Federal Bar Association
Northern District of Ohio Chapter

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President's Podium - Derek Diaz

For crafting post-covid judicial procedures, your opinion matters

If you are registered to file court documents electronically in the Northern District of Ohio, you'll soon receive an email about a survey regarding your experiences practicing law during the pandemic. Please be sure to complete the survey. The goal of the inquiry is to collect insights from local attorneys about favorable and unfavorable aspects of conducting judicial proceedings remotely. Results of the survey will be shared with various groups of judges who are trying to create rules for the post-pandemic era.

While video and telephone hearings are nothing new, covid made them universal almost overnight. The upcoming survey, for which numerous judges have offered input, recognizes that people's experiences with remote hearings have varied. For instance, you may have found that some types of judicial proceedings in which you have participated have easily lent themselves to virtual appearances (like status conferences, for example), while other types of proceedings (such as hearings on contested motions) have not.

The survey also recognizes that civil cases and criminal cases will likely require different policies. So the interface will ask whether you mainly handle civil or criminal matters. It will then sort your answers accordingly.

The survey consists of a mere 15 questions, so it shouldn't take you long to finish. Here's a sample query:

In your opinion, was the outcome for your client negatively affected by the remote video technology format of the proceeding for any of the following? (Select all that apply.)

- Case management/status conference(s);
- Hearing on motion(s) other than dispositive motions and complicated discovery disputes;
- Hearing(s) on complicated discovery dispute(s);
- Hearing(s) on dispositive motion(s);
- Non-jury trial(s);
- Jury trial(s);
- Appellate oral argument(s); and
- None/Not applicable.

At the end, there is a prompt for any additional comments you may have.

Again, please take the time to do this short survey and to contribute to this worthwhile effort to navigate the post-covid practice of law.

FBA Members in the News

The United States District Court for the Northern District of Ohio

FOR IMMEDIATE RELEASE February 10, 2022

Judge Patricia A. Gaughan, Chief Judge of the United States District Court for the Northern District of Ohio, announced that Magistrate Judge David A. Ruiz and Bridget Meehan Brennan, Esq. were sworn in today to serve as United States District Judges in Cleveland. Judges Ruiz and Brennan were nominated by President Joseph R. Biden, Jr. to serve life terms. The newly appointed judges replace District Judges Oliver and Polster, who assumed senior status in February 2021.

Judge Ruiz has served the United States District Court for the Northern District of Ohio since October 1, 2016, when he was appointed as a United States Magistrate Judge. He joined the Court with 16 years of experience in both civil and criminal litigation. Prior to his appointment, he served as an Assistant United States Attorney in the Civil Division of the U.S. Attorney's Office for the Northern District of Ohio beginning in 2010. Prior to joining the U.S. Attorney's Office, Judge Ruiz served in the Litigation Department of Calfee Halter & Griswold, LLP in Cleveland, Ohio for 10 years. He received his B.A. from The Ohio State University in 1997, where he also earned his J.D. in 2000. He was inducted into Kaleidoscope Magazine's Cuarenta/Cuarenta "40 under 40" Class of 2006, honoring Hispanic leaders in Northeast Ohio for community service and achievements.

Judge Brennan recently served as U.S. Attorney for the Northern District of Ohio. Since she first joined the U.S. Attorney's Office in 2007, she had served in the positions of First Assistant United States Attorney, Chief of the Criminal Division, Chief of the Civil Rights Unit, and Ethics Advisor. Prior to joining the U.S. Attorney's Office, she worked as a litigation associate at Baker Hostetler in Cleveland. Judge Brennan was appointed to the Northern District of Ohio's Advisory Committee and served as Co-Chair of its Subcommittee on Criminal Rules. She earned her B.A. from John Carroll University in 1997 and her J.D. from Case Western Reserve University School of Law in 2000.

Chief Judge Gaughan said, "We are very excited to have David Ruiz and Bridget Brennan join the Court as District Judges. They have the judicial temperament, intelligence, work ethic, and commitment to justice to be invaluable assets to our Bench."

The United States District Court for the Northern District of Ohio has court locations in Cleveland, Akron, Toledo, and Youngstown and serves 6 million citizens in the 40 northernmost counties in Ohio.

CONTACT: Sandy Opacich, Clerk of Court

(216) 357-7068

FBA Members in the News

The United States District Court for the Northern District of Ohio

FOR IMMEDIATE RELEASE March 11, 2022

Judge Patricia A. Gaughan, Chief Judge of the United States District Court for the Northern District of Ohio, announced that Charles Esque Fleming, Esq. was sworn in today to serve as a United States District Judge in Cleveland. Judge Fleming was nominated by President Joseph R. Biden, Jr. to serve a life term. He replaces District Judge James S. Gwin, who assumed senior status in February 2021.

Judge Fleming served as an Assistant Federal Public Defender beginning in 1991 and as a Supervisor in the Office of the Federal Public Defender for the Northern District of Ohio since 2010. He represented indigent defendants in federal criminal cases at both the trial and appellate levels. As an attorney with Forbes, Forbes & Associates from 1990 to 1991, he had a wide-ranging civil practice, which included employment discrimination, property, torts, municipal and state bonding, domestic relations, contracts and corporate law. From 2007 to 2018, Judge Fleming served as an adjunct professor of trial advocacy at the Cleveland-Marshall College of Law. He earned his B.B.A. from Kent State University in 1986 and his J.D. from Case Western Reserve University School of Law in 1990.

Chief Judge Gaughan said, “We are very excited to have Charles Fleming join the Court as a District Judge. He has the judicial temperament, intelligence, work ethic, and commitment to justice to be an invaluable asset to our Bench.”

The United States District Court for the Northern District of Ohio has court locations in Cleveland, Akron, Toledo, and Youngstown and serves 6 million citizens in the 40 northernmost counties in Ohio.

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Iceberg Ahead: Why Courts Should Presume Bias in Cases of Extraneous Juror Contacts

Andrew Rumschlag*

Introduction

In 1954, the Supreme Court declared that outside influences on jurors are "presumptively prejudicial" in *Remmer v. United States*.[1] Although the incident before the *Remmer* Court involved actual jury tampering, extraneous contacts involving jurors—and juror misconduct generally—comes in many forms. The internet requires courts to address extraneous contact[2] involving internet research and social media.

Although it has not explicitly overruled *Remmer*, the Court's later decisions cast enough doubt on *Remmer*'s vitality to sow confusion among the lower courts. Although some circuits maintain some form of *Remmer*'s presumption of prejudice, others have done away with it entirely. Further, although the Sixth Amendment impartial-jury right is incorporated through substantive due process, states have adopted disparate extraneous-contact investigation procedures.

To presume that extraneous contacts are or are not prejudicial is not a minor, idiosyncratic difference between jurisdictions, because it is often difficult if not impossible to show what impact those contacts had on the jury's deliberations. "[T]he assignment of the burden of proof on an issue where evidence does not exist and cannot be obtained is outcome determinative. [The] assignment of the burden is merely a way of announcing a predetermined conclusion."[3] Thus, while an evidentiary burden may at first glance seem like no more than a thumb on the scale, absent any counterweight, that thumb determines the outcome.

An evidentiary counterweight in *Remmer* cases is often unavailable due to the no-impeachment rule, which prohibits jurors from testifying about their deliberations. When the only fact either party can prove is whether extraneous contact *happened*, rather than what its *effects* were (i.e., whether a juror manifested bias during deliberation), the burdened party fails.

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* Editor-In-Chief, Case Western Reserve Law Review. This is an abridged version of a Note that will be published In Volume 72, Issue 2 of the Case Western Reserve Law Review and appears here with the permission of the Law Review.

[1] Remmer v. United States (*Remmer I*), 347 U.S. 227, 229 (1954).

[2] This piece uses the term "extraneous contact" to refer to any contact with extrajudicial influence pertaining to the matter for which a juror is empaneled. That influence could be effectuated by extrajudicial factual information not admitted at trial or by third parties who offer opinions or inducements that might sway a juror's vote.

[3] United States v. Leon, 468 U.S. 897, 943 (1984) (Brennan, J., dissenting) (quoting Roger B. Dworkin, *Fact Style Adjudication and the Fourth Amendment: The Limits of Lawyering*, 48 IND. L.J. 329, 332–33 (1973)).

Put another way, the no-impeachment rule restricts admissible evidence of whether extraneous contacts influenced a jury's verdict to no more than the proverbial tip of the iceberg. The question is whether to presume until proven otherwise that what lies unseen below the water threatens to sink the defendant's impartial-jury guarantee—or whether to sail ahead under the assumption that no danger lurks beneath the waves, in the interest of making good time.

This article examines attempts by the Supreme Court, federal circuits, and state courts to combat extraneous contacts involving jurors to propose a uniform procedural framework. The proposed framework strikes an appropriate balance between the constitutional guarantee of an impartial jury and concerns of judicial efficiency.

United States v. Remmer

Elmer "Bones" Remmer, a well-known money launderer, stood trial in San Francisco from late 1951 through early 1952 for tax evasion.[4] Sometime during the trial, James Satterly, a Las Vegas craps dealer, approached one of the jurors—I.J. Smith—and remarked that Smith "could profit by bringing in a favorable verdict" for Remmer.[5] Smith immediately informed the judge of Satterly's comments. The judge conferred with the prosecuting attorneys and informed the FBI. The FBI's investigation—which included interviewing Smith while the trial was ongoing—concluded that Satterly had made the statement as a joke. But defense counsel did not learn of the contact or investigation until articles in Bay Area newspapers reported the events—*after* the jury had already convicted Remmer.[6]

Remmer moved for a new trial requesting that the district court hold a hearing to determine whether the bribe offer, and subsequent FBI investigation, had affected the jury's impartiality. The district court denied the motion and refused the hearing request, and the Ninth Circuit affirmed.

The Supreme Court vacated Remmer's conviction and remanded to the district court, instructing the trial judge to hold a hearing to determine whether Satterly's comments had biased the jury. The *Remmer* Court refused to burden a defendant to show prejudice, explaining:

> In a criminal case, any private communication, contact, or tampering, directly or indirectly, with a juror during a trial about the matter pending before the jury is, for obvious reasons, deemed *presumptively prejudicial*, if not made in pursuance of known rules of the court and the instructions and directions of the court made during the trial, with full knowledge of the parties. The presumption is not conclusive, but the burden rests heavily upon the Government to establish, after notice to and hearing of the defendant, that such contact with the juror was harmless to the defendant.[7]

On remand, the district court limited its inquiry to whether the FBI investigation had prejudiced the jury deliberations. But when the case returned to the Supreme Court two years later, the Court explained that it had intended the district court to examine "the entire picture," including Satterly's communications with Smith.

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[4] *Remmer I*, 347 U.S. at 228.
[5] Affidavit in Support of Motion for New Trial at 3–4, Remmer v. United States, 347 U.S. 227 (1954) (No. 12,177).
[6] *Id.* at 4.
[7] *Remmer I*, 347 U.S. at 229.

That picture, as it turned out, was troubling. The Court characterized Smith's reaction to Satterly's comments as "disturbed." Smith also discussed Slattery's offer, and the "terrific pressure" he felt, to two other jurors. Further, Smith did not know the results of the FBI investigation when casting his vote to convict Remmer. Taken together, the Court determined that the extraneous contact had biased Smith. Remmer was therefore entitled to a new trial.[8]

Remmer's Presumption

The *Remmer* Court deemed extraneous contact involving a juror "presumptively prejudicial." But that presumption's nature is unclear—and courts have further muddied the water by incautiously interpreting *Remmer*'s holding.

The *Remmer* Court omitted a key intermediate premise from the rule it articulated. The extraneous *contact* does not presumptively prejudice the defendant. Instead, the contact presumptively *biases the juror*—either by altering the juror's opinion of the defendant's character or by exposing the juror to extrajudicial facts or law. The presumption is that the juror, once exposed to extraneous contacts, will not be able to "render a verdict based on evidence presented in court" as required by the impartial-jury guarantee.[9] That biased juror, then, is prejudicial because he can no longer deliberate impartially using only the record generated at trial.

Further, the *Remmer* Court most likely contemplated a presumption that assigns not only a burden of production, but also a burden of persuasion. Courts apply presumptions that include a burden of persuasion when strong policy underpinnings—including the availability of evidence and social policy—render a "bursting bubble" presumption inadequate. The policy concerns that *Remmer*'s presumption serves are unquestionably important: a criminal defendant's Sixth Amendment impartial-jury guarantee and the inability to prove biased deliberations due to the no-impeachment rule.[10] The *Remmer* Court did not specify an evidentiary standard the government has to meet to rebut its presumption of prejudice. But that the Court characterized the burden as "rest[ing] heavily" certainly rules out anything less than a preponderance of the evidence—and likely implies an even more demanding standard.

The No-Impeachment Rule, Federal Rule of Evidence 606(b), and *Tanner*

The *Remmer* presumption is inextricably intertwined with the no-impeachment rule, which prohibits jurors from testifying about their deliberations. Federal Rule of Evidence 606(b) codified this common law rule,[11] intended to ensure "finality" and jurors' "absolute privacy." Although Rule 606(b) preserved the common law exception to the no-impeachment rule that permits jurors to testify about improper extraneous contacts, it still excludes testimony about whether those contacts actually affected a jury's deliberations.[12] Parties tasked with proving actual bias therefore face a nearly impossible task. They must rely only on the juror's ability to self-diagnose—and willingness to admit—whether she is biased. But studies indicate that jurors are especially bad at this sort of self-diagnosis.[13] The purpose of *Remmer*'s presumption is therefore to ensure that in a criminal proceeding, the government—rather than the defendant—bears this nearly impossible burden.

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[8] Remmer v. United States, 350 U.S. 377, 378 (1956) [hereinafter *Remmer II*].
[9] Irvin v. Dowd, 366 U.S. 717, 723 (1961).
[10] Under the no-impeachment rule, courts may still inquire whether individual jurors remain impartial. They may not, however, inquire how their partiality did or did not impact the proceeding.
[11] Tanner v. United States, 483 U.S. 107, 121 (1987).
[12] The Supreme Court has recognized that Rule 606(b), like the common-law no-impeachment rule, does not prohibit juror testimony "concerning any mental bias in matters unrelated to the specific issues that the juror was called to decide," such as a juror's extrajudicial discovery of a defendant's prior convictions. Rushen v. Spain, 464 U.S. 114, 120–21 & n.5 (1983).
[13] *See* David Yokum, Christopher T. Robertson & Matt Palmer, *The Inability to Self-Diagnose Bias*, 96 DENV. L. REV. 869, 913 (2018).

Smith v. Phillips

Although not the sole cause of confusion, some have blamed *Smith v. Phillips*[14] for courts' departure from *Remmer*'s presumption.[15] During Phillips's trial, one of the jurors applied for a job with the District Attorney's Office.[16] Phillips's prosecutors initially concealed the juror's application from the trial court, but the district attorney eventually disclosed it following a five-day internal investigation. The trial judge determined that the application did not warrant a mistrial, and the jury convicted Phillips. On collateral appeal, the district court granted relief, which the Second Circuit affirmed.

The Supreme Court reversed. Writing for the majority, Chief Justice Rehnquist explained that trial courts do not need to grant a mistrial "every time a juror has been placed in a potentially compromising situation." Somewhat perplexingly, the Chief Justice—citing *Remmer*—stated that "[t]his Court has long held that the remedy for allegations of juror partiality is a hearing in which the *defendant* has the opportunity to prove actual bias."[17] But the *Remmer* Court did something quite different—it placed "the burden . . . heavily upon the *Government* to establish . . . that [extraneous] contact with the juror was harmless to the defendant." This apparent disparity between the *Remmer* Court's presumption of prejudice and the *Phillips* Court's burden on the defendant to prove prejudice led to confusion about *Remmer*'s continuing vitality.

Further, that the *Phillips* Court invoked *Remmer* in this context is especially perplexing given that *Remmer* constrained its prescription to contacts "about the matter pending before the jury."[18] Nothing in *Phillips* indicates that the juror's job application fit this description. Rather, the defendant's theory was that the job application manifested the juror's implied bias in law enforcement's favor. It therefore made little sense to invoke *Remmer*—which dealt with contacts that *caused* jurors' biases.

The *Phillips* Court's decision caused widespread confusion, leading two circuits to reject *Remmer*'s presumption of prejudice outright, and leading other circuits to question *Remmer*'s continued vitality.

At least one commentator has suggested that *Phillips* is reconcilable with *Remmer* based on procedural posture. That is, that *Phillips* reflects only the Supreme Court's view of presuming prejudice on collateral appeal—unlike *Remmer*, which came before the Court on direct appeal as a preserved error. But the *Phillips* Court directly cited *Remmer* for the proposition that "the remedy for allegations of juror partiality is a hearing in which the *defendant* has the opportunity to prove actual bias."[19] It is therefore unlikely that *Phillips* can be reconciled with *Remmer*—which explicitly burdened the government—based solely on procedural posture. Rather than accepting this current, unsettled jurisprudence, courts should adopt a uniform framework with which to analyze cases of extraneous contacts involving jurors.

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[14] 455 U.S. 209 (1982).

[15] Eva Kerr, Note, *Prejudice, Procedure, and a Proper Presumption: Restoring the* Remmer *Presumption of Prejudice in Order to Protect Criminal Defendants' Sixth Amendment Rights*, 93 IOWA L. REV. 1451, 1460 (2008).

[16] *Phillips*, 455 U.S. at 210.

[17] *Id.* at 215 (citing *Remmer I*, 347 U.S. 227 (1954)) (emphasis added).

[18] *Remmer I*, 347 U.S. at 229; *see also Phillips*, 455 U.S. at 223 (O'Connor, J., concurring) (noting this disparity).

[19] Smith v. Phillips, 455 U.S. at 215 (emphasis added).

Splintered Caselaw

Courts have essentially adopted three approaches to examine extraneous contacts with jurors: (1) presuming prejudice as *Remmer* instructed, (2) requiring the defendant to prove bias, and (3) relying solely on judicial discretion.[20]

Maintaining *Remmer*'s Presumption. Eight federal circuits[21] and twenty-eight states maintain some form of *Remmer*'s presumption. Many of these jurisdictions have added a mechanism to filter out meritless claims of prejudicial extraneous contacts. Some jurisdictions provide clear guidance, requiring the defendant to prove by preponderance of the evidence that a juror was exposed to potentially prejudicial evidence. Others have much vaguer requirements, such as requiring the defendant to "demonstrate" or "show" a biasing contact without articulating any evidentiary standards. These unclear requirements leave trial courts with little guidance about when they should presume prejudice.

Other jurisdictions condition the presumption's availability on the contact's perceived severity—the likelihood that the alleged extraneous contact was the kind that would bias a juror. But these jurisdictions rarely concretely define the circumstances that merit a presumption of prejudice, effectively granting trial courts broad discretion of whether to presume prejudice or not. To counteract trial courts' concern for judicial resources—which may predispose them to avoid finding prejudice in close calls—something more than vague guidance as to when *Remmer*'s presumption applies is necessary.

While a prudent *Remmer* framework should include a threshold requirement to filter out clearly innocuous extraneous contacts, such a framework should clearly state (1) what sort of extraneous contacts require an evidentiary hearing and (2) the evidentiary standard required to prove that the contact was of that nature.

No Presumption Available. The Sixth Circuit is sometimes cited as standing alone in rejecting *Remmer*'s presumption entirely. In *United States v. Pennell*,[22] the Sixth Circuit interpreted *Phillips* as an unqualified rejection of *Remmer*'s presumption. But the Tenth Circuit has followed in its sister's footsteps. In *United States v. Barrett*, the Tenth Circuit stated that "[t]he *defendant* must . . . demonstrate that an unauthorized contact created actual juror bias; *courts should not presume* that a contact was prejudicial."[23]

Fifteen states, including Ohio, also either reject or question the continued vitality of *Remmer*'s presumption of prejudice when extraneous contact is alleged. Frequently, these states do not distinguish between extraneous contact involving jurors and juror misconduct. The commingling of juror misconduct and extraneous contact jurisprudence likely explains why some jurisdictions do not presume prejudice. There is admittedly some logic to treating extraneous contacts as juror misconduct. When jurors initiate extraneous contacts, those contacts are also juror misconduct A prudent *Remmer* analytical framework should be responsive to both juror-initiated extraneous contact and third-party-initiated extraneous contact. But it does not follow that a juror who engages in misconduct by *initiating* extraneous contact is *not* presumptively biased, while a juror contacted by a third party or unwillingly exposed to extraneous information *is* presumptively biased. If any distinction is appropriate, the presumption of bias ought to be even stronger when the juror initiates extraneous contact.

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[20] Nine if one counts the Fifth Circuit, which purports to reject—but effectively applies—*Remmer*'s presumption. *See* United States v. Jordan, 958 F.3d 331, 335 (5th Cir. 2020).

[21] For a survey of each circuit and state's extraneous-contact jurisprudence, see Appendices A & B in the unabridged version of this article.

[22] 737 F.2d 521 (6th Cir. 1984).

[23] United States v. Barrett, 496 F.3d 1079 (10th Cir. 2007).

Judicial Discretion. The Eighth Circuit and seven states do not place the burden of proof on either the defendant or the government. Instead, these jurisdictions grant trial courts discretion to find facts, determine prejudice, and grant or deny a new trial. These jurisdictions generally do not differentiate extraneous contact involving a juror from any other reason to declare a mistrial. They instead rely on the trial court's ability to root out juror bias and determine whether a mistrial is warranted.

Notably, it appears that the Eighth Circuit's adoption of a judicial-discretion approach means that it has implicitly rejected *Remmer*'s presumption. District courts in the Eighth Circuit have broad discretion to determine what the extraneous contact was, how it affected the jury's deliberations, and whether or not a new trial is warranted.

What the Eighth Circuit's approach offers in flexibility, it lacks in concrete procedural protections for criminal defendants. Allowing individual judges to make ad hoc determinations of prejudice means that different defendants may enjoy disparate Sixth Amendment protections. Moreover, courts are often loath to declare a mistrial, emphasizing concern for judicial resources. Leaving the decision of whether a mistrial is warranted to the trial court's sole discretion therefore does not provide adequate safeguards for defendants' impartial-jury guarantee.

In sum, the patchwork solutions adopted by circuit and state courts provide inconsistent—and therefore constitutionally unacceptable—protections to defendants' Sixth Amendment right to an impartial jury. A uniform, administrable *Remmer* framework is needed to guarantee an impartial jury, while giving due consideration to the policy concerns of judicial efficiency and juror privacy.

A Proposed Practical Solution

A better framework acknowledges that a truly perfect jury is impossible, while protecting defendants' fundamental right to an impartial jury.

Although some jurisdictions require a defendant to move for a new trial in order to qualify for an evidentiary hearing on extraneous contacts, the better practice is for the court to investigate *sua sponte* when it becomes aware of potential extraneous contacts with jurors. Information about extraneous contacts is frequently revealed directly to the trial judge. The burden therefore ought not fall to the defendant to initiate the hearing—but the defendant should still be *permitted* to initiate the hearing by informing the judge of extraneous contact with jurors of which the defendant is aware.

A threshold requirement to prevent defendants from abusing *Remmer* hearings is prudent. Under the proposed framework, after a trial court initiates the evidentiary hearing, the defendant must present evidence amounting to probable cause that (1) extraneous contact involving a juror took place; (2) the juror initiated the contact or a third party initiated the sort of contact that might bias a reasonable juror; *and* (3) the contact was not clearly irrelevant to the matter for which the juror is empaneled.

Probable cause is a low bar—and one with which courts are already familiar. This requirement would preserve judicial resources by screening entirely meritless claims of juror bias. And this burden may be met as a matter of course if what the judge learned from the initial reporting of the contact, without more, amounts to probable cause that the three elements are met.

Rather than this framework's proposed "not clearly irrelevant" standard, some jurisdictions instead require that the contact "pertain" to the proceedings. But extraneous contacts may sometimes be ambiguous. And the government is better positioned to fully investigate the extraneous contact. It is therefore appropriate to require defendants to meet only the proposed framework's very low bar.

In order to rebut the presumption of juror bias, I propose that the government must prove beyond a reasonable doubt that the extraneous contact would not have prejudiced a hypothetical reasonable juror.[24] Beyond a reasonable doubt is an evidentiary standard with which trial courts are already familiar. And adopting a specific evidentiary standard provides the clear guidance that existing approaches often lack. Because at stake is the validity of a criminal trial, beyond a reasonable doubt is the appropriate standard.

An objective hypothetical-reasonable-juror standard is more administrable than a subjective actual-bias one. Although some jurisdictions inquire into actual bias, the no-impeachment rule leaves the court to take the juror at her word that she was not biased. And given that self-diagnosing bias is nearly impossible, juror testimony is at best weakly probative for the purpose of *disproving* actual bias. But while the trial court need not inquire into actual bias, a juror's subjective belief that she *was* biased is still very probative—if not dispositive—of the extraneous contact's effect on a hypothetical reasonable juror. The objective standard therefore still accounts for the juror's subjective state of mind.

Concededly, requiring the government to rebut the presumption beyond a reasonable doubt places a heavy burden on the government. But this is exactly what *Remmer* prescribed. Trial courts may compel jurors to produce text messages and web browsing histories and interview third parties with whom jurors communicated. If necessary, the government may work with law enforcement to investigate the extraneous contacts. If the extraneous contact would not have biased a hypothetical reasonable juror, these evidentiary sources should be sufficient to prove that fact beyond a reasonable doubt.

Conclusion

To ensure that the Sixth Amendment's impartial-jury guarantee is equally available to all defendants, courts must respond to extraneous contacts uniformly. A careful analysis of *Remmer* and its underlying policies demonstrates that courts should presume that a juror is biased when he is involved in extraneous contacts that might bias an objective reasonable juror. This presumption is necessary because of the no-impeachment rule, which restricts the available evidence to only manifestations of bias outside the jury's deliberations—the tip of the iceberg. The proposed framework would keep defendants' impartial-jury guarantee afloat without wholly sacrificing judicial efficiency. While there may still be close calls and opportunities for judges to exercise individual discretion within this framework, the proposed measures would ensure that the fundamental right to an impartial jury is equally guaranteed to every defendant.

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[24] Massachusetts follows this approach. *See, e.g.*, Commonwealth v. Guisti, 747 N.E.2d 673, 680 (Mass. 2001).

Cryptocurrency and Bankruptcy

Ryan R. McNeil*

The Bitcoin currency network officially launched on January 3, 2009. In the ensuing period, the world has witnessed an explosion in the popularity and utilization of cryptocurrency, blockchain technology, and non-fungible tokens ("NFTs"). Four separate cryptocurrency commercials featuring celebrities such as Lebron James and Larry David aired during the 2022 Super Bowl.[1] The State of U.S. Crypto Report released by the New York-based cryptocurrency exchange Gemini Trust Company, LLC in April 2021 found that "21.1 million adults, or about 14% of the U.S. population, own cryptocurrency."[2]

Federal regulators and government enforcement agencies are attempting to catch up to this emerging technology and establish systems to administer, monitor, and tax crypto and virtual currency. The Commodity Futures Trading Commission, the Securities and Exchange Commission, the Internal Revenue Service, and the Financial Crimes Enforcement Network are just some of the United States federal agencies currently examining cryptocurrency and implementing regulations at the federal level. In January 2022, Bloomberg reported: "The Biden administration is preparing to release an initial government-wide strategy for digital assets as soon as next month and task federal agencies with assessing the risks and opportunities that they pose."[3] On January 20, 2022, the Federal Reserve published a 40-page discussion paper examining a potential U.S. central bank digital currency ("CBDC").[4]

There is another important group that will have no choice but to quickly establish procedures and systems to deal with this emerging asset class: the bankruptcy bar. If they have not already, bankruptcy attorneys representing debtors will undoubtedly encounter cryptocurrency issues in their practice. The current United States Bankruptcy Code was enacted in 1978. The Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 ("BAPCPA") made substantial amendments to the Bankruptcy Code. It goes without saying that both the Bankruptcy Code and BAPCPA are silent on the issue of cryptocurrency. Further, the body of bankruptcy case law concerning cryptocurrency is scarce.[5]

Even though Bitcoin did not exist at the time BAPCPA was enacted in 2005, the current bankruptcy law requires debtors' attorneys to perform substantial due diligence to ensure that all documents filed by the attorney with the bankruptcy court contain accurate information. 11 U.S.C. § 707(b)(4)(C)(i) provides: "The signature of an attorney on a petition, pleading, or written motion shall constitute a certification that the attorney has performed a reasonable investigation into the circumstances that gave rise to the petition, pleading, or written motion."

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* Ryan McNeil is the owner of McNeil Law Firm, LLC in Akron. He focuses his practice primarily on representing debtors in Chapter 7 and Chapter 13 bankruptcy proceedings.

[1] Anthony Tellez, *Crypto Ads Are a Super Bowl Talker, with Floating QR Codes and Larry David*, NPR, Feb. 14, 2022, https://www.npr.org/2022/02/14/1080237873/superbowl-ads-crypto-bitcoin.

[2] Dawn Allcot, *14% of Americans Own Crypto Right Now—Here's Who's Actually Doing It Right*, Yahoo! Finance, Apr. 21, 2021, https://finance.yahoo.com/news/study-reveals-crypto-biggest-investors-132102315.html?guccounter=1.

[3] Jennifer Epstein, Jenny Leonard & Allyson Versprille, *White House Is Set to Put Itself at Center of U.S. Crypto Policy*, Bloomberg, Jan. 21, 2022, https://www.bloomberg.com/news/articles/2022-01-21/white-house-is-set-to-put-itself-at-center-of-u-s-crypto-policy.

[4] Bd. of Govs., Fed. Res. Sys., Money and Payments: The U.S. Dollar in the Age of Digital Transformation (Jan. 2022), https://www.federalreserve.gov/publications/files/money-and-payments-20220120.pdf.

[5] "Meanwhile, bankruptcy courts have not even attempted to answer the question of what a crypto asset is." Megan McDermott, *The Crypto Quandary: Is Bankruptcy Ready?*, 115 Nw. U. L. Rev. Online 24, 27 (2020), https://scholarlycommons.law.northwestern.edu/cgi/viewcontent.cgi?article=1290&context=nulr_online.

The crucial question facing debtors' attorneys is what constitutes a reasonable investigation about whether a debtor owns cryptocurrency? Debtors' attorneys should inquire about whether a potential client owns cryptocurrency during the initial consultation. However, is that enough to satisfy the requirement of 11 U.S.C. § 707 (b)(4)(C)(i)? Unlike real estate owned by the debtor, cryptocurrency is not an asset that can be located with minimal effort. Anonymity is one of the fundamental elements of the blockchain technology used by cryptocurrency and NFTs. "The relative anonymity of crypto investments poses similar challenges for bankruptcy or insolvency systems . . . ."[6] The growing utilization and popularity of these anonymous assets poses a problem for both debtors' attorneys and bankruptcy trustees tasked with locating assets for liquidation and valuation purposes.[7] The Bankruptcy Code requires debtors to completely disclose all of their assets so debtors should list any and all crypto assets in the bankruptcy petition. However, the bankruptcy schedules and Statement of Financial Affairs currently contain no specific affirmative questions relating to the ownership of cryptocurrency.[8]

In addition to directly asking debtors, the best method for a debtor's attorney to determine whether a debtor owns cryptocurrency is to examine a debtor's prepetition financial statements for transactions with a cryptocurrency exchange.[9] In 2019 the Internal Revenue Service started to require taxpayers to disclose virtual currency transactions on their tax returns. Attorneys who notice cryptocurrency transactions on bank statements, online account statements (e.g., PayPal, Venmo, Cash App), or tax returns should then inquire further with their clients to ensure that all cryptocurrency and virtual assets are properly listed in the documents filed with the bankruptcy court. If a debtor has assets with a cryptocurrency exchange, an attorney should research whether the exchange is based in the United States.[10] Cryptocurrency exchanges located in the United States "are regulated by state and federal authorities and must comply by maintaining key financial and customer records. These records are often critical to the investigation of the debtor's financial affairs."[11]

The emerging asset class of cryptocurrency will certainly lead to substantial bankruptcy procedural changes and contested litigation in the near future. In the meantime, debtors' attorneys should use all tools at their disposal to ensure that every document they file with the bankruptcy court represents a true and accurate picture of the debtor's assets.

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[6] *Id.* at 38.

[7] "Often a trustee's biggest challenge is identifying cases where a debtor has or had cryptocurrency in the first place" *See* Nancy J. Gargula & Colin May, *Investigating the Financial Affairs of a Debtor Who Has Cryptocurrency*, at https://www.justice.gov/ust/file/investigating_cryptocurrency.pdf/download.

[8] "One step that bankruptcy courts can adopt is to specifically ask debtors about crypto assets, just as the IRS recently added a specific question about cryptocurrency to federal income tax forms. For example, debtors should be asked if they have ever purchased or owned cryptocurrency. Requiring a clear 'yes' or 'no' answer to this question will make it less likely for a debtor to inadvertently fail to disclose crypto assets, and this will, in turn, make it easier for a creditor or trustee to demonstrate bad faith on the part of a debtor who fails to disclose significant crypto assets." McDermott, *supra* note 5, at 42 (footnote omitted).

[9] "Cases involving cryptocurrency are often identified through reviewing the debtor's bank statements, PayPal transactions and credit card statements." Gargula & May, *supra* note 7, at 3.

[10] "Coinbase is one of the largest VCEs and is based in San Francisco." *Id.* Others U.S.-based VCEs include Bittrex, Kraken, and GEMINI. *Id.*

[11] *Id*.

Sanctions in Response to the Russian Invasion of Ukraine

Jon Yormick and Emily Mikes*

It has been just over a month since Russia recognized two regions in eastern Ukraine, Donetsk and Luhansk, as independent states, and then launched its invasion of Ukraine. In response, the United States, along with allies around the world, have imposed sanctions and export controls against Russia, Belarus, and the now notorious oligarchs who help fund Russian President Vladimir Putin's war chest.

Most of the sanctions issued against Russian government officials, companies, and other individuals have been issued pursuant to the Russian Harmful Foreign Activities Sanctions Regulations. The sanctions first prohibited U.S. persons from engaging in importing, exporting, financing, facilitating, or approving, directly or indirectly, and goods, services, or technologies to or from the so-called Donetsk People's Republic and Luhansk People's Republic. The sanctions then targeted Russia's banking sector including large banks like Public Joint Stock Company Sberbank of Russia and VTB Bank Public Joint Stock Company. The sanctions also prohibited U.S. companies and persons from working with enumerated Russian banks related to matters of new debt (which includes extending credit) and equity. These sanctions have dramatically impacted companies' abilities to finance transactions with Russian companies and receive payment from Russian parties. Sanctions were also levied against Belarus state-owned banks and Belarus's defense sector for its role in the invasion.

As the invasion has continued, the Biden administration has imposed further sanctions on Russia's energy and defense sectors in an attempt to further isolate Russia and its economy from the world.

Private companies—including major national brands, such as Boeing, McDonalds, and BP—have also taken it upon themselves to impose embargoes on business with Russia. Several large freight forwarders, carriers, and logistics companies have issued statements that they will not facilitate shipments to Russia even if the shipment complies with sanctions and export controls.

This article provides a brief overview of the sanctions imposed to date.

Sanctions Framework

The Office of Foreign Assets Control ("OFAC") within the U.S. Department of the Treasury implements and enforces U.S. sanctions. OFAC requires all U.S. persons, including U.S. non-profit and for-profit entities, to adhere to its requirements, regardless of where the U.S. person may be located. OFAC sanctions extend to suspected or known terrorists, narcotraffickers, individuals involved in human rights abuses (e.g., Belarus government officials and Burma (Myanmar) military officers), and, in some instances, even extend to entire countries in the form of comprehensive country or region embargoes (e.g., Cuba, the Crimea and Donbas regions of Ukraine, Iran). OFAC maintains a list known as the "Specially Designated Nationals and Blocked Persons List ("SDN List"), which contains approximately 6,3000 names connected with sanctions targets.[1]

The recent Russian sanctions are well-understood to prohibit U.S. persons (entities and individuals) from direct involvement in transactions involving Russian parties. What cannot be overlooked or misunderstood is that sanctions also prohibit U.S. persons from indirect involvement in some transactions that involve non-U.S. parties.

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[1] An individual or entity placed on the SDN List is referred to as a "designated" person.

Specifically, the sanctions preclude "any approval, financing, facilitation, or guarantee" by a U.S. person, wherever located, "of a transaction by a foreign person where the transaction by that foreign person would be prohibited" by OFAC or other sanctions if performed by a U.S. person or within the United States.[2] This prohibition needs to be considered by U.S. entities and individuals with respect to operations of subsidiaries, joint ventures, and other strategic alliance arrangements so management can take necessary precautions to avoid running afoul of U.S. sanctions.

U.S. persons are not only prohibited from engaging in transactions with the specific SDNs, but also with companies in which an SDN has a majority ownership interest. Under OFAC's "50% rule," companies treated as a sanctioned entity—as though they were on the SDN list themselves—if more than 50% of their shares are owned, directly or indirectly, by one or more SDNs.[3]

Additionally, non-U.S. parties may have concerns about potential exposure under U.S. sanctions. OFAC has provided some guidance regarding non-U.S. parties, addressing this concern by stating that generally non-U.S. parties do not risk exposure to U.S. sanctions for engaging in transactions with persons subject to the U.S. sanctions prohibitions. OFAC further states that non-U.S. parties generally do not risk exposure to U.S. blocking sanctions by "engaging in transactions with blocked persons, where those transactions would *not* require a specific license if engaged in by a U.S. person."[4]

However, OFAC goes on to warn that Executive Orders ("EOs") and sanctions regulations do prohibit "any transaction that evades or avoids, has the purpose of evading or avoiding, causes a violation of, or attempts to violate any of the prohibitions of those directives, as well as any conspiracy formed to violate any of the prohibitions of those directives."[5] For instance, several years ago a mid-size company paid a $182,000 settlement to resolve 52 apparent violations of Iranian sanctions. In this case, OFAC found that even though the company was not directly selling products to Iran, it knew or had reason to know that the products were destined for Iran in violation of sanctions.

OFAC may impose civil penalties for sanctions violations based on strict liability, meaning that a person subject to U.S. jurisdiction may be held civilly liable even if it did not know or have reason to know it was engaging in a transaction with a person that is prohibited under sanctions laws and regulations administered by OFAC. If appropriate under the circumstances, a referral may also be made to the U.S. Department of Justice for criminal prosecution.

Oligarch Sanctions and New Task Forces

The U.S. has also sanctioned a number of Russian oligarchs known to be friendly with President Putin and has made it a priority to vigorously enforce these sanctions. As a result, several task forces have been created to ensure compliance, track down and seize ill-begotten assets, and even criminally prosecute those who violate of U.S. laws, regulations, and EOs.

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[2] Blocking property of certain persons and prohibiting certain transactions with respect to continued Russian efforts to undermine the sovereignty and territorial integrity of Ukraine, 87 Fed. Reg. 10293 (Feb. 21, 2022).

[3] *Revised guidance on entities owned by persons whose property and interests in property are blocked*, U.S. Department of Treasury Advisory, April 13, 2014, https://home.treasury.gov/system/files/126/licensing_guidance.pdf

[4] *Russian Harmful Foreign Activities Sanctions*, U.S. Department of Treasury FAQ, Feb. 24, 2022, https://home.treasury.gov/policy-issues/financial-sanctions/faqs/980

[5] 87 Fed. Reg. at 10294.

Several countries in Europe have made headlines for their seizure of mega yachts: for example, Italy seized a $578 million yacht belonging to Andrey Melninchenko, while Spain seized the $140 million mega yacht belonging to Sergei Chemezov. While similar seizures have yet to make it to U.S. shores, the government has made it clear it intends to aggressively enforce sanctions.

Conclusion

The U.S. sanctions are fluid, with new additions coming on a weekly—and sometimes daily—basis. The U.S. government will be focusing on these issues and will be looking to make examples of companies and individuals who do not comply. It is important to understand the risks and how to navigate the complex framework when addressing concerns about sanctions.

Federal Bar Association
Northern District of Ohio Chapter

INTRODUCTION TO FEDERAL PRACTICE

Thursday, May 5, 2022
9:00 a.m. - 12:00 p.m.
Via Zoom
2.25 Hours of Ohio CLE Credit
(This seminar satisfies Local Rule 83.5)
CLE program approval pending by the Supreme Court of Ohio.
REGISTRATION FEES: $70 FBA Member $95 Non-Member
Registration online only: www.fba-ndohio.org

SEMINAR AGENDA

8:30 **Registration**

9:00 **Welcome and Introduction**
Chief Judge Patricia A. Gaughan
U.S. District Court, ND Ohio

9:20 **Role of the Magistrate Judge**
Magistrate Judge Amanda M. Knapp
U.S. District Court, ND Ohio

Magistrate Judge Knapp will review the role of the Magistrate Judge in the federal system and the benefits to the parties and the Court of consenting to the jurisdiction of the Magistrate Judge in civil cases.

9:40 **Court Programs, Accessing Court Information and Electronic Filing**
Sandy Opacich, Clerk of Court
Michelle D. Sztul, Deputy-in-Charge (Cleveland)

The Clerk and Deputy-in-Charge will provide an overview of the Court, comment on recent developments, and describe the Court programs of interest to attorneys (the Civil Pro Bono Program, the Criminal Justice Act Plan, the Federal Court Panel of ADR Neutrals and the Northern Ohio Advisory Group). They will also provide an introduction to the Court's Website and describe the electronic filing system through which all attorneys must file and receive notice of filings.

10:30 **Break**

10:45 **Local Rules and Practice**
Sarah Nintcheff, Career Law Clerk to Chief Judge Patricia A. Gaughan
Ellen Siebenschuh, Career Law Clerk to Judge Pamela A. Barker

The law clerks will review key Local Rules related to attorney admissions, case assignments, discovery, motion practice and Alternative Dispute Resolution, with an emphasis upon the Differentiated Case Management Plan by which the Court manages its civil docket.

11:30 **Electronic Courtrooms**
James D. Jones
Courtroom Technology Coordinator
U.S. District Court, ND Ohio

The Court strives to provide litigants with the best facilities to conduct hearings and trials. Most courtrooms are now outfitted with electronic evidence presentation systems, video-conferencing capability, infrared headphones for hearing assistance and translation, real-time court, reporting, telephone interpreting and "smart" counsel tables. This section of the program provides an overview and demonstration of these features.

11:50 **Swearing-in Ceremony by Sandy Opacich,** *Clerk of Court*

Participants who have completed the course and otherwise met the requirements of Local Rule 83.5, will be sworn in to practice in the Northern District of Ohio.

** Please review the cancellation policy listed on the website: https://www.fba-ndohio.org/About*

For information on FBA-NDOC membership, events and programs, please visit our website at www.fba-ndohio.org.
Phone: 440-226-4402 **Email:** admin@fba-ndohio.org
Seminar Co-Chair: Lori Riga, Federal Public Defender & Sandy Opacich, Clerk of Court, U.S. District in Court, ND Ohio

Brown Bag Luncheon with Judge J. Philip Calabrese

May 5, 2022 at 12:30 P.M.
Courtroom 16B

Online Registration Only
Registration Fees:
FBA Members - $15 / Non-Members - $20

Boxed lunches will be provided.

Cancellations will not be accepted.

Click here to register.

Save the Date and Join us for

2022 State of the Court Luncheon
&
Installation of FBA Board Officers

Monday, October 3, 2022

More information to follow

Federal Bar Association
Northern District of Ohio Chapter

2022 Bankruptcy Bench-Bar Retreat
Save the Date

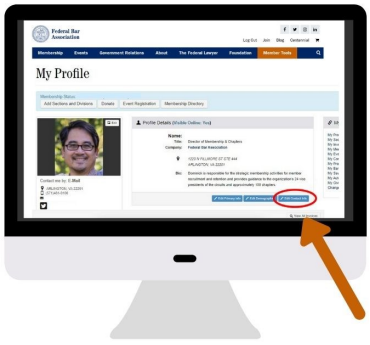
The Attorney Constituent Group of the United States Bankruptcy Court for the Northern District of Ohio invites you to its tenth biennial Bench-Bar Retreat on October 14, 2022. The event will be held at Sawmill Creek by Cedar Point Resorts in Huron, Ohio. Breakout sessions, a judges' panel, and town hall meetings will provide opportunities for industry updates, legal education, and engaging exchanges among practitioners and judges.

Additional information regarding discounted room rates and registration will follow.

Membership Information

Here's How to Renew your membership:

1) Log in to www.fedbar.org with your email and password.
2) Confirm your contact information in "My Profile."
3) Click **PAY NOW** next to your national membership invoice (located mid-page in My Profile). During checkout, please consider a donation to the FBA Foundation.



Log in at fedbar.org to update your profile

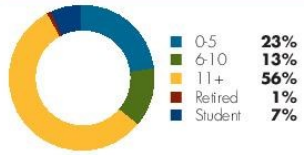
Federal Bar Association

Benefits of Membership

Joining the FBA entitles you to membership within the national organization as well as within your local FBA chapter. Members receive a host of special benefits designed to uphold the mission of the FBA and support each member's career within the federal legal system. Association activities and member benefits are organized into five primary categories.

You're in Good Company

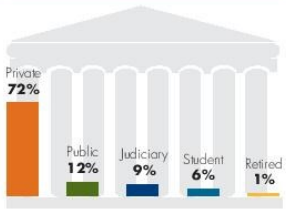
Years in Practice



Note: Chart only includes practicing attorney members of the Association.

Gender

Types of Practice



Advocacy

The organization's headquarters are located outside of Washington, D.C., in Arlington, Va., giving it the proximity necessary to remain engaged on behalf of its members.

- government relations efforts as defined by the FBA Issues Agenda
- annual Capitol Hill Day
- monthly updates on recent government relations developments

Networking and Leadership

The FBA is large enough to have an impact on the federal legal profession, but small enough to provide opportunities for networking and leadership. The FBA is governed by a 15-member, elected, Board of Directors and numerous volunteer members.

- more than 95 chapters across all federal circuits
- 22 practice area sections
- five career divisions
- volunteer leadership opportunities within each chapter, section, and division

Education

The FBA offers more than 700 credit hours of continuing legal education (CLE) at both the national and local level throughout the year.

- national CLE conferences
- bimonthly CLE webinars
- local chapter-sponsored CLE events

Publications and Communication

As part of your membership, you will receive and have access to:

- FBA website (www.fedbar.org)
- The Federal Lawyer magazine (10x per year)
- bimonthly eNewsletter
- section, division, and chapter newsletters (printed)
- Judicial Profile Index (archived)

Legal Career Center

The Legal Career Center is an online resource for both employers looking to hire and job seekers looking for a position within the federal legal community. Employers have the option of posting jobs available to the FBA Legal Career Center only, or to the Legal Job Exchange Network that reaches thousands of potential candidates through the network of partner job boards. Job seekers have free access and can use the Legal Career Center to post resumes, search for jobs, and prepare for interviews, as they launch their careers.

Member-Only Advantages

- Member Plus affinity program
- online membership directory
- optional public directory listing
- online specialty items catalog
- discounted rates for CLE, networking events, publications, and other services

Become a Sustaining Member

Support

Sixty dollars of every sustaining membership is used to support educational programs and publications of the FBA.

Save

Sustaining members save five percent on national event registrations and publications orders, and are recognized annually in *The Federal Lawyer* and at FBA events.

Sustaining Members also receive one free CLE webinar per year—a $99 value!

Make your mark within the federal legal community.
Sign up for membership today at www.fedbar.org/join.

Contact the FBA at (571) 481-9100 or membership@fedbar.org for more information.

Federal Bar Association

FBA-NDOH Calendar of Events:

April 20, 2022 ***FBA-NDOH Board Meeting***

May 5, 2022 ***Introduction to Federal Practice Seminar***

May 5, 2022 ***Brown Bag Luncheon with Judge J. Philip Calabrese***

May 18, 2022 ***FBA-NDOH Board Meeting***

June 15, 2022 ***FBA-NDOH Board Meeting***

July 20, 2022 ***FBA-NDOH Board Meeting***

We add events to our calendar often so please check our website for upcoming events that may not be listed here.

Federal Bar Association
Northern District of Ohio Chapter

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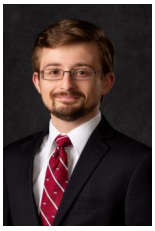

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Federal Bar Association

STATEMENT OF THE FEDERAL BAR ASSOCIATION BOARD OF DIRECTORS ON JUDICIAL INDEPENDENCE

Judicial independence, free of external pressure or political intimidation, lies at the foundation of our constitutional democracy. An independent judiciary needs to remain free of undue influence from the legislative and executive branches and to remain beholden only to the maintenance of the rule of law and the protection of individual rights and personal liberties. We affirm the right to challenge a judge's ruling for reasons based in fact, law or policy. However, when robust criticism of the federal judiciary crosses into personal attacks or intimidation, it threatens to undermine public confidence in the fairness of our courts, the constitutional checks and balances underlying our government and the preservation of liberty.

The Federal Bar Association is comprised of over 19,000 public and private sector lawyers practicing in our federal courts, hailing from all fifty states and the U.S. Territories. The Federal Bar Association is a non-partisan professional organization created to promote the sound administration of justice and integrity, quality and independence of the judiciary.

INTER ALIA is the official publication of the Northern District, Ohio Chapter of the Federal Bar Association.

If you are a FBA member and are interested in submitting content for our next publication please contact Stephen H. Jett, Prof. Jonathan Entin, James Walsh Jr. or Benjamin Reese no later then June 15, 2022

Next publication is scheduled for Spring 2022.

SOLACE
Support of Lawyers/Legal Personnel – All Concern Encouraged

Our Chapter supports the FBA's SOLACE program, which provides a way for the FBA legal community to reach out in small, but meaningful and compassionate ways, to FBA members and those related to them in the legal community who experience a death, or some catastrophic event, illness, sickness, injury, or other personal crisis. For more I nformation, please follow this link: http://www.fedbar.org/Outreach/SOLACE.aspx, or contact our Chapter Liaison Robert Chudakoff at rchudakoff@ulmer.com

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