

Corporate Articles

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Interview Question for Judge Robert E. Bacharach

by Crystal Ellis and Diana Lai



Judge Robert E. Bacharach is a United States Circuit Judge for the United States Court of Appeals for the Tenth Circuit . He joined the court in 2013 after being nominated by President Barack Obama and confirmed by the United States Senate.

Judge Bacharach was appointed United States Magistrate Judge of the United States District Court for the Western District of Oklahoma from 1999-2013, an adjunct professor at the University of Oklahoma School of Law from 1997-1999, and was

in private practice in Oklahoma from 1987-1999 . He is an active member of the Federal Bar Association and has served as the Tenth Circuit Vice President since 2007-2013. He has chaired numerous committees for his district, including the Civil Rules Committee and the Criminal Justice Act Committee .

Judge Bacharach received a Bachelor of Arts from the University of Oklahoma in 1981 and a Juris Doctorate from the Washington University School of Law in 1985.

Please tell us about your background.

I was born in a little town in Mississippi called Clarksdale. Since the age of ten, I have lived in Oklahoma City. My wife, Rhonda Bacharach, and I have been married for a little over 20 years. We have a 7-year-old daughter, Olivia, who is in first grade.

Professionally, I graduated law school at Washington University at St. Louis in 1985 and clerked for two years for then-Chief Judge William J. Holloway, Jr. of the Tenth Circuit Court of Appeals. He was a great judge and a wonderful man and the U.S. Courthouse in Oklahoma City is now aptly

Message from the Chair

by Rachel V. Rose, JD, MBA

First and foremost, we would like to thank you for your continued support of the Federal Bar Association's Corporate and Association Counsel Division. This edition of *Corporate Articles* highlights Judge Robert E. Bacharach of the Tenth Circuit Court of Appeals, as well as three items dedicated to cybersecurity. As you have no doubt seen in the news and read in newspapers, cybersecurity is becoming increasingly important. Protection of client and/or company data is an emerging area of the law, relevant to both external and in-house counsel, as well as compliance officers. Awareness is key to avoiding the pitfalls of cybersecurity and, as a result, we include an analysis of the recent *Apple* case and an article on Ransomware. These articles provide members with insights on how compliance programs, policies and can be refined to prevent unnecessary attacks. Finally, we also bring to you a practical tool: a HIPAA checklist, which is provided to assist with risk assessments.

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As always, if you have any suggestions for programs or articles, please let us know. Again, your continued commitment to the FBA is truly appreciated. ■

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named in his honor. I finished my judicial clerkship in 1987 and practiced civil litigation at a law firm in Oklahoma City, Crowe & Dunlevy. In 1999, I was appointed as a United States Magistrate Judge for the Western District of Oklahoma, where I served for a little less than 14 years. In early 2013 I was appointed to the Tenth Circuit Court of Appeals, where I have served for a little over 3 years.

How would the possibility of splitting the 9th Circuit impact other appellate courts and legal precedent?

If the Ninth Circuit is split up, some of the states in that circuit will presumably go to another circuit. Because of geographic considerations, there is the possibility that one or more states might be moved to the Tenth Circuit. Of course, that is just a possibility, as states in the Ninth Circuit could be moved to other circuits as well. I don't anticipate this would have any effect on precedents developed in the Tenth Circuit. Even if a state currently in the Ninth Circuit were moved to the Tenth Circuit, and the two circuits were in conflict with respect to a particular legal issue, I would expect that Tenth Circuit law would apply to that state going forward. Similar issues were addressed when the Eleventh Circuit was created and, as I recall, a lot of consideration was given to the potential ramifications of moving states to a new circuit.

What accomplishment, personal or professional, are you most proud of?

Hands down, that'd be my family. I have a wonderful wife, who is the love of my life and my best friend. And I have the most wonderful child, Olivia, that anyone could ever hope for. Luckily she takes after my wife.

What are some emerging legal issues that you are seeing in your Courtroom and how do you anticipate, if at all, these developing issues will affect attorneys practicing in these areas?

In the last few years, there seems to have been more cases involving claims involving the right to religious freedom. Specifically, in the last several years, it appears there are more cases involving the intersection between corporate rights and individual rights to religious exercise. On a somewhat different area, emerging legal trends, I think nationwide there has been a significant dropoff in trials. This has been the subject of a great deal of commentary recently. One unfortunate aspect of this trend is that it is increasingly difficult for young attorneys to gain trial experience.

Do you anticipate the development of a litmus test for corporations related to these religious freedom cases?

Likely not. Each case comes up in its own unique way and with its own unique issues. The Supreme Court has been pretty clear that courts are not to embark on trying to ascertain whether someone actually is religious or to evaluate his or her beliefs. It also would depend on whether claims are statutory or constitutional. I would expect that these types of religious freedom cases will most likely be on a case-by-case basis, with each case decided on its particular facts as opposed to application of an across-the-board rule.

What advice would you give your younger self about being successful in the practice of law?

Advice for a younger me about being successful in the practice of law: One piece of advice I'd give to young attorneys is that they

should remember that the practice of law is a profession, but it is not their life. Their families and their happiness should always remain the top priority in their lives.

In practicing law, learn how to say "no" sometimes. That was difficult for me as a young attorney and it's difficult for many young attorneys. It's important, however, to maintain a manageable work schedule. In addition, I think it's very important for young attorneys to accept that they will sometimes make mistakes. We all do; we're only human. When an attorney makes a mistake, what's important is how he or she handles it. It's always important to take responsibility for the mistake and not to blame anyone else. Lastly, I would advise young attorneys to find a good mentor. A good mentor may be in the same law firm, but not always. Often it's possible to find good mentors through bar organizations like the Federal Bar Association.

How, if at all, do you think the Tenth Circuit's recent decision against Dow Chemical in *In Re: Urethane Antitrust Litigation* will affect the bringing of class certification lawsuits in the Tenth Circuit, especially considering the higher standards recently adopted by the U.S. Supreme Court and other courts with respect to obtaining class certification?

With regard to the Dow Chemical case, I can't speak too much about that opinion except for what is contained in the opinion itself. But I would say that in all opinions I write or join, I would hope that the opinions do not change the law (unless the court, sitting en banc, expressly overrules a precedent). I think my function as a judge is to try to figure out what the existing law is and to apply that law to a given set of facts. As a consequence, if we do our job right, we will avoid dramatic changes in the law and, instead, the law of the circuit will change rather slowly.

What do you believe are the most prevalent and pressing issues facing corporate or in-house attorneys in Oklahoma today?

I have never been an in-house attorney, but I would expect that the cost of litigation must be putting enormous pressure on in-house counsel. For multiple reasons, the cost of civil litigation is tremendous. It is becoming increasingly difficult to keep these costs manageable. ■



Crystal M. Ellis (J.D., Stetson University College of Law; B.A. Stetson University) is a Seattle-based attorney with the firm of Betts, Patterson & Mines, P.S. Ms. Ellis focuses her practice on complex civil litigation, including the defense of businesses and individuals against a variety of personal injury and property damage lawsuits. She is admitted in Washington and Florida and can be reached at cellis@bpmlaw.com. Diana N. Lai (J.D., Roger Williams Law School; B.A. Texas A&M University) serves as Associate Counsel with American Beacon Advisors, Inc. based in Irving, Texas. Ms. Lai practices in securities and corporate law. She is admitted in New Jersey.



Considerations from California: Relevant Themes from a Lawsuit over a Terrorist's iPhone

by Liz Dillon

The long-standing debate over whether private companies must aid governmental efforts to access secured data recently culminated in a short-lived lawsuit between the Federal Government and Apple, Inc. (Apple). The lawsuit centered on whether Apple should assist the FBI in obtaining data from San Bernardino shooter Syed Farook Rizwan's iPhone. Although the lawsuit quickly caught the public's attention, it unfortunately did not resolve the debate, as, on March 28, 2016, the Federal Government moved the Court to vacate its earlier order compelling Apple to assist the FBI, effectively ending the case.

The lawsuit between Apple and the Government centered on the following key issues: (1) the public's (often conflicting) concerns over data security; (2) the future of governmental efforts to compel private companies to aid in accessing data; (3) the potential for legislation to resolve the dispute over data security; and (4) the potential economic effect of the changing legal landscape surrounding these issues. Although the lawsuit has ended, these issues will continue to resurface in the ongoing debate over data security, and should be considered by corporate attorneys.

A Terrible Tragedy in California.

On Dec. 2, 2015, 28-year-old Farook and his 27-year-old wife, Tashfeen Malik, shot and killed 14 people (and seriously injured 22 others) during a holiday party and training session at Inland Regional Center in San Bernardino, CA. Of the 14 dead, 12 were Farook's co-workers at the County Health Department. The incident appears to have been both a mass shooting by a disgruntled employee against his co-workers and a vicious attack motivated by terrorist ideologies. The shooting has been called the deadliest terrorist attack on U.S. soil since Sept. 11, 2001.

After the attack, Farook and Malik fled in a rented black Lexus SUV, but fortunately were intercepted by police. During a subsequent shoot-out, Farook and Malik were killed. While searching the getaway car, the police discovered an iPhone issued to Farook by his employer. It is the data on this iPhone that led to the lawsuit between the Government and Apple.

A Short-Lived Lawsuit Over a Terrorist's iPhone.

Despite having obtained a warrant to search Farook's iPhone, the Government initially was unable to access the data on the password-protected phone. The Government was unable to "brute force" its way into Farook's iPhone (i.e. by repeatedly guessing random passwords) due to three Apple-implemented security measures featured on the phone: (1) a requirement that passwords be manually-entered (i.e. not entered by a computer program); (2)

the increasing delay, after each incorrect password entry attempt, before another attempt could be made; and (3) an optional feature, which may or may not have been activated on Farook's iPhone, which deletes all data on the phone after ten incorrect password-entry attempts.

The Government moved the Court to compel Apple to develop and load an operating system onto Farook's iPhone to bypass these security measures. While the Court initially granted the motion, the Government was able to obtain the data without Apple's assistance, and the litigation concluded less than two months after it began. Although the lawsuit now is over, its four key themes remain worthy of consideration by corporate lawyers.

Americans Hold Conflicting Concerns Over Data Security.

The first key theme is that Americans hold conflicting concerns about the security of data contained on their smart phones and other devices.

The Government focused largely on the public's concerns about data security, as it relates to terrorism. Specifically, the Government argued that if private companies like Apple did not help bypass security measures like those found on Farook's iPhone, the Government could be unable to access data essential to preventing future terrorist attacks like the one in San Bernardino.

For its part, Apple also focused on the public's concern over data security and terrorism, but reached a wholly different conclusion. While the Government argued that the order compelling Apple to assist the FBI could prevent future terrorist acts, Apple argued the order would actually have the opposite effect. Specifically, Apple argued that the "back door" code into the iPhone contemplated by the order could be stolen and/or exploited by identity thieves, cybercriminals, oppressive foreign governments, and even terrorists. Further, Apple argued that increasing governmental access to data could lead to governmental surveillance of the wealth of personal information that most Americans keep on their smart phones, including information relating to their health, finances, businesses, and families.

The Court did not ultimately determine which of these concerns should take precedence. As the debate surrounding data security continues, lawyers should consider and advise their clients as to these various security concerns.

Lawsuits Between the Government and Private Companies Over Data Security Will Continue.

The second theme worthy of consideration is the ongoing state of litigation regarding data security.

As noted by the parties, the Government has previously requested, and will continue requesting, the assistance of private corporations in accessing data. Where companies like Apple have not complied with such requests, the Government has moved to compel such assistance, and will likely continue doing so.

Corporate attorneys should be aware that their corporate clients who refuse governmental requests for access to secured data may face costly litigation.

The Legislature May Ultimately Resolve the Dispute Over Data Security.

The third theme worthy of consideration is the potential for legislation to resolve the ongoing debate over data security.

Apple argued that any requirement for private corporations to assist the Government in obtaining secured data must come from the Legislature, not the courts. Apple criticized the Government for bringing the lawsuit in what Apple sees as an attempt to bypass the Legislature. The Government agreed that Congress could resolve the debate, but maintains that Courts also have the authority to do so.

Congress, for its part, already has begun taking action. For example, House Homeland Security Committee Chairman Michael McCaul and Senate Intelligence Committee member Mark Warner introduced a bill creating a National Commission on Security and Technology Challenges to advise Congress on Americans' conflicting concerns over data security.

Attorneys representing corporations should be aware of, and advise their clients about legislative efforts to resolve disputes between the Government and private corporations over data security.

Any Resolution to the Debate over Data Security May Significantly Impact Corporations.

The fourth theme worthy of consideration is the potential economic impact of Governmental requests for assistance in accessing data. As Apple noted, repeated governmental requests for assistance may require companies like Apple to divert key personnel to write and test software code any time the Government requests, or a court orders, such assistance.

It is unclear whether the economic burden on private corporations will be as significant as Apple portends, and Apple never actually had to assist the Government access Farook's data. Corporate attorneys should, however, advise their clients as to the potential economic impact of requests for assistance in obtaining secured data, particularly where requests may be numerous.

Conclusion.

Although the lawsuit between Apple and the Government over Farook's iPhone has concluded, the four key themes on which the lawsuit centered remain relevant for corporate attorneys. Attorneys should pay particular attention to the ongoing debate over data security, potential efforts by courts and the Legislature to resolve this debate, and the potential economic impact on corporations of any such resolution. ■



Elizabeth Dillon is an attorney at Cetrulo LLP. Her practice focuses on employment advice and counseling, as well as employment, business, real estate and probate litigation.

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Ransomware: The Cybercriminal's Gold Rush

by Chris Cochran

Imagine for a moment the following: You are on your way home from work after a long day at the office. The sun is setting in the distance and you already are looking forward to your nightly routine. You are thinking about what you are going to eat, how great it will feel to lay on your couch, and continuing the show you have been binge watching for the last few nights. You pull your keys out of your pocket and already can feel your mind relaxing in preparation for the final chapter of your day. You put your key into the lock as you have done a thousand times before. Only this time, there is not that familiar feeling of the key turning.

This time, the lock doesn't budge. It is as if you used the wrong key. Puzzled, you look at your key to verify that it is the correct key, you look at your house to make sure you are at the right address, and you confirm both are a match. Upon inspecting your house, you notice a note next to the door, which you grab and begin to read:

"Dear Homeowner,

It is with great regret, that I must inform you that we have taken control of your house. However, all hope is not lost! We will return access to your home in exchange for a "small" ransom. Well, I would imagine "small" is relative. In the event you choose not to pay the ransom, we will disappear and so will the chances of you ever gaining access to your home. On the back of this page are instructions on how to obtain Bitcoins¹ (our preferred method of payment) and steps to pay us. We will then, and only then, send you a key to access your home.

Good Luck! Hope to hear from you soon!

Signed,

Your Friendly Neighborhood Cybercriminals"

Although this story is fictitious, the Ransomware attack vector occurs nearly everyday in cyberspace. Cyber Extortion is very real and comes in many varieties. In this article, we will discuss the different threat vectors used in these extortion operations and touch on best practices to mitigate the risk of exposure. These attacks are widespread and garnering a tremendous amount of media attention. Awareness and mitigation of these threats are imperative for lawyers, law firms and the clients they serve.

How Ransomware Works.

The FBI defines "ransomware" as a "type of malware that infects computers and restricts users' access to their files or threatens the permanent destruction of their information unless a ransom—anywhere from hundreds to thousands of dollars—is paid."²

In general, this is how the attack plays out:

1. The attacker sends a malicious e-mail or compromises a website that the victim frequents;
2. The victim clicks a link, opens an attachment in the e-mail or visits the compromised website;
3. The code executes to set up the delivery of the ransomware;
4. The ransomware is delivered and either locks the user out of the computer or encrypts³ files or drives; and

5. A note is delivered to the user, detailing what has happened and the steps they need to take to pay the ransom.

If the ransom is not paid, the files usually will be locked in perpetuity. If the ransom is paid, a key is sent to the user, which (hopefully) will unlock the computer or files.

Resources and Tips for Avoiding Ransomware Attacks.

The potential impact of this attack can vary greatly. For a person it could range from annoying to disastrous; for an organization it can be crippling and far reaching. So what can one do to mitigate risk? Here are some resources and concepts for assisting you with determining the best course of action for your personal or corporate system:

1. Institute policies and best practices for e-mail use.⁴
2. Institute policies and best practices for web surfing (we will be doing a deep-dive on this in an upcoming issue).
3. Back up your files, back up your files ... Did I mention backing up your files?

Conclusion.

When it comes fending off threats and mitigating risk, knowledge is power.⁵ Awareness of Ransomware and knowledge of how it operates will make life easier for both individuals and organizations by arming you with the tools you need to avoid attacks. Stay tuned for additional information and tips related to web surfing. ■



Chris Cochran is a former US Marine with over a decade of Signals Intelligence/ All-Source Intelligence Analysis experience and a deep passion for security. He began conducting Cyber Threat Intelligence analysis in 2010 and founded Ashlar Cyber Solutions in 2015. Cochran has led Cyber Threat Intelligence analysis teams at the tactical, operational and strategic level. He has provided threat intelligence council to the highest levels of government and Industry and built Threat Intelligence capabilities for organizations across multiple sectors.

Endnotes

¹"Bitcoin" is a consensus network that enables a new payment system and completely digital money. It is the first decentralized peer-to-peer payment network that is powered by its users with no central authority or middlemen. From a user's perspective, Bitcoin essentially is cash for the Internet. See, bitcoin.org/en/faq (last accessed Apr. 10, 2016).

²See, www.fbi.gov/news/stories/2015/january/ransomware-on-the-rise (last accessed Apr. 10, 2016)

³Encryption- a way to enhance the security of a message or file by scrambling the contents so that it can be read only by someone who has the right encryption key to unscramble it. See, windows.microsoft.com/en-us/windows/what-is-encryption (last accessed Apr. 10, 2016).

⁴Please refer to *Corporate Articles*, Winter 2016 edition, for a discussion of e-mail phishing and tips for avoiding the same. See, www.fedbar.org/Image-Library/Sections-and-Divisions/Corp-Assoc/CACD-Winter-2016--Newsletter.aspx (last accessed April 20, 2016).

⁵For a deeper look at ransomware in general, there are many resources that I would recommend. Symantec, a prominent technology

company, wrote an excellent and very in-depth article titled, “*The Evolution of Ransomware*,” that discusses ransomware with great granularity and should serve as an excellent resource for those wanting additional information. It can be found at www.symantec.com/content/en/us/enterprise/media/security_response/whitepapers/the-evolution-of-ransomware.pdf.

CHECKLIST FROM THE ABA’s *What Are International HIPAA Considerations?*

by Rachel V. Rose, JD, MBA

This checklist serves as a framework to augment HIPAA risk assessments and risk analyses, as well as to highlight some international standards.¹

Item	Currently Implemented (Y/N)	Date Completed
Name and Location of All Business Associates and Subcontractors		
Data Center and/or Server Location(s)		
Policies and Procedures – General and International Travel and Use of Company Information		
Mobile Application Management – Can the Device or Application be Disabled Internationally?		
Provisions in Business Associate Agreement Regarding Data Outside the United States		
International Data Breach Procedures		
Theft of Mobile Devices Abroad		
All Devices Encrypted		
Data Is Encrypted at Rest and in Transit		
Controlled Software Distribution Installed		
Automatic Lock with Eight Digit Passcode		
Local Data Storage		
Is Data Flowing Across Borders?		

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By signing this application, I hereby apply for membership in the Federal Bar Association and agree to conform to its Constitution and Bylaws and to the rules and regulations prescribed by its Board of Directors. I declare that the information contained herein is true and complete. I understand that any false statements made on this application will lead to rejection of my application or the immediate termination of my membership. I also understand that by providing my fax number and e-mail address, I hereby consent to receive faxes and e-mail messages sent by or on behalf of the Federal Bar Association, the Foundation of the Federal Bar Association, and the Federal Bar Building Corporation.

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Application continued on the back



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<input type="radio"/> Northern District of Indiana | North Carolina
<input type="radio"/> Eastern District of North Carolina
<input type="radio"/> Middle District of North Carolina
<input type="radio"/> Western District of North Carolina | Texas
<input type="radio"/> Austin
<input type="radio"/> Dallas-\$10
<input type="radio"/> El Paso
<input type="radio"/> Fort Worth
<input type="radio"/> San Antonio
<input type="radio"/> Southern District of Texas-\$25
<input type="radio"/> Waco
Utah
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Vermont*
<input type="radio"/> At Large
Virgin Islands
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Virginia
<input type="radio"/> Northern Virginia
<input type="radio"/> Richmond
<input type="radio"/> Roanoke
<input type="radio"/> Hampton Roads Chapter
Washington*
<input type="radio"/> At Large
West Virginia
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Wisconsin*
<input type="radio"/> At Large
Wyoming
<input type="radio"/> Wyoming |
| Arizona
<input type="radio"/> Phoenix
<input type="radio"/> William D. Browning/Tucson-\$10 | Iowa
<input type="radio"/> Iowa-\$10
Kansas
<input type="radio"/> Kansas and Western District of Missouri
Kentucky
<input type="radio"/> Kentucky
Louisiana
<input type="radio"/> Baton Rouge
<input type="radio"/> Lafayette/Acadiana
<input type="radio"/> New Orleans-\$10
<input type="radio"/> North Louisiana
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<input type="radio"/> Western District of Michigan
Minnesota
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Mississippi
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Missouri
<input type="radio"/> St. Louis
<input type="radio"/> Kansas and Western District of Missouri
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Nebraska
<input type="radio"/> Nebraska
Nevada
<input type="radio"/> Nevada | California
<input type="radio"/> Inland Empire
<input type="radio"/> Los Angeles
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<input type="radio"/> Orange County
<input type="radio"/> Sacramento
<input type="radio"/> San Diego
<input type="radio"/> San Joaquin Valley
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Delaware
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District of Columbia
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<input type="radio"/> Pentagon
Florida
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<input type="radio"/> Tallahassee
<input type="radio"/> Tampa Bay
Georgia
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<input type="radio"/> Southern District of Georgia Chapter
Hawaii
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Idaho
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Ohio
<input type="radio"/> Cincinnati/Northern Kentucky-John W. Peck
<input type="radio"/> Columbus
<input type="radio"/> Dayton
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Oklahoma
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Oregon
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Pennsylvania
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<input type="radio"/> Middle District of Pennsylvania
<input type="radio"/> Western District of Pennsylvania
Puerto Rico
<input type="radio"/> Hon. Raymond L. Acosta/Puerto Rico-\$10 |

Chapter Total: _____

Payment Information

TOTAL DUES TO BE CHARGED

(membership, section/division, and chapter dues): \$ _____

Check enclosed, payable to Federal Bar Association
 Credit: American Express MasterCard Visa

 Name on card (please print)

 Card No.

 Exp. Date

 Signature

 Date