



Side BAR

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MESSAGE FROM THE CHAIR



John G. McCarthy

Dear Fellow Section Members –

As we begin 2018, momentum continues to build both in our section and for the FBA as an organization. By the time you read this message less than two years will remain until the FBA celebrates its 100th Anniversary on January 5, 2020. During the first 98 years of our association, the FBA has been steadily building its membership and its reputation as a premier bar association. The Federal Litigation Section, as the largest section in the FBA, has played a prominent role in helping to build that stellar reputation throughout the country.

Our Section continues to sponsor its own outstanding programs. Rob Kohn has agreed to chair the next Annual Federal Litigation Conference on May 30, 2018 in Washington, D.C. Rob and his committee are already hard at work planning it. We have agreed to partner with the Intellectual Property Law Section this year and anticipate another successful event. The evening preceding the conference we will honor our most recent recipient of The Rule of Law

Award, Ben Ferencz. This year will be the third time that the Section has presented The Rule of Law Award to deserving lawyers who remind us about the importance of our role in society. In 2014, we gave the initial award to Bruno Peter Jost and Alexander von Stahl, German lawyers who were instrumental in proving the role of the Iranian government in the 1992 assassination in Berlin of Iranian dissidents. In 2016, we honored Bryan Stevenson for his work with the Equal Justice Initiative. I was privileged to have been able to attend both of the prior ceremonies. Based on my experience I can assure you it will be uplifting when we honor Mr. Ferencz, the last of the Nuremberg prosecutors, on May 29. For the younger lawyers in our section, I would also note that earlier in the day, the YLD will be holding its annual admission ceremony to the U.S. Supreme Court so it would be a fabulous opportunity to take part in three great FBA events in our Nation's capital.

At our most recent Board meeting, your Section leaders voted to approve a budget that included substantial funds to co-sponsor events with local Chapters and other FBA Sections or Divisions. If you have an idea for an event that

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About the Chair • John McCarthy is a trial attorney and partner in the New York City office of Smith, Gambrell & Russell, LLP, where he leads the litigation practice and is a member of the firm's Intellectual Property Law Group and its Commercial and Bankruptcy Law Practice. John is a former FBA Circuit Vice President and past Chapter President of the S.D.N.Y. Chapter; John most recently served as Vice Chair of the FBA Federal Litigation Section. He can be reached at jmccarthy@sgrlaw.com or (212) 907-9703.

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Note from the Editor

Jeffrey T. Cox

"Whatever you are, be a good one."
-- Abraham Lincoln

Simple words, but none truer than those spoken by our 16th President, and a fitting aspiration at the beginning of a new year. This sentiment speaks to me on both a personal level – husband, father, son, friend, as well as a professional one – partner, colleague, advocate, counselor. President Lincoln's words also speak to who we associate with, and the commitments we make through such associations. With that sentiment in mind, I am confident in my association with the Federal Bar Association and the FBA's Federal Litigation Section.

2017 was a rewarding and invigorating year for the FBA; with membership continuing to swell, and service projects and new national initiatives such as SOLACE, the Civics Education Program, and Wills for Veterans as examples, the FBA's professionalism shines bright. The FBA's prominence was further reflected in its statement on the importance of the Rule of Law and Judicial Independence; its highly-regarded representation on Capitol Hill; and close partnership with the Administrative Office of the United States Courts.

Likewise, the Federal Litigation Section had an active and impactful year, offering an exceptional series of programs featuring Jim Wagstaffe, a leading authority on federal civil procedure, who was joined by several panels of federal judges and leading federal practitioners at several locations throughout the United States, including Washington, D.C., New York City, Phoenix, Cincinnati, and additional programs planned in Orlando, Portland, Eugene, and Los Angeles.

The Federal Litigation Section once again hosted a well-attended networking reception at the national FBA convention in Atlanta in September, and was a lead sponsor of the highly-successful Sixth Circuit Practice Institute in October, which drew nearly 375 federal judges and practitioners to the day-long seminar. Organized by the Cincinnati/Northern Kentucky and Dayton FBA Chapters, the Practice Institute included opening remarks from Professor Arthur Miller as

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About the Editor • Jeff Cox is a business and complex litigation attorney, and Partner at Faruki Ireland Cox Rhinehart & Dusing P.L.L., a business and complex litigation and white collar criminal defense practice with offices in Dayton and Cincinnati, Ohio. Jeff's practice includes intellectual property and technology disputes, competition-based litigation and professional malpractice and data security matters. A past president of the FBA's Dayton Chapter, Jeff serves on the Federal Litigation Section Board of Directors, as well as the FBA's Government Relations Committee and Professional Ethics Committee. Jeff can be reached at jcox@ficlaw.com or (937) 227-3704.

FEDERAL LITIGATION SECTION LEADERS

CHAIR

John G. McCarthy
Smith, Gambrell & Russell, LLP
New York, NY
(212) 907-9703
jmccarthy@sgrlaw.com

VICE-CHAIR

Susan D. Pitchford
Chernoff, Vilhauer, McClung, &
Stenzel PC
Portland, OR
(503) 227-5631
sdp@chernofflaw.com

SECRETARY/TREASURER

Nicole D. Newlon
Johnson & Cassidy, PA
Tampa, FL
(813) 699-4858
nnewlon@jclaw.com

IMMEDIATE PAST CHAIR

Robert E. Kohn
Kohn Law Group, Inc.
Santa Monica, CA
(310) 917-1011
rkohn@kohnlawgroup.com

BOARD MEMBERS

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Chief U.S. District Judge
Southern District of New York

Douglas W. Truxillo
Onebane Law Firm
Lafayette, LA
(337) 266-1154
truxillod@onebane.com

Hon. Suzanne H. Segal
Chief United States Magistrate Judge
Central District of California
Los Angeles, California
(213) 894-2872
suzanne_segal@cacd.uscourts.gov

MEMBERSHIP LEADER

Calvert G. Chipchase
Cades Schutte
Honolulu, HI
(808) 521-9220
cchipchase@cades.com

PROGRAMMING LEADERS

Matthew C. Moschella
Sherin and Lodgen LLP
Boston, MA
(617) 646-2245
mcmoschella@sherin.com

Andrea Marconi
Thorpe Shwer, P.C.
Phoenix, AZ
(602) 682-6104
amarconi@thorpeshwer.com

CHAPTER CONTACT LEADER

Aaron H. Bulloff (Retired)
Shaker Heights, OH
(216) 696-3030
canoelaw@gmail.com

NEWSLETTER EDITOR

Jeffrey T. Cox
Faruki Ireland Cox Rhinehart &
Dusing PLL
Dayton, OH
(937) 227-3704
jcox@ficlaw.com

APPELLATE LAW & PRACTICE COMMITTEE

Kelly F. Pate, Committee Chair
Balch & Bingham LLP
Montgomery, AL
(334) 269-3130
kpate@balch.com

Hannah Metcalfe, Committee Vice Chair

Metcalfe & Atkinson, LLC
Greenville, SC
(864) 214-2319
hmetcalfe@malawfirm.com

FEDERAL RULES OF PROCEDURE & TRIAL PRACTICE COMMITTEE

Michael A. Zuckerman, Committee
Co-Chair
Jones Day
Chicago, Illinois
(312) 269-1537
mzuckerman@jonesday.com

Jeffrey T. Cox, Committee Co-Chair
Faruki Ireland Cox Rhinehart &
Dusing PLL
Dayton, OH
(937) 227-3704
jcox@ficlaw.com

FEDERAL TORT LITIGATION COMMITTEE

George Jackson, III, Committee
Co-Chair
Wacker Law Group LLC
Chicago, IL
(773) 454-7645
gjackson@wackerlawllc.com

Tina Wolfson, Committee Co-Chair
Ahdoot & Wolfson, PC
West Hollywood, CA
(310) 474-9111
twolfson@ahdootwolfson.com

FEDERAL RULES OF EVIDENCE COMMITTEE

Ryan M Sugden, Committee Chair
Greenwood Village, CO
(303) 376-8405
ryan.sugden@stinson.com

FEDERAL LAW CLERKS COMMITTEE

Chip Molster, Committee Chair
The Law Offices of Charles B. Molster,
III PLLC
Washington, DC
(202) 282-5988
cmolster@molsterlaw.com

LIAISONS WITH OTHER SECTIONS AND DIVISIONS

Adine S. Momoh
Younger Lawyers Division Liaison
(ad hoc)
Stinson Leonard Street LLP
Minneapolis, MN
(612) 335-1880
adine.momoh@stinsonleonard.com

FEDERAL LITIGATION SECTION NEWS

Federal Litigation Section Financial Report

The Federal Litigation Section is the largest of the FBA's practice sections, with roughly 4,000 members -- about 20 percent of all FBA members. Section leadership is continually looking for opportunities to support FLS members through networking events, CLE offerings, support for chapter programming and other FBA programs. The FLS has a robust treasury to support such events and programming, and encourages chapter leaders to apply for FLS support to assist with underwriting programming opportunities.

FLS Treasurer, Nicole Newlon, a partner with Johnson & Cassidy, PA in Tampa, Florida, reported recently that the FLS ended FY 2017 with \$110,416 in its coffers. The Section generated \$75,000 in 2017 revenue against \$65,000 in expenditures. The FLS FY 2018 budget projects \$75,000 in revenues and expenses of \$70,000.

FLS Supports FBA 2018 Annual Meeting in the Big Apple

September 2018 may seem a long way off, but FBA chapter leaders in New York City are hard at work preparing for the 2018 FBA Annual Meeting, with many outstanding professional, social and cultural events on tap.

The Federal Litigation Section Board recently approved a \$5,000 sponsorship gift in support of the New York meeting planning efforts, and the FLS also looks forward to once again hosting a networking reception for all FBA members attending the September gathering.

FLS members attending the FBA meeting in New York City are encouraged to attend the Section's Board meeting

to learn more about FLS programming, committee work and leadership opportunities. The Board also welcomes ideas and recommendations regarding program and sponsorship possibilities.

We hope to see you in New York later this year!

FLS Committees – Join Us!

Interested in getting more involved in your Section activities? FLS committee work is a great way to network with fellow federal litigators from around the country, and to make a direct impact on our profession. The Federal Litigation Section has five standing committees, all of which welcome interested FLS member participation. Those committee include:

- Appellate Law & Practice Committee
- Federal Rules of Procedure & Trial Practice Committee
- Federal Tort Litigation Committee
- Federal Rules of Evidence Committee
- Federal Law Clerks Committee

The FLS committees serve as a resource to FLS members, planning continuing education programs, and are frequently called upon to assist other FBA sections and committees to offer input on issues confronting the Association that may impact on federal litigation practice. An example: the FBA Government Relations Committee often seeks study and feedback from one or more FLS committees to assist with vetting proposed legislation moving through Congress that may affect federal trial practice. FLS committees also serve as a resource for other agencies and organizations involved in supporting the federal judicial system, such as the Federal Judicial Center and the Administrative Office of the United States Courts.

FLS committees are only as strong as FLS members make

them, and Section leadership welcomes members interested in joining in this active committee structure! **SB**

SAVE THE DATE!





**FBA Annual Meeting
and Convention**

N Y C 2 0 1 8

September 13–15, 2018



Federal Bar Association

Plan Now to Attend the 2018 Federal Litigation Conference: May 29-30 Washington, D.C.

The Federal Litigation Section, in partnership with the Intellectual Property Law Section of the FBA, invites all FBA members to attend the Third Federal Litigation Conference scheduled for late spring 2018 in our nation's Capitol. Program details will be forthcoming in the next several weeks, but the focus of the program will be on IP litigation issues and developments.

The schedule is still being finalized, but the event will

begin with a May 29 evening reception and celebration at which the prestigious Rule of Law Award will be presented. May 30 will present a full-day's slate of CLE programming and networking, with an excellent slate of federal practitioners and judges speaking on IP litigation matters.

We look forward to this outstanding conference and hope you will plan to attend! **SB**

Save the Date: 2018 Federal Litigation Conference

It is not too soon to red flag **Wednesday, May 30, 2018**, for the next FBA Federal Litigation Conference in Washington, D.C. The Planning Committee is hard at work organizing a great event and lining up outstanding speakers. Please mark your calendars and plan to join us for the 2018 conference! **SB**

Celebrating 15 Years of Operation Protect and Defend

The FBA Federal Litigation Section was a financial supporter of the 2017 OPD Dinner described below. This article illuminates one of the outstanding civics education efforts under way across the country.

Chi Soo Kim

The month following the September 11th attacks, the Honorable Frank C. Damrell, Jr., United States District Judge of the Eastern District of California (Ret.), spoke at the annual Stanislaus County Bar Association's bench-bar dinner and gave the following remarks:

Today, after 9/11, patriotism is in full flower. The American flag is proudly displayed in our homes and in our businesses. On the front pages of our newspapers people are publicly reflecting what it means to be an American and extol the value of American citizenship, yet there are other stories on pages 4 and 5 of our newspapers such as the Sikh convenience store owner in Arizona. He had a dark complexion and wore a turban and was shot and killed for no apparent reason. He was an American citizen like you and me. Then there is the Arab-born shopkeeper in Reedley who recently was gunned down. He was an American citizen like you and me. This evil side of American resolve is born of ignorance. The perpetrators of these evil acts do not know America or what America stands for. They live in the iron grip of ignorance. . . . [Ignorance] requires the mobilization of all to protect and defend the values of the Constitution of the United States. I call it: "Operation Protect and Defend." . . .

Lawyers must now realize they are citizens who have been given the privilege of being educated in the law and the Constitution. You members of the legal profession have been chosen to prosecute and defend our fellow citizens; you are entitled to counsel fellow citizens on the meaning of the law; you, alone, are eligible to be chosen to judge

and ultimately interpret the law and the Constitution for all Americans, including the government itself. If lawyers are given the privilege to assume such public responsibility to protect and defend the Constitution, lawyers therefore must become the educators as well as protectors and defenders of the Constitution and its values.

Honorable Frank C. Damrell, Jr.
October 2001
Modesto, California

And so began Operation Protect and Defend ("OPD").

Over fifteen years later, Operation Protect and Defend remains one of the most active civics organizations in the Sacramento area. In the 2016-2017 year, Operation Protect and Defend sent over 80 volunteers into 62 classrooms in twelve Sacramento high schools and one class of Sacramento-area home school students.

* * *

OPD's Founding

After his October 2001 speech, Judge Damrell began reaching out to other judges and members of the bar, forming an informal steering committee comprised of Eastern District of California District Judge Morrison C. England, Jr. (a Sacramento Superior Court Judge at the time), attorney Joe Genshlea who founded one of Sacramento's largest law firms (now called Weintraub Tobin), Eastern District of

California District Judge Kimberly J. Mueller (an attorney in private practice at the time), California Court of Appeal Justice Arthur Scotland, Third Appellate District (Ret.), and then Assistant United States Attorney Robin Taylor. Judge Damrell and Genshlea accompanied United States Supreme Court Justice Anthony Kennedy on a visit to Ellen Wong's class at C.K. McClatchy High School to discuss the need for civic education. And at an April 12, 2002 event hosted by the Federal Bar Association and the Sacramento County Bar Association, Judge Damrell invited and challenged the bar to "teach Democracy. We must take hold of our own citizenship responsibilities. There must be a sense of urgency about us. There must be a clear and unmistakable call for leadership in every community, school district, and university. This effort needs support from the highest levels of the federal and state governments to local school boards, administrators and teachers and lawyers and judges."

After months of discussions and meetings, Judge Damrell and the steering committee arrived at the idea of sending a judge-and-lawyer pair into local high school classrooms to teach civics to create a dialogue with students (the "Dialogue" program). OPD would also include an essay contest that explored issues taught in the Dialogue program. The steering committee grew into a larger working group that also included Sacramento County Superior Court Judge Judy Holzer Hersher, Sacramento County Superior Court Judge Christopher Krueger (a Deputy Attorney General at the time), Ward Campbell, Heather Susan Candy, Thomas ("Tac") Craven, Byron Gregory, Jean McEvoy, Andy Stroud, McClatchy teacher Ellen Wong, and Rio Americano teacher Sharon Gillum.

Robin Taylor, a member of OPD's original steering committee and OPD's first Executive Chair from 2002 to 2005, explained that OPD's mission was based on the principle that "[c]ivic education is critical to maintain a democracy." As a result, Taylor continued, "there was no more important task than the development of an informed, effective, and responsible citizenry." Taylor, Judge Damrell, and many other individuals involved in starting OPD emphasized that OPD's mission remains relevant and significant today. Sacramento County Superior Court Judge Judy Holzer Hersher sees first hand that "the paucity of civics education is alarming." Judge Hersher continued, "I think OPD is a tremendous program. OPD has had an extremely positive impact on the schools that are participating."

In its first year, OPD sent volunteers to John F. Kennedy

High School, Luther Burbank High School, McClatchy High School, Rio Americano High School, and Sacramento High School to teach its Dialogue program. OPD wanted to reach a diverse group of schools and also reach under-served populations, explained Heather Susan Candy, part of the working group that helped get OPD off the ground and OPD's Executive Chair from 2005-2007. Wong, who was also a member of OPD's original steering committee, explained, OPD "is the most positive or the only positive experience students have with judges and lawyers. Most students only

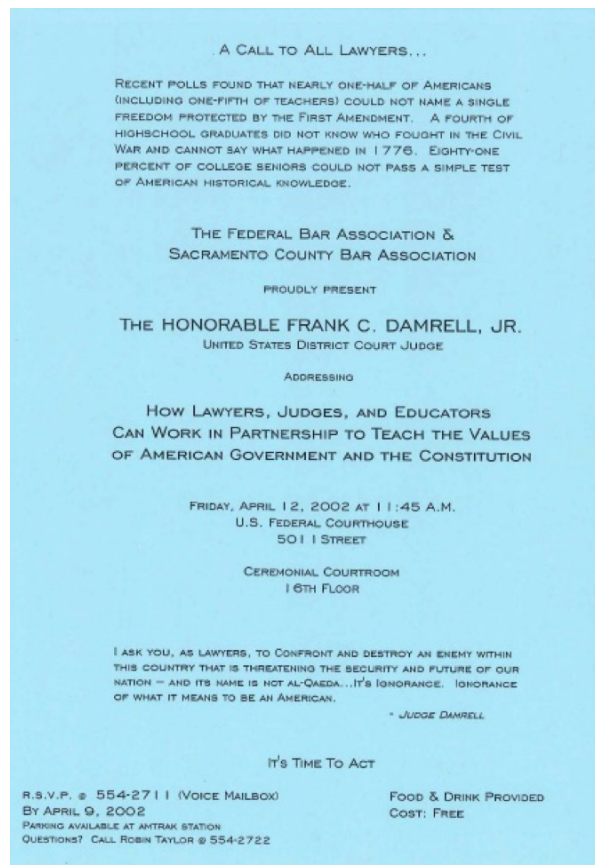
engage with the judiciary for jury duty or if there is a problem. The students get inspired by the judges and volunteer attorneys."

OPD's first curriculum was based on Mark Curriden's *Contempt of Court*, which explored the impact of the United States Supreme Court decision to stay the execution of Ed Johnson, a young African American man who had been sentenced to death for rape. After the United States Supreme Court issued a stay of Johnson's execution, Johnson was murdered by a lynch mob in Tennessee that broke into the jail where Johnson was detained. Curriden's book was selected after he spoke at the Eastern District of California's annual conference.

Alf Brandt, Senior Counsel to California State Assembly Speaker Anthony Rendon, became involved in OPD shortly after Judge Damrell's April 2002 speech. Brandt shared that since OPD's founding, it focused on three components—the teacher-

led curriculum, the Dialogue program, and the student essay contest. Brandt headed OPD's curriculum and Dialogue committees before becoming OPD's Executive Chair in 2007, a position he held until 2009. Brandt explained, "The key to OPD's organization has always been the willingness of individuals to stand up and volunteer and say, 'I'll do that.'" Under Brandt's leadership, OPD became part of the Sacramento Law Foundation and adopted bylaws. Though no longer on OPD's board, Brandt still volunteers every year and taught three Dialogue classes in 2017.

Andy Stroud, OPD's Executive Chair from 2009-2012 and partner at Hanson Bridgett, echoed Brandt's sentiment regarding OPD's volunteers— "The 'can do' spirit of OPD amazes me. The board is made up of teachers, lawyers, and judges who all have day jobs and still commit so much of their time and effort to OPD. It is really refreshing." Stroud explained that OPD has become "a fixture of the Sacramento legal community and something that the community takes prides in." The legal community's support of OPD has been



critical to its success, Stroud noted, and included support from organizations like the Asian/Pacific Bar Association of Sacramento ("ABAS"). Administrative Law Judge Teri Block, OPD's Executive Chair from 2012-2014, also emphasized the importance of support from the bar in OPD's success. Under Judge Block's leadership, OPD partnered with the Sacramento Chapter of the Federal Bar Association, which helped provide volunteers, secure funding, and co-sponsored OPD's law day dinner.

In 2010, OPD expanded and added an art contest in addition to its essay contest. OPD's art contest was the brainchild of Judge Hersher. After chairing the essay contest, it became obvious to Judge Hersher over time that OPD was "missing out on a whole segment of students whose writing wasn't their best talent and for whom art and music could get them excited about learning." Working closely with attorneys Kim Lewellen and Emily Hanselman, Judge Hersher reached out to art teachers at the schools where OPD was already teaching. Like OPD's essay contest, the art contest is based on OPD's Dialogue program. The student art pieces were showcased in a local Sacramento art gallery and the winners were selected by Judge Damrell, Judge Hersher, art professor Vallene Hardman, and a professional artist. This provided the students with an opportunity to experience realistic art judging, which Judge Hersher explained was a critical component of the art contest.

Eastern District of California Magistrate Judge Deborah Barnes, OPD's Executive Chair from 2014-2016, noted that "you do not know what spark will connect with a kid," and OPD can create that spark and has created that spark with the high school students in its program. Stroud gave an example of this "spark," sharing that he has met students who participated in OPD and later became lawyers. Under Judge Barnes' leadership and through the efforts of OPD board member Kathi Finnerty, OPD launched its website to reach more volunteers, teachers, and students.

To Andrea Fazel, a government teacher at Natomas Pacific Pathways Prep ("NP3") who was also an OPD board member, the "most effective and most valuable part of OPD is the Dialogue and having members of the bench and bar meet with students. It's helpful for students to hear authentic and concrete things from members of the bench and bar. While there are a lot of helpful materials for teachers to teach law-related issues, what is unique about OPD is the connection to the bench and bar for the students."



OPD's 2017 student award winners, OPD board members, and OPD volunteers

Kelley Lincoln, OPD's current Executive Chair and shareholder at Boutin Jones, shared that "we have the best group of volunteers," which includes state and federal judges and attorneys, and private practitioners. Lincoln has focused her energy on expanding OPD by teaching the Dialogue for the first time to a class of home-school students, which was arranged by Ninth Circuit Public Education and Community Outreach Administrator Kari Kelso, and encouraging the expansion of OPD into Fresno.



Student award winner, Ajit Rakhi, performing his slam poetry piece

Rio Americano teacher Linda Reed, who has been involved with OPD since the beginning, shared that "kids have felt very rewarded talking to attorneys and judges." Reed believes that OPD's 2017 curriculum on the 75th Anniversary of Executive Order 9066 had the biggest impact among the different Dialogue topics because of its timeliness and relevance to the Executive Orders of the current administration.

2017 OPD Dinner

Since its founding, OPD has hosted an annual Law Day Dinner to recognize local Sacramento-area high school student winners of OPD's essay contest, and beginning in 2010, student winners of OPD's art contest. With over 225 people in attendance at OPD's 2017 Annual Law Day Dinner held in May, OPD honored over 30 student winners of OPD's essay and art contests, including Natomas Pacific Pathways Prep student, Ajit Rakhi, who performed his slam poetry piece entitled "History Repeats Itself."

Magistrate Judge Allison Claire, an OPD board member who also provides training for the Dialogue program to judge and attorney volunteers, served as the Master of Ceremonies. The keynote speaker was United States Congresswoman Doris Matsui, who was born in a Japanese internment camp.¹ Congresswoman Matsui shared her father's persistent efforts to grow a flower in the dry desert of the camp, and how the flower that eventually grew and blossomed became a symbol of hope for the Japanese American community at the camp. Judge Damrell gave closing remarks. OPD's Law Day Dinner was co-sponsored by the Sacramento County Bar Association and the Federal Bar Association Federal Litigation Section, with additional sponsorship from many law firms, organizations, and individuals.



Congresswoman Doris Matsui giving keynote address

OPD's 2017 Dialogue Program & 2017-2018 Fresno Expansion

OPD continues to grow and reach more local high school students. In the last five years, OPD has added more than

10 classes. In 2017, OPD's volunteer judges and attorneys taught 62 classes at twelve Sacramento-area high schools: Cordova, Elinor Hickey, Florin, George Washington Carver School of Arts & Science, Grant Union, John F. Kennedy, Luther Burbank, McClatchy, Natomas Charter, Natomas Pacific Pathways Prep, Rio Americano, and Sacramento High School. For the first time, OPD also taught the Dialogue program to a class of home-school students during their visit to the federal courthouse.

OPD is proud to announce that in the 2017-2018 academic year, it is expanding into Fresno, which fulfills the founders' goal of expanding beyond Sacramento area. The Fresno expansion effort is being led by Eastern District of California District Judge Dale Drozd, First Assistant United States Attorney Phil Ferrari, OPD board member and Assistant United States Attorney Chi Soo Kim, and Fresno Assistant United States Attorney Alyson Berg, with the assistance of California Court of Appeal Justice Donald Franson, Fifth Appellate District, the Fresno County Civic Learning Partnership, attorney Michael Wilhelm, and retired educator Dr. John Minkler. OPD is actively looking for volunteer judges and attorneys in Fresno, and interested volunteers should contact Chi Soo Kim at chi.soo.kim@usdoj.gov.

* * *

Reflecting on his October 2001 speech and the start of Operation Protect and Defend, Judge Damrell shared, "In that speech I urged lawyers and judges to confront the widespread and profound ignorance which is eroding our understanding of our Constitution. I felt it was time for lawyers and judges to both 'protect and defend' the very meaning of the United States of America.

I still do." **SB**

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could use some financial backing and other support from FLS, please complete the request forms available on the FLS' portion of the FBA's website and submit your idea for consideration. We are continuing our CLE series with the Wagstaffe Group and expect to be in several chapters in the southeast in late April.

A few years ago when there was a proposal to amend the Federal Rules of Civil Procedure with respect to limitations on discovery, our Section took the lead for the FBA and surveyed our members. We took the feedback that we received from you and shared it with the rule making committee. Certain limitations were later withdrawn from the proposed rule and the sub-committee specifically acknowledged the efforts of the organized bar in providing comment. I am excited for a new initiative that we hope will give our Section a more persistent role in gathering and

Endnote

¹"Internment camp" is a phrase used by Congresswoman Matsui and others referring to the detention of Japanese Americans pursuant to Executive Order 9066 in the aftermath of the attack on Pearl Harbor in World War II.

sharing feedback as the rules evolve to better serves the needs of our federal judiciary and practitioners.

The Board has once again voted to provide financial support for the FBA's Annual Meeting. This year's meeting will be in my hometown, New York, on September 13-15. I hope you will be able to make it.

Thanks for your support of FLS and I hope to see you at some of our events in 2018. **SB**

John

Sixth Circuit Practice Institute a Smashing Success

Cincinnati was the place to be October 3, 2017 for many leading federal court practitioners who convened for the every-few-year gathering of the Sixth Circuit Practice Institute. Over 375 federal lawyers gathered in the Grand Ballroom of the Queen City's Renaissance Hotel for a full-day of CLE programming featuring nationally-renowned speakers such as Jim Wagstaffe, as well as outstanding (and practical) panel presentations from many members of the Sixth Circuit bench.

FBA national leaders John McCarthy (FLS Chair) and Ray Dowd, both members of the NYC FBA chapters, as well as Immediate Past President of the FBA, U.S. Magistrate Judge Michael Newman, were among the sell-out crowd at the event organized by the Cincinnati/Northern Kentucky and Dayton FBA chapters. The Federal Litigation Section was a prominent financial sponsor of the event and the networking reception that followed.

The day kicked off with Chief Judge Guy Cole of the Sixth Circuit meeting for breakfast with members of the Young Lawyers Division. Professor Arthur Miller's morning presentation focused on class action and multi-party litigation practice developments. Representatives of some U.S. Attorney Offices and Federal Public Defenders spoke on current issues in criminal appellate practice, and the Sixth Circuit Clerk of Courts shared numerous tips to assure timely and complete appellate filings.

S.D. Ohio U.S. Attorney Ben Glassman was joined by a representative from the Department of Justice discussing the

current work of the Justice Department during the pivot from the Obama to Trump administrations. The afternoon was filled with outstanding panels featuring Circuit and District Judges addressing practical considerations for preserving issues for appeal, as well as effective brief writing and effective oral argument. The afternoon sessions were marked by gregarious and candid comments from the panelists, and their observations were followed closely by all those in attendance. Eight members of the Sixth Circuit bench participated in these various presentations, including Chief Judge Guy Cole, as well as Judges Julia Gibbons, John Bush, Deborah Cook, Karen Nelson Moore, Jeffrey Sutton, Bernice Donald, and John Rogers.

The Sixth Circuit Practice Institute provides an excellent template that could be undertaken in other jurisdictions. The Federal Litigation Section would welcome the opportunity to support such programming in other circuits around the country. **SB**

Editor continued from page 2

well as panel presentations from Sixth Circuit appellate judges and district judges, plus a civil procedure tutorial from Jim Wagstaffe. The Federal Litigation Section was proud to host the networking reception, and FLS Chair John McCarthy welcomed the assembled throng to this great gathering.

These are but a few of the 2017 successes of the FLS, which was recognized in Atlanta with an FBA Outstanding Section recognition, and this newsletter received the FBA's outstanding newsletter award, too. Like all things past, these events provide great memories, and motivation to excel further going forward, and so it is with the Federal Litigation Section. As detailed in this newsletter, the FLS is hard at work planning the third Federal Litigation Conference for late May 2018 in Washington, D.C. in concert with the FBA Intellectual Property Law Section. The Section will also award the 2018 Rule of Law Award at a gala reception preceding that upcoming conference.

2018 finds the FLS undertaking to expand its interactions with the Federal Judicial Conference Committee on Rules of Practice and Procedure. FBA/FLS member Ben Robinson of Orlando serves as the FBA's representative observer to the Committee, providing great insight on the deliberations over federal practice rules and procedures. For more information, see the article on this important relationship later in this newsletter.

Finally, we are pleased to feature two contributed articles to

this Winter edition of SideBAR. Ira Cohen of Miami, Florida offers a great set of practice pointers to litigators regarding doing your homework to know your judge. Jason Scheiderer of Kansas City shares his article, reprinted with permission from BNA's Privacy and Security Law Report, entitled: "The Machines are Talking – So Can We Sue Them if the Conversation Leaks?", taking a fresh look at the continuing challenges presented by how we manage data in this digital age. Good work by good lawyers; thanks Ira and Jason for your contributions.

Happy 2018. **SB**



Federal Litigation Section to Expand Member Benefits with Enhanced Focus on Shaping of Federal Rules and Trial Practice and Procedure

The Federal Litigation Section in concert with the FBA's Government Relations Committee (GRC), will be taking on an expanded effort to monitor and report on the work of the Judicial Conference of the United States' Committees on Rules of Practice and Procedure.

FBA/FLS member Ben Robinson of the Florida law firm of Broad and Cassel will serve in a legal monitor role, and the Federal Litigation Section will work to support Ben's efforts. Prior to joining Broad and Cassel, Robinson served as Deputy Rules Officer and Counsel to the Judicial Conference's Committee on Rules of Practice and Procedure, as well as its five Advisory Committees (Federal Rules of Appellate, Bankruptcy, Civil, Criminal Procedure, and Federal Rules of Evidence). Now, FLS committee leaders, and interested members will undertake to assist in monitoring the deliberations of these working committees, which play an important and formative role in the shaping of federal court practice.

Ben provided a brief overview of the rulemaking process to the GRC in February 2017, which is reprinted in part here:

How The Rulemaking Process Works

Congress created the current system of advisory committees in 1958. There are separate advisory committees for the various rules of procedure, specifically appellate, civil, criminal, bankruptcy and evidence. The advisory committees in turn report to the Judicial Conference of the United States, which consists of twenty-seven federal judges who meet twice a year to set policy for the Judiciary.

The Conference relies heavily on the guidance of the Standing Committee on Rules and Practice, Procedure, and Evidence ("Standing Committee"), which includes a panel of roughly eight judges, five lawyers, and one or more law professors. The five advisory committees – appellate, civil, criminal, bankruptcy and evidence – report to the Standing Committee. Each of these committees usually meets twice a year in a forum open to the public. But, despite their important work studying and adjusting litigation policy throughout the federal court system (and, indirectly, to the majority of state systems), the Rules Committees receive little attention or interest, even among practitioners, beyond a small group of monitors.

The process of adopting a rule change is lengthy, usually spanning three years and consisting of a seven-step process from the initial proposed change to the final adopted rule. Specifically, the seven-step process consists of (1) the initial consideration by the advisory committee; (2) publication and public comment of the proposed change; (3) consideration of the public comments and final approval by the advisory committee; (4) approval by the Standing Committee; (5) Judicial Conference approval; (6) Supreme Court approval; and (7) Congressional review.

Judges, lawyers, law professors, government agencies, state attorneys general, or other individuals or organizations

can initiate a proposal for a change to the Rules. After distributing the proposals to the appropriate advisory committee, the Reporter and Secretary of the advisory committee prepare and advise on the suggested change. The changes that merit discussion are discussed or debated at the meetings, and after discussion and recommendations, the Reporter typically prepares a draft amendment and an explanatory committee note.

Before the advisory committee formally pursues a new rule or amendment, it must first seek the approval from the Standing Committee to publish the proposal for public input. After receiving approval, the advisory committee widely distributes the proposed change to the public for input. During the public comment period, formal hearings are held and stakeholders are welcome to provide their testimony and opinions on the proposed changes. Those who comment or appear to testify may include national bar leaders, current and former legislators leading law professors, and practitioners at all levels.

The end of the public input period, usually lasting six months, is marked by a thorough summary of the written comments and testimony received, prepared by the advisory committee Reporter. The advisory committee then considers this summary of input from the public, and decides whether to proceed with a final proposed change. If, after reviewing public input, the advisory committee wishes to make a substantive change to the proposal, the committee will resubmit the proposal for public input. The advisory committee then submits a final proposal for approval, along with a summary of the public comments and an explanation of any changes made to the original proposal.

The Standing Committee may accept, reject, or modify the proposal. If accepted, the proposal will proceed with a recommendation for approval by the Judicial Conference. If the Standing Committee makes any substantive changes, it generally resubmits the proposal to the advisory committee for review.

The Judicial Conference generally considers proposals for amendments to the rules at its September semi-annual session. Amendments approved by the Judicial Conference are thereafter submitted to the Supreme Court for review and, in most cases, approval. The Supreme Court typically takes seven months from when the amendments are received until May 1st to review, approve, and submit the amendments to Congress. Congress then has a statutory six-month period to act on the rules prescribed by the Supreme Court. If the amendments are not modified or rejected by legislation through Congress, the rules take effect on December 1st of the same year.

Even though this is the typical route for the rule changes, an expedited process may be encouraged by a request for prompt consideration by Congress. However, the fourteen-month delay by the Supreme Court and Congress cannot be decreased, as it is established by statute.

Committee Membership

The various committees' members include federal judges, state chief justices, practicing lawyers, law professors, and representatives of the Department of Justice. A law professor, as the leading expert in his or her respective field, is designated as the Reporter for the committee. The Reporter is responsible for drafting proposed amendments and any explanatory committee notes, as well as helping establish the committee's agenda.

Even though the advisory committee that drafted the original Federal Rules of Civil procedure was entirely staffed with lawyers and professors, judges were later added to the committees and became a large majority of each committee. The membership is geographically balanced and represented by different perspectives from different practice areas within the legal community.

Conclusion

Federal Litigators: Have You Done Your Preliminary Homework On The Judge(s) Assigned To Your Case?

Ira Cohen

"The law is a jealous mistress, and requires a long and constant courtship. It is not to be won by trifling favors, but by lavish homage."¹

Prologue

"Many have become chess masters; no one has become the master of chess."²

So, too, while many attorneys have become litigation masters, no one has become a master of litigation. In that vein, I have long held the belief that the practice of law, in general, and litigation, in particular, is analogous to playing the ancient, and venerable, board game of chess.³

This quote reminds us that there is always room for improvement in our playing of the game. Whether it be chess or litigation, there is nothing we do perfectly, and litigation always provides us with further opportunities to learn and study, and improve. The nuances and subtleties of the game of litigation suggest that even the most formidable competitors will face a host of challenges for the full span of their professional legal careers.

In litigation, as in chess, in order to prevail you need to think, and stay, 3 moves ahead of your opposition. A dominating litigating attorney needs to start off strong and, then, stay on top of the game (i.e., what is happening in his (her) client's case, and the overall direction in which the case appears to be heading).

All moves are deemed important. Some moves are, indeed, critical. Furthermore, as many of us have learned, at a relatively early age, from playing chess, even a solitary wrong move can lead to dire consequences, Draconian sanctions, and/or adverse final results. In order to obtain the most favorable outcome, one must ponder carefully and, then, implement all of the right moves.

The Federal Judiciary's Rules Committees have an incredible impact on litigation process and policy, which invariably trickles down to affect all federal practitioners. As the FBA's members are expected to be the foremost leaders in federal court practice, the importance of having the most current knowledge of and insight into any potential or pending rules changes cannot be overstated. The Federal Litigation Section and the Government Relations Committee are partnering to ensure that there will be a respected, consistent observer in attendance at meetings to relay questions and concerns from the Association, and to report back on significant developments to our members. Keep an eye out for additional reports in future editions of SideBar. **SB**



Benjamin Robinson is an associate with the Florida law firm Broad and Cassel. He can be reached at (407) 839-4228 or at brobinson@broadandcassel.com.

Introduction

In the wake of almost 35 years of litigation practice, I have managed to learn, through trial and error (no pun intended), many valuable legal lessons related to a federal lawyer's necessary tasks in the earliest days of the life of a litigation. In this article, I offer the neophyte and the occasional, along with the well-seasoned, litigator the following Baker's Dozen of nuts and bolts tips and techniques.

Discussion and Analysis

"By failing to prepare, you are preparing to fail."⁴

As soon as you are involved in a new federal legal action – whether you represent the bold Plaintiff who instituted the litigation or the hapless Defendant on the receiving end of a loaded pleading – you need to commence your studies of the case in earnest. I am not here talking about the myriad of procedural and substantive legal issues that are likely to arise during the course of the legal battle. Rather, I am speaking to acquiring a "lay of the land," or the "view from 30,000 feet," if you will.

Stated otherwise, what does the judicial terrain of the litigation landscape look like? Does it appear that you and your client are heading straight for the proverbial "rough ride" or, instead, are you embarking on a cruise where the compass points to "smooth sailing"?

What judge(s) has (have) been assigned to preside over your case? What is the background and pedigree of the Article III U.S. District Judge whose initials now grace the filings in your case? Who is the Magistrate Judge and what can you discern about that Article I jurist who likely also will have a significant impact on your case, particularly as regards issues pertaining to pretrial

discovery?

Check the Local Rules:

Check the pertinent Local Rules. If you are litigating in your home district, while this may not be a critical step, it is still a good idea. If you are not conversant with the applicable Local Rules, and even if you are (for convenience's sake), print out a complete copy and keep it in your file.

Identify the Jurist(s) Assigned to the Case:

As soon as the case is assigned, check the initials of the District Judge and identify him (her), while noting same for your file. Repeat this process for the assigned Magistrate Judge.

Check the Judge's Individual ("Chamber's") Rules:

Most judges have Individual ("Chamber's") Rules. Forgetting or ignoring such rules and procedures can lead to significant bouts of heartburn, if not unintended, and most unwelcome, legal consequences. Make a copy and place it in the file.

Check the Court's Standing Rules:

Make sure the Judge has no Standing Orders regarding, for example, discovery, or as to trial, or as to certain types of cases. If there are, make copies and place them in the file.

Check the Judge's Professional Legal Background:

Diligently conduct your research on the judge's background and pedigree. Where did the judge go to law school? Was the judge a government lawyer or a private practitioner before ascending the bench? Was the judge a former prosecutor? Which U.S. President appointed the judge?

Learning about the judge's background can provide key insights into the judge's political, social, economic, religious, racial, ethnic, and/or other leanings. It also likely will furnish invaluable information about any potential undercurrents of bias or prejudice, judges being, after all, very much like the rest of us fallible and imperfect humans.

We all recognize the grandiose motto emblazoned atop the 16 marble columns at the front entrance to the U.S. Supreme Court in Washington, D.C., which reads: "Equal Justice Under Law." Though an admirable sentiment, and a quite lofty goal - and while I believe that the American legal system is, without question, the best in the world - to say that this precept is universally, and without exception, applied, at all times, would not be entirely accurate or truthful.

Where does one dig to unearth such illuminating information? You may start with the website of the court in which the judge sits (*e.g.*, U.S.D.C., S.D. Fla.).

I would also suggest checking Wikipedia®. You can, additionally, scour the entries of Judgepedia and The Federal Courts Project (both projects of Ballotpedia). Above the Law ("ATL") is yet another website that will provide you with perspectives about law, the bar, and the members of the bench. Law 360 (a Lexis-Nexis company) also may hold out some juicy informational nuggets for you.

Another fine resource, not to be omitted, is the website of the Federal Judicial Center, which contains most, if not all, of the federal jurists' biographical information.

To be sure, a broader, general internet search should also be done, utilizing search engines such as Google®, Bing®, Dogpile®, Yahoo! Search®, Aol Search®, Ask®, DuckDuckGo®, Wolfram Alpha®, Yandex®, WebCrawler®, Search®, Ixquick®, Excite®, and Info.com®, as well as other search engine sites. You will be amazed at the wealth of articles and/or information that can be retrieved.

Print out all pertinent information and place copies thereof in your file.

Check Your Legal Colleague's Comments about the Jurist:

Ask around. No doubt you have many good friends or acquaintances who are federal practitioners. If you have not encountered a particular judge before, see what you can learn about the jurist from your colleagues.

Next, go to your computer and check "The Robing Room," a website which publishes comments and critiques of most federal judges. It may be compared to a "Yelp" type website, but directed at jurists' supposed judicial demeanor and juridical smarts. Again, if you are litigating out of state, your Local Counsel can be a font spring of information and advice. Perhaps your Local Counsel has appeared in this judge's courtroom before, for better or worse. There is no good reason, or excuse, to ever engage in the risky affair of "flying blind" into a courtroom for the first time. And, if your Local Counsel himself (herself) is not familiar with the judge, perhaps some of his (her) lawyer colleagues are.

Print out all articles or items of interest and place copies thereof in your file.

Research Prior Decisions of the Jurist:

Take your time and effort to do electronic research relating to the judge(s). Find out if there any published decisions by the judge (and/or magistrate judge) in the area of law and/or as to the important issues involved in your case. Print out copies of all relevant cases opinions and place them in your file. You will undoubtedly wish to cite some of these decisions as you work your way through the legal action. To be sure, if the cases previously handed down by the judge support your position, that is ideal. If not, you still need to know about them and, moreover, be able to explain to the judge why they are distinguishable and/or inapposite to the case at bar.

Apply the Same Process to the Magistrate Judge:

Undertake the same types of investigatory efforts with respect to the Magistrate Judge assigned to your case. Nowadays, only once in a great while will you actually have to appear in Court and stand before the District Judge, *e.g.*, at the Initial Scheduling Conference and, later, the Final Pretrial Conference. But, other than those few occasions (and the trial, if the case ever gets that far; most, in fact, do not), it is much more likely that you will have a live hearing before a Magistrate Judge (often over a discovery dispute). Print out all relevant information and place it in the file.

Check Out Any Mediator Before the Mediation Session:

The lion's share of federal civil cases (with the possible exception of civil forfeiture cases) will, at some point in time, be ordered to mediation. Whether the Mediator has been

assigned or, in the alternative, selected by the parties, they should be checked out by the lawyers, much in the same way as the judge has been vetted. There may be quite a bit of information readily available, particularly if the Mediator was a formal federal judge.

Understand the Way the Judge's Procedures Work:

Having a good working-knowledge of the Judge's "in-house" procedures will make the litigator's life easier and more pleasant. Various and sundry traps and pitfalls may, thus, be avoided. You will be far less likely to commit any *faux pas* on motion practice. You will not be surprised if you know, for example, that there are no telephonic appearances allowed. You also will be conversant with the *pro hac* vice admission rules of the particular judge.

Apply the Same Exploratory Process to Opposing Counsel:

Your legal sparring partner also needs to be scrutinized. First, check the validity and current status of his or her Bar License. Note any disciplinary issues or records. Review the lawyer's website, if applicable. Check the lawyer's usual area(s) of practice. Has the lawyer been involved in any notable cases? Is the lawyer prominent in any legal organizations or bar groups? And, finally, is the lawyer a former Federal Judge's Law Clerk?

Judge Shopping:

Albeit I neither advocate, nor recommend the practice of judge shopping, I would be remiss if I did not at least mention it in passing. It would be naïve to think, or say, that there are no practitioners who - having had the hairs on their head shockingly rise to attention, or turn markedly grayer, by virtue of the designation of a given jurist on their case - have not opted to hit the button on their ejection seat.

Utilize your Federal Bar Association Resources:

Remember that the Federal Bar Association offers all of us tremendous resources of all sorts. To illustrate, if you need a Local Counsel in an out-of-state district, you should contact the FBA or attorneys in one of the subject-area Sections to see if they can be of service by referring you to a qualified practitioner in that area of the law, in that area of the country.

Do not eschew looking at back issues of various FBA publications, both for information about the judges and about your case's major subject-matter (*e.g.*, intellectual property or agricultural/PACA law). Doubtless, you will find helpful articles. There are Judicial Profiles to read in The Federal Lawyer, and all manners of well-research, peer-reviewed articles, featured in multiple FBA publications, covering a veritable smorgasbord of legal subjects.

Conclusion

As Thomas Edison sagely observed, "[t]here is no substitute for hard work." In law, and in litigation - as is true for most human endeavors - your ultimate results necessarily will largely hinge on the extent and caliber of your mental efforts (to wit, researching and thinking).

In the chess game of litigation, one also needs to understand

the strengths and weaknesses of the opposing player. Only in that manner can the successful litigator gain useful advantages over his (her) adversary.

Equally important is a thorough comprehension of the various playing pieces and what precise moves each piece is capable of or allowed. Let us suppose that the clients are, for argument's sake, the Kings in this legal game; able to make only forward moves, in a single direction, one space (or step) at a time. However, they are unquestionably the lawyers' single most important piece (and asset), the valued client, which must be protected at all costs and, in the best-case scenario, will witness the checkmate of the opposing King.

Then, the courtroom lawyers could be likened to the Bishops or the Rooks (Castles) who, whether diagonally or horizontally, within in a row (that is to say, in a straight line), can proceed apace, or retreat, as the needs of the particular situation may demand.

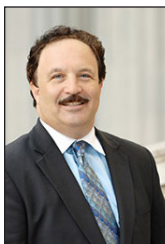
The expert witnesses, like the Knights (Horses) prance around in contorted directions, all over the board, and one never really knows where they will all end up, until the very heat of battle.

The necessary support staff, on both sides of the fence, can be likened to the Pawns, with the secretaries, legal assistants, paralegals, clerks, and associates, on the lawyers' side, and the law clerks, judicial secretaries (or judicial assistants), courtroom deputies, bailiffs, and student interns, on the judicial side of the fence.

Which piece, then, would the judge be likened to? Why, the Queen, of course; able to move all over the board, in any direction, and as many spaces at a time as the Queen desires. Predictable in the concept, yet unpredictable in the manner or timing of the application thereof, the Queen (*i.e.*, the Judge) is, hands down, the most powerful, and formidable, player on the board. And, we veteran chess aficionados well know that one single move of the Queen can change the entire game, very quickly and, often, decisively.

In order for you, the federal litigator and, by extension, your valued client, to have the best chance to excel at this daunting legal game, diligent study and solid research always must precede play. Otherwise, the contest may be over for your side far sooner than you had imagined. Can you say "checkmate?"¹⁵ **SB**

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Ira Cohen, Esq., B.A., J.D., LL.M., is a partner of Henkel & Cohen, P.A. of Miami, FL. Ira served as Judicial Law Clerk to the Honorable Harold J. Raby, United States Magistrate Judge for the Southern District of New York (1982-85). Ira can be reached at (305) 971-9474 or ic@miamibusinesslitigators.com.

Endnotes:

¹⁵Joseph Story, The Value and Importance of Legal Studies. Story (1779-1845). Story was an American attorney who later served as Associate Justice of the U.S. Supreme Court (1811-1845). Justice Story wrote the majority opinion in the "Amistad" case (United States v. Schooner Amistad, 40 U.S. 518 (1841),

a famous United States Supreme Court decision resulting from the rebellion of African slaves on board the Spanish schooner *La Amistad* in 1839.

²Siegbert Tarrasch (1862-1934), Prussian born, and a medical doctor by profession, was a notably strong chess player and influential chess teacher of the late 19th and early 20th century.

³Most scholars track back the roots of the game of chess to India's Gupta Empire around the 6th Century (A.D.). The early form of the game (called "Chaturanga") represented 4 military divisions, to wit, infantry (mod.: Pawns), cavalry (mod.: Knights), elephantry (mod.: Bishops), and chariotry (mod.: Rooks).

⁴Benjamin Franklin (1706-1790), co-founder of our great

nation; scientist, statesman, author, printer, inventor, diplomat; in short, an all-around revolutionary times "Renaissance" man.

⁵Checkmate, as we have come to know the term, is a modification of the Persian phrase "shah mat," which has been translated as "the king is helpless."

Editor's Note: The suggestions and recommendations in Mr. Cohen's article are those of the author; reference to specific vendors or services in the article are not and should not be read as an endorsement by the Federal Bar Association or the Federal Litigation Section.

The Machines are Talking – So Can We Sue Them If the Conversation Leaks?

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Jason R. Scheiderer

Machine Liability

Machines have been helping people record, communicate, and listen for some time now, and in the process automatically collecting and storing mountains of data. As information is shared between machines and devices and becomes vulnerable to data breaches, can machines be considered negligent and manufacturers held liable for internet of things breaches, the author asks.

Your fitness tracker, in direct communication with your refrigerator, calculates that nearly all of your steps last Saturday were back and forth to the refrigerator. A simple example, and you might be annoyed that these machines have this information about you. But what if this information left the privacy of your home? What if this information left these two machines and became known to your personal trainer, or worse yet, was posted to your Facebook Inc. page? What if this information was released to your health insurance or life insurance carriers? And what if the information released was much more sensitive?

We have asked our machines to follow us, record us, listen to us, and communicate for us. In doing so, we have also asked the machines to create mountains of new data. All of this data is being saved, tracked, and shared in ways we may have never imagined, or wanted. We know we are being watched, but who is watching the watchers? Who (or what) is responsible for safeguarding the private information held by our machines and devices? And when things go badly, who is responsible?

The "Internet of Things" (IoT) is shorthand for the increasing variety of direct internet-based communication between machines. As information is shared between devices and machines, it is subject to many of the same threats of hacking and data theft. So can a machine be "negligent" in its data security "practices?" And if so, should the manufacturer be liable for a resulting data breach?

These questions lead us to the new frontier of data breach litigation and regulation. This article discusses recent lawsuits seeking to introduce these type of liability theories, notes early efforts by legislators and regulators to impose standards on

IoT businesses, and provides recommendations for companies engaged in IoT business.

Litigation is Coming

"Data theft," "data breach," and "invasion"—many lawsuits today invoke these terms. Data breach class action litigation has expanded significantly in recent years—in the number of suits, the number of potential class members, and in the scope of the alleged harm. Until very recently, the targets of these lawsuits have been consumer-facing businesses. Plaintiffs have typically asserted that a business failed to adequately safeguard company data, allowing it to be taken from the company.

But when data stored or communicated by devices is hacked, who should be liable? The manufacturers of the machines that had access to the data? The network provider that connected the machines? The software developers whose software was deployed into the machines? For many plaintiffs' lawyers, the answer may be: all of them, at least until discovery can sort out their various roles.

In recent months, the plaintiffs' bar has begun pursuing class action liability theories against a variety of businesses involved in device connectivity.

Undisclosed Collection of Data

A recent class action lawsuit against Vizio resulted in a \$2.2 million settlement (the case was filed in the U.S. District Court for the District of New Jersey). Plaintiffs alleged that the Vizio's "smart" televisions were collecting too much customer information. Vizio was accused of tracking viewers' habits and preferences and secretly storing and transmitting that data. As part of the settlement, Vizio agreed to stop tracking viewers and to obtain informed consent for information collected in the future.

Standard Innovation was sued in 2016 because its "WeVibe" vibrator product and its corresponding smartphone app did not inform users about the data it was collecting (the case was filed in the U.S. District Court for the Northern District of Illinois). The data included how often and how long users enjoyed the

toy, the selected vibration settings, the device's battery life, and even the device's temperature. All of this data was collected and sent to the company's Canadian servers. The class action plaintiffs alleged that the company's undisclosed collection and transfer of data violated Illinois' consumer protection laws and the federal Wiretap Act. The lawsuit settled in March 2017, with final compensation to be determined and a final hearing set for later this year.

Data Vulnerability

In *Cahen v. Toyota Motor Corp.*, plaintiffs alleged that the car manufacturers equipped their vehicles with computer technology that is vulnerable to hacking. Plaintiffs assert that a hacker can communicate remotely with the network of computers controlling many of the vehicle's functions, which could result in the driver losing control over the steering, acceleration, or braking systems. The plaintiffs claimed that the manufacturers were aware of these security vulnerabilities, but still marketed their vehicles as safe. Plaintiffs thus claimed that the manufacturers misrepresented known facts, and breached implied and common law warranties. The case is currently on appeal before the Ninth Circuit.

In *Flynn v. FCA US LLC*, plaintiffs alleged that there was a security flaw in the "infotainment" centers, which were installed in certain Dodge vehicles. The complaint asserts that the infotainment system is highly vulnerable to hacking, and, if hacked, could allow the hackers to take control of the car's steering, acceleration, and braking. The complaint similarly asserted misrepresentation and breaches of warranties.

VTech was called to answer for alleged vulnerabilities in its learning toys for children (the case is pending in the U.S. District Court for the Northern District of Illinois). The toys link to the internet to collect and receive data. However, plaintiffs claimed that a hacker could steal data from the devices and web services. This information included pictures, chat logs, emails, passwords, and nicknames—often belonging to children. Plaintiffs alleged breach of contract, breach of the warranty, and violations of state consumer protection laws. Similar to the plaintiffs in the automobile cases, the plaintiffs alleged an increased risk of harm and that the value of the products had diminished.

Finally, in *Ross v. St. Jude Medical Inc.*, plaintiffs' claims arose out of medical devices—including pacemakers, defibrillators, and heart resynchronizers—that communicate using radio frequency wireless technology (the case is pending in the U.S. District Court for the Central District of California). The implanted devices' ability to communicate wirelessly allows them to be monitored remotely with in-home equipment. Plaintiffs claim that the devices and the in-home transmitters lacked "basic security defenses," making them highly vulnerable to hackers.

In each of these cases, actual injury and standing has been an issue. These challenges mirror the ongoing battles in typical consumer data breach cases, where plaintiffs are challenged to prove actual injury based upon the risk that compromised data will be used to commit identity theft and other fraud in the future.

Plaintiffs, up to this point, have most often asserted legal claims arising out of an exposure to increased risk, the misrepresentation of risk, or the misrepresentation of data

collected. But it will not be long before plaintiffs come forward with allegations of substantial injuries as a result of a breach of data security within a device. The consequences of a data breach in certain applications, such as industrial machines, automobiles, home security systems, and medical devices, could be catastrophic. Despite improvements and innovations in the industry, we can expect an increase in class action lawsuits and significant damages awards against manufacturers and other businesses within the IoT supply chain.

Regulatory Efforts

Federal Regulation

Many governments—from small cities to multi-national pacts—have enacted data privacy regulations. Recently, several U.S. governmental bodies have turned their attention to IoT data security.

In 2015, the United States Federal Trade Commission (FTC) issued a staff report entitled, "The Internet of Things: Privacy and Security in a Connected World." This guidance memorandum provides information for consumers, legislators, and businesses, encouraging best practices for IoT businesses. The FTC complemented its staff report with additional information directed more specifically at businesses in the IoT sector entitled, "Careful Connections: Building Security in the Internet of Things."

Among the key best practices currently recommended by FTC:

- devices should have security built into them at the outset (often referred to as "security by design" or "security by default");
- companies should conduct privacy or security risk assessment on new products or innovations;
- companies should minimize the data they collect and retain;
- companies should appropriately test their security measures before launching their products;
- companies should provide clear notice of the ways in which the machine will collect and use data; and
- companies should provide consumers and users with meaningful opportunities to exercise choices regarding their data.

The FTC is not alone in its focus on IoT data security. The National Institute of Standards and Technology, which is the federal agency that issues standards for government work, has created a program to assist businesses, particularly government contractors with IoT security.

Similarly, the Food and Drug Administration (FDA), the Department of Defense (DoD), and the Federal Communications Commission (FCC) have all recently included IoT specific recommendations in their cybersecurity standards and publications, each with their own priorities. The FDA is understandably very concerned about connected medical devices, the DOD has focused on standards for defense contractors, and the FCC includes IoT issues as part of its larger approach to consumer cybersecurity.

While careful businesses proactively review statements, guidelines, and publications, enforcement actions seem to

capture much more attention. Currently, the FTC does not have any specific rulemaking procedures to set minimum security practices for manufacturers or retailers. However, that has not eliminated the possibility of IoT security enforcement actions. Instead, the FTC has recently worked to enforce data security practices in the IoT sector through enforcement of promises made by manufacturers in their product websites, brochures, and advertising. FTC enforcement actions thus often allege unfair and deceptive practices under Section 5 of the FTC Act.

In January 2017, the FTC brought such an enforcement action against a computer networking equipment manufacturer, D-Link Corporation. The FTC asserted that the company had failed to undertake “reasonable steps” to secure wireless routers and IP cameras from “widely known and reasonably foreseeable” risks. The FTC claimed that the company was aware of “well known and easily preventable security flaws,” which left consumers vulnerable to data privacy and security risks.

Given the stakes of data breach and the exponential growth of device connectivity, businesses should expect additional publications, recommendations, rulemaking, and enforcement in the coming months.

State Regulation

As many expected, California introduced one of the first efforts to mandate “security by design.” In 2017, a new bill (Senate Bill 327) was proposed that would require manufacturers and sellers of IoT connected devices to:

- equip the device with “reasonable” security features, appropriate to the nature of the device and the information it collects, contains, or transmits;
- design the device to indicate to the consumer when it is collecting information;
- obtain consumer consent before the device collects or transmits information;
- provide an explicit privacy notification to the consumer about what data is collected by the device; and
- directly notify consumers of security patches and updates intended to make the device more secure. Beyond manufacturers, the bill would also require retailers to provide a short, plainly written notice of the device’s information-collection functions. This notice must be provided to the consumer at the point of sale. Specifically, the notice must inform the consumer whether “the device is capable of collecting audio, video, location, biometric, health, or other personal or sensitive consumer information.” Finally, the notice must tell the consumer where to find the device’s privacy policy.

If this bill becomes law, California would be the first state able to bring enforcement complaints against companies that do not build proper security safeguards into their devices from the moment they are created. To date, companies have been encouraged to “patch” or to upgrade security when vulnerabilities are found, and industry groups have developed their own “best practices.” But California’s effort would be the first codification of “security by design.” This concept requires manufacturers—from the earliest manifestations of the product—to plan and implement data security structures within the machine.

The Future

Right now, it is estimated that more than six billion devices and machines are connected to the internet in some form. By 2020, experts predict that there will be 50 billion internet-connected devices. As a result, by 2025 these connected devices will have an economic impact of more than four trillion. Put simply, device connectivity is prevalent now, and will become nearly ubiquitous in just a few years.

We know the machines will be creating, storing, and transferring data about us. And we know that some of this data will be personal, private, and sensitive—from our medical data to our finances. Right now, lawyers from legislators to litigators—are searching for practices that will support the convenience of device connectivity while protecting privacy. Businesses large and small will be impacted by the legislation and liability theories that are created and implemented over the next few years.

Technology and trends continue to evolve, but there are certain practices and efforts IoT businesses should consider, including:

- audit and regularly monitor user data already collected and purge unneeded data;
- develop a data collection and storage procedure for user data going forward;
- for new products, integrate physical security into product design at the earliest stage possible;
- for new products, integrate software security into product design at the earliest stage possible;
- develop and update notices to users regarding data collection and processing;
- develop and deploy user consent measures, such as waivers, “click-wrap,” and assumption-of-the-risk statements;
- update and verify the accuracy of privacy disclosures and policies, both business-to-consumer and business-to-business;
- implement a comprehensive testing, updating, and patching process for already released devices;
- consider liability shifting provisions in their agreements with vendors and administrators of the connectivity; and
- consider insurance products that could provide necessary coverage.

When must manufacturers impose security apparatus into the devices they invent? What needs to be imbedded into the machine? What happens when a manufacturer fails to install “appropriate” security structures? What responsibility do retailers and resellers have for the machine’s vulnerabilities—whether known, unknown, disclosed, or undisclosed? And how far should liability extend? These are the types of questions now posed by the tremendous growth and success of machine-based internet communication. Businesses should stay engaged in the analyses and developments that will shape our increasingly connected future. **SB**



Jason R. Scheiderer is a partner at Dentons LLP in Kansas City. He is a member of the litigation and dispute resolution group and the privacy and cybersecurity group. Scheiderer can be reached at 816-460-2418 or via email at Jason.scheiderer@dentons.com.



Federal Litigation Section
Federal Bar Association
1220 North Fillmore Street
Suite 444
Arlington, VA 22201