subsequent year extensions for H-1B specialty worker cases, there may be a significant risk entailed in converting an existing case to PERM. Whether the benefits of converting pending cases outweigh the risks remains an outstanding issue.

3. Reasonable Period of On-the-Job Training

As noted above, applicants cannot be lawfully rejected if they lack a skill which could be acquired during a reasonable period of on-the-job training. There is no definition of what constitutes a "reasonable period." This will apparently be decided on a case-by-case basis, although preliminary indications are that DOL will review item 14 of Section H of ETA 9089, which refers to specific skills and other requirements to determine whether these requirements could be learned within a reasonable period. It remains to be seen whether this will pose a significant hurdle for employers to overcome.

4. Foreign Language Requirements

An employer's requirement that a foreign language be spoken has traditionally been viewed as unduly restrictive unless justified by "business necessity." The PERM regulation at 20 CFR 656.17(h)(2) expands the business necessity bases to include the need to communicate with a large majority of the employer's customers, employees and contractors. The regulation also describes the documentation required: the number and proportion of its clients, contractors, or employees who do not speak English; detailed plans to market to a foreign country; and detailed explanation of why the duties include frequent communication with such individuals.

The open issue is whether the mere mention of a foreign language requirement will trigger an audit to allow DOL to review the documentation.

Conclusion

The labor certification process has been in place for decades as the basic means of allowing U.S. employers to hire foreign workers while protecting the integrity of the U.S. labor market. It has become so clogged and backlogged as to be virtually of no use. PERM is unquestionably the greatest single revolution in the history of the program. It promises to get the labor certification program back on track, allowing employers to permanently hire qualified foreign nationals while testing the labor market in genuine good faith. While some issues remain open as PERM continues it launch, employers, foreign nationals and their attorneys are relieved and excited about the promise held out by the new program.

**Thomas R. Williams is a member of Kerr, Russell and Weber, PLC, where he specializes in immigration and nationality law. He is past chairperson and secretary of the Michigan Chapter of the American Immigration Lawyers Association and past chairperson of the International Law Section of the State Bar of Michigan. Mr. Williams graduated cum laude from Wayne State University Law School. He is a frequent lecturer and author on topics dealing with immigration law and policy*

[1] 8 USC 1182(a)(5)(A)

[2] Fed. Reg. Vol 69, No 247 (Dec 27, 2004).

First Annual Detroit Bankruptcy Conference

The First Annual Detroit Bankruptcy Conference, "Practice Under the New Bankruptcy Law," will be held on November 11, 2005, at the Sheraton Novi. The conference brings together this region's preeminent insolvency professionals for one day of intense learning. Topics include:

- Tax Changes;
- U.S. Trustee Implementation: Entering, Getting Through and Exiting the Process;
- The Means Test: An In-depth Analysis;
- Chapter 13 Changes;
- What Debtors Get to Keep (And Not): Homestead Exemption; Household Goods; Privacy Issues;
- The New Super-Creditor: Domestic Support Changes; and
- The New World of Chapter 11: Small Business Rules, Strategies in Real Estate Cases, Lease Rules, Preference and Reclamation Issues; and
- Ethics

The Program Chairs are Stuart A. Gold, Gold, Lange & Majoros PC; Richardo I. Kilpatrick, Kilpatrick & Associates PC. Judicial Chair is Chief Bankruptcy Judge Steven W. Rhodes.

To register, visit http://coletrain.abiworld.org/t/6912/1579825/494/0/

Wetland Enforcement Seminar

On June 3, 2005, in cooperation with the Michigan State Bar Environmental Law Section, the Chapter hosted a seminar appropriately titled, "A Not-So-Dry Presentation on Wetland Enforcement."

Kicking things off were two representatives of the U.S. Department of Justice, Steve Samuels, Assistant Chief, Environmental Defense Section, and Kris Dighe, Senior Trial Attorney, Environmental Crimes Section. Both Steve and Kris provided insights on how to avoid running afoul of wetland regulations and what the DOJ looks at in evaluating an enforcement case.

Peter Manning of the Michigan Attorney General's office and David Dortman of the MDEQ Surface Water Quality Division provided insights into the changing landscape of wetland regulation and enforcement in Michigan. Derek Stratelak of King & MacGregor Environmental also provided his thoughts on the issues he and his clients face in delineating wetlands and obtaining wetland permits.

Supreme Court Review: October 2004 Term
by M Bryan Schneider

The Supreme Court's October 2004 Term was eclipsed by Justice Sandra Day O'Connor's announcement of her retirement, followed by President Bush's nomination of D.C. Circuit Judge John G. Roberts, Jr., to fill her seat. Nevertheless, the Term provided a number of decisions of particular importance to federal practitioners.

Civil Procedure

The Court issued two significant decisions involving aspects of federal civil procedure. In *Exxon Mobil Corp. v. Saudi Basic Industries Corp.*, the Court narrowed the scope of the *Rooker-Feldman* doctrine, which prohibits federal district courts from exercising jurisdiction over a claim which in effect seeks appellate review of a state court decision. In a unanimous decision authored by Justice Ginsburg, the Court explained that, although principles of res judicata and abstention may come into play, the fact of parallel state and federal proceedings in which the state court reaches judgment first does not automatically raise a *Rooker-Feldman* problem. Thus, the doctrine applies only when a party is seeking to undo a state court judgment, not any time a party raises a claim that was litigated in state court.

In *Exxon Mobil Corp. v. Allapattah Services, Inc.*, a 5-4 decision authored by Justice Kennedy, the Court considered whether a district court may exercise supplemental jurisdiction under 28 U.S.C. § 1367 over diversity claims which do not independently satisfy the amount in controversy requirement. Analyzing the plain language of the statute, the Court concluded that so long as one claim satisfies the amount in controversy requirement, and so long as there are no other jurisdictional defects, the district courts can exercise supplemental jurisdiction over claims which do not independently satisfy the amount in controversy requirement but which form part of the same Article III "case or controversy."

Civil Rights/Discrimination

The Court also decided a number of important cases involving federal civil rights and discrimination statutes. In *Smith v. City of Jackson*, the Court considered whether disparate impact claims are cognizable under the Age Discrimination in Employment Act (ADEA). In an opinion authored by Justice Stevens, a four-justice plurality concluded that such claims are permitted by the language of the ADEA, which mirrors the language of Title VII. Justice Scalia concurred separately, concluding that the EEOC's regulations permitting such a claim are a reasonable interpretation of the statute entitled to *Chevron* deference, and thus such claims are permissible.

In *Jackson v. Birmingham Board of Education*, the Court considered whether Title IX authorizes a civil suit for retaliation. In a 5-4 decision authored by Justice O'Connor, the Court concluded that Title IX's broad language encompasses such claims, permitting relief for a plaintiff who is retaliated against because he complained of sex discrimination.

Cutter v. Wilkinson involved a constitutional challenge to the Religious Land Use and Institutionalized Persons Act (RLUIPA), which prohibits the states from imposing a substantial burden on the religious exercise of prisoners unless the burden is the least restrictive means to satisfy a compelling governmental interest (*i.e.*, satisfies strict scrutiny). In a unanimous decision authored by Justice Ginsburg, the Court rejected the argument that the RLUIPA constitutes an establishment of religion prohibited by the First Amendment. Reasoning that the statute falls into the zone of the "play in the joints" between the Establishment and Free Exercise Clauses, the Court concluded that the statute does not establish a religion, but mere promotes free exercise by removing government-created burdens on religious observance.

Finally, in *Town of Castle Rock v. Gonzales*, the police failed to enforce a state court restraining order, which resulted in the deaths of the plaintiff's three children. The Court, in a 7-2 decision authored by Justice Scalia, concluded that the plaintiff did not have a due process claim under the Fourteenth Amendment. Specifically, the Court concluded that the plaintiff did not have a claim of legal entitlement to the enforcement of the restraining order, and thus she had no property interest which was deprived by the defendants.

Criminal Cases

The Court was also active in cases involving issues of federal criminal law and procedure. Most significantly, in *United States v. Booker* the Court applied its prior holdings in *Apprendi v. New Jersey* and *Blakely v. Washington* to the Federal Sentencing Guidelines. In a 5-4 opinion authored by Justice Stevens, the Court concluded that *Blakely* applies to the Guidelines, and that the Guidelines are therefore unconstitutional because they permit a defendant's sentence to be increased on the basis of facts which were not presented in an indictment and found by the

jury. In a separate 5-4 opinion authored by Justice Breyer, however, a separate majority concluded that the appropriate remedy was to excise those portions of the federal sentencing statutes which make the Guidelines mandatory. The effect of the two opinions is to deprive the Guidelines of their binding force, although they remain advisory and should be considered by district courts in imposing sentence.

The Court also interpreted a number of federal criminal statutes. In *Small v. United States* the Court narrowed the scope of 18 U.S.C. § 922(g), which prohibits a person who has been "convicted in any court" from possessing a firearm. In a 5-3 decision authored by Justice Breyer, the Court concluded that the phrase "any court" includes only convictions in domestic courts, and thus does not include convictions arising in a foreign court.

In *Whitfield v. United States* the Court unanimously held, in an opinion authored by Justice O'Connor, that proof of an overt act is not required for a conspiracy to commit money laundering conviction under 18 U.S.C. § 1956(h). In *Pasquantino v. United States* the Court held, in a 5-4 opinion authored by Justice Thomas, that the federal wire fraud statute encompasses a scheme to avoid payment of taxes to a foreign sovereign. And in *Arthur Anderson LLP v. United States*, Chief Justice Rehnquist wrote for a unanimous Court, holding that a person is guilty of "knowingly . . . corruptly persuad[ing]" another person to destroy documents needed in an official proceeding only if the he is aware of the particular proceedings in which the documents might be material.

The Court also decided two significant Fourth Amendment cases. In *Devenpeck v. Alford*, the Court unanimously held, in an opinion authored by Justice Scalia, that a warrantless arrest is permissible if there objectively exists probable cause to arrest for an offense, even if the arresting officer made the arrest based on a different crime for which there was not probable cause. And in a 6-2 decision authored by Justice Stevens, the Court held in *Illinois v. Caballes* that a drug dog sniff of the exterior of a car during an otherwise permissible traffic stop does not violate the Fourth Amendment because the search reveals only the presence of a contraband item, the possession of which raises no legitimate expectation of privacy.

On The Record With The FBA

On May 19, 2005, the Chapter Rules and Civil Practice Committee presented a panel discussion on the intersection of the legal, media, and public relations worlds entitled "When No Comment Is No Good." The free program was held in Courtroom 100, the new ceremonial Courtroom of the Theodore Levin U.S. Courthouse in Detroit.

Leonard Niehoff, a shareholder of Butzel Long, presented an attorney's perspective. Mr. Niehoff practices media law and has represented the Detroit News, WXYZ-TV, CBS, and other media entities, and teaches media law at the University of Michigan Law School.

Matt Friedman provided a point of view from a publicist. Mr. Friedman is a partner at Marx Layne & Company, Michigan's largest independently owned public relations agency, where he collaborates with clients to design and implement communications strategies.

Finally, David Ashenfelter rounded out the panel with a journalist's viewpoint. Mr. Ashenfelter is a Pulitzer Prize-winning reporter for the Detroit Free Press who covers the U.S. District Court in Detroit.

The panelists first shared their general observations and motivations when faced with a "media crisis." They were next presented with a variety of hypothetical crises, and they explained how they would manage and react to them. The situations ranged from sudden incidents, like an automobile accident caused by a company's delivery driver, to a planned unfortunate event, such as a major plant closing.

The discussions also included criminal, as well as civil situations. Following discussions of each hypo, the audience members presented questions and comments to the panel. In addition, the attendees had the opportunity to meet informally with the panel members, as well as Chief Judge Bernard A. Friedman, before and after the program.

The program provided FBA members with useful tips and an understanding of different perspectives involved in managing a media crisis. The Chapter Rules and Civil Practice Committee is planning more such practical programming in the 2005/2006 program year. If there is a topic of interest to you, or if you would like to assist in planning such a program, please feel free to contact committee co-chairs Dan LaCombe, dlacombe@bsdd.com, or Adam Strauss, at astrauss@dykema.com.

Gilman Award Luncheon

On April 28, 2005, the Chapter's prestigious Leonard R. Gilman Award was bestowed upon two outstanding federal practitioners: Kenneth R. Sasse, Senior Litigator in the Flint Federal Defender Office and the Legal Aid & Defender Association, Inc., and Eric M. Straus, Chief of the Counter-Terrorism Unit of the United States Attorney's Office in Detroit.

The Award is given annually to a practitioner of criminal law who is believed by his peers to emulate the excellence, professionalism and commitment to public service which exemplified the life of Len Gilman, who, at the time of his death on February 12, 1985, was the United States Attorney.

Gilman Award Recipients: Kenneth Sasse - Introduction by Miriam Siefer, Chief Federal Defender

It is with great pride that I present this year's Leonard R. Gilman Award to Kenneth Sasse. Ken has been a Federal Defender with Legal Aid and Defender Association for twenty-one years.

He is the consummate defender. I cannot begin to think of a defense attorney who has tried more cases in federal court throughout the years than Ken; and tried so many of them successfully. As Cameron Henke, the Flint office investigator, stated about Ken, "When you first look at the case, the facts look so bad for the defendant, but Ken has the ability to take these facts, work the case, and during his closing argument, turn it around."

I have personally witnessed this magic in cases that we have tried together. In one case, the prosecutor introduced numerous Title III recordings of our client discussing every intricate detail of the conspiracy. It was the type of trial where you would rather be sitting under the defense table. In closing argument, Ken gets up and confidently explains to the jury how fortunate it is that the government has surreptitiously taped the client for hundreds of hours–because now we know exactly what the defendant said. And, despite these apparently incriminating conversations, the jury acquits.

After each experience of working a case with Ken, you emerge a better lawyer. I know I have.

Ken is also an equally fine appellate attorney. He is the "go to" guy for legal advice for the Flint and Bay City criminal defense bar who depend on his knowledge of the law as well as his good counsel. But most important, Ken epitomizes all that the recipient of the Gilman award should be: an attorney dedicated to his clients, a formidable litigator, and a decent human being.

Being a defender to Ken is more than just a win/loss ratio. As U.S. District Judge Joan Gottschall, from the Northern District of Illinois recently stated: "The possibility of winning, what makes the law fun for most litigators, is not a common outcome in an appointed case. These lawyers day in and day out mediate the hard no man's land between our neediest individuals and the power of the United States judicial system. They are people who must be able to keep their eyes trained on a higher prize than professional glory and glamour: the hope that they will succeed in making the system act fairly." Ken has spent his legal career doing just that—insuring that justice is the goal and not just a game.

Many of you probably don't know this, but one of Ken's first jobs after college was as a postman delivering mail. While his job description has changed, when the chips are down–as they say in the sport's world–Ken still delivers.

Ken, congratulations on this well-deserved award!

Eric Straus - Introduction by AUSA Robert Cares

It is my privilege to introduce to you Eric Straus, this year's co-recipient of the Leonard Gilman award. I have known Eric for 15 years. For the last five years I have worked closely with him on public corruption cases and counter-terrorism investigations and cases.

Those of you who know Eric realize that he has a great sense of humor, with an infectious laugh. Much of his humor is self-deprecating, but he does take jabs at others, especially his friends.

Underneath that humor and wit is a deep commitment to his job as an Assistant U. S. Attorney. He performs his duties with a high degree of professionalism and ethics. We all greatly appreciate his dedication to the national interest in his role as chief of the counter-terrorism unit in the U. S. Attorney's Office.

Because of his ideals and dedication, he willingly assumed the responsibility of the post-trial issues in the highly publicized case of *U. S. v. Koubriti*. That was a daunting task, which involved a great personal sacrifice to Eric and his family. He spent countless hours here and other places sifting through tons of information. It was a grind, physically and emotionally – day after day, week after week, month after month. I could see the toll that it was taking on him; but, he persevered.

This dedication and perseverance led to the August 2004 filing of the fifty-nine page response to the defendants' motion for new trial and the government's motion to dismiss count one of the indictment. (These papers can be found on FINDLAW.) Eric's commitment to hard work and just results exemplifies the spirit of the Gilman award.

Before turning the podium over to Eric, I want to make a comment about welding. I don't know how many of you have experience with welding together two pieces of metal. But, when a welder runs a bead between two pieces of metal, the weld is actually stronger than the metal itself.

Our system of justice, like steel, is strong. However, sometimes cracks develop. In carefully examining the Koubriti case, Eric detected a crack. And he went to work. He put his head down, and welded – filling the crack and making the entire piece stronger.

It is my privilege and honor to introduce to you Eric Straus.

Summer Associate/Law Clerk Program a Success

The Third Annual FBA/Summer Associate/Law Clerk Program was once again a resounding success. The program was held July 28 in the special proceedings courtroom in the Theodore Levin U.S. Courthouse in Detroit. Over one hundred attended.

Committee Chair Cameron J. Evans opened the program by welcoming the summer associates, judicial law clerks, and members of our Federal Bench who were in attendance. Chapter President Julia Caroff Pidgeon provided an overview of the FBA.

Chief Judge Bernard A. Friedman entertained the crowd with his witty opening remarks. Judge Robert H. Cleland discussed various issues regarding electronic filing, and the crowd seemed to be quite impressed with Judge Cleland's knowledge of computer lingo. Judge George Caram Steeh addressed the importance of one's reputation and the dwindling number of trials, both civil and criminal, in Federal Court. Judge Avern Cohn and Judge Paul V. Gadola shared their insights on the latter issue and, not surprisingly, a robust discussion ensued. After the program concluded, everyone adjourned for refreshments and desserts.

All Star Gala

Oh, what a night! This year, the Chapter tied Detroit's hosting of Major League Baseball's All Star Game with its 26th Annual Dinner honoring our federal judicial officers. The Tiger Club at Comerica Park, with its wall-to-wall and floor-to-ceiling windows overlooking the ballpark, proved to be a breathtaking venue. The individual baseball desert cakes were also a "hit."

The event was attended by over 200, including federal judges, private practitioners, U.S. Attorneys, federal defenders, law clerks, and spouses/significant others. They gathered to pay tribute to and mingle with the judicial officers of the Eastern District, to conduct some business, and to enjoy the camaraderie of fellow FBA members.

Chief Judge Bernard A. Friedman administered the oath to new officers, including Julia Caroff Pidgeon, President; Grant Gilezan, President-Elect; Honorable Mark A. Goldsmith, Vice President; Julia Blakeslee, Secretary; and Barbara McQuade, Treasurer. As her first official act, President Pidgeon acknowledged the dedication and leadership of outgoing President Dennis M. Barnes.

As in past years, the Chapter received tremendous support from seventeen sponsor firms and one corporate sponsor. Thanks in large part to these sponsors, the Chapter was once again able to contribute several thousand dollars to the Federal Bar Foundation.

Special thanks go to our legal community's talented musical parody troupe, A (Habeas) Chorus Line and to Butzel Long for providing the invitations and programs.

A complete list of Chapter Officers, Board Mambers and Committee Chairs is available on-line at www.fbamich.org.

Barbara Rom

Rom Appointed Chair of Bankruptcy Judge Merit Selection Panel

Sixth Circuit Chief Judge Danny Boggs has appointed Barbara Rom**,** managing partner of the Detroit office of Pepper Hamilton LLP, chair of a merit selection panel to screen applicants for a new bankruptcy judgeship at Flint or Bay City. She is certified as a business bankruptcy specialist by the American Board of Certification and is a Fellow of the American College of Bankruptcy.

The Chapter welcomes the following new Law Clerks for the Eastern District and the Sixth Circuit:

Chief Judge Friedman
Jeff Imerman - Duke Law School

Judge Feikens
Robyn Tessin – University of Michigan

Judge Cook
Neha Dewan - American University, Washington College of Law
James Perez - New York University School of Law

Judge Cohn
Andrew Lievense – University of Michigan

Judge Zatkoff
Matthew McKendrick - Ave Maria School of Law

Judge Gadola
Luke Reilander - Ave Maria School of Law

Judge Cleland
Christy Dral – University of Tennessee Law School

Judge Edmunds
Bradley R. Hall - Northwestern University School of Law

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Law Clerks (continued)

Judge Hood
Richard L. Brooks III -Howard University School of Law
Monifa K. Gray - Vanderbilt University Law School

Judge Borman
Carla R. Dorsey - Georgetown University Law Center
Stephen H. Ravas -Wayne State University

Judge Tarnow
Gregory R. Swygert - Northwestern University School of Law

Judge Roberts
Jennifer Newby - Wayne State University

Judge Battani
Matthew Powell - Wayne State University Law School

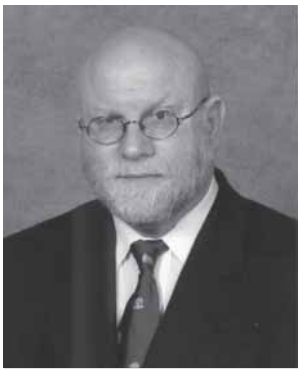
Judge Lawson
MacKenzie Fillow - University of North Carolina School of Law

Judge Keith
Karla A. McKanders - Duke University Law School
Kennisha A. Austin - Columbia Law School (NY)
Walter Mosley -Harvard Law School

Judge Kennedy
Christa Cottrell – University of Michigan

Judge Ryan
Margaret L. Lassack – University of Michigan
Albert A. Starkus III - Ave Maria School of Law

Judge Clay
Stephanie Roy - George Washington University
Chakira Hunter – Northwestern University
Colleen Sorensen – Cornell University
David Chu – Northwestern University



News From National

By: Brian Figot, 6th Circuit VP

The Governance Review Committee Report: Let's Not Lose Our Voice

In my last column, I sought input from Chapter members regarding the proposal for sweeping change in the structure of our National organization. A copy of the column is on the Chapter website, at http://www.fbamich.org/index.cfm?location=9.

During the summer months, the Chapter studied the proposal very carefully. President Schuck of National, a proponent, met with the Chapter's Executive Board and National leaders from this Chapter, to answer questions and seek support for the proposal. Frankly, I have remained an outspoken opponent of the proposal, even though I have been a strong supporter of National FBA initiatives in nearly all other respects since I became involved in national governance.

At the end of the process, the Chapter passed a resolution, availale on the website and inserted in this newsletter, which seeks a middle ground; proposing three specific reforms which address the primary deficiencies which National has identified as underlying the conclusions of the Governance Review Committee. I support those reforms.

Likewise, I support the Chapter's conclusion that "the fundamental reordering of the National FBA structure that the proposal contemplates requires a more deliberative, broad-based consideration before adoption" and I agree with the Chapter's advice "that the proposal be formally presented to the Chapters, Sections and Divisions for consideration and comment for six months and that the National Council, at the meeting in September of 2006, vote on whether to approve the proposal with such changes as result from consideration by the constituent members of the organization."

Calendar of Events

September 8
State Of The Court Luncheon
Speaker: Chief Judge Bernard A. Friedman
State of the Court & Awarding of Pro Bono Honors
Hotel Pontchartrain
11:30 a.m.
Contact: Elisa Angeli, 313.496.7635 or register on-line at www.fbamich.org

September 20
State Of The Bankruptcy Court Luncheon
Speaker: Honorable Steven W. Rhodes
Details to Follow
For further information: www.fbamich.org, click on "Hot News" or "Events."

November 17
Rakow Scholarship Awards Luncheon & Historical Society Annual Meeting
Special Event: Preview of the documentary film commissioned by the Society and produced by previous Academy Award nominee Judith Monteil, and Ronald Aronson, Distinguished Professor of Humanities
Hotel Pontchartrain
11:30 a.m.
Contact: Elisa Angeli, 313.496.7635 or register on-line at www.fbamich.org

December 6-7
New Lawyers Seminar
Hotel Pontchartrain
8:15 a.m.
Contact: Brian Figot, at 248.593.5928 or register on-line at www.fbamich.org

I firmly believe that there are too many questions which remain unanswered, incurable deficiencies with the proposal and inherent flaws in the arguments for immediate adoption. The proposal should be viewed as a starting point for further discussion among the constituent elements of the association, and further refined to meet the needs of the FBA and its members. The discussion should be an open one. To the extent that the matter is studied in committee, the committee should publish its minutes; or, at the very least, generate a document which is both explanatory and visionary – presenting not just a proposal, but also an exposition of the organization's missions and goals and an explanation of how the proposal meets those ends. Dissent should be encouraged, never stifled, and then published to the National Council and to the Membership, at a minimum by electronic means.

Concerning the call for more debate, we have been asked, rhetorically, "How long is needed?" and it has been noted that the Governance Committee was constituted three years ago. However, little changed after the Committee's **first** report which was issued midway through its first year. After another two-and-one-half years, "consensus" was achieved by reconstituting the Committee in order to exclude dissenting voices. How long? As long as it takes, and the process must begin with consideration of the systemic goals which need to be balanced.

Efficiency, the focus of the plan under review, is just one of those goals. Other goals include democratic representation of the membership as a whole and its various constituent parts; effective communication and collaboration among the constituent parts; support for semi-independent entities (*i.e.*, Divisions, Sections, Chapter and other internal entities); support of current leadership while developing future leadership; and providing services of value to the membership and the community.

Proponents of the plan argue that it reflects the actual manner in which the FBA works – through a strong executive committee, and contend that the plan makes that executive branch more representative. I believe that such an approach is an oversimplification. While it is true, that the Executive Committee has assumed a much greater role over the past several years, the EC still must act within the broad policies established by the National Council. The FBA Constitution grants the EC "the power to do and perform all acts and functions which the National Council itself might do or perform, subject in all respects to the authority and discretion of the National Council." Why is that not enough?

That leads us to the next issue. Should the Council be merely a reactive body? Alternatively, should the Executive Director and EC do more than the day-to-day and month-to-month administration of existing policy as set by the Council?

I favor the latter approach, and believe that the National Council represents the exercise of decentralized control which is the hallmark of the type of organization which the FBA has been (or at least has become over the years). The constituent parts of the association are (1) the local chapters; and (2) the Sections and Divisions. Each of those parts, and the components of those parts, act autonomously of National within the framework of the National Constitution.

In other words, the association is a con-federal alliance; more congregational than hierarchal. The fundamental nature of this relationship is confirmed by the provisions in the most recent Strategic Plan. National exists in order to provide coordination, training, and "value-added" benefits to the local chapters, sections and divisions. The benefits of membership include the economies of scale and the ability to speak as a unified group, thereby commanding attention on the national scene which comes from the synergistic effort.

The governing body of the FBA should be representative of the broad spectrum found in its component parts. Representation is the nature of legislative power. I believe that the plan, by combining the executive and the legislative, purporting to give some constituent parts an executive voice (through national election at large) would deviate too far from the existing model, decreasing the effective impact of the parts acting through the National Council.

Some argue that National Council is too cumbersome and meets only twice a year. However, the authority which comes from consensus need not be as cumbersome as it was in the past. Web-based communications are instantaneous, and when issues that are outside the guidance of existing policy arise in the course of administration, the National Council can be briefed, have debate, and even vote without physical presence in a single forum.

It has been suggested that the proposal is based more upon a "private sector model" than a "public sector model." I do not believe that such a model provides an appropriate balance for an organization such as ours, as it overemphasizes efficiency while undercutting the goals of a representative assemblage of constituencies. The public sector model, balancing the legislative and executive functions, remains more appropriate.

There also needs to be harmonization between the products of the Governance Review Committee and the Strategic Planning Committee. Significantly, it would appear that the Review Committee's Plan is inconsistent with the first objective set forth under Goal I of the Strategic Plan, which seeks to "Improve collaboration among FBA Executive Committee, National Council, Chapters, Divisions, Sections, Committees and Staff [including] a one-day retreat for all EC members, Vice Presidents for the Circuits, chapter presidents, section/division chairs, and committee chairs to be held prior to the Mid-year Meeting each year."

The Governance Plan does not increase, but instead reduces the communication of constituent parts of the organization. It provides "transparency," in that it allows people to know exactly who passed a policy or

(see page 12)

National (continued)

took an action, but it removes the policies and actions from effective opposition.

It also has been suggested that the National Council should pass on the governance issue and allow the matter to be put to the entire membership as a plebiscite. Again, I respectfully disagree, and believe that to do so would be an abdication of the constitutional duties of the National Council. Particularly given the exclusive reliance upon paper ballots and the sparse return of those ballots (generally 10-12% of eligible voters), I do not believe a plebiscite would be as representative of the membership as a vote of National Council.

The unassailable fact is that, for the most part, members attend National Council meetings because they are interested in the affairs of the association. An unreturned ballot, on the other hand, is the result of disinterest. In any organization, the vast majority of dues-paying members do not wish an individual voice in governance. However, it remains important that they at least **know** someone who has such a voice. That is the purpose of National Council.

Your FBA should not be allowed to be left to the exclusive administration by people you do not know. There should be no rush to judgment.

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Eastern District of Michigan Chapter
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By Resolution of the Officers and Executive Board
of the Eastern District of Michigan Chapter of
the Federal Bar Association, on July 28, 2005

Dear President Schuck:

Thank you for meeting with our Officers and Executive Board on June 22 regarding the final report of the FBA's Governance Review Committee. Your insights, together with the observations of past Chapter and National leaders including Alan Harnisch and Geneva Halliday and the recommendations of our present leadership, have assisted our Chapter in studying the proposal and the systemic problems that the Governance Review Committee sought to address by the proposal.

We agree that certain reforms are needed, even as we counsel additional consideration of the Committee's proposal. Specifically, we support an immediate shortening of the leadership ladder by one year, reduction in the size of National Council, and expansion of the Executive Committee in order to serve the interests of diversity. If these changes are effected by action of the National Council in September, the principal shortcomings identified by the Committee will be ameliorated. However, the fundamental reordering of the National FBA structure that the proposal contemplates requires a more deliberative, broad-based consideration before adoption. We urge that the proposal be formally presented to the Chapters, Sections and Divisions for consideration and comment for six months and that the National Council, at the meeting in September of 2006, vote on whether to approve the proposal with such changes as result from consideration by the constituent members of the organization.

In the interim, we believe that the principal systemic problems should be remedied by a series of specific changes in the by-laws, presented *in seriatim*:

1. Executive Committee Diversity. To bring additional voices into the governing body, a goal with which we fully agree, we propose the expansion of the Executive Committee by the at-large election of three representatives who are past Chapter presidents but have not been National officers. One of these positions should be reserved for a past president of a smaller chapter.

2. Reduction in the Size of National Council. The Governance Committee has identified unwieldy size and insufficient attendance at meetings as two shortcomings of the present structure. At first blush, these concerns appeared to us to be mutually exclusive. We are unclear whether the attendance is insufficient as an overall percentage of the 330 members, or as unrepresentative of the various constituents. To address both unwieldiness and a possible imbalance in representation, we suggest that the at-large appointments be reduced from fifty to twenty. We further recommend that attendance be analyzed in terms of actual representation of chapters, sections and divisions, and an effort be made to determine the causes of under-representation. We regard the twice-yearly National Council meetings as essential to the vitality of the FBA as these meeting provide a means for the Chapters, Sections and Divisions to express their points of view and to debate the merits of the policies and initiatives of our organization.

3. The Leadership Ladder. We agree that six years on a leadership ladder, with an additional year on the Executive Committee as immediate past president, is too long and, as you have noted, may discourage some from seeking leadership due to the length of the ladder. We propose the elimination of the position of Deputy Secretary as a means of shortening the ladder. The duties of Deputy Secretary would be assumed by the Secretary.

Our Chapter views itself as part of a national organization with both rights and responsibilities to the organization and a voice in the adoption of long term goals and the strategic planning for the adoption of those goals. Other chapters undoubtedly share our view. Our specific recommendations for by-law changes and our request for a formal process to permit review and comment are the expressions of our commitment to the FBA. Our meeting on June 22 and this letter are part of a dialogue that we hope to continue and expand to other constituent parts of the FBA, as these exchanges contribute to the vitality and cohesiveness of our national organization.

We thank you for your consideration of our views and for your efforts and the efforts of your colleagues at the National Headquarters to strengthen our organization.

Sincerely,

Julia Caroff Pidgeon
President

cc: Jack Lockridge