President’s Message
by Eric Gabrielle

It is a privilege to assume a post so ably and exceptionally filled by René Harrod over the last year. Under René’s outstanding leadership, the Chapter has grown and prospered in many ways. The Chapter is well poised to continue this success in 2009-2010.

Many thanks are due as well to Gabe Pinilla, Editor-in-Chief of Et Alia, and his editorial board, for their fine work on the newsletter last year. Today’s special issue on the Supreme Court of the United States is a fine illustration of the dedication of Gabe’s team to producing an informative and timely publication. We as a Chapter are very fortunate that Gabe and his board have graciously and generously agreed to volunteer their time and effort.

The Chapter has a fine group of officers for the coming year: Paul Lopez (President-Elect); Lorianne Williams (Vice President); Kim Gilmour (Treasurer); Matt Mandel (Secretary); and Greg Ward (National Delegate). We also remain grateful for the assistance of our Chapter’s Advisory Board, whose names and contributions are too numerous to include here, but which appear on our Chapter’s web page -- accessible through the Federal Bar Association website (www.fedbar.org).

We look forward to a terrific year. Our Chapter’s traditional monthly luncheons will continue, as will the brown bag lunch program. In addition, we can look forward to the Southern District of Florida Bench and Bar Conference on April 30, 2010, this year’s Summer Associates Day at Court and many other events to come.

The Chapter will also continue its role supplying the invited keynote speaker to the monthly Naturalization Ceremony held at the Fort Lauderdale federal courthouse. Any reader interested in taking a leadership role in these or other activities should contact one of the Chapter’s officers.

It will be an exciting year for the Broward County Chapter. We hope to continue the fine relationship we have with the United States District Judges, United States Magistrate Judges and United States Bankruptcy Judges in Fort Lauderdale who have been so generous with their time and their company and to welcome a new Federal District Judge to Fort Lauderdale very soon. Please watch this space and be a part of the Broward County Chapter this year.

Special Edition:
United States Supreme Court

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For readers who have been waiting patiently for this edition, we proudly present our first annual United States Supreme Court Special Edition. Combining two full editions (Summer and Winter), the Supreme Court Special Edition reviews notable moments and opinions from last term and also previews upcoming cases to be decided this term—all along side our usual regular features. There has been much to cover over both last term and the present docket, with a new Justice, several highly anticipated rulings, and even one case that has spanned both terms and which has now shed light on how Chief Justice Roberts is shaping his legacy on the Court.

This special edition also brings a first of our own, with Eric Gabrielle now at the Chapter helm, we present his first President’s message to usher in what we hope will be an exciting new year of federal bar events and exchanges. As always, we also bring you news and notes from Clerk of Courts, Steve Larimore, who has previewed the upcoming changes in the Federal Rules. And for those practitioners looking for an edge by mining the thoughts and personalities of our local judiciary, we are excited to bring you part one in a two-part series of practice tips from the Honorable Paul Huck as well as a judicial profile of District Judge William P. Dimitrouleas.

We hope you find this Special Edition thought-provoking and helpful as you navigate your way through federal practice in South Florida. And for all of you who wish to contribute to our mission to bring together the local federal bench and bar, we extend an open invitation for you to submit articles, essays or stories related to issues and events of interest that can lead to improving federal practice in South Florida. Our offer from last edition still stands: submit and essay, story or article, and if we publish it, you’ll receive complimentary admission to a federal bar luncheon or comparable event.

Thanks again to our great editorial staff and all of our special contributors, including Hon. Paul Huck, Clerk of Courts Steve Larimore, Christopher Hunter and Susan Alesi. Special thanks also to Lori Rabinowitz, marketing and recruitment director for Berger Singerman, for her continued commitment to making our newsletter a reality.

Best wishes in this new year to all!!

Gabe Pinilla
Editor-in-Chief

WHO SAYS THERE’S NO SUCH THING AS A FREE LUNCH??

Submit an article to Et Allia and if it’s selected for publication, we’ll send you to an FBA speaker series luncheon or comparable Broward FBA chapter event FOR FREE!! Articles should be no more than 2500 words and have a substantial relationship to the South Florida federal bar. We are seeking traditional articles on legal issues of importance to federal practice in our district, as well as non-law review-style essays and works of non-fiction or short fiction, so long as there is a sufficient nexus to legal issues or current events touching the South Florida federal bar. So, we encourage our local scholars and writers to submit their scholarly works, insightful pieces on locally important legal happenings or issues, and even well crafted accounts of your favorite federal court war stories. Please send all submissions to gdpinilla@aol.com with “Featured Articles” in the subject field.
Judicial Profile

District Judge William P. Dimitrouleas
by Michael Caruso

In the proud tradition of the Southern District of Florida, Judge William P. Dimitrouleas became a federal district court judge after a distinguished career as a trial lawyer. During his run as a state prosecutor in Broward County, he tried many significant cases, impressing juries and swaying judges in the process. The prosecutor office's loss has been the federal bench's gain, as the traits he demonstrated while serving as a trial lawyer—hard work, integrity and a commitment to justice—have benefited the litigants and lawyers of the Southern District of Florida. Indeed, Judge Dimitrouleas credits his formative time "in the pits" as essential to his success as a judge.

Judge Dimitrouleas was born in Lynn, Massachusetts. As a young boy, his family moved to Ohio, where the Judge excelled in both academics and athletics. As a teenager, his family moved to Broward County and opened a restaurant in Wilton Manors. Judge Dimitrouleas enrolled at Pompano Beach High where he starred in multiple sports for the Golden Tornadoes, perhaps being best known for the discus.

After high school, Judge Dimitrouleas attended Furman University. Again, he excelled both in the classroom and on the track. While at Furman, Judge Dimitrouleas developed a love of history through an inspiring professor and earned his Bachelor's Degree, Magna Cum Laude, in 1973. He also participated in Track and Field, again with an emphasis on the discus and the shot-put. During his senior year, the Southern Conference named him the Most Outstanding Indoor and Outdoor Performer. In fact, the Judge still holds the Furman records for discus and the 35-pound weight throw.

Appreciating the limited employment prospects for history majors, Dimitrouleas decided to attend law school at the University of Florida. He credits a family friend, Elizabeth Athanasakos, a lawyer from Wilton Manors and the first female municipal judge in Broward County, for sparking his interest in the law. Ms. Athanasakos was counsel for the family's restaurant and her visits always led to spirited debate. His love of debate would serve him well as he embarked on a career as a trial lawyer.

While at University of Florida, Judge Dimitrouleas interned at the Gainesville Public Defender's Office. He says that he learned more during that internship than in any class. This experience "whetted his appetite for criminal law." Judge Dimitrouleas earned his Juris Doctor, with Honors, from the University of Florida, College of Law in 1975.

After graduation, he began his legal career as an Assistant Public Defender in the Florida Public Defender's Office representing low-income and indigent clients from 1976 to 1977. In 1977, Judge Dimitrouleas became an Assistant State Attorney for the Florida State Attorney's Office. From 1977 to 1989, he worked in that office ultimately attaining the position of Chief of Felony Trials where he prosecuted homicides and other significant cases.

During his time at the state attorney's office, Judge Dimitrouleas had the reputation of being a superb trial lawyer. One colleague remarked that his talent as a trial lawyer was unsurpassed. For his part, Judge Dimitrouleas "loved" being a trial lawyer. In particular, the Judge enjoyed the jury dynamic and the interaction with members of the community. In the Judge's experience, cases could not be resolved because of a certain fact or issue. He loved "finding that nugget" in the case—the pivotal fact or issue that could be argued either way—and convincing the jury or judge to see that aspect of the case his way. As a trial lawyer, he tried many cases; in one year period he tried forty-three jury trials.

During our talk, Judge Dimitrouleas recounted one memorable case: the case of the "Super Thief," a very clever burglar who specialized in high income robberies. The super thief would only commit burglaries on Friday and Saturday nights while his victims were at dinner. And, he only robbed houses with sophisticated alarm systems because that signaled that there would be valuables worth stealing. At trial, the super thief presented an insanity defense. When I asked him what the result of the trial was, the Judge replied simply that the defense "didn't work."

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After his experience “in the pits,” Judge Dimitrouleas believed that he could make a substantial contribution as a judge. In 1989, Governor Bob Martinez appointed him to serve as Circuit Court Judge in the 17th Judicial Circuit, where he served for approximately 10 years. After one year in civil court, he transferred into criminal court. Judge Dimitrouleas eventually presided over the Habitual Offender Court. Upon entering this specialized court, many serious cases had been languishing and the defendants had been detained in jail for years. In one year, the Judge presided over 153 jury trials (although not all to verdict). Many of the defendants, the Judge said, were acquitted at trial after years of detention.

On the recommendation of U.S. Senator Bob Graham, Judge Dimitrouleas was nominated to the United States District Court for the Southern District of Florida by President Bill Clinton in 1999. Upon taking the federal bench, he was challenged and energized by the variety of cases confronting him. In a recent week, for example, the Judge tried a criminal case, a trademark infringement matter and a personal injury case.

During his time on the federal bench, the Judge has presided over a number of significant cases. In United States v. Mandhai, Judge Dimitrouleas handled the first post-9/11 terrorism prosecution in this district. Imran Mandhai and Shueyb Mosaa Jokhan were convicted and sentenced to lengthy terms of imprisonment for conspiring to bomb South Florida electrical substations and a National Guard Armory. In sentencing the defendants, the Judge had to balance national security interests and the need for individual justice.

In United States v. Ze’ev Rosenstein, Judge Dimitrouleas decided the rare question of whether a witness could testify in disguise. The government alleged that Rosenstein was a major importer of the designer drug Ecstasy into the United States. As his trial neared, the government filed a motion requesting permission to allow six Israeli agents to testify using aliases and in “light disguise.” In considering the Sixth Amendment ramifications, the Judge would not allow the agents to testify using aliases but allowed the use of light disguises.

Recently, Judge Dimitrouleas presided over the case of former Broward County Sheriff Ken Jenne. Jenne pled guilty to tax evasion and mail fraud charges. At sentencing, Jenne brought before the Judge many of Broward County’s most distinguished residents who asked for leniency based upon his character and record of achievement. Judge Dimitrouleas stated that he once believed, as many did, that Jenne would be Governor. But, the Judge said, Jenne had disappointed his family, his deputies and the community by engaging in his fraudulent scheme.

Judge Dimitrouleas handled these cases as he handles all of his cases: by being as fully prepared as possible, by reading all of the submissions of the parties and by conducting his own independent research. The Judge relishes the opportunity to deconstruct a complex issue and set the path toward a legal resolution.

His commitment to the law does not end in the courtroom. Judge Dimitrouleas also contributes to the advancement of the legal profession in many other ways. In addition to serving on numerous bar committees, he chaired the Southern District’s Criminal Justice Act Panel Committee from 1998 to 2008. This Committee oversees the administration of the program that provides competent counsel to indigent defendants. Having been “in the pits,” Judge Dimitrouleas appreciates the quality of counsel that panel attorneys provide to indigent defendants in this district. Away from the bench, Judge Dimitrouleas is a devoted husband and father. In his spare time, he also competes in Masters Track and Field competitions all over the country.

Judge Dimitrouleas offers lawyers in the district classic advice: be prepared and know your audience. The Judge feels that all too often lawyers write in a vitriolic or sarcastic tone to either impress their client or to annoy the opposing side. Lawyers should not lose sight that this writing style does not impress or persuade the ultimate fact-finder: the judge. Coming from a man with his breadth of experience and accomplishment, this is advice worth heeding.
In Camera
Practice Tips From Inside the Minds of Your Judges and their Staff

Some Friendly, Random Advice On Motion Practice Advocacy
By Hon. Paul C. Huck, District Judge

To further our mission of bringing the federal bench and bar together to foster greater quality representation and more effective administration of justice, Et Alia is proud to present this first in a two-part series of practice tips from Hon. Paul C. Huck. This initial chapter focuses on general advocacy tips that reflect Judge Huck’s own individual preferences as well as advice that is applicable across the board—all of which members of the federal bar would be wise to incorporate into their own practice. Tune in next edition where we’ll feature Judge Huck’s tips on Motions for Summary Judgment. Many thanks to Judge Huck and his staff for compiling and sharing these practice tips with Et Alia and the federal bar at large.

• Judges do not like surprises! Anticipate potential problems, issues or changes in circumstances, discuss them beforehand with opposing counsel in a good-faith attempt to resolve them, and if unable to do so, bring the matter to the court’s attention as soon as reasonably practical. Give the judge sufficient time to carefully consider and resolve the matter. For example, do not wait until the hearing begins or the jury is filing into the courtroom to disclose that you have a new issue, a scheduling problem or an evidentiary issue that needs resolution before the proceeding can go forward.

• If possible, ask the judge’s former law clerk or someone who has appeared before the judge about the judge’s approach to your particular kind of motion and oral argument.

• As with any effective advocacy, advise the judge right up front of the specific issues being raised, the general basis for granting the motion and the relief you seek. (Or, if opposing the motion, why it should not be granted.) That way the judge can put the statement of facts into proper perspective. It is frustrating to read through several pages or listen to a recitation of facts and background information without knowing why they are significant.

• Concede points that you cannot win. Those concessions protect your credibility and make your arguments more persuasive. Also, be prepared to point out why the conceded point is either irrelevant or not dispositive of the issue.

• Don’t ignore facts that aren’t in your favor. Elicit, acknowledge and distinguish them. This way you stay in control of the facts and how they are cast. And, again, this strengthens your credibility with the judge (or jury) because you are being candid by telling the whole story, not just part of it.

• Similarly, don’t misrepresent or exaggerate facts and don’t overstate or spin cited cases. And if you speculate or assume in an answer to a question, always properly qualify your statement by explaining that you’re speculating or assuming.

• Don’t waste time or your reputation on personal attacks. And make sure your replies and responses are actually responsive to the relevant issues, rather than just attacking the other side.

• My law clerks, on their own sometime ago, created a “Worst Filing of the Month” contest. Typically, the filings that won that distinction were the ones that were the most hostile towards the opposing party. Those filings were too full of dramatic, exaggerated criticisms of the opponent’s positions and actions to calmly and persuasively address the relevant legal issues.

• Adequately support your discussion of the important facts with specific, accurate record citations (including page and line numbers).

• Do not pepper your arguments with emotionally charged, superfluous adjectives. They are generally distractions and seldom add to the persuasiveness of your argument.

• Learn to be a good listener. It is not as easy as you may think.

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Changes in Federal Procedural Rules Impacting Computation of Time

By Steven M. Larimore

Major changes have come to the federal rules governing the calculation of time periods. On March 26, 2009, the Supreme Court approved amendments to the federal Appellate Rules, Bankruptcy Rules, Civil Rules and Criminal Rules impacting the computation of time under dozens of provisions. These changes took effect December 1, 2009, along with corresponding changes to time periods in 28 statutes adopted by Congress in H.R. 1626, which was signed into law by President Obama on May 7, 2009. Comprehensive and far-reaching, these revisions are the outgrowth of a long-term effort by the federal judiciary to make the calculation of time periods easier and clearer under all federal rules.

Due to the significant impact of the changes on local practices, the Judicial Conference Committee on Rules of Practice and Procedure has asked courts to undertake a comprehensive review of their local rules and standing orders to determine whether any amendments in them are necessary for purposes of consistency. The Southern District’s Ad Hoc Committee on Rules and Procedures chaired by Thomas J. Meeks has been working this year on an exhaustive review of our Local Rules to bring them in line with these upcoming changes. Conforming revisions to the Southern District’s Local Rules will be proposed and advertised for public comment soon, as part of the next cycle of amendments scheduled to take effect April 1, 2010. Because the Federal Rule amendments were to become effective on December 1, 2009, at the Ad Hoc Committee’s urging, Administrative Order 2009-51 have been entered adopting interim changes to the Local Rules until they can be formally amended next year.

The extent of the changes are too deep to address at length here, but some of the most significant changes merit mention. The current rules exclude intermediate weekends and holidays for some short time periods, oftentimes resulting in inconsistencies depending upon the time period being computed. Under the proposed rule changes, a uniform approach is adopted, as all intermediate weekends and holidays are counted for all time periods regardless of length, the so-called “days are days” approach.

Because one by-product of this approach is to shorten current periods of less than 11 days, most short periods under the federal rules are extended. Typically five-day periods become seven days, and ten-day periods become 14-day periods. Furthermore, many periods of less than 30 days are modified into multiples of seven days to minimize the likelihood that response deadlines will fall on weekends. Of particular note, the amendments also revise the time periods for filing many civil post trial motions (Rules 50, 52 and 59) from ten days to 28 days, and the time period for filing a response to a Motion for Summary Judgment changes from ten days to 21 days in new Rule 56(c)(1)(B), Fed. R. Civ. P. Other revisions include changes affecting the determination of when the last day of a time period ends, the computation of hourly time periods and the computation of backward-counted periods that end on a weekend or holiday.

The Court will continue to provide further information and updates concerning the upcoming changes to the Federal Rules and our Local Rules. Once finalized, the proposed Local Rules revisions will be published and circulated for comment. Detailed information about the federal rule changes can be found at the United States Courts’ national website at http://www.uscourts.gov/rules/supct0309.html. Information about proposed changes to our Local Rules and interim changes to time computations adopted via Administrative Order 2009-51 will be posted on the Southern District’s website at www.flsd.uscourts.gov.

In this feature we will bring you news and notes from Steve Larimore, Court Administrator and Clerk of Courts for the Southern District of Florida. Steve has been incredibly supportive in our efforts to produce the newsletter and we are extremely grateful for his contributions. We look forward to continuing this partnership with Steve to keep the federal bar and the Clerk’s Office connected with the goal of fostering a higher caliber of practice in our community. Our lead editor for this feature is Julia Luyster. If you have comments or questions for Steve or related to this Feature, please send them to gdpinilla@aol.com with “Clerk’s Corner” in the subject field.
you should advise the judge and opposing counsel beforehand, and bring copies of those cases for the judge and opposing counsel.

• Call chambers to let the judge know as soon as you have resolved any issue currently pending. Even though you may have come to a resolution, unless the judge is made aware of that, she is still working on the issue. Similarly, if you have settled the case, let the judge know as soon as possible.

• Be on time. No, be there early so you can get organized and relax.

• Be judicious in filing motions as emergency motions. (Remember the boy who cried “wolf.”) A former chief judge advised me when I took the bench that there were only two legitimate emergencies — “someone is dying or the ship is sailing.” And never file an emergency motion at 4:45 p.m. on Friday afternoon.

• When pointing out to the judge the error of his way, do not use the phrase “with all due respect.” This overused phrase is listed by researchers at Oxford University as the fifth most irritating phrase in the English language.

• Read the Local Rules!

• Did I mention judges do not like surprises?

Pay close attention to the trier of fact, jury or judge. Don’t get so focused on what you are doing that you miss telltale signals from the trier of facts.

When you or your opponents examine a witness, listen carefully to the testimony. In a hearing or trial, as in life, things don’t always go as planned. (Actually, they never do in trial.) Be ready to deviate from your prepared “script” of questions as circumstances dictate and use rebuttal to effectively respond to previous testimony and resolve new questions or issues that arose in the course of testimony.

Be prepared, including anticipating likely questions from the judge and being familiar with your opponent’s likely arguments and all cases that were cited in the legal memoranda.

Be respectful of the judge and your opponents, including being on time.

Be flexible and ready to depart from what you may have intended to discuss in the hearing. It is likely that the judge has already identified specific issues or questions she wants addressed. Do not expect to simply regurgitate your legal memorandum.

Listen carefully to what the judge is asking. Answer questions directly. Don’t try to duck questions. It is seldom a good response to say that you’ll get to that point later.

Listen carefully to what your opponent is saying so that you can properly respond. Do not get so caught up with what you are going to do next that you miss an important point made by your opponent.

Don’t interrupt. In other words, don’t let the beginning of your sentence interrupt the middle of the judge’s or an opponent’s sentence.

Again, be prepared. This seems obvious, but if the judge has scheduled a hearing to discuss a certain statute and its effect on your case, read the statute and research it. Also, if coming to a hearing with case law not previously cited (which is generally not a good idea),
Significant Rulings: 2008 Term

**Wyeth v. Levine (06-1249)**
*By Laurie Richter*

In 2000, Diana Levine injected Phenergan, a drug used to prevent allergies and motion sickness, into her arm. After complications arose from the injection, Levine, a professional guitarist, ultimately had to have her arm amputated. Levine filed a personal injury action against Wyeth, Phenergan’s manufacturer, in Vermont state court.

Levine asserted that Wyeth failed to include a warning label describing the possible arterial injuries that could occur from negligent injection of the drug. Wyeth argued that because their warning label had been deemed acceptable by the FDA, a federal agency, any Vermont state regulations making the label insufficient were preempted by the federal approval. The Superior Court of Vermont found in Levine’s favor by awarding her $6.8 million, and denied Wyeth’s motion for a new trial.

On appeal, the Supreme Court of Vermont affirmed the ruling, holding that the FDA requirements merely provide a floor, not a ceiling, for state regulation. Therefore, states are free to create more stringent labeling requirements than delineated by federal law.

The U.S. Supreme Court affirmed the holding of the Supreme Court of Vermont, holding that federal law did not preempt Levine’s state-law claim that Wyeth’s labels failed to adequately warn of its dangers. In a 6-3 decision, Justice Stevens wrote for the majority and asserted that the manufacturer bears ultimate responsibility for its labels. The Court then rejected Wyeth’s argument that requiring it to comply with Vermont’s duty to provide a stronger warning would interfere with Congress’ purpose of entrusting the FDA with drug labeling decisions. Instead, the Court reasoned that Congress did not intend to preempt state-law failure to warn actions when it created the FDA.

Justice Alito wrote the dissenting opinion which disagreed with the Court’s holding that a jury, rather than the FDA is ultimately responsible for regulating warning labels for prescription drugs. He argued such a result is incompatible with the Court’s precedent in *Geier v. American Honda Motor Co.*, which established the principles of conflict preemption.

**Ashcroft v. Iqbal (07-1015)**
*By Christopher J. Hunter*

On May 18, 2009, the Supreme Court decided a case that at first may have seemed applicable solely to actions similar to the one that resulted in the opinion—civil lawsuits against government officials alleging unconstitutional conduct, commonly known as *Bivens* actions. Since the decision was announced, however, the Court’s reasoning and holding have been extended to all manner of civil lawsuits, contributing to the continued uncertainty about the pleading standard in federal civil practice. Well-known by now, the opinion at issue is, of course, *Ashcroft v. Iqbal*.

Christopher J. Hunter is an Assistant U.S. Attorney in the S.D. Fla. This year he was one of a team of law enforcement officers lauded for excellence in fighting health care fraud.
Ashcroft v. Iqbal continued from page 8.

Javaid Iqbal, the respondent in the case and a Pakistani citizen, was arrested in November 2001 on criminal charges following the September 11 terrorist attacks. He was held at the Metropolitan Detention Center (“MDC”) in New York. Iqbal ultimately pled guilty to the criminal charges and was removed to Pakistan. He then filed a Bivens action in the Eastern District of New York with 21 causes of action against 34 current and former federal officials and 19 unnamed federal corrections officers. Iqbal alleged that during his detention, he was designated a person “of high interest” and moved to a special housing unit within the MDC where he was subjected to unconstitutional violations of his rights. Former Attorney General John Ashcroft and FBI Director Robert S. Mueller, III were named defendants, and Mr. Iqbal sought to hold them liable for the unconstitutional conduct alleged in his complaint.

The Supreme Court, in a 5-4 opinion delivered by Justice Kennedy, said he could not. A number of interesting issues are present in the opinion, ranging from appellate jurisdiction under the collateral order doctrine to the contours of the qualified immunity doctrine as applied to supervisory liability in a Bivens action. But the issue with broadest applicability is the pleading standard that Iqbal already has come to represent. The Court found that Mr. Iqbal’s allegations as to Mr. Ashcroft and Mr. Mueller were conclusory, and, as a result, were not entitled to the “presumption of truth.” The Court also found Mr. Iqbal’s allegations did not “plausibly suggest an entitlement to relief.” Amplifying its holding in Bell Atlantic Corp. v. Twombly, 127 S. Ct. 1955 (2007), the Court acknowledged the notice pleading standard of Rule 8, but said that “the tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions ‘couched as factual allegation[s].’”

Additionally, the Court seemed to say, plausible is more than possible but not necessarily probable. “[W]here the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged—but it has not ‘show[n] ‘that the pleader is entitled to relief.’” The immediate impact of the decision was a finding that Mr. Iqbal’s complaint failed to state a claim against Mr. Ashcroft and Mr. Mueller resulting in a remand to the Second Circuit.

Perhaps the Justices had intended Iqbal to be limited to its facts, to apply only to Bivens actions, or to be delimited in other ways. Lower courts seem not to be recognizing such limits, however, citing Iqbal in dismissing or affirming dismissals of a variety of civil complaints for failure to state a claim, which is Iqbal’s longer-term impact, already felt only a few short months from publication.

Safford United School District v. Redding (08-479)

By Gabriel D. Pinilla

In a departure from its traditional support of broad discretion for local school administrators in disciplinary matters, the Supreme Court in Safford United School District No. 1 v. Redding placed new limits on how far school officials can go in searching students. The Safford School District case involved a 13-year old honor student, Savanna Redding, whose planner was discovered containing knives and other contraband. Redding denied that the contraband items were hers and stated that she had lent out her planner to a friend. Redding was also confronted with a small number of common prescription pain relief pills, which are not allowed in school without advance permission.

When her principal indicated that he had been told she was handing out pills to other students, Redding denied the allegation and consented to a search of her belongings. After no pills were found in the outer layers of her clothing, the nurse and another female administrator told Redding to pull her bra out and shake it, and to pull out the elastic on her underpants, thus exposing her breasts and pelvic area.

Savana’s mother filed suit against the school district and the school officials involved, alleging that the strip search violated Savana’s Fourth Amendment rights.

The trial court granted summary judgment to the school district and other defendants under a qualified immunity theory, but was reversed by the Ninth Circuit sitting en banc. On the issue of whether the search of Redding’s bra and underwear were proper, the Supreme Court agreed with the Ninth Circuit by laying out a highly fact intensive analysis in a “totality of circumstances” style approach.

At the root of the analysis, the Court established that the test for student searches stops short of probable cause and is in the realm of reasonable suspicion. However, the Court qualified this less strict standard by concluding that the more intrusive the search, the more compelling and relevant the facts justifying or guiding the search must be. Accordingly, for a search exposing such intimate areas as the breast and pelvic area, especially for sensitive adolescents, the basis of the suspicion must be greater and must provide a logical basis for searching such areas.

The Court cited various facts in support of its conclusion that, in this instance, school officials did not have sufficient grounds (or the right facts) to justify a partial strip search. Specifically, the Court noted that: a similar search of another student suspected to have pills had revealed nothing; that the student who implicated Redding in the first place had not suggested she had the pills on her person or hidden in an intimate area such as her underwear; that the items sought, common prescription pain relievers, did not present an elevated level of danger to other students; and the humiliating nature of a partial strip search.

Based on these findings, the Court handed Redding a victory in principal. However, the Court granted the school district defendants qualified immunity in this case, citing the substantial divergence of lower court opinions in applying the rules clarified in this case.

Arthur Anderson, LLP, et al. v. Carlisle, et al. (08-146)
By Gabriel D. Pinilla

The Supreme Court continued to uphold strong support in favor of the Federal Arbitration Act (“FAA” or the “Act”) when it ruled in Carlisle that non-signatories to an arbitration agreement are entitled to move to stay litigation and compel arbitration pursuant to the Act’s Section 3 so long as the law of contracts in the state in which the motion is brought allows such third-parties to enforce the agreement.

In Carlisle, three individuals (“Respondents”) sought to reduce their tax liability in connection with the sale of their construction equipment company. In so doing, Respondents consulted with their long time accountant/auditors, Arthur Anderson, LLP. Anderson, in turn, referred the three to Bricolage Capital LLC, an investment management company. Bricolage then referred Respondents for legal advice to yet another firm. According to Respondents, the panel of advisors recommended a “leveraged buyout strategy” by which they would form companies to purchase various investments through Bricolage.

As part of the investment purchases, the companies formed by Respondents entered into agreements with Bricolage which contained an arbitration provision. The investment purchases turned out to be worthless and the leveraged buyout strategy an illegal tax shelter. Respondents filed a diversity suit in federal district court against Arthur Anderson and others (“Petitioners”) for, inter alia, fraud, malpractice and breach of fiduciary duties. Petitioners moved to stay the litigation relying on § 3 of the FAA based on the arbitration provisions in the Bricolage investment agreements. The district court denied the motion and the Sixth Circuit denied the ensuing interlocutory appeal for lack of jurisdiction based on its conclusion that such an appeal would be unsuccessful since Petitioners were not signatories to the arbitration agreement.
Ordinarily, courts of appeals have jurisdiction only over “final decisions” of district courts. 28 U. S. C. §1291. The FAA, however, makes an exception to that finality requirement, providing that “an appeal may be taken from . . . an order . . . refusing a stay of any action under section 3 of this title.” 9 U. S. C. §16(a)(1)(A). By that provision’s clear and unambiguous terms, any litigant who asks for a stay under §3 is entitled to an immediate appeal from denial of that motion—regardless of whether the litigant is in fact eligible for a stay. Because each petitioner in this case explicitly asked for a stay pursuant to §3, the Sixth Circuit had jurisdiction to review the District Court’s denial.

In other words, courts must assume jurisdiction in any appeal from a denial of a § 3 request and, only thereafter, determine whether a stay is proper on the merits, not the other way around.

The Court next turned to the underlying merits of the Sixth Circuit’s objection to jurisdiction—that because the Respondents were not signatories to the arbitration agreement, they could not seek relief under § 3 or other provisions of the FAA. In rejecting the Sixth Circuit’s apparently categorical bar against allowing non-signatories to seek relief under the FAA’s § 3, Justice Scalia pointed to language in that provision reflecting that it required a stay of litigation in connection with “claims referable to arbitration under an agreement in writing . . . .” Based on this language, the majority concluded that “[i]f a written arbitration provision is made enforceable against (or for the benefit of) a third party under state contract law, the statute’s terms are fulfilled.”

Arizona v. Gant (07-542)
By Laurie Richter

Arizona state police officers detained Rodney Gant on a warrant for driving with a suspended license. The officers handcuffed Gant and placed him in the police cruiser. Then, they searched his vehicle, discovering a gun and a bag of cocaine. At trial, Gant asked that the evidence found in his vehicle be suppressed because the search was conducted without a warrant, in violation of the Fourth Amendment’s prohibition of unreasonable searches and seizures. The judge declined, stating that the search was a direct result of Gant’s lawful arrest and therefore an exception to the Fourth Amendment’s warrant requirement. The court convicted Gant on two counts of cocaine possession.

The Arizona Court of Appeals reversed, holding the search unconstitutional, and the Arizona Supreme Court agreed. The Supreme Court stated that exceptions to the Fourth Amendment’s warrant requirement must be justified by concerns for officer safety or evidence preservation. Because Gant left his vehicle, the search was not directly linked to the arrest and therefore violated the Fourth Amendment. Arizona’s Attorney General argued that this ruling conflicted with the U.S. Supreme Court’s precedent, as well as precedents set forth in other courts.

In April, 2009, the Supreme Court held that police may search a vehicle after an occupant’s arrest only if it is reasonable to believe that the arrestee might access the vehicle at the time of the search or that the vehicle contains evidence of the offense of the arrest. In a 5-4 decision with Justice Stevens writing for the majority, the Court reasoned that “warrantless searches are per se unreasonable” and subject only to a few, very narrow exceptions. In this case, Gant was arrested for a suspended license and the exceptions did not apply.

Justice Alito’s dissenting opinion argued that the majority improperly overruled its precedent in New York v. Belton which held that “when a policeman has made a lawful arrest… he may, as a contemporaneous incident of that arrest, search the passenger compartment of that automobile.” Justice Breyer’s separate dissenting opinion noted that the court could not create a new governing rule.
On April 29, 2009, in its final oral argument of the session, the Supreme Court heard a controversial constitutional challenge to Section 5 of the Voting Rights Act of 1965 (the “Act”). Considered among the most sweeping and effective pieces of civil rights legislation in U.S. history, both critics and supporters of Section 5 alike closely watched the Northwest Austin case because of suspicion that the Court’s conservative majority may find Congress’ 25-year extension of that provision unconstitutional.

The questions posed to the Court were relatively straightforward: Is the Northwest Austin Municipal District Number One (“NAMD-1” or “the District”)—a small utility district with an elected board, no history of racial discrimination and required by Section 5 of the Act to seek preclearance from federal authorities before changing anything about its elections—eligible to seek a “bailout” from Section 5 preclearance restrictions? If not, are the Section 5 preclearance requirements unconstitutional?

The U.S. District Court for the District of Columbia denied that NAMD-1 could seek bailout relief because it was not a “political subdivision” within the meaning of Section 5, pointing to the fact that the District did not register its own voters. In side-stepping the constitutional challenge to Section 5, Chief Justice Roberts, writing for the majority stated as follows:

That constitutional question has attracted ardent briefs from dozens of interested parties, but the importance of the question does not justify our rushing to decide it. Quite the contrary: Our usual practice is to avoid the unnecessary resolution of constitutional questions. We agree that the district is eligible under the Act to seek bailout. We therefore reverse, and do not reach the constitutionality of §5.

By resolving the issue in this manner, the Court formally expanded the definition of a “political subdivision” under the Act, to include districts like NAMD-1 that do not register their own voters, despite a contrary definition in the statute itself. In support of its more expansive definition, the Court noted that:

Bailout and preclearance under §5 are now governed by a principle of symmetry. “Given the Court’s decision in Sheffield that all political units in a covered State are to be treated for §5 purposes as though they were ‘political subdivisions’ of that State, it follows that they should also be treated as such for purposes of §4(a)’s bailout provisions.

Based on the above reasoning, the Court concluded that “the Voting Rights Act permits all political subdivisions, including [NAMD-1], to seek relief from its preclearance requirements.”

While Section 5 proponents have, in a sense, lost the battle but won the war in this case, many still consider the Act’s constitutional future far from settled. Indeed, Chief Justice Roberts seemed to foreshadow a more scrupulous review of Section 5’s constitutional status under other circumstances in a future case:

More than 40 years ago, this Court concluded that “exceptional conditions” prevailing in certain parts of the country justified extraordinary legislation otherwise unfamiliar to our federal system. Katzenbach, 383 U.S., at 334. In part due to the success of that legislation, we are now a very different Nation. Whether conditions continue to justify such legislation is a difficult constitutional question we do not answer today.

In support of this veritable “heads up” to Congress and civil rights proponents about Section 5’s potentially shaky constitutional standing, the Court cited numerous concerns, including, “federalism costs” such as treating states unequally and providing federal oversight of even granular, seemingly insignificant electoral practices. The Court also pointed to the fact that, due in large part to its own effectiveness, many of the circumstances that once justified the Act’s sweeping scope have substantially improved, such as minority voter turnout.

Consequently, many observers suspect that, unless Congress can speak to the Court’s concerns, Section 5 will be back before the Court in a future case, perhaps in connection with the 2010 re-districting session. If that is the case, Chief Justice Roberts’ rhetorical musing that “the Act imposes current burdens and must be justified by current needs” is likely to be the kernel at the center of the ideological war that many thought Northwest Austin was to be this go-round.
In perhaps the most closely watched cases of the Court’s last session, the Supreme Court considered *Ricci v. DeStephano*, in which the city of New Haven, CT was sued by a group of white firefighters after it failed to certify promotion exams that resulted in no black applicants and only a small minority of Hispanic applicants scoring high enough to attain any of the designated promotions. The Ricci case was catapulted onto the national stage during then-high court hopeful Sonia Sotomayor’s nomination process amid claims by critics that her participation in the opinion siding with the city supported concerns of a reverse racial bias.

The city used objective exams specifically designed by outside contractors to identify those firefighters best qualified for promotion. When white candidates outperformed minority candidates, the city was confronted with arguments both for and against certifying the test results, including threats of legal action from all sides. Reacting to the debate, the city failed to certify the test results, actions it later defended as based on the statistical racial disparity.

Petitioners, white and Hispanic firefighters who passed the exams but were denied a chance at promotions by the city’s refusal to certify the test results, sued the City and respondent officials, alleging that discarding the test results discriminated against them based on their race in violation of, *inter alia*, Title VII of the Civil Rights Act of 1964. The defendants responded that, had they certified the test results, they could have faced Title VII liability for adopting a practice having a disparate impact on minority firefighters. The District Court granted summary judgment for the defendants, and the Second Circuit affirmed.

In a 5-4 decision closely shadowing the Court’s ideological divide, Justice Kennedy served as the tipping point for conservative Justices and delivered the majority opinion, siding with the white firefighters in holding that the city should not have discarded the exam results. In the process, the Court clarified the standards to be used in evaluating Title VII disparate impact cases by employing the “strong basis in evidence” test previously used in analogous equal protection cases.

Essentially, the Court found that the city acted unconstitutionally, that is, without a strong enough evidentiary basis, when it discarded the test results based solely on the fact that they statistically favored whites and thus provided minority applicants a *prima facie* cause of action under a disparate impact theory.

As applied to the facts in *Ricci*, the Court’s new standard would require that before an employer can engage in intentional discrimination (in this case tossing out exam results favoring whites) solely for the asserted purpose of avoiding an unintentional, disparate impact, the employer must have a strong basis in evidence to believe it will be subject to disparate-impact liability if it fails to take the race-conscious, discriminatory action. In *Ricci*, the statistical evidence alone was viewed as insufficient to meet the “strong basis in evidence” test based in part on the majority’s position that disparate impact suits brought by those who did not receive promotions would not have been successful.

The Court reasoned that the city would have been able to overcome the *prima facie* case of disparate impact against minorities by pointing to the strong evidence that the test, although apparently statistically skewed in favor of whites, was job-related and that a valid, alternative and less biased test was not available and rejected by the city. In other words, prior to tossing exam results favoring whites, the city had to have more than simply a fear of minority disparate impact lawsuits—it had to demonstrate a real threat of being found *liable* under such suits.

Although the Court ultimately reversed the Second Circuit opinion joined by then Circuit Judge Sonia Sotomayor, by adopting the “strong basis in evidence” test for the first time in the context of Title VII disparate impact cases, the majority somewhat vindicated Sotomayor’s position that her Second Circuit panel adequately applied then existing law.
Notable Statistics: 2008 Term

**Docket**
~ 75 merits opinions after argument.
~ 79 cases in total, of which four were summary reversals.
~ The Court reversed or vacated the lower court in 60 of 79 cases (75.9%) and affirmed in 16 (20.3%). This reflects a significant uptick in reversals from prior terms.
~ The Court heard the most cases on appeal from the Ninth Circuit – 16 of 79 cases (20.3%), followed by state courts – 15 cases (19%); then the Second Circuit – with 9 cases (11.4%).
~ Seven circuits had all of their decisions reversed: the Fourth, Sixth, Seventh, Eighth, Tenth, the DC Circuit and the Federal Circuit. Last term only the Tenth Circuit had a 100% reversal rate and with only two cases.
~ The Eleventh Circuit, had a 100% affirmance rate (three cases).

**Distribution of Justices in 5-4 Decisions**
~ Sixteen 5-4 decisions (69.6%) divided along ideological lines, with either the “left” (Justices Stevens, Souter, Breyer, and Ginsburg) or “right” (CJ Roberts along with Justices Scalia, Thomas, and Alito) holding and Justice Kennedy tipping the scales. Justice Kennedy joined with the right in 11 cases and with the left in just five.
~ Justice Kennedy cast the most majority votes in 5-4 cases (18), followed by Justice Scalia with 16 and Justice Thomas with 15. Justice Breyer cast nine votes in 5-4 majorities, the least this term.
~ CJ Roberts did not break ranks with the right in any 5-4 cases this term, the only Justice to do so. This is in contrast to last term in which he voted with mixed majorities in three 5-4 cases.

**Levels of Agreement Between Pairs of Justices**
~ Chief Justice Roberts and Justice Alito voted together in whole, part, or in the judgment in 92% of cases.
~ On the left, Justices Stevens and Souter paired most often at 87%, followed by Justices Stevens and Ginsburg and Justices Souter and Ginsburg at 86%.
~ Chief Justice Roberts and Justice Scalia, Justices Scalia and Thomas, Justices Scalia and Alito, and Justices Kennedy and Alito paired up at 87%.
~ Justice Kennedy, trending more closely to the right this term, voted with CJ Roberts in only one fewer case (68) than Justice Scalia and the Chief Justice.
~ In contrast, Justice Kennedy’s votes with Justices on the left reached only 77% (Justice Breyer). He agreed with Justice Ginsburg in 67% of all cases; with Justice Souter in 66%; and Justice Stevens in only 59%.
~ Justice Kennedy voted more often with Justice Alito and CJ Roberts than did Justice Thomas. Justice Thomas paired with both Justice Alito and the Chief Justice at 79% in contrast to 88% and 84% respectively for Justice Kennedy.

**Frequency in the Majority**
~ Not surprisingly, Justice Kennedy outpaced all other Justices by voting with the majority at 92.4%.
~ Justice Scalia followed at 83.5% with Justices Thomas, Alito and CJ Roberts all in the majority at 81%.
~ The left bloc trended with the majority with significantly less frequency. Justice Ginsburg voted at just 69.6%, Souter at 68.4%, and Stevens at 64.6%. 

On August 6, 2009, by a vote of 68 to 31, the United States Senate confirmed Sonia Sotomayor as the 111th Justice of the Supreme Court. The vote concluded eighteen hours of hearings before the nineteen-member Senate Judiciary Committee with a show of support that included nine Republicans and fifty-nine Democrats. Justice Sotomayor became the third women to serve on the Supreme Court following Justice Ruth Bader Ginsberg and former Justice Sandra Day O’Connor, and the first Hispanic. Justice Sotomayor was sworn in by Chief Justice John Roberts on August 10, 2009.

Justice Sotomayor has a distinguished career that spans three decades. She has worked at almost every level of the judiciary system. Her academic credentials include an undergraduate degree from Princeton University, graduating summa cum laude, and a law degree from Yale University Law School where she served as an editor of the Yale Law Journal. In 1979, following law school, she became an Assistant District Attorney in Manhattan where she tried dozens of criminal cases. In 1984, she entered private practice and subsequently became a partner at the firm Pavia and Harcourt where she served as a general civil litigator in all facets of commercial law including real estate, employment, banking, contracts and agency law.

In 1992 she was appointed to the United States District Court for the Southern District of New York by President George H.W. Bush. In 1998, President Clinton appointed her to the United States Court of Appeals for the Second Circuit.

As a trial judge she earned a reputation as sharp and fearless but fair and thoughtful. She approached her decisions with an awareness of the law’s impact on everyday life. While she believes that the job of the judge is to apply the law to the facts of the case she also believes that upholding the rule of law means going beyond legal theory to ensure consistent, fair, common sense application of the law to real world facts.

During her confirmation hearing she displayed an impressive command of legal concepts and portrayed the image of a confident jurist. With support from the White House Counsel’s Office she was able to navigate the rough waters of aggressive questioning on a variety of issues ranging from politics (such as abortion and gun control), controversial statements (such as “a wise Latina woman with the richness of her experiences would more often than not reach a better decision than a white male”), and to personal characterizations of being a judicial activist for liberal causes.

Justice Sotomayor took her seat for the first time in early September when the Justices convened for a rare out of session hearing on a campaign finance case, then began her first full session on October 5, 2009.

Susan Alesi is retired from the U.S. Office of Management and Budget’s Office of Federal Procurement Policy Office in Washington, D.C. where she served as legal counsel on matters related to procurement law and legislation.
In *Citizens United v. FEC*, the Court refocused what could have been decided as a narrow question of how certain federal election laws apply to feature-length films about political candidates into a sweeping constitutional inquiry concerning the legitimacy of campaign finance rules that restrain the use of corporate funds in political campaigns. The Court’s processing of this case has been rare, most notably because it required the parties to re-brief the case to address whether it should overrule settled law lending constitutional legitimacy to campaign finance principles with roots going back more than one hundred years. This resulted in the case being heard both during last term and in a September 9, 2009 special session in which Justice Sonia Sotomayor made her debut behind the High Court bench.

The case is also of special interest because it may prove to be the first significant example of the conservative-leaning Roberts Court’s approach to peeling back more liberal precedent. Some observers have highlighted the balance Chief Justice Roberts must strike in reconciling respect for stare decisis while at the same time working to reverse or limit prior decisions that are at odds with conservative ideological principles. Roberts has publicly, and in his written opinions, advocated judicial restraint, both in addressing constitutional questions when narrower grounds can resolve a case, as well as in reversing standing precedent.

In balancing the above, some have hypothesized that the Court is using an incremental approach to chipping away at Warren-era precedent, whereby narrow, measured opinions related to larger constitutional issues are relied on to justify more striking encroachments on prior opinions in future cases. By using this approach, the Court can avoid accusations that it is acting too hastily or for political purposes in overturning Supreme Court precedent when it takes the larger issues head on in future cases. In this instance, the test is whether the *Citizens United* Court will rely on *FEC v. Wisconsin Right to Life, Inc.* (“WRTL”) to strike down or substantially limit longstanding congressional restraints on the use of corporate treasury funds in connection with political elections. If so, we may be able to more readily count on decisions like last term’s *Northwest Austin Municipal Utility District Number One v. Holder* (08-322) to serve as compass points signaling major shifts in High Court jurisprudence on the horizon.

*Citizens United* involved a more-or-less straightforward factual scenario: *Citizens United*, a conservative non-profit organization, used its own corporate funds to produce a documentary-style film critical of Hilary Clinton and her 2008 presidential bid. Regaled by many as a feature-length political attack ad on then Senator Clinton, *Hilary: The Movie*, and television ads created to promote the movie, were scheduled to air on television shortly before 2008 presidential primary elections.

Because of their timing and content, the Federal Election Commission (“FEC”) considered the ads and film to be “electioneering communications” within the meaning of the Bipartisan Campaign Reform Act (AKA McCain-Feingold) (“BCRA”), the most recent outgrowth of federal regulation dealing with corporate campaign finance dating back to the Tillman Act of 1907. The designation as “electioneering communications” triggered § 203 of the BCRA which prohibits political ads naming a specific candidate—and produced with corporate funds—from airing within 30 days before a primary election or political convention and 60 days prior to a general election.

Citizens United brought suit to bar the FEC from blocking the film and related ads. Its central argument was that the movie was not an electioneering communication because it did not explicitly advocate a vote for or against Sen. Clinton. Alternatively, Citizens United argued that, if the film and ads did fall within the scope of § 203, the law was unconstitutional because it encroached on political speech. The District Court denied the injunction, finding that the movie could only be interpreted as a message that Sen. Clinton was unfit for office and that viewers of the movie should not vote for her.

During the initial briefing, Citizens United argued that the FEC was claiming authority to regulate “activity that attempts to sway public opinion on issues . . .” thereby mounting a broad attack on the government’s ability to regulate “electioneering communications” at all. Citizens United further argued that the film, as “a movie” should be classified differently than a political ad and afforded full First-Amendment protection.

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Citizens United v. FEC
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In support of it position, Citizens United urged the Court to support a strict interpretation of WRTL, a 2006 term opinion imposing limitations on § 203 of the BCRA.

In WRTL, the Court narrowed application of § 203 to communications that either urge a direct vote for or against an identified candidate, or are the “functional equivalent” of such encouragement — that is, § 203 will only apply if the communication at issue “is susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate[].” The WRTL majority strongly worded its disfavor of the BCRA and McConnell v. FEC, 540 U.S. 93 (2003), which ruled that § 203 was facially constitutional based on Congress’s legitimate interest in curbing actual and perceived corruption connected with large financial contributions. Three of the five Justices in the majority actually advocated reversing McConnell altogether. However, by the votes of only Chief Justice Roberts and Justice Alito, WRTL was instead limited to allowing “as applied” exemptions to § 203 for ads or communications that did not meet the above-quoted standard.

The Justice Department, together with the FEC, argued that § 203 does not exclude feature-length films and so the movie should be considered an electioneering communication properly blocked by the District Court. In support of this contention, the government asserted that the film expressly advocated against Senator Clinton being elected president by attacking her character and fitness and contained little content addressing purely policy or legislative issues. Falling within the definition of electioneering communications, urged the Justice Dept., triggers § 203 despite the fact that Hilary: The Movie was a feature as opposed to a traditional ad. The Government brief also likened the movie to 30-minute political infomercials which are regulated. Finally, the Government argued that the case was controlled by McConnell and that Citizens United’s emphasis on a sweeping constitutional attack over corporate political speech was a last ditch effort to distract the Court from the fact that McConnell required rejection of all the claims asserted.

Somewhat shockingly, at oral argument, Deputy Solicitor General Malcolm L. Stewart suggested that the FEC’s regulatory grasp could reach books, internet content or even a 90-minute political documentary where only the first minutes contained express advocacy against a specific candidate. The Government further reinforced its position that § 203 does not, by its terms, apply differently to a feature film or a short, traditional political ad. Justice Kennedy hinted at the larger issues looming at the logical conclusion of such reasoning by stating: “So if we think that this film is protected, and you say there’s no difference between the film and the ad, then the whole statute must be declared unconstitutional.”

Perhaps responding to Stewart’s striking view of the scope of the FEC’s authority and the fundamental ill feelings conjured by thoughts of censoring books containing political content, on June 29, 2009, the Court issued an Order requiring a re-hearing of the case. Making clear that the Court was considering the broader constitutional challenge to the Government’s ability to regulate corporate political speech, the Court’s Order focused the re-briefing as follows: “For the disposition of this case, should the Court overrule either or both Austin v. Michigan Chamber of Commerce and the part of McConnell v. FEC which addresses the facial validity of Section 203 of the Bipartisan Campaign Reform Act of 2002?” The Court now appears poised, if it reverses McConnell, to declare the BCRA or portions thereof as facially unconstitutional, or substantially broadening exemptions to the BCRA, further gutting the legislation of its proscriptive force.

Observers on all sides of the debate are bracing for a watershed moment in which the Court may strike down standing precedent considered well-settled law (nearly 20 years in the case of Austin v. Michigan Chamber of Commerce) and in the process make a sweeping statement that regulation of corporate campaign funding is unconstitutional or riddled with broad exemptions. Despite the air of inevitably those predictions appear to carry, that result would seem at odds with the Court’s recent pronouncements that it should decline to rule on a constitutional basis when other grounds would dispose of the case. However, even a more measured result in Citizens United could align with the theory that the Court is charting a steady and deliberate course, albeit incremental, towards dismantling stare decisis on big issues in favor of conservative political ideology. In either case, given that the seats to be vacated on the High Court in the next eight years are expected to be on the liberal side (barring some unforeseen events), there may be no check on the Court’s current direction yet in sight, giving Chief Justice Roberts ample room to play out the current strategy.  

!!! UPDATE - HIGH COURT OPINION ISSUED JANUARY 21, 2010 !!!

A five justice majority has made what is being called a radical and transformative impact on federal and state election laws in its ruling in Citizens United. Read the opinions at http://www.supremecourtus.gov/opinions/09pdf/08-205.pdf.
Opinion Preview: 2009 Term

**McDonald v. City of Chicago**
*by Susan Alesi*

This is a Second Amendment case based on an alleged violation of an individual’s right to bear arms. At issue are Chicago’s laws banning handguns and requiring other guns to be registered prior to acquisition. The Second Amendment provides the right to keep and bear arms; the Fourteenth Amendment prohibits States from making any law which abridges or deprives an individual of life, liberty or property without due process or equal protection of the laws. The question presented to the Supreme Court for review is whether the Second Amendment is incorporated into the Due Process Clause or the Immunities Clause of the Fourteenth Amendment so as to make it applicable to the States. A petition for writ of certiorari was filed after the Court of Appeals for the Seventh Circuit affirmed the holding of the District Court declining to incorporate the Second Amendment into the Fourteenth Amendment.

Petitioners brought this action in the United States District Court after the Supreme Court held in a recent case that concerned the actions of the District of Columbia, that the Second Amendment guarantees an individual the right to keep handguns at home. Both the District Court and the Court of Appeals for the Seventh Circuit refused to apply the District of Columbia case as precedent noting that case involved a Federal entity, and instead relied on a line of incorporation cases that have direct applicability to the States. The Supreme Court agreed to hear this case but as of this writing it has not been scheduled.

**Samantar v. Bashe Abdi Yousef**
*by Susan Alesi*

The Foreign Sovereign Immunities Act (FSIA), 28 U.S.C. Sections 1330, 1602-1606, 1608, immunizes foreign states from the jurisdiction of the United States unless the claim falls within one of the statute’s specified exemptions. (No party argues that any of the exemptions apply here.) With regard to application of FSIA, this case presents two questions to the Supreme Court: first, whether a foreign state’s immunity from suit extends to an individual acting in his official capacity on behalf of a foreign state; and second, whether such immunity for acts taken on behalf of the foreign state while in office extends to individuals after they leave office. A petition for writ of certiorari was filed after the United States Court of Appeals for the Fourth Circuit reversed the District Court’s holding that sovereign immunity does apply to individuals acting in their official capacity on behalf of the foreign state.

The District Court held that although the statute is silent on the subject, immunity should be extended to these individuals because claims against the individual in his official capacity are the practical equivalent of claims against the foreign state. The Court of Appeals for the Fourth Circuit reversed this decision, relying in part on a historical administrative contraction of the granting of immunity, noting that the statute makes no explicit mention of individuals or natural persons nor could it be interpreted to include these individuals. The Court also concluded that in any event immunity does not apply to individuals who had left office at the time that suit was filed against them. The petitioner argued that the Supreme Court should review the decision of the Court of Appeals because, among other things, the various Courts of Appeals are divided on this issue. The Supreme Court agreed to hear the case but the case remains unscheduled at this time.

**Pottowattamie County v. McGhee**
*by Susan Alesi*

This case addresses an issue of prosecutorial immunity in a suit filed under 42 U.S.C. 1983 (Civil Action for the Deprivation of Rights.) Prosecutors are shielded from liability by absolute immunity for their official actions during a trial. The issue raised in this case is whether a prosecutor may be subject to a civil trial and potential damages for wrongful conviction and incarceration stemming from a prosecutor’s procurement of false testimony during the investigation of a crime and the subsequent use of that testimony at trial. The prosecutors in this case argued that they were entitled to immunity. A petition for a writ of certiorari was filed after the Court of Appeals for the Eighth Circuit

Susan Alesi is retired from the U.S. Office of Management and Budget’s Office of Federal Procurement Policy Office in Washington, D.C. where she served as legal counsel on matters related to procurement law and legislation.
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affirmed the decision of the District Court holding that the prosecutors were not entitled to immunity.

Petitioners argued that the procurement of false testimony does not in and of itself violate any constitutional right, and that the use of false testimony at trial is shielded by immunity. The District Court disagreed holding that the prosecutor should not be immune from liability for the procurement of the false testimony because the conduct ripens into a cause of action under 42 USC 1983 when the false testimony is used at trial. The Court of Appeals for the Eighth Circuit affirmed the analysis of the District Court holding that a prosecutor’s procurement of false testimony violates a criminal defendant’s substantive due process rights. The Eighth Circuit further held that a prosecutor was not entitled to immunity where the prosecutor was accused of both fabricating the evidence and then using the fabricated evidence at trial. The case was returned to the district court for trial and the petitioners sought review by the Supreme Court. The case was heard by the Supreme Court on November 4, 2009.

by Laurie Richter

On December 9, 2009, the Court heard argument in Stolt-Nielsen S.A. v. AnimalFeeds International Corp. to decide whether the Federal Arbitration Act permits the imposition of class arbitration when the parties’ agreement is silent regarding class arbitration.

AnimalFeeds International Corp., on behalf of a class of plaintiffs, filed suit against Stolt-Nielsen alleging defendants were engaged in a “global conspiracy to restrain competition in the world market for parcel tanker transportation services.” Stolt-Nielsen filed a motion to compel arbitration, which was denied. On appeal, the U.S. Court of Appeals for the Second Circuit reversed. During arbitration, AnimalFeeds filed a demand to proceed as a class. A panel determined that the language of their agreement permitted AnimalFeeds to proceed as a class. Stolt-Nielsen then petitioned the district court to vacate the panel’s determination, which was granted.

On appeal, the Second Circuit reversed and reinstated the panel’s decision. The court held that the arbitration panel did not manifestly disregard the law when reaching its conclusion that the agreement permitted AnimalFeeds to proceed as a class, even though the agreement was silent on whether proceeding as a class was permitted. The court reasoned that when parties agree to arbitrate, the question of whether an agreement permits class arbitration is generally left to the arbitrators, not the courts.

Kiyemba v. Obama
by Laurie Richter

Seventeen Uighurs, Chinese citizens detained at Guantanamo Bay Naval-Base, Cuba, sought federal habeas corpus relief in the D.C. District Court. The petitioners argued that since they were no longer considered “enemy combatants” they should be transferred and released from Guantanamo Bay. They feared a transfer to China may lead to their arrest, torture, or execution. Therefore, they sought a transfer to the United States for their safe release. The district court granted the petition and ordered their transfer to the United States and release.

On appeal, the D.C. Circuit court reversed the district court, holding that the district court lacked authority to order the petitioners’ transfer and release into the United States. The court reasoned that without specific authorization by statute, treaty, or the Constitution, only the political branches of government could determine the admissibility of aliens into the United States.

On October 20, 2009, the Supreme Court granted a Petition for Writ of Certiorari filed by the Uighurs. The Court will decide whether a federal district court exercising its habeas corpus jurisdiction has the power to order the release of prisoners held under Executive Order at Guantanamo Bay, Cuba into the United States.

Salazar v. Buono
by Laurie Richter

In 1934, the Veterans of Foreign Wars built a wooden cross on top of Sunrise Rock in the Mojave National Preserve as a World War I memorial. The original cross has been rebuilt several times. Frank Buono, a former Preserve employee, filed suit in a California district court
Opinion Preview: 2009 Term

Continued

**Salazar v. Buono**

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seeking to prevent the permanent display of the cross. He argued that the cross’ display on federal property violated the Establishment Clause of the First Amendment. The district court agreed and the cross was covered.

While the case was pending, Congress made Sunrise Rock private property in exchange for another parcel of land. Mr. Buono moved to not only enforce the previous court order preventing the display of the cross, but also to prohibit the land swap. The district court granted both motions. The Secretary of the Interior appealed, arguing that the district court abused its discretion. On appeal, the Ninth Circuit held that the district court did not abuse its discretion.

On October 7, 2009, the Court met to hear argument on whether an individual has Article III standing to bring an Establishment Clause suit challenging the display of a religious symbol on government land and if an Act of Congress directing the land be transferred to a private entity is a permissible accommodation. Justice Scalia attempted to keep alive the core question of whether the cross display was a violation of the Constitution’s Establishment Clause. However, after an hour of oral argument, the Court had only addressed how the government can react if told to take down religious displays.

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**Padilla v. Commonwealth of KY**

by Michael Caruso

On October 14, 2009, the Court heard argument in Padilla v. Commonwealth of Kentucky. The question presented in Padilla is whether the Sixth Amendment’s guarantee of effective assistance of counsel requires a criminal defense attorney to advise a non citizen client that pleading guilty to an aggravated felony will trigger mandatory, automatic deportation. As a corollary, the Court will consider whether that misadvice could amount to ineffective assistance of counsel and warrant setting aside the guilty plea if that misadvice induces a guilty plea.

At oral argument, counsel for Padilla asserted that the answer is yes to both questions. The State countered that lawyers only have an obligation to make sure their clients understand the direct consequences of a guilty plea, not collateral consequences such as deportation. As amicus curiae, the United States took a middle approach by arguing that the lawyer’s misadvice may be a Sixth Amendment violation, but Padilla suffered no prejudice because “the evidence of guilt was overwhelming.”

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**Holder v. Humanitarian Law Project**

by Michael Caruso

This Term the Court has consolidated two terrorism-related cases in Holder v. Humanitarian Law Project. The government brought charges against defendants who sought to assist only the non-violent and lawful activities of a Kurdish political party and a Tamil group designated as foreign terrorist organizations. The defendants trained these organizations in peaceful methods of dispute resolution and engaged in political advocacy on their behalf. The Ninth Circuit held that the criminal prohibition on providing certain forms of material support—“training,” “service,” and, in part, “expert advice or assistance”—is unconstitutionally vague, because the statutory terms fail to provide clear notice as to what is prohibited. Moreover, the court held that the statute could be read to criminalize protected speech and expression.

The Supreme Court will decide whether those terms are indeed impermissibly vague. In addition, the Court will rule whether prohibitions on additional forms of support are constitutional as applied to speech that furthers only the lawful and nonviolent activities of proscribed organizations.

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**Graham v. Florida & Harris v. Florida**

by Michael Caruso

This term, the Court considered the cases of Terrance Jamal Graham and Joe Harris. While juveniles, Graham and Harris committed serious violent crimes. Both Graham and Harris are currently serving life sentences in Florida with no possibility of parole. They each argued that sentencing a juvenile to life imprisonment without the possibility of parole violates the Eighth Amendment’s ban on cruel and unusual punishments. Florida responded that such sentences are not constitutionally barred and reflect a state’s considered legislative response to the growing problem of juvenile crime. The Supreme Court will determine whether juveniles may be sentenced to life imprisonment without the possibility of parole for committing non homicide offenses.
Opinion Preview: 2009 Term

American Needle, Inc. v. National Football League
By Valorie Chavin

For many years, the NFL granted headwear licenses to multiple vendors, including American Needle, permitting them to manufacture and sell hats bearing team marks and logos. In December 2000, following a vote by all of the 32 separately-owned teams, the NFL entered into an agreement with Reebok International Ltd. under which Reebok became the exclusive headwear licensee for a period of ten years. Consequently, the NFL declined to renew American Needle’s headwear license.

American Needle brought suit, alleging that the agreement among the NFL, its teams, and Reebok violated Sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1-2. In order to prevail under Section 1 of the Act, American Needle must prove concerted action taken by separate entities. After permitting limited discovery on whether the NFL and other respondents functioned as a single entity in licensing marks and logos, the district court granted summary judgment for respondents on American Needle’s Section 1 claim. The court held that, for purposes of Section 1, the NFL and its 32 teams acted as a single entity. In affirming the lower court’s decision, the Seventh Circuit concluded that, even if the several NFL teams had competing interests regarding the use of their intellectual property, those interests would not necessarily keep the teams from functioning as a single entity.

The question presented to the Supreme Court is whether the NFL and its 32 separately-owned teams functioned as a single entity in taking these actions. The Court has stated, according to American Needle, that application of the Sherman Act to professional sports teams is wholly consistent with Congressional Intent. Concluding otherwise, the Seventh Circuit candidly admits that it stands alone.

Perdue v. Kenny A.
by Valorie Chavin

Respondents filed a class action complaint against petitioners on behalf of 3,000 children in foster care alleging violations of federal and state constitutional and statutory provisions in their administration of the foster care system. In October 2005, after years of litigation, the parties resolved all pending issues through a consent decree except the amount of attorney’s fees to be awarded to respondents as the “prevailing party.” Respondents submitted a request for $14,342,860 in attorney’s fees for almost 30,000 hours of time devoted by attorneys, paralegals and interns. Respondents argued that half of the fee award was the “lodestar” amount, which is “the product of reasonable hours times a reasonable rate.” While the other half of the fee award was a warranted enhancement based upon (1) the quality of representation; (2) the successful result achieved; (3) the contingency risk in the case; and (4) delayed payment of attorney’s fees and expenses.

Among other objections, petitioners claimed that respondents’ request was excessive because the lodestar amount already accounted for the factors presented for entitlement to the enhancement. Hence, petitioners urged the district court that the total amount requested would amount to a double recovery if awarded.

The district court disagreed with petitioner’s objection and awarded respondents $6,012,803 of the lodestar amount requested plus an enhancement of $4,509,602, which resulted in a total fee award of $10,522,405. On appeal, the district court of appeals unanimously affirmed the fee award. The Supreme Court granted petitioners’ writ of certiorari on the narrow question: “Can a reasonable attorney’s fee award under a federal fee-shifting statute ever be enhanced based solely on quality of performance and results obtained when these factors already are included in the lodestar calculation?” The answer to this question will impact many cases where the “prevailing party” is entitled to an award of fees.

Free Enterprise Fund & Beckstead & Watts, LLP v. Public Co. Accounting Oversight Board
by Valorie Chavin

Following the high-profile Enron and Worldcom accounting scandals, Congress passed the Sarbanes-Oxley Act, which created the Public Company Accounting Oversight Board to regulate auditors of public companies. Free Enterprise Fund and Beckstead & Watts LLP, a small Nevada accounting firm, was under investigation by the Board when it filed suit. Petitioners
The district court granted Respondents’ motion for summary judgment, concluding that it possessed jurisdiction despite the exclusive review procedures in the Act and petitioners’ failure to exhaust administrative remedies. The court of appeals affirmed. In rejecting Petitioner’s contention that the Act violated the Appointments Clause, the court emphasized that Board members have no power to render a final decision on behalf of the United States unless permitted to do so by other Executive officers. With respect to the separation of powers argument, the court reasoned that petitioners’ arguments are undercut by the vast degree of S.E.C. control at every significant step. Lastly, the court explained that petitioners’ insistence that the President must have direct removal authority over all executive officers, including “inferior” officers such as Board members, has no basis in law.

In urging the Supreme Court to accept the case, Petitioners argued that the issues presented go to the heart of the relationship between the Legislative and Executive Branches and that it involves an unprecedented model for federal agencies. Certainly, the greatest point of contention that will undergo scrutiny is the Act’s stripping of the President’s ability to remove Board members.

Abbott v Abbott
by Julia Luyster

This is a most significant case to be decided by the United States Supreme Court which is set for oral argument on January 12, 2010. It will determine where the United States stands on the world stage on the matter of protecting a parent’s right to have his or her child returned under a ne exeat order, to the country where the child was habitually resident. The Court will decide specifically whether ne exeat rights constitute a “right of custody” under the Hague Convention. Ne exeat is defined in the family law context as an equitable writ restraining a person from removing a child from the country’s jurisdiction. In Abbott, the mother was granted custody of the couple’s child by a Chilean court. The father was given visitation rights. The Chilean court also entered a ne exeat order prohibiting the child’s removal from Chile by either parent without mutual consent. The mother removed the child from Chile without the father’s knowledge or consent and through private investigators the father located the mother and child in Texas, U.S.

The Hague Convention provides the remedy of return of the child if the removal breaches a right of custody. The Hague Convention defines a right of custody as including the right to the care of the child and the right to determine the child’s place of residence. In conflict with the Eleventh Circuit, the Fifth Circuit held that ne exeat rights do not constitute custodial rights under the Hague Convention; however, Justice Sotomayor’s powerful Second Circuit dissent in Croll v. Croll, 229 F.2d 133 (200), cert, denied 534 U.S. (2001) will be center stage. Sotomayor’s dissent is now in line with the Solicitor General’s position as briefed in Abbott which urges reversal of the Fifth Circuit decision.

If the Supreme Court reverses it will align itself with Israel, the United Kingdom, Australia, South Africa, France. This will advance the purpose of the Hague Convention which is a uniform international interpretation. It would further foster the protection of children from abduction to the United States which would become a safe haven for abductors should the Supreme Court affirm the Fifth District Court’s decision.
Event Spotlight

Summer Associates/Law Clerks’ Day At Court ~ June 19, 2009
Summary by Valorie Chavin

We did it again, and this year was even better than last! On June 19th our Chapter of the Federal Bar Association proudly held its Second Annual “Summer Associates/Law Clerks’ Day at the Federal Courthouse.” This event invited all Summer Associates and Law Clerks to learn more about the federal system and observe both civil and criminal hearings before Judge William P. Dimitrouleas and Magistrate Judge Barry Seltzer. Like last year, prior to attending the hearings, the nearly sixty Summer Associates and Law Clerks enjoyed breakfast sponsored by Higer Lichter & Givner, LLP and interacted with, among others, Magistrate Judges Barry Seltzer and Robin Rosenbaum. The attendees were honored by guest speakers Kathleen Williams, Federal Public Defender, and Stefanie Moon, Assistant U.S. Attorney. Both women provided insight into their careers and their passion for their work.

After observing the civil and criminal hearings, forty five attendees were invited to lunch with “Legend” speakers, Jesse Diner, Florida Bar president, Adele Stone, President of Florida Bar Foundation, Skip Campbell, Sam Fields, and Bruce Udolf. All involved with the event, including its organizers, Rene Harrod, Greg Ward, Mark Levy, and Valorie Chavin, were very pleased with the positive feedback, and they look forward to repeating the event again next year.

Special thanks to all the judges, judiciary staff, and lawyers who participated in making this event such a great success and to those chapter members who helped organize and execute!

Summary by Valorie Chavin

The Honorable Raymond B. Ray, United States District Court Bankruptcy Judge for the Southern District of Florida, spoke to us about the harsh realities of the state of our economy and the real estate market, and truthfully projected that things are probably going to get worse before they get better. The number of cases overwhelming the bankruptcy court’s docket is a sign of the times and the problems that aren’t going away any time soon.

Judge Ray frankly pointed out the issues surrounding the sub-prime loan disaster and the next wave of issues that will likely revolve around commercial property loans that are maturing within the next few years. Real estate prices are down on average approximately 35-40% and continue to fall. Judge Ray informed us that between 2010 and 2012 nearly 185 billion commercial property loans will mature, but the borrowers will not be able to secure enough money to refinance their debt at an affordable rate to maintain their properties.

To add to the economic catastrophe, Judge Ray warned us of the problems with unsecured credit card debt. He explained that it’s not uncommon to see debtors in bankruptcy with between $20,000.00 – 50,000.00 in credit card debt. He reminded us that some families are only one tragedy away from financial ruin when they are uninsured or underinsured and they have a medical emergency, lose their job, or worse.

Statistically, 80% of homes purchased in 2005, 90% of homes purchased in 2006, and 88% of homes purchased in 2007 have negative equity. The people who are the poorest are the ones that are paying the most in interest. Judge Ray pointed out the irony that the same mortgage brokers that got us into the “exploding arms” and 100% financing are now back disguised as “foreclosure experts” that will supposedly help get you out of the mess that they got you into in the first place. Judge Ray warned us that there are an overwhelming number of criminal complaints filed against these self proclaimed experts. Meanwhile, a law that would have had a dramatic effect on South Florida by permitting the bankruptcy court to modify debt on primary homestead did not make it out of Congress.

One thing is for sure, we have to appreciate Judge Ray’s honestly. A bad situation is always better when you know what to expect.
Event Spotlight

Luncheon Speaker Series: Hon. Lurana Snow ~ June 25, 2008
Summary by Valorie Chavin

The Honorable Lurana Snow, Magistrate Judge for the United States District Court for the Southern District of Florida, honored two of her role models and mentors during our general membership luncheon that took place on June 23rd. Magistrate Snow took this opportunity to teach us how important it is to not only have a mentor in our profession, but to be a mentor. She explained that “you don’t learn to be a good lawyer in law school.” You need to find good lawyers and judges and ask a lot of questions. More importantly, she reminded us to cherish our mentors while they are here with us.

Magistrate Snow gave a heartfelt tribute to one of her first legal mentors and teachers, deceased Senior Judge Joe Eaton, United States District Court for the Southern District of Florida. Magistrate Snow was proud to relish in Judge Eaton’s accomplishments as a civil rights activist, including his ruling to integrate Palm Beach County’s public schools. Judge Eaton taught Magistrate Snow many lessons during her time as his law clerk, such as to refrain from arguing with a judge after a ruling and avoid the use of legalese in court, especially before a jury - all lessons that we can learn from. Most importantly, Magistrate Snow reminded us to tell our mentors how much they have helped us while they are here with us.

During the second half of her speech, Magistrate Stone gave us some insight on another one of her role models, Senior Judge Jose A. Gonzalez, Jr., United States District Court for the Southern District of Florida. Where Judge Eaton was Magistrate Snow’s teacher, Judge Gonzalez is Magistrate Snow’s role model. She explained him as a person with a sense of humor who does what he sees is fair, even if it’s not the most popular decision. Magistrate Snow recalls Judge Gonzalez explaining that the job of a judge is the only one in the world where you are paid to do what is right.

The lesson of the day was to learn from those around you and appreciate their lessons while you have the chance. It was a pleasure learning from Magistrate Snow’s experiences and helping her honor the role model that is with us and the teacher that she will never forget.
Event Spotlight - Fall Events

By Eric Gabrielle

The Broward Chapter had a successful series of events this fall.


On October 22, 2009, United States District Judge William P. Dimitrouleas provided the Chapter with a history of courthouse construction and judgeships in the Southern District of Florida and an overview of the process involved in the funding, approval and construction of a new Fort Lauderdale federal courthouse.

On Friday, October 23, 2009, the Broward County Chapter hosted An Afternoon at the Federal Courthouse orientation program and reception for attorneys taking the admissions exam for the Southern District of Florida. Judge Cohn, Judge Rosenbaum, and Phil Rothschild, Career Federal Judicial Law Clerk, gave valuable guidance to those in attendance about practice in this District. In addition, the Broward Chapter provided keynote speakers for Naturalization ceremonies, which now occur regularly at the Fort Lauderdale federal courthouse.

On November 19, 2009, United States District Judge James I. Cohn provided a personal history of the events surrounding the integration of his hometown high school and surrounding national and global events in 1963.