



# Federal Bar Association

Northern District of Ohio Chapter

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Ph (440) 226-4402

Summer 2023

### Summer 2023

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## President's Podium—Hon. Amanda Knapp

Somehow it is August already. "The first week of August hangs at the very top of summer" wrote Natalie Babbitt in *Tuck Everlasting*, "the top of the live-long year, like the highest seat of a Ferris wheel when it pauses in its turning."

The balmy spring is behind us. The chill of autumn is waiting around the bend. But today we are at the top of the Ferris Wheel in the sunshine, enjoying the last days of summer.

As I take a moment to enjoy the view, glancing back at the spring and looking forward to the fall, I see themes that fit right in with the summer season: Community. Civility. Creativity.

In April and May, hundreds of members of our community came together at two special events to celebrate the nine new judges sworn in to serve the Northern District of Ohio since 2020.

After that, we kicked off the summer with back-to-back events featuring a true summer staple—BBQ! District Judge and "Barbeque Master" Charles Fleming cooked his award-winning BBQ for seminar participants and attendees at a unique brown bag luncheon in May.

In June, our community welcomed the swearing-in of the Honorable Sara Lioi as the new Chief Judge of the District Court for the Northern District of Ohio. Our Federal Agencies Committee also hosted a kickoff mixer to welcome public sector attorneys from across the region to network and learn about opportunities for learning and connection through our FBA chapter.

We renewed our commitment to civics and community engagement in June, hosting local high school students for *My Day in Court* programming at the Stokes Courthouse in Cleveland. Students had a unique opportunity to learn about our courts and legal system, interact with federal judges and government and private attorneys, and enjoy lunch with presenters.

In July, we had an absolutely packed house at our Summer Associate/Law Clerk Social at the House of Blues in Cleveland, where law students from around the region networked with local judges and practitioners, and learned more about building a career and life in northern Ohio.

While it has been a summer of community and connection, there is much more on the horizon:

**August 11:** The 2023 Federal Criminal Practice Seminar, planned by the Federal Public Defender's Office, will feature a full-day program with important topics and talented presenters.

**August 29:** Our free members-only Summer Social will be at Cleveland's 78<sup>th</sup> Street Studios. Bring a guest and visit with colleagues as we eat, drink, learn more about this popular local creative hub, and tour galleries and artist studios.

**September 6-8:** Don't forget to attend the Sixth Circuit Judicial Conference in Cleveland.

**September 22 & 29:** Our popular Trial Academy returns with in-depth and hands-on training for newer attorneys, this time tackling the topic of "TROs and Injunctive Relief."

**October 2:** Mark your calendars for the State of the Court luncheon, featuring the Chief Judges of the District and Bankruptcy courts, the installation of our FBA-NDOC board, and more!



## CRIMINAL LAW COMMITTEE PROGRAM AT CLEVELAND STATE

John McCaffrey  
Co-Chair, Criminal Law Committee

On April 18, 2023, the Criminal Law Committee of the Federal Bar Association for the Northern District of Ohio and the Cleveland State University Federal Bar Association student chapter sponsored a panel discussion entitled “Pleas, Plea Bargaining, and Criminalization in the United States.” Judge J. Philip Calabrese of the U.S. District Court for the Northern District of Ohio moderated a panel consisting of Clark Neily, Senior Vice President for Legal Studies at the Cato Institute; John McCaffrey, partner at Tucker Ellis LLP; Timothy Ivey, attorney at the Federal Public Defender’s Office for the Northern District of Ohio; and Michael Collyer, Assistant U.S. Attorney for the Northern District of Ohio.

The event was attended by law students, law professors, experienced private and public agency lawyers, and members of the U.S. District Court and the Ohio Common Pleas Court. Among the topics discussed were current trial statistics in the Northern District of Ohio and U.S. Attorney General Merrick Garland’s December 16, 2022, Memorandum to Federal Prosecutors concerning Department of Justice policies regarding charging, pleas and sentencing. The panel also discussed the 2023 Plea Bargain Task Force Report prepared by the Criminal Justice Section of the American Bar Association. Mr. Neily was one of fourteen members of the Plea Bargain Task Force, so his shared insight and discussion on the work of the Task Force was particularly noteworthy. The panel discussion concluded with the identification of strategies for improving actual and perceived inequities in current criminal charging and plea bargaining procedures in state and federal courts. A social event at Cleveland State University College of Law that included all attendees permitted further discussions and exchanges to continue.



## NEW FEDERAL AGENCIES COMMITTEE

This year, the FBA Northern District of Ohio Chapter created a new committee titled the Federal Agencies Committee. The goal of the committee is to serve public sector lawyers who work for the various government agencies in the Northern Ohio legal community. On June 7, 2023, the committee held its kick-off event at Agave and Rye on W. 6<sup>th</sup> Street in Cleveland. The event was sponsored by the National FBA’s Federal Litigation Section. The mixer was attended by attorneys who work for the U.S. Attorney’s Office, attorneys and judges for the District Court, attorneys who work for other federal agencies, and private sector lawyers. The committee is hosting its first CLE on October 5 on the Administrative Procedure Act. More details to come. If you have any questions or would like to get involved with the committee, email chair Rema Ina at [Rema.Ina@usdoj.gov](mailto:Rema.Ina@usdoj.gov).”

## FBA HONORS CWRU LAW STUDENTS

Jonathan L. Entin  
CWRU Faculty Representative,  
FBA-NDOC Board

Two students at Case Western Reserve University School of Law received the chapter-sponsored Federal Bar Association award for obtaining the top grades in Constitutional Law. Panagiota (Pammy) Boulas and Kennedy Dickson received their awards at the law school's awards ceremony on May 19 and their J.D. degrees the next day.

Pammy is from Brecksville, Ohio, and received her bachelor's degree in philosophy from Capital University, where she was a successful debater. That experience prepared her for success in law school, where she was a standout performer on the National Moot Court Team and the Mock Trial Team. Pammy also was president of the Federalist Society and active in the Christian Legal Society. She will be joining James E. Boulas Co., L.P.A., a small Broadview Heights firm.

Kennedy is from Whittier, California, and graduated from the University of Mississippi Sally McDonnell Barksdale Honors College. Serendipitously, she got involved in Ole Miss's unique marijuana research program as an undergraduate, and that experience has influenced her work in law school. She published a Law Review Note about administrative law issues in federal marijuana regulation and wrote a seminar paper on the Dormant Commerce Clause and state regulation of marijuana.

As the Law Review's symposium editor, Kennedy organized a successful conference about education and the First Amendment. In addition to the FBA award in Constitutional Law, she was honored as the best student in the clinical program and in several classroom courses. She will be clerking for Judge J. Philip Calabrese of the U.S. District Court for the Northern District of Ohio.



Dean Jessica Berg & Pammy Boulas



Dean Jessica Berg & Kennedy Dickson

**CWRU SYMPOSIUM TO FOCUS ON JUDICIAL ETHICS**

Jonathan L. Entin  
David L. Brennan Professor Emeritus of Law,  
Case Western Reserve University

In recent years, the United States has seen increased concern about the judiciary. Beyond debate over particular judicial rulings, attention has focused on the courts as institutions. For example, public approval of the Supreme Court of the United States is at the lowest level ever recorded, critics complain that the justices do not subscribe to an ethics code of the kind that binds lower federal court judges, complaints under the Judicial Conduct and Disability Act have increased by more than 20 percent since 2020, and state judicial elections have become increasingly expensive and vitriolic.

These concerns raise profound questions about the functioning of the American judiciary as an institution and mechanisms for reform. What sorts of rules relating to judicial ethics and conduct are appropriate, and who should be responsible for promulgating those rules? How do existing governance structures such as the Judicial Conference of the United States function, and how might they be improved? How does the First Amendment limit the scope of rules relating to judicial ethics, conduct, and campaign speech?

The *Case Western Reserve Law Review* will address these and related questions in a daylong symposium to be held on Friday, November 3, at the CWRU School of Law, 11075 East Boulevard, Cleveland. The program will feature a philosophically and demographically diverse set of scholars, lawyers, and judges. Confirmed speakers include Timothy R. Schnabel, executive director of the Uniform Law Commission; Judge Margaret McKeown of the U.S. Court of Appeals for the Ninth Circuit; Stephen L.A. Dillard of the Georgia Court of Appeals; Douglas Keith, counsel in the Brennan Center's Democracy Program at New York University; Adam Sopko, staff attorney at the State Democracy Research Initiative at the University of Wisconsin; Dawn Chutkow, Visiting Professor of Law at Cornell University and editor of the *Journal of Empirical Legal Studies*; Rakesh K. Anand, Professor of Law at Syracuse University; and Shih-Chun Steven Chien, Assistant Professor of Law at Cleveland State University.

The program is co-sponsored by the FBA's Federal Litigation Section. CLE approval is pending. Further details related to registration and attendance will be available soon, but mark your calendars now for this program.





### **The United States District Court for the Northern District of Ohio**

FOR IMMEDIATE RELEASE

Tuesday, June 6, 2023

Today, U.S. District Judge Patricia A. Gaughan completed her six-year term as Chief Judge of the United States District Court for the Northern District of Ohio. Judge Gaughan was the first woman to be Chief Judge of this District. She was appointed to the federal bench in 1995 by President William Jefferson Clinton. The United States District Court for the Northern District of Ohio has court locations in Cleveland, Akron, Toledo, and Youngstown and serves 5.9 million citizens in 40 Ohio counties.

Judge Gaughan stated, "It truly has been an honor and privilege to serve in the role of Chief Judge, and I consider it to be the highlight of my legal career. I am grateful to my wonderful colleagues and exceptional employees who are committed to making our system of justice the best known to the world." Judge Gaughan will continue to be a sitting judge on the federal bench.

Judge Gaughan presently serves on the Committee on Judicial Conduct and Disability of the United States Judicial Conference, the policy-making body of the federal judiciary, which is chaired by the Chief Justice of the United States Supreme Court. Previously, she served on the Federal-State Jurisdiction Committee.

Prior to Judge Gaughan's appointment to the federal bench, she served as Judge with the Cuyahoga County Court of Common Pleas from 1987-1995. Prior to her service on the bench, Judge Gaughan was an Assistant Prosecuting Attorney in the Major Trial Division of the Cuyahoga County Prosecutor's Office, and Assistant U.S. Attorney for the Northern District of Ohio. She was also in private civil practice in Cleveland, and was an Adjunct Professor of Law at Cleveland-Marshall College of Law. She received her B.A. degree from St. Mary's College in 1975 and her J.D. from the University of Notre Dame Law School in 1978.

Judge Gaughan will be succeeded by Judge Sara Lioi, who was appointed to the court by President George W. Bush in 2007.

\* \* \*

For further information, please contact Mary Doubrava, Judicial Assistant to Chief Judge Patricia A. Gaughan, at (216) 357-7210.



### **The United States District Court for the Northern District of Ohio**

FOR IMMEDIATE RELEASE

Wednesday, June 7, 2023

U.S. District Judge Sara Lioi has been sworn in as Chief Judge of the United States District Court for the Northern District of Ohio, succeeding Judge Patricia A. Gaughan. Judge Lioi was appointed to the federal bench in 2007 by President George W. Bush.

Prior to Judge Lioi's appointment to the federal bench, she served as Judge with the Stark County Court of Common Pleas from 1997-2007. Prior to her service on the bench, Judge Lioi was a partner with the law firm of Day, Ketterer, Raley, Wright & Rybolt, Ltd. Judge Lioi is a graduate of Bowling Green State University and The Ohio State University College of Law, where she received her Juris Doctor degree.

Judge Lioi served a term as the Sixth Circuit District Judge Representative to the Judicial Conference of the United States. She was also appointed by Chief Justice John Roberts to serve two terms on the Advisory Committee on Civil Rules of the Judicial Conference of the United States. She currently serves as Chair of the Sisters of Charity Foundation of Canton and is an emeritus member of the Ohio State University Moritz College of Law National Council.

The United States District Court for the Northern District of Ohio has court locations in Cleveland, Akron, Toledo, and Youngstown and serves 5.9 million citizens in the 40 northernmost counties in Ohio.

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For further information, please contact: Sandy Opacich, Clerk of Court, at 216-357-7068.

**Clerk's Corner****CLERK'S CORNER**

Sandy Opacich

Clerk of Court, U.S. District Court for the Northern District of Ohio

Greetings to all and Happy Summer! I am pleased to share the following recent leadership transitions in our court:

On June 6, 2023, U.S. District Judge Patricia A. Gaughan completed her six-year term as Chief Judge of the United States District Court for the Northern District of Ohio. She was the first woman to be Chief Judge of this District. Judge Gaughan was appointed to the federal bench in 1995 by President William Jefferson Clinton.

Judge Gaughan will continue to be a sitting judge on the federal bench.

Judge Sara Lioi assumed her role as Chief Judge on June 7, 2023. Chief Judge Lioi was appointed to the court by President George W. Bush in 2007.

Prior to Judge Lioi's appointment to the federal bench, she served as Judge with the Stark County Court of Common Pleas from 1997-2007. Prior to her service on the bench, Judge Lioi was a partner with the law firm of Day, Ketterer, Raley, Wright & Rybolt, Ltd. Judge Lioi is a graduate of Bowling Green State University and The Ohio State University College of Law, where she received her Juris Doctor degree.

Judge Lioi served a term as the Sixth Circuit District Judge Representative to the Judicial Conference of the United States. She was also appointed by Chief Justice John Roberts to serve two terms on the Advisory Committee on Civil Rules of the Judicial Conference of the United States. She currently serves as Chair of the Sisters of Charity Foundation of Canton and is an emeritus member of the Ohio State University Moritz College of Law National Council.

Lastly, Ms. Suzanne Evans was sworn in as Chief United States Pretrial Services and Probation Officer for the Northern District of Ohio on June 2, 2023. She replaced Chief United States Pretrial Services and Probation Officer Robin K. Grimes, who retired effective June 1, 2023.

Ms. Evans has been employed with the U.S. Pretrial Services and Probation Office in the Northern District of Ohio for the past twenty years, handling investigations and supervising high-risk cases. She has received many promotions during her tenure, including Aftercare Treatment Specialist, Supervisor, Assistant Deputy Chief and Deputy Chief. Since 2018, she has worked on the Administrative Team handling day-to-day operations across the district.

Congratulations to Chief Judge Lioi, Judge Gaughan, and Mrs. Evans!

## Articles

### EARLY CASE EVALUATION AND THE RULE 26(F) REPORT

Judge J. Philip Calabrese  
U.S. District Court for the Northern District of Ohio

Rule 26(f) requires the parties to confer as early in the life of a lawsuit as practicable and to discuss and report to the court about a number of case management issues. As a lawyer, I rarely found the conference of much value beyond, perhaps, getting agreement on a protective order or agreement about some fairly uncontroversial matters. Generally, filing the Rule 26(f) Report was a ministerial exercise—one that clients and lawyers often dutifully addressed because they had to—and little of substance was accomplished.

But go back and re-read the Rule. In theory, the parties' planning conference should be quite robust and include discussion of a number of critical items that can shape the life, and expense, of a case. For example, the Rule directs parties to discuss whether discovery should proceed in phases, Fed. R. Civ. P. 26(f)(3)(B), what limitations on discovery might be appropriate, Fed. R. Civ. P. 26(f)(3)(E), and issues relating to discovery of electronically stored information, Fed. R. Civ. P. 26(f)(3)(C).

For a judge, these and other related issues serve a valuable function. They raise early in litigation key issues that can provide opportunities for early resolution, expediting the central factual or legal disputes for litigation or motions, and suggesting other cost-effective case management techniques. But such decisions require counsel and their clients to conduct sufficient investigation and a serious planning conference—requirements inconsistent with my experience in practice. To try to push discussions in more serious and substantive directions, I created a beefed-up form for parties to report on their discussions. Then, I remembered that in 2015 Rule 4(m) was amended to reduce the time available for service of process to commence a lawsuit to 90 days. Because the Rules shortened the life of a case at the front end, I decided that that time could be best used to defer the initial case management conference to allow the parties additional time to conduct an initial investigation and have a meaningful planning conference pursuant to Rule 26(f). After all, *pro forma* compliance with Rule 26(f) typically just defers the investigatory and planning work and discussions that the parties must undertake. Better to do that work in a meaningful way up front so that the parties and the court begin the case on the same page and limit the opportunities for delays, course changes, and surprises as the case unfolds.

Consistent with these views, as of the beginning of the year, I revised the standard form I require for the Rule 26(f) Report (available here <https://www.ohnd.uscourts.gov/content/judge-j-philip-calabrese>) to include a number of questions to facilitate the discussions between counsel and clients that the Rule contemplates. For example, I request very specific information about the subjects on which the parties will seek discovery, including the identification of specific witnesses, the number of written discovery requests, and potential motions. Obviously, in the early stages of a case, this information might well change. But it provides a starting point for critical case management decisions.

Also, I want lawyers and clients to be able to hold each other accountable for the recommendations they make to the court at the initial case management conference. For that reason, I ask that clients physically (not electronically) sign the Report, certifying consistent with Rule 26(g) the adequacy of their investigations and that they are not undertaking discovery for any improper purposes.

To facilitate these discussions, I strongly encourage parties to make initial disclosures in advance of the Rule 26(f) conference. Those disclosures should generally provide a starting point for conversations about discovery and other case management issues. Additionally, if counsel need additional time before the case management conference to investigate matters and have a meaningful planning conference, I am willing to continue the conference.



One other case management issue I now ask the parties to think about is whether there are any discrete issues or matters within the case that might be appropriate for supervision by a magistrate judge, even if they are unwilling to consent to the exercise of jurisdiction by the magistrate judge over the entire case. In other words, perhaps there are some preliminary matters or particular issues that a magistrate judge could more effectively and timely address to move a case forward. If so, I encourage the parties to identify those issues early in the litigation.

While the information I now request in the Rule 26(f) Report will not be appropriate in every case, I hope it encourages more robust discussions between lawyers and their clients and between opposing counsel early in the life of a case. Based on my experience working with this updated Rule 26(f) Report, I already know of further changes that I will introduce next year. When that happens, look for more information here.

## MAKING REENTRY A REALITY: LARRY THOMPSON'S INSPIRING JOURNEY AND VISIONARY ANTI-RECIDIVISM PROGRAM

By: Benjamin R. Syroka\*

I first met Larry Thompson<sup>1</sup> not long after his arrival in Toledo, Ohio in April 2022. Larry was not your average Midwest transplant—he had just been released after 16 years in the Ohio Department of Rehabilitation and Correction (ODRC). He was staying at the Cherry Street mission, and I was stopping by quickly to drop off a few items from my boss.<sup>2</sup> After what turned into a 20-minute conversation on the hot blacktop outside the shelter, I found myself deeply impressed by the depth of Larry's knowledge and his positive outlook. "Life is all about relationships," he told me. We became fast friends (as do most who meet Larry).



When we met for lunch the following Saturday at Michael's Bar & Grill, the topic of conversation was something we share a passion for—reducing recidivism. Larry's journey through incarceration led him to establish an educational program, Reentry Realities, designed to help inmates transition smoothly back into society upon release. While reentry efforts have increased over the past decade, the majority of resources have been allocated to helping inmates *after* they have been released. Larry's program is taught prior to release, from the perspective of someone with deep personal experience. The program, outlined in his book *Reentry Realities: A Survival Guide for Reintegration*, is an 18-week course designed to address the psychosocial causes of incarceration and inspire inner growth within students. Larry self-published his book while incarcerated, with the help of his mentor Joe,<sup>3</sup> and taught the course to hundreds of inmates over an eight-year period. Listening to Larry—and the many transformational stories from his classes—I was, frankly, blown away.

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\* Ben Syroka is a Career Law Clerk to the Honorable Jack Zouhary. Ben also serves on the FBA Editorial Board and the Northern District of Ohio Advisory Group. In his spare time, he serves as volunteer counsel for the Reentry Realities program, teaches Legal Writing and Motion Practice at the University of Toledo College of Law, and referees NCAA Men's College Basketball. This article was previously printed in the summer edition of the Federal Lawyer Supplement and appears here with permission of the Federal Lawyer. This Article originally appeared in the Federal Lawyer Supp.

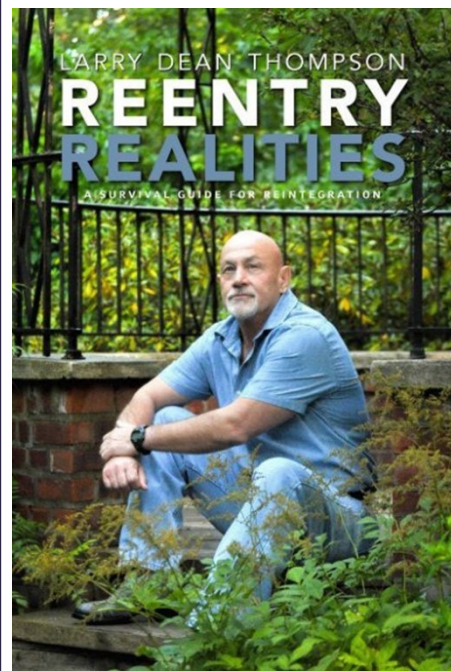
<sup>1</sup> Larry Dean Thompson is an author, pastor, and reentry specialist. While incarcerated, he graduated with an associate degree from Ashland University, earned a four-year certification from Grace Ministries Bible College, and graduated from a state-certified counselors training program. Since being released, he has dedicated his life to being successful—and helping others be successful—in reintegration.

<sup>2</sup> Judge Jack Zouhary, U.S. District Court for the Northern District of Ohio, has known Larry and supported his reentry efforts since 2013.

<sup>3</sup> Pastor Joe Hoeflinger, of Sylvania, Ohio, has been Larry's mentor for over a decade. He has helped countless inmates through his Restored Hope Prison Ministry.

But Larry had a problem. Now that he was out, he wanted to formalize his book and spread the message but didn't have the resources. Well, out of pure coincidence, I had just met a nontraditional law student—a summer intern at the courthouse, who happened to have over 20 years of publishing experience. A few weeks later, the three of us were back at Michael's, with Larry and Mark<sup>4</sup> shaking hands on a deal to publish Larry's book and accompanying workbook. The wheels were in motion.

In late September, after hours of editing, revising, and formatting, Larry's book—first written on a typewriter in a state prison—was live for sale on Amazon.<sup>5</sup> In the meantime, Larry had found employment at a factory (after building himself a bicycle to get there), permanent housing, and (eventually) a car. He also reintegrated himself into the digital world,<sup>6</sup> learning to use word-processing and editing software—no easy feat after 16 years behind bars!



Now it was time to spread the word. In October, an official book launch<sup>7</sup> was held at the University of Toledo Law Center,<sup>8</sup> featuring the first official public screening of the PBS Documentary, *Reentry Realities: Hope Deferred*, detailing Larry's story. The event was well attended, and the book sales, all of which were donated to the Reentry Coalition of Northwest Ohio, exceeded expectations. By the time we celebrated Larry's one-year "release anniversary" in the spring, he had already trained instructors at the Lucas County Community Treatment Facility (CTF) to teach the program, shared his reentry experience in a speech to the Rotary Club of Toledo,<sup>9</sup> and—most importantly—achieved early termination from parole. Larry was now truly a free man.

<sup>4</sup> Mark Hanusz is a former international banker, author, publishing-company founder, and 2023 University of Toledo Law Graduate. He recently accepted a position with the Lucas County Prosecutor's Office.

<sup>5</sup> See *About the Author: Larry Dean Thompson*, AMAZON, [www.amazon.com/stores/Larry-Dean-Thompson/author/B0BGJXW724?ref=ap\\_rdr&store\\_ref=ap\\_rdr&isDramIntegrated=true&shoppingPortalEnabled=true](https://www.amazon.com/stores/Larry-Dean-Thompson/author/B0BGJXW724?ref=ap_rdr&store_ref=ap_rdr&isDramIntegrated=true&shoppingPortalEnabled=true) (last visited May 4, 2023).

<sup>6</sup> *I'm Larry*, LARRY THOMPSON, [www.larrythompson.net/](http://www.larrythompson.net/) (last visited May 4, 2023).

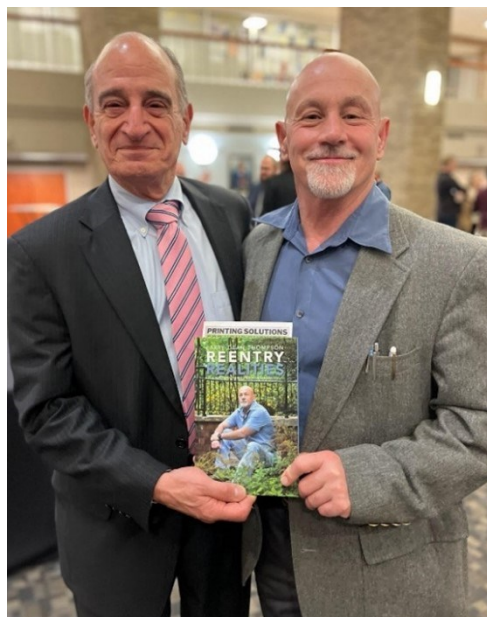
<sup>7</sup> *Reentry Realities: Book Launch, Film Screening, and Reception*, UNIV. TOL. LAW. (October 21, 2022), [www.utoledo.edu/law/events/reentry-realities/](http://www.utoledo.edu/law/events/reentry-realities/).

<sup>8</sup> Mike Henry of Erie Ink Printing Company, located in Toledo, Ohio, donated both his time and materials to launching Reentry Realities. He has been instrumental in the program's success.

<sup>9</sup> Toledo Rotary, *Larry Thompson*, YouTube (Apr. 3, 2023), [www.youtube.com/watch?v=l2ziqtGO6uY](https://www.youtube.com/watch?v=l2ziqtGO6uY).

What sets Larry's program apart is its holistic, step-by-step, integrative approach to prisoner rehabilitation. Reentry Realities is designed to arm inmates with the mindset and skillset necessary for successful reintegration, while simultaneously addressing the underlying causes and trauma that led to their incarceration in the first place. The program has now been implemented in nine ODRC facilities, along with CTF, and has been met with overwhelmingly positive feedback. Among participants, recidivism rates have been remarkably low, a testament to the program's effectiveness. Larry hopes to spread the program throughout all facilities in the ODRC system, and is currently in discussions with officials from several other states.

Larry's work has attracted increasing acclaim,<sup>10</sup> particularly from those who have benefited directly from his program. Former inmates speak of the impact on their lives with deep gratitude, emphasizing how it taught them to deal with the underlying issues that led them to prison and equipped them with the tools to avoid returning. Moreover, members of the local legal community, including local judges and prosecutors, have endorsed Larry's program, acknowledging its potential to change the way we think about rehabilitation and reentry. Buoyed by the success of Reentry Realities at the state level, we are now making efforts to introduce the program to the Federal Bureau of Prisons—hoping to extend its reach and impact to the federal system.



Larry's journey is a testament to the power of inner change and the possibilities that can arise when we address the root causes of incarceration. His program, born out of personal experience, inspires us to work toward a justice system that doesn't just punish, but also rehabilitates and, in turn, reintegrates our fellow citizens back into society. As Larry puts it: "Helping restore former prisoners to meaningful lives through inner growth and principle-centered maturity is my life's work." This single statement captures the essence of Larry as a person, teacher, and mentor.



To me, Larry serves as an example of the transformational power of empathy, understanding, and true rehabilitation. It's possible to rethink our approach to justice, recidivism, and the lives ensnared in our justice system. We can collectively work toward a future where reentry is not just a reality, but a success story for all those returning home.

Oh, and one more thing. If you happen to bump into Larry around town, say "hello" and stop to chat. I promise, you won't regret it . . .

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<sup>10</sup> See Vincent Lucarelli, *Ex-prisoner teaches 'Reentry Realities'*, TOL. BLADE (Oct. 10, 2022).



## A REVIEW OF THE 2023 GUIDELINE AMENDMENTS

Christian Grostic—Assistant Federal Public Defender, Northern District of Ohio

Cathi Adinaro Shusky—Research & Writing Attorney Office of the Federal Public Defender, Northern District of Ohio

Although the federal sentencing guidelines are advisory, most defendants receive a sentence within the advisory guidelines range. Changes to the sentencing guidelines thus carry great weight, potentially increasing a defendant's sentence by several years.

The United States Sentencing Commission recently adopted several sentencing guidelines amendments that, unless Congress unexpectedly modifies or rejects them, will take effect on November 1, 2023. By default, the guidelines manual in effect at the time of sentencing applies. There is an important exception to the default rule, though, consistent with the Ex Post Facto Clause—if the guidelines manual in effect at the time of sentencing would result in a higher guidelines range than the guidelines manual at the time of the offense, the earlier guidelines manual applies. The sentencing court must apply one complete guidelines manual; it cannot apply some sections from one manual and other sections from another manual.<sup>1</sup>

Most sentencing hearings in the Northern District of Ohio happen 3½ months or more after a guilty plea or conviction. Thus, even now, federal criminal-law practitioners need to be aware of the upcoming guidelines amendments, both to understand the new guidelines that will apply and to identify circumstances where the amendments increase a defendant's guidelines range such that the older guidelines therefore should apply.

The forthcoming guidelines amendments are grouped into 11 different categories.<sup>2</sup> This article addresses amendments that will most commonly affect defendants in our district—criminal history, career offender, safety valve and drug offenses, firearms offenses, acceptance of responsibility, and motions for a reduction in sentence. For more details on the upcoming amendments, please join us at the Federal Criminal Practice Seminar on Friday, August 11, 2023.

### 1. Criminal History

Several important changes have been made to the criminal history section of the guidelines. First, the commission has limited the application of "status points." Second, the commission has created a new guideline to allow for a two-point reduction for certain defendants with zero criminal history points. Third, the commission expanded the examples of where a downward departure may be appropriate for overrepresentation of criminal history.

Under the current guidelines, if a defendant committed the federal offense while under another criminal justice sentence (typically on parole or supervised release), he or she would automatically receive two additional criminal history points. These additional points are known as "status points." The commission, relying on recent research, found these status points had little correlation with the likelihood of future recidivism.<sup>3</sup> The commission concluded the status points should be more narrowly applied. Under the new guidelines, a defendant with less than seven criminal history points will not receive any additional criminal history points for being under another criminal justice sentence. A defendant with seven or more criminal history points will receive one additional criminal history point. The commission is contemplating whether to apply this amendment retroactively.

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<sup>1</sup> FEDERAL SENTENCING GUIDELINES MANUAL ("U.S.S.G.") § 1B1.11.

<sup>2</sup> For the full text of the amendments, see United States Sentencing Commission, Amendments to the Sentencing Guidelines (Apr. 27, 2023), [https://www.ussc.gov/sites/default/files/pdf/amendment-process/reader-friendly-amendments/202305\\_RF.pdf](https://www.ussc.gov/sites/default/files/pdf/amendment-process/reader-friendly-amendments/202305_RF.pdf).

<sup>3</sup> *Id.* at 77-78.



The second change to criminal history was the creation of § 4C1.1, which provides an adjustment for certain defendants with zero criminal history points. To be eligible for this reduction, the defendant must not have any criminal history points but may have prior convictions that do not qualify for points. The guideline also provides a list of other criteria, including: (1) the defendant did not use violence or credible threats of violence in connection with the offense; (2) the offense did not result in death or serious bodily injury; (3) the instant offense of conviction is not a sex offense; (4) the defendant did not possess, receive, purchase, transport, transfer, sell, or otherwise dispose of a firearm or other dangerous weapon (or induce another participant to do so) in connection with the offense; (5) the defendant did not receive an adjustment under § 3B1.1 (aggravating role) and was not engaged in a continuing criminal enterprise; and (6) the defendant did not personally cause substantial financial hardship. New commentary notes suggest that a non-custodial sentence will generally be appropriate in cases where the defendant receives a reduction under this new guideline.

Third, the amendment revises the commentary to § 4A1.3. The new commentary expands the examples where a downward departure may be appropriate for overrepresentation of criminal history to include defendants who receive criminal history points for a prior conviction for simple possession of marijuana.

## 2. Career Offender

The commission made several changes to the career offender guidelines, primarily in response to the litigation surrounding what authority should be given to commentary. The commission moved the definitions of forcible sex offense and extortion from the commentary to the text. The commission also moved the definition of a prior felony conviction from the commentary into the text. Lastly, the commission moved the note from the commentary to include inchoate offenses—the guideline’s text now states that the terms “crime of violence” and “controlled substance offense” include offenses of aiding and abetting, attempting, and conspiring.

The commission also defined robbery. The definition of robbery now reads: “the unlawful taking or obtaining of personal property from the person or in the presence of another, against his will, by means of actual or threatened force, or violence, or fear of injury, immediate or future, to his person or property, or property in his custody or possession, or the person or property of a relative or member of his family or of anyone in his company at the time of the taking or obtaining.” The guideline further defines “actual or threatened force” to mean “force that is sufficient to overcome a victim’s resistance.” Please take note that the commission expressly intended this definition to include Hobbs Act robberies, which most courts had excluded from the crime of violence definition in recent years.

There are notable things the commission did not change. The commission did not eliminate the categorical approach when determining if a prior offense qualifies as a crime of violence or a controlled substance offense. The commission also did not specify which drug schedule (federal or state, and from what date) applies when defining a controlled substance offense.<sup>6</sup>

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<sup>4</sup> U.S.S.G. § 4C1.1 (effective Nov. 1, 2023).

<sup>5</sup> U.S.S.G. § 4B1.2(e)(3) (effective Nov. 1, 2023).

<sup>6</sup> The Supreme Court will take up the question of timing next term in a pair of consolidated cases. *Brown v. United States*, 143 S. Ct. 2458 (2023) (No. 22-6389, consolidated with *Jackson v. United States*, No. 22-6640). These cases address whether the categorical approach calls for comparing state and federal drug schedules as they existed at the time of the prior conviction, or instead at a later point—either the time of the federal offense, or alternatively the time of the federal sentencing. These cases from the federal de-scheduling of low-THC marijuana in 2017 (*Brown*); and a cocaine derivative termed 123I-Ioflupane in 2015 (*Jackson*).

### 3. Safety-Valve and Drug Offenses

The First Step Act of 2018 amended the eligibility requirements for the safety-valve provision in 18 U.S.C. § 3553(f). The commission has revised § 5C1.2 to align with the statutory changes. Neither the guidelines amendments nor the commission's stated reasons address the circuit split as to whether the criminal history criteria should be read conjunctively or disjunctively.<sup>7</sup> The amendments did add a "guideline-range floor" for defendants who are safety-valve eligible and for whom the statutorily required minimum sentence is at least five years. In those cases, the "applicable guideline range shall not be less than 24 to 30 months of imprisonment."<sup>8</sup>

The commission has also modified § 2D1.1 to replace reference to a prior conviction for "a similar offense" with a prior conviction for "serious drug felony," "serious violent felony," or "felony drug offense," respectively. The commission noted that Congress, in the First Step Act, modified 21 U.S.C. § 841(b)(1)(A) and (b)(1)(B) to require a prior "serious drug felony" or a "serious violent felony," before a defendant could receive a statutorily enhanced sentence. Congress did not change 21 U.S.C. § 841(b)(1)(C), which still only requires a prior "felony drug offense" to trigger an enhanced sentence. The commission modified § 2D1.1 to reflect this nuance. Specifically, if the defendant is convicted of a drug trafficking offense under § 841(b)(1)(A) or (b)(1)(B), and the defendant has a prior conviction for a "serious drug felony or a serious violent felony," his base offense level will be 43. If the defendant is convicted of a drug trafficking offense under § 841(b)(1)(C) and has a prior conviction for a "felony drug offense," his base offense level will be 43. The Department of Justice has previously taken the position that it will not seek a statutory enhancement under § 841(b)(1)(C) unless the defendant has a prior "serious drug felony," despite the statutory language only requiring a "felony drug offense." It is unclear what position the government will take on this new guideline.

### 4. Firearms Offenses

The commission made numerous amendments to the firearms guideline in response to the Bipartisan Safer Communities Act. Section 2K2.1 was amended to include references to the new offenses established by the Act. (18 U.S.C. § 932—straw purchasing of firearms, and 18 U.S.C. § 933—trafficking in firearms). The new guidelines set the base offense for both new offenses at 14, or 20 if the firearm was either a semiautomatic capable of accepting a large-capacity magazine or a firearm described in 26 U.S.C. § 5845(a).

The new guidelines include a 4-level enhancement if the defendant knew the firearm was not marked with a serial number (commonly called a "ghost gun") or was willfully blind to or consciously avoided knowledge of such fact. This enhancement does not apply to firearms manufactured prior to 1968, when serial numbers became required.

The guidelines added a new enhancement (either two or five levels) for persons convicted of straw purchasing or firearm trafficking offenses.<sup>9</sup> If that enhancement applies, two additional subsections may be implicated. First, there is an additional two-level enhancement if the defendant committed the offense in connection with their "participation in a group, club, organization, or association of five or more persons."<sup>10</sup> Second, the guidelines provide for a two-level reduction if the defendant has no more than one criminal history point and "was motivated by an intimate or familial relationship or by threats or fear to commit the offense and was otherwise unlikely to commit such an offense, or ... was unusually vulnerable to being persuaded or induced to commit the offense due to a physical or mental condition."<sup>11</sup>

<sup>7</sup> The Supreme Court will address this question in the first case to be argued next term. See *Pulsifer v. United States*, 143 S. Ct. 978 (2023) (granting cert. in No. 22-340).

<sup>8</sup> U.S.S.G. § 5C1.2(b) (effective Nov. 1, 2023).

<sup>9</sup> U.S.S.G. § 2K2.1(b)(5) (effective Nov. 1, 2023).

<sup>10</sup> U.S.S.G. § 2K2.1(b)(8) (effective Nov. 1, 2023).

<sup>11</sup> U.S.S.G. § 2K2.1(b)(9) (effective Nov. 1, 2023).

## 5. Acceptance of Responsibility (Resolving a Circuit Conflict)

Section 3E1.1 permits the government to move for a third level of acceptance of responsibility if the defendant timely notified them of his or her intention to plead guilty, “thereby permitting the government to avoid preparing for trial.” Some circuits, including the Sixth Circuit, have upheld the government’s decision to withhold a third level of acceptance of responsibility if the defendant filed a motion to suppress.<sup>12</sup> The commission amends § 3E1.1 of the guidelines to clarify that generally, preparations for pretrial proceedings are not considered “preparing for trial” under this section and therefore may not form a basis for withholding the third level of acceptance.

In years past, the United States Attorney’s Office in this district routinely would threaten to withhold the third level of acceptance if the defendant filed a motion to suppress. In our experience, this practice fell by the wayside a couple of years ago. This amendment therefore likely reflects the current practice in our district.

## 6. First Step Act—Reduction in Term of Imprisonment Under 18 U.S.C. § 3582(c)(1)(A)

Section 3582(c)(1)(A), commonly referred to as the “compassionate release statute,”<sup>13</sup> authorizes a district court to reduce a defendant’s term of imprisonment if they establish “extraordinary and compelling reasons” and the reduction is “consistent with the applicable policy statement issued by the Sentencing Commission.” Historically, only the Bureau of Prisons could request a reduction in a defendant’s sentence. With the First Step Act of 2018, Congress changed § 3582 to permit a defendant to request relief directly from the courts.

Although the statute was amended in 2018, the Sentencing Commission has not had the opportunity to amend the related policy statement in U.S.S.G. § 1B1.13 due to lack of a quorum. The Commission, now fully staffed, amends § 1B1.13 to: (1) extend the policy statement to include defendant-filed motions; (2) move a list of extraordinary and compelling reasons from the commentary to the text of the guidelines; (3) expand the list of extraordinary and compelling reasons that can warrant a reduction; (4) add specific guidance for courts when considering changes in the law; and (5) modify the commentary to state that a reduction is not appropriate if a furlough of the defendant will “adequately address[ ] the defendant’s circumstances” and to “encourage” courts to make efforts to notify any victim of the offense and to provide them, to the extent practicable, an opportunity to be heard.

### a. Extraordinary and Compelling Reasons

The list of extraordinary and compelling reasons has been significantly modified by the 2023 amendments. The categories include: (1) medical circumstances of the defendant; (2) age of the defendant; (3) family circumstances of the defendant; (4) whether the defendant is a victim of abuse in the BOP; (5) a catch-all provision; and (6) unusually long sentences.

Medical circumstances of the defendant include not only end-of-life illnesses and serious medical conditions from which the defendant is not expected to recover but also a “medical condition that requires long-term or specialized care that is not being provided and without which the defendant is at risk of serious deterioration in health or death.”<sup>14</sup> The medical circumstances now also include pandemic-related scenarios.

<sup>12</sup> See, e.g., *United States v. Collins*, 683 F.3d 697, 704–08 6th Cir.(2012).

<sup>13</sup> The Sentencing Commission notes that the term “compassionate release” does not appear in the statute and is a misnomer. Reductions in a defendant’s sentence are permitted under § 3582 even if the reduction does not result in immediate release. We encourage counsel to refer to § 3582 motions as motions for a reduction in sentence and not compassionate release.

<sup>14</sup> U.S.S.G. § 1B1.13(b)(1)(C) (effective Nov. 1, 2023).

The family-circumstances category has been expanded in scope in two important ways. First, the text expands situations related to the defendant's child to include where the defendant's adult child is incapable of self-care because of a mental or physical disability or a medical condition. Second, the text is expanded to cover incapacitation of an "immediate family member or an individual whose relationship with the defendant is similar in kind to that of an immediate family member," if the defendant is the only available caregiver for that person.<sup>15</sup> Immediate family member is defined as spouse, parent, grandparent, grandchild, and sibling of the defendant.

There is a new category for victims of abuse. If the defendant was the victim of sexual or physical abuse resulting in serious bodily injury while in custody for the term of imprisonment he or she is seeking to reduce, this circumstance may serve as extraordinary and compelling reasons for a reduction in sentence. To establish the abuse, the defendant can use (1) a conviction from a criminal case, (2) a liability determination in a civil case, or (3) a finding in an administrative proceeding. The court can also find the abuse was established without these if "such proceedings are unduly delayed or the defendant is in immediate danger."<sup>16</sup>

The commission has also added unusually long sentences as an extraordinary and compelling reason for a reduction in sentence. Under this section, courts may consider a non-retroactive change in the law when determining if the defendant has established extraordinary and compelling circumstances. A non-retroactive change in the law does not include non-retroactive changes to the guidelines. To fall within this section, the defendant must be serving an unusually long sentence and have already served at least 10 years, and the change in the law must reflect "a gross disparity between the sentence being served and the sentence likely to be imposed at the time the motion is filed."<sup>17</sup> The guidelines now explicitly limit this as the only time courts may consider a non-retroactive change in the law when deciding if the defendant has established extraordinary and compelling circumstances. Once the defendant establishes extraordinary and compelling circumstances, courts may consider changes in the law in determining what amount of reduction is appropriate.<sup>18</sup>

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<sup>15</sup> U.S.S.G. § 1B1.13(b)(3) (effective Nov. 1, 2023).

<sup>16</sup> U.S.S.G. § 1B1.13(b)(4) (effective Nov. 1, 2023).

<sup>17</sup> U.S.S.G. § 1B1.13(b)(6) (effective Nov. 1, 2023).

<sup>18</sup> U.S.S.G. § 1B1.13(c) (effective Nov. 1, 2023).

## Ads, Announcements & Membership Benefits



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**2023 State of the Court Luncheon & Installation of  
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**will be held on Monday, October 2, 2022.**

**More information to follow.**

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Contact Kerri Keller ([kerri.keller@lewisbrisbois.com](mailto:kerri.keller@lewisbrisbois.com)) or Rick Hamilton ([rhamilton@ulmer.com](mailto:rhamilton@ulmer.com)) for more information or if you would like to volunteer to be a faculty member.

Learn practical tips for obtaining or opposing requests for injunctive relief while sharpening your courtroom skills. Gain experience through classroom instruction, one-on-one coaching, and courtroom practice, to include openings, closings, and examination of witnesses in front of federal and state judges.

9/22/23 – 8:45-5:15 p.m.

9/27/23 – 9:00-11:00 a.m. (or another mutually agreed upon time)

9/29/23 – 8:30-1:00 p.m.

10/2/23 – State of the Court Luncheon

**\*\*11.75 hours of CLE accreditation anticipated.  
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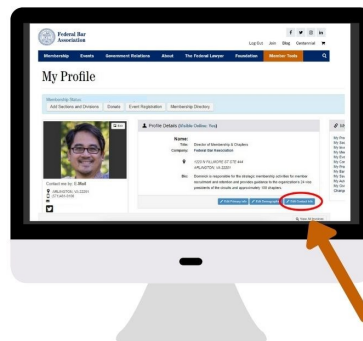
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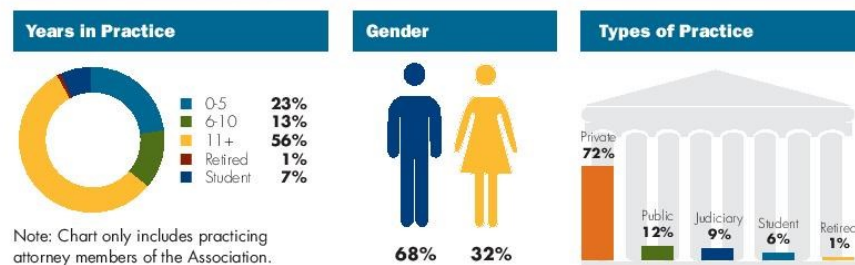
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## **FBA-NDOH Calendar of Events:**

**August 11, 2023** *Federal Criminal Practice Seminar*

**August 16, 2023** *FBA-NDOH Board Meeting*

**September 6-8, 2023** *Sixth Circuit Judicial Conference in Cleveland*

**September 20, 2023** *FBA-NDOH Board Meeting*

**Sept. 22, 27, 29, 16, 2023** *FBA Trial Academy presents "TROs and Injunctive Relief"*

**October 2, 2023** *2023 State of the Court Luncheon & Installation of FBA Board Officers*

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



**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.

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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 information, please follow this link:

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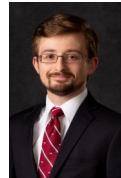
Stephen H. Jett  
Co- Chair, Newsletter Committee  
Buckingham, Doolittle & Burroughs, LLC  
216-736-4241



Prof. Jonathan Entin  
Co-Chair, Newsletter Committee  
Case Western Reserve University  
216-368-3321  
[jonathan.entin@case.edu](mailto:jonathan.entin@case.edu)



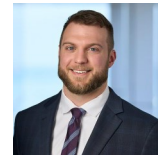
James J. Walsh Jr.  
Newsletter Committee  
Benesch, Friedlander, Coplan & Aronoff LLP  
216-363-4441  
[jwalsh@beneschlaw.com](mailto:jwalsh@beneschlaw.com)



Benjamin Reese  
Newsletter Committee  
Flannery | Georgalis LLC  
216-230-9041  
[breese@flannerygeorgalis.com](mailto:breese@flannerygeorgalis.com)



Andrew Rumschlag  
Newsletter Committee  
317-502-9966  
[andrewrumschlag@gmail.com](mailto:andrewrumschlag@gmail.com)



Nathan P. Nasrallah  
Newsletter Committee  
Tucker Ellis LLP  
216-696-2551  
[nathan.nasrallah@tuckerellis.com](mailto:nathan.nasrallah@tuckerellis.com)

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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 than October 15, 2023

Next publication is scheduled for Fall 2023

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