



FBA Newsletter

Winter 2003

Federal Bar Association - Eastern District of Michigan Chapter - 46 years of service to our Federal Bench and Bar

WINNER

National FBA
2 0 0 3
 Outstanding
 Newsletter
 Award

Distinguished Panel to Recall Fourth Amendment Case

Concurrent with the Rakow Scholarship Luncheon, this year's Annual Meeting of the Historical Society for the

Eastern District of Michigan will include U.S. District Judge John Feikens who will preside over a distinguished panel consisting of U.S. Circuit Judges Damon Keith and Ralph B. Guy, Jr., and attorney Leonard Weinglass, who will recall *United States v. Sinclair*, 321 F. Supp.1047 (E.D. MI 1971), and the appeals relating to that case.

The case arose from a criminal proceeding in the early 1970's in which the Government brought charges of conspiracy to destroy Government property against three defendants, one of whom was charged with the dynamite bombing of a Central Intelligence Agency office in Ann Arbor. The Government's evidence included electronic surveillance information that had been obtained without a warrant pursuant to then President Richard Nixon's assertion of presidential authority to protect national security under Title III of the Omnibus Crime Control and Safe Streets Act. The constitutionality of the surveillance was argued in the U.S. District Court for the Eastern District of Michigan, the U.S. Court of Appeals for the Sixth Circuit and the U.S. Supreme Court.

(see page 2)

WSU Law School To Host Symposium: "Judge Keith, The Constitution And National Security"

As a follow-up to the Rakow Scholarship Luncheon, Professor Robert Sedler of the Wayne State University Law School will host a symposium titled "Judge Keith, The Constitution and National Security" concerning the case of *United States v. Sinclair*, 321 F. Supp.1047 (E.D. MI 1971), and the appeals that followed. In addition to Professor Sedler, the participants will be U.S. Circuit Judge Damon Keith, who issued the district court opinion in the case, and attorneys Leonard Weinglass and Hugh Davis, who represented defendants. The Symposium will provide a more in-depth discussion of the case, including discussing the case in the context of current events.

The Symposium will be held after the Rakow Scholarship Luncheon on November 18th, from 4:00 to 5:30

(see page 2)



President's Column

Dennis J. Clark

The Eastern District of Michigan Chapter (founded in 1957 as the Detroit Chapter) is one of 87 chapters in the national Federal Bar Association. The mission of the FBA is "to advance the science of jurisprudence and to promote the welfare, interests, education, and professional growth and development of the members of the Federal legal profession." At the recent Federal Bar Association National Convention in Washington, D.C., the Eastern District of Michigan Chapter was honored to have received three awards for the year 2003:

- * the Presidential Excellence Award, in recognition of superior chapter activities in the areas of administration, membership, programming and member outreach
- * an Outstanding Newsletter Award (this was a first in recent memory); and,
- * a Chapter Activity Award Presidential Citation for the 2002 Bench-Bar Conference.

Congratulations to past and current officers, board members, committee chairs, editors and members for a job very well done. Thanks to all who worked so hard to earn these accolades.

Also, former Chapter President Brian Figot, was presented an award by the national Federal Bar Association in recognition of his outstanding service as a Sixth Circuit Vice President - a most deserving honor.

For more information about the national FBA, you may access the website at www.fedbar.org or refer to the organization's monthly magazine, "The Federal Lawyer."

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Symposium (continued)

p.m. in the Spencer M. Partrich Auditorium of the Wayne State University Law School. A reception will follow. Admission to the Symposium and reception are free, and parking will be available. For additional information, please call Kris Herzog at (313) 577-4157.

Rakow Luncheon, Fourth Amendment (continued)

The Luncheon will be held on November 18th at the Crowne Plaza Pontchartrain in Detroit. A reception will begin at 11:30 a.m., with lunch and the program following. Tickets are \$25

for FBA members and \$30 for non-members. To make reservations or for more information, please contact Program Chair Julia Blakeslee at (248) 855-6729 or jfblakeslee@yahoo.com. Reservations must be made by November 7, 2003.

From Court Administrator Dave Weaver

As you know, Chief Judge Lawrence P. Zatkoff provided an overview of activity in the Court in his Annual State of the Court Speech on September 16, 2003. [Ed. Note: see photos on page 9.] The full text of his comments can be obtained on-line at www.fbamich.org.

The Court's implementation of the new Case Management/Electronic Case Files (CM/ECF) system is progressing well. At its September 8, 2003 meeting, the Bench approved new civil and criminal local rules authorizing electronic filing in the Eastern District of Michigan effective October 1, 2003. Judge Robert Cleland is working with a group of judges, court staff and attorneys to develop a policies and procedures manual that will govern the use of the

electronic filing system. The manual should be completed and available in the near future.

I urge you to continue to review as much information as possible about CM/ECF between now and March 3,

2004. The impact of CM/ECF on you as a federal practitioner will be substantial, and it is in your best interest and the interest of the Court to be ready! The Court has information available on its Web site at www.mieduscourts.gov. The Administrative Office of the U.S. Courts has a wide range of information on the system that can be obtained at www.uscourts.gov.

Magistrate Judge Thomas Carlson retired from the Court effective October 3, 2003, having served three full 8-year terms. Detroit

attorney Mona Majzoub has been selected to fill the vacancy created by Magistrate Judge Carlson's retirement. Ms. Majzoub is currently undergoing her FBI background investigation.

A cooperative effort between the Court, the U.S. Attorney's Office and the Federal Defender's Office has resulted in the elimination of the routine initial criminal pretrial conferences conducted by magistrate judges. After reviewing the process, it was determined that the conferences were not generally productive. They also resulted in unnecessary CJA panel attorney fees. Now, the U.S. Attorney's Office will file a new "Discovery Notice" within 10 days of a defendant's arraignment. All agree the new Discovery Notice will provide more useful information to all parties in a more timely manner.

While I routinely end this article by indicating questions or comments can be sent to me via email at mie_fba@mied.uscourts.gov, over the past two years I have not received a single question or comment. To provide a little incentive, the first attorney to submit a legitimate question or comment will receive a coffee mug emblazoned with the Court seal and the official CM/ECF logo.



At FBA Annual Meeting and Convention, (Left to Right) Brian Figot, Dennis Clark and Dennis Barnes show off Eastern DistrictMichigan Chapter Awards (Presidential Achievement award; Outstanding Chapter Program Award; Outstanding Chapter Newsletter Award; and Outstanding Circuit V.P. --Brian Figot)

Judge Duggan Speaks To Law Students At UDM

By: Sue Kozlow, VP - FBA Student Division University of Detroit Mercy School of Law

The Student Division at University of Detroit Mercy School of Law kicked off its first annual Luncheon Series on Wednesday, October 1, 2003, at the Law School. The Luncheon Series, designed to promote an awareness of federal practice, affords law students the opportunity to connect with and meet members of our federal legal community. It opened with U.S. District Judge Patrick Duggan, who offered his perspective on the differences between State and Federal practice.

Judge Duggan graduated from the University of Detroit School of Law, *cum laude*, in 1958, and continues to support his alma mater. In addition to his participation in the Luncheon Series, Judge Duggan has participated in UDM's American Inns of Court for over a decade, serving as its President for the last several years.

Judge Duggan discussed a number of issues relating to the differences in State and Federal practice. His informative talk directed our attention to the importance of finding the appropriate forum to file a lawsuit, as well as the practical considerations lawyers face in deciding whether a state or federal court is best for their client. Such considerations include speed of trial, scheduling of cases, and how fast a motion will be heard. He also stressed the importance of communication as it relates to attorneys working together and resolving issues prior to the start of trial. Not only does Judge Duggan encourage lawyers to communicate, he also meets with lawyers from both sides early on in the case to promote dialogue and to flesh out any issues that might impede the trial process.

Judge Duggan's warm humor and profound knowledge of the legal system provided a wonderful educational opportunity for all who attended the luncheon. Law students and lawyers alike are indeed fortunate to have distinguished professionals such as Judge Duggan who are willing to invest their time and energy to promote the practice of law. I am confident that we could not have an impact on the legal profession without the commitment of members and chap-

ters to our professional goals. Few organizations can boast such synergy, and it is rewarding to know that ours has accomplished that feat.

Federal Filing Reminder

According to Deputy Court Administrator Mary Miers, many attorneys continue to submit filings erroneously under Fed. R. Civ. P. 5(d) and LR 26.2.

In December 2000, Fed. R. Civ. P. 5(d) was amended. The amended rule provides that discovery requests and responses under Rules 30, 31, 33, 34 and 36 and disclosures under Rule 26(a)(1) or (2) must not be filed until they are "used in the proceeding," a phrase that refers to proceedings in court. In addition, the comment to LR 26.2 states: "The Court has extended the prohibition of filing discovery material to include the certificate of service of such discovery material."

The following papers, listed in alphabetical order, will not be filed by the Clerk's Office pursuant to Fed. R. Civ. 5 (d) and LR 26.2, unless they are used in the proceeding or the Court orders filing: certificates/proofs of service of such discovery material, depositions, deposition notices, disclosures under Rule 26(a)(1) or (2), interrogatories, objections, requests for documents or to permit entry upon land, and request for admissions.

The Clerk's Office requires a Notice Regarding Filing of Deposition and/or Other Discovery Material (Local Rule 26.2) when discovery material is submitted for filing. The form is available on the Court's website. Prohibited papers submitted for filing will be returned to the sender with a letter asking for compliance with the federal and local rules. Improper filings tax our resources and the Court's. If you have any questions, please contact Ms. Miers at (313) 234-5015.

Student Division Luncheon Series

The University of Detroit Mercy Student Division Luncheon Series commenced October 1, 2003, with the Honorable Patrick J. Duggan speaking on the differences between State and Federal practice. The luncheon was well attended by students and faculty who found the presentation interesting and entertaining.

The remaining schedule of presentations is as follows:

October 20 Len Niehoff
Constitutional Law and First Amendment

November 24 Christine Dowhan-Bailey
Environmental Law

Nominees for McCree Award

The Wade McCree Award Luncheon will be held in February 2004. The Chapter Social Justice Committee is soliciting names of potential recipients of the Wade H. McCree, Jr. Award for the Advancement of Social Justice. Please submit all names to Karen Gibbs (313) 226-9705 or Miriam Siefer (313) 961-4150, no later than **January 1, 2004**.

(see page 4)

January 26	Mike Leibson <i>Federal Criminal Law, Prosecutor's View</i>
February 26	Dona Tracey <i>Federal Agency Law</i>

Each presentation will take place in the UDM School of Law's Atrium. A deli style lunch will be served promptly at noon. Speakers will begin at about 12:15 and end by 1:00 p.m. The event is free for FBA members and will cost \$3 for non-members. For questions, contact Rob Klautky, Student Division Treasurer, at sarsanet@netzero.net.

Electronic Case Filing

By: Daniel J. LaCombe

The Eastern District of Michigan continues to move forward with its new local rule and a Policies & Procedures Manual for electronic case filing ("ECF"). There are two aspects of ECF. First, the Eastern District will maintain its official files electronically beginning March 1, 2004. Second, attorneys will be able to file electronically in the Eastern District as of that date. A brief summary of the policies and procedures under consideration for electronic filers follows.

Electronic filers must be admitted to practice in the Eastern District of Michigan or be an attorney authorized to represent the United States. They will also need internet access, a PACER account and an ECF login and password for the Eastern District. In order to obtain the ECF login and password, an attorney must first complete an ECF registration form. The Eastern District plans to hold training sessions which will require no more than 2-3 hours and may be available online.

Electronic filing will be voluntary through at least September 1, 2004. Attorneys are encouraged to file electronically, but there is no requirement that attorneys register for an ECF login and password at this time. For those attorneys who choose to register, electronic filing will continue to be optional until September 1, 2004. Thereafter, it will be mandatory for attorneys with an ECF login and password, subject to a grace period for new registrants that has not yet been determined. To obtain the maximum amount

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of time for optional ECF use, electronic filers are encouraged to register and begin use by March 1, 2004.

Even when the electronic filing becomes mandatory for attorneys with ECF login and password, certain papers will remain an exception. Those exceptions will include "initiating" papers (i.e., civil complaints, criminal complaints, removal petitions, and other documents filed with the Court that create a new case number in the Court's docket). Other exceptions to electronic filing are:

- 1) Sealed documents;
- 2) *In camera* filings;
- 3) State court records;
- 4) Administrative records and transcripts in Social Security cases;
- 5) Papers over 200 pages;
- 6) Grand jury matters; and
- 7) Warrants issued.

The exceptions may require filing by hard copy accompanied by a CD or diskette electronic version. Also, service of process for these exceptions is still required by the Federal Rules of Civil Procedure to be made in the traditional manner.

If the recipient has an ECF login and password, the notice of electronic filing (NEF) generated by the system will constitute service. The NEF will have a hyperlink that will allow the recipient to open the document, download it, and print it. Unfortunately, the Federal Rules of Civil Procedure continue to require that a certificate of service be filed even if the document is filed electronically and an NEF is generated to the recipient. However, the certificate of service can be incorporated as part of an electronically filed document.

The user login and password will serve as the electronic filer's signature for the purposes of Fed. R. Civ. P. 11. Papers filed electronically must contain a signature block containing the name, address, telephone number, email address and bar ID number. An "s/" typed at the signature line will be used in place of a signature.

Proposed orders must be transmitted via email in Word Perfect and not in PDF format, allowing modification by the Court. Alternatively, a motion or stipulation may request that routine relief be granted by a text-only docket entry.

Filing electronically will not alter the date of the filing deadline and filings need only be completed by midnight in order to be timely.

Exhibits will generally be scanned in a PDF format for filing and may only be filed as one exhibit up to two megabytes. Larger exhibits must be broken into segments (e.g., Exhibit 1a, 1b, 1c, etc.) in order to reduce the burden on the Court's system. Color exhibits must be scanned to black and white at 200 dpi for filing. Exceptions may be granted by order.

With certain exceptions (i.e., social security cases and criminal cases), all users may retrieve the electronic case files at the Court's internal site by use of a PACER login

and password. The E-Government Act and local policies and procedures will therefore require that certain personal identifiers, including social security numbers, financial account numbers, dates and birth names of minor children, driver's license numbers and state-issued personal identification card numbers, must be redacted. The purpose of these redactions is to prevent identity theft in light of anticipated world-wide access to filed documents. It is strongly advised that other personal information, including home addresses, employment histories, individual financial information and proprietary information be redacted whenever practical.

Technical failures as a result of problems with the Court's ECF system will allow users to file the next day that the system is available. Technical failures or malfunctions of the users' equipment will not, in themselves, extend filing deadlines: The user must seek appropriate relief from the Court.

The Court will continue with orientation sessions on October 14, 2003 in Ann Arbor and October 20, 2003 in Bay City. The Court expects to have a training environment available and training sessions scheduled early next year.

All attorneys are encouraged to begin use of the ECF system as soon as possible. It is expected to substantially reduce paper and postage for users, as well as provide greater ease of filing and virtually instantaneous notice to recipients.

Magistrate Judge Thomas A. Carlson Retires After 24 Years

On October 3, 2003, United States Magistrate Judge Thomas Carlson retired after twenty-four years of dedicated service to the United States District Court for the Eastern District of Michigan.

Magistrate Judge Carlson is a native of Muskegon, Michigan, where he graduated from Muskegon Catholic Central High School. He then attended college at the University of Notre Dame, where he earned a B.A. in political science in 1964. He earned his law degree from the University of Michigan in 1967.

After law school, Magistrate Judge Carlson served for two years in the JAG Corps of the United States Army in Fort Knox, Kentucky. He then took a position with the Attorney General's Office, where he had worked as a summer intern. Magistrate Judge Carlson worked as an Assistant Attorney General in both the Criminal and Appellate Divisions from 1969 to 1974. One of his more memorable events at the Attorney General's Office was assisting in the perjury trial of Peter Lazarus who was defended by F. Lee Bailey. While in the Appellate Division, he argued several cases before the Court of Appeals for the Sixth Circuit. He also taught criminal procedure at the Michigan State Police Academy.

Looking for a change, in 1974, Magistrate Judge Carlson served as a Commissioner of the Michigan Supreme Court. His duties primarily consisted of reading applications for leave to appeal and preparing a report and recommendation for the Justices on the application. He believes that this experience prepared him the most for becoming a Magistrate Judge as it involved distilling complex matters and making recommendations.

After leaving the Michigan Supreme Court, Magistrate Carlson spent two years in private practice in Okemos, Michigan. His practice consisted of representing public employees, labor, police, and teacher unions in contract disputes, arbitration, and discharges.

In 1979, he responded to an advertisement in the State Bar Journal for a Magistrate Judge position. He recalls the appointment process as being very non-political. There was no selection committee, rather he was chosen by the district judges then in service. At the time of his appointment, he was one of three magistrate judges. He was sworn into service on October 4, 1979 by then U.S. District Judge Cornelia G. Kennedy.

Over his years of service, Magistrate Judge Carlson estimates that he prepared over 3,000 reports and recommendations, heard 10,000 discovery disputes, and presided over hundreds of detention hearings and numerous naturalization ceremonies.

He also presided over many marriage ceremonies, and is pleased to know that all of the couples are still together. This past July, he performed the marriage ceremony for his daughter, Angela Licia, in Seattle, Washington. Licia has a PhD in philosophy and a B.A. in music and teaches at Seattle University.

Looking back on the past twenty-four years, Magistrate Judge Carlson says it has been an "interesting and enjoyable ride but it is time to do something else." He says he will miss the people he has come to know, his colleagues, and members of the bar. However, he looks forward to spending more time with his wife of thirty-five years, Teresa, as well as traveling and taking care of his parents.

The FBA wishes him a long and fulfilling retirement.

Patricia Wolshon
Partner



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From The Chambers of Magistrate Judge Carlson

**By: Michael R. Dezsi
Former Law Clerk to
Magistrate Judge
Carlson**

How better to express my sincere appreciation to the man who taught me so many things than to write a short article about my experience clerking for Magistrate Judge Thomas Carlson. My extremely favorable impression of Judge Carlson began when I interviewed and we ended up discussing classical music. Magistrate Judge Carlson seemed thrilled to learn that I had performed as a violinist in a symphony for several years before attending law school. This was not surprising when I noticed that hanging in his office was a picture of his daughter, Licia, playing the violin.

I will certainly miss working in his chambers where it was standard to hear classical music playing on the radio and rare that he did not know both the name of the piece and composer of the music. He routinely hummed arias and symphonic repertoire while working. On a rare occasion when he was unsure of a piece of music, his sheer delight at my having correctly guessed was characteristic of his all-embracing and caring personality.

If I had to pick one word to describe Magistrate Judge Carlson, it would be compassionate. Not only has he faithfully served the judiciary for a period of twenty-four years, but he has also served as a loving father, husband, and son. Magistrate Judge Carlson's family serves as the center of his life. When asked about his plans for the weekend, he often gave the same response, "I'm driving up to Muskegon," his home town, to care for his parents. Although he may not have known it, I drew a lot of my strength from his exemplary actions in taking care of his family.

Magistrate Judge Carlson's life experiences helped to give him a unique approach from the bench. He viewed every case not just as an argument, but a real life problem between real life people. A perfect example of his lasting impression can be best illustrated by a recent story. About two weeks ago, a man and his young son stopped by chambers to say hello because he knew that Magistrate Judge Carlson was retiring and he wanted his son to meet him. He said that he was a former federal prisoner and jailhouse lawyer and that he once appeared before Magistrate Judge Carlson and received a favorable ruling on a motion. He never forgot how kind and understanding Magistrate Judge Carlson had been to him and really wanted his son to meet "the kind of Judge the framers of the Constitution had envisioned."



Magistrate Judge Carlson

I am proud to have been given the opportunity to learn from and observe a person who has served our community by unfaltering dedication, compassion, and integrity. For these and many other reasons, I speak on behalf of many in saying thank you to Magistrate Judge Carlson for serving us so well throughout the years. We wish you the best in your retirement.

Judge Rhodes Delivers State Of The Bankruptcy Court Address

The Bankruptcy Section presented Chief Bankruptcy Judge Steven W. Rhodes on Thursday, October 23, 2003, at the Crowne Plaza Ponchartrain Hotel in Detroit.

Chief Judge Rhodes delivered the 2003 State of the Bankruptcy Court address, the first of a series of Bankruptcy Section lunches. As always, the luncheon was well attended with an interesting program. The full text of Judge Rhodes' address will be made available on-line at www.fbamich.org.

The Founders

By: Brian D. Figot

Recently, I was asked: Who were the Charter Members of the Detroit (now Eastern District of Michigan) Chapter? [Ed. Note: *The inquiry came from one of the founders who wanted to contact all living founders.*]

The question is a difficult one, as we do not have the original charter. It was presented to Fred Kaess on December 3, 1957, when he was U.S. Attorney for the district. I have not located it yet. Therefore, we have chosen to use the term "founders," which would include all members at the time the Charter was presented. Utilizing the Federal Bar News, "New Members" column, I have been able to assemble a rough list of those members in response to the inquiry.

The Detroit Chapter was "formalized" on August 15, 1957. At that time, the temporary officers were Fred Kaess, President, and Wilfred Laurie, Secretary. Contemporaneous accounts indicate that the petition for a charter was submitted by those officers and Dick Tarnas.

However, even before formalization, the Federal Bar Association had "Michigan" members – as the Federal Bar News lists "New Members" under the headings of the various chapters, and under the home state of members in geographical locations without a formal chapter.

Going back to October 1953, the earliest reference I have found to "New Members" in the Federal Bar News is in September 1954, when Charles F. Lattimer was listed. The next reference is in the following month, as Edward F. Janis is listed; and then, in July of 1955 we find W. Carl Bauer. These three gentlemen are not listed in the current State Bar Directory.

Next, in August of 1955, Robert R. Mallory is listed. Mr. Mallory is listed in the current bar directory and has a post office box in Dearborn Heights. Then, in December of 1955, Samuel R. Cratis is listed. He is not in the bar directory. In 1956, the following new members came aboard: George A. Cooney (July, 1956), William L. Harding (August, 1956), William E. Bertholf, Jr. (September, 1956), Louis R. Harrington (September, 1956), Edward L. Cobb (November, 1956) and Louis A. Keary (December, 1956). The bar directory does not contain any of these individuals.

The first real growth, sufficient to seek a charter, occurred in 1957. In January, Arnold M. Gold was listed as a new member. The March issue lists Frederick W. Seitz; and the April issue lists Sarah G. Wilcox – possibly the first female chapter member.

In June, the listed new members were John M. Heaphy, Jr., Wendell A. Miles, and Walter J. Murray. The sponsoring member for Mr. Murray was Thomas P. Thornton – who must have been listed prior to October of 1953. In July 1957, Wilfred F. Laurie and Richard T. Tarnas are listed. Of these individuals, Judge Miles is still active with the Western District of Michigan Chapter; Mr. Heaphy lives in Arizona, and Dick Tarnas is still very active with our Chapter. An article featuring Mr. Tarnas was in a recent Chapter Newsletter.

The September, 1957 issue lists 39 new members, as follows (* designates a person who is in the bar directory)

J. Connor Austin
*Robert M. Barrie
Rex W. Beardsley
William G. Comb
John S. Crandell
Robert E. DeMascio
*Jack F. Gardner
Peter P. Gilbert
David A. Goldman
Lewis E. Goldstein
Ronald L. Greenberg
Otto E. Haass
Dwight K. Hamborsky
Paul Vincent Huston
Phyllis K. Johnson
*John R. Jones
Orrin C. Jones
Frederick W. Kaess
*John L. King
*Rodney C. Kropf
Joseph Maisano
William G. Manders
Joseph A. Moynihan, Jr.

Roger P. O'Connor
John L. Owen
George F. Petzer
*Elmer L. Pfeifle, Jr.
David Polasky
John C. Ray
R. Cass Ready
*Robert L. Richardson, Jr.
*Horace J. Rodgers
Joseph Paul Sitek
Winfield S. Smith
James Stephen Soltesz
Alexander A. Trout
Fred R. Walker
Willis F. Ward
*Donald F. Welday, Jr.
*George Edward Woods, Jr.

As of September 3, 1957, the "chapter" had 59 members. I put the word chapter in quotes because the "Charter" was not presented until the First Annual Dinner, which was held on December 3, 1957. At that time, the first officers were elected:

Fred W. Kaess, president
Wilfred R. Laurie, First VP
William G. Comb, Second VP
Willis Ward, Third VP
*Richard T. Tarnas, Secretary
Abraham J. Friedman, Recording Secretary
Peter P. Gilbert, Treasurer
*John L. King, Assistant Treasurer
Louis M. Hopping, Parliamentarian

In October, 1957, after the formalizing, but before the charter, we find another 16 new members, including Russell Paquette, another active past president. The October new members were:

Clark W. Denton
Robert E. Farmer
Edward M. Feeney
Oswald C. Grattan
Franklin Knock
L.D. MacLean
*Ralph H. McIntyre
John W. Neville
*Russell M. Paquette
*Edward J. Proppe
Milton Roberts
Allan F. Rowley
Roger B. Roy
Anthony J. Slowick
Edward J. Stoll
Wallce Visscher

Past presidents Lawrence Verdier, Wallace D. Riley, David Patton, Charles Rutherford and Ed Rakow also are considered Chapter founders, though their membership ap-

(see page 8)

The Founders (continued)

plications were submitted during the first year after the charter was presented.

[Ed. Note: Since all history is a work in progress, we urge any reader having information relating to any of the founders' FBA activities to write to Brian Figot at the Chapter address or email him at bdf@slandau.com]

Over 100 Attend Appellate Practice Seminar

On June 6, 2003, over 100 attorneys and law students attended "Sixth Circuit Appeals for Michigan Lawyers — From Basics to Best Practices." The free seminar on handling Sixth Circuit appeals was held in the Wayne State University Law School auditorium.

It was presented by our Chapter's Appellate Practice Committee, the State Bar of Michigan Appellate Practice Section, and the Wolverine Bar Association.

The speakers included representatives of the Sixth Circuit bench and clerk's office, as well as prominent Michigan practitioners. Circuit Judge James L. Ryan and District Judge Arthur J. Tarnow provided a lively discussion on effective appellate advocacy. Sixth Circuit Chief Deputy Clerk Janice Yates, Briefs Deputy Roy Ford, and Case Manager Sue Burlage gave attendees a view from within the Court, along with practical tips on complying with the Court's technical briefing requirements. Kathleen Lewis and Rosalind Rockkind discussed civil appeals, while Assistant U.S. Attorney Kathleen Moro Nesi and criminal defense attorney Elizabeth Jacobs addressed issues unique to criminal appeals. The discussion was moderated by J. Mark Cooney, Assistant Professor, Thomas M. Cooley Law School, and Mary Massaron Ross of Plunkett & Cooney. Special thanks go to J. Mark Cooney for chairing this outstanding seminar.

News From National: Isabel Storms Out At Annual Convention

**By: Brian D. Figot,
FBA Sixth Circuit Vice-President**

In recent years, the Federal Bar Association has had an affinity for providing its members with unique experiences in connection with its annual conventions and mid-year meetings, as unexpected events overcome meticulous advance planning.

During this decade alone, we have had our mid-year meetings in Washington, D.C. punctuated by the unprecedented security of our nation's capital during wartime, as the war in Iraq commenced on the second day of the meeting; and we have been in the Capital during the security "lockdown" of the city which was part of the celebration of the golden anniversary of NATO. Two years ago, the annual convention was scheduled to begin on September 12 and had to be cancelled in the wake of the tragic events of 9-11.

This year, the annual convention near Washington, in Arlington, Virginia, was disrupted by natural causes, as we stood in the path of Hurricane Isabel. On Wednesday afternoon, after less than half of the delegates had arrived, the airports closed. Fortunately (?), this occurred only after the flight that brought Dennis Clark and me to the soon to be drenched convention.

Thereafter, few were as resourceful as our Eastern District President-Elect, Denny Barnes, who found an alternative flight to Philadelphia, rented a car, and bravely drove from Philadelphia to Arlington through the torrential rain so that he could get to the convention in time for the Supreme Court's "by invitation only" reception for the FBA (which was cancelled, due to the weather, as Denny neared Baltimore). Instead, the delegates attended an *ad hoc* hurricane/karaoke party, at which the opportunity to network and enjoy the company of other FBA members' was far more memorable than the free expression of our members hidden talents which, for the most part, remain obscured.

The Friday wreath-laying at Arlington National Cemetery likewise was cancelled, and the Friday night dinner at Mount Vernon was consumed – as if George and Martha Washington were there – by candlelight because there was no electricity.

Saturday afternoon, however, the National Council Meeting (which was, after all, a central purpose for the unconventional convention), was conducted as planned. I can safely submit that nothing of any particular local interest was discussed, debated or decided at the meeting.

The other *raison d'être* for the meeting, the annual dinner and installation of officers was made memorable by the first annual presentation of the FBA's "Sarah T. Hughes Civil Rights Award" to Judge Robert L. Carter of the Southern District of New York. Judge Carter, a living legend of American legal history, is the attorney who argued *Brown v. Board of Education* before the United States Supreme



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Court. The February 2003 issue of *The Federal Lawyer* contains an excellent article about Judge Hughes, written by FBA Immediate Past President Kent Hofmeister. If you'd like a copy of the article, or more information about Judge Carter or the award itself, please let me know.

On a more substantive note, delegates were informed that the year long study of the Governance Review Committee is nearing completion. The Committee's report will be presented prior to the next midyear meeting, and is expected to address the fundamental basis of the FBA's dues structure.

Currently, there are three dues categories: younger member, regular member, and senior member. The debate at the midyear meeting will be whether to maintain the current dues structure, or move to a structure in which regular dues are increased, and federal employee dues are decreased.

Photographs from the State of the Court Luncheon on September 16, 2003



Chapter President-Elect Dennis M. Barnes, District Judge Gerald E. Rosen, Chief Judge Lawrence P. Zatkoff and Chapter President Dennis J. Clark.



Chief Judge Lawrence P. Zatkoff and Chapter President Dennis J. Clark.

On the one hand, critics of the current structure point to the sacrifices made by federal lawyers vis a vis attorneys in the private sector, the payment of dues by many private firms, and the need to address declining numbers in public sector membership. On the other hand, the opponents of change argue that apathy may be unrelated to pay scales, which in any event are not so divergent. For example, according to the November 2000 issue of the *Michigan Bar Journal*, the wage differences, at the 50th percentile, in 1999, were:

Sole Practitioner	\$45,000
Sole Practitioner, with 1 or more associates	\$98,333
Sole Practitioner sharing space	\$59,000
Partner in firm (with 2-7 partners)	\$100,000
Partner in firm (with 8+ partners)	\$147,000



Chapter Board Member Dona Tracey, Program Chair Julia Blakeslee, Vice President Julia Caroff-Pidgeon and President Dennis J. Clark.

Associate in firm (with 2-7 partners)	\$50,000
Associate in firm (with 8+ partners)	\$69,333
Federal Service	\$95,000
All Attorneys	\$71,167

Obviously, the issue is one which is expected to engender vigorous debate. I request and encourage your viewpoints.

(see page 10)

Proposed Amendments To F.R.C.P. 23: Do The Benefits Of Class Action Certification Justify The Costs?

By: Ian B. Bourgoine*

Class actions have been likened to “Frankenstein’s Monster” and a super-hero capable of rectifying the evils of American commerce, by the finest legal minds in America.¹ This difference of opinion is largely due to the author’s personal views of the social benefits of class action lawsuits, and possibly the author’s politics.

In April of this year, the United States Judicial Conference proposed an amendment to the “superiority” requirement for class action certification under F.R.C.P. 23(b)(3). The Judicial Conferences’ amendment requires federal courts to set forth their own opinions on the social benefits of particular class actions lawsuits in determining whether certification is appropriate under F.R.C.P. 23(b)(3). Specifically, the amendment calls upon the federal courts to determine whether the benefits to the plaintiffs of class action certification “justify” the burdens and costs placed upon the defendant.²

Currently, F.R.C.P. 23(b)(3) sets forth several non-exhaustive factors to be weighed by the courts in determining whether the class action mechanism is a “superior” method by which to bring an action. These factors include: (A) the interest of the members of the class individually controlling the prosecution or defense of separate actions; (B) the extent of and nature of litigation already commenced; (C) the desirability of litigating a class action in the particular forum; (D) the difficulties likely to be encountered in the management of the class action.³

Within this framework, several courts initially looked beyond these factors and discussed the superiority requirement in terms of whether there was a genuine social “need” for the class action lawsuit.⁴ These opinions were not guided by F.R.C.P. 23, but by the courts’ own political and social temperament.⁵ Subsequently, however, the federal courts distanced themselves from this approach and determined the propriety of class action certification by applying the express requirements set forth in F.R.C.P. 23 to the specific facts of the case before them.⁶

The Judicial Conference’s proposed amendment to the “superiority” requirement invites the federal courts to return to determining class action certification, in part, based on the courts’ own political temperature. To ask whether the benefits conferred upon the plaintiffs of the class action lawsuit “justify” the costs and burdens placed on the defendant is to ask the court to determine whether it believes the plaintiffs’ case is worthwhile. This is dangerous territory since many consumer protection and civil rights class actions involve minimum monetary recovery, but seek social change.

The Judicial Conference’s proposed amendments run the significant risk of turning the superiority prong of class certification into an evaluation of the “need” for class actions seeking social change in a particular area of American society. Such an open-ended and unpredictable approach to class action certification is likely to be viewed negatively by plaintiffs and defendants alike because the courts’ political viewpoints cut both ways.

The amendment to the superiority requirement is unfortunate because the federal courts’ grant or denial of class certification under F.R.C.P. 23(b)(3) is most persuasive when it employs a strict application of the current factors set forth in F.R.C.P. 23. Indeed, if the class is numerous, if there are common questions of law and fact, if the claims of the representatives are typical, if the representative parties will fairly protect the interests of the class, and if the class action is manageable for the court, class action status is “superior” to bringing multiple individual claims.⁷ This narrowly tailored approach has fostered predictability in class action certification, and further bolstered the principle that class action certification is granted or denied in the federal courts based on a predetermined set of requirements, and not on the courts’ personal opinion on the need or lack of need for the underlying lawsuit.

The U.S. Judicial Conferences’ amendment to the superiority requirement set forth in F.R.C.P. 23(b)(3), consequently, will not serve to protect the superhero, and slay the Frankenstein monster. The current requirements, if employed properly, are capable of that task. Instead, the amendment will likely create further cynicism on the part of the parties

Calendar of Events

November 18 Rakow Scholarship Awards Luncheon
Crowne Plaza Pontchartrain
11:30 AM
Contact: Julia Blakeslee (248) 855-6729.

November 18 Symposium
Spencer M. Partrich
Auditorium
Wayne State University
Law School
4:00-5:00 PM
Contact: Kris Herzog (313) 577-4157.

December 9-10 New Lawyer’s Seminar
Crowne Plaza Pontchartrain
8:15 AM
Contact: John Mayer (313) 393-7475

and the public that the courts' determination of class action certification is based on the courts' personal views, and not on preset rules and the principles those rules embody.

**Ian B. Bourgoine* is an attorney with Charfoos & Christensen, P.C. in Detroit.

1 William Simon, *Class Actions – Useful Too or Engine of Destruction*, 55. F.R.D.

375 (1973); Jack Weinstein, Geoffrey Hazard and Arthur Miller, *Some Reflections of the "Aubisiveness" of Class Actions*, 58 F.R.D. 299 (1973).

2 The amendment is to be F.R.C.P. 23(b)(3)(F).

3 F.R.C.P. 23(b)(3).

4 See, e.g., *Wilcox v. Commerce Bank of Kansas City*, 474 F.2d 336, 346 (10th Cir. 1973).

5 *Id.*

6 *In Re: Inter-Op Hip Prosthesis Liability Litigation*, 204 F.R.D. 330 (N.D. Ohio, 2001); *Gilkey v. Central Clearing Co.*, 202 F.R.D. 515 (E.D. Mich. 2001); *Talbott v. GC Services Limited Partnership*, 191 F.R.D. 99 (W.D. Virg. 2000).

7 F.R.C.P. 23(a). The factors set forth in (b)(3) should also be considered.

New Lawyer's Seminar December 9th and 10th

Have you ever hired a new lawyer who can write a great brief, but who fails to obtain the relief requested because he or she did not seek concurrence as required by the local rules? Or hired a bright new lawyer who didn't know how to present an argument in court in a persuasive fashion, or how to approach the prosecutor regarding a plea agreement? The FBA's New Lawyer's Seminar, a nationally acclaimed (and widely copied) seminar is a wonderful way to address these issues. This year's seminar, the 29th, will be held on Tuesday and Wednesday, December 9 and 10, 2003, at the Ponchartrain Hotel.

The seminar takes a practical, "how-to-do-it approach" on things not taught in law school. Topics are presented by judges, court personnel and leading practitioners, and are designed to assist recent law graduates in understanding the fundamental procedures followed in federal and state courts. The seminar begins at 8:15 a.m. on December 9 with presentations on various federal court practice areas,

and continues on December 10 with presentations on a variety of state court topics, including a presentation on how to screen clients. Co-chairs for the seminar are attorneys Christine Dohman-Bailey, Brian Figot, Grant Gilezan, Geneva Halliday and Catherine Wenger.

The seminar is a bargain, costing only \$65 for members of the Federal Bar Association and \$95 for non-members. Admission includes a luncheon on December 9th, in addition to course materials on CD-ROM containing form pleadings and memoranda expanding on the topics covered by the speakers. A special price of \$120 includes the seminar plus membership in the Federal Bar Association.

Reservation checks should be made payable to the FBA Eastern District of Michigan Chapter, and mailed to New Lawyers Seminar, c/o FBA Executive Director, P.O. Box 310610, Detroit, Mi. 48231-0610. If you have any questions, call John Mayer at (313) 393-7475.



Chapter President Dennis J. Clark, President Elect Dennis M. Barnes and Past President and Sixth Circuit Vice President Brian D. Figot accept the 2003 National FBA Outstanding Newsletter Award

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