INTER ALIA
the Newsletter of the
Northern District of Ohio Chapter of the Federal Bar Association

The Sounds of Settlement

(With apologies to Simon and Garfunkel)

by Judge Jack Zouhary

As a former trial lawyer, I had the opportunity to witness firsthand the settlement styles of various federal and state court judges. These styles ran the gamut from hands off (Fleetwood Mac, *Go Your Own Way*) to activist (Frank Sinatra, *My Way*). Each judge, like each trial lawyer, has certain strengths. And just as there is no one winning courtroom style, there is no one winning judicial style.

My personal philosophy is that the jury system works and should be encouraged, but also that before a party goes to trial, that party should understand the stakes. This means the case should be fairly evaluated well before you arrive at the courtroom. If the dispute is over money, are you going to trial over $1,000 or $1 million (Dire Straits, *Money for Nothing*)? And some cases should be tried because the parties believe there is an important principle, or because it is the kind of dispute that needs a track record of jury verdicts, or because of legitimate and divergent evaluations.

Here is how it works for me (ABBA, *The Name of the Game*).

I review each complaint shortly after it is filed. I then make a determination based on the kind of case and the lawyers involved whether it makes sense to discuss settlement at the Case Management Conference (CMC). Sometimes this involves my staff placing a phone call to the lawyers to determine if in fact the parties are or can be prepared to discuss settlement (Bee Gees, *I've Gotta Get a Message to You*). If so, then our order requires an immediate exchange of Rule 26(a) disclosures and we set aside extra time for the conference. We also add a line to the CMC order: Counsel and parties shall attend in person and be prepared to discuss settlement (Beatles, *Come Together*). If a party representative resides far away and counsel advises that it will be easier to settle (saving travel expense) if the representative is available by phone, then attendance is excused.

Even if the case does not settle at the CMC, it is helpful for each side to hear the other's viewpoint. Sometimes there is a consensus that targeted discovery may enable the parties to reach a preliminary case evaluation, before everyone dresses in full combat gear (The Beatles, *We Can Work It Out*). If so, then we set another settlement status before the time and expense of full discovery and the filing of dispositive motions. This approach has met with success and is particularly liked by the clients.

Sometimes the parties prefer to file dispositive motions before a settlement conference; sometimes they prefer I not rule, with a decision hanging over their heads while they try to negotiate a settlement; and sometimes the parties insist on a decision. Of course, at times it is best for the court to simply get out of the way and let the parties work it out themselves (Ray Charles, *Hit the Road Jack*). Again, the lawyers tell me which avenue works best for that particular case.

Meeting the clients at the conferences is not only enjoyable, it is very helpful to have the parties sit together around the table. This setting allows them the opportunity to be heard— to have their day in court. I don't profess to have any special settlement expertise. In fact, I often tell the parties that the only advantage to having a settlement conference with me is that I am cheap— free! (ABBA, *Take a Chance on Me*).

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Judge Jack Zouhary
is a a district judge for the United States District Court, Northern District of Ohio.

Summer 2009

President's Podium

By Ellen Toth

As I attend Northern District of Ohio FBA Chapter events and programs, I realize that we are having success in reaching our goals of outreach, communication and inclusion in our Chapter. To try to achieve these aspirations, we launched new programs, empowered Chapter committees to take action and worked to increase our Chapter's activities and visibility throughout all of the Northern District of Ohio.

Recently I attended our fifth Members-Only Networking Breakfast, which was hosted by Tim Collins and Tony LaCerva at Collins & Scanlon. If you haven't yet participated in these informal, early morning get-togethers, I recommend them highly. We limit attendance to 25 members and give everyone the opportunity to talk about their practices, hot legal issues or whatever else is on their minds. It is a great opportunity to meet other federal practitioners in different practice areas and in different types and sizes of firms, companies or agencies. The brain child of Board Member Tony Vegh, these quarterly breakfasts are a favorite event for many of our members.

You will also see that our Chapter newsletter has many new features in this issue, under the leadership of Steve Jett and Rocco Debitetto. We are pleased to add new columns by Chief District Court Judge Carr and Bankruptcy Clerk of Courts Ken Hirz, as well as an insightful article by Judge Zouhary on settlement. District Clerk of Court Geri Smith continues to update all of us on what is happening in the District Court and District Court Law Clerk Lori Riga has contributed an article on a case involving Ohio's lethal injection protocol. We're also including a "Courtoon" for the first time by David E. Mills. Please send us your suggestions and comments on our newsletter, and consider writing an article for the next edition.

Our Chapter now has nine active committees, which hold periodic meetings, planning events and make recommendations to the Board of Directors. The committees are: Board Development, Continuing Legal Education, Membership, National Relations, Programming, Nominations and Elections, Publicity and Public Relations, Newsletter and Younger Lawyers. I want to give special thanks to our CLE Committee and its chair, Kip Bollin, for presenting an excellent selection of CLEs this year, including the New Lawyer Training Curriculum series. I would also like to thank the Membership Committee, chaired by Diana Thimmig, for its heroic efforts in increasing our Chapter membership by 38 percent so far this fiscal year and reaching out to the law schools within the Northern District to encourage student participation in our Chapter.

Our efforts to offer quality programming and events in all geographic areas within the Northern District of Ohio continue. We co-sponsored a Brown Bag Luncheon in Akron with District Judge Sara Lioi. We had an excellent turnout in Toledo for the Advanced Federal Practice seminar on June 5, which included a panel discussion with Judge Katz and Judge Zouhary on multidistrict litigation and class actions, as well as a Brown Bag Luncheon with Magistrate Judge Greg White. We're also sponsoring a Members-Only Networking Breakfast in September at Cooper & Walinski's Toledo offices. Board Member J.P. Daliman is planning a Brown Bag Luncheon in Youngstown in September to encourage federal practitioners from Mahoning, Trumbull and Columbiana counties to increase their involvement

Ellen Toth *is an attorney with Ogletree Deakins Nash Smoak & Stewart PC in Cleveland. Ms. Toth is President of the Northern District of Ohio Chapter of the FBA.*

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in our Chapter. In Cleveland, we will be sponsoring a reception for all Northern District of Ohio summer associates, externs and law clerks on July 22, hosting our Fourth Annual State of the Court Luncheon on Sept. 14, and holding the fourth installment of our 2009 New Lawyer Training Seminars on Sept.18.

We hope you will consider becoming actively involved in the Northern District of Ohio Chapter as it grows in membership and activities. Please visit our Web site at www.fba-ndohio.org or contact me at ellen.toth@ogltreedeakins.com or (216) 274-6907 if you would like to participate on an FBA committee or share any programming or other ideas.

Alien versus Creditor

Write an Article!

Members of the Northern District of Ohio Chapter of the Federal Bar Association are invited to submit an article for an upcoming issue.

If you are interested in writing an article, please contact me at (216) 706-3874 or sjett@taftlaw.com. **The deadline to receive articles for the Fall 2009 issue is Aug. 28, 2009.**

Stephen H. Jett
Taft Stettinius & Hollister LLP
2008-09 Newsletter Editor

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The Gavel

By Chief Judge James G. Carr

Some Comments on the Confirmation Process

There are three things in my life that I have done once and do not care to do again (whether of my own accord or not is beside the point): have a garage sale, remodel a kitchen and be confirmed by the Senate Judiciary Committee for a federal judicial appointment. For district court nominees, the confirmation process is, at best, stressful; for circuit court nominees, at best, trying and difficult; and for recent Supreme Court nominees, nasty, brutish and, most unfortunately for them and us all, far from short.

There are three things in my life that I have done once and do not care to do again (whether of my own accord or not is beside the point): have a garage sale, remodel a kitchen and be confirmed by the Senate Judiciary Committee for a federal judicial appointment.

Even before being nominated Judge Sonia Sotomayer was the target of allegations that she has neither the intelligence nor temperament required of a Supreme Court Justice. From the seeds of a handful of anonymous sources—nourished by the Internet—has come a thicket of sharp and, for her, no doubt, stinging allegations.

Aside from the slurs of her shadowy detractors, Judge Sotomayer's critics have focused primarily on two speeches from 2001 and 2005. In those speeches, Judge Sotomayer spoke with pride and feeling about herself, her outlook on life and what she and her experiences, in her view, bring to the job of judging.

Even if one were to conclude— something I eschew here— that her remarks about her being female, and, indeed, a Latina, were "poorly worded," I do not believe that her remarks, or, indeed, her heritage and gender, merit more than a passing glance during the confirmation process.

The focus—and it would be appropriate that it be a thorough and penetrating focus— should, rather, be on the corpus of her judicial work. Which, in her case, appears to be a magnum opus. Rather than trying to assess that work in toto, or even, apparently, in representative part, her most strident opponents have turned to a single opinion, now under review in the Supreme Court, in which Judge Sotomayer, joined by her panel colleagues, upheld a district court decision in favor of Hispanic New Haven firefighters.

That is, of course, but one of thousands of decisions in which she has participated and often signed her name, first as a district and lately as a circuit judge.

What matters in a judge are not the biases, or even prejudices that he or she carries around inside. All judges are human and afflicted, at least to some extent, by personal likes and dislikes.

What matters is the ability to leave biases behind when judging. To be sure, this can sometimes be difficult. There is, though, a wide and perceptible gap between judgments based on principle and those imbued with bias.

No judge can be true to the Oath or the law if he or she cannot be as unaffected by bias as successfully and thoroughly as humanly possible. Perfection, as in all human endeavors, may be unattainable. But that does not mean that a judge's personal views will pervade all, or even a small portion of what he or she does.

Observations by those who have looked at Judge Sotomayer's judicial work indicate that her decisions are remarkably free of the bias her critics claim will accompany her on the Supreme Court bench. Scotusblog studied nearly a hundred opinions involving claims of race or similar discrimination. Those looking for manifestations of bias would most likely find them there. But they would find nothing to support their claims or justify their fears.

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Judge James G. Carr *is the Chief Judge of the U.S. District Court for the Northern District of Ohio. He has served as Chief Judge since 2005 and as a judge with the district court since 1994. He previously served as a magistrate judge with the Northern District of Ohio from 1978-1994.*

District Court Clerk's Corner

By Geri M. Smith

The Honorable Peter C. Economus

The Honorable Peter C. Economus has announced his intentions to retire from regular active service as a district judge on July 3, 2009, pursuant to 28 U.S.C. 371 (b)(1), having attained the age and met the service requirements as set forth in subsection (c) of that section. We are pleased that Judge Economus plans to continue to render substantial judicial service as a senior judge.

Temporary Judgeship

The Northern District of Ohio is served by 12 judgeships, one of which is a "temporary" judgeship, originally created in 1991. The current extension of the temporary judgeship expires with the first vacancy occurring on or after Nov. 15, 2009. The Judicial Conference recommendation for a five-year extension, until 2014, has been transmitted to Congress by the Administrative Office of the U.S. Courts, as the Comprehensive Judgeship Bill. In addition, S. 193 was introduced at the beginning of this session and would extend the judgeship until 2017, or twenty-five years from its initial creation in 1991. Should there be any risk of losing the temporary judgeship, we are hopeful, that at a minimum, another one year extension of the judgeship will be sought.

Toledo Court House

A presentation of the 75 percent concept design took place to the Peer Review Board on June 19, 2009. A presentation of the 100 percent design to GSA's Public Buildings Commissioner is scheduled for late August. The Toledo judges have been developing a strategy to expedite construction funding for the courthouse, especially our schedule for construction funding has been pushed back, yet again, to 2013. Our critical short term need is for supplemental design funding to complete the construction drawings so that we can be "shovel ready" should funding from the Recovery Act become available.

Videoconferencing with BOP Milan and CCA/NEOCC Youngstown

These two facilities will soon complete the installation of rooms and equipment to support videoconferencing. We are working with each institution to obtain their Standard Operating Procedures (SOPs) so that we can adjust our procedures for scheduling videoconferences accordingly. We will be able to use these facilities for courtroom hearings (arraignments, guilty pleas), for inmate meetings with probation/pretrial officers and defense counsel, including CJA panel attorneys and the Office of the Federal Defender. More information regarding procedures and available locations for videoconferencing will be posted on the Court's Web site www.ohdn.uscourts.gov.

The Northern District of Ohio Advisory Group

The Advisory Group last met on May 21, 2009. As I've reported in the past, the Northern District of Ohio has maintained an active Advisory Group for the past 16 years, ever since the Court was named a demonstration district under the Civil Justice Reform Act. Members of the Advisory Group meet with the Court twice each year, in May and November, and are charged with bringing to the attention of the Court matters of interest to the bar and the community and to assist the Court in the implementation of Court adopted programs such as electronic filing and electronic courtrooms. Members also meet with each other throughout the year as needed. The Advisory Group is comprised of approximately 50 attorneys appointed by the Court, including representatives from the U.S. Attorney's Office, the Federal Public Defender's Office, the Federal Bar Association and each of the five law schools located within the district.

The Advisory Group is chaired by Jose Feliciano of Baker and Hostetler and has four standing committees, as well as ad hoc committees as needed. The standing committees are the Civil Rules Committee, co-chaired by Steven W. Funk of Roetzel & Andress and Dustin Rawlin of Jones Day; the Criminal Rules Committee, co-chaired by Sharon Long, Assistant U.S. Attorney, and John Pyle of Gold, Rotatori and

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***Geri M. Smith** was appointed the Clerk of Court for the U.S. District Court Northern District of Ohio on July 1, 1991, having joined the court in 1982. She serves as the chief administrative officer of the court as well as the administrative assistant to the Chief Judge. Smith is a member of the FBA-NDOC Board of Directors.*

Bankruptcy Court Clerk's Corner

By Ken Hirz

Bench-Bar Retreat

The U.S. Bankruptcy Court for the Northern District of Ohio held its fifth biennial bench-bar retreat on Friday, March 27, 2009, in Independence, Ohio. The retreat, which is an outgrowth of the court's strategic planning efforts, brought together the bankruptcy court judges, law clerks, clerk's office personnel, and more than 300 bankruptcy attorneys from the Northern District of Ohio to address common concerns shared by the court and practitioners who appear before the court. Continuing the tradition started in 2000, which was the first program of its kind in the district, the retreat focused on procedural and practice issues rather than substantive law topics. The general theme of this year's retreat was best practices, and included CLE-approved sessions on ethics, professionalism and substance abuse instruction. Throughout the court's five retreats a myriad of practice issues have now been covered, including electronic case filing, customer relations, uniform practices, complex case protocol, appellate practice, local rules, and post-BAPCPA concerns.

Chief Judge Marilyn Shea-Stonum opened the retreat with welcoming remarks that recognized the efforts of Judge Mary Ann Whipple (Toledo) and Judge Kay Woods (Youngstown) in working with the court's Attorney Constituent Group (ACG) and Bill Kurtz, Stephanie Armstrong and this author to organize the all-day program. The ACG consists of 20 attorneys appointed by the various bar associations throughout the Northern District of Ohio. The ACG assisted in planning the theme and breakout sessions held during the first half of the program. The chair of the ACG is Romi Fox, representing the Portage County Bar Association. Other members, noted by their bar association affiliation, include Peter G. Tsarnas (Akron), Bruce Comly French (Allen), Ryan K. Miltner (Auglaize), Jeffrey A. Baddeley (Cleveland), Alan M. Koschik (Cleveland), Lisa A. Vardzel (Cleveland), Ann S. Giesler (Erie), Rocco I. Debitetto (Federal), Mark L. Powers (Fulton), Jonathan P. Blakely (Geauga), Howard S. Rabb (Lake), Frederick S. Coombs III (Mahoning), Stuart L. Larsen (Stark), Chrysanthe Vassiles (Stark), Michael Dansack, Jr. (Toledo), Michael D. Buzulencia (Trumbull), Richard Schmidt (Wood), Craig Shopneck (Chapter 13 Trustee) and Lenore Kleinman (Office of the U.S. Trustee).

The educational program began with a one-hour plenary session on ethical issues moderated by Michael Dansack. Panelists included attorneys Michael Buzulencia , Bruce French (Lima), David Lake (Warren), Jerome Lemire (Jefferson) and Richard Rabb (Cleveland). This diverse panel—two case trustees, a consumer bankruptcy attorney, a domestic relations attorney, and a personal injury attorney—explored the ethical issues in establishing and maintaining the attorney-client relationship under various fact patterns, including the interrelationship of bankruptcy law with domestic relations, probate, and personal injury law.

Two one-hour concurrent breakout sessions followed the initial plenary session, one session dealing with chapter 7 and 13 matters and the other with business cases. The chapter 7 and 13 panel consisted of a debtor's attorney, Richard Nemeth (Cleveland), a chapter 13 trustee, Keith Rucinski (Akron), and an assistant United States trustee, Andrew Vara (Cleveland). The main topics for discussion were the concepts of the means test and current monthly income. Through the use of hypotheticals, the panel examined these concepts as they affect conversions, the marital adjustment, retirement issues and similar situations. The business cases session was moderated by Judge Mary Ann Whipple and included a panel of three attorneys, each focusing on a particular party's role in the chapter 11 process. Sean Malloy (Cleveland) spoke from the debtor's perspective, Marc Merklin (Akron) spoke from the creditor committee perspective, and Drew Parobek (Cleveland) presented the secured lender's perspective. Some of the issues discussed by the panel were first-day motions, executory contracts, unexpired leases and critical chapter 11 deadlines.

The morning concluded with three one-hour concurrent sessions. A session on adversary proceedings

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Kenneth J. Hirz *is the clerk of court for the U.S. Bankruptcy Court for the Northern District of Ohio.*

Supreme Court Narrows "Arranger" Liability in CERCLA Litigation

By Carter E. Strang

On May 4, 2009, the United States Supreme Court (8-1) significantly narrowed "arranger" liability in CERCLA cases. It held, in *Burlington Northern & Santa Fe Railway Co. v. United States*, that under CERCLA: 1) parties are not liable as "arrangers" under CERCLA unless an "intent to dispose" of the waste by the alleged arranger is proven, and 2) that where a "reasonable basis" exist to apportion liability, "joint and several" liability is not applicable.

Defendant Shell was found liable in the trial court as an "arranger" for the sale of a pesticide to a customer, which customer's product handling practices at its facility caused it to spill and leak into the soil and groundwater. It was assessed 6 percent liability on an allocation basis for the $8 million in clean up costs incurred by EPA. The co-defendant railroads (there were two of them) were liable as property owners of an adjacent parcel that the Shell customer leased and which became contaminated due to the customer/lessee's waste handling practices of many chemicals. They were assessed 9 percent liability. The customer had long ceased operation and was unable to pay any damages (it, then, represented an "orphan" share of liability).

The 9th Circuit upheld the "arranger " liability determination against Shell because evidence existed showing it was aware of the fact that its customer's product handling practices during transfer of it from Shell resulted in spills and leaks of the product into the environment. However, the Court reversed the trial court's allocation of damages against both Shell and the railroad defendants, holding "joint and several" liability was proper, thereby making each liable for the $8 million of the EPA's costs.

The Supreme Court held that "[b]ecause CERCLA does not specifically define what it means to 'arrang[e] for' disposal of a hazardous substance, the phrase should be given its ordinary meaning." The ordinary meaning of "arrange," it further stated, implies action directed to a specific purpose, which requires a showing that it took "intentional" steps to dispose of the substance. Here, Shell's knowledge of "minor, accidental spills" that occurred during the transfer process to the customer did not equate with the requisite "intent," particularly in light of Shell's efforts to have the customer, and other customers in general, to adopt practices designed to reduce spills and leaks.

It also held that sufficient evidence existed to support the trial court's determination that an apportionment of liability (at 9 percent), rather than joint and several liability, was proper as to the railroad defendants. Such evidence considered included information about the percentage of land leased at the site in question, the duration and term of the lease, and information about the specific contaminants, including their location, migration and remediation.

The Court's holding is most noteworthy for its "arranger" liability determination. Certainly, parties facing such liability will be better able to challenge such claims. This will be problematic for the United States and may also be problematic for other CERCLA defendants facing other types of PRP liability. Such parties will likely be looked to by the United States to cover for damages that "arranger" defendants may now be able to avoid.

Carter E. Strang *is President Elect of the Northern District of Ohio Chapter of the FBA. He is a partner in the Cleveland office of Tucker Ellis & West LLP. He is a trial lawyer who focuses on environmental, mass tort and product liability litigation. He has handled a broad range of matters in both state and federal court. He is a frequent lecturer and author regarding legal issues.*

We're Going Green!

Starting in 2010, we're "going green" in an effort to become more environmentally friendly. We will unveil our new electronic version of *Inter Alia* with the Fall 2009 issue. You will receive your Fall 2009 issue in both printed version and electronically via e-mail. All future issues will only be available electronically via e-mail and on our Web site at www.fba-ndohio.org. If you have any questions or concerns, please contact us at (877) 322-6364.

Arizona v. Gant
Or Stare Decisis v. The Fourth Amendment

By Annette G. Butler

Did you ever wish that you were a fly on the wall during the Supreme Court's case discussions? Most of us have at one time or another after reading a particularly intriguing Supreme Court Decision. I did after reading *Arizona v. Gant*.[1]

Maybe a little refresher on the precision and decorum practiced by that august body is necessary here—just to set the scene.

Most of us, especially federal practitioners, have an awareness of the tradition that is followed by the Justices when deciding cases. They all meet in the conference room adjacent to that of the Chief Justice and, after shaking hands, they sit at a long rectangular table in the order of their seniority. The Chief Justice sits at the head of the table and the discussion begins in the order of seniority beginning with the Chief Justice.[2] Despite the Justices' commitment to collegiality, sometimes there is "trouble in paradise."[3]

With those pictures in your mind, let us go on to review the discussion that ensued when the above case came to the table. But, first a little background.

Background

Chimel

The laws involving traffic stops by law enforcement agents have been frequent visitors to the U.S. Supreme Court due to the proliferation of drugs in our culture.

In 1969, the Supreme Court decided *Chimel v. California*.[4] Chimel involved the arrest of Mr. Chimel for burglarizing a coin shop. The officers involved executed the warrant at Mr. Chimel's residence, but he was not home. His wife denied the officer's entrance or the right to look around. The officers looked around anyway and found several items that were later admitted into evidence. The trial court, appeals court and Supreme Court of California all upheld Mr. Chimel's conviction even though he asserted his rights under the 4th and 14th amendments of the U.S. Constitution to have illegally obtained evidence suppressed. The Supreme Court, with only two dissenting opinions, agreed that incident to an arrest, only the person's body and immediately adjacent area are subject to a warrantless search.[5] Mr. Chimel's conviction was thereby reversed.

Belton

The Supreme Court revisited the warrantless search issue again in 1981 when it decided *New York v. Belton*.[6] The *Belton* decision extended the warrantless search to those places within a reasonable distance or under the control of the person arrested.

Mr. Belton was stopped for speeding because the officer smelled marijuana, so Mr. Belton and his passengers were directed to exit the vehicle. The officer searched the vehicle and found marijuana in Mr. Belton's zipped-up jacket pocket in the glove compartment of the automobile. Mr. Belton was arrested on the charge of possession so, as did Mr. Chimel, he asserted his rights under the 4th and 14th Amendments. This time the Supreme Court expanded the rights of law enforcement and decided that not only can officers search the glove compartment of an automobile incidental to a lawful search, but any containers whether open or closed. The rationale was that "the lawful custodial arrest justifies the infringement of any privacy interest the arrestee may have.[7] The *Belton* decision has been used as the training tool for law enforcement officers nationwide.

Thornton

Thornton v. United States just placed a dose of icing on the decisions in Chimel and Belton.[8]

Mr. Thornton, after noticing police officers nearby, parked his car and exited before the officers could approach. The officers searched Mr. Thornton's person and found drugs in his pocket. They then searched the vehicle and found a handgun under the driver's seat. Both items were admitted into evidence to convict Mr. Thornton for possession of drugs and firearms violations. Again, the Supreme Court upheld *Chimel* and *Belton* affirming that whether the arrested person was inside or outside the car, the search was not a violation of the 4th or 14th Amendment. With that background in mind we arrive at the Court's decision in A*rizona v. Gant*. And what an explosive arrival it is!

Arizona v. Gant

Mr. Gant was arrested, handcuffed and locked in the back of a patrol car. After he was safely ensconced, the officers searched his car and found cocaine in the jacket pocket that was found on the backseat of Mr. Gant's car. The jacket belonged to Mr. Gant. It might be important to note here also, that the officers, acting on a tip that a residence was being used as an illegal drug store, and without a warrant, arrived at said residence

and Mr. Gant answered the door. Mr. Gant identified himself and advised the officers that the owner of the house was due to return later. The officers left the vicinity, checked out Mr. Gant, found him to be the subject of a warrant for driving under suspension. They then returned to the house and arrested Mr. Gant who had just exited his automobile. The Arizona Supreme Court, after reviewing *Chimel* and *Belton*, decided that since Mr. Gant's rights under the 4th and 14th amendments had indeed been violated and they found the search illegal.

The Supreme Court, throwing stare decisis to the wind, agreed with the Arizona Supreme Court in spite of *Chimel* and *Belton*.

Since this is not the first time the Supreme Court has reversed itself, that is not the news. The news is that this decision, in the words of Justice Alito, one of the dissenting Justices, is really a 4-1-4 decision. And, Justice Alito did not hesitate to openly express his indignation with that outcome.

This case set off fireworks that must have begun in the conference room during the case discussion and spilled out into the Supreme Court's slip opinion.

So what was the cause of all the commotion?

First, let us examine how the sides aligned. In the "majority opinion" corner we have Justice Stevens, the author, and J. Souter, J. Thomas and J. Ginsberg. J. Scalia wrote what could be called a concurring opinion, but more on that later. In the "dissenting opinion" corner we have Justice Alito, the author, and C.J. Roberts, J. Kennedy and J. Breyer, with a concurring opinion.

Now for the commotion. Justice Stevens flatly rejected the Belton holding because he was convinced that *Chimel's* conclusion that officers could only conduct a warrantless search of a vehicle if the arrestee is unsecured and within reaching distance of the passenger compartment during the search was incorrect.[9]

This is a clear reinvention of the meaning and holding in *Belton* since Mr. Belton was as secured at the time of his search as was Mr. Gant.

Justice Stevens went on in his opinion to state that the dissenting Justices led by J. Alito, arrived at their opinion for reasons that had to do with not wanting to abandon precedent or, equally as important, not wanting to force police officers to abandon their 28-year reliance on *Belton*.[10] J. Stevens further opined that law enforcement efficiency was not nearly as important as adherence to the principles stated in the 4th Amendment.[11]

Enter J. Scalia. He stood alone. He made it clear that he only concurred with the holding because he could not agree with the dissenters. He had no difficulty with abandoning precedent, because he felt it to be badly reasoned in the first place.[12] He believed that J. Stevens artificially narrowed *Belton* and *Thornton* by focusing on Mr. Gant's suspended license as the reason for the arrest and deciding that no search could have reasonably discovered anything in Mr. Gant's vehicle incidental to a suspended license. So, J. Scalia, stating that because he disagreed with the reasoning in all of the opinions, he chose the lesser of the two evils and concurred with the J. Stevens corner.

The dissenters became acerbic in their disagreement with the majority because they viewed *Belton* and *Thornton* as important precedent that should not be overruled. J. Alito sniped that the only reason J. Scalia joined with the majority was because he could not abide a 4-1-4 result.[13] In addressing J. Stevens' assertion that a 28-year practice by police officers relying on *Belton* is no reason to reverse Gant, J. Alito again sniped that "But for the Court this seemingly counts for nothing"[14] J. Alito went on to accuse the Court of sua sponte ignoring stare decisis while at the same time providing no authority for doing so.[15] Without hiding his disgust with the majority, J. Alito completed his analysis by discussing the unreasonableness of distinguishing between an arrestee's ability or lack of ability to reach a glove compartment during a search.

These Justices wrote their respective opinions without disguising their disdain for the position taken by the opposing Justices.

I wonder if they shook hands before parting to write their respective opinions?

If you enjoy Supreme Court drama, you should give *Gant* a read. It is all in there.

Endnotes

[1]07-542, slip.op., 556 U.S. 2009.
[2]The Oxford Guide to the Supreme Court, Kermit L. Hall, et al. eds., 1152-53 (2d ed. 2005).
[3]*Id*. at 191, 255.
[4]395 U.S. 752 (1969).
[5]Justice White and Justice Black.
[6]453 U.S. 454 (1981).
[7]*Belton* at 457-463.
[8]541 U.S. 615 (2004).
[9]*Gant* at 16.
[10]*Id*.
[11]*Id*.
[12]*Gant* at 3 (concurring opinion).
[13]*Gan*t at 1 (dissenting opinion).
[14]Id. at 5.
[15]Id.

Annette G. Butler *is a former Assistant U.S. Attorney and a former President of the Northern District of Ohio Chapter of the Federal Bar Association. She is currently teaching Legal Research and Writing and Criminal Law to Paralegals.*

Courts to Decide Constitutionality of Ohio's Lethal Injection Protocol

By Lori Riga

In attempting to comprehend the United States Supreme Court's opinion in *Baze v. Rees*, a paraphrased Winston Churchill quote comes to mind: Never in the history of death penalty jurisprudence has so much been written by so many yet said so little.[1] Although Chief Justice Roberts authored the plurality opinion upholding Kentucky's lethal injection protocol, no less than five other justices wrote concurring opinions, and Justice Ginsburg filed a dissenting opinion. The *Baze* Court's actual holding is so narrow that states other than Kentucky must forage through the *Baze* thicket to glean some understanding of its effect on their lethal injection protocols. Ohio is no exception. Criminal defendants and death row inmates have and will continue to litigate the constitutionality of Ohio's lethal injection protocol under *Baze* in both state and federal courts. In the Northern District of Ohio, there are three pending cases in which this issue has arisen. Interested parties should anticipate a surge in litigation until the Supreme Court of Ohio or the Sixth Circuit Court of Appeals, if not the United States Supreme Court, settles the matter for Ohio.

Baze Deconstructed

In Kentucky, death-row inmates are executed through the administration of a three-drug protocol. First, the inmate receives three grams of sodium thiopental (a sedative), to render the inmate unconscious. The executioner then administers the second drug, 50 milligrams of pancuronium bromide. This drug paralyzes the muscles, including those needed for respiration. The final drug, potassium chloride, induces cardiac arrest almost immediately after introduction into the body. Emergency medical technicians both start the IV lines and administer the drugs.

The *Baze* petitioners conceded that Kentucky's method of lethal injection would result in a humane death if carried out as written. They challenged the lethal injection protocol, however, on the grounds that if the first drug did not take effect as intended, the second two drugs could cause significant pain, resulting in an execution that constitutes cruel and unusual punishment under the Eighth Amendment. The petitioners proposed a one-drug protocol, in which the executioner would administer a lethal dose of sedative to the inmate.

Chief Justice Roberts's plurality opinion found that the petitioners could not carry their burden of establishing that, the risk of pain from maladministration of the first drug, or that Kentucky's failure to follow a one-drug protocol, was unconstitutional.[2] The petitioners asked the Court to adopt a standard of review that would have prohibited protocols that create "unnecessary risk" and argued that the Court should examine the severity of pain risked, the likelihood of pain occurring, and the extent to which alternative means of execution were feasible through modifications in the existing procedure or alternative approaches.[3]

The respondent's approach, which the Court ultimately adopted, requires a petitioner to prove that alternatives to a state's lethal injection protocol: (1) address a "substantial risk of serious harm"; (2) be feasible and readily implemented; and (3) actually reduce the risk of severe pain.[4] Applying this standard to the *Baze* petitioners, the Court concluded that they failed to demonstrate that the risk of an improper administration of the first drug was substantial under the first factor.

The plurality opinion assumed that the standard it enunciated would obviate the need for future lethal injection challenges. It opined that a petitioner questioning the constitutionality of a state's lethal injection protocol henceforth must demonstrate that a state's current method creates a demonstrated risk of severe pain compared to known alternative methods. It reasoned that, "a State with a lethal injection protocol substantially similar to the protocol we uphold today would not create a risk that meets this standard."[5]

Justice Alito wrote a concurring opinion to explain that any modifications to a state's lethal injection protocol requiring medical professionals to participate in the execution would be prohibited because their code of ethics generally proscribes such practices. He also emphasized that a modification showing some reduction in the risk of pain would be insufficient to meet the plurality's standard.

Justices Stevens and Scalia, both writing concurrences, opined not only on the lethal injection issue before the Court, but whether this issue should reignite the debate about the constitutionality of the death penalty generally. Justice Stevens questioned

its place in today's society, while Justice Scalia replied that the decision to abolish the death penalty does not rest with unelected judges. Regarding the affect of the plurality opinion, Justice Stevens cautioned that states that "wish[ed] to decrease the risk that future litigation will delay executions or invalidate their protocols would do well to reconsider their continued use of pancuronium bromide."[6]

Justice Thomas, concurring in judgment only, expressed his disapproval for both the plurality's and the dissent's standard. Reasoning that no such standards are articulated in the Constitution, he interpreted the Eighth Amendment's "cruel and unusual punishment" clause to mean an execution that was designed to inflict pain. After observing that states historically utilized "super added" measures to elevate the suffering of the condemned, he concluded that the Founding Fathers created this clause to prevent the use of torture in capital punishment. Justice Thomas predicted that the plurality's standard would invite subsequent litigation because it provided courts with no bright-line tests by which to judge the constitutionality of a state's lethal injection protocol.

While the dissent found that the plurality's factors for consideration— degree of risk, magnitude of pain, and availability of alternative methods— were all appropriate, it "parted ways" with the plurality's apparent determination that the first factor was a fixed threshold.[7] Instead, the dissent maintained, a court should consider each factor with equal import. It concluded that a state's protocol violates the Eighth Amendment when it creates an "untoward, readily avoidable risk of inflicting severe and unnecessary pain."[8]

Cooey v. Strickland

The first federal judge in Ohio to be charged with the unenviable task of deciphering *Baze* was Judge Gregory L. Frost in the Southern District of Ohio in the matter *Cooey v. Strickland*.[9] Arguing that Ohio's lethal injection protocol was unconstitutional, the plaintiff filed a civil rights action pursuant to 42 U.S.C. §1983. With remarkable detail, the *Cooey* court decided that the plaintiff could no longer stay his pending execution because he could not demonstrate a likelihood of success on the merits of his lethal injection claim. After reviewing extensive testimony regarding Ohio's lethal injection protocol, practices, and past executions, the court held that, while Ohio's lethal injection system is flawed, it is not constitutionally flawed under the *Baze* holding.[10]

The court found *Baze's* legacy was twofold: It upheld the constitutionality of Kentucky's lethal injection protocol and, more important, determined that a court may look beyond an evaluation of the drugs and dosages used when reviewing the constitutionality of a state's lethal injection protocol. The *Cooey* court reviewed such factors as: (1) the mixing of the sedative; (2) the insertion of the IV lines and the easing of the time limit to establish them; (3) the execution team's practice sessions, and (4) the warden's practice of shaking the inmate once the execution team administers the sodium thiopental to ascertain the inmate's level of consciousness.[11]

Finding the Baze holding unclear, the *Cooey* court reviewed Ohio's protocol under the standards articulated in the *Baze* plurality, concurring, and dissenting opinions. It concluded that, while Ohio's lethal injection protocol and unwritten practices contain risk of errors, they are not unconstitutional under any standard articulated in *Baze*. The *Cooey* court vacated the preliminary injunction staying the plaintiff's execution.[12]

State Court Litigation

While the Supreme Court of Ohio and Ohio District Courts of Appeals previously have summarily rejected inmates' lethal injection claims, one recent common pleas court found that Ohio's lethal injection protocol conflicts with the condemned inmate's expectation of a painless death under the Ohio statute authorizing lethal injection.[13] In *State v. Rivera*, the court found when granting a pre-trial motion that, while capital punishment and lethal injection are not per se unconstitutional, the use of pancuronium bromide and potassium chloride create an "unnecessary and arbitrary risk" of a painful death.[14] The *Rivera* court disregarded *Baze* because Kentucky, unlike Ohio, has no requirement that an execution be painless. It concluded that capital punishment in Ohio must be carried out through the use of a lethal dose of sodium thiopental so that it would fulfill Ohio's requirement of a painless execution.

Northern District of Ohio Litigation

In addition to the active dockets in the Southern District of Ohio and in the Ohio state courts, our own Northern District has three cases pending in which two of our judicial officers may have to review and

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(Lethal Injection, continued from page 11)

resolve whether Ohio's lethal injection protocol is constitutional under *Baze*. Although at different stages in litigation, any one of these pending actions could become a catalyst for a Sixth Circuit or Supreme Court of Ohio resolution of this issue.

Jones v. Bradshaw and *Adams v. Bradshaw*

On May 21, 2007, Judge David A. Katz denied petitioner Odraye Jones's petition for a writ of habeas corpus without certifying the lethal injection issue Jones raised for appeal.[15] Because Kentucky's lethal injection protocol is similar to Ohio's, it appeared doubtful that the Sixth Circuit would grant Jones's request for a certificate of appealability (COA) even after *Baze*, which was decided in the time intervening Judge Katz's decision and Jones's appeal. Finding that *Baze* focused on issues other than the three-drug protocol, such as the inmate's consciousness after the administration of the sedative, the Sixth Circuit granted Jones a COA on his lethal injection claim. Earlier this year, the Sixth Circuit remanded the case to Judge Katz for purposes of conducting limited discovery and factual development on Ohio's lethal injection protocol. Almost concurrently, the Sixth Circuit remanded another of Judge Katz's capital habeas cases, *Adams v. Bradshaw*, with the identical instruction.[16]

Scott v. Houk

In *Scott v. Houk*, the petitioner raised a similar claim questioning the constitutionality of Ohio's lethal injection protocol.[17] Unlike *Jones* and *Adams*, however, Judge John R. Adams, who was assigned to the matter, has not yet ruled on the petition. Pending before him, however, are two motions requesting that the Court either: (1) certify a question to the Supreme Court of Ohio regarding where a death-row inmate should raise a lethal injection claim in state court; or (2) stay the case and hold it in abeyance until the Sixth Circuit has had an opportunity to adjudicate on this issue; or (3) conduct discovery and/or a hearing on this issue.

Conclusion

As authors of the *Baze* concurring opinions predicted, rather than resolve this issue, the plurality's standard has invited new death penalty litigation outside of Kentucky. Ohio's litigation in both state and federal court promises to be prolonged and its outcomes conflicting. While the *Rivera* opinion might appear to be the most direct route to an Supreme Court of Ohio adjudication on this issue, the *Rivera* defendant ultimately may not be sentenced to death and therefore may not raise this issue on appeal.[18] The *Cooey* opinion, although thorough, was admittedly not a decision on the merits of the claim.[19] It is therefore not inconceivable that the Northern District of Ohio will be the most direct route to a Sixth Circuit Court of Appeals or Supreme Court of Ohio decision on the constitutionality of Ohio's lethal injection protocol.

Endnotes

[1]*Baze v. Rees*, – U.S. – , 128 S.Ct. 1520 (2008); Speech to House of Commons complimenting the pilots in the Royal Air Force during the Battle of Britain. (August 20, 1940).

[2]All justices assumed for purposes of reaching a decision that, because capital punishment is constitutionally permitted under *Gregg v. Georgia*, 428 U.S. 153 (1976), logic would dictate that there is some constitutional means of imposing it.

[3]*Baze*, 128 S.Ct. at 1529.

[4]*Id*. at 1532.

[5]*Id*. at 1537.

[6]*Id*. at 1546.

[7]*Id*. at 1568.

[8]*Id*. at 1572. Justice Breyer, who adopted the dissent's standard, wrote a separate, concurring opinion in which he concluded that the petitioners could not meet it.

[9]*Cooey v. Strickland*, – F.Supp.2d – , 2009 WL 1067049 (S.D. Ohio Apr. 21, 2009).

[10]Similar to Kentucky's lethal injection protocol, Ohio's written protocol requires the administration of three drugs, sodium thiopental, pancuronium bromide, and potassium chloride. The only difference between the two states' drug protocol is that Ohio administers only two grams of sodium thiopental while Kentucky administers three grams. *Cooey*, 2009 WL 1067049, at *54.

11While at least some of the these practices recently have been added to Ohio's written lethal injection protocol, based on the testimony in *Cooey*, these practices—such as the qarden physically checking the inmate for signs of unconsciousness—previously have been part of the execution team's unwritten practices. Reginald Fields, Execution Procedures Revamped, *The Plain Dealer*, May 21, 2009.

[12]*Id*. at *85. Ohio executed Richard Cooey, the named plaintiff in the litigation, after he instigated this action. The *Cooey* decision pertained to death-row inmate Kenneth Biros.

[13]See, e.g., *State v. Carter*, 734 N.E.2d 345 (Ohio 2000) ("Carter fails to cite any case in which lethal injection has been found to be cruel or unusual punishment. This proposition of law is overruled."). *State v. Rivera*, No. 04CR065940; 05CR068067, slip op., at 6 (Ohio Ct. Common Pleas June 10, 2008). The statute at issue is Ohio Revised Code §2949.22, which states:

(A) Except as provided in division (C) of this section, a death sentence shall be executed by causing the application to the person, upon whom the sentence was imposed, of a lethal injection of a drug or combination of drugs of sufficient dosage to quickly and painlessly cause death. The application of the drug or combination of drugs shall be continued until the person is dead . . . Ohio Rev. Code §2929.22.

[14]*Rivera*, at 7.

[15]*Jones v. Bradshaw*, No. 1:03 CV 1192, ECF No.128 (order remanding case to district court for limited discovery and factual development). Section 2253 of Title 28 requires a habeas petitioner to obtain a certificate of appealability to raise an issue in the circuit court of appeals.

[16]*Adams v. Bradshaw*, No. 1:05 CV 1886, ECF No. 66 (order remanding case to district court for limited discovery and factual development).

[17]No. 4:07 CV 753.

[18]While the State attempted to appeal the Rivera court's order to the Ninth District Court of Appeals, that court dismissed the appeal as improvidently granted after finding that the trial court's order was not a final, appealable order. *State v. Rivera*, No. 08CA009426; 08CA009427, 2009 WL 806819, at *7-8 (Ohio Ct. App. Mar. 30, 2009).

[19]*Cooey*, 2009 WL 1067049, at *85.

Judge Walinski Portrait Presentation Held in Toledo

An overflow crowd was in attendance on May 18, 2009, as a portrait of the late Nicholas J. Walinski was presented to the Bench and Bar at the Toledo Federal Courthouse. Judge Walinski served as a district court judge for the Northern District of Ohio, Western Division, from 1970 until his death on Dec. 24, 1992. Prior to his appointment to the federal bench, he also served as a judge of the Lucas County Court of Common Pleas and the Toledo Municipal Court.

At the portrait presentation, remarks were offered by former staff members, lawyers who practiced before Judge Walinski and by his grandson, Cory Catignani, also a lawyer. Chief Judge Carr accepted the portrait on behalf of the Northern District of Ohio and also offered fond remembrances of Judge Walinski. A reception followed the portrait presentation and was attended by former staff members, court personnel and members of the bar. Judge Walinski's portrait is on permanent display in the Federal Courthouse in Toledo, Ohio.

Left to right: Judges McQuade, Potter, Katz, Carr and Zouhary stand with the portrait of Judge Nicholas J. Walinski.

Intellectual Hero or Fanatical Villain:

How Sonia Sotomayor's Confirmation Process Will Say More About Us Than Her

By Nick York and Michelle Waller

We have again come to a point in our nation when history is being made: President Obama's May 26, 2009, nomination of the Hon. Sonia Sotomayor to the United States Supreme Court may very well be one of the most lasting historic events of a most historic presidency.

We recognize that by writing this article we are stepping into the fray— the now ubiquitous and often vitriolic discussion of the President's selection of Judge Sotomayor. We do not opine on this subject because of a dearth of op-ed pieces; to the contrary, there are scores of articles and blog commentary. Nor do we look for an easy opportunity to espouse a particular ideology, only to invite the backlash sure to follow. Instead, we venture down this path in an effort to shape the debate.

Missing from much of the reporting and commentary on Judge Sotomayor, is a discussion about what really matters. We think this current deficiency, like so many other issues our society faces, presents our profession with an opportunity to challenge the status quo and elevate the debate. In the words of President Ronald Reagan: "If not us, who? If not now, when?"[1]

In the frenzied midst of competing sound-bites—accolades v. fear mongering, and glowing testimonies v. polarizing accusations—the critical question for those in our profession is relatively simple: How will you help shape the debate regarding the merits of Judge Sotomayor's nomination and her fitness for this esteemed position?

Will you stand idly by while talking heads frame the issues for the American people? Or do you feel, as we do, a greater obligation to guide and improve the quality of the debate within our communities—both the legal community and perhaps more important, the broader community.

Over the coming months there will be dozens of water cooler conversations, backyard BBQs, kids' ball games, dinner parties and a host of other social gatherings at which your opinion will be sought on both the nominee and the process, including requests for your "professional opinion." What you say may not affect the outcome of the nomination (it seems that is all but a forgone conclusion), but it will affect the community's understanding and respect for our profession and the importance of the often overlooked and undervalued "third branch" of government.

So far the debate has centered on Judge Sotomayor's "personal story"—both pro and con. Her supporters praise her path from the "school of hard knocks" to Ivy League standout as a testament to her personal fortitude, independence and empathy for those in the broader community. Her critics suggest that her ethnicity and "empathy" will lead to decisions motivated by a desire to "create policy" from the bench in favor of certain minority, gender and socio-economic interest groups because she lacks the "intellectual capacity" to decide cases otherwise. Of course, that same "logic" could just as easily be used to argue that her adult life in the Ivy League and among Washington's elite, which led to two previous lifetime federal court appointments, has created an allegiance to the powerful corporate and financial interests associated with such institutions.

Most of the hyper-critical commentary on Judge Sotomayor is designed to gin up fundraising among certain interest group faithful. The goal of such groups is to reduce the debate to a couple of sound-bite mantras or bumper sticker slogans, and to avoid the cultivation of an honest assessment of judicial philosophy, decision making, or the proper role of the courts. In retort of course, supporters typically do similar simplistic feel-good counter points.

But what does that get us? Answer: plenty of "opinions" but very few facts.

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Michelle Waller *is an Associate in Tucker Ellis & West's Business Group. Her practice focuses on a wide variety of corporate transactions, including mergers and acquisitions, tax planning for corporate transactions and real estate transactions. Michelle is an alumna of Cleveland Bridge Builders Flagship Program, a participant in the Cleveland Leadership Center's 2009 Civic Leadership Institute, and a volunteer for the Cleveland Metropolitan Bar Association's 3Rs Program—Rights, Responsibilities, Realities.*

Over 60 New FBA-NDOC Members Join Supreme Court Bar

William K. Suter reports on the Supreme Court's activities.

On Thursday, April 16, 2009, at a special luncheon ceremony in Cleveland, Ohio, General William K. Suter, Clerk of Court for the Supreme Court of the United States, administered the Oath of Admission to 62 new members admitted to the Bar of the Supreme Court of the United States. The ceremony, held at the Cleveland Marriott Downtown, was sponsored by the FBA Northern District of Ohio Chapter and the U.S. District Court for the Northern District of Ohio. In addition to administering the Oath to the new members of the Supreme Court Bar, General Suter spoke about his role as the Clerk of the Supreme Court and the benefits of membership in the Supreme Court Bar. He also provided a current report on the Supreme Court's activities and a few amusing anecdotes as well. Other speakers at the event were Geri M. Smith, Clerk of Court for the U.S. District Court for the Northern District of Ohio, Chief Judge James G. Carr and Chapter President-Elect Carter E. Strang. The ceremonial motion for admission of the new Supreme Court Bar members was made by James W. Satola, Supreme Court Swearing-in Luncheon Program Chair and member of the Supreme Court Bar.

This is the third time General Suter has visited Cleveland to conduct a swearing-in ceremony at the invitation of the FBA Northern District of Ohio Chapter. In addition to the recent event this past April, General Suter was here in September 2002 (at which 102 new Supreme Court Bar members were admitted) and again in April 2006 (at which 114 new bar members were admitted). To put things in perspective, a few weeks prior to the ceremony, in a conversation with Program Chair Jim Satola on March 23, at the Supreme Court Building just prior to oral arguments, General Suter noted that the usual number of new Bar members sworn-in at "off-site" ceremonies (those not conducted in the Supreme Court courtroom) averages around 20 new members. The collective 278 new bar members sworn in at the FBA-NDOC events demonstrates just how successful these swearing-in events have been for both the Chapter and the Court.

Geri M. Smith & William K. Suter.

Only attorneys admitted to the Bar of the Supreme Court of the United States can appear, file and

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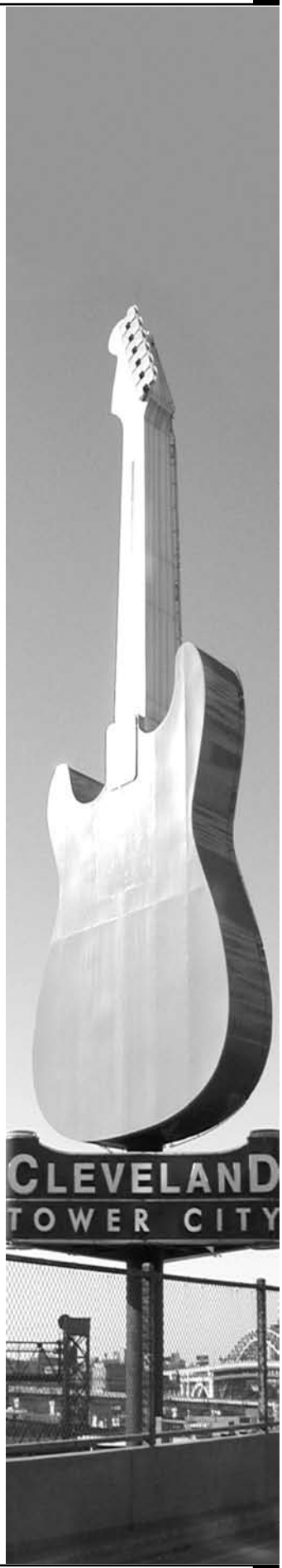
Magistrate Judges Pearson and White Participate in CLE Program

United States Northern District of Ohio Magistrates Judges Benita Pearson and Greg White spoke on May 14, 2009, at a CLE program organized by the Ohio State Bar Association's Federal Courts and Practice Committee. The CLE was part of the Ohio State Bar Association's Annual Convention, held May 13-15 in Cleveland, Ohio

The CLE program consisted of panel discussions on the selection and retention of magistrate judges and the scope and exercise of their power and duties.

Chapter President-Elect Carter Strang served as a panel moderator. Other panel members were Magistrates Judges Michael Abel, Tim Black and Michael Merz, all of the Southern District of Ohio.

Members of the Federal Courts and Practice Committee include Northern District of Ohio Chief Judge James Carr and FBA Chapter Board Members Ken Bravo, Jason Hill, Anthony LaCerva, Carter Strang and Bruce Wilson.



Cleveland-Marshall Brings Home Best Brief at Moot Court Competition

By Eric Becker and Drew Odum

Pictured, left to right: Cleveland-Marshall FBA Moot Court Team Members Eric Becker and Darren Dowd, FBA-NDOH Board Member Jim Satola, and Cleveland-Marshall FBA Moot Court Team Members Drew Odum and Julia Leo.

"May it Please the Court" were the words we lived by for nearly eight weeks while preparing for this year's Thurgood Marshall Moot Court Competition. Each spring the Federal Bar Association hosts moot court teams from law schools around the country in a competition that hones the legal skills of students hoping to one day practice law. This year was the first time Cleveland-Marshall's Moot Court team participated.

Our school sent two teams to the Thurgood Marshall Competition. Team 1 consisted of Drew Odum and Julia Leo, and Team 2 consisted of Eric Becker and Darren Dowd. As new members to the moot court team, we spent our fall semester learning the ropes of appellate advocacy by practice judging for teams competing in the fall. Needless to say, the bar was set high as one team Cleveland-Marshall sent to Nationals ultimately advanced to the second round of the National Moot Court competition.

By January and the start of the spring semester, we were eager to begin our competition. Even before our problem was released, much planning had already been done. Each team met with our advisor, Stephen Gard, to plan out our brief writing and oral practice round schedules. Once we received our problem, each team went straight to work researching and forming initial thoughts that would eventually take the form of our first brief outline. This year's problem involved First Amendment law, specifically, student-speech in schools. No members on either team had taken Constitutional Law yet, which meant each team was sailing into uncharted waters. Yet, we kept our focus by honing in on those critical pivot points of the problem. By the end of February and hours of editing, we mailed our brief to Washington, D.C. four weeks after receiving the problem.

The oral argument portion of the competition also proved to be a great experience. Unlike other moot court competitions, the Federal Bar Association hosted its competition in actual courtrooms. Our judges were also actual judges, practitioners and scholars who took their time to come and challenge us on the issues embedded in our problem. As a competitor, it was an exhilarating feeling to be standing in the D.C. Court of Appeals arguing before a three-judge panel, not knowing where the panel's line of questioning would lead or when the next question would come. But as we stood up and delivered our argument, we simply fell back on all the time spent preparing for this moment.

At the close of the competition, each team felt a sense of gratitude and accomplishment. But nothing was more gratifying than hearing the names of Drew Odum and Julia Leo announced as the first place competition winners for Best Brief.

We were told early on that, while participating in moot court would be a substantial time commitment, it would also be one of the most rewarding experiences of our law school career, and indeed it was. Without question, each student put as much, if not more hours into this year's moot court experience than the work of an actual class. We all spent long hours at school, many times not leaving until after

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Drew Odum *is a 3L at Cleveland-Marshall College of Law. He clerked at the 8th District Court of Appeals this semester with the Honorable Judge Melody Stewart and is presently a Summer Associate at Tucker, Ellis & West LLP.*

midnight. Yet each team bonded in a way commonly seen on football or gymnastics teams. Moreover, the process of appellate brief writing is perhaps one of the most challenging assignments to undertake. By undertaking this challenge, we learned the process and stylistic structure needed to create a winning brief. Good legal writing skills are essential to life as a practitioner and we each walked away from this experience better writers and better friends.

Cleveland-Marshall takes moot court very seriously, which is apparent from the success we have achieved this year as a team. Not only did Drew and Julia win Best Brief at the Thurgood Marshall competition, but several other teams won awards for best brief and best oral advocate.

The Federal Trade Commission Cracks Down on Robocalls

by Kerri L. Keller

You may never have heard the term "robocall," but you most certainly have experienced one. A robocall is an automated telemarketing call that uses both an automatic dialer and a computer-recorded message to enable the speaker to reach as many people as possible. Most commonly known for their use by politicians during political campaigns, robocalls are now used by companies to target prospective consumers and, in some instances, the targeting is quite aggressive.

In a case recently filed in the Northern District of Illinois, the Federal Trade Commission (FTC) sued a company who had been bombarding U.S. consumers with hundreds of millions of allegedly deceptive robocalls. In *FTC v. Voice Touch, Inc., et al.*, the FTC alleges that the defendants used robocalls to push extended vehicle warranties onto consumers by fooling them into believing that their own vehicle's warranty was about to expire.[1]

The FTC's complaint is premised on violations of the Federal Trade Commission Act, the Telemarketing and Consumer Fraud and Abuse Prevention Act, and the FTC's Telemarketing Sales Rule. The complaint sets forth specific allegations that the defendants violated Section 5 of the FTC Act and the Telemarketing Sales Rule, ignored "do not call" requests and the Do Not Call registry; abandoned calls; failed to transmit the caller ID and to make required oral disclosures; initiated unlawful prerecorded messages; and failed to pay national registry fees.

The FTC also filed a motion for temporary restraining order with asset freeze and sought the appointment of a receiver. The FTC is able to move for such relief under the authority of 15 U.S.C. §53(b), which gives it the right to seek injunctive relief for equitable remedies in federal court. According to the FTC, the defendants were engaging in a "massive illegal enterprise" that was "plaguing tens of millions of consumers" with robocalls regarding extended warranties and were violating federal law in the process. Their allegedly unlawful actions, among other things, consisted of creating deceptive recordings, illegally blasting the deceptive recordings though indiscriminate dialing, and ignoring the Do Not Call registry.

The Court granted the FTC's requested temporary restraining order enjoining the defendants from their allegedly unlawful activities. Several defendants stipulated to a preliminary injunction. A preliminary injunction hearing was subsequently held for one of the non-stipulating defendants and the court entered a preliminary injunction against him. A preliminary injunction hearing is scheduled for another co-defendant later this month. Although the case is currently pending before Hon. John F. Grady (and it remains to be seen whether the FTC will ultimately prevail), the millions of robocalls regarding automobile warranties have ended for now.

Endnote

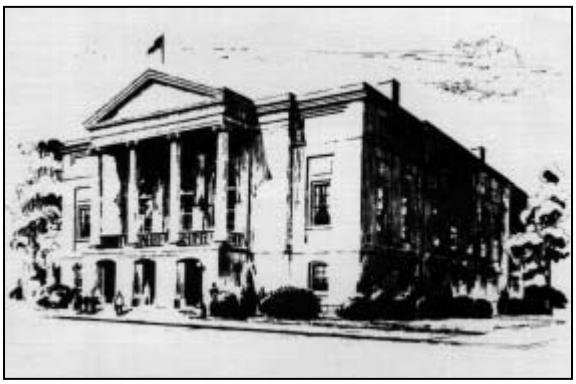
[1]Civ. No. 09-CV-2929 (N.D. Illinois 2009).

Kerri Keller *is an Associate at the Cleveland firm of Brouse McDowell, LPA. She focuses her practice in the areas of business and commercial litigation. She worked as a Law Clerk for the Hon. John R. Adams, U.S. District Court Judge for the Northern District of Ohio, Eastern Division, from 2003 through 2007. Kerri is a member of the FBA-NDOC.*

FBA Mid-Year Meeting Highlights

by James W. Satola

The Federal Bar Association held its annual Mid-Year Meeting this past March 20-21, at the Sheraton Crystal City Hotel, in Arlington, Va. As many of you already know, the Mid-Year Meeting presents an opportunity for representatives of local FBA chapters to gather together for meetings related to chapter leadership and to exchange ideas for educational and social activities. The Mid-Year also plays host to one of the two FBA National Council Meetings held each year (the other occurs during each year's FBA Annual Meeting and National Convention, which this year will be held from Sept. 10-12, 2009, in Oklahoma City, Okla., where incoming FBA National President Lawrence R. Baca will be sworn in, along with the new slate of FBA officers and board members).



United States Court of Appeals for the Armed Forces Building, Washington, D.C.

The first day of the Mid-Year Meeting was dedicated to meetings held by the FBA National Board of Directors (the leadership structure recently adopted by the FBA, replacing the former Executive Committee model)—one of four held by the FBA National Board each year—and by the Federal Bar Building Committee (the Board responsible for administrating the proceeds from the FBA's sale of its former national headquarters and matters related to the lease/purchase of the FBA's new headquarters space). The morning and afternoon meetings were followed by the Annual FBA Moot Court Competition Final Round and Reception, which, as always, was held at the historic U.S. Court of Appeals for the Armed Forces building, formerly the home of the U.S. Court of Appeals for the District of Columbia Circuit from 1910 to 1951. This is a special time for the USCAAF building, as it is the year preceding the 100th anniversary celebration for the courthouse, which will include the installation of identification plaques to mark the location of the judicial chambers formerly occupied by Supreme Court of the United States Chief Justice Fred M. Vinson (who served as a judge of the D.C. Circuit Court of Appeals from 1938 to 1943, before leaving to join the Roosevelt Administration, later to be appointed as Chief Justice in 1946) and Associate Justice Wiley B. Rutledge (who served as a judge of the D.C. Circuit from 1939 to 1943, before being elevated to Associate Justice in 1943). Earlier oral argument rounds of the FBA Moot Court Competition were held on Thursday and Friday morning (the day of the final round) at the District of Columbia Superior Court (across the street from the USCAAF building) and the nearby U.S. District Court for the District of D.C. Students from law schools throughout the country participate in the tournament, which represents the culmination of a lot of hard work on the part of each of the school's participants. Among this year's winners, for best brief, was a team from the Northern District of Ohio's own Cleveland State University Cleveland-Marshall College of Law.

The second day of the Mid-Year Meeting included an early morning meetings of the Vice Presidents for the Circuits (the FBA Circuits mirror geographically the U.S. Courts of Appeals numbered and D.C. circuits, with two vice presidents within each Circuit, collectively representing all the chapters located within each geographic circuit), the Section and Division Chairs Meeting, and the Foundation of the FBA Board of Directors Meeting. Following these meetings, the primary gathering for all attendees to discuss and exchange ideas on programs and events was the late-morning Chapter Leaders Update Meeting, at which FBA National Executive Director Jack Lockridge introduced possible future offerings such as lifetime FBA membership, official recognition for FBA members who have passed away within the preceding year, and a new FBA membership initiative. After the morning meetings, many representatives attended the

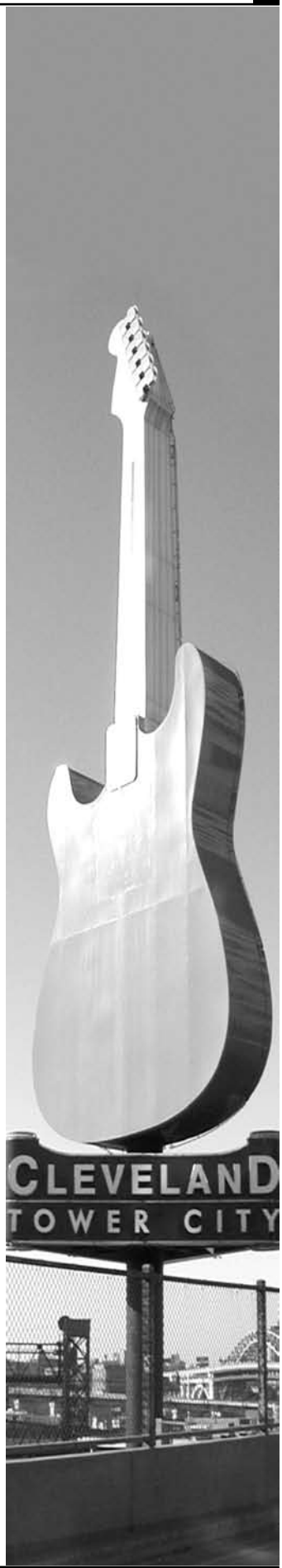
James W. Satola *is a senior attorney with Squire, Sanders & Dempsey L.L.P., as well as a past president and current board member of the FBA Northern District of Ohio Chapter.*

FBA Mid-Year Meeting Luncheon, featuring lawyer and author Talmage Boston, who discussed and read from his book Baseball and the Baby Boomer: A History, Commentary, and Memoir, as well as his earlier 1939: Baseball's Tipping Point.

The Mid-Year Meeting formally concluded on Saturday afternoon with the FBA National Council Meeting, attended by two representatives from each Chapter of a majority of the 86 individual FBA Chapters from around the country, including two representatives from our own Northern District of Ohio Chapter, Aaron Bulloff (former FBA-NDOC Chapter President 2001-2002) and myself (former FBA-NDOC Chapter President 2002-2003). The plenary National Council Meeting was followed with a reception at the new FBA National Headquarters, which opened just a little over a year ago in Arlington, Va. Finally, for a number of the attendees who also are Fellows of the Foundation of the FBA (including Aaron Bulloff and myself), the events were capped off with what has become a traditional "FBA Fellows Dinner," which this year was held at the Palms Restaurant in downtown D.C.

Welcome New Chapter Members

Richard N. Alston, Advocates for Basic Legal Equality
Anthony Ania, Ania & Associates
Stacy D. Ballin, Squire, Sanders & Dempsey LLP
Robert D. Barr, Dettelbach, Sicherman & Baumgart
Terry M. Billups, Squire, Sanders & Dempsey LLP
Richard H. Blake, Bricker & Eckler LLP
Michael A. Bonfiglio, Connelly, Jackson & Collier LLP
Marshall D. Buck, Comstock, Springer & Wilson, Co. LPA
Nicholas P. Capotosto, Brouse McDowell LPA
Deborah A. Coleman, Hahn, Loeser & Parks LLP
Erika Cunliffe, Cuyahoga County Public Defender
Patrick J. Daugherty, Driggs, Hogg, Daugherty & Del Zoppo Co.
Larry B. Donovan, Tucker, Ellis & West LLP
Matthew Duncan Buckingham, Doolittle & Burroughs, LLP
Kimberly Eberwine, Squire, Sanders & Dempsey LLP
Victoria L. Fedor, Victoria L. Fedor, Attorney at Law
John C. Fickes, Brouse McDowell LPA
Joyce Goldstein, Goldstein Gragel LLC
Richard Hackerd, Richard E. Hackerd, Attorney at Law
Hazel A. Hall, National City
David H. Hooker, Thompson Hine LLP
Maura L. Hughes, Calfee, Halter & Griswold, LLP
Eric B. Levasseur, Hahn, Loeser & Parks LLP
Andrew P. Lycans, Critchfield, Critchfield, Johnston Ltd.
Caroline L. Marks, Brouse McDowell LPA
Kristina D. Melomed
Drew Odum, Tucker, Ellis & West LLP
Mark A. Phillips, Benesch, Friedlander, Coplan & Aronoff LLP
Karen E. Ross, Tucker, Ellis & West LLP
James D. Schweikert, Hahn, Loeser & Parks LLP
James Slater, Baker & Hostetler, LLP
Lydia E. Spragin, Lydia E. Spragin, Attorney at Law
Deborah K. Spychalski, Deborah K. Spychalski, Attorney at Law
Lisa Whittaker, Ohio Attorney General's Office
Michael J. Zbiegien Jr., Taft, Stettinius & Hollister LLP



(Sounds of Settlement, continued from page 1)

Here in Toledo, the Federal Bench makes itself available to settle cases pending on the dockets of colleagues. Some parties are not comfortable having the judge who will decide the motions also handle the settlement. Full disclosure is encouraged at settlements, and a party is more likely to acknowledge a weakness before a different judge (Chicago, *Hard to Say I'm Sorry*). Also, I fully recognize that a particular judge (or an outside mediator) can make a difference in the settlement of a case and counsel should size up the judges in making a request. One size does not fit all cases. This is why I am never offended when counsel choose to go elsewhere. After all, I used to do the same! I try to create an inviting and relaxed atmosphere for settlement conferences. Sometimes the conferences take a while. I have been known to go into the evening to close the deal (B.T.O., *Taking Care of Business*). I offer snacks and treats as a way not only to avoid hunger pains, but also because I believe that when I invite people into my chambers and courtroom, it is much like having friends or guests to my home and helps to create a relaxed atmosphere conducive to talks (James Taylor, *How Sweet It Is*).

I can never make a party settle. But I can reinforce the risks and benefits of pursuing the case, and remind them of the wear and tear of litigation, including the indirect costs of time away from business or family matters. I stress the ability of a party to control the outcome of the case during a settlement, something that is lost if the case is decided later by a judge or jury. I display a pair of dice in my chambers to make the point that going to trial can be risky— no one has a crystal ball (Guys and Dolls, *Luck Be a Lady*). Every judge has a story or two (or more) of the unexpected verdict.

If a case does not settle at a conference, I may engage in follow-up telephone shuttle diplomacy (The Temptations, Ain't Too Proud to Beg). I have found that a more active role on my part can assist in a settlement. Lawyers who know the personalities of their clients and the details of their case can be quite helpful as well. Conversely, lawyers who have not prepped their clients, or are unfamiliar with the case facts or the law, impede the settlement process.

While I am willing to spend the time to try to achieve a settlement, I confess that the favorite part of my job is presiding at a jury trial with good trial lawyers. Judges and lawyers should do all they can to assist juries in what, for them, is frequently a difficult task. Drawing again on my past experiences, I was often frustrated by judges who were routinely tardy and kept juries and parties waiting; who were unprepared; or who failed to facilitate an efficient presentation of the evidence and arguments (Rod Stewart, *People Get Ready*). During trial, I may remind counsel and parties of the continued opportunity to talk settlement, if they wish (Chicago, *Call On Me*). Sometimes just facing his or her peers creates a panic in a client that causes a change in attitude. Hearing a certain witness or learning a particular ruling may set the stage for renewed negotiations (Queen and David Bowie, *Under Pressure*).

The best case management technique is very simple, and very effective: a firm trial date and a ready judge. The parties deserve to know that there is a finish line for their case and that the Court takes their case seriously. Justice delayed can be justice denied (Carole *King, It's Too Late*). A case that is kicked is not only costly to the parties, but sends a message that the case is not considered important. As judges, we have numerous competing demands on our time, but our first priority should be moving cases on our docket. This is true whether the case is settled or tried.

(District Court Clerk's Corner, continued from page 5)

Schwarts; the ADR Committee, chaired by Annette Butler and Marshall Bennett of Marshall and Melhorn; and the Futures Committee, co-chaired by Leslie Jacobs of Thompson, Hine and Flory and Eric Kennedy of Weisman, Kennedy and Berris. A list of the Advisory Committee members and their e-mail addresses can be found at: www.ohnd.uscourts.gov/Advisory_Group/html/advroster.html. Some highlights from the May 21 meeting follow.

The Civil Rules Committee is reviewing model admiralty local rules. Annette Butler invited members to join the ADR Committee and attend an upcoming organizational meeting of the committee. Larry Salibra and Bill Leatherberry (Professor of Law, CWRU) Larry Salibra reviewed the history of ADR in the Northern District and recounted that prior national studies, including a Rand Study and a local study, concluded that ADR resulted in no cost savings. Nonetheless, ADR flourished in the Northern District and throughout the United States. The study seeks to gather data not only on cases in the Northern District, but from other districts as well. The purpose of the study is to evaluate if ADR has changed since the previous studies and, if so, why the change has occurred. The study (see handout materials) is divided into two parts. The first part of the study involves collecting new data to determine the factors that play a role in promoting ADR, who was critical to the initiation of the process, how the process was selected, how the neutral was selected, the effectiveness of different types of neutrals, the perception of the parties and conflicts of interest. The second part reviews the previous study conducted in the Northern District which was designed to determine if the implementation of differentiated case

management and formal ADR programs reduced the cost of litigation. The proposal contemplates seeking funding from law firms to sponsor data collectors who will most likely be law students and college students.

Mr. Jacobs described the four goals of the Futures Committee as follows; 1) to identify best practices, 2) to anticipate issues that the Northern District and federal trial courts will confront over the next 5-10 years, 3) to generate innovative ideas that might be worth testing even though they are not prevailing practices, and 4) to make the Northern District an attractive and vibrant venue for discretionary filings for cases that could be filed in other courts and to ensure that the bar is engaged in challenging and interesting work. Mr. Jacobs reviewed the results of the survey conducted at the last meeting. The topic that received the most votes was the "Consequences of E-discovery" followed by "Summary Judgment as the Center of all Litigation", the "Effect of the Daubert Standard" and "Changes in the Federal Rules Regarding Disclosure of Expert Reports."

Presentations were made by Calvin Griffith, representative of the court–appointed local patent committee, and Marshall Bennett, followed by discussion. The Court will be considering final proposed local patent rules later this summer.

Federal Court Panel Training

Training for new members of the Federal Court Panel on ADR will take place on the 2nd floor of the Carl B. Stokes U.S Court House on June 30, 2009 at 9:30 a.m. Individuals interested in being appointed to serve on this panel may submit an application located at www.ohnd.uscourts.gov/Attorney_Information/ADR/adr.html

CJA Panel Membership

Pursuant to the Court's CJA Plan the membership of the panels are reviewed annually. New panel members approved by the Court earlier this month are:

- Akron/Youngstown Panel—Robert E. Duffrin, Richard E. Hackerd, J. Gerald Ingram, Anthony Koukoutas, Richard P. Kutuchief
- Cleveland Panel—Terry Brennan, Kenneth R. Callahan, Jr., Alek El-Kamhawy, John A. Fatica, Gerald S. Gold, Bret Jordan, Donald Riemer and Jennifer E. Schwartz
- Toledo Panel—Roger Stark

The CJA Plan and the Application for Membership may be found at: www.ohnd.uscourts.gov/Attorney_Information/CJA/cja.html

Law and Technology Workshop for CJA Panel Attorneys

The Administrative Office of the U.S. Courts, Office of Defender Services, Training Branch announces its Law & Technology Workshop, a national training program open to CJA Panel attorneys across the country from Thursday, July 30 through Saturday, August 1, 2009. The L&T Workshop will be held in Denver, Colorado and will provide valuable tuition-free CLE for both experienced and new CJA Panel attorneys. This event is an intense program where participants will focus on the use of modern courtroom technology, TrialDirector and PowerPoint, to enhance their courtroom skills. Details regarding how to register for the Law & Technology Workshop, and further information regarding our training programs and resources can be found at www.fd.org.

Early registration for the L&T Workshop is strongly encouraged. Hotel reservations must be made by June 26, 2009 in order to receive the contracted room rate. Please share this information with your CJA Panel members by distributing it through your listserv, posting it on your Web site, or placing the flyer in a location accessible to them.

If you have any questions regarding the Law & Technology Workshop, please contact Karen Holsendorff, Administrative Assistant, at Karen_W_Holsendorff@ao.uscourts.gov or (202) 502-2905.

NDOH Annual Criminal Practice Seminar— Friday, August 28, 2009

Dennis Terez, Federal Defender has announced that this year's seminar which is co-sponsored by our chapter of the Federal Bar Association will be held on August 28, 2009. An agenda with the registration information will soon be made available. To remain on the panel attorneys must certify completion of at least one seminar annually on federal criminal defense practice.

Naturalization

A number of off-site naturalization ceremonies are conducted throughout the district each year. On June 12, 2009, the Akron/Summit County Library hosted a ceremony in celebration of Flag Day with Judge Adams presiding. Also, on the same day, the Joint Veterans Commission of Cuyahoga County along with the Rock and Roll Hall of Fame and Museum hosted a ceremony in celebration of Flag Day. Judge Nugent presided over this ceremony. On July 2, 2009, the James A. Garfield National Historic Site and the League of Women Voters of Lake County will host a ceremony in celebration of Independence Day. Judge Baughman will preside over this ceremony.

(The Gavel, continued from page 4)

In a June 9 *New York Times* column, David Brooks, expressing support for Judge Sotomayer's confirmation, observed that, "When you read her opinions, race and gender are invisible." That observation, and the failure of her critics to show that bias or predilection even from time to time has infected her decisions, give cause for confidence that Judge Sotomayer will be a fair and impartial Justice. Intelligent, clearly, too.

I'm not sure what, if anything, more we can ask, expect or desire.

I sincerely hope that the forthcoming confirmation process, set to begin on July 13, looks principally at what Judge Sotomayer has done, rather than at what, at least to some, she appears to be. If not, her confirmation hearing, as have other recent confirmation hearings, will most unfortunately re-enforce the public perception that judges rule on the basis of what they would like the law to be, rather than what they understand the law is.

That perception denigrates, and, in time, if allowed to deepen and broaden, can endanger our public commitment to and acceptance of the rule of law.

(Bankruptcy Court Clerk's Corner, continued from page 6)

was presented by panelists Jeffrey Levinson (Pepper Pike), Robert Stefancin (Cleveland) and Diana Thimmig (Cleveland). The session focused on service of process, discovery disputes, stipulations, motion practice and evidentiary issues. Another concurrent session, titled Back to Basics, dealt with three different topics applicable to both debtors' and creditors' counsel. The topics were based on suggestions from members of the bar and court personnel about basic principles and concepts that are often assumed to be known, but not always adequately practiced. These topics were the precepts of notice and hearing, the basics of motion practice, and the requirements for section 341 hearings. The panelists were Gilbert Blomgren (Cleveland), Frederick Coombs III, William Swope (Findlay) and Terry Zimmerman (Akron). The final concurrent session examined big picture bankruptcy for the sole or small firm practitioners. The main topic of discussion was the impact of bankruptcy on other areas of law in which the sole or small firm attorney practices, including real estate/landlord and tenant, domestic relations, personal injury, probate, business, and employment. The panel, which was moderated by Judge Richard L. Speer (Toledo), included Kenneth Freeman (Cleveland), Harold Hanna (Bowling Green), Richard Schmidt (Bowling Green) and Craig Shopneck.

The lunch break was capped with an interesting keynote presentation from Dr. Jay Zagorsky, Ph.D., who is affiliated with both The Ohio State University and Boston University. At OSU Dr. Zagorsky works in the Center for Human Resource Research, whose work includes a longitudinal survey of thousands of Americans studied since the mid-1960s to determine their understanding of their personal finances. Dr. Zagorsky tied together the metrics of the research data to help explain how and when those declaring bankruptcy eventually recover financially.

The second plenary session was a dynamic and entertaining 90-minute presentation on professionalism given by Dr. Roger Hall, Ph.D., a business psychologist from Dublin, Ohio. Dr. Hall showed how stress impacts professional values in the bankruptcy practice environment, helping attorneys recognize disabling stress in themselves and in their colleagues, and explaining what attorneys can do to alleviate stress.

The third plenary session, taught by Arthur Kaufman, a partner at Hahn Loeser & Parks in Cleveland, addressed substance abuse and the myriad of problems associated with it, including depression, anxiety, hostility, paranoia and obsessive compulsive behavior, which tend to increase in attorneys as they continue to practice law. Taking a humorous approach to this difficult topic, Mr. Kaufman sensitized the audience to recognize early warning symptoms and the need to seek help as needed.

The retreat concluded with a one-hour plenary session featuring the judges as panelists. Participating were Chief Judge Shea-Stonum, Judge Speer, Judge Randolph Baxter (Cleveland), Judge Pat E. Morgenstern-Clarren (Cleveland), Judge Whipple, Judge Arthur I. Harris (Cleveland) and Judge Kay Woods. The judges took questions from the floor and discussed specific issues, including innovations in court technology, updates on the Bankruptcy Judges Advisory Committee and the Bankruptcy Appellate Panel, information on privacy protections, problems with powers of attorney, and upcoming rules changes regarding deadlines.

Based on the program evaluations completed by the participants, the retreat was a rousing success. The organization of the program was rated excellent or good by 97 percent of the respondents, and the content was rated excellent or good by 90 percent. Many respondents commented on the inherent value of judges, court staff and practitioners getting together to discuss mutual concerns and share ideas.

(Intellectual Hero, continued from page 14)

As lawyers, we are trained from the outset that "the facts matter." Whether drafting a pleading, negotiating a settlement or arguing a motion, the facts—not opinions—determine the outcome. In anticipation of the inevitable "oral arguments" that you will have around the water cooler or at the ball game, know the facts and not just those facts repeated by the media. Simply validating or invalidating the chattering class's version of what matters most is not enough.

So do your own research and encourage others to do the same. Identify a trusted resource and send it to colleagues and friends. Draft your own "top 10 questions" for Judge Sotomayor—i.e., questions that you would ask if the decision was entirely up to you. And then, share your list of questions with others—including our U.S. senators!

The facts are that Judge Sotomayor has been nominated and confirmed twice to the federal courts: first by President George H. W. Bush in 1992, and then by President Clinton in 1998. There is no doubt that her stellar educational background, coupled with her years of private practice and government service (including more than a decade as a federal appeals court judge) qualifies her for the Supreme Court. End of (personal) story.

We need to move beyond the "qualifications" question as part of the confirmation process and look for insight about how she would perform in the role of Supreme Court Justice. It is entirely unfair and unreliable to ask her how she would rule in a particular case, past or present. Instead we should demand broader-themed questions that elevate the debate and shed light on her thinking process about the role of the Court. For example:

- What standards or criteria should be used to decide which cases are heard by the Supreme Court?
- What resources does she draw upon to decide cases in which the text of a statute does not provide a clear answer?
- How much value does she place on unanimity in Supreme Court decisions?
- What factors does she consider when deciding whether to author a concurring opinion?
- As a noted "pragmatist," where does she stand on the doctrine of Obstacle Preemption and the Supremacy Clause?
- What guidance can or should be taken from international norms or legal opinions on U.S. constitutional issues?

These types of questions give us a chance to return to the heady days of law school when we were first discovering the foundation and importance of our system of jurisprudence, and what makes it great (or not so great).

This type of thoughtful inquiry gives us a chance to reflect on our careers in the law and to consider whether our system of jurisprudence has lived up to the promises it offered. We must strive to fulfill that promise, either personally or by advocating for improvements to the way we manage that system.

Too often we are led away from our foundations by the ambiguities and compromises of everyday life. Yet, in this context, our founding fathers gave us an outstanding constitutional framework under which to evaluate future decisions and actions. They also gave us a process that affords the opportunity to reflect on our foundations and to ponder their importance.

We write to encourage you to do the same with the nomination of Judge Sotomayor in hopes that, if not now, then perhaps future nominations will be afforded the respect and contemplation both the nominee and the process deserve. If another confirmation process proceeds via "politics as usual," without a demand for more, we have only ourselves to blame. If not you, who? If not now, when?

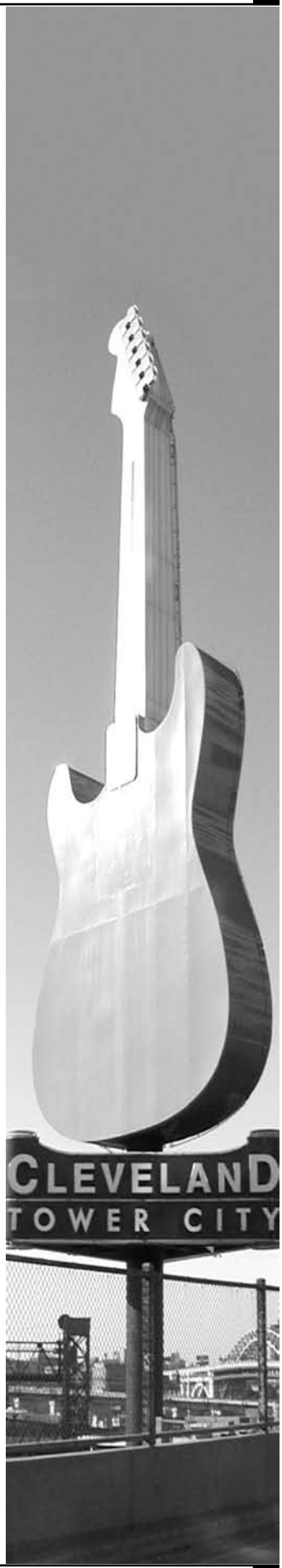
Endnote

[1]Rabbi Hillel and Robert F. Kennedy are other great men in history to whom this quote has been attributed.

(Members Join Supreme Court Bar, continued from page 15)

argue cases before the Court. In addition, bar members are entitled to use the Supreme Court's library and (space permitting) are entitled to "in front of the rail" seats reserved for members of the Supreme Court Bar to view oral arguments.

General Suter received his B.A. from Trinity University and his law degree from Tulane School of Law, where he was on the *Tulane Law Review.* He practiced from 1962 to 1991 with the Judge Advocate General's Corps of the U.S. Army, rising to the rank of major general in the position of Assistant Judge Advocate General. He was awarded the Distinguished Service Medal, Bronze Star Medal and Parachutist Badge. General Suter has been the Clerk of the Supreme Court of the United States since 1991.



Calendar of Events

Please visit our Web site at www.fba-ndohio.org for additional information pertaining to any of the events listed below.

July 22
Summer Associate Reception, Cleveland

July 30
Brown Bag Luncheon with Judge Solomon Oliver Jr., Cleveland

August 28, 2009
Annual Criminal Practice Seminar, co-sponsored by the FBA-NDOC and the Office of the Public Defender, Cleveland

September 3
Members-Only Networking Breakfast, Cleveland (tentative date)

September 10-12
National FBA Event—Annual Meeting and Convention, Oklahoma City

September 14
State of the Court Luncheon, Cleveland

September 15
Members-Only Networking Breakfast, Toledo

September 18
New Lawyer Training Curriculum Seminar, "A Whole Trial in 3 Hours," Cleveland

November 6
Advanced Federal Practice Seminar, Cleveland

November 13
New Lawyer Training Curriculum Seminar, "What You Need to Know About … ," Cleveland

November 14
Brief Advice and Referral Clinic, Cleveland

December 1
Federal Employment Litigation Seminar, Cleveland

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