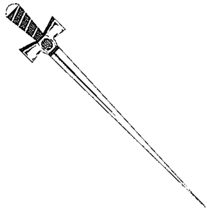

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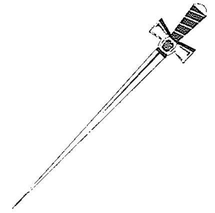

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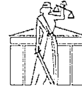

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Dear Members:

This is just a short update of some of the Federal Litigation Sections' activities.

On April 3rd, I attended the Ninth Circuit Leadership Conference in Las Vegas during which the Nevada Chapter was reactivated. I encourage all Federal Litigation Section members residing or practicing law in Nevada to become active in the Chapter. Chapter President Arleen Kaizer may be contacted at 1700 West Charleston Boulevard-SIIS, P.O. Box 26929, Las Vegas, NV 89126-0929, (702) 388-3120.

The Section is co-sponsoring with the Tampa Chapter a Sentencing Guidelines Seminar on June 24th & 25th. The Section also expects to co-sponsor with the San Diego Chapter the Ninth Circuit Appellate Conference on November 13, 1993.

Remember, if you have any suggestions for programs or activities be sure to contact me. Also, remember you may submit articles on any topic of your choice to Mark Lee Hogge, Editor of the *Sidebar*.

Don't forget to mark your calendars for the National Convention in New Orleans, September 29–October 2, 1993.

Sincerely,
Adrienne A. Berry, Chair
Federal Litigation Section

DOs and DON'Ts of Cross-Examination

DOs

1. Always have a purpose or objective in mind.
2. Ask questions which are short and simple.
3. Only ask leading questions; make exceptions only to avoid the appearance of bullying the witness, or to change the "tempo" to keep the juror's interest, or on minor points where you are sure of the answer.
4. Ask questions where you don't know the answer only if no possible answer can hurt you.
5. Look carefully at the witness' expressions and reactions on direct and cross—they can serve as valuable clues.
6. Try to keep your ultimate objective hidden—don't let the witness know where you're going.
7. End on a high note—save your bombshell for the last question.
8. Look for improbabilities and conflicts in the witness' story and hit details (*e.g.*, times, dates, locations, etc.)
9. If a witness is arrogant or hostile, lead him on and foster and emphasize the arrogance and hostility. Let the witness destroy himself with his attitude.
10. Listen carefully to the witness' direct testimony—jot down key notes but not to the point that you're not listening.
11. Use exhibits as cross-examination tools.

Do's And Don'ts continued on page 4

Claims Court Changes Name

**By William K. Drew,
Shannon H. Renchard,
and Karen J. Vogel**

(Federal Circuit and Court of Federal Claims Committee)

AND JUST WHEN YOU HAD GOTTEN USED TO SAYING CLAIMS COURT

The Federal Litigation Section's Federal Circuit and Claims Court Committee is back in existence and is operating under a slightly revised name in order to conform to a recent name change by the Claims Court.

The United States Claims Court, after existing for ten years under that name, became the United States Court of Federal Claims on October 29, 1992. This change was made by the Federal Courts Administration Act of 1992, Pub. L. No. 102-572, 106 Stat. 4506 (1992). On December 4, 1992, Chief Judge Loren A. Smith issued General Order No. 33 addressing various matters related to this change. The Court's new name is to be used on all papers in place of the Court's former name. The Clerk of the Court, however, will not reject any filings or pleadings because of use of the former name. All General Orders of the Claims Court remain in effect and apply to the Court of Federal Claims. Decisions of the Court will be published in the Federal Claims Reporter, cited as "Fed. Cl." Decisions that were rendered by the Claims Court, however, will continue to be cited as "Cl. Ct." The rules of the Court will now be known as Rules of the United States Court of Federal Claims and may be cited as "RCFC". All members in good standing of the bar of the United States Claims Court shall continue to be members of the bar of the United States Court of Federal Claims.

Further, in a rule change effective last July, all pleadings and other papers, other than the complaint, now must state the name of the judge or special master to whom the case is assigned. The name of the judge or special master is to be set forth in the caption immediately below the docket number.

Attorneys who are interested in being admitted to practice before the Court of Federal Claims may obtain forms and information from the Clerk of the Court. The fee for admission and certification is $30. Attorneys outside of the Washington, D.C. area may apply for admission to practice by submitting a verified application to the Court. This form may be obtained by calling the Clerk of the Court at (202) 219-9657.

Significant upcoming events include the Judicial Conferences of the Federal Circuit and of the Court of Federal Claims. The Federal Circuit's conference will be held on June 18, 1993, and will include a Court of Federal Claims breakout session. The Court of Federal Claim's conference is currently scheduled for October 20-22, 1993. Planning for this conference is still in the preliminary stages.

Attorneys practicing before the Court of Federal Claims may be interested in membership in the Court of Federal Claims Bar Association. Annual dues for membership in that Association are $50 for private practitioners and $35 for government lawyers. For more information about the Association, contact the Association's president at the following address:

Robert K. Huffman
Miller & Chevalier
655 Fifteenth Street, N.W.
Washington, D.C. 20005

Child Abuse Materials Available

A highly successful "Child Abuse Seminar" was held at Montclair State in November 1992. It was sponsored by the Litigation Section and the New Jersey Chapter of the Federal Bar Association. Audio and video tapes of the conference are available. Please check with Mr. Raymond P. D'Uva at (201) 643-7750 if you are interested.

Announcement

There is now a committee for all those fans of *Jayson's Federal Tort Claims.*

Yes, the Federal Bar Association is forming a Federal Tort Claims Committee.

We are actively seeking government and private practitioners to serve on the Committee.

Anyone interested in participating in this Committee, please contact:

Chuck R. Pardue
Pardue & Massey
563 Greene Street
Augusta, Georgia 30901
(706) 722- 0227

Apologies from *Sidebar*: Reporters Needed

The editor apologizes for the lateness of this edition. The problem is the under-staff of one person. The deadlines for the last two editions this year are September 1, 1993 and November 1, 1993, respectively. Members should receive their copies in the third week of the respective months.

Two reporters are needed. This is the first time "Sidebar" has requested more staffing. The job takes only a few hours a quarter. So, do not be shy and do not think you are too tired (why should you be different from anyone else)! Help increase the competency of the trial bar by working for *Sidebar*. If you are interested, please contact the editor.

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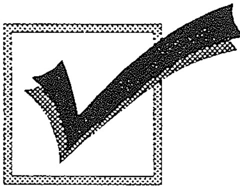
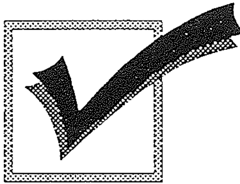
F.B.A. - ELECTION

FEDERAL LITIGATION SECTION

ENDORSES



JUSTIN DINGFELDER
Vice President



ADRIENNE BERRY
Deputy Secretary

BE SURE TO RETURN YOUR BALLOT!

Federal Discovery Undergoes Radical Change

The Supreme Court has ordered radical amendments to the Federal Rules and forms which are effective December 1, 1993. To the extent "just and practicable" the amendments will apply to civil cases already pending as of December 1, 1993.

Justice White filed an apparent exculpatory statement concerning the new rules notifying the Bar that the Supreme Court's role regarding the changes is very limited. Justice Scalia objected to the twenty-one day "safe harbor" of new Rule 11 which will allow withdrawal of the challenged document with impunity. Justice Scalia, joined by Justices Thomas and Souter, objected to the "radical reforms" of new Rule 26(a)(1)(A), (a)(1)(B) and (e)(1). Here are just a few quips which are, of course, taken out of context.

> The proposed radical reforms to the discovery process are potentially disastrous and certainly premature—particularly the imposition on litigants of a continuing duty to disclose to opposing counsel, without awaiting any request, various information "relevant to disputed facts alleged with particularity."
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> * * * * *
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> But the duty-to-disclose regime does not replace the current, much-criticized discovery process; rather, it *adds a further layer of discovery.*
>
> * * * * *
>
> By placing upon lawyers the obligation to disclose information damaging to their clients—on their own initiative, and in a context where the lines between what must be disclosed and what need not be disclosed are not clear but require the exercise of considerable judgment—the new Rule would place intolerable strain upon lawyers' ethical duty to represent their clients and not to assist the opposing side. Requiring a lawyer to make a judgment as to what information is "relevant to disputed facts" plainly requires him to use his professional skills in the service of the adversary. See Advisory Committee Notes to Proposed Rule 26, p. 96.
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> * * * * *
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> I am also concerned that this revision has been recommended in the face of nearly universal criticism from every conceivable sector of our judicial system, including judges, practitioners, litigants, academics, public interest groups, and national, state and local bar and professional associations. *See* generally *Bell, Varner & Gottschalk Automatic Disclosure in Discovery -The Rush to Reform,* 27 GA L REV 1, 28-32, and nn 107-121 (1992). Indeed, after the proposed rule in essentially its present form was published to comply with the notice-and-comment requirement of 28 USC §2071(b) [28 USCS §2071(b)], public criticism was so severe that the advisory committee announced abandonment of its duty-to-disclose regime (in favor of limited pilot experiments), but then, without further public comment or explanation, decided six weeks later to recommend the rule. 27 Ga L Rev, at 35.
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> * * * * *
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> ....It takes no expert to know that a measure which eliminates rather than strengthens a deterrent to frivolous litigation is not what the times demand; and that a breathtakingly novel revision of discovery practice should not be adopted nationwide without a trial run.

Proposed New Joint Conference on Indian Law

Lawrence R. Baca, Chairman of the Indian Law Section, and Adrienne A. Berry, the Chair of this Section, would like to announce the formation of a joint section conference planning committee.

The proposed conference would be called The Washington, D.C. Conference on Federal Indian Law. The target date for this new conference will be October or November of 1993.

As Chairman of the Indian Law Section (formerly the Indian Law Committee) Lawrence Baca has overseen the rise in attendance at the FBA Annual Indian Law Conference, now in its 18th year, from a steady 175 to over 500 at last year's affair. (The 1993 conference had over 500 participants.

"I have believed for several years now," says Baca, "that a second Indian law conference could be sponsored here in D.C. and draw a different audience than our Albuquerque conference. Many government attorneys, who cannot afford to fly to New Mexico, would come to a conference here in D.C."

Ms. Berry who overheard Baca talk about the D.C. Indian law conference idea said, "So let's do it. My section would love to help put on a conference. Let's be co-sponsors."

So, born of Baca's idea and Berry's energy, a planning committee is being formed. Anyone who would like to be a part of this venture should call Lawrence Baca at (202) 514-3874 or Adrienne Berry at (502) 568-5600.

Do's And Don'ts continued from page 1

DON'Ts

1. Don't badger or ridicule witnesses—remember that a jury will often identify and sympathize with whomever is on the stand.
2. Don't rehash the witness' direct examination.
3. Don't bore the jury. There is no sense in prolonging an unproductive cross-examination—you can only get hurt.
4. Avoid "how" and "why" questions.
5. Don't attack the truthful or favorable testimony of a witness; attack the collateral matters which point to inconsistencies or improbabilities.
6. Don't allow the witness to be unresponsive or, worse, to offer self-serving statements—cut him off and ask the court to tell the witness to answer the question. If the question calls for a "yes" or "no" answer, insist on such an answer.
7. Don't get into a shouting match with the witness—serve as a contrast—if he is angry, you be calm, etc.
8. Don't ever give the impression you are trying to trick the witness or put words in his mouth.
9. Don't belabor or overstate a good point. If the witness gives an answer helpful to you, don't repeat the question because chances are you will get a different response. Save the emphasis for closing argument. Similarly, if on cross a witness concedes points A and B from which a logical inference is that C happened, don't ask the witness if C happened—argue the inference in argument.
10. Don't outwardly show contentment with favorable answer.
11. Don't rush—if you feel hurried and can't think of a next question, pause—if you don't do so, you might ask a question the answer to which you will regret.
12. Don't take a witness through a chronological development of the facts—jump around.
13. Don't cross-examine unless the witness has hurt you on direct.
14. Don't dwell on or overemphasize small and relatively meaningless inconsistencies or contradictions.

Sidebar is published quarterly by the Federal Litigation Section of the Federal Bar Association. The views expressed herein do not necessarily represent those of the FBA, Send any contributions you may have to the Editor, Mark Lee Hogge, at Morgan & Finnegan, 555 13th Street, NW, Suite 480, West, Washington, D.C. 20004-1109, (202) 857-7887, fax (202) 857-7929.

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