

Federal Bar Association - Eastern District of Michigan Chapter - 55 years of service to our Federal Bench and Bar

Judge Sosnick to Address Gilman Luncheon on April 30

This year's Leonard R. Gilman Award Luncheon will be held on Tuesday, April 30 at 11:30 a.m. at the Westin Book Cadillac Hotel. The keynote speaker will be retired Oakland County Circuit Judge Edward Sosnick.

Sosnick was first elected to the Circuit Court bench in 1989, where he served until he retired at the end of his term in January 2013. He served as Chief Judge of the Court from 1996-99. Previously, he served as a judge of the 48th District Court in Bloomfield Hills for four years. Before joining the bench he was a prosecuting attorney, city attorney, and worked in private practice. He has received many awards, including the State Bar of Michigan Champion of Justice Award. (continued on page 3)

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President's Column

Thomas G. McNeill

Sequestering the Federal Judiciary

During the 2012 presidential and congressional campaigns and since, we have been inundated with media attention to the \$16 trillion national debt, the Budget Control Act of 2011 (requiring \$1.2 trillion in spending reductions from FY 2013 through 2021), the March 1, 2013 implementation of the sequester (effecting \$85 billion in budget cuts over the next 7

months), and the competing (and partisan) budget debates in Congress. As this edition of the Newsletter goes to print, Congress has agreed upon a Continuing Resolution that keeps the federal courts and the rest of the government funded through the end of the fiscal year, September 30, 2013. The measure provides funding at sequester-reduced levels, effectively a five percent cut below last year's level.

But in this cacophony of perspectives and words, actions and inactions, have we lost sight of the very real threat to an independent judiciary that is inherent in the politicized budget process and manifested specifically in sequestration's "across-the-board" cuts?

In The Federalist No. 78, Alexander Hamilton described the federal courts as the "citadel of public justice and public security." Could sequester breach the citadel?

According to U.S. Representative Paul Ryan, Congressional budget decisions reflect "national priorities." For FY 2013, before the sequester, Congress had allocated \$6.6 billion to the federal judiciary. So, how does the federal judiciary fare in the national agenda of priorities? -- \$6.6 billion is just 2/10ths of 1% of the federal budget.

In the setting of the national agenda, process matters. After the public hearings are concluded, unlike the legislative and executive branches, the judicial branch does not have a seat at the table as the budget negotiations are conducted and the deals are made. There is a growing sense that this critical independent third branch of government is treated as if it were "just another government agency." Consider this comment by a prominent U.S. Senator as perhaps illustrative of an emerging dark problem: "We have three branches of government: the President, the House, and the Senate." CNN broadcast, January 30, 2011. What would the Founding Fathers, and high school government teachers, ponder in this peril?

Let's place the judicial budget in the context of budgetary allocations to departments, agencies, and programs within the executive branch: Defense, \$525 billion; National Intelligence (including the CIA), \$52 billion; NASA,

\$17.7 billion; the self-funded US Postal Service has maxed out its \$15 billion federal line of credit (after losing \$16 billion on \$65 billion in revenue); and science programs administered by the Department of Energy, \$5.5 billion. In another example of comparative Congressional tax spending, as implemented by the American Taxpayer Relief Act of 2012 (which activated budget sequestration), the annual cost of marriage penalty tax relief (continued on page 2)

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President's Column (continued)

(\$8.6 billion) and continued college tuition tax relief (\$6.7 billion) each exceed the annual total funding to the federal judiciary.

In the 2013 sequestration, the federal judiciary's budget was cut by \$350 million. During testimony before the Appropriations Committee of the U.S. House of Representatives on March 20, 2013, Sixth Circuit Judge Julia S. Gibbons projected the following impacts: possible layoffs of 2,000 court staff employees, on top of the 1,800 employees lost over the past 18 months – a 9% decrease since July 2011; 20% cuts in Probation and Pretrial Services; and 30% cuts in funding for court security personnel and equipment. For more on the testimony of Judge Gibbons and Chief Judge Thomas F. Hogan (U.S. District Court for the District of Columbia), see http://news.uscourts.gov/funding-cuts-will-compromise-federal-courts-judges-tell-congress.

Judge Gibbons also warned of impending cuts to the federal defender offices and programs, and decreases and delays in payments to private criminal defense attorneys appointed to represent the indigent under the Criminal Justice Act. As the nation celebrates the 50th anniversary of the Supreme Court's landmark decision in *Gideon v. Wainright* guaranteeing indigent defendants legal representation, Federal Defender Offices across the country now face sequestration and "deep issues," as reported by *The Huffington Post* in an article well worth the read: http://www.huffingtonpost.com/2013/03/24/budgetcuts-federal-defenders Some Chief Federal Defenders have had to lay off staff, and the average furlough across the program is 21 days. Other FDOs anticipate turning away death penalty cases for lack of funding.

While not finalized in the immediate wake of the March 21, 2013 Continuing Resolution, assuming a 5.3% sequestration cut, U.S. Attorney's Offices around the country would be required to effect a \$101 million reduction in salary and expenses. It has been reported that every employee of every U.S. Attorney's office in the country has received a notice that they could be furloughed for up to 14 days between the middle of April and the end of September 2013. See http://nj1015.com/sequester-felt-by-u-s-attorneys-audio. The Justice Department has issued a statement that it "anticipates that U.S. Attorneys' Offices will handle 1,600 fewer civil cases and 1,000 fewer criminal cases. Fewer affirmative civil and criminal cases will affect our ability to ensure that justice is served and impact funds owed to the government."

Likewise, the U.S. Marshal's Service expects substantial furloughing to effect sequestration reductions of a magnitude that could create security vulnerabilities throughout the federal court system by impairing the ability of the Service to provide adequate security for court facilities, court personnel and the public.

What will be the real cost to the administration of justice and the safety, and constitutional protections, to be afforded our citizens (criminal defendants, victims and judges, court personnel and lawyers in the federal courthouse)? What is the real price to be paid for these

aspects of national "across-the-board" sequestration?

There will be significant sequestration impact here in the Eastern District, one of the ten largest judicial districts in the country, serving approximately 66% of Michigan's 10 million citizens. Compensation and benefits for federal judges and their immediate court staff and the Court's lease obligations are paid through centralized national budget sources and thus are unaffected by the sequester. The sequestration cuts to the judicial branch will be in "decentralized" local budgetary categories and thus determined and implemented by Chief Judge Gerald E. Rosen and Court Administrator David Weaver. The Court's local budget is approximately \$22 million which is about \$2 million less than last fiscal year.

In a recent interview with Michigan Lawyers Weekly, Chief Judge Rosen commented: "We are hopeful we can get through this fiscal year, which ends September 30, without having to do furloughs and layoffs, but it is not a sure thing by any means." Nonetheless, the cuts will still sting. According to Mr. Weaver, and budget administrator Raymond Vance, our Court is faced with across the board cuts of 14% in salary accounts, 20% in operating costs and 20% to Probation Department and Pretrial Services Agency law enforcement accounts. This is in addition to cuts made over the past five years. The Court's roster of employees is now down to approximately 425 to 450 - the Clerk's Office, Probation Department and Pretrial Services Agency are operating at a combined 62 positions under their authorized staffing levels. "We have literally cut to the bone," says Mr. Weaver, while reassuring that "we are doing the best we can with the limited resources we have." Meanwhile, the Court's docket has increased to about 5,700 civil cases and over 700 criminal cases, with a concomitant demand upon a wide range of crucial court services.

One of the major sequestration impacts here will be on spending in the Probation Department and Pretrial Services Agency for the tools that officers use to supervise defendants, both in pre-trial and post-incarceration supervision. There simply is less money to spend on tethers, drug testing, drug/alcohol treatment, and cognitive training. Yet these are the tools of supervision and for reducing recidivist behavior that presents serious risk to our community.

What will happen if sequestration continues into fiscal year 2013-14, with another \$350 million cut from the judicial budget, and another \$2 million cut here in the Eastern District. According to Chief Judge Rosen: "Beyond [this year's cuts and] into next year, it's anybody's guess. I don't know how we are going to provide the level of service that the public expects – that they have a right to expect." The Chief adds: "And a greater concern we have is public safety and the role we fill," echoing Hamilton's vision of the citadel of public justice and public security.

The often acrimonious debate will continue over funding each of the three branches of the federal government, as will the ever present jockeying for position in the national agenda. As federal practitioners, however, we dare not lose sight of the crucial role in American democracy of the federal judiciary and those employed in the federal criminal justice system. Keep the faith; but spread the word.

Gilman Luncheon (from page 1)

The recipient of the Gilman Award will be announced at the luncheon. The Gilman Award is given annually to an outstanding practitioner of criminal law who exemplifies the excellence, professionalism, and commitment to public service of Len Gilman, who was U.S. Attorney for the Eastern District of Michigan at the time of his death in 1985. The selection is made by prior recipients of the Award, many of whom served with and knew Len.

Tickets are \$25 for members and \$35 for non-members. For more information and to register for the Luncheon, visit the Chapter website or contact Program Chair Susan Gillooly at 313-226-9577.

Law Day 2013: Realizing the Dream

On May 1, 2013, the Court, the Chapter, and the Wolverine Bar Association will jointly host an open house at the Courthouse to celebrate Law Day.

The event will occur between 11:00 a.m. and 2:00 p.m. The theme for this year's celebration is *Realizing the Dream: Equality for All.* Participants will include federal and state law enforcement agencies, members of the federal judiciary, and other invited guests. Courthouse tours will be scheduled. The "Ask the Lawyer" Pro Bono program will again be featured as a community service to those in need. A town hall discussion will be held on "Why Diversity Matters & The Importance of Jury Service." A hotdog, chips, and cookie lunch will be served.

Members of the public and the downtown community are invited to attend.

Book Club - May 23

The next selection for the Chapter Book Club is *The Oath: The Obama White House and the Supreme Court*, by Jeffrey Toobin. Toobin is a staff writer at *The New Yorker*, senior legal analyst at CNN, and a bestselling author. The book discusses what the author describes as an "ideological war" between President Barack Obama and Chief Justice John G. Roberts' Supreme Court.

The Book Club is designed to build relationships between the bench and bar through an informal but elevated dialogue. Attendance is free for FBA members; \$5 for non-members. To order lunch or for more details, contact Andrew Doctoroff (adoctoroff@honigman.com) or Erica Fitzgerald (efitzgerald@bsdd.com).

Bench Bar Social Plum Hollow - June 10

If you recognize a metallic golf ball as a "Ball of Justice," you were one of the many that experienced last year's Chapter Bench-Bar Social Event. Participants played two nine-hole segments of golf with the Half-Way Mingle on the porch area between the two. Each group had the opportunity to play with one of our Eastern District judges. Many more joined the groups for drinks and dinner.

This year the event promises even more. By popular demand, the afternoon of camaraderie will also include tennis. Everyone is welcome for dinner. Arrangements continue for a first-class afternoon where the Bench and Bar will have a unique opportunity to interact in a country club setting. Please mark your calendars. Special marketing opportunities are still available. Please contact Tom Esordi at (586) 726-1000.



Court Administrator Dave Weaver

As I mentioned last time, the Bench approved a revised Juror Selection Plan for the Court, which was forwarded to the Sixth Circuit Judicial Council for final approval. The Council has now

approved the Plan which will be implemented within the next 90 days.

The revised Juror Selection Plan and other activities of the Court's Ad Hoc Jury Committee, co-chaired by Judges Denise Page Hood and Victoria A. Roberts, will be highlighted at this year's Law Day celebration taking place on May 1, in the Theodore Levin U.S. Courthouse. The revised plan moves the Court from a two-step juror qualification and summoning system to a one-step system, includes a supplemental draw procedure, raises the jury service exemption age from 70 to 73, and allows the Court to supplement its juror source lists to include persons who have filed Michigan state income tax, if available.

On the budget front, the federal judiciary, like the rest of the federal government, is dealing with the impact of the automatic sequestration budget cuts that took effect on March 1, 2013. This district must work with approximately two million dollars less than it had in the prior fiscal year, affecting both salary and non-salary funding. The result of these cuts and other cuts from prior years has the Clerk's Office, Probation Department, and Pretrial Services Agency

(continued on page 4)

Dave Weaver (from page 3)

working at only a combined 76% of authorized staffing levels.

At the time of this writing, the next hurdle is the expiration of the Continuing Budget Resolution, which expires on March 27, 2013. Given the current climate in Washington, D.C., our already dire budget situation may get even worse. As I have stated in the past, we are committed to doing everything within our power and authority to ensure that the Court continues to serve the Bench, Bar, and public as timely and efficiently as possible.

Finally, and on an interesting note, the Court currently has 22 working district judges with 4 of its 15 active judgeships vacant, resulting in an even split of 11 active

district judges and 11 senior district judges. Nothing like a good balance!

If you have any questions or comments, please do not hesitate to contact me via email at: david_weaver@ mied.uscourts.gov.

Judge Terrence G. Berg Investiture Ceremony by Bradley H. Darling*

On February 8, the Court held an investiture ceremony

for its newest judge, Terrence G. Berg. The ceremony was held in the Special Proceedings Courtroom, with Chief Judge Gerald E. Rosen presiding. Accompanying Judge Berg were his wife, Anita Sevier, and his three children – Helen Marie, Colette, and Teddy – along with numerous extended family members.

Judge Berg joins the federal bench following an extremely distinguished career, primarily as a prosecuting attorney. Judge Berg began his legal career in 1986 as a law clerk to the Honorable Anthony A. Alaimo, then-Chief Judge of the U.S. District Court for the Southern District of Georgia. Judge Berg then joined the Washington, D.C. offices of Debevoise & Plimpton as an associate attorney, working on general civil litigation matters. In 1989, he was appointed as an Assistant U.S. Attorney in the Eastern District, and served as an AUSA until 1999, when he was appointed by then-Attorney General (later Governor) Jennifer M. Granholm as Chief of that office's High Tech Crime Unit.

Judge Berg returned to the U.S. Attorney's office in 2003, handling white collar crime prosecutions, with a focus on computer crimes. He was appointed First Assistant U.S. Attorney in May 2005, and managed the day-to-day operations of the office. When then-U.S. Attorney Stephen J. Murphy, III was appointed to the federal bench in August 2008, Judge Berg became the Interim U.S. Attorney, managing and setting the priorities of the office. He served in that capacity until January 2010.

In May 2010, Judge Berg began serving as the acting First Assistant U.S. Attorney for the Middle District of Georgia, in Macon, Georgia. In October 2010, he resumed his duties as an AUSA in Detroit, carrying a full caseload of white collar and computer crime cases. In March 2011,

he was detailed to the Justice Department's newly created Professional Misconduct Review Unit, where he investigated allegations of professional misconduct against federal prosecutors.

To open Judge Berg's investiture ceremony, Rev. James Serrick, S.J., Associate Pastor of Gesu Church in Detroit, gave an invocation. Next, Carl Clendenning sang a rousing rendition of "The National Anthem." Chief Judge Rosen then introduced the federal judges in attendance. In addition to several District Judges, Bankruptcy Judges and

Bankruptcy Judges and Magistrate Judges from this district, Judges Eric L. Clay and Damon J. Keith of the Sixth Circuit were present, along with Judge Marcia G. Cook from the Southern District of Florida; Judge Cook is a former Magistrate Judge for the Eastern District.

Kevin A. Ohlson, an Associate Deputy Attorney General with the U.S. Department of Justice, then read the Commission of Appointment. Mr. Ohlson highlighted Judge Berg's integrity and decency before proceeding to read the Commission, which was signed by President Barack Obama and Attorney General Eric Holder. Judge Berg's wife, Anita, held the Bible as Chief Judge Rosen administered the oath of office. Judge Berg's children then presented him with his robe, and his brother presented him with his gavel.

Chief Judge Rosen then opened the speakers' remarks by noting that, as an AUSA appearing in his courtroom, Judge Berg was always prepared and that he approached his responsibilities with fairness and decency. Chief Judge Rosen read a letter from U.S. Senator Carl Levin



Judge Terrence G. Berg and his family.

expressing his congratulations to Judge Berg. Chief Judge Rosen then turned the podium over to several distinguished speakers.

First up was Senator Debbie Stabenow, who began her remarks by recognizing Judge Berg's family, including Anita's siblings (Anita comes from a family of ten – eight of whom were in attendance!) and Judge Berg's daughter, who served as a Senate Page in her office. Senator Stabenow noted that Judge Berg is very much a part of the local community, and she highlighted his work with the homeless. She noted that Judge Berg has proven throughout his career that he is thoughtful and independent, and a steward of the public trust.

The next speaker was Judge Edward Ewell, Jr. of the Wayne County Circuit Court. Judge Ewell previously served as an AUSA, alongside Judge Berg. Judge Ewell emphasized Judge Berg's intellect and hard work, but also spoke upon Judge Berg's personal qualities, such as his wicked sense of humor and extremely competitive nature – especially as a runner, but also as a basketball player. Judge Ewell recounted a story of Judge Berg once knocking future-Governor Granholm to the ground while attempting to block a shot during a pick-up basketball game.

Chief Federal Defender Miriam Siefer spoke next. She recognized Judge Berg's long history as an adversary of her office, but noted that their adversarial relationship was marked by its cordiality, civility, and professionalism. Next up was Councilman Gary Brown, President Pro Tem of the Detroit City Council. Councilman Brown gave a lively and humorous speech, noting that he is part of a neighborhood running group with Judge Berg that has one inviolable rule – "what's said on the running trail stays on the running trail." Councilman Brown then reflected upon a question he is asked frequently – why does he choose to live in Detroit, when he could live anywhere? His answer is that he lives in Detroit because of the people and, more specifically, because of people like Judge Berg and his family.

Finally, Judge Stephen J. Murphy, III, spoke. Judge Murphy opened his remarks by noting that one of the most important decisions during his tenure as U.S. Attorney was to elevate Judge Berg to serve as First Assistant. He noted that Judge Berg is the kindest person he has met in his life, highly respected throughout the Justice Department and beloved by the employees of the U.S. Attorney's Office in Detroit. Finally, Judge Murphy noted that Judge Berg is humble, modest, kind and remarked that he is so thankful and happy to now have Judge Berg as a colleague on the bench.

Chief Judge Rosen then read letters from three of Judge Berg's fellow law clerk alums from Judge Alaimo's chambers. The first was from Lisa Godbey Wood, who is now Chief Judge of the Southern District of Georgia. She wrote to pass along Judge Alaimo's three rules for judges: (1) never wear your suit jacket under your robe; (2) always

visit the facilities just before taking the bench; and (3) call 'em like you see 'em. The next letter was from Harry Simon, an Assistant Federal Defender from the Eastern District of California. Finally, Chief Judge Rosen read a letter from Judge Berg's former fellow AUSA, Governor Granholm.

Judge Berg then addressed the audience. He began his comments by saying how deeply grateful he was for the honor bestowed upon him by President Obama and Senators Stabenow and Levin. He thanked the speakers for their remarks and thanked the U.S. Attorney's Office and the Federal Defender's Office for teaching him the skills and professionalism that are the hallmarks of our local bar. Then, he thanked his wife, Anita, for her deeply generous heart and phenomenal work ethic.

Judge Berg then highlighted four values that he hopes to exemplify as a Judge. First, he cited justice, which to Judge Berg meant respect for the rule of law. He acknowledged his former Georgetown Law Professor, Father Robert F. Drinan, S.J., for instilling a commitment to justice in him. Next, Judge Berg said that he hopes to display courage, such as that shown by Judge Alaimo, a World War II pilot and POW, who escaped from Nazi custody three times before finally securing his freedom. Judge Berg also noted that Judge Alaimo was burned in effigy to protest

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Judge Berg (from page 5)

his rulings to reform Georgia's prison system, but that he taught Judge Berg to never be afraid to make a decision that was required by the rule of law.

The next value Judge Berg cited was integrity. Judge Berg thanked the U.S. Attorney's office as well as numerous members of the criminal defense bar for instilling this value in him, which to him meant always doing the right thing, and letting the chips fall where they may. Finally, Judge Berg stated that he hopes to display humility, taught to him through his mother's frequent admonition "not to blow your own horn." Judge Berg committed himself to being fair and open minded, and vowed to treat everyone that came before him with respect and dignity.

Following Judge Berg's remarks, Mr. Clendenning sang "God Bless America," Reverend Serrick delivered the benediction, and Chief Judge Rosen closed the proceedings.

Judge Berg is temporarily holding Court in Detroit, but will eventually preside in Flint, once construction of a new courtroom and chambers is completed. Judge Berg is deeply grateful to the support he has received over the years from his family, friends and colleagues. He looks forward to the challenge that his new role brings.

* Brad Darling is a law clerk to the Hon. Terrence G. Berg.

Pleadings in the New Era of Plausbility

On February 6, the Chapter Rules & Civil Practice Committee held a session covering "Pleadings in the New Era of 'Plausibility.'" Judges Avern Cohn and Robert H. Cleland presented on the topic, covering the Supreme Court's decisions in Bell Atlantic v. Twombly, 550 U.S. 544 (2007) and Ashcroft v. Iqbal, 556 U.S. 662 (2009) and the effects of these two decisions on motion practice. Daniel Sharkey from Brooks, Wilkins, Sharkey & Turco PLLC moderated the discussion. The event was well attended and led to a spirited debate about the application of the standards set forth by the Supreme Court and practical methods for dealing with motions to dismiss.

Judge Cohn began by noting that the Supreme Court's decisions have generated a flurry of activity and a wealth of law review articles. While there is a lot of interest in these cases, the effects of the cases remains to be determined. He said he had conducted a poll of judges to determine whether the judge generally allows amendment of a complaint following an Iqbal motion. The responses were split

down the middle. Approximately half of the judges generally allow amendment and half of the judges rarely allow amendment. He also expressed an opinion that judges differ on how they read a complaint. As he read through cases, he noticed a dichotomy in this regard as well.

Judge Cleland believes the pair of decisions by the Supreme Court was designed to restrict the number of cases remaining in federal court and to improve the pleading standard. He stated that over the fifty-year period preceding these decisions, there were too many illegitimately stated cases burdening the federal courts. He compared the Supreme Court's *Igbal* and *Twombly* decisions to the revision of the summary judgment standard twenty-five years ago, which he said stemmed from

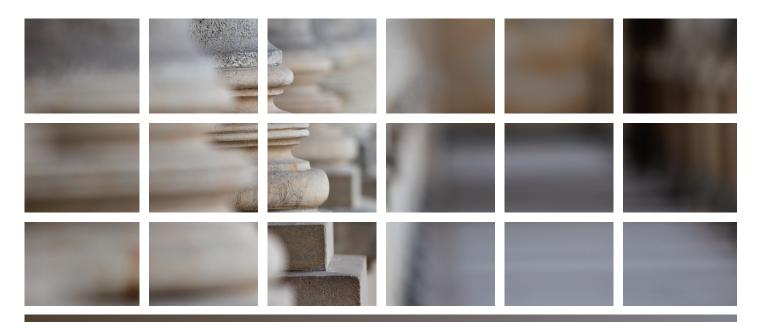
too many meritless cases requiring the attention of juries. He expressed a belief that Twombly and Iqbal will have an effect over the next ten years in slimming down the number of cases remaining after motion practice. He believes the practicalities will be worked out in the coming years, and that the standard will become better defined and solidified.

Judge Cohn noted that Twombly and Iqbal may actually prove helpful to a plaintiff. The motion practice forces a defendant to explain any deficiency in the claim early in the case. This allows the plaintiff to sharpen his or her focus and to better set forth the factual predicate for the claim through amendment. He generally allows amendment if he thinks the plaintiff may have a claim but just has not yet fleshed out the factual detail for the claim.

On the other hand, Judge Cleland stated that once a motion to dismiss is before the court, the plaintiff has already had an opportunity to review defendant's arguments and to amend; therefore, a later application for leave to amend on that same basis should fall on deaf ears. He emphasized the significance of Local Rule 7.1(a). Local Rule 7.1(a) requires that a movant confer with the other side, explain the nature of the motion and its legal basis, and seek concurrence in the motion before filing it. He suggested that this concurrence may enable a plaintiff to sharpen his or her claim in the way described by Judge Cohn before a motion to dismiss is even filed. (continued on page 8)



Judge Berg and his wife, Anita Sevier.



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New Era of Plausbility (from page 6)

Judge Cleland emphasized the importance of explaining your efforts to obtain concurrence in any motion filed before him. He asks the parties to include detail in their statement indicating compliance with Local Rule 7.1(a), information such as the attorneys who had a discussion and the substance of the discussion. He wants to ensure that the parties actually had a conversation about the motion before its filing and are not merely reciting language from the Local Rule. He indicated he sometimes follows up a motion with a telephone conference to ensure that this has happened.

The panel also noted other procedural methods for addressing motions to dismiss. For example, Judge Mark A. Goldsmith issues a form order after an initial Igbal motion. The order provides that the plaintiff may file either an amended complaint or a response to the motion to dismiss. His order essentially incorporates Fed. R. Civ. P. 15(a)(1)(B), which allows a party to amend its pleading once as a matter of course within 21 days after service of a

motion to dismiss under Fed. R. Civ. P. 12(b). He has found that the issuance of these orders has markedly reduced the number of motions he needs to address. It also avoids delay in briefing, hearing, and determination if a plaintiff is ultimately going to seek leave to amend. If a plaintiff files an amended complaint after receiving the order, the court then denies the motion to dismiss as moot. A defendant may refile the motion

Linda Givens, Donna Williams, Congressman Keith Ellison, Elizabeth Stafford, U.S. Attorney Barbara McQuade, and Carl Stafford at the McCree Award Luncheon.

to dismiss if there are still deficiencies in the plaintiff's claims.

Judges Cohn and Cleland also addressed the application of Iqbal to affirmative defenses. Judge Cohn questioned the usefulness of filing a motion to dismiss affirmative defenses. He indicated that he would generally not decide such a motion, because the case is still going to be before his court. He also indicated the law review articles are split on whether the standard applies.

Judge Cleland indicated that the spirit of Igbal and Twombly combined with Fed. R. Civ. P. 11 suggests that the *Iqbal* standard is applicable and could be useful in narrowing the number of affirmative defenses. Judges Cohn and Cleland also discussed the standard as applied to employment cases. Judge Cleland emphasized that every case has its own set of facts. Judge Cohn noted that judges are given more discretion under the *Iqbal* and Twombly decisions.

In conclusion, the event was very informative and helpful for both practitioners and law clerks. The event was well attended and resulted in a lively discussion regarding the varying viewpoints on the application of the Supreme Court's decisions and best practices and procedures used in implementing the standard set by those decisions.

Florise Neville-Ewell and PBJ Outreach Receive McCree Award

At this year's Wade Hampton McCree, Jr. Memorial Luncheon, held on March 1 at the Westin Book Cadillac, the

Chapter bestowed the McCree Award for the Advancement of Social Justice on two worthy recipients. First, the Chapter honored Florise Neville-Ewell, a Professor at Thomas M. Cooley Law School. Introduced by John R. Nussbaumer, Associate Dean of Cooley Law School (Auburn Hills Campus), Neville-Ewell's long and storied career was recapped, highlighted by her commitment to her students and her public outreach efforts

related to the mortgage crisis. During her acceptance, Neville-Ewell conveyed a message of hope and continued dedication to improve the lives of those around her. She also gave a touching thank you to her husband for his longtime support.

The second recipient was the PBJ Outreach, Inc., founded by former ATF agent, Deacon Tim Sullivan. Sullivan founded PBJ Outreach after meeting a homeless woman during a trip to Boston, and being inspired to do something to help. PBJ Outreach, through its group of dedicated volunteers, provides a peanut butter and jelly sandwich, as well as toiletries and clothing, to a group of about 250-300 homeless people every Saturday. The message



Photo by John Meiu, courtesy of Detroit Legal News Publishing LLC.

from PBJ Outreach was not only to give back to the community, but also to take a moment and listen to those that are being served. If you are interested in joining PBJ Outreach, please meet any Saturday morning in the basement of Our Lady of



Florise Neville-Ewell, McCree Award Recipient, and Dean John Nussbaumer.

Photo by John Meiu, courtesy of Detroit Legal News Publishing LLC.

Good Counsel Church, located at 47650 N. Territorial Rd, Plymouth, at 6:00 a.m. You can also meet volunteers at the corner of Martin Luther King and 3rd Ave., Detroit, at 8:10 a.m. by prior arrangement, to distribute sandwiches. You may also make a contribution by contacting Kirk Zell at 734-260-3895 or kirk.zell@gfs.com.

Following the awards, keynote speaker Keith Ellison, U.S. Representative, Minnesota 5th Congressional District, took the podium. Ellison first acknowledged the historic career of Wade McCree, Jr. Ellison, a native Detroiter, then talked about the strides that have been made in race relations and the work yet to be done. He also talked about the growing gap between the haves and the have-nots, something he has tried to address through his contributions to the Credit Cardholder's Bill of Rights of 2009 and his membership on the House Financial Services Committee. Ellison's inspirational message was that lawyers need to continue to work and get involved in their communities to bring about change.

U.S. Attorney's Office Welcomes New AUSAs

Despite limits on hiring imposed by the Department of Justice, the U. S. Attorney's Office was able to welcome 7 new AUSAs in 2012. Commenting on the new members of her staff, U.S. Attorney and former Chapter President Barbara McQuade noted that "our hiring philosophy has been to hire outstanding lawyers from diverse backgrounds."

Brandon Bolling joined the Criminal Division, General Crimes Unit. Previously, he worked as an AUSA in Arizona. Brandon is also a reserve U.S. Marine currently

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New AUSAs (from page 9)

serving with the Navy-Marine Corps Trial Judiciary as a court-martial judge. Brandon received his law degree from the University of Detroit-Mercy School of Law, and his undergraduate degree from Michigan State University.

Adriana Dydell joined the Criminal Division, General Crimes Unit, but has already moved to the Civil Division, Asset Forfeiture Unit. She joined the office after working for a law firm in California. Before law school, Adriana worked as an English teacher in China for the Peace Corps. She graduated from the University of California, Hastings College of the Law, and California Polytechnic State University.

Jonathan Grey joined the Forfeiture and Financial Litigation Unit. Jonathan previously worked at the law firm of Seyfarth Shaw in Chicago. Additionally, he clerked for Sixth Circuit Judge Damon J. Keith and Judge W. Louis Sands of the Middle District of Georgia. He received his law degree from Georgetown University Law Center and his undergraduate degree from Morehouse College where he majored in Chemistry.

Mollie O'Rourke joined the Criminal Division, General Crimes Unit. Previously she worked at Alternatives for Girls, a non-profit in Detroit, and as a litigation associate at Cadwalader Wickersham & Taft in New York. Mollie graduated from New York Law School, earned a master's degree from Trinity College, Dublin, and a bachelor's degree from Gettysburg College.

B. Michael Ortwein III joined the Drug Task Force

from the U.S. Attorney's Office in Washington, D.C. Previously he worked as an associate at Kirkland & Ellis, and before that served as a law clerk to Judge Richard J. Leon of the District Court for the District of Columbia. Michael received his law degree from Suffolk University Law School and his undergraduate degree from the College of Holy Cross.

Anca Iulia Pop joined the Bay City Branch Office. Anca had been an AUSA in Arizona and, before that, served as a Judicial Clerk for Michigan Supreme Court Justice Stephen J. Markman and as a Prehearing Attorney for the Michigan Court of Appeals. Anca earned her law degree at the Michigan State University College of Law where she was a Dean King Scholar. She is a native of Romania and holds a law degree from the Babes-Bolyai University Faculty of Law in Cluj-Napoca. She speaks Romanian, Italian, French, and Spanish.

Christopher W. Rawsthorne joined the Flint Branch Office. He previously worked as an Assistant District Attorney at the Milwaukee County District Attorney's office. Before that he worked as an associate at a law firm in Milwaukee and as an Assistant District Attorney in New York County. Christopher graduated from the University of Michigan Law School and Northwestern University.

Chapter Doubles Down on Diversity

The Chapter is intensifying its efforts to help diverse children and young adults in the "pipeline" to prepare for successful legal careers. In furtherance of those efforts, Chapter President Thomas McNeill, Diversity Committee members Judge Victoria A. Roberts, John Nussbaumer and Elizabeth Stafford, and State Bar Diversity Director

(continued on page 12)



Among those taking part in the event were (l-r) Kenneth M. Essad (Arab American Bar), CABA President Paul Jonna, Michelle Carter (DMBA and WBA), IABAM President-Elect Caterina Amaro, Jim Feinberg (HBAM), HBAM President-Elect Alfredo Casab, Armenian American Bar President Diane Margosian Paulsen, Ben Jeffers (DMBA), Armenian American Bar Vice President Sevahn Merian, Tim Cordes (Stonewall), Susan Reed (WCCDBA), State Bar of Michigan President Bruce Courtade, Erica Bell (Straker), Lawrence Garcia (HBAM), Elisa Angeli-Palizzi (FBA), Gregory Conyers (State Bar of Michigan), Elizabeth Stafford (FBA), and Robyn McCoy (Vanzetti M. Hamilton Bar Association)

Photo by John Meiu, courtesy of Detroit Legal News Publishing LLC.

Diversity (from page 11)

Gregory Conyers hosted a Diversity Summit on March 7, at the Atheneum Hotel in Detroit.

The twenty-eight individuals in attendance, who each represented a law firm, nonprofit organization or special purpose bar association, were asked to join the planned Metro Detroit Pipeline Coordinating Council (MDPCC). The MDPCC will be an independent entity, and not owned or controlled by any other existing organization. The Diversity Summit attendees described their organizations' existing pipeline programs, and unanimously agreed that coordinated efforts through the MDPCC should be undertaken in order to improve the diversity of the legal profession. Faced with statistics showing that the legal profession is among the least diverse, there was a consensus that the credibility of our justice system is at risk.

The serious work of the summit was followed by conviviality that evening. The Chapter was one of twenty-one area bar associations to co-sponsor the Celebrating Our Diverse Bar event at Fishbone's Rhythm Kitchen Café, which adjoins the Atheneum Hotel. Held for the

fourth year, the event has become a must for a growing number of judges, lawyers and law students. State Bar of Michigan President Bruce A. Courtade greeted the 200 attendees, who munched on fried alligator and sipped spirits. As the saying goes, "A good time was had by all."

Criminal Practice Brownbag Lunch

The Criminal Practice Committee presented a lunchtime program, "Everything You Need to

Know About Pretrial Services," on March 13. The program highlighted the Federal Pretrial Services Agency.

This panel discussion program featured several representatives from Pretrial Services, including Alan Murray (Chief Pretrial Services Officer), Susan Gilmore and Simona Turner (Mental Health and Self-Surrender Specialists), Homero Hinojosa (Location Monitoring Specialist), and Derek Brand and Susan Dely (Drug/Alcohol Treatment Specialists).

The panelists provided a general overview of their

procedures and practices and provided important details about topics that have generated questions among criminal practitioners. Topics included pretrial issues relating to the use of tethers, defendants charged with child pornography offenses, mental health issues and pretrial supervisees, self-surrender issues, alcohol and drug issues, and various options for pretrial supervision. Panel members provided practical advice to make interactions with the Agency as productive and efficient as possible.

The program was well attended by defense attorneys and AUSAs who will all benefit greatly from the knowledge gained.

Plausibility and Affirmative Defenses by Jonathan F. Karmo*

On February 6, the Chapter Rules & Civil Practice Committee presented *Pleadings in the New Era of "Plausibility."* See the related article on page 6. In a

session moderated by Daniel Sharkey, Judges Avern Cohn and Robert H. Cleland discussed their views on how the "plausibility" standard affects their analysis of pleadings, and the corresponding "do's" and "don't's" for civil practitioners. The "plausibility" standard requires a complaint to contain sufficient factual matter that, when taken as true, states a claim to relief that is "plausible on its face." Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (citing Bell Atlantic v. Twombly, 550 U.S. 544, 557 (2007)).

At the presentation, a question was raised and not completely answered: Does

the "plausibility" standard apply to affirmative defenses? A recent decision from the U.S. District Court for the District of Columbia held that it does not. *Paleteria La Michoacana v. Productos Lacteos*, ____ F.Supp.2d ____, No. 11-1623(RC), 2012 WL 5901036 (D.D.C. Nov. 26, 2012). In *Paleteria La Michoacana*, the court differentiated the "plausibility" standard used to gauge the sufficiency of a complaint under Rule 8(a)(2) from Rule 8(c). Rule 8(c) asks parties to "affirmatively state" their affirmative

(continued on page 14)



Joseph Vernon, Judge Robert H. Cleland, Judge Avern Cohn, Daniel Sharkey, and Michael Blalock at the "Pleadings in the New Era of 'Plausibility'" seminar.

Photo by John Meiu, courtesy of Detroit Legal News Publishing LLC.

Calendar of Events

April 19 Master Lawyers: A Deeper Dive into Computer Security With Peter Marsak of **Vision Computer Solutions**

Dickinson Wright.

500 Woodward Ave., Suite 4000, Detroit

11:30 A.M. - 1:00 P.M.

\$15.00 admission. \$20.00 non-members

includes buffet lunch

Contact: Christine Dowhan-Bailey,

dowbaileycm@gmail.com

Criminal Practice Brown Bag: April 23 **How to Improve Your Practice**

Tips on the everyday "do's and don't's" of federal criminal practice

Levin Courthouse. Room 115.

12:00 P.M. - 1:30 P.M.

Free Admission, Bring Your Own Lunch & please register in advance

Additional details online at www.fbamich.org

Bankruptcy Committee Consumer April 24 **Issues Forum**

Westin Southfield, 4:00 - 6:00 P.M.

Contact: David A. Lerner,

dlerner@plunkettcooney.com or 248.901.4010

Leonard R. Gilman Award Luncheon April 30

Westin Book Cadillac Hotel

11:30 A.M. Reception

12:00 P.M. Luncheon

Speaker: Judge Edward Sosnick

Oakland County Circuit Court (retired)

Veterans' Treatment Courts Seminar April 30

Levin Courthouse, Room 115

Start time: 30 minutes after Gilman Luncheon

Seminar duration: 3-1/2 to 4 hours

May 1 Law Day at The Courthouse:

A Downtown Tradition

11:00 A.M. and 2:00 P.M. Don't miss it this year.

Litigation Technology Committee May 14

Seminar: The All-New Language of Data **Preservation, Collection and Production**

in Federal Court: A Practitioner's Guide to the **Technological Tsunami**

Levin Courthouse. Room 115

12:00 P.M.

May 17 Labor and Employment

Committee: "Meet the Judges Panel"

Levin Courthouse. Room 115 11:30 A.M. - 12:45 P.M.

Moderated by Judge Victoria Roberts.

May 22 Bankruptcy Judges Panel Luncheon

Further details to follow at www.fbamich.org

The FBA Book Club Presents for **May 23**

Discussion: The Oath: The Obama White House and the Supreme Court by Jeffrey Toobin Theodore Levin U.S. Courthouse, Room 722, **12:00 P.M.** Admission: Non-members \$5.00 Lunch: Bring your own, or register in advance for

the \$10 lunch provided

Master Lawyers Committee Presents: May 29 A Review of Social Security and Other

Retirement Benefits

Featuring Charles Russman, Bodman Law Firm Pepper Hamilton Conference Room,

4000 Town Center, Southfield

11:30 A.M. - 1:00 P.M.

\$15.00 admission includes buffet lunch.

For reservations, contact David Murphy

murphyd@pepperlaw.com

Bench-Bar Social and Golf Outing June 10

In addition to an 18-hole scramble, the Bench Bar Social will have tennis courts & a variety of other activities. Dinner following.

Plum Hollow Golf Club, Southfield, Michigan

June 20 Rutter Group Seminar:

"Federal Practice 2013"

Panelists: Chief Judge Gerald E. Rosen, Judge David M. Lawson and Thomas W. Cranmer

of Miller Canfield PLC Registration: 1:30 P.M. Program: 2:00 - 5:15 P.M. Westin Book Cadillac Hotel

June 20 The 34th Annual Dinner

Featuring:

- Election and Installation of Officers and Board Members
- •The Sixth Annual Julian Abele Cook, Jr. Bernard A. Friedman FBA Civility Award to be presented in recognition of a civil practitioner who is an outstanding example of professional excellence and civility.
- Nominations Open for Civility Award until May 15 Westin Book Cadillac Hotel

5:30 P.M. Cocktails, Dinner following

June 26 Master Lawyers: Holocaust **Museum Tour**

Led by Docent Michael C. Leibson

Contact Michael Leibson at mleibson@aol.com

Updates and further developments at www.fbamich.org

See "Hot News" and "Events & Activities" Online registration available for most events.

Plausibility and Affirmative Dedfenses (from page 13)

defenses. The court held that treating the two standards identically would be a "dramatic shift" that is unwarranted. *Id.* at *1.

The *Paleteria* court began its analysis by explaining the Supreme Court's shift from the "short and plain statement of the claim" standard from *Conley v. Gibson*, 355 U.S. 41 (1957), to the "plausibility" standard set forth in *Twombly* and *Iqbal*. Recognizing a split among courts that have considered whether the "plausibility" requirement applies to affirmative defenses, *id.* (citing *Falley v. Friends Univ.*, 787 F.Supp.2d 1255, 1256-57 (D.Kan. 2011) (collecting cases)), it stated five compelling reasons why it does not.

First, *Paleteria* recognized that Rule 8(a)(2) governs pleading requirements for a complaint while Rule 8(c) governs affirmative defenses. *Id.* This difference, according to the court, should not be brushed aside. The court stated that "[c]ourts must be careful not to extend a court's legal analysis beyond its original context 'without careful and critical examination.'" *Id.* (citations omitted). The *Paleteria* court reasoned that, central to the Supreme Court's decisions in *Twombly* and *Iqbal* was the Court's reliance on language taken directly from Rule 8(a)(2). *Id.* (explaining Supreme Court's use of the phrase "entitled")

to relief" in *Twombly* and *Iqbal*, which appears in Rule 8(a)(2), but not Rule 8(c)). It concluded that, "[t]he fact that Rule 8(a) and Rule 8(c) use different language is a strong indication that the two rules should be interpreted differently." *Id.* (citations omitted).

Next, Paleteria reasoned that, because "plaintiffs and defendants do not share an equal footing when it comes to the speed with which they must craft their pleadings," affirmative defenses must be treated differently than complaints. Id. at *2. While plaintiffs choose when to file their complaints after "months or years of contemplation and investigation," subject only to the statute of limitations, defendants must typically file an answer "within 21 days after being served with the summons and complaint." *Id*. (quoting Fed. R. Civ. P. 12(a)(1)(A)(i)) (internal quotations omitted).

Third, *Paleteria* stated that, "defendants may suffer greater consequences if they fail to raise certain defenses in their initial filings." *Id.* The court contrasted a plaintiff's ability to freely amend his or her complaint, *id.*

(citing Fed. R. Civ. P. 15(a)(2)), with a defendant's risk of losing certain defenses if they are not initially raised, *id.* (citing Fed. R. Civ. P. 12(h)(1)). It recognized that, "[a]lthough certain other affirmative defenses can be raised in an amended answer, plaintiffs and defendants face different stakes when it comes to the early pleading of their legal theories. This differential treatment counsels against applying *Iqbal* and *Twombly* to defendants and plaintiffs alike." *Id.*

Fourth, *Paleteria* recognized that *Twombly* and *Iqbal* "were motivated by a concern that baseless complaints could 'open the gates to expensive discovery and force an extortionate settlement." *Id.* (citations omitted). However, unlike dismissing a complaint, striking an affirmative answer does not "relieve the other party of all litigation costs." *Id.* It merely prolongs pre-discovery motion practice. *Id.* (citation omitted). The court reasoned that defendants should "not feel free to fire off 'shotgun pleadings' or boilerplate defenses without deliberation," but the court was "wary that extending *Iqbal* and *Twombly* to Rule 8(c) might invite a torrent of time-consuming motions to strike." *Id.* at *3 (citations omitted). Accordingly, it concluded that "the costs associated with extending *Iqbal* and *Twombly* could outweigh the limited benefits." *Id.*

Finally, *Paleteria* reasoned that "a party faced with an incomprehensible or meritless affirmative defense is not left

without a remedy." *Id.* Judges have broad discretion under Rules 26(b)(2) and 26(c) to narrow discovery. *Id.* In addition, Rule 12(f) "allows courts to strike truly baseless or spurious affirmative defenses" and, in the worst cases, Rule 11 sanctions can be imposed. *Id.* (citations omitted).

In concluding, *Paleteria* stated that, "[i]mposing the plausibility requirement to affirmative defenses would be a sea change for this court's practitioners; absent any compelling need for such a change, the court will leave Rule 8(c) undisturbed." *Id.* at *4.

Paleteria provides a comprehensive analysis of why the "plausibility" requirement should not apply to affirmative defenses and provides compelling arguments for civil practitioners faced with a motion to strike affirmative defenses.

*Jonathan F. Karmo is a law clerk to the Honorable Avern Cohn. He is a graduate of the University of Detroit-Mercy School of Law and Wayne State University.





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Judges Hold Motion Calls at Law Schools

The Chapter recently hosted two motion days at Michigan law schools that were attended by over 100 students.

On March 7, Judge Bernard A. Friedman held motion call at Wayne State University Law School's Spencer Partrich Auditorium. The auditorium was filled with students, journalists, and spectators there for the opportunity to hear oral argument on the legality of the Michigan Marriage Amendment to the state Constitution banning same-sex marriage and the state statute that prohibits unmarried couples from second-parent adoption. After the excitement died down, Judge Friedman heard additional cases and joined the faculty and students for lunch.

On March 21, Judge George Caram Steeh held his motion call at the University of Michigan Law School, where students heard arguments relating to a multi-million dollar real estate dispute (among other matters) that raised legal theories such as *res judicata*, abstention, and standing. After the arguments, Judge Steeh joined the students for lunch over pizza.

Both motion days were preceded by a description of the benefits of FBA membership! attendance at each of the sessions. UDM Law provided sandwiches and refreshments to attendees.

U.S. Attorney McQuade emphasized the importance of students getting involved in the FBA. "Through this type of involvement, students and lawyers show that they are willing to take on responsibilities to better their profession that others may shy away from." Ms. McQuade also discussed her career path and the important role mentors and organizations like the FBA have played in her professional development.

Judge Kethledge spoke about life on the federal bench and the qualities it takes to become an effective advocate. "Civility and ethics are paramount to being an effective litigator and are values that every judge respects in a lawyer," he said. He also discussed some of the more interesting cases he has had since he joined the bench in 2008

Dan Gordon, president of the Student Bar Association, said that students "very much enjoyed meeting the speakers. They really related to us and encouraged us to keep in touch with them."

The goal of the UDM Law Student Chapter is to promote interaction and learning between law students and federal judges and lawyers. UDM Law students have been working with the Chapter on ways to strengthen that interaction through various types of activities. Faculty Advisor C. Michael Bryce already is organizing a robust schedule of events for the 2013-14 academic year and predicts that the UDM Law Student Chapter will grow by "leaps and bounds" in the next several years.

UDM Student Chapter Revived

The revived University of Detroit Mercy School of Law (UDM Law) Student Chapter is off and running. After a hiatus of several years, UDM Law recently held two lunch-hour events. The first, in November 2012, featured U.S. Attorney Barbara L. McQuade, and, in February, Sixth Circuit Judge Raymond M. Kethledge spoke to students and faculty. Both events were moderated by Michigan Court of Appeals Judge Michael J. Riordan, immediate past-president of the Chapter.

Dean Lloyd Semple commented that "we could not have been more privileged than to host these distinguished speakers. The students were absolutely thrilled to hear what they had to say about federal practice and were delighted to engage them in a question and answer period." There were more than sixty people in



Daniel Gordon, Dean Lloyd Semple, Sixth Circuit Judge Raymond M. Kethledge, Professor C. Michael Bryce, and Michigan Court of Appeals Judge Michael Riordan during Judge Kethledge's visit to the University of Detroit Mercy School of Law student chapter event.

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Rutter Group Seminar "Federal Practice 2013"

and

34th Annual Dinner

Both Events on June 20, 2013

See **Calender of Events** on page 13 for details

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