



FBAnewsletter

Federal Bar Association - Eastern District of Michigan Chapter - 63 years of service to our Federal Bench and Bar

Espionage, Betrayal, and Good Trial Skills

By Michael Turco

The American public followed the Rosenberg Spy Case with rapt attention in early 1951. Julius Rosenberg, and his wife, Ethel, were charged with violating the Espionage Act of 1917 by conspiring to steal secret information about the atom bomb for Soviet Russia. The trial, in March 1951, was choked-full of details ripped from a spy novel: atomic secrets, stolen drawings, and a clandestine meeting between spies who used a coded Jell-O box to confirm their identity.

The Rosenbergs were the first couple to be sentenced to death in the United States. No one provided more crucial evidence against Ethel than her brother, David Greenglass. Greenglass, a government witness, testified that his sister typed notes of the classified information spies ultimately passed to the Soviets. Julius and Ethel died by electrocution on June 19, 1953. Greenglass received a 15-year sentence and secured his release after 10 years.

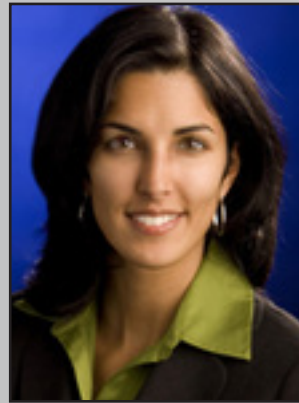
Over 100 lawyers re-lived this trial experience on October 28, 2022, at the Anatomy of a Trial Program at the Theodore Levin United States Courthouse. As part of their common mission to train lawyers on effective, ethical trial practices, the American College of Trial Lawyers and the Federal Bar Association Eastern District of Michigan Chapter used the Rosenberg Spy Case as grist for a full day of mock trial exercises. It was a standing room only event, and for good reason.

Accomplished civil and criminal trial lawyers from around Michigan demonstrated best practices for developing a case theme, opening statements, and direct and cross examination of David Greenglass using actual trial testimony and exhibits. University of Michigan law student Ryan Lawton studied trial transcripts of Greenglass' testimony and faithfully followed historical fact as he portrayed Greenglass, while practitioners hammered away with

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President's Column

Jennifer Newby

It is harder than you might think to decide what to include in the President's Article. Except this issue. This article is dedicated to the members of our federal bench.

There were many names that loomed large when I started practicing in 2005. Judge Avern Cohn with his sharp mind and notorious temper. Judge Arthur Tarnow with his dry humor. Judge Marianne Battani with a slow smile and a warm temperament. They were more than just names, they were the keepers of justice in our district for many years. They each left an indelible mark.

As time marches on, another incomparable jurist, and a personal hero of mine, recently announced her plans to retire. Judge Victoria Roberts will leave large shoes to fill when she steps down in September. Our district's loss is her family's gain. There are others who plan to enjoy the next chapter of their lives, but it is not my place to make a public announcement.

Perhaps it's the natural order of things – if you practice long enough you see the turnover of the federal bench the way we are used to seeing in other sectors. But somehow, it seems more moving.

As with any loss, there is a silver lining to be found if you look for it. With the changing of the guard on our bench, there is a new cadre of judges waiting to build their legacy. Judge Shalina Kumar and Judge F. Kay Behm are wonderful additions to the bench, both bringing with them years of judicial experience. We also welcome the newest name to the roster, Magistrate Judge Jonathan J.C. Grey, who took his seat in March.

One thing that has remained the same as the years go by is the unwavering support the bench offers to our Chapter. Our Chapter is extraordinarily fortunate to have incredible participation from the bench. It has never been difficult to find a judge to be a part of a panel or to attend a social event. Many judges are regular attendees at our luncheons. Chief Judge Sean Cox is no exception. During his tenure he has made a point to attend Chapter events and support our endeavors. The word

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President's Column (from page 1)

on the street is that he may even golf this summer. On behalf of the Chapter, we extend our gratitude to the members of the bench for their service to this district and support of our Chapter.

As many of you know, our Chapter suffered a loss of its own recently, with the passing of former Executive Director Brian Figot. Brian worked tirelessly for this Chapter with endless dedication. In the words of Nathaniel Hawthorne, "time flies over us, but leaves its shadow behind." Brian cast a long shadow and we hope to honor him by continuing to strengthen the Chapter he loved. I thank our members, sponsor firms, judges, committee members, keynote speakers, and especially our Executive Director Mindy Herrmann for their investment in our Chapter.

Good Trial Skills (from page 1)

sample direct and cross examinations. Magistrate Judges David Grand and Elizabeth Stafford and District Judges Shalina Kumar, Matthew Leitman, and Terrence Berg presided over portions of the trial or engaged the audience on best trial practices.

Unlike many programs of this nature, where lawyers only discuss courtroom techniques, the Anatomy of a Trial gave attendees the opportunity to see masters of the craft on their feet, in Judge David Lawson's courtroom, trying a case based on historical fact. A panel discussion followed each segment of the trial, where lawyers and judges focused on that specific aspect of trial, discussed best (and worst) practices, and shared advice from their lives in the courtroom.

The Anatomy of a Trial is the brainchild of acclaimed trial lawyer and American College of Trial Lawyer Fellow Paul Mark Sandler of Baltimore, Maryland. Sandler is a prolific writer on trial practices and chairs the American College of Trial Lawyers national Bootcamp Committee. He worked closely with local program organizers, Melinda Hermann, Michael Palizzi, and Michael Turco, to present what the Chapter hopes will become a new tradition based on different trials of national and historical significance. Work is underway for a 2023 Anatomy of a Trial Program in the Western District of Michigan.



Kinikia Essix, Court Administrator / Clerk of Court

I would like to welcome our newest District Judge F. Kay Behm! Chief Judge Sean F. Cox administered the oath of office to Judge Behm on December 15, 2022. Judge Behm fills a vacancy that resulted when Judge

David M. Lawson took senior status and she will be based at the U.S. Courthouse in Flint.

Judge Victoria A. Roberts has announced her retirement effective September 1, 2023. She has served as a district judge in the Eastern District of Michigan since 1998. We wish her all the best in her retirement!

The Court's Capital Security Program is entering its final stages before construction begins. As you may know, this project

will address security improvements needed in the Theodore Levin U.S. Courthouse. Plans include a functional sally port in the basement for secure prisoner transport and major redesigns to both entrances of the building. The new entrances will provide more space for efficient screening of visitors to the courthouse. We expect to see hammers swinging beginning in late May or early June of 2023. Construction is expected to last anywhere between 12 to 18 months. We will keep you informed on impacts to the entrances as the project gets underway.

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

Recent Local Rule Changes By Michael W. Shaffer, Law Clerk to the Honorable David M. Lawson

This article covers recent notable changes to the Local Rules for the Eastern District of Michigan, which became effective between September through December 2022. The information that follows is drawn from a review of the revised rules and commentary, as well as discussions with members of the District's Local Rules Committee.

Revision of Meet-and-Confer Requirements

Effective December 1, 2022, the Eastern District overhauled its Local Rule 7.1 to require counsel to engage in more robust efforts to meet and confer before resorting in motion practice. As one member of the Local Rules Committee observed, under the previous rule the bench's experience had been that the meet-and-confer requirement was "more honored in the breach than the observance." It also was noted that, in some instances, attempts by counsel to confer were limited to the sending of a single email shortly before a motion was filed, leaving little time for opposing counsel to consider or respond to the questions presented. The revision of the rule was driven by the experience of the bench demonstrating that in many cases opportunities to narrow issues or avoid the need for court supervision were lost due to perfunctory efforts at compliance, which involved no meeting of persons or minds and little informed discussion.

To address those concerns, the revised Rule 7.1 now mandates that counsel for a moving party engage in an "interactive process" with opposing parties that allows for the issues presented to be both explained and discussed. As the rule now states:

To accomplish this, the movant must confer with the other parties and other persons entitled to be heard on the motion in good faith and in a manner that reasonably explains the basis for the motion and allows for an interactive process aimed at reaching agreement on the matter or those aspects of the matter that can be resolved without court intervention, given the nature of the contemplated motion. The conference must be held sufficiently in advance of filing the motion to allow a good faith interactive exchange aimed at resolving the matter.

E.D. Mich. LR 7.1(a)(1). Added commentary to the rule explains that ordinarily the conference should be conducted via an in-person meeting, telephone, or video conference, although for "rudimentary" motions email communication may suffice, so long as the exchange includes an interactive discussion of the issues. As the commentary notes:

The Court's strong preference is for conferences held in a manner that facilitates discussion and debate, such as in person, by video or by telephone. Sometimes, email exchanges may suffice if the motion is rudimentary and uncomplicated, or to document conversations. But sending an email without engaging the other parties will not satisfy this rule.

E.D. Mich. LR 7.1 cmt. Furthermore, the efforts made by counsel to convene a conference now must be not only "reasonable" but also "timely" in advance of the filing. E.D. Mich. LR 7.1(a)(2)(B). However, the meet-and-confer requirement may be excused "due to the emergent nature of the relief requested." E.D. Mich. LR 7.1(a)(2)(C). Notably, sanctions including costs and attorney fees may be imposed both for "unreasonable withholding of consent," and for otherwise violating the rule — e.g., by making inadequate efforts to seek consent. E.D. Mich. LR 7.1(a)(3). Moreover, denial of a motion now is endorsed as a sanction. *Id.*

Overhaul of Procedures for Filing Digital and Physical Exhibits

Effective September 1, 2022, the district introduced a new procedure for submission of digital exhibits, such as audio and video recordings that cannot be converted to standard Adobe Portable Document Format (PDF) files for electronic filing. The section of the district's Electronic Filing Policies and Procedures that previously governed the filing of exhibits "in the traditional manner" was overhauled, and a new procedure was added, mandating the use of the new "Media File Upload" portal in the district's CM/ECF system for submission of digital exhibits.

Rule 5 of the District's Electronic Filing Policies and Procedures provides, as previously, that "[n]o embedded interactive content is allowed" in electronic filings, "such as embedded audio and video." Elec. Filing Pol. & Proc. R5(c). Previously, the rule stated that "[i]f a party chooses to file audio or video recordings with the Court," then the party would need to seek leave to present the exhibit "in the traditional manner" — i.e., on a physical medium such as a flash drive. However, that procedure now has been modernized, and the amended Rule 5 requires that a party wanting to file a digital exhibit such as a video or audio recording "must obtain leave of Court to file using the Media File Upload procedures under Rule 19(c)."

Revised Rule 19(c) now states that "[m]edia files, such as an audio clip or video clip, may be filed only with leave of court and a filing user must use the Media File Upload procedures." The rule now provides that "[i]f the Court grants a filing user's motion, media files must be submitted using the electronic portal called 'Media File Upload' located in the ECF system." Also "[a]ll media files must be in one of the following formats: avi, mov, mp3, mp4, mpeg, wav, wmv," and "[f]iles not submitted in the proper format may be stricken." The submission of digital exhibits via the Media File Upload portal also must be accompanied by an index of exhibits docketed in the usual manner via CM/ECF. R19(c)(1).

Under the newly added Rule 19(d), the procedure for filing items "in the traditional manner" now is reserved exclusively for "physical items," and digital media no longer may be submitted in this way. Filing a "physical item" as an exhibit also requires leave of court, which must be sought by way of an appropriate motion, *ibid.*, and the physical submission must be accompanied

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Rule Changes (from page 3)

by an exhibit list e-filed in the usual manner, R19(d)(1). When submitted to the Clerk of Court for filing, “[p]hysical objects must have a label physically attached that includes a case number, date of the order granting permission to file and a description.” R19(d).

The revised procedures further require that all digital materials submitted via the Media File Upload facility must be served on other parties in accordance with the applicable federal and local rules of procedure, R19(c)(3), and service of physical items on other parties must be accomplished “if practicable,” R19(d)(3).

Revision of Rules for Filing Conventional Exhibits

In addition to the Rule 19 revisions discussed above, the rule for electronically-filed exhibits other than media files and physical items also were enhanced both to prohibit the e-filing of excess materials not germane to a substantive filing, and to require the use of exhibit lists when multiple exhibits are included. The revised rule specifies that “[f]iling users must file only portions of exhibits that are germane and shall not include any paper that is already part of the record.” R19(a). “Previously filed papers should be referenced using the PageID.” See R6. Furthermore, “[u]nless there is only one exhibit, the filing user must prepare an index of exhibits and file the index as the first attachment to the paper.” R19(b)(2).

Prohibition on Combined Filings

Effective December 1, 2022, Local Rules 5.1 and 7.1 were amended to prohibit the embedded filing of a motion as part of “any other stand-alone document.” Under the revised rules, “[m]otions must not be combined with any other stand-alone document.” E.D. Mich. LR 7.1(i); see also LR 5.1(e) (1). “For example, a motion for preliminary injunctive relief must not be combined with a complaint, a counter-motion must not be combined with a response or reply, and a motion for downward departure must not be combined with a sentencing memorandum.” LR 7.1(i). “Papers filed in violation of this rule will be stricken.” *Ibid*.

The Michigan Task Force on Forensic Science

By Eugene Lee, 3L, University of Michigan Law School

“It is a capital mistake to theorize before one has data.

*Insensibly, one begins to twist facts to suit theories,
instead of theories to suit facts.”*

—Sherlock Holmes, “A Scandal in Bohemia”

On April 2, 2021, Governor Gretchen Whitmer signed an executive order establishing the Task Force on Forensic Science to discuss proposals for improving the state of forensic science in Michigan.¹ This executive order comes on the heels of various calls for forensic science reform in recent years. On December 21, 2022, the Task Force issued its report and recommendations. This article discusses the background that led to the Task Force’s creation, the issues it was commissioned to address, and the recommendations it has made.

Background of Forensic Science and Its Flaws

Forensic science is not a unified discipline, but refers to a range of disciplines that have developed in response to investigating crime scenes including, but not limited to, analysis of DNA,

fingerprints, ballistics, and arson. Although the phrase includes the word “science,” which connotes a certain level of objectivity derived from the notion of peer-review and repeatability of testing, the forensic sciences developed independently of this traditional scientific methodology. Whereas academic science has always been based on hypothesis testing and peer review of replicable studies, forensic science has primarily relied on the subjective interpretation of evidence usually presented by law enforcement officials. Once those reports are submitted in a specific case, they are then discarded, meaning that those findings are never collected in large batches to conduct secondary analysis, in order to determine reliability of the data, unlike in traditional sciences. The single-use nature of forensic science analyses results in a baseline level of scientific unreliability, which creates an opportunity for people to twist the “scientific” facts to suit their theories. The result has been a staggering number of wrongful convictions that rested on erroneous forensic science, affecting nearly half of DNA exonerations and almost a quarter of all exonerations in the United States.² The number of people wrongly convicted based on faulty forensic science analysis is due, in part, to the power of forensic science to seduce jurors—who are often familiar with shows such as CSI or the stories of Sherlock Holmes—with the satisfaction of a fully solved mystery.³ The reckoning with forensic science at a national level can be traced back to a 1989 case in New York City involving the murder trial of a janitor, in which scientific experts for both the prosecution and defense met to declare that the practices used by a laboratory to produce DNA evidence were unacceptable.⁴ Afterward, the National Academy of Sciences (NAS) moved to establish more rigorous methods for DNA evidence in the 1990s, and, in 1992, the Innocence Project was founded, which exposed flaws in the criminal justice system and helped exonerate wrongfully convicted individuals through DNA testing.⁵

Although these efforts were spurred by DNA science, they also led to questions about other forensic science disciplines. In 1993, the Supreme Court decided *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, which strengthened the standards for scientific reliability of evidence presented in court. And in 2004, the NAS presented a report which undermined the validity of comparative bullet lead analysis (CBLA), which, at the time, had been admitted in criminal trials for nearly 40 years without meaningful oversight.⁶ That same year, fingerprint examiners at the FBI erroneously linked Brandon Mayfield to the terrorist bombings in Madrid, Spain. The examiners made a mistaken identification of a fingerprint taken from a plastic bag containing detonator caps, which triggered an aggressive surveillance and detainment of Mayfield. In 2006, the federal government agreed to pay Mayfield \$2 million and issued a formal apology to him and his family.⁷

These developments, as well as others, culminated in the NAS’s groundbreaking 2009 report,⁸ which sparked a national conversation about the state of forensic science. Bridget McCormack, former Chief Justice of the Michigan Supreme Court, has recently stated that even “[t]oday, forensic science conversations between criminal justice and scientific stakeholders around the world begin with the NAS report.”⁹

The report provided a comprehensive overview of the far-reaching consequences of forensic science’s unreliability, shifting the focus away from DNA exclusively and towards the wide range of other forensic science disciplines. Although forensic science is most commonly associated with the criminal justice system, the NAS report noted the potential impact it also has on fields such as “civil litigation, legal reform, the investigation of insurance

claims, national disaster planning and preparedness, homeland security, and the advancement of technology.”¹⁰

The NAS report identified several overarching challenges facing the forensic science community. First, it identified a conflict of interest concern, spurred by the close relationship between forensic science service providers and law enforcement departments. For example, in many states, crime labs doing forensic analysis are actually housed inside law enforcement facilities and are part of the law enforcement system, rather than being independent research facilities.¹¹

The NAS report also identified two other systemic issues. The first was the disparity in forensic science operations across federal, state, and municipal levels of government.¹² In particular, forensic science laboratories largely function at the state and local levels — jurisdictions which are usually underfunded.¹³ This lack of funding causes disparities in training, accreditation, and oversight systems.¹⁴ For example, the lack of funding means some forensic science service providers are unable to pay accreditation fees, much less establish the robust oversight systems necessary to comply with the standard practices required by accreditation agencies.

The second problem was the breadth of forensic science, which is an umbrella term that captures a wide range of disciplines.¹⁵ The report found a clear division between disciplines performed in forensic laboratories and those performed at crime scenes. For example, whereas disciplines in the former category have more structured, bureaucratic leadership, education and training requirements, those in the latter are often based on “apprentice-type” training.¹⁶ This contributes to substantial variation in the level of scientific development and existing accountability measures, which makes it difficult to create uniform oversight systems.

The NAS report provided thirteen recommendations. These recommendations identified two broad problems: (1)

“basic validity problems” regarding the public’s knowledge of the accuracy of certain techniques even under ideal conditions, and (2) “environmental problems” that undermine the ability to conduct analysis in ideal conditions.¹⁷ To address “basic validity problems,” the report recommended providing more funding for research on the validity of forensic methods and maximizing forensic science service providers’ independence from law enforcement. As for “environmental problems,” recommendations included improving standardization, mandating accreditation requirements, implementing routine quality assurance procedures, creating a national code of ethics for all forensic science disciplines, and attracting students to study forensic science in multidisciplinary fields.¹⁸

To address both these categories of problems, the report’s central recommendation was to create a national, independent entity called the National Institute of Forensic Science (NIFS) to oversee the forensic science industry.¹⁹ Unfortunately, this proposal never gained traction because of special interests that opposed forensic science oversight.²⁰ Although, in 2013, a National Commission on Forensic Science was created to provide recommendations to the Department of Justice, by 2017 it was disbanded, when then-Attorney General Jeff Sessions decided to return forensic science oversight to the Department of Justice.²¹

Before and after the NAS report, forensic science service providers in Michigan were plagued by similar scandals as those that prompted the report. In 2008, for example, the Detroit Police Lab was closed after an audit discovered serious errors across numerous cases involving firearms, which raised the possibility of wrongful convictions and led to civil lawsuits valued in the hundreds of millions of dollars.²² In 2009, over 11,000 untested rape kits, including kits from 1984 to 2009, were found in a Detroit Police Department’s storage room.²³ In 2016, it was revealed that the Michigan State Police incorrectly analyzed

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Forensic Science *(from page 5)*

more than 4,000 items in alcohol-related cases across the state.²⁴ And even after the creation of the Task Force, the Michigan State Police, in August 2022, issued a statement acknowledging that about 3,250 laboratory reports on THC toxicology samples used in prosecutions could be inaccurate due to technical issues that spanned as far back as 2019.²⁵

The Task Force's General Recommendations

In the wake of some of these scandals, and in light of the failure to make progress at the national level, Governor Whitmer convened the Michigan Task Force, which consists of forensic science practitioners, academics, the Michigan State Police, judges, prosecutors, and defense attorneys.²⁶ This diverse range of experience is evenly distributed across three subcommittees that focus on: (1) proposing legislation to establish an oversight body called the Michigan Forensic Science Statewide Body (FSSB), (2) determining standards and best practices for different forensic science disciplines, and (3) discussing how these reform efforts will be situated in relation to existing legal systems.²⁷

On December 21, 2022, the Task Force issued its final “Report and Recommendations.” The Task Force’s recommendations can be broadly grouped into four categories. The first is ensuring scientific reliability by requiring mandatory accreditation of forensic science service providers, the registration of forensic science experts, establishing forensic science practitioner training requirements, implementing quality control practices, and making appropriations to enable best practices in forensic science.

The second is expanding awareness of the pitfalls of forensic science in order to improve the public’s ability to file complaints. The Task Force proposes doing so by establishing model policies for disclosing professional negligence and misconduct, providing forensic science education and information, and requiring education for attorneys and judges on forensic science. The third is promoting independence of forensic science work from law enforcement agencies.

The fourth category of recommendations were aimed at the judiciary; the Task Force has recommended that the judiciary consider amending Michigan Rule of Evidence 702 in accordance with the proposed amendments for Federal Rule of Evidence 702 (to confirm the preponderance of the evidence standard for admitting expert testimony). It also made other suggestions, including to eliminate some jury instructions around forensic evidence introduction, and to separate DNA evidence from other forensic science evidence in the context of what is discoverable.²⁸ The Task Force is now consulting with the Governor’s Office and the Legislature on next steps as a result of these recommendations.

Forensic Science Complaint Reporting System

Among the wide range of reforms the Task Force has discussed, one of the most promising, though, is for the proposed FSSB to establish a system in which the public can file complaints of professional negligence and misconduct regarding forensic testing, which could trigger independent investigations.

Establishing a complaint reporting system to capture instances of professional negligence and misconduct by forensic science service providers is essential because the same peer review mechanisms that assure quality in academic science do not necessarily work when it comes to forensic science. As noted above, whereas academic science operates in a “prestige

economy,” in which there are reputational rewards for conducting peer review, forensic science service providers operate in a bureaucratic structure in which the reports are “not cited, but merely consumed and then discarded by the criminal justice system.”²⁹ Consequently, self-regulation by peer review is likely unsustainable. Instead, it is necessary to create a reporting system to solicit complaints of alleged professional negligence or misconduct.

In considering the implementation of a complaint reporting and investigation system, the Task Force drew inspiration from the Texas Forensic Science Commission (FSC), which was established in 2005. Its complaint reporting system has been largely successful – according to the Texas FSC’s 2021 annual report, the FSC has, since its creation, received a total of 334 external complaints and 152 internal self-disclosures by forensic science service providers.³⁰ Under the Texas FSC’s statute and regulations, the FSC requires all forensic science service providers to report professional negligence and misconduct where it would “substantially affect” the integrity primarily of the results of a forensic analysis.³¹ Although these reports can trigger investigations, the Texas FSC can also, in some instances, authorize investigations even in the absence of a complaint.³² Additionally, the Texas FSC likely has the ability to initiate “statewide reviews of certain cases or classes of forensic casework.”³³ The Michigan Task Force has considered adopting these general features of the Texas FSC’s complaint reporting and investigation system.

Conclusion

Although science and law are both disciplines concerned with uncovering the truth, they can be understood as disciplines with diametrically opposed methodologies and aims. Whereas the laboratory is a place where it is customary to begin with the facts, the courtroom is a place where advocates often start with their theories. And whereas scientific progress is an unending pursuit of knowledge, the law is concerned with the finality of judgments. Consequently, there are instances of judgments rendered on the basis of scientific analyses, particularly forensic scientific analysis, that are later discovered to be incorrect. Defendants in the criminal justice system bear the brunt of this unfortunate reality.

But reforms at the national level and in states such as Texas have shown that reform is possible. Michigan’s latest efforts through the Task Force are part of this broader movement towards addressing the longstanding problems of forensic science. While we must recognize forensic science is susceptible to abuse, it is also a powerful tool that can ensure more accurate police investigations, as well as secure exonerations. Grappling with the scientific and systemic reforms required to ensure proper use of forensic science is also the first step towards addressing other issues, such as cognitive bias within the forensic science community and the roles that related social science fields, such as psychology, might play in our criminal justice systems. Now that the Task Force has issued its final recommendations, it is up to the Legislature and the judiciary to take the next steps toward implementation.

¹ Executive Order No. 2020-4;

<https://www.michigan.gov/whitmer/Appointments/oma/all/4/task-force-on-forensic-science>.

² <https://innocenceproject.org/forensic-science-problems-and-solutions/>.

³ See generally N.J. Schweitzer & Michael J. Saks, *The CSI Effect: Popular Fiction About Forensic Science Affects the Public’s Expectations About Real Forensic Science*, 47 *Jurimetrics J.* 357 (2007); see also *The Courts, the NAS, and the Future of Forensic Science*, at 1209.

⁴ <https://www.nytimes.com/2015/04/21/opinion/fix-the-flaws-in-forensic-science.html>.

⁵ <https://www.nytimes.com/2015/04/21/opinion/fix-the-flaws-in-forensic-science.html>; <https://innocenceproject.org/about/>.

⁶ https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2186718.

⁷ <https://www.nytimes.com/2006/11/30/us/us-will-pay-2-million-to-lawyer-wrongly-jailed.html>

⁸ I will refer to the 2009 report as “the NAS report.”

⁹ <https://innocenceproject.org/lasting-impact-of-2009-nas-report/>.

¹⁰ NAS report, xix.

¹¹ See NAS Report, 7–14 (discussing the political realities that undermine the potential for separating forensic science laboratories from law enforcement departments).

¹² NAS Report, 5.

¹³ NAS Report, 6.

¹⁴ NAS Report, 6.

¹⁵ NAS Report, 6–7.

¹⁶ NAS Report, 7; *Improving Forensic Science Through State Oversight*, at 231.

¹⁷ *NAS/NRC Report on Forensic Science*, at 233.

¹⁸ NAS Report, 19–33.

¹⁹ NAS Report, 19.

²⁰ *Keynote Address by Judge Jed Rakoff*, at 479.

²¹ <https://www.nytimes.com/2017/04/11/opinion/sessions-is-wrong-to-take-science-out-of-forensic-science.html> (citing Session’s skepticism over the NAS’s 2009 report); *Keynote Address by Judge Jed Rakoff*, at 479.

²² <https://www.nytimes.com/2008/09/26/us/26detroit.html> (noting that the Michigan State Police operates seven laboratories).

²³ <https://wdet.org/2021/09/13/evidence-from-massive-rape-kit-backlog-yields-more-than-200-convictions-lasting-policy-changes/>.

²⁴ <https://www.freep.com/story/news/local/michigan/wayne/2016/08/22/alcohol-cases-analyzed-msp/89119250/>.

²⁵ <https://www.michigan.gov/mspnewsroom/news-releases/2022/08/31/state-police-halts-the-toxicology-testing>; <https://www.usnews.com/news/best-states/michigan/articles/2022-08-31/state-police-3-250-the-lab-reports-may-be-inaccurate>.

²⁶ <https://www.michigan.gov/whitmer/Appointments/oma/all/4/task-force-on-forensic-science>.

²⁷ <https://www.michigan.gov/msp/divisions/forensic-science/forensic-science-task-force>.

²⁸ *Id.*

²⁹ *Who Will Regulate American Forensic Science*, at 569–70. For a more extensive overview examining potential for peer review in forensic science, see *Peer Review in Forensic Science*.

³⁰ Texas FSC Annual Report 2021, at 6.

³¹ Texas Statute § 4(a)(3).

³² Texas Statute § 4(a-1).

³³ NIJ report, 28.

Barbara J. Rom Award Luncheon and Historical Society Annual Meeting

On November 16, the Chapter hosted the annual Edward H. Rakow and Barbara J. Rom Awards Luncheon in conjunction with the annual meeting of the Historical Society for the U.S. District Court for the Eastern District of Michigan. The event was held at the Atheneum Hotel.

Chapter President Jennifer Newby began the event by welcoming the large crowd in attendance. This included several District, Bankruptcy, and Magistrate Judges from the Eastern District of Michigan, the award recipients and their guests, other Chapter members, and guest keynote speaker Peter J. Hammer. The event most likely set a record for welcoming the youngest guest to a Chapter program luncheon: the granddaughter of Rom Award recipient Julie B. Teicher. It was an honor to have Barbara Rom in attendance, as well as several prior recipients of the Rom Award: Judy O’Neill (2012); Steve Howell (2014); Earle Erman (2018); and Stuart Gold (2020).

After President Newby’s welcome, the Honorable Daniel S. Opperman, Chief Judge of the United States Bankruptcy Court for the Eastern District of Michigan, introduced the Barbara J. Rom Award for Bankruptcy Excellence. Erman then presented this year’s award to Teicher. Both are current shareholders at Maddin Hauser Roth & Heller, P.C., and were previous partners at Erman, Teicher, Zucker & Freedman, P.C. Teicher serves in the firm’s Bankruptcy, Restructuring, and Debtor-Creditor Rights group, as well as the Financial Services and Real Property Litigation group. She concentrates her practice on business-related insolvency and bankruptcy matters. She is also a Fellow of the American College of Bankruptcy, has been recognized in the Best Lawyers in America since 2010, and has twice received Lawyer of the Year awards locally.

Susan Fairchild, Acting Chair of the Federal Bar Foundation of Detroit and an Assistant United States Attorney, next presented the Rakow Award to the Wayne State University Business and Community Law Clinic. Receiving the award on behalf of the clinic was Maya Watson, its director and an assistant clinical professor at Wayne State University Law School. The clinic offers free transactional legal services to nonprofit organizations, social enterprises, and under-resourced entrepreneurs and small businesses in and around Detroit. Law students, under the direction of faculty members, assume primary responsibility for the cases and work directly with organizational clients to address their transactional legal needs.

Following the award presentations, Matthew J. Lund, a partner at Troutman Pepper and the president of the Court

(continued on page 8)



Rom Award recipient Julie B. Teicher.

Photo by Melinda Herrmann



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Rom Award *(from page 7)*

Historical Society, launched the Historical Society meeting. Lund began by sharing a trailer for a documentary the Historical Society created to highlight the history of the District Court for the Eastern District of Michigan, including five significant cases heard in the court. Lund then introduced Peter J. Hammer, who provided the annual meeting address.

Hammer is a professor at Wayne State University Law School, the director of the Damon J. Keith Center for Civil Rights at the law school, and a co-author of *No Equal Justice: the Legacy of Civil Rights Icon George W. Crockett, Jr.* Through words and photographs, Hammer shared Crockett's background and legacy as a lawyer committed to economic and social justice generally, and workers' rights particularly. Hammer described how Crockett stood against McCarthyism and defended individuals accused of being Communists and Communist sympathizers, which at one point led to Crockett being sentenced to four months in jail for contempt of court. Crockett eventually served as a judge in Detroit's Recorder's Court and as a member of the United States House of Representatives, where he continued to fight for justice. The Chapter is grateful to Professor Hammer for sharing Crockett's story.

Wade McCree Luncheon By Carsten Parmenter

The Chapter hosted its annual Wade Hampton McCree Jr. Award Luncheon for the Advancement of Social Justice on February 8, 2023, at the Atheneum Suites Hotel in Detroit. The nationally recognized McCree Award is given annually to an individual or organization who has made significant contributions to the advancement of social justice.

The Chapter was thrilled to be joined by members of the McCree family: Genet Barthwell, Geoffrey Craig, James McCree, Katrina McCree, and Wade McCree. Many judges were also in attendance, including: Chief Judge Sean F. Cox, Judges Terrance G. Berg, Gershwin A. Drain, Denise Page Hood, Shalina D. Kumar, and Victoria A. Roberts, Magistrate Judges Kimberly G. Altman and Elizabeth A. Stafford, and Bankruptcy Judge Lisa S. Gretchko.

Chapter President Jennifer Newby launched the event with opening remarks and introduced keynote speaker Ken Daniels, co-founder of the Jamie Daniels Foundation and the lead announcer of the Detroit Red Wings. Daniels, in his 26th season as the voice of the Red Wings, is an award-winning broadcaster. The Detroit Free Press named Daniels the Top Sportscaster in

Michigan in 2013, and he received the Ty Tyson Award for sports broadcasting excellence from Detroit Sports Media in 2010. Daniels has twice been named the Michigan Sportscaster of the Year by the National Sportscasters and Sportswriters Association.

In the spirit of the McCree Award, Daniels' keynote address focused on his passion for social justice. Daniels co-founded the Jamie Daniels Foundation in memory of his son. Daniels and the foundation dedicate their work to providing support for teens, young adults, and families struggling with substance use disorder and to ending the shame and stigma surrounding addiction. Daniels encouraged the audience to help end the stigma with empathy and by providing direction to addicts, in addition to hope.

After Daniels' address, Scott Fishwick, the chair of the McCree Award Committee, introduced the award and welcomed ACLU of Michigan Legal Director Dan Korobkin, who introduced the 2023 McCree Award recipient, Amanda Alexander.

Alexander is the founder and executive director of the Detroit Justice Center. She is a racial justice lawyer and historian who works alongside community-based movements to end incarceration and build thriving and inclusive cities. To that end, Alexander spoke about the importance of building a Detroit with everyone in mind.

Alexander hails from Michigan and has worked at the intersection of racial justice and community development in Detroit, New York, and South Africa for more than two decades.

She is a Senior Research Scholar at the University of Michigan Law School, where she has taught Law and Social Movements and was an attorney in the Child Advocacy Clinic. She launched the Prison and Family Justice Project at the law school to provide legal representation to incarcerated parents and advocate for families divided by the prison and foster care systems.

Alexander's work has been widely recognized. In 2019-20, Alexander was appointed by Governor Gretchen Whitmer to the State's joint task force on jail and

pretrial incarceration to develop strategies to reduce Michigan's jail population. Alexander has received numerous awards and been published in newspapers and journals across the country. Since Alexander founded the Detroit Justice Center in 2018, the Center has provided life-changing legal services to more than 4,000 people, supported the launch of nine worker-owned co-ops and three community land trusts, built restorative justice infrastructure, and effected systemic change to foster true community safety.

While accepting her award, Alexander emphasized focusing not only on what needs to end in our society but on what needs to be built up to build truly just communities. She asked the



Edward H. Rakow and Barbara J. Rom Awards Luncheon attendees, including one of the youngest, Rom Award recipient Julie B. Teicher's granddaughter.

Photo by Melinda Herrmann.



Wade McCree attendees.

Photo by Melinda Herrmann.

audience to worry less about winning the next race and more about implementing generational change.

The McCree Award is named for Judge Wade Hampton McCree Jr., who began his legal career in Detroit after graduating from Harvard Law School. McCree served on the Wayne County Circuit Court and was appointed by President John F. Kennedy to the U.S. District Court in 1961. In 1966, President Lyndon B. Johnson appointed McCree to the U.S. Court of Appeals for the Sixth Circuit. McCree accepted an appointment to U.S. Solicitor General by President Jimmy Carter in 1977. After serving as Solicitor General, McCree taught at the University of Michigan Law School until his death in 1987. Judge McCree was renowned for his passion for education, service to the legal profession, and service to the Detroit community.

47th Annual New Lawyers' Seminar

By Christine Dowhan-Bailey, Catherine Wenger,
Jeff May, Lauren Mandel, Grant Gilezan,
Hussein Jaward

January 24 and 25 marked the Chapter's 47th annual New Lawyers' Seminar. After two years of a shortened, virtual program due to COVID, the seminar at last returned to in-person, full-day programming. Almost 70 new and newer Michigan attorneys attended. The Detroit Room of the Theodore Levin United States District Courthouse provided a grand setting for the seminar.

The first day focused on practice in federal court. Chief Judge Sean F. Cox began the day with a warm welcome to the attendees. Victoria Lung, an Operations Analyst with the court, then spoke about the ins and outs of using the ECF system, and introduced the new lawyers to PACER. Rich Hewlett from Varnum next presented an "Anatomy of a Civil Case," providing an extensive overview of a case's progression and explaining differences between state and federal court practice.

Richard Loury, the District Court Pro Se Case Administrator (E.D. Mich.), Nolan Moody from Dickson Wright, and Chapter President Jennifer Newby then presented on pro bono practice. The panel highlighted some of the many pro bono opportunities available to lawyers, including current opportunities through the district court, and the benefit such work offers to the individuals who receive services and the lawyers who provide them. Magistrate Judge Anthony P. Patti and Angela Jackson from Hooper Hathaway then discussed discovery practice in federal court, offering their different perspectives on discovery, but their shared belief in civility practices.

District Judges Shalina D. Kumar and Matthew F. Leitman, and Wayne County Circuit Court Judge Martha M. Snow then discussed their best practice tips for motion practice in a lively and entertaining panel moderated by Lauren Mandel, career law clerk to District Judge Linda V. Parker. At the conclusion of the panel, the judges were joined by Chief Judge Cox and District Judges Victoria A. Roberts, Laurie J. Michelson, Linda

V. Parker, Terrence G. Berg, Bernard A. Friedman, and Denise Page Hood, and Magistrate Judge Patti for a meet and greet lunch with attendees. To break the ice, all of the judges were asked to answer: what is your most embarrassing moment from practice as an attorney or as a judge? Although their answers are under seal and will not be published in this report, it is clear these judicial officers are not afraid to laugh at their own expense. Seminar participants welcomed the personal interaction with the judges. Attendee Daniel Baum of Jones Day shared that "nothing will lessen your nerves more for your first appearance in federal court than hearing directly from our EDMI judges about their most embarrassing stories from their time in practice or on the bench. I left the seminar with the lesson—among many others—that judges, too, are people."

After lunch, Charissa Potts from Freedom Law and Paul Hage from Taft, Stettinius & Hollister discussed the essentials of practicing bankruptcy law. Attendees next received "Do's and Don'ts" for practicing in federal district court from Rasha Alzahabi (career law clerk to District Judge Nancy G. Edmunds), Karen Benjamin (career law clerk to District Judge Shalina D. Kumar), Eric Lee (then career law clerk to District Judge Laurie J. Michelson and now with Circuit Judge

Stephanie Dawkins Davis), and Lauren Mandel (career law clerk to District Judge Linda V. Parker). The day's final presentation was put on by several court reporters from the court: Andrea Wabeke, Shacara Mapp, Christin Russell, and Leann Lizza. They provided useful tips to new lawyers for making a "clean" record and demonstrated real-time reporting by transcribing their presentation, along with questions, comments, and other noises from the audience on screens throughout the room.

The federal day closed with Chief Judge Cox presiding over a very special swearing-in ceremony held in the Million Dollar Courtroom. Before court was opened, Judicial Assistant Barbara Radke provided an informative tour of this special courtroom. She explained that it is one of the original seven courtrooms of the old 1890 federal building. Saved from demolition and reassembled on the 7th floor, this unique piece of history features 30 species of marble as well as a bench carved from East Indian mahogany. NLS Co-Chair, Jeffrey May from Bodman, moved for the admission of our new attorneys with a thoughtful tribute to the special perseverance it took for them to complete their law studies during the pandemic. The thirty-seven seminar participants who Chief Judge Cox swore in to the District Court for the Eastern District of Michigan will hopefully have an opportunity to litigate a case in this historic location.

The second day of the seminar focused on practice in the State courts. The storm that blanketed Metro-Detroit with more than seven inches of snow gave speakers and attendees an opportunity to demonstrate the agility and flexibility learned during Covid as the events moved to a Zoom format on only a few hours' notice. The day began with a welcome from Coleman Luther Potts, Chairperson of the Young Lawyers Section of the State Bar of Michigan, which co-sponsors the seminar. Potts talked about the ways new lawyers can become involved in bar



Swearing in at the New Lawyers' Seminar

Photo by Lauren Mandel.

(continued on page 10)

New Lawyers' *(from page 9)*

activities, including on his own committee. Next, long-time NLS speaker Michael Goetz, Grievance Administrator for Michigan's Attorney Grievance Commission, counseled the new lawyers on how to avoid a grievance and best practices on how to respond to a grievance if one is filed. State Bar President James W. Heath was inspirational and discussed using a legal career to help others.

The remaining presenters provided practical pointers from the trivial to the sublime in various substantive areas of the law such as: how to screen a case or determine its settlement value, how to protect yourself from client claims, when to waive (or not) a preliminary examination, how to use an administrative procedure to get "free" discovery, and even which table to sit at in the courtroom. Speakers in substantive areas included: Todd Flood from the Law Offices of Todd Flood (criminal law); Erin Bowen-Welch from Dawda Mann (real property); Cathrine Wenger of La-Z-Boy Inc. (employment law); Peter Kupelian from Clark Hill (ADR); Lawrence Pepper of the Lawrence S. Pepper Law Office (probate), Dean Googasian of The Googasian Firm (personal injury), Kristina Billowus, Assistant Director of Career Services at Michigan State University College of Law (domestic relations); and Jessica Super of Miller Cohen (workers compensation).

According to seminar attendees, the 47th annual seminar was a success. Baum offered: "Law school doesn't teach you the ins and outs of how to practice law. The New Lawyers' Seminar does." Laura Demarco from Fraser Trebilcock shared that the seminar "offered the unique opportunity to learn from a number of individuals in the legal world" and that "[n]etworking with judges, clerks, peers, experienced attorneys, and court staff is an unmatched experience that offers unique professional growth for all new lawyers."

The NLS committee (Christine Dowhan-Bailey, Grant Gilezan, Hussein Jaward, Lauren Mandel, Jeff May, and Cathrine Wenger) is grateful to this year's speakers, most of whom have offered their time to the seminar year after year. The committee also thanks the staff of the District Court for the Eastern District of Michigan (Crystal Flood, Josh Matta and his IT staff, and Julie Owens) who helped the seminar run smoothly. Without the tremendous creativity and hard work of the Chapter's Executive Director Mindy Herrmann, the 47th NLS would not have been the success that it was.

Civil Rights Étouffée was Delish!

By Robin Wagner*

The FBA Civil Rights Section once again took to New Orleans to put on a spicy and savory stew of cutting edge panels related to a wide variety of topics in civil rights law. On February 2-3, 2023, over 100 practitioners from across the country gathered first at the courthouse of the Eastern District of Louisiana for three "Nuts & Bolts" sessions on Section 1983 litigation aimed at newer attorneys, and then at the New Orleans Jazz &



New Orleans musicians Johnny Sansone and John Fohl provide the perfect "keynote" during a lunch of jambalaya, étouffée, catfish, rice & beans and other NOLA favorites.

Photo by Zachary Buckner.

18 other chapters across the country, along with the Judiciary and Young Lawyers Divisions of the FBA, to sponsor this event. Sponsors were given free registrations for several members, and the sponsorship funds allowed for over 100 federal law clerks to participate at no cost.

Heritage Foundation for a full-day program ranging from qualified immunity to the Post-Cummings landscape for remedies and relief in ADA cases, and from e-discovery issues unique to civil rights cases to trauma-informed lawyering in civil lawsuits involving sexual assault. Another 200 practitioners participated online in the program.

This event was the fourth biannual Civil Rights Étouffée, as the program is called, and the Eastern District of Michigan Chapter joined

Highlights from day one included important insights on preparing a plaintiff for deposition, and strategies for using discovery as a way to gain an advantage against the other side, "like always be on top of dates and requirements so that the other side feels the pressure," in addition to how to think through initial pleadings to avoid 12(b)(6) motions. This set of introductory topics to Section 1983 was new to the 2023 Civil Rights Étouffée, and we will be looking to bring a version of the program on the road to Detroit

and other cities. Newer attorneys often get their first significant litigation experience on pro se prisoner cases, and such a program would be a great way for FBA chapters and their associated U.S. District Courts to gather and build expertise on an important aspect of federal dockets. (If anyone reading this is interested in helping us produce such a program here in the Eastern District of Michigan, contact me!)

The second day featured ten programs on a broader set of topics. Stand-out sessions included David Gersten, Acting Immigration Ombudsman for the Department of Homeland Security, Mark Fleming of the National Immigrant Justice Center, and Jeffrey Feinbloom, a highly regarded private immigration attorney in New York, discussing the civil rights issues arising out of the civil immigration detention system. Meanwhile, Jonathan Moore of Beldock, Levine & Hoffman, who represented the family of Eric Garner as well as the "Central Park 5" in their wrongful conviction proceedings, and who was one of the architects of the important "stop and frisk" litigation in New York, discussed cutting edge litigation bringing Section 504 of the Rehabilitation Act and the ADA into police misconduct and excessive forces cases involving persons with mental health



A scene from the Civil Rights Étouffée Program.

Photo by Zachary Buckner.

disabilities. How to choose between these two programs at the same time?!

The plenary sessions from the second day were particularly valuable. Our own Megan Bonanni of Pitt McGehee Palmer Bonanni & Rivers organized a panel on trauma-informed lawyering that addressed ethics and professionalism issues that arise in civil lawsuits arising from sexual assault and violence. Her panel also featured Kim Dougherty from Boston-based Justice Law Collaborative, co-counsel on the USA Gymnastics cases along with Olympic Bronze Medalist and now lawyer Tasha Schwikert, who was a Nassar victim, and forensic psychologist Victor Petreca, who works extensively with survivors of sexual abuse and other trauma. Participants loved hearing from both a former plaintiff and the trauma counselor and many agreed that this topic “should be required training for lawyers.”

The morning’s plenary session featured ten attorneys who were ordered to consolidate (for discovery and mediation) their related cases involving claims against the New York City Police Department alleging mistreatment of protesters during the Summer 2020 George Floyd demonstrations. The panelists discussed how they have come to form a team, took on different roles for themselves within the litigation, and navigated the challenges of their duties to their individual clients in the process.

And, finally, what would a fantastic law conference be without a show-stopping keynote speaker? Well, the Civil Rights Étouffée is what it would be. Because instead of a keynote, the lunch break may have stolen the show with a performance by NOLA legends Johnny Sansone and John Fohl, as participants dined on a true NOLA feast of jambalaya, shrimp étouffée (of course), corn bread, and beans and rice.

Our Chapter can be proud to have contributed to such a vibrant and meaningful gathering, and let’s see if we can get more members down to NOLA in early 2025.

**Robin Wagner is a partner at Pitt McGehee Palmer Bonanni & Rivers and serves on the Civil Rights Committee and is Immediate Past Chair of the FBA Civil Rights Section.*

Classroom to Courtroom

By Amir El-Aswad

On January 17, 2023, the Diversity Committee hosted its annual Classroom-to-Courtroom event, during which law students across Michigan and Ohio visited the Theodore Levin U.S. Courthouse in Detroit to observe hearings, proceedings, and arguments before the federal judiciary. After Chief Judge Cox kicked off the event with opening remarks, the students attended a supervised release hearing before Judge Goldsmith as well as a hearing on a motion for summary judgment before Judge Berg. The students observed two more hearings that morning: a probation violation hearing before Chief Judge Cox as well as a criminal sentencing hearing before Judge Parker.

After the proceedings concluded, the Diversity Committee convened a panel of three excellent litigators from diverse backgrounds and practices to share their lived experiences in the profession. Moderated by the Committee’s co-director, Amir El-Aswad, panelists Jihan Williams (assistant United States attorney), Daniel Dena (assistant federal defender), and Leighton Watson (associate at Jones Day), discussed their inspiration for pursuing careers in litigation, the struggles and advantages they faced related to their diverse backgrounds, and practical advice for students aspiring to pursue similar careers in the profession.

The event was warmly received, and the Diversity Committee looks forward to hosting more students next year!



Classroom to Courtroom.

Photo by the FBA Chapter Diversity Committee.

Calendar of Events

April

April 11

Bankruptcy Committee Presents:
Does the Department of Justice’s New Student Loan Guidance Change Anything? A Discussion
with the U.S. Attorney’s Office and Debtor’s Counsel
12:00 pm - 1:30 pm
FREE

April 18

Computer Basics Tips & Tricks PART I
Join us for an informative Zoom class for computer tips and tricks, techniques and short-cuts for use in your digital world to make you more productive and effective.
12:00 pm - 1:00 pm
MEMBERS: \$0 & NON-MEMBERS/GUESTS: \$15

April 19

2023 Leonard R. Gilman Award Luncheon
12:00 pm - 1:00 pm
MEMBERS: \$45 & NON-MEMBERS/GUESTS: \$60

May

May 17

Meet the Judges
Join us on Wednesday, May 17th to meet our District’s newest judges – Judge Shalina Kumar, Judge F. Kay Behm, and Judge Jonathan J.C. Grey
12:00 pm - 1:30 pm

June

June 7

Annual Dinner
Save the Date!
5:00 pm - 8:00 pm

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