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FEDERAL BAR ASSOCIATION
Eastern District of Michigan Chapter

FBAnewsletter

Summer 2020

Federal Bar Association - Eastern District of Michigan Chapter - **62** years of service to our Federal Bench and Bar

Valerie Newman Wins Gilman Award

This year's Gilman Award recipient, Valerie Newman, accepted the honor in a socially distanced manner. Originally scheduled for April 22, the Gilman Luncheon was one of the many events cancelled this season due to the coronavirus.

The Chapter still recognized Newman for her outstanding achievement and plans to formally present the award at the virtual State of the Court Luncheon on October 14, 2020.

Newman is director of the Conviction Integrity Unit of the Wayne County Prosecutor's Office. She has served in this role since the CIU's formation in 2017. Newman herself played an integral part in establishing Wayne County's CIU—the thirtieth of its kind in the United States—and leads a team of lawyers and investigators to examine claims of innocence based on new evidence in cases prosecuted by the Wayne County Prosecutor's Office.

Before joining the Prosecutor's Office to lead the CIU, Newman worked at the Michigan State Appellate Defender Office for more than 20 years. Among many other roles, she led the Juvenile Lifer Unit in that office.

Throughout her career, Newman has advocated for a fair and just criminal justice system and worked with stakeholders to enact systemic change. She has been a featured speaker at numerous conferences and has taught as an adjunct professor of law at the University of Michigan Law School.

She has been appointed to serve on numerous state government and bar association committees. She has received numerous awards and recognition, including the

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President's Column

Immediate Past President Matthew J. Lund

Our Chapter's 62nd year is one to remember. It was certainly unique, but when I look back on the year, I don't think of the issues that made it different. Instead, I think of all that we accomplished.

We started the year with the challenging and ambitious initiative of expanding the Chapter to include our colleagues in the Northern Division. While the Northern Division is an active and important part of the Eastern District, its practitioners and judges never before had the benefit of an active Chapter presence.

We changed that. With the assistance of some very enthusiastic lawyers and judges, the Northern Division is now fully integrated into the Chapter.

Northern Division members expanded the geographic reach of the Chapter, participated fully in all of the Chapter's Board and Committee meetings, and held successful events with significant turnout.

On behalf of the Chapter, I extend special thanks to Tom McDonald, Rozanne Giunta, Melanie Beyers, Magistrate Judge Patricia Morris, and Chief Bankruptcy Judge Daniel S. Opperman. Their efforts made our initiative work, and their continued involvement in the Chapter will make it thrive.

Our 62nd year was also a year for setting records. Our September Board and Committee Chair meeting had the largest attendance of any in our history, with 55 lawyers and judges participating.

Our McCree Luncheon in February brought out more than 310 people, making it the largest luncheon in the Chapter's history.

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WINNER
17 YEARS
National FBA
Outstanding
Newsletter
Award

President's Column (continued)

And the webinar programs held by the Bankruptcy Committee in March and June were each attended by more than 400 members and guests – another Chapter record.

And best of all, the programming and social events that have been a part of the Chapter's identity for years continued to thrive. Our newsletter again received national recognition. Our Book Club provided stimulating discussion. Our New Lawyers Seminar made a lasting impact upon its 44th class of attendees. Our former law clerks met for their sixth Judicial Family Reunion. And our bench-bar golf outing paired the District's judges and lawyers together for another afternoon of fun and relaxation.

When the quarantine kept us all at home, the Chapter carried on. Almost immediately after the shutdown, we convened a video conference forum for the Chief Judges of the District and Bankruptcy Courts to discuss ongoing operations and answer questions for Chapter members.

And while some programs were cancelled by necessity, many were added by video conference, including two well-attended (and much welcomed) virtual happy hours.

As my final note, I would like to extend a sincere thank you to our 2019-2020 leadership group. When we began our journey at the Annual Dinner last June, I introduced the group as the "Magnificent Seven." They were that, and more. I was most fortunate to work with Fred Herrmann, Dan Sharkey, Jennifer Newby, George Donnini, and Saura Sahu as our group of officers, and with Mindy Herrmann as our Executive Director. The group was efficient, wise, and productive. But most of all, we had fun together.

As we enter the 2020-2021 Chapter year, our organization is in the most capable of hands. It has been a pleasure serving as the Chapter's 60th President. Thank you, sincerely, for this great opportunity.

Gilman *(from page 1)*

Champion of Justice Award from the State Bar of Michigan, and she was the first recipient of the Norris J. Thomas Jr. Award for excellence in appellate advocacy from SADO.

Newman is also a strong advocate for women's rights and professional development.

She is a graduate of Wayne State University Law School and the University of Michigan.

The Gilman Award is presented annually to an outstanding practitioner of criminal law who embodies excellence, professionalism, and commitment to public service. The award is named for former U.S. Attorney Len Gilman, who exemplified each of these traits and was known for his ability to balance aggressive advocacy with compassion. Valerie Newman joins the ranks of former award recipients Hon. Paul Borman, Hon. Maura Corrigan, Hon. Timothy Kenney, Hon. Michael Hluchaniuk, and many others.

Please join us in congratulating Ms. Newman – virtually, for now.

Chapter Honors Reginald Turner with Civility Award

The 41st Annual Dinner Honoring the Judicial Officers of the Eastern District was scheduled to take place on June 17, though as with almost all events the dinner did not proceed as scheduled due to COVID-19. Additionally, the Chapter business that is typically conducted at the annual meeting—including voting on new officers and board members—occurred during a video conference on June 30.

These adjustments, however, did not prevent the Chapter from selecting a 2020 recipient of the Cook-Friedman Civility Award, so named in recognition of the dedication to civility of former Chief Judges Julian Abele Cook, Jr. and Bernard A. Friedman.

Although unable to honor him in person yet, the Chapter recognized Reginald Turner as the recipient of the Cook-Friedman Civility Award and plans to present the award to him at the virtual State of the Court Luncheon on October 14, 2020.

Turner is a partner at Clark Hill PLC in Detroit with too many accomplishments and accolades to recite. He has successfully litigated commercial, employment, labor, class action, and public policy matters in state and federal courts and administrative tribunals.

Turner has a long and distinguished career as a lawyer in both private practice and government. He served as a White House Fellow under President Bill Clinton and worked for the U.S. Department of Housing and Urban Development. He has also served in many roles at the state and local level, including, for example, on the Michigan State Board of Education, chairman of the City of Detroit Board of Ethics, and as Secretary of the Wayne County Airport Authority.

He is also active in both civic and charitable organizations. To name just some of his appointments, Turner has served on

the Board of Trustees of the Community Foundation for Southeast Michigan, as chairman of the Detroit Public Safety Foundation, and also sits on the boards of both Comerica Inc. and Masco Corp. He is a trustee of the Hudson-Webber Foundation, a past chair of the United Way for Southeastern Michigan, and a past vice chairman of the Detroit Institute of Arts.

Turner is also the President-Elect nominee of the American Bar Association, a past president of the National Bar Association, and a past president of the State Bar of Michigan.

In addition, and importantly for purposes of the Cook-Friedman Award, Turner is a model of professionalism and civility in all of his professional, civic, and philanthropic endeavors.

The Chapter congratulates Reginald Turner on his accomplishments, and on his receipt of this year's Civility Award.

Unable to hold the Annual Dinner, Chapter members conducted the official business of the annual meeting by Zoom on June 30, which included voting on new officers and board members.

Photo by Mindy Herrmann.

The Court will also be scheduling one or more live video presentations in conjunction with the Chapter. The sessions will provide important information regarding the Court's return to work plans for members of the Bar and allow for a question and answer period.

As I have said to many throughout this crisis, the Court is doing everything it can moving forward to ensure the safety of its staff, judges, members of the Bar, and the public. Please continue to review the Court's website for information as we forge on.

I reiterate to the Bar, the public, our judicial officers, and staff, your patience, cooperation and willingness to adapt to such extreme circumstances has been truly incredible. Thank you all.

If you have any suggestions or comments please contact me at: david_weaver@mied.uscourts.gov.

Dave Weaver, Court Administrator/ Clerk of Court

The Court is working diligently to restart operations at all Court facilities as soon as practicable. A group of district and magistrate judges and Court staff have been meeting regularly to determine the best procedures for returning to work. Though Michigan has begun to reopen, it and most states across the country are dealing with a strong resurgence of COVID-19 that will inevitably delay many of our plans.

A new Administrative Order was recently entered that describes how we will begin to return to work and when criminal and civil proceedings, including jury trials, may resume. While there is no hard date to restart any in-court proceedings, the administrative order outlines under what conditions their return will be permitted.

One important activity, grand jury proceedings, have resumed on a limited basis. Through a great deal of preparation and coordination, grand jury sessions are taking place with all necessary safety precautions. This is a big step forward and is providing us with important and practical information that will help us resume other Court proceedings.

Daniel S. Opperman Elevated to Chief Bankruptcy Judge

By Melanie R. Beyers*

Many of you already know or have practiced in front of Judge Daniel S. Opperman during his almost 14 years serving on the bankruptcy bench in the Eastern District. Even so, with his selection as the District's new Chief Judge of the Bankruptcy Court, it is my hope to give you some additional insight into Judge Opperman's professional and personal accomplishments during his career.

Judge Opperman was sworn in on July 13, 2006, as a Bankruptcy Judge. Before taking the bench, Judge Opperman was a partner at Braun Kendrick Finkbeiner, concentrating on litigation, bankruptcy, and real estate law.

During his time as a bankruptcy judge, Judge Opperman has had one of the largest caseloads of any bankruptcy court in the country, covering a large geographic territory. From 2006 to 2019, Judge Opperman split his workload and week between the Bay City and Flint divisional offices. Judge Opperman now is stationed exclusively in Bay City, after the appointment of Judge Joel Applebaum to the Flint court location.

In addition to hearing cases in the Eastern District, Judge Opperman has served as a Bankruptcy Appellate Panel ("BAP") Judge for the Sixth Circuit. He served on

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Chief Judge *(from page 3)*

the BAP from 2014 to 2019, serving for two three-year terms, his last two years as the Chief Judge.

Along with traveling the four states of the Sixth Circuit for BAP matters, Judge Opperman served for several years in the Western District of Michigan, assisting the Bankruptcy Court there with various matters.

In April of this year, just a few months after his second term on the BAP concluded, Judge Opperman was appointed Chief Judge by the Judicial Council of the Sixth Circuit. This is just another example of Judge Opperman's willingness to seek out and take on another task.

Over the years, Judge Opperman has regularly served on numerous panels as a speaker for the American Bankruptcy Institute, the Federal Bar Association, and the Institute of Continuing Legal Education, in addition to many brown bag lunch sessions and other events for local bar associations.

Most recently, Judge Opperman became the Chapter's liaison between the Northern Division in Bay City and the Southern Division in Detroit and Flint. The Bay City Bankruptcy Courthouse has served as the location for Chapter members in the Northern Division to gather and participate in bi-monthly Chapter meetings via video conference. Before this, the Northern Division members either had to drive to Detroit to participate in live meetings, or forgo participation.

Despite all of his professional duties and activities, Judge Opperman also makes time to serve as a director of the Midland Center for the Arts and a trustee of the Eastern Michigan University Foundation.

Judge Opperman is patient, well-prepared, and thoughtful on the bench. Many times, nervous pro se parties or even attorneys appearing before Judge Opperman search for words and stumble in their presentations to the Court. Judge Opperman's approach in these circumstances is always to encourage them to take the time they need to gather their thoughts and articulate their positions, reminding them that "this is not a timed event."

He is a firm believer in every party being allowed a full opportunity to present their respective argument and evidence. Judge Opperman also takes the time to offer the Court's guidance and direction with prehearing status conferences to allow the parties to continue communicating, and work toward an effective and efficient evidentiary hearing or trial, or perhaps resolution. Sometimes one conference is needed; sometimes several. Whatever it takes, Judge Opperman makes himself available.

Judge Opperman jokingly refers to me as his "long suffering" law clerk, but my time working with Judge Opperman has been anything but long or suffering. In fact, the years have flown by quickly and have been quite enjoyable. I hear the same sentiments from all who work with him at the Bankruptcy Court, the attorneys, and parties appearing before him, and other judges.

** Beyers has served as Judge Opperman's law clerk for the past 14 years. She is a graduate of Michigan State University College of Law.*

Effects of COVID-19 on the Practice of Law

The ongoing COVID-19 pandemic has quite literally altered the way our society functions. And its effects on the practice of law—specifically litigation—are likely not here for the short term. In an attempt to confront this fast-spreading pandemic, the legal world has been forced to transition to what we now know as the "new normal" – a virtual world of Zoom conferences, hearings, depositions, mediations, case evaluations, bench trials, and even jury trials.

The most evident and necessary change faced by litigators has been that legal services are now provided remotely. Even as states relax stay-at-home requirements, more and more lawyers are still opting to work from home, finding that the virtual transition is, in many respects, pretty seamless.

As virtual depositions, mediations, and arbitrations take root, however, there are practical considerations that are worth noting to ensure that proceedings run smoothly.

The most obvious is that all parties must have the proper technology. Unreliable internet or low-quality webcams/microphones during a deposition, for example, will undoubtedly hinder a party's ability to depose a witness and effectively advocate on behalf of their client.

Another fundamental challenge will be ensuring that witnesses and parties are not being coached by counsel. These ethical considerations are complicated by the lack of oversight. There is no official way to check whether a witness and their counsel are communicating directly through text or email or to confirm who is present in the room at the time these proceedings are taking place. The duty is on respective counsel to self-police.

Courts across the nation have similarly altered the way in which cases are litigated through the court system by implementing COVID-19-specific practice guidelines and protocol. Generally speaking, many courts have extended deadlines and are now conducting status conferences, hearings, and trials virtually.

Status conferences and non-evidentiary hearings have proven to be fairly simple and can be conducted via teleconference or video.

Evidentiary hearings and trials, on the other hand, require presenting and exchanging exhibits and examining witnesses. A more fundamental problem arises when a witness's credibility is at issue because a witness's demeanor plays a significant role in determining key factual issues. Ethical issues also arise in instances where witnesses are not in view of the court and other parties.

To maintain the integrity of the court, courts that have conducted fully remote bench trials have required witnesses to be in a remote location, away from counsel. Witnesses have also been required to stipulate that they did not access any form of communication during their examination, except for the invitation from the courts to participate virtually.

The prospect of virtual criminal jury trials raise serious constitutional questions that could pose a threat to a defendant's fundamental rights. For example, a defendant has the right to a jury of his or her peers. But to virtually serve as a juror, an individual must have reliable high-speed internet, access to a reliable webcam, and must be able to arrange for childcare, among other things. These necessities could make it impossible for certain people, such as those with fewer resources, to serve. Thus, the pool of jurors for virtual trials will disproportionately favor one socioeconomic class over another.

A defendant's right to confront adverse witnesses is also compromised by virtual trials for reasons discussed above – no matter how much technology evolves, video can be distorting and there is simply no replacing the inherent value of examining witnesses in person.

As time progresses and the numbers of COVID-19 cases begin to decline, a number of courts have started to host live hearings and trials all while adhering to social distancing practices. The Eastern District of Texas, for example, conducted a live jury trial in *Newberry v. Discount Waste Inc.*, beginning on June 22 and ending on June 24. To ensure the safety of those present, the temperatures of all potential jurors were taken and masks were required during voir dire. The attorneys and witnesses who were present in the courtroom were not required to wear masks during the trial.

But, even as courts begin to reopen their doors, constitutional issues still arise with respect to ensuring that defendants have a representative panel of jurors. Potential jurors who are most at risk for contracting COVID-19 will likely be excused or pardoned from jury duty. This then necessarily dissuades individuals over a certain age and/or individuals with health issues from serving.

In all, while there are practical and fundamental hurdles to virtual legal proceedings, courts and litigators alike have proven that the practice of law will continue to move forward, finding ways to adapt to the new normal. In so doing, attorneys are recommended to practice proper courtroom decorum to maintain structure during virtual proceedings. Courts have cautioned that counsel should still be operating under the same formalities as they would inside the courtroom, including wearing professional clothing, eliminating any distracting noises or backgrounds, and showing professional courtesy to all parties.

Even though some things have changed, remembering to practice basic courtroom etiquette remains key to having a successful judicial proceeding, even if it is virtual.

Zoom on Zoom Ethics Webinar

The pandemic has dramatically changed the mechanics of practicing law and is likely to do so well into the future. Since mid-March it has been difficult and in many cases impossible or inadvisable to meet with clients, witnesses, and other counsel face-to-face, and many court hearings and depositions have been conducted remotely through use of online meeting apps such as Zoom or WebEx.

What are the ethical implications of these adaptations? On June 10, the Legal Ethics Committee hosted a panel with diverse backgrounds to thoughtfully discuss that question in, appropriately, a Zoom webinar.

The panel consisted of Magistrate Judge Anthony P. Patti; Acting Chief Federal Defender Richard Helfrick; Alecia M. Chandler, Esq., the State Bar Professional Responsibility Programs Director; and Thomas Schehr, a commercial litigator (Dykema) and past president of the Chapter.

The discussion was organized by, and the panel was joined by, the Chapter's Legal Ethics Committee: Oakland Circuit Judge Hala Jarbou; employment lawyer Jennifer McManus (Fagan McManus); ethics and criminal defense lawyer Ken Mogill (Mogill, Posner & Cohen); and Lynn Helland, Executive Director of the Judicial Tenure Commission.

A snapshot of the presenters and some participants at the Zoom on Zoom Ethics Webinar.

Photo by Mindy Herrmann.

Approximately forty persons "attended" the discussion, which Helland moderated. As if to illustrate one of the points of the exercise, the discussion began with an unintended demonstration of one hazard of remote practice when Helland's computer failed just as the webinar was to begin. The other members of the Legal Ethics Committee ably filled the breach until Helland was able to rejoin the discussion.

Among the concerns about remote practice discussed by the panel were that (1) it is difficult to ensure the confidentiality of client communications when the lawyer cannot control who might be present on the client's side of the conversation; (2) it is difficult to ensure there is no improper coaching during remote testimony; and (3) significantly, a good deal of emotional information and non-verbal communication is lost during a remote session.

To illustrate this last point, Magistrate Judge Patti noted that he has found settlement conferences much less productive when conducted remotely rather than in person. He also has observed a drop in civility when lawyers interact remotely rather than in person. Mogill cited research corroborating these observations, to the effect that remote communication deprives the participants of a substantial part of the subliminal cues that inform in-person interactions.

Helfrick stressed the difficulty appointed attorneys face with developing trust with imprisoned clients they have never met prior to the appointment when they are constrained to meet those clients and have all interactions with them remotely.

Magistrate Judge Patti also observed that when some attorneys are in the comfort of home rather than in the courtroom, they become much more casual in their dress and demeanor. He stressed that attorneys should continue to treat remote proceedings with the formality they accord in-person proceedings.

Chandler focused on the technology aspects of a lawyer's ethical duty to be competent, emphasizing that because remote proceedings differ from in-person proceedings in important ways, lawyers should either ensure their own competence in remote proceedings, or consult with someone else who is competent, before advising clients concerning remote proceedings or participating in them. The wisdom of her observation echoed recent Michigan Supreme Court amendments to the Rules of Professional Conduct to make it clear that our duty of competency includes technological competency.

Schehr pointed out that the success of remote proceedings can be affected by the computer software the attorney uses. He noted that there are multiple software options and encouraged attorneys to learn enough about them to obtain and utilize the software that best suits their remote needs.

McManus addressed the problem of protecting confidential information during a remote proceeding. She said she has had success with the parties agreeing that all documents subject to a protective order be identified ahead of time, and referred to only by Bates number during the proceeding, to avoid doing a screen share via Zoom. In that way the parties can view the documents simultaneously, but the documents are never published on a platform that may be accessible to the public.

The Legal Ethics Committee welcomes suggestions for future ethics discussions, whether in-person or remote. Please pass along your suggestions to any committee member.

Automotive Insolvency Issues in the COVID Age Webinar

On June 18, Chapter's Bankruptcy Committee co-sponsored (along with the American Bankruptcy Institute and the Bankruptcy Section of the FBA's Western District Chapter) a webinar on Automotive Insolvency Issues in the COVID Age. The webinar featured experts from the Michigan bench and bar discussing automotive restructuring matters related to the COVID-19 crisis. Over 400 attendees from across the country registered for the webinar.

The webinar was moderated by Bankruptcy Judge John T. Gregg of the Western District of Michigan. Panelists included Eastern District Bankruptcy Judge Phillip J. Shefferly, Daniel F. Gosch of Dickinson Wright, Stephen M. Gross of McDonald Hopkins, Richard E. Kruger of Jaffe Raitt Heuer & Weiss, and Alicia B. Masse of Alderney Advisors.

The panel of automotive insolvency experts walked attendees through the current global economic challenges that the industry is facing, and provided an overview of the bankruptcy and non-bankruptcy processes that may be utilized to address automotive insolvency issues in the wake of the pandemic.

Masse opened the webinar with a discussion of the global pandemic's derailment of a decade of growth in terms of U.S. Light Vehicle Sales Volume. Vehicle volume declined 32 percent from February to March, and an additional 24 percent from March to April, as the impact of COVID-19 caused facilities to shut down for two months. Masse stated that May saw a positive rebound, but predicted the path back to pre-COVID volume is about six years long. Additionally, a second wave of the virus and another round of shutdowns could thwart that positive forecast. "The biggest risk will be a resurgence of COVID-19," Masse said.

Gross and Kruger provided an overview of some of the key terms and issues that arise in automotive workouts. Original equipment manufacturers (OEMs), they explained, receive parts from multiple tiers of suppliers. Each tier of suppliers contracts with other suppliers to provide parts utilized in their own production process. OEMs and tier one suppliers each have thousands of contracts with suppliers, many of whom are located all over the world.

Gross and Kruger noted that the complex and global nature of the automotive supply chain presents issues during the pandemic. In addition to health related shutdowns in the U.S., there is significant concern about

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Automotive Insolvency *(from page 7)*

supply chain interruptions in Mexico and Asia, which have the potential to significantly impact production in the U.S.

Moreover, because of the "just in time" nature of the parts supply process in the automotive industry, any hiccup in the supply chain that lasts more than a couple of days could lead to a shutdown of the OEM's assembly line. A line shutdown can cost an OEM millions of dollars per hour, Gross said. "The damages for not having parts is so huge."

Although the different stakeholders (i.e. OEMs, the troubled supplier, lenders) have different interests in an automotive workout, the panel agreed that all stakeholders generally share a desire to keep a troubled supplier operating. The OEM needs parts. The troubled supplier wants to continue to operate to preserve relationships and jobs. And, while the lender wants to ensure that its loan is repaid, it does not want to see the supplier fail as collateral value is usually maximized by continuing operations until an orderly reorganization, resourcing, or sale is effectuated.

As Gosch stated, "there is a dance between various competing interests." Each party must "cover its respective flanks" while doing that "dance." At the end of the day, each party usually benefits from continued production.

The panel explained that negotiations amongst the stakeholders generally result in two documents: (i) an accommodation agreement, and (ii) an access and security agreement. An accommodation agreement is essentially a forbearance agreement wherein the lender and the OEM will commit to provide financing and other accommodations to the troubled supplier that will enable it to continue manufacturing parts.

The OEM and the lender also benefit from an accommodation agreement. The OEM is assured that it will receive needed parts thereby avoiding a line shutdown. The lender obtains expedited payments with respect to the supplier's receivables, and a limitation on setoffs that could be asserted by the OEMs.

The access and security agreement provides an OEM with access to the troubled supplier's facility and the necessary equipment and tooling. In the event of a default by the troubled supplier, the OEM is permitted to temporarily step in and operate the facility to ensure the continued production of parts.

Collectively, Gross likened these documents to "a three-legged stool that allows the lender, supplier and customer to keep going."

Judge Shefferly wrapped up the webinar with a discussion of some things that he has learned while presiding over a number of complex automotive Chapter 11 cases during his 17-year term as a bankruptcy judge. He acknowledged the immense downside risk to the automotive industry and the local community if production is interrupted. Because of that, "things happen fast" in an automotive bankruptcy case.

Because of the speed of these cases, Judge Shefferly stated, the court needs to put in a little extra work on the front end to understand how the troubled supplier ended up in bankruptcy, the pre-bankruptcy negotiations that occurred, and what the parties hope to accomplish (i.e. a reorganization, a sale or an orderly liquidation) in Chapter 11.

To help ensure a successful process, Judge Shefferly encouraged the parties to alert the court clerk that a Chapter 11 filing is coming in advance. He also encouraged all parties to become familiar with local rules and procedures applicable in the court where the case is to be filed.

Civil Rights Committee Hosts Virtual Happy Hour

On May 28, the Civil Rights Law Committee hosted a virtual get-together, enabling them to socialize and plan for the future. Approximately 10 members and guests participated on the call. After a round of introductions, the Committee discussed some of the issues that were most on the mind of practitioners in the area.

Participants noted that since the Committee's January 2020 presentation on the eviction crisis in Michigan, the results of a major research project on Michigan evictions data has been published by the University of Michigan. In the wake of the COVID-19 pandemic, the topic of evictions remains important and the Committee agreed that it would invite back attorney Libby Benton, who spoke at the January 2020 presentation, to discuss the findings in this report, which she co-authored. The study can be found at: https://poverty.umich.edu/data-tools/michigan-evictions/

Court and Criminal Bar Address "Compassionate Release"

In addition to being remembered for COVID-19, the year 2020 will also be known for the Coronavirus Aid, Relief, and Economic Security Act, or the "CARES Act." The CARES Act, which became law on March 27, authorized more than $2 trillion to battle COVID-19 and its economic effects.

As federal practitioners know, it also changed the way federal courts operate, allowing them to temporarily conduct proceedings virtually, among other things.

Even more important to the Court's docket and the criminal bar over the past several months, however, is that COVID-19 and the CARES Act, combined with the First Step Act § 603, Public Law 115-391 (Dec. 21, 2018), changed the law regarding if, when, and how sentenced defendants can be released from prison early. Congress made the changes at least in part because COVID-19 is understood to spread more quickly in communal living situations like prisons, where people cannot take the same precautions as people outside those situations.

Two changes occurred.

First, the CARES Act temporarily permits the Bureau of Prisons to "lengthen the maximum amount of time for which [it] is authorized to place a prisoner in home confinement" during the COVID-19 pandemic. CARES Act § 12003(b)(2), Pub. L. No. 116-136 (Mar. 27, 2020). Previously, near the end of a person's sentence, the Bureau of Prisons could move the person to a place like a halfway house or to home confinement to serve the remaining time of their sentence, but could only place a person on home confinement "for the shorter of 10 percent of the term of imprisonment of that prisoner or 6 months." 18 U.S.C. § 3624(c)(2).

Under its new temporary authority, and in accordance with directives issued by the Attorney General, the Bureau of Prisons can allow sentenced defendants to serve the balance of their sentences in home confinement for longer periods of time, thus permitting the agency to release earlier individuals who may be most at risk from COVID-19.

Through the end of July, the Bureau of Prisons has released thousands of federal prisoners to serve their sentences in home confinement.

Second, and more important to the Court and federal criminal practitioners, COVID-19 has caused prisoners to file motions for "compassionate release."

Previously, and in general, a sentence only could be modified by a court (1) "upon motion of the Director of the Bureau of Prisons" where "extraordinary and compelling reasons warrant such a reduction," so long as the reduction is consistent with the U.S. Sentencing Guidelines, (2) as permitted by Fed. R. Crim. P. 35, and (3) in certain circumstances where sentencing law had changed.

With respect to the first category, the First Step Act changed the law by permitting defendants to file such a motion based on "extraordinary and compelling reasons." Before obtaining relief, defendants must either fully exhaust all required administrative remedies or wait for "the lapse of 30 days from the receipt of such a request by the warden of the defendant's facility, whichever is earlier." 18 U.S.C. § 3582(c).

Then, in the wake of COVID-19 and the CARES Act's recognition that it may be safer for some at-risk prisoners to serve the remainder of their sentences at home, many prisoners began filing motions for "compassionate release" under § 3582(c) to get out of prison and to be permitted to serve their sentences in home confinement.

These motions have presented criminal practitioners and the Court with a host of new practical and legal questions, and they have led to the rapid creation of a developing body of case law.

For example, given that COVID-19 is a massive public health crisis, many prisoners filed motions for compassionate release quickly, without first tending to the administrative exhaustion requirements in § 3582(c)(1)(A). They (both pro se and with counsel) argued that exhaustion was futile or otherwise should not be required given the pandemic. After some initial inconsistency at the district court level, the Sixth Circuit in *United States v. Alam*, 960 F.3d 831 (6th Cir. 2020), confirmed that the exhaustion requirement is mandatory.

Next, federal practitioners and the Court have grappled with what are "extraordinary and compelling reasons" for a reduction, and how to apply the proscriptions of the U.S. Sentencing Guidelines.

As mentioned, § 3582(c)(1)(A) requires that any reduction in sentence be "consistent with applicable policy statements issued by the Sentencing Commission." The Sentencing Commission long ago issued a policy statement in USSG § 1B1.13, which addresses sentencing reductions under § 3582(c). Because the Commission did not revise § 1B1.13 after enactment of the First Step Act or CARES Act, federal practitioners have disagreed about how the policy statement applies to recent compassionate release motions.

Section 1B1.13 permits compassionate release for non-dangerous prisoners based on "extraordinary and compelling reasons" due to: (1) the inmate's medical condition; (2) the inmate's age; (3) the inmate's family circumstances; and (4) other reasons "[a]s determined by the Director of the Bureau of Prisons," which the Bureau of Prisons has set forth in Program Statement 5050.50. It also requires an analysis of the traditional sentencing factors set forth in 18 U.S.C. § 3553(a).

Section 1B1.13 also requires that courts determine that the prisoner is "not a danger to the safety of any other person or to the community, as provided in 18 U.S.C. § 3142(g)" if released.

Applying these standards during the COVID-19 pandemic can be a demanding task. Doing so requires an understanding both of a specific prisoner's particular health concerns, and how that prisoner's health issues could impact them should they contract COVID-19. Scientists' understanding of COVID-19 has shifted significantly over time, making this job harder.

Courts also must consider whether an individual is a danger to the community. While courts are called on to make such an assessment regularly, doing so during a pandemic can be particularly complicated. For example, a significant time may have passed from the time of sentencing. Alternatively, there is evidence that law enforcement resources have been strained during the pandemic. Both considerations may affect the court's analysis of dangerousness.

Finally, § 1B1.13 requires courts to reconsider the same factors under § 3553(a) that it considered when it initially sentenced the defendant. Some of these factors are redundant, but some are new, and they include: defendant's history and characteristics, the nature and circumstances of the offense, the need to promote respect for the law and provide just punishment for the offense, general and specific deterrence, and the protection of the public.

Courts are used to applying these factors. Being called on to re-apply them to already-sentenced defendants, during a global pandemic, can be more difficult.

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Compassionate Release *(from page 9)*

More generally though, the impact of these motions on the Court's operation has been significant. The Court has already had to adapt to the myriad ways COVID-19 has impacted already-pending civil and criminal cases. Now, in addition, and through the end of July, more than 500 motions for compassionate release have been filed in the Eastern District alone. Judges have evaluated the motions in diverse ways, with some judges being more or less inclined to grant them.

Moreover, the reality is that the pandemic continues to affect our society. The Court and federal criminal practitioners expect to continue addressing compassionate release motions for the foreseeable future.

Supreme Court Review

M Bryan Schneider

The Supreme Court recently concluded its unprecedented October 2019 Term by conducting the last month of oral arguments through computer teleconferencing. In high profile decisions, the Court held that states may remove or punish faithless presidential electors (*Colorado Dep't of State v. Baca and Chiaalo v. Washington*), rejected an abortion-provider admitting-privilege law (*June Medical Servs. v. Russo*), and ruled that President Trump's financial records are proper subjects for a state grand jury subpoena (*Trump v. Vance*) but may or may not be subject to congressional subpoenas (*Trump v. Vance*). Oh, and the eastern half of Oklahoma is part of the Creek Nation reservation (*McGirt v. Oklahoma*).

Just as importantly, the Court issued a number of decisions impacting federal practitioners.

The Court decided three cases touching on international issues this Term. In *GE Energy Power Conversion France v. Outokumpu Stainless USA*, the Court held that the Convention on the Recognition and Enforcement of Arbitral Awards does not conflict with, and thus prohibits, the application of state law equitable estoppel rules that enforce an arbitration agreement against non-parties to the agreement. This Term, the Court returned once again to the Foreign Sovereign Immunities Act, holding in *Opati v. Republic of Sudan* that plaintiffs may, under a provision added to the FSIA in 2008 authorizing punitive damages, seek punitive damages for conduct occurring prior to enactment of the provision. And in *Monasky v. Taglieri*, the Court held that the determination of a child's habitual residence under the Hague Convention should be based on a totality-of-the-circumstances test, and not on any categorical requirements.

This Term the Court was extremely active in civil and employment rights cases. In procedural civil rights issues, the Court held in *Comcast Corp. v. National Association of African American-Owned Media* that a plaintiff alleging racial discrimination under § 1981 must show that the plaintiff's race was a but-for cause of its injury. Once again, the Court also declined to extend the constitutional civil cause of action recognized in *Bivens*, holding that *Bivens* does not extend to a claim based on a shooting across the U.S.-Mexico border (*Hernandez v. Mesa*). And in *Lomax v. Ortiz-Marques*, the Court held that any dismissal, regardless of whether it was with or without prejudice, counts as a "strike" under the three-strikes provision of the Prison Litigation Reform Act.

Turning to more substantive civil rights matters, in perhaps its most momentous decision of the term, the Court held that Title VII's prohibition on sex discrimination in employment covers discrimination on the bases of sexual orientation and gender identity (*Bostock v. Clayton County, Ga.*). And in *Babb v. Wilkie*, the Court held that under the public sector provisions of the Age Discrimination in Employment Act, which differ from the private sector provisions, a plaintiff need only show that age played some role in the employment decision, not that it was a but-for cause of the decision.

The First Amendment figured prominently at the Court this Term. In *Agency for International Development v. Alliance for Open Society International*, the Court held that a foreign affiliate of an American organization lacks First Amendment rights, and therefore could not challenge a law restricting funding to organizations that explicitly oppose prostitution and sex trafficking. *Barr v. American Association of Political Consultants* found an exception to the general ban on robocalls for attempts to collect a government or government-secured debt violates the First Amendment. In an important free-exercise case, *Espinoza v. Montana Department of Revenue*, the Court found unconstitutional Montana's so-called Blaine Amendment, which prohibited any government aid to a school controlled by a church. The Court also held that the ministerial exception derived from the Religion Clauses prohibits the adjudication of employment discrimination claims brought by parochial school teachers (O*ur Lady of Guadalupe School v. Morrissey-Berru*). And although not a First Amendment case, religious groups obtained a third victory in *Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania*, in which the Court upheld regulations allowing those with religious objections to exempt themselves from the contraceptive coverage mandates of the Patient Protection and Affordable Care Act.

The Court also issued a number of decisions involving intellectual property issues this Term. In two patent decisions, the Court held that salaries of the Patent and Trademark Office's (PTO's) legal personnel are not an

"expense of the proceeding" chargeable to a plaintiff challenging a PTO determination in a civil action (*Peter v. Nantkwest*), and that the preclusion of judicial review of the PTO's *inter partes* review decisions extends to the PTO's determination that the request for *inter partes* review was untimely (*Thryv, Inc. v. Click-To-Call Technologies*).

In two copyright suits involving states, the Court held that Congress did not validly abrogate States' sovereign immunity from copyright infringement suits (*Allen v. Cooper*), and that official annotations to a state statutory code compiled by an arm of the state legislature are not "original works" that may receive copyright protection (*Georgia v. Public Resource.Org*). And in three trademark cases the Court held that: a showing of willful infringement is not required for an award of profits under the Lanham Act (*Romag Fasteners, Inc. v. Fossil Group, Inc.*); the addition of ".com" to a generic term may be registerable as a trademark so long as the "generic.com" term in toto has not acquired a generic meaning among consumers (*U.S. Patent & Trademark Office v. Booking.com*); and a second claim or defense relating to a trademark litigated in a prior proceeding is not precluded where the conduct challenged differs in the two suits (*Lucky Brand Dungarees v. Marcel Fashions Group*).

Turning to the Employee Retirement Income Security Act, in *Intel Corporation Investment Policy Committee v. Sulyma*, the Court held that to trigger the running of the statute of limitations for fiduciary duty claims a plaintiff must have actual knowledge of the alleged breach, which is not satisfied by the mere fact that the information was contained in disclosures that the plaintiff did not read. In a second ERISA case, *Thole v. U.S. Bank*, the Court held that beneficiaries of a defined-benefit retirement plan lack standing to bring an ERISA claim alleging breach of the duties of loyalty and prudence because, not withstanding any plan losses, they would receive the same retirement benefit.

In other general civil matters, the Court held that: the statute of limitations under the Fair Debt Collection Practices Act begins to run on the date the violation occurs, not the date the violation is discovered (*Rotkiske v. Klemm*); disgorgement is a permissible equitable remedy in a civil action brought by the Securities and Exchange Commission (*Liu v. Securities & Exchange Comm'n*); and the proper allocation of a federal tax refund among affiliated companies is governed by state law, not a federal common law rule (*Rodriguez v. Federal Deposit Insurance Corp.*).

The Court was much less active on the criminal side of its docket this Term, but nonetheless issued several important decisions, particularly involving issues of constitutional criminal procedure. Most notably, in *Ramos v. Louisiana,* the Court held for the first time that the Sixth Amendment requires a unanimous verdict to convict a defendant of a serious crime. In another important decision, *Kahler v. Kansas*, the Court held that states retain wide latitude in structuring the insanity defense, and that due process does not require a state to adopt an insanity defense that depends on a defendant's ability to distinguish right from wrong. In the only Fourth Amendment decision of the Term, the Court held that an investigative traffic stop is reasonable when it is based on an officer's learning that the vehicle's registered owner has had his license revoked, so long as the officer lacks any information that the driver of the vehicle is not the registered owner (*Kansas v. Glover*). And in a capital sentencing case, the Court held that upon finding that a trial court failed to properly consider a mitigating factor at sentencing, an appellate court may reweigh the aggravating and mitigating factors without remanding the case for a new jury sentencing proceeding (*McKinney v. Arizona*).

In statutory matters, the Court held that New Jersey officials involved in the "Bridgegate" scandal could not be convicted of federal program fraud or wire fraud because the officials did not seek to obtain money or property as an object of their regulatory activities (*Kelly v. United States*). In *Shular v. United States*, the Court concluded that the Armed Career Criminal Act's definition of a "serious drug offense" does not require a state offense to match some generic offense, but only that the state offense involve the conduct set forth in the statute, namely manufacturing, distributing, or possessing with intent to distribute a controlled substance. And in *Holguin-Hernandez v. United States*, the Court held that a defendant's argument for a specific sentence is sufficient to preserve for appeal a claim that the sentence was greater than necessary to accomplish the goals of sentencing.

Finally, as has been true in recent terms, the Court considered several immigration cases. In *Department of Homeland Security v. Regents of the University of California* the Court struck down the Trump administration's rescission of the DACA program, concluding that the decision was arbitrary and capricious under the APA. The Court held in *Barton v. Barr* that a serious offense precluding eligibility for cancellation of removal need not be the same as the offense which renders a lawful permanent resident removable. In a significant preemption decision, the Court held that state court convictions for fraudulently using another person's Social Security number were not preempted merely because the defendants had also used those numbers on their I-9 forms when seeking employment (*Kansas v. Garcia*). And in three decisions governing review of immigration determinations, the Court held that courts are not precluded from reviewing factual challenges to denials of relief from removal under the Convention Against Torture (*Nasrallah v. Barr*) or claims of due diligence for equitable tolling purposes (*Guerrero-Lasprilla v. Barr*), but that the statutory limitation on habeas review of an immigration judge's rejection of an asylum seeker's claim of a credible fear of persecution does not violate the Suspension and Due Process Clauses (*Department of Homeland Security v. Thuraissigiam*).

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