



# FBAnewsletter

Summer 2009

Federal Bar Association - Eastern District of Michigan Chapter - **51** years of service to our Federal Bench and Bar

## State Bar Boot Camp For Local Bar Leaders

The Chapter recently participated in two programs for State Bar leaders in Michigan. On May 8, 2009, Chapter President Elisa Angeli Palizzi and Executive Director Brian Figot participated in the Michigan Association of Bar Executives' Second Annual Bar Association Boot Camp. Also, on June 12 and 13, 2009, Elisa Angeli Palizzi attended the State Bar of Michigan's Bar Leadership Forum on Mackinac Island. Both events provided an excellent opportunity for the Chapter's leadership to meet with leaders of other bar associations in Michigan to share ideas and form mutually beneficial partnerships.



*Attendees of the Summer Associate Program*

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

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## Summer Associate Program

The Chapter held its 7th Annual Summer Associate Program Tuesday, June 23, 2009 at the Courthouse. Nearly 100 law students pre-registered for the event. For \$10.00,

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## President's Column

*Barbara L. McQuade*

### Key Contributors

This column focuses on key contributors to our Chapter. One group of key contributors is the Chapter's communicators – the Newsletter Committee and Webmaster. No one ever writes about these members and they are too modest to write about themselves, but they deserve a moment in the spotlight for their excellent work.



*Kim Altman*



*Christina Farinola*

Kim Altman and Christina Farinola serve as Co-Editors-in-Chief to produce the quarterly newsletter, chronicling the unfolding history of the Eastern District of Michigan Chapter. Executive Director Brian Figot serves as Webmaster, producing and posting notices of events and providing

online registration for Chapter activities. Take a look at his work at [www.fbamich.org](http://www.fbamich.org)

The Newsletter has received an Outstanding Newsletter Recognition Award from the National FBA for the past six years. Committee members include Christine Dowhan-Bailey of the Army Corps of Engineers, Thomas Esordi of Kitch Drutchas Wagner Valitutti and Sherbrook, Dennis Levasseur of Bodman, management consultant and former Court Administrator/



*Brian Figot*

**WINNER  
6 YEARS**  
National FBA  
Outstanding  
Newsletter  
Award

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## President's Column (continued)

Clerk of Court John Mayer, Andrew Lievens of Honigman Miller Schwartz and Cohn, and Michael Riordan of the U.S. Attorney's Office.

The Newsletter and Website are generously supported by the Court.

Kim Altman has co-chaired the Newsletter Committee since 2005, and has served on the Committee for seven years. Kim also serves on the FBA's Executive Board and Law Clerk Committee. Kim is a career law clerk to Judge Avern Cohn. A 1995 magna cum laude graduate of Wayne State Law School, Kim started her career as a law clerk to Judge Robert DeMascio. She served with Judge DeMascio until his death in 1999, when she began clerking for Judge Cohn.

Christina Farinola has co-chaired the Newsletter Committee since 2007, and has served on the Newsletter Committee for the past seven years. Christina is a career law clerk to Magistrate Judge Paul J. Komives, and has served in that job for ten years. As a law student at the University of Detroit Mercy School of Law, Christina gained her first introduction to the Federal Court when she interned for Chief Judge Gerald E. Rosen. As co-chairs, Kim and Christina make story assignments, write articles and edit the content of the newsletter to insure its high quality each quarter.

Executive Director Brian Figot serves as the Chapter's Webmaster. Along with John Mayer and former Chapter President Dennis Barnes, Brian helped launch the website in 2001. Brian is a former president of the Chapter and Sixth Circuit Vice President for National FBA. Brian graduated from Wayne State University Law School, where he was Editor-in-Chief of the Wayne Law Review, and started his legal career as a law clerk to U.S. District Judge James P. Churchill, from 1981 to 1983. He has been in private practice since then and is currently associated with Stephen M. Landau, P.C. He performs with the musical parody troupe A (Habeas) Chorus Line, and his Tidbits and Trivia column is a regular feature of this Newsletter. As Webmaster, Brian is responsible for just about every word on the Website, which is regarded as one of the best Chapter websites in the country.

We appreciate the hard work of these dedicated members of our Chapter.

## Summer Associate *(from page 1)*

participants were treated to a lunch catered by Au Bon Pain. In addition, students were provided with the opportunity to network with other program participants, and meet practicing attorneys and members of the judiciary. Guest speakers included the Hon. George Caram Steeh, the Hon. Sean Cox, and Chapter President Elisa Angeli Palizzi of Miller Canfield. Judges spoke on the topic of civility and provided tips on successful trial practice. Ms. Palizzi gave the students valuable information about the benefits of joining the FBA and getting involved with the Chapter.

Thanks to the FBA Summer Programs Committee: Carrie S. Bryant, Co-Chair, Blue Cross Blue Shield of Michigan; Phyllis Golden Morey, Co-Chair, Brooks Kushman PC; and Samantha S. Smith, Miller & Tischler PC. Special thanks to Chapter Executive Director Brian D. Figot.



*From left to right: First row; Brian D. Figot; Frank Cristaudo, Chief Administrative Law Judge for the United States; Jeffrey S. Appel; Second row: Benjamin Parks, visiting ALJ from San Francisco; Peter Dowd, Chief ALJ of the Flint ODAR office. Photo by John Meiu, courtesy of Detroit Legal News Publishing LLC.*

## Social Security Seminar

The FBA Social Security Committee sponsored a very successful seminar for advanced Social Security practitioners on March 26, 2009 featuring the Chief Administrative Law Judge for the United States Frank Cristaudo and Administrative Law Judge Peter Dowd, the chief ALJ of the Flint, Michigan Office of Disability Adjudications and Review.

Judge Cristaudo spoke on his area of expertise, vocational expert testimony. Judge Dowd provided perspectives on how to more effectively represent individuals seeking Social Security disability benefits. The seminar was well-attended and the feedback has been very positive. The seminar set the bar extremely high, and the Committee has already promised that our next seminar will be equally outstanding.

## Past Presidents' Luncheon

The Chapter's annual Past Presidents' luncheon meeting was held on May 14th and, as usual, provided a unique opportunity for the past, present and future Chapter leadership to successfully mix business with pleasure. This event is always a highlight as the regard and affection of the past presidents for each other is always apparent. The location this year was a nostalgic return to the Book Cadillac Hotel, which also hosted several other Chapter events this year, starting on December 3, shortly after its reopening, and culminating with our Annual Dinner on June 18. As many FBA regulars will recall, this was the site of our first Annual Meeting, in 1957, and had been an FBA-preferred venue until its [temporary] closure in 1984.

Following status reports on progress in the three goals set by Barb McQuade for her term as president (Membership Retention, Diversity Task Force, and Pro Bono Service) and a recounting of the year's events, the past presidents unanimously concluded that during Barb McQuade's year as president, she, the officers, the Board and Committee Chairs have truly outdone themselves with a year of hard work and stellar achievement. Needless to say, the proposed slate of officers and board members for next year was enthusiastically endorsed for presentation to the membership at the Annual Dinner.



*Susan E. Gillooly, Michael Krebs (as Abraham Lincoln) and Dona Tracey. Photo by John Meiu, courtesy of Detroit Legal News Publishing LLC.*

## Law Day 2009

On May 1, 2009 President Abraham Lincoln, portrayed by actor Michael Krebs, along with Law Day co-chairs Assistant U. S. Attorney Susan E. Gillooly and Veterans Affairs attorney Dona Tracey greeted judges, attorneys, and visitors from downtown businesses and agencies to the Federal Courthouse for the annual Law Day event.

This year's theme, A Legacy of Liberty-- Celebrating Lincoln's Bicentennial, marks the 200th anniversary of Lincoln's birth in 1809. Lincoln, who devoted much of his adult life to the practice of law, was the quintessential American lawyer-President. Visitors were amazed to see Abraham Lincoln himself in downtown Detroit.

The afternoon's agenda included Courthouse tours, "Ask the Lawyer" free legal advice, bomb sniffing dogs, and interactive displays from many Federal agencies including the FBI and Secret Service. Guests en-



*First row: Richard T. Tarnas, Hon. Mark A. Goldsmith, Barbara L. McQuade, Elisa M. Palizzi, Julia Caroff Pidgeon.*

*Second row: Geneva S. Halliday, Hon. Virginia M. Morgan, Brian D. Figot, Michael C. Leibson, Barbara J. Rom, Joseph F. Dillon, Christine M. Dowhan-Bailey, Charles R. Rutherford, Lawrence G. Campbell, Dennis J. Clark, Laurie J. Michelson. Third row: John R. Runyan, Jr., Richard A. Rossman, Alan C. Harnisch, Daniel P. Malone, Thomas G.*

*McNeill, Thomas W. B. Porter, Thomas W. Cranmer, Robert E. Forrest, Dennis M. Barnes, Michael K. Lee.*

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

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## Law Day 2009 (from page 3)

joyed free hot dogs, chips, cookies and candy. The sunny spring weather and red, white and blue balloons lent a festive air to the elegant Courthouse. Special thanks to David Weaver, Libby Smith, Stephanie Miskowski, John Nussbaumer, Rick Haberman and the many volunteers who participated.

## Chapter's Thirtieth Annual Dinner

On June 18, 2009, the Chapter held its 30th Annual Dinner at the Westin Book Cadillac. Approximately 270 guests, including members of the Federal and State judiciary, attended the festivities. The assembled group paid tribute to and mingled with the judicial officers, elected new officers of the Chapter, and conducted other business. Outgoing Chapter President Barbara L. McQuade was thanked for her service and given numerous books in appreciation, including *My Secret Life as a Spy* and *Footloose in Washtenaw*. She then passed the gavel to incoming President Elisa Angeli Palizzi.

The Chapter recognized the impending retirement of Magistrate Judge Steven D. Pepe. The Chapter presented Magistrate Judge Pepe with a plaque honoring his more than 25-year service, his dedication to the FBA, including as a member of the nominating committee for the Wade H. McCree, Jr. Award, as well as his years of service as a legal practitioner and clinical law professor.

The Chapter then presented the Julian Abele Cook, Jr. – Bernard A. Friedman FBA Civility Award to Lawrence G. Campbell of Dickinson Wright PLLC. For history of and criteria for the Award see [www.fbamich.org/index.cfm?location=178&ParentID=1](http://www.fbamich.org/index.cfm?location=178&ParentID=1)

This year's recipient, Lawrence G. Campbell, is a partner in Dickinson Wright's Detroit office. Born in Marshall, Michigan, Mr. Campbell attended Michigan State University where he was elected student body president. He then studied at the Dunwoody School of Bakery, a leading culinary institute in Minneapolis, before returning to Michigan to become a professional baker.

While working as a baker, Mr. Campbell attended the University of Detroit Law School in the evening. He served as the Managing Editor of the Law Review before graduating in 1969 and going to work for Dickinson Wright.

His four-decade practice at Dickinson Wright has focused on litigation in the following fields: commercial and business, accountant malpractice, legal malpractice, class actions, securities, and labor and employment relations. He has tried more than 100 cases and argued more than 50 appeals at all levels of the Federal and State appellate courts.

He is a fellow of the American College of Trial Lawyers and has been recognized as a top commercial trial lawyer by Chambers and Partners USA, Best Lawyers in America, and Michigan Super Lawyers. In 2007, he was recognized by the Michigan Defense Trial Counsel and awarded the career Excellence in Defense Award, and the Rehabilitation Institute of Michigan named him its Man of the Year for his resolute fight to recover from a 2006 stroke.

He is a past president of this Chapter, a member of the Michigan Supreme Court Historical Society Board of Directors, an original and current fellow of the State Bar of Michigan Foundation, a member of the Michigan Defense Trial Counsel Board of Directors, a past chairperson of the State Bar of Michigan's U.S. Court's Committee, and a member of the American Arbitration Association's Large Complex Case Program and of Employment Arbitrators. He has served in numerous leadership roles at Dickinson Wright as well.

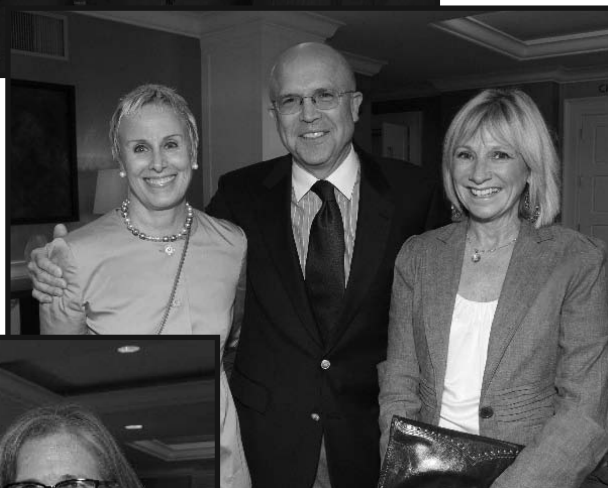
Rounding out the evening was a performance by the musical parody troupe, A (Habeas) Chorus Line, consisting of Chapter Executive Director Brian D. Figot; Sara F. Fischer, Retired Case Manager, U.S. District Court; Justin G. Klimko, Butzel Long; Joseph M. LaBella, Kitch, Drutchas, Wagner, Valitutti & Sherbrook; Michael C. Leibson, Assistant U.S. Attorney; Mark R. Lezotte, Oakwood Healthcare, Inc.; James D. Robb, Thomas M. Cooley Law School; Angela R.C. Williams, Detroit Housing Commission and Judith L. Zorn, The Zorn Law Firm PLC.

The Chapter thanks its sponsor firms for their support of the 30th annual dinner. Thanks in large part to these sponsors, our Chapter is once again able to contribute several thousand dollars to the Federal Bar Foundation. This year's sponsors were:

Barris Sott Denn & Driker  
Brooks Kushman  
Bush Seyferth & Paige PLLC  
Butzel Long  
Charles Taunt & Associates  
Conway MacKenzie  
Dickinson Wright  
Dykema  
Foley & Lardner  
Hewson & Van Hellemont  
Honigman Miller Schwartz and Cohn  
Howard and Howard  
Kitch Drutchas Wagner Valitutti & Sherbrook  
Law Offices of Lee & Correll  
Miller Canfield Paddock and Stone  
Sullivan, Ward, Asher & Patton  
Ufer & Spaniola

Annual dinner chairs David Grand, Sue Evans, and Cameron Evans are specially thanked for making the 30th Annual Dinner a great success.

## Scenes From The Annual Dinner



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

## Law Clerk Committee Holds Panel Discussion

On May 19, 2009, the Law Clerk Committee, under the direction of Laurie Michelson, Butzel Long, presented a noon-time panel discussion providing “A True Federal Courthouse Story.” The well-attended program featured helpful hints for attorneys practicing in Federal Court from an insider’s perspective – that of the Federal law clerks.

Panelists included Krystal Johnson, Law Clerk to Judge Victoria Roberts; Lauren Mandel, Career Law Clerk to Judge Patrick Duggan; Linda Hylenski, Career Law Clerk to Chief Judge Gerald Rosen, and Ruth Tyszka, Law Clerk to Magistrate Judge Mona Majzoub. Theresa M. Serra, Career Law Clerk to Judge Nancy G. Edmunds, was the moderator. All attendees received a bound copy of suggested Do’s and Don’ts for practicing in front of the individual Federal Judges in this District. That booklet is sure to be a very popular volume in law firms in this District.

The discussion was divided into four parts. Linda Hylenski addressed initial filings (complaints, notices of removal), touching specifically on privacy considerations, subject matter jurisdiction issues, “companion case” procedures, and how TROs/preliminary injunction motions are processed when filed with a complaint. Lauren Mandel addressed motion practice in general. She highlighted the following points: that the District’s electronic filing rules require courtesy copies for dispositive motions; that courtesy copies should also be provided for other motions with multiple exhibits; that motions should be bound, preferably book style; that exhibits must be tabbed; that copies of unpublished opinions, law review articles, treatise sections, etc. should also be provided; and that attorneys should immediately inform the assigned Judge if a pending motion has been resolved or the case is likely to be settled.

Krystal Johnson discussed the substantive portion of brief/motion writing and oral argument. Many of the points she highlighted were consistently referenced by the Judges in their individual suggested Do’s and Don’ts. For example, do not bold, capitalize, underline, or use exclamation points as a substitute for persuasive writing. Please cite all supporting authority in the text of your brief – do not bury this information in footnotes. If you need more pages, follow that Judge’s rules for doing so rather than using a font size



*Linda S. Hylenski, Lauren N. Mandel, Ruth H. Tyszka, Theresa M. Serra, Laurie J. Michelson, Krystal D. Johnson. Photo by John Meiu, courtesy of Detroit Legal News Publishing LLC.*

that is smaller or a page margin that is larger than that set out in the Court’s Local Rules. Address all relevant case law, even if unfavorable but on point. Don’t include a motion in a response brief. Each motion should be a separate document. For oral argument, it is suggested that attorneys remember to speak slowly and spell case names to allow the court reporter to obtain an accurate record. When addressing the court, use the podium. Don’t just say, “I rely on the briefs” as your entire argument.

Ruth Tyszka addressed the jurisdiction of Magistrate Judges and civil discovery motions. Some of the topics covered included the following. With all motions to compel discovery, Local Rule 37.2 requires the moving party to include a copy or verbatim recitation of the interrogatory, request, answer, response and objection at issue. Attorneys should not fail to make disclosures, to produce documents or otherwise respond to discovery because the opposing party has not responded to your discovery. The discovery deadline is a deadline for completion of discovery, so attorneys should plan accordingly. Requests for Admission are not interrogatories and should not be used as a tool for circumventing the 25 interrogatory limit. Finally, parties should not expect the Court to draft their protective orders. Rather, they should submit stipulated or proposed protective orders.

The panel discussion was followed by a productive question-and-answer session. After the presentation ended, several attorneys lingered to thank the panel members for their insight, information, and “insider perspective.”

## Supreme Court Review by M Bryan Schneider\*

The Supreme Court’s 2008 Term resulted in a number of decisions of importance for Federal practitioners. Although not a comprehensive discussion of the Court’s docket or its more noteworthy decisions, this article provides a quick snapshot of some of the decisions sure to impact both criminal and civil practitioners.

On the criminal side of the docket, the Court was extremely active in both statutory and constitutional cases. The Court interpreted a number of Federal criminal statutes. In *Chambers v. United States*, the Court held that an Illinois statute criminalizing failure to report for penal confinement is not a “violent felony” under the Armed Criminal Act.



Interpreting 18 U.S.C. § 922(g)(9), which prohibits possession of a firearm by a person convicted of a misdemeanor crime of domestic violence, in *United States v. Hayes* the Court held that while the existence of a domestic relationship at the time of the underlying crime is an element of the offense, the existence of such a relationship need not be a defining element of the underlying predicate offense.

The Court also considered a firearm statute in *Dean v. United States*, specifically 18 U.S.C. § 924(c), which prohibits use of a firearm in connection with certain offenses, and provides an enhanced penalty when a firearm used in violation of the statute is discharged. The Court held that no separate proof of intent is required to support the discharge element, and thus an accidental discharge satisfies the statute.

In *Flores-Figueroa v. United States*, the Court held that under 18 U.S.C. § 1028A(a)(1), which prohibits aggravated identity theft, the Government must prove that the defendant knew that the means of identification he unlawfully transferred, possessed, or used, in fact belonged to another person.

The Court also held in *Abuelhawa v. United States* that 18 U.S.C. § 843(b), which prohibits the use of any communication facility in facilitating felony drug distribution, does not apply to a buyer's use of a telephone to make misdemeanor drug purchases. Finally, in *Boyle v. United States* the Court held that an "association-in-fact" enterprise under RICO must have an ascertainable structure, but that the structure may be inferred from the pattern of racketeering activity itself and the association need not be shown to have an ascertainable structure beyond the pattern of racketeering activity.

The Court also considered two sentencing cases flowing from its *Apprendi-Blakely-Booker* line of cases. In *Spears v. United States*, the Court held that the advisory nature of the Sentencing Guidelines after *Booker* allows a sentencing court to reject and vary categorically from the crack-cocaine guidelines based on the sentencing court's policy disagreement with those guidelines. And in *Oregon v. Ice*, the Court held that the Sixth Amendment as interpreted in *Apprendi* and *Booker* does not prevent states from assigning judges rather than juries the task of finding facts necessary to the imposition of consecutive rather than concurrent sentences for multiple offenses.

With respect to constitutional criminal procedure issues, the Court held in *Herring v. United States* that the Fourth Amendment exclusionary rule does not require suppression of evidence resulting from a nonrecurring, negligent error by the police. In another Fourth Amendment case, *Arizona v. Johnson*, the Court held that when a driver and passengers have been seized pursuant to a lawful traffic stop, the police may search the occupants if they have reasonable suspicion to believe that they are armed and dangerous, regardless of whether the police have cause to believe that any occupant is involved in criminal activity.

And in *Arizona v. Gant*, the Court held that police may conduct a warrantless search of the passenger compartment of a vehicle incident to an arrest only if there is reason to believe that the arrestee might access the vehicle at the time of the search or that the vehicle contains evidence of the offense of arrest.

With respect to the Sixth Amendment right to counsel, the Court in *Montejo v. Louisiana* overruled its prior decision in *Michigan v. Jackson*, and held that the police may initiate contact with a criminal defendant in attempt to get him to waive counsel and speak with the police. This decision did not, however, overrule *Edwards v. Arizona*, prohibiting such initiation of contact when a suspect has invoked his right to counsel under the Fifth Amendment.

Also, in *Kansas v. Ventris* the Court held that a statement elicited from a defendant in violation of his Sixth Amendment right to counsel is admissible at trial for impeachment purposes. In two double jeopardy cases, the Court held in *Bobby v. Bies* that the Double Jeopardy Clause does not preclude a new capital sentencing proceeding with respect to a defendant whose original proceeding was overturned on the basis of *Atkins v. Virginia* (prohibiting execution of a mentally retarded offender), and in *Yeager v. United States* that when a jury has inconsistently acquitted on some counts and hung on other counts of a multi-count indictment, the hung verdicts have no bearing in determining the preclusive effect of the acquittals.

The Court held in *Melendez-Dias v. Massachusetts* that the Confrontation Clause is violated by the admission of lab reports without the opportunity for cross-examination of the lab technician. In *Vermont v. Brillon*, the Court held that, when determining whether a defendant's speedy trial rights have been violated, delay caused by appointed defense counsel is attributable to the defendant, not the state. And in *Rivera v. Illinois*, the Court held that so long as all jurors are qualified and unbiased, the Due Process Clause does not require automatic reversal based on a trial court's error in denying a defendant's peremptory challenge.

Turning to the Court's civil docket, *Ashcroft v. Iqbal* was newsworthy because it arose from the Government's detention of Muslims following the September 11th terrorist attacks. For Federal practitioners, however, the Court's decision is important because it makes clear that the Court meant what it said when it imposed a stricter interpretation of the Rule 8(a) pleading requirements in *Bell Atlantic v. Twombly*. The Court reiterated that a complaint's factual allegations must have "facial plausibility," and that a court need not accept as true allegations that are mere recitals of a cause of action's elements supported by mere conclusory statements.

The Court also addressed a number of civil rights issues. Significantly, in *Pearson v. Callahan*, the Court held that the sequential qualified immunity test from *Saucier v. Katz*, which requires a court to first consider whether a right was violated and only then proceed to determine

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## Supreme Court *(from page 7)*

whether the right was clearly established, is not required in all cases. Thus, a court may proceed directly to determine whether the alleged right was clearly established without first determining whether the right was violated at all.

In *Haywood v. Drown*, the Court held that a state law divesting the state's courts of general jurisdiction of jurisdiction over all suits against corrections officers is barred by the Supremacy Clause to the extent it is applied to bar civil rights suits under 42 U.S.C. § 1983. In *Fitzgerald v. Barnstable School Committee*, the Court held that a § 1983 suit alleging unconstitutional sexual harassment in schools is not precluded by Title IX of the Education Amendments of 1972. The Court also held, in *Van de Kamp v. Goldstein*, that supervisory prosecutors are entitled to absolute immunity from claims alleging that they failed to adequately train and supervise trial prosecutors in the handling of exculpatory evidence.

In *Caperton v. A.T. Massey Coal Co.*, the Court held that due process requires the recusal of a state court judge when a party to the case had a substantial influence in electing the judge while the case was pending or imminent. In *Safford Unified School District v. Redding*, the Court held that a strip search of a middle school student for prescription strength ibuprofen and a nonprescription painkiller was unreasonable in light of the intrusiveness of the search and the school interest involved. And, in *District Attorney's Office v. Osborne*, the Court held that a person convicted of a crime has no right under the Due Process Clause to post-conviction access to the state's evidence for DNA testing.

The Court also issued a number of decisions regarding Federal antidiscrimination statutes. In *Crawford v. Metropolitan Government of Nashville & Davidson County*, the Court held that the Title VII antiretaliation provision protects an employee who speaks not on her own initiative, but in response to an employer's internal investigation. Considering the Age Discrimination in Employment Act (ADEA) in two cases, the Court first held in *Gross v. FBL Financial Services* that the ADEA does not authorize so-called "mixed motive" cases, and that a plaintiff must show not that age was a motivating factor in the employment decision, but was the "but for" cause of the decision. And in *14 Penn Plaza v. Pyett*, the Court held that a collective bargaining agreement provision that clearly and unmistakably requires union members to arbitrate ADEA claims is enforceable.

Those interested in a fuller discussion of the Court's decisions from this Term may visit the Scotusblog website's ScotusWiki page at [www.scotuswiki.com](http://www.scotuswiki.com)

*\*M Bryan Schneider, Career Law Clerk to U.S. Magistrate Judge Paul J. Komives*



## Focus On An FBA Member

**Steven D. Pepe**  
**U.S. Magistrate Judge**  
**Retiring After Twenty-Six**  
**Years on the Bench**

**By Michael J. Riordan\***

After twenty-six years of service to the U.S. District Court, Magistrate Judge Steven D. Pepe is hoping to have his caseload wound up by July 31st. While he will be leaving his Ann Arbor chambers to Magistrate Judge Virginia Morgan, Judge Pepe will continue his public service as a recalled magistrate judge at least until March 2, 2010, handling ad hoc individual case assignments and completing a Sixth Edition of a Social Security Disability Manual he has written for the Federal Judicial Center's national training efforts.

The son of retail florists, Judge Pepe was born in Indianapolis in 1943. He is a 1961 graduate of Cathedral High School and a 1965 graduate of the University of Notre Dame. A lifelong fan of Irish football, he recalls listening on radio in 1957 to Notre Dame ending Oklahoma's thirty-seven game winning streak limiting the Sooners to a 10-1 season. A similar fate befell Notre Dame in Judge Pepe's senior year at Notre Dame which was Ara Parseghian's first year as football coach. "The Irish ended the season 9-1 losing its final game to Southern California 20-17 by two outrageous penalty calls by the then Pac-Eight referees," recalled Judge Pepe. "Even the Trojan Coach, John McKay, angered at the Pac-Eight because he did not get the Rose Bowl bid after beating Notre Dame, admitted to Parseghian that Notre Dame's National Championship hopes were defeated by the Pac Eight referees."

Judge Pepe then went on to graduate from the University of Michigan School of Law in 1968. He chose Michigan over Chicago or Columbia law schools in no small part because of his enjoyment of college football.

Judge Pepe began his legal career as a law clerk to D. C. Circuit Judge Harold Leventhal from 1968 to 1969. "Judge Leventhal had the biggest influence on my legal career.



*Magistrate Judge Steven D. Pepe*



He had clerked for three U.S. Supreme Court Justices and he taught me the central importance of factual accuracy to quality lawyering and writing.” In 1969, Judge Pepe joined Neighborhood Legal Services in Washington D.C. There he handled housing cases, juvenile cases and also mental health cases at St. Elizabeth’s Hospital, the longtime home of John Hinkley and future site for the Department of Homeland Security.

“The overcrowding in Anticostia was aggravated by the many minorities being displaced by the massive Southwest Washington urban renewal project,” said Judge Pepe. “In my first year I became a sort of general counsel to the National Tenants Rights Organization. We acted as legislative advisors to the Senate Banking and Currency Committee supporting passage in 1970 of the Brooks and Sparkman amendments to the Public Housing Act. This was before the many restrictions later put on Legal Services lawyers preventing them from giving their client groups the same ‘full service lawyering’ available to the wealthy.”

From 1970 through 1972, Judge Pepe was at the London School of Economics where his work centered on housing for the poor and land use planning. In 1972, he accepted a Teaching Fellowship at the Harvard Law School to work with Professor Gary Bellow on the early development of clinical legal education. In 1974, Judge Pepe became the director of U of M Law’s Clinical Law Program. In his ten years there, he expanded the clinical offerings from a core civil and criminal clinic to include clinical offerings in environmental law, legal problems of the aging, child advocacy and tax law.

“At U-M, I had the opportunity to work with Wade Hampton McCree, Jr. We taught separate sections of a first-year course on the legal profession and ethics. He was very instrumental in my becoming a Magistrate Judge in 1983.” While teaching at U-M Law, Judge Pepe also worked with Andy Watson, a psychiatrist affiliated with the U-M clinical program. “Andy gave me many physiological insights on both ethics and effectiveness in lawyering. We co-taught a course on negotiations that has been invaluable to me as settlement judge – an area I hope to continue for the Court.”

Only one case Judge Pepe worked on ever got all the way to the Supreme Court, a prisoner’s case he says “will not be long remembered”, *Jones v. Bock*, 549 U.S. 199 (2007). “Ironically, in retrospect, there is a part of me that is glad the district judge and three appellate judges disagreed

with my Report and Recommendation, otherwise the case would have lingered in the trial court and never made it to the Supreme Court.” A unanimous Court reversed the Sixth Circuit and basically vindicated the position on three issues Magistrate Judge Pepe had taken three years earlier in the case.

When he began law school, Judge Pepe thought he would end up as a tax or securities litigator. “It is ironic that the last case I’ll likely ever try was an SEC 10b-5 case involving Kmart’s former CEO. It is sometimes surprising how life unfolds. It convinced me my change of career choice many decades ago was probably a wise one,” he said.

*\*Michael J. Riordan is an Assistant U. S. Attorney and Chapter Vice-President.*

## Rutter Group And “Home Run Motions In Federal Court”



*Judge David M. Lawson, Chief Judge Gerald E. Rosen, Thomas W. Cranmer. Photo by John Meiu, courtesy of Detroit Legal News Publishing LLC.*

On June 11, 2009, the Rutter Group, in conjunction with the Chapter, held a seminar entitled “Home Run Motions in Federal Court” at the Atheneum Hotel. The seminar, which was well-attended by local attorneys and law clerks, was led by Chief Judge Gerald E. Rosen, Judge David M. Lawson and prominent local practitioner Thomas W. Cranmer, of Miller Canfield, PLC. It was designed to educate attorneys and clerks on recent developments of note in Federal pretrial practice.

Among the most important recent cases discussed by the panel was this year’s Supreme Court decision in *Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009). This case confirmed and, as some see it, extended the

rule of *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), (some commentators had wished the Court to limit *Twombly* to the antitrust context from which it sprung). According to the panelists, *Iqbal* will have a significant effect on the level of specificity in pleading required to defeat a motion to dismiss. Although Federal Courts still, nominally at least, require only notice pleading, under *Iqbal* and *Twombly* it is clear that allegations which are merely legal conclusions will not suffice; nor will a complaint survive a motion to dismiss when it only pleads facts “merely consistent with” liability. Indeed, the panel opined that *Iqbal* seems to move the pleading requirements in all cases closer to the designedly heightened pleading standard of cases falling under Fed. R. Civ. P. 9 (e.g., complaints alleging fraud or mistake).

*(continued on page 10)*

## Rutter Group *(from page 3)*

The panel also helpfully weighed in on several aspects of the intricacies of Federal jurisdiction, a subject obviously crucial in Federal practice. They discussed the necessity of accurate jurisdictional pleading and the propriety of a judge retaining supplemental jurisdiction over one or more state law claims after having dismissed all the federal claims, as well as other issues of civil procedure.

## Wind Energy Seminar Resonates With Audience

Consistent with the Obama Administration's and Governor Granholm's emphasis on renewable energy sources, the Chapter Environmental Committee sponsored a panel discussion in the Courthouse on June 5, 2009 entitled "Federal Regulations Governing the Siting of Wind Turbines in the Great Lakes: the Answers are Blowin' in the Wind." A knowledgeable panel comprised of four experts impressed 35 attendees with state-of-the-art information regarding this emerging and important alternative energy source.

Panelist Matt Bissett, professional surveyor and group leader for Atwell-Hicks' Power & Energy Sector, began with a technical presentation that addressed the design, transportation, and location challenges, as well as the economic drivers associated with wind turbines. Headquartered in Ann Arbor, Atwell-Hicks has assisted with over 65 wind energy projects nationwide, enabling Mr. Bissett to speak authoritatively about the exponential growth (20-30% annually) in wind energy projects.

According to Mr. Bissett, technological advances in the last 10 years have been key as energy production by the average turbine has more than doubled. Wind energy can realistically produce up to 6% of our electricity needs by 2020. Challenges include lengthy studies, turbine demand coupled with transportation issues, proximity of windy areas to major metropolitan electrical grids, and difficulties in maintaining the huge structures, particularly in an offshore environment.

Jeff Gosse, Ph.D., the Regional Hydro and Wind Power Coordinator for the U.S. Fish and Wildlife Service in Minneapolis, pointed out that wind energy may not be entirely "green" considering the sizable number of bird and bat deaths associated with turbines, especially if the

structures are located off shore in migratory corridors. The Migratory Bird Treaty Act of 1918, Mr. Gosse explained, is a strict liability statute triggering automatic penalties for the death of migratory birds. Additional legal concerns emanate from the Endangered Species Act of 1973, the National Environmental Policy Act of 1969, and the Bald and Golden Eagle Protection Act of 1940.

Surprisingly, turbines often disappear into the horizon rendering them nearly invisible to avian wildlife. According to Dr. Gosse, the Secretary of the Interior has pledged to work within the Department and collaboratively with others to "encourage the timely and responsible development of renewable energy...while protecting and enhancing the Nation's water, wildlife, and other natural resources." Accordingly, Dr. Gosse participates as an active member in the Great Lakes Wind Collaborative.

Ms. Gina Nathan, a wind permitting specialist with the Detroit District of the Army Corps of Engineers, explained that Corps jurisdiction does not attach to upland structures. For turbines located in U. S. waters, the Corps will conduct a public interest and NEPA review. Ms. Nathan noted that her office has not yet received any applications for siting wind turbines, but the Corps, in conjunction with other state and federal agencies, engaged in a mock application review process that was most instructive to the regulating community. She also participates in the Great Lakes Wind Collaborative.

The last speaker, Ms. Victoria Pebbles, Program Director, Great Lakes Commission, pulled everything together with an outstanding overview. She noted that Minnesota leads the region with installed wind energy capacity; Michigan and Ohio significantly trail the other Great Lakes states. She hailed the environmental benefits, such as a projected reduction of carbon dioxide emissions by 1,260 million tons if 20% of energy needs are provided by wind in the year 2030.

Economic development prospects are impressive, especially considering the fact that automobile manufacturing plants are well suited to conversion to turbine production. Furthermore, proximity to shipping can solve the dicey issue of moving these structures over the highways. Ms. Pebbles explained the role of the Great Lakes Wind Collaborative, a multi-sector coalition of wind energy stakeholders working to facilitate the sustainable development of wind power in the bi-national Great Lakes region. Ms.



*Matt Bissett, group leader for Atwell-Hicks' Power & Energy Sector and Gina Nathan, wind power permitting specialist with the Army Corps of Engineers, Detroit District. Photo by John Meiu, courtesy of Detroit Legal News Publishing LLC.*

Pebbles acknowledged that while there is no silver bullet, “wind is likely to be an increasing part of the regional energy portfolio.”

As a final note, audience participation rounded out a wonderful learning experience. One member of the audience recounted the marvelous success of wind energy in Europe, which he has witnessed first-hand. The mix of attorneys, technical specialists and entrepreneurs made for a most interesting afternoon. Brian Considine (248-642-2531), Christine Dowhan-Bailey (313-226-6822), and Bill Schikora (313-568-6789) served as Co-Chairs of the event. Please call any of them if you have an interest in participating in the Environmental Committee.

## **Motion Day at Cooley Law School Judge Friedman Presiding**

On May 13, 2009, the Chapter co-sponsored Motion Day at the Auburn Hills campus of Thomas M. Cooley Law School, in its new trial litigation complex. Accompanied by several of his law clerks, Judge Bernard A. Friedman began the day sharing lunch, introductions and conversation with Associate Dean John Nussbaumer; Assistant Dean Joan Verstrand; Professor (and former Chief of the Criminal Division, U.S. Attorney’s Office) Alan Gershel; and officers of Cooley’s Student Bar Association, President Anthony Vitucci, Jr. and Bethany Watson.

After lunch, the group proceeded to Cooley’s state-of-the-art trial courtroom where Judge Friedman heard arguments on several civil matters in front of a standing-room-only crowd. Law students witnessed the application of civil procedure rules to actual cases, affording them an opportunity to fully integrate the experience with their more abstract classroom lessons. The students also learned first-hand the importance of professionalism in the courtroom, preparation and the value of persuasive argumentation. Judge Friedman acknowledged that he often has a good idea which way he will rule on any given motion based upon the written documents submitted prior to the hearing. As appeared to occur on this particular Motion Day, however, attorney responses to several of Judge Friedman’s questions caused him to reconsider at least one motion.

Judge Friedman further invited each attorney to present a brief summary of their case and relevant law. Similarly, Judge Friedman encouraged interaction among the students soliciting questions at various points throughout the hearings. At the conclusion of the court session, students were invited to join Judge Friedman for an informal gathering where he continued to share his practical and legal wisdom with the law students.

The entire event was a tremendous success. The Chapter was invited to return the following week to participate in Cooley Law School’s Student Organization Fair. To date, approximately a dozen Cooley Law Students have joined FBA and several students have already completed most of the formalities necessary to establish a student chapter at Cooley Law School. Based upon the enthusiasm that has been readily apparent at each visit to the Law School, this new Student Chapter will undoubtedly be successful and a welcome addition to the Chapter.



*Vanessa Miree Mays, Joseph A. Golden, Gregory V. Murray and Robert M. Vercruysse. Photo by John Meiu, courtesy of Detroit Legal News Publishing LLC.*

## **Labor and Employment Law Seminar**

The Labor and Employment Law Committee hosted a seminar double header on May 14, 2009, dubbed “Two Important Topics and a Boxed Lunch”. The lunch and speakers were both hits.

The first presentation, “A Bankruptcy Primer for Employment Lawyers - The Nuts and Bolts”, was made by Mike Hammer, co-chairman of the FBA

Bankruptcy committee. An unfortunate side effect of current economic conditions is that bankruptcy issues are becoming more prevalent in employment cases, a reminder to many of us why we studied the subject in law school. Mike’s thoughtful and readily understandable answers to the questions with which he was inundated during the Q & A section of his talk were appreciated by all.

The seminar concluded with a panel consisting of the Hon. John Corbett O’Meara (a management labor and employment lawyer in a previous life) and committee co-chairs Joe Golden and Bob Vercruysse on the topic of “Talking with the Jury from Voir Dire to Closing Argument”. The wealth of practical knowledge from the panel’s 100+ plus years of aggregate legal experience and the genuine camaraderie demonstrated by the panel made for an entertaining and enlightening afternoon.

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## Calendar of Events

**Sept 15** State of the Court Luncheon  
Speaker: Chief Judge Gerald E. Rosen  
Westin Book Cadillac Detroit  
Venetian Ballroom  
12:00 P.M. Reception  
12:30 P.M. Lunch

**Nov 19** Rakow Scholarship Awards/Historical  
Society Luncheon  
Program: To Be Announced  
Westin Book Cadillac Detroit  
Venetian Ballroom  
12:00 P.M. Reception  
12:30 P.M. Lunch

**Dec 1-2** New Lawyers Seminar  
Theodore Levin U.S. Courthouse  
8:00 A.M. Registration

**Dec 1** Chapter Gala Holiday Reception  
4:30 P.M.  
Hold the date: Further details to follow.

**Updates and further developments at [www.fbamich.org](http://www.fbamich.org).  
See "Hot News" and "Events & Activities."  
Online registration available for most events.**

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