



FBA newsletter

Spring 2006

Federal Bar Association - Eastern District of Michigan Chapter - 47 years of service to our Federal Bench and Bar

McCree Luncheon February 23, Award Winner: Freedom House Speaker: Eric Rothschild, Intelligent Design Litigator

The Chapter will host its annual Wade Hampton McCree Jr. Memorial Luncheon on Thursday, February 23, at the Hotel Pontchartrain. A reception will begin at 11:30 a.m., followed by luncheon at noon. The Luncheon will feature the presentation of our Chapter's annual McCree Award for the Advancement of Social Justice, nationally acknowledged as one of the most prestigious awards in recognition of contributions to the community.

This year's award recipient is Freedom House, a not-for-profit organization located in southwest Detroit whose mission "is to address the needs of homeless and/or indigent refugees seeking asylum in either the U.S. or Canada . . . guided by the belief that all persons deserve to live free from oppression and deserve to be treated with justice, compassion and dignity." More information about Freedom House is available online at www.freedomhousedetroit.org

Maintaining the strong tradition of presenting McCree Award Luncheon speakers on matters of vital current interest in the areas of social justice and constitutional freedoms, the Chapter will be honored to host Eric Rothschild, a partner with Pepper Hamilton LLP, resident in the Philadelphia office, who served as co-lead counsel for the plaintiffs in *Kitzmiller v. Dover Area School District*, the first case in the nation to test whether "intelligent design" -- an argument that the complexity of biological life proves the existence of a supernatural intelligent designer -- should be introduced into the curriculum of public high school science classes.

Mr. Rothschild and a team of lawyers from Pepper, the ACLU, and Americans United for Separation of Church and State represented eleven parents who challenged the curriculum change in the

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President's Column

Julia Caroff Pidgeon

The judiciary is the least understood branch of our federal government. Swept up in the excitement of a presidential campaign every four years, the public

has a generally positive understanding of the role of the executive branch. While decrying the legislative branch as the captives of campaign donors and profligate dispensers of pork, many citizens regard their Congressional representative and Senators as the exceptions to the rule, ready to listen to concerns and to bring much needed projects to their district and state.

By contrast, the judiciary has no popular constituency. Unless nominated to the Supreme Court, the names of most judges remain unfamiliar to the public, even in the districts and circuits where they sit. Appointed and confirmed, judges do not campaign for their positions. They speak only through their orders and opinions, which, once issued, cannot be further explained or defended by their authors absent a remand.

The judiciary consequently is sometimes subject to popular misunderstanding, criticized for thwarting the will of the majority and defying its common sense. We appear to be in such a period, with the personal convictions of judicial nominees scrutinized in the belief that judges act from private bias, rather than from abiding respect for the rule of law applied in a fair manner to the cases before them. Judges whose rulings are contrary to prevailing common opinion, or, at least, the firmly-held views of a vocal segment, are castigated as "activists."

This suspicious regard of the judiciary is amplified by a dismissive view of lawyers. Shark jokes abound, promoting stereotypes of amoral, clever manipulators thwarting true justice in the service of their clients or personal ambition. Perhaps these caricatures arise from the

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President's Column (continued)

often unhappy circumstances that bring individuals into contact with lawyers and the courts: commercial disputes, divorces, the aftermath of an injury or bankruptcy. Lawyers, particularly opposing counsel, are blamed for the anger and frustration engendered by the disputes that the parties have brought to them for resolution. Despite the best effort of judges and lawyers to maintain the civility of legal proceedings, the experience is often difficult for litigants and intimidating for witnesses.

Lost in these popular misconceptions is understanding of the roles of the judiciary and lawyers in giving vitality to the Constitutional principle that human progress and happiness are best achieved in a society where individuals are governed by the rule of laws democratically enacted and justly administered. Frustrating as it can be at times to the popular will, courts and lawyers protect these rights and with them the prosperity and peace that come from living in a society where constitutional guarantees of the rights of individuals have enduring substance.

Dismissive popular attitudes toward lawyers and suspicions regarding the impartiality of the judiciary over time erode respect for the rule of law - attitudes that we as a profession must do our best to dispel as part of our commitment to a civil society. Changing misperceptions takes time, but it can be achieved, starting with our community. Coming to court can be a positive experience that leads to an appreciation of the essential roles the court and our profession play in making our society just.

Here are just a few of the ways we can increase our fellow citizens' appreciation for the least understood branch of government and the often misunderstood lawyers who serve the cause of justice in its courtrooms. We can lead a school group on a tour of our federal courthouse, or go to a local school to talk about the legal profession. We can invite members of our business community to Law Day at the Courthouse, or go to a community group for an "ask the lawyer" session. Please go to our Chapter website at www.fbamich.org, click on the link to community outreach, volunteer, and change some hearts and minds, one school busload at a time.

McCree (continued)

Dover district as a violation of the First Amendment, on the grounds that the school board acted with a religious purpose and that its action have the effect of promoting or endorsing an inherently religious concept. In a sweeping victory for the plaintiffs, a federal judge ruled on December 20, 2005 that the Dover policy violated the First Amendment, holding that intelligent design is clearly religious in nature, and is not science.

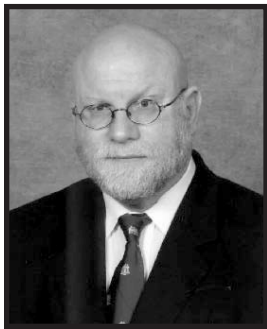
Tickets are \$25.00 for FBA members and \$30 for non-members and are available on-line at the Chapter website [www.fbamich.org/Events & Activities](http://www.fbamich.org/Events%20&%20Activities). For more information, contact Program Chair Elisa Angeli at angeli@millercanfield.com or by calling her at 313.496.7635.

New Lawyers Seminar Caps 28th Year! By Grant P. Gilezan

Record the recent New Lawyers Seminar held on December 6th and 7th at the Ponchartrain Hotel in the success column, as the event enjoyed one of its largest turn-outs ever. One hundred twenty attorneys admitted to practice in 2005 enjoyed the learning the "nuts and bolts" of practice from some of the best state and federal legal talent the Metropolitan Area has to offer. Even the seminar luncheon provided a uniquely spirited learning opportunity when Honorable William J. Giovan of the Wayne County Circuit Court graciously addressed the group, including surprising all by breaking into song with the help of his fellow Forum Shoppers. Our Chapter performed the honor of sponsoring these new lawyers admission to practice in the Eastern District of Michigan during a mass swearing in ceremony on the December 6th. Presiding over the admissions were District Judges Battani, Cleland, Cohn and Tarnow. Local attorneys who served as sponsors included Brian Anderson, Peter Caplan, Thuy Dao, Rita Foley, Susan Gillooly, Jeanine Jones and Michael Leibson.

The Seminar reflected very well on the Federal Bar Association, inspiring nearly sixty participants to join our National organization in addition to becoming members of our Chapter. On behalf of all of my New Lawyers' Seminar Committee Co-Chairs (Brian Akkashian, Christine Dowhan-Bailey, Brian Figot, Geneva Halliday and Cathrine Wenger), I would like to thank all of the busy practitioners and members of the judiciary who volunteered their time to instruct these new members of our legal community. The committee also expresses its gratitude to the Eastern District of Michigan District Court for their wonderful participation and for defray-

ing the cost of holding this event at the Pontchartrain while renovations at the Theodore Levin United States Courthouse continue.



Sixth (Circuit) Sense [f/k/a News from National] *

If you are a member of the National FBA, you received a large yellow envelope in mid-January, with the proposed changes in National's governance structure. Absent some unexpected, unorganized and spontaneous popular uprising, the National Governance Proposal will have passed by the time this Newsletter is distributed, despite vigorous opposition by the Eastern District of Michigan Chapter.

We could continue to find fault with the proposal and the manner in which it was bullied through, or complain that the particular constitutional and by-law changes sent to the membership were never presented to the National Council in the manner specified by the constitution then in effect. We could fixate on the fact that the mailing itself presented an unbalanced set of pros and cons that ignored all of the procedural and most of the substantive objections to the proposal, including those which were specifically solicited as a summary of the arguments against the amendments. The website www.fedbar.org was devoid of any reference to these issues.

However, it is my sense that if the amendments pass, it will be time to move on – while remaining vigilant in protection of chapters' rights and on the alert against harms that may come to pass from the centralization so that, to the extent possible, appropriate counter-actions may be taken.

In many ways, it will be more difficult now for the (presumably) victorious proponents of change. In particular, it will be incumbent upon the new regime to demonstrate that it is indeed imbued with the "transparency, accountability checks and balances" which it has promised are inherent in the changes. The Directors, once elected, must ensure that their purported motivation, based in a "desire to represent one of the association's key constituencies" (i.e., chapters, circuits, sections and divisions, and younger lawyers) does not prove a divisive and counterproductive force.

The wisdom of the eighteen directors will need to match the collective wisdom which National Council has provided over the years, for many of their deci-

sions will be effectively non-reviewable. For example, as the governing body of the organization, the new constitution will provide that the "headquarters of the Association shall be at a site determined by the Board of Directors." If the Directors choose to sell the D.C. headquarters and relocate to suburban Virginia (or even north to Alaska), no ratification by National Council would be required; and no post-hoc attempt to review, alter, amend or reverse the decision could be effective absent the consent of the entities with which the Board of Directors transacted.

Focus, therefore, on the future; and, while thinking globally, act locally. Get involved with the Chapters and Circuits, join the Sections and Divisions which correspond to your areas of interest. Choose a local committee with which to associate. Attend local events (including the upcoming Sixth Circuit Judicial Conference, for which you must pre-register. Forms are available by linking through www.fbamich.org).

In short, regardless of the structure of national leadership, the FBA still has limitless opportunities for collegiality, learning, service and leadership which are relevant to your practice. You don't even have to be a "federal" practitioner to benefit from membership. Under the new constitution, the best way to assure national leadership which is responsive to the needs of Chapters and Circuits will be through involvement and participation in the new system, starting on the local level. When ballots are mailed for the first election of directors, VOTE. Even better, run for office.

**Since this column was inaugurated in 2003, it was entitled News From National. However, in deference to our National Executive Director, Jack Lockridge, who has expressed a desire to utilize that title for his informative reports from our D.C. headquarters, a new name has been chosen.*

Dr. James McHenry Retires by Charles Shepherd

On July 25, 1983, Dr. James O. McHenry was appointed Chief United States Pretrial Services Officer for the Eastern District of Michigan. During his twenty-two years here, he worked tirelessly in propelling the Agency into one of the top five in the nation. Dr. McHenry retired on January 3, 2006, and his friends and colleagues in the Court "family" gathered to honor him and his outstanding career on January 6th.

Dr. McHenry instituted consistency among all officers promoting honesty, fairness and propriety in their positions of trust. Through innovative policies, procedures, and methods of operations, he fostered the

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McHenry (continued)

respect, dignity, and individuality of all persons who came before the Court and assured that they would be treated equitably and courteously.

Dr. McHenry implemented specialized programs to ensure that persons under supervision in the community received the support and services they needed to achieve a law-abiding lifestyle while upholding the right of the public to be safeguarded against criminal activity, i.e., mental health evaluation and treatment, electronic monitoring, drug and alcohol treatment, and a comprehensive drug analysis laboratory.

Dr. McHenry ushered Pretrial Services into the field of high technology with a Cyber-Crime Unit implemented to minimize the risk to the community posed by persons on pretrial release using the internet to further criminal behavior. His expansion of the firearms and safety programs, assured that officers exceed established standards and are able to defend themselves and others while performing their duties to the Court and the community.

He worked in harmony with his colleagues in the court system as well as with other agencies to foster mutual respect and improvement of the quality of services.

The FBA wishes him a long and fulfilling retirement.



From Court Administrator Dave Weaver

Case Management / Electronic Case Files (CM/ECF)

Electronic filing in the Eastern District of Michigan continues to expand. Since September 19, 2005, the Court has trained almost 1,000 attorneys and support staff. Currently, 4,234 attorneys have been issued logins and passwords to CM/ECF and 2,797 have actually filed electronically. From July 1, 2005 through January 1, 2006 22,374 documents were filed electronically by 2,313 different attorneys. Overall, 50,774 documents have been filed electronically since March 1, 2004.

The Court has entered two administrative orders which govern privacy protection for civil and criminal filings made with the Court. Both orders are in compliance with the privacy policy of the Judicial Conference

of the United States and the E-Government Act. The orders are available on the Court's website.

Please remember that electronic filing became mandatory effective December 1, 2005. Training is available at the Court at off-site venues. Please visit the Court's official CM/ECF and website accessible at www.mied.uscourts.gov. The site has all of the information and resources an attorney needs to register, sign up for training and start e-filing!

Chief Pretrial Services Officer Dr. James O. McHenry

Dr. James O. McHenry retired on January 3, 2006. He served as the Chief Pretrial Services Officer since 1983 when he was selected from a field of approximately 500 candidates. Over the course of his career, he served under eight different Chief Judges. Dr. McHenry and his wife Esther have already relocated to Houston, Texas where he hopes to teach criminal justice courses at local colleges. For fun, he loves to drive and hopes to travel and to "...see the beauty of America."

Following Dr. McHenry's departure, Charles Shepherd has been appointed the Chief of Pretrial Services Officer and will act in that capacity until his mandatory retirement in July 2006. Mr. Shepherd has been with the Pretrial Services Agency since January 1976.

Dr. McHenry's outstanding contributions to the Court are set forth in the article appearing elsewhere in this newsletter.

Jury Administrator

In December, Theresa Hryshko was formally designated as the Jury Administrator in addition to her duties as Supervisor, Court Reporting and Interpreting Services. Ms. Hryshko has been acting in this dual capacity since January 2004 following the retirement of Jeanne Schmidt who had served as Jury Administrator for thirty-nine years. Ms. Hryshko has a wealth of Court experience and has incorporated her new responsibilities without missing a beat.

The Court's Website

Over the next several months the Court will be reviewing the Court's Website (www.mied.uscourts.gov) and making many changes and improvements to it. If you have any ideas on how you think our site can be improved please send your comments and ideas to the email address listed below.

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

New Student Chapter

At WSU Law School

By Kevin Fanning,

Law School Initiative Co-Chair

The Law School Initiative recently established a series of goals to capitalize on growing interest in the FBA among students at area law schools.

One of these goals is to organize a new student chapter at Wayne State University Law School. As a result of recent efforts by several Board Members throughout the last semester, the Law School Initiative expects that a student chapter at WSU Law School will be organized and functioning by the end of the 2006 academic year.

The process began in September 2005, when Committee Co-Chairs Kevin Fanning and Kelly Walters met with numerous WSU law students during the "Celebrate with the Bar" function held in the WSU Law School atrium. During the event, several students expressed interest in starting a student chapter at WSU.

Several weeks later, former Chapter presidents Geneva Halliday and Christine Dowhan-Bailey presented a seminar at the Law School entitled "Careers in Federal Law." Geneva and Christine shared their career experiences during the event with more than twenty-five students. The lively group of attendees asked superb questions and the event generated even more interest in the development of the student chapter.

As a result, in November, just prior to fall examinations, WSU law student representatives Elizabeth Winfield and Tisha Simmons attended a meeting hosted by the WSU Student Bar Association to commence the formal application process to establish an FBA student chapter at WSU. That process is under way.

Our co-chairs are continuing to work with these outstanding law student representatives in order to achieve the goal of having an FBA student chapter organized and functioning at the Law School by the end of the 2006 academic year.



When Are Lost Profits Calculations Considered Speculative? An Expert's Perspective

By Patrick Dunleavy*

CPA's are often engaged as experts to assist the trier of fact in the quantification of lost profits, one type of

economic damages. The calculation of lost profits can be required in litigation involving a breach of contract, business tort, patent or copyright infringement, or a breach of fiduciary duty. In order for the lost profits calculation to be admissible, the expert must use acceptable calculation methods and appropriate assumptions based on the facts and evidence of the case. Additionally, the underlying assumptions should not be based on speculation thereby tainting the entire calculation. This article will briefly describe the process used to prepare a lost profits calculation in order to explain various factors that could cause the calculation to be considered speculative.

Depending upon the facts of the case, a past and/or future lost profits calculation may be required. A calculation of past lost profit damages (for damages suffered before the date of the trial) is required when the defendant's alleged wrongful acts ("defendant's acts") cause the plaintiff's actual operating results to be lower than they would have been absent the defendant's acts. The calculation of past lost profits typically compares the plaintiff's actual historical operating results to a forecast of the plaintiff's operating results assuming that the defendant's acts had not occurred; the difference is the past lost profits damages. Normally, the actual past operating results of the plaintiff are based on verifiable accounting records. However, the forecast of the plaintiff's operating results, assuming that the defendant's acts had not occurred, is based on a hypothetical situation (i.e., absent the defendant's acts). As such, the forecast may not be readily verifiable and may be subject to a level of uncertainty.

The calculation of future lost profit damages (for damages suffered after the date of the trial) is further complicated by the need to forecast not one, but two sets of operating results for the plaintiff. Future lost profit damages occur when the plaintiff's expected future operating results are lower than they would have been without the defendant's acts. In this calculation, the expert is required to forecast the plaintiff's future operating results given the current operating environment, and to forecast the plaintiff's future operating results assuming that the defendant's acts had not occurred.

The forecasts used in past and future lost profits calculations are based on assumptions about past events which did not occur and future events which may or may not occur and, as such, are subject to a level of uncertainty. It is the responsibility of the expert to reduce the level of uncertainty through the application of principles and practices set forth in authoritative literature promulgated by the courts and leading economic damage experts.

Specific to the issue of speculation, in order for the lost profits calculation to be admissible, the expert must comply with the principles of reasonable certainty and best available evidence in the preparation of the underly-

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Expert's Perspective (continued)

ing forecasts. The ultimate test is whether the item being forecast (whether revenue, volume, cost or profits) can be predicted with reasonable certainty. Forecasts that are based purely on speculation or the positive outcome of contingencies or possibilities are not acceptable. Whereas all forecasts will contain uncertainties, the authoritative literature indicates that an expert has the responsibility to utilize the best available evidence. The authoritative literature sets forth a number of evidence sources that should be considered by the expert including prior experience of the company, prior experience and trends of its industry, and competitive factors.

In order to avoid being considered speculative, the lost profits calculation and its underlying assumptions should be: (1) based on facts and evidence set forth in the case; (2) based on a comprehensive evaluation of the facts and circumstances of the case and the gathering of sufficient, corroborating evidentiary matter; and (3) proximately related to the defendant's acts.

Speculative characteristics of lost profits calculations:

1. The assumptions to a lost profits calculation must be based on facts and evidence set forth in the case or they may be considered speculative.

All forecasts require the use of assumptions, but assumptions that are not grounded in evidence can be considered speculative. For example, an assumption that a company's future market share will increase that is unsupported by historical growth trends, additional products or the elimination of a major competitor could be considered speculative. Other revenue assumptions that are often subject to challenge include product pricing trends, product volume and mix trends, and the duration of significant customer purchase orders. Cost assumptions that can be challenged include the duration and history of labor contracts, the terms of major supplier pricing and volume agreements, plant capacity, and the way that operating costs fluctuate with changes in volume. For example, reliance on an internally prepared budget indicating significant cost savings in the future may be considered speculative if past budgeted cost reductions were not achieved or if the cost reductions are unsupported by current market data.

Forecasts involving an uncertain transaction (such as municipal approval of a special project) or a future unknown event (attracting investors at favorable rates of return) may be considered speculative. Additionally, forecasts that are predicated on the successful conclusion of negotiations that have not yet occurred (such as successful resolution of a customer pricing issue) may be considered speculative. Assumptions involving a

risky business opportunity, an untested product, or entry into new or previously non-viable markets may cause speculation in the forecast.

In the past, forecasts involving new or start-up business ventures were considered speculative by their very nature and damages were not allowed. However, forecasts for new or start-up businesses are now acceptable if they are based on sufficient evidence and reasonable assumptions. Factors that affect the speculative nature of new or start-up businesses include the experience of the principles in similar undertakings, the maturity of the industry, the experience of others in the industry and competitive forces in the industry itself.

2. Forecasts must be based on a comprehensive evaluation of the facts and circumstances of the case, and the development of reasoned assumptions.

The expert generally obtains the knowledge needed to prepare the lost profits forecasts by first analyzing the company's historical operating results. Such analysis may include trend analysis of the company's revenue, cost structure, profitability and key financial ratios. In addition to the company's historical financial and operating results, the expert should consider the company's product mix, product life cycles, market share, competition, business plans, distribution channels, plant capacity, and capital requirements.

The expert should also evaluate the industry in which the company operates including industry growth trends, new product technologies, regulatory changes within the industry, and competitive and economic forces. Finally, the expert should consider the effects on the company of the local, regional and national economy and economic forecasts for the future.

Expert opinions or assumptions based solely on the expert's past experience are no longer sufficient. Rather, the expert's assumptions must be the result of a comprehensive evaluation of facts of the case, including company research, and based on evidence in the record. For example, lost profits calculations may be considered speculative if the expert simply relies on the testimony of the company's owner as to key assumptions, or justifies such reliance based solely on his own knowledge and experience in the industry. Instead, wherever possible, the expert should obtain sufficient corroborating documentation for the owner's testimony based on other facts and evidence presented in the case.

3. The damages claimed must be proximately related to the defendant's acts.

Failure to determine how the defendant's acts resulted in the damages claimed can result in a speculative lost profits calculation. For example, failing to prove the company's sales decline was a result of the defendant's

acts could render the calculation speculative. Additionally, use of a forecast period that exceeds three to five years could be considered speculative because beyond that time, the proximal link to the event that gave rise to the damages may be lost. A longer forecast period is generally not used unless the company holds special rights such as a long-term contract, a patent, or a long-term exclusive marketing agreement.

In addition to establishing proximity, the expert must consider whether factors unrelated to the defendant's acts had a significant effect on the historical operating results or the forecast. For example, consider a past lost profits calculation for a breach of a supply contract where the plaintiff's profitability declined throughout the five year damage period. The expert must eliminate outside factors such as a national recession, competitive forces, technology changes or any other issue unrelated to the defendant's acts that may have affected the profitability during the five year period. Failure to do so could render the lost profits calculation speculative.

Two other factors are worth mentioning: the failure to adjust the calculation for future risk, and the failure to perform reasonableness tests on the resultant lost profits calculation.

Lost profits calculations are generally adjusted for the uncertainty (or risk) associated with the use of forecasts. The adjustment for uncertainty is normally reflected in the discount rate used to discount the forecasted lost profits to present value. Failure to apply an appropriate discount rate can result in a speculative lost profits calculation.

Experts are required to perform certain tests to validate the reasonableness of the damages claimed, often referred to as "sanity tests." Individually, the assumptions that are required for a lost profits calculation could appear reasonable, but if collectively the resultant damages are not reasonable, then the lost profits calculation may be considered speculative.

In summary, the forecasts used in past and future lost profits calculations are based on assumptions of hypothetical events and are subject to a level of uncertainty. It is the responsibility of the expert to reduce the level of uncertainty through the application of principles and practices promulgated by the courts and leading economic damage experts. The lost profits calculation and its underlying assumptions should be based on facts and evidence set forth in the case and a comprehensive evaluation of such evidence including the operations of the company, its industry and the competitive and economic forces affecting it. Further, the assumptions to the lost profits calculation must be based on sufficient corroborating evidentiary matter including evidence that the damages claimed are proximally related to the defendant's acts. Failure to do so could render the lost profits calculation speculative and the expert's testimony inadmissible.

**Patrick G. Dunleavy has more than twenty-two years of experience providing litigation support and fraud/forensic accounting services to clients in a wide range of industries. These services include business appraisals and quantification of economic damages resulting from breach of contract, business interruption, shareholders' disputes, business torts, patent/copyright infringement, professional malpractice, condemnation, personal injury, wrongful death and employment disputes. In addition to numerous law firms, Mr. Dunleavy has provided these services to large corporations, banks and insurance companies.*

Patrick G. Dunleavy is a partner and Firm leader of commercial litigation support services for Virchow Krause & Company LLP. Virchow Krause & Company, LLP is the 15th largest Certified Public Accounting firm in the nation.

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Rakow/Historical Society Luncheon Held

The Edward H. Rakow Awards Luncheon and the Annual Meeting of the Historical Society for the U. S. District Court for the Eastern District of Michigan were held jointly on November 17, 2005 at the Hotel Pontchartrain.

The program began with the presentation of the Rakow Scholarship Awards by Chapter President Julia Caroff Pidgeon. The Rakow scholarships are given annually to students of Michigan law schools who demonstrate outstanding scholarly achievement in securities, corporation or business law. The scholarships are endowed by the Federal Bar Foundation of Detroit in memory and honor of Edward H. Rakow, one of our Chapter's founders.

The 2005 recipients of the Rakow awards are: Andrew Willis, Ave Maria School of Law; Niki Wilkinson, Thomas M. Cooley Law School; Marcus Ray Jones, Michigan State University College of Law; Patrick MacQueen, University of Detroit Mercy School of Law; Sophia Hudson, University of Michigan Law School; and Stefan Ostebur, Wayne State University Law School.

The Historical Society presented a special preview of a twenty-eight minute documentary which it commissioned about one of the most famous trials ever held in the Eastern District of Michigan. It involved the Smith Act prosecution in 1953 of six leaders of the Communist Party for conspiring to teach and advocate the overthrow of the United States Government. The trial was held at

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Luncheon (continued)

the height of the McCarthy era when issues of personal liberty and due process were frequently ignored. It shows an imbalance between free speech and political rights, on the one hand, and national security, on the other hand, which is unresolved to this day.

In the end, the film shows that the judicial system, in the Supreme Court decision in *Yates v. United States*, performed its vital role of protecting speech. *Yates* held that the Smith Act could not be used to prohibit “advocacy and teaching of forcible overthrow [of the government] as an abstract principle, divorced from any effort to instigate action to that end.”

Or, as more simply stated by President Eisenhower: “Un-American activity cannot be prevented or rooted out by employing un-American methods; to preserve freedom we must use the tools that freedom provides.” Ultimately, however, the vindication of the Smith Act defendants took years and came at great personal cost to them. The question left for the viewer is whether any lessons remain intact half a century later.

The film’s producers, Judith Monteil, who received an Academy Award nomination for best documentary in 1991, and Ronald Aronson, Distinguished Professor of Humanities at Wayne State University, were present at the Luncheon. They answered questions after the presentation of the film.

Detroit Public Television will broadcast the film and offer it to other public television stations in Michigan and throughout the country. The Michigan Center For Civic Education will promote the educational use of the film in our schools.

For more information on the case, see David G. Chardavoyne’s article, “The Smith Act and the Trial of the Michigan Six,” in the November 2005 issue of the Historical Society newsletter, “The Court Legacy.” The article includes Judge Frank A. Picard’s lengthy sentencing remarks which were published verbatim in *U. S. News & World Report*.

Courthouse Tours

On November 29, 2005, Chief Judge Bernard A. Friedman held a training session for new and experienced Courthouse tour guides. In attendance were approximately thirty lawyers from throughout the Eastern District. Chief Judge Friedman provided breakfast and regaled us with fascinating historical tidbits about the Court building. He said that he would like to revitalize the Courthouse tours program as part of his tenure as Chief Judge.

As part of the Chief Judge’s revitalization program, tours generally will be held from January through April

for children in grades six through twelve. The Judge said that new tour guides are usually surprised by how easy it is to conduct a tour and how professionally rewarding it is to share the “people’s courthouse” with the students.

If you are interested in being a Courthouse tour guide, it’s not too late to volunteer for the 2006 season. Contact Barb Radke at 313-234-5210. You can also contact her to arrange for a group to visit the Courthouse. Thanks to Chief Judge Friedman, Barb Radke and Barb McQuade for their energetic support of this important program.

Deputy Court Administrator Mary Miers Retires By Court Administrator Dave Weaver

Mary Miers began her career with the District Court after her appointment as the Courtroom Deputy Coordinator in September 1989. In this position, she played an integral role in the conversion from the criminal courtran docketing system to ICMS. She was also instrumental in setting up the system to use events to track speedy trial.

In October 1999, Mary was appointed District Court Administrator. Part of her duties and responsibilities included the day-to-day supervision of the District Court Clerk’s Office. She played a major role in the implementation of the Jury Management System (JMS) by being present in the courtroom the first time each judicial officer selected a jury under the new system.

Mary also served as the Project Manager of the Case Management/Electronic Case Files (CM/ECF) system. Under her leadership, the Court successfully implemented CM/ECF and made electronic filing mandatory effective December 1, 2005.

Few people knew that Mary was fluent in Russian. For many years she translated documents for Ford Motor Company. In contrast, however, anyone who visited Mary in her office knew that she had a green thumb. She planted many varieties of flowers in her garden and often had freshly-cut blooms in her office during spring, summer and fall.

Mary retired from the Court on December 2, 2005. She was honored by her friends and colleagues at a reception held at the Court on Wednesday, November 30, and was presented a Resolution of Appreciation by Chief Judge Friedman on behalf of the Court. Immediately thereafter, Mary and husband, Ken, left for their new home in Kalispell, Montana.

Mary was a dedicated employee, a trusted colleague and friend to many. We wish her years of happiness and health during her retirement.

Scenes from the Pro Bono Seminar

Chapter Vice President, Judge Mark Goldsmith with Erica Eisinger, Professor, Clinical Education, WSU Law School, Leo Friedman, Assistant Attorney General, Corrections Division, Attorney General's Office.



First Row From Left to Right: Dan Manville, Judge Hood, Patricia Streeter, Erica Eisinger, Matt Jakubowski, John LeRoy and Laura Sagolla. Second row: Magistrate Judge Komives, Judge Goldsmith, Matthew Leitman, Magistrate Judge Pepe, Tom Cranmer, Steven Boehringer, and Julie Pidgeon.



Tom Crammer & Dan Manville with Diana McBroom, student at WSU Law School.



Steven Boehringer, Matt Jakubowski and Tom Cranmer.



**DETROIT:
“WE’RE READY
TO DELIGHT
YOU !!!”**



For the first time in more than 25 years, the Sixth Circuit Judicial Conference is coming to Motown, and we’re pulling out all the stops to make it memorable.

Great Parties

Great CLE Programs

Great Sightseeing

The CLE: For those attorneys attending from Kentucky, Ohio and Tennessee, the Conference will seek approved CLE credit for attendance at this program.

The program: Plenary sessions on "The Law, the Courts"; "The Future of the American Automobile Industry" "Class Action and Related Jurisdictional Issues"; "Supreme Court Update" "An Independent Judiciary: An Historical Overview"; and an "Independent Judiciary: Present Status and Future Prospects." Breakout sessions on Sentencing, Communication, Appellate Practice, and Bankruptcy.

Circuit and District breakout sessions: Active participation by all lawyers and judges in the discussion of issues and problems in each court as well as other issues that may be identified throughout the Conference.

Banquet at the World-Famous Wintergarden: The conference banquet will be held on Friday evening, May 19, and will feature remarks by Sixth Circuit Justice John Paul Stevens, and speaker, Michael Barone, senior staff writer for *U.S. News & World Report*. The Welcoming Mixer and the Life Members' Reception will also be memorable.

The DIA, The Henry Ford, The Rouge and More: The Social Agenda We are planning tours of the Henry Ford/Greenfield Village and the Rouge; an afternoon Tiger game at Comerica Park; Lunch at the Detroit Institute of Arts and the Charles H. Wright Museum of African American History; the Junior League Show House and Lunch at the Eleanor and Edsel Ford Estate and a Very Special Exhibit from the Damon Keith Collection

PREREGISTER NOW AT <http://www.ca6.uscourts.gov>

Sustaining Members

We gratefully acknowledge the additional support provided to our Chapter by the following individuals, who opted during 2005 to renew their Membership at the Sustaining Member level. Thank you for contributing to our ability to fund essential programming. We hope to have 100 Sustaining Contributors at this \$100 level in calendar year 2006 – a true Century Club of Support!

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Margaret Lynch	Rodger Young
Scott A. MacGriff	Stephanie Zimmerman
Clara Mager	

Calendar of Events

March-May 2005

Updated regularly at

[www.fbamich.org/Events & Activities](http://www.fbamich.org/Events%20&%20Activities)

February 23 **Wade H. McCree Award Luncheon**
11:30 a.m.
Location: Hotel Pontchartrain
Contact: Elisa Angeli, 313.496.7635
or register on-line
at www.fbamich.org

March 22 **Motion Day at UDM School of Law**
1:00 p.m.
Contacts: Kevin A.S. Fanning
kfanning@clarkhill.com
Kelly A. Walters
kwalters@lange-cholack.com

April 3 **Motion Day at U of M Law School**
1:00 p.m.
Contacts: Kevin A.S. Fanning
kfanning@clarkhill.com
Kelly A. Walters
kwalters@lange-cholack.com

April 6 **Leonard R. Gilman
Award Luncheon**
11:30 a.m.
Speaker: Elmore Leonard
Location: Hotel Pontchartrain
Contact: Elisa Angeli, 313.496.7635
or register on-line at
www.fbamich.org

May 3 **27th Annual Dinner And Meeting**
Location: Gem Theatre
5:30 pm Cocktails
7:00 pm Dinner
Entertainment:
A (Habeas) Chorus Line
Contact: Laurie Michelson
313.983.7463 or
michelso@butzel.com

May 17-20 Hold these dates for the
Sixth Circuit Judicial Conference
See related article in this newsletter.
Additional details to follow.

Judge Lawrence P. Zatkoff's New Chambers

**Directions To U. S. District Court
526 Water Street, Port Huron**

From the South:

Take I-94 East toward Port Huron, exiting at Exit 271 (Business Route 69). Proceeding in the left lane of this one-way street, follow Business Route 69 until you reach 6th Street. Turn left on 6th Street. The Federal Building is at the southeast corner of 6th Street and Water Street.

From the North or West:

Take I-69 to Business Route 69. Proceeding in the left lane of this one-way street, follow Business Route 69 until you reach 6th Street. Turn left on 6th Street. The Federal Building is at the southeast corner of 6th Street and Water Street.

Parking:

There is metered parking on the streets surrounding the Federal Building (6th Street, Military Street, etc.). If there is no metered parking available on the street, there is additional metered parking in a lot on the southwest corner of 6th Street and Pine Street. Meters are color-coded. Red 30 minutes; blue 60 minutes; green 2 hours; silver 3 hours; bronze 10 hours. Meters accept nickels, dimes and quarters.

Do not park in the Times Herald or Citizens First Savings Bank parking lots. Your car may be towed.

Restrictions:

Cell phones and PDA's (Palms and Blackberries, etc.) will not be allowed into the Court.

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