



Side BAR

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OPENING STATEMENTS

Message from the Editor

John F. "Joe" Perry

Recently, it seems that there has been a lot of discussion regarding ADR in federal courts. Our roving reporter, Kelly McCloskey of Chicago, reports on the recent session on ADR held at the National Litigation Seminar in New Orleans this past spring. I was there and it was great — Alan Blakley, our soon-to-be chair, put together a fantastic program.

Do you have ADR in your district? The Western District of Pennsylvania has both mediation and arbitration. I have not yet participated in the mediation program, but I have arbitrated a couple of cases and wish to share with you my thoughts on this excellent ADR method.

Arbitration is, in a sense, optional, although you must opt out of arbitration if you do not want to participate. You have 10 days to do so after the defendant's answer is filed.

I recommend arbitration if your case is rather straightforward and not too complex. Arbitration can provide several benefits in terms of cost savings and time to get to a hearing — in our district about 150 days after the answer is filed. The short time limit causes one to quickly focus on the case.

The parties have full discovery rights (and duties) and access to a judge at all times to resolve disputes. The hearing, as in most arbitrations, is more informal than a full trial and the Federal Rules, while used, are more for guidance. But from my perspective the most unique aspect of the arbitration is that you do not necessarily need witnesses! Our guidelines provide that "[e]vidence shall be presented primarily through the attorneys for the parties" What an opportunity to be a *spin doctor*!

Another positive aspect of ADR is that the parties are to provide the arbitrators with copies of all exhibits at least 10 days before the hearing. This allows for the panel to be a hot court.

One final note: The arbitration process allows for your client to have his, her or its day in court at a relatively modest cost and in a shorter time. While you always have a right to a trial *de novo*, the statistics from my district show that 81 percent of the time, the cases are not appealed and that 28 percent of cases settle after the hearing and before a decision is rendered.

If you have arbitration in your district — try it; I think you'll like it.

Message from the Section Chair

N. Patrick Flanagan

When people ask the single question, why should they join the Federal Bar Association, the answers are many. As a government lawyer, you have the unique ability to network with your peers and superiors in ways that can enhance your career. If you are in the private sector, you have the opportunity to network with other federal practitioners in focused settings designed to improve your working knowledge of your field of law and introduce you to other lawyers from around the country. If you are a member of the federal judiciary, the FBA is your voice on issues like education, policy and equal pay. No matter what area of federal law, what role you play within the federal legal system, the FBA is best suited to meet your needs.

FBA President Robert McNew is leading a grassroots campaign for pay equity among the federal judiciary. We have an outstanding federal bench. Win or lose, federal litigators can be assured that they will receive a fair hearing before a respected jurist when they come into a federal courtroom. But these judges are facing extreme financial pressures and deserve our support. Often federal judges' clerks will outstrip their judge's salary almost immediately upon leaving their clerkship. With many

Message from the Chair continued on the next page

Inside

Food for Thought	2
<i>Report from New Orleans</i>	
Errata	3
<i>Membership Directory</i>	
<i>Electronic Discovery Project</i>	
<i>More on Electronic Discovery</i>	
Member Profiles	4
<i>Ken Lawson</i>	
Famous Trials	5
<i>Sentencing in the case of United States vs. Susan B. Anthony</i>	

Message from the Chair continued from page 1

judges, there is the burden of putting children through college. What is the incentive for a successful practitioner to leave private practice, ascend to the bench, and take a significant pay cut?

Recently, I met with a group of African judges visiting the National Judicial College in Reno, Nev. They asked me if our judges were elected. I told them Nevada elects their state court judges, but all federal judges are appointed and serve for life. They asked me if I, as a lawyer, give money to the state court judges to run for office. I admitted that my law firm is often asked to contribute to judicial campaigns. They asked me if I expected favorable rulings from the judge who received my contributions. I had a bad feeling where this conversation was going. I was then asked if that contribution could be considered a bribe. My protestations as to the fairness of our judicial system were met with a stoic skepticism.

As litigators, we owe it to our judges to speak out in their defense. They have lost significant ground and the pay scale train is passing them by. Whether you speak to your elected representatives or your neighbors at your next barbecue, take the opportunity to educate them on the most precious jewel of our system of government: the Third Branch.

Remember to mark your calendars for the FBA's Annual Convention Sept. 12-15, 2001, in Tucson, Ariz. In addition to the great CLE programs in criminal law, employment law and civil litigation, there will be a mock trial reenacting the civil lawsuit brought against Marshall Wyatt Earp and Doc Holliday for the shootout at the O.K. Corral. See you there!

FOOD FOR THOUGHT

Report From New Orleans

FBA's Challenge in Improving ADR in District Courts

By Kelly McCloskey

Judges and officials of the Administrative Office of the U.S. Courts and the Federal Judicial Center participated in a panel at the FBA's National Litigation Seminar in New Orleans to discuss the FBA's challenge in improving alternative dispute resolution in the district courts. The panel members included Hon. Ron Hedges, U.S. magistrate judge for the District of New Jersey; Robert W. Flack Jr., chief circuit mediator for the U.S. Court of Appeals for the Sixth Circuit; and Mark Miskowsky and Donna Stienstrat from the Federal Judicial Center.

The panel discussed the status and concerns of ADR — the process by which the district court refers a dispute to a neutral third party for resolution. The panel also addressed the FBA's involvement with improvement of the ADR system.

The statutory ADR provisions provides authorization for a district court to implement ADR through processes such as mediation, arbitration, and early neutral evaluation. The ADR provisions also set forth requirements for the implementation of ADR for each district court. Specifically, each district court shall define its own ADR program through local rules. See generally 28 U.S.C. §§ 651-658.

One of the panel members provided interesting statistics regarding the use of ADR in the district courts. Several years ago, 50 out of 94 district courts participated in a survey regarding the implementation of an ADR program. The majority of these district courts, 54 percent, maintain a formal program that includes a panel of neutral attorneys who participate in ADR. Twenty-two percent of the district courts reported using magistrate judges for their ADR program, and 12 percent of the district courts have the general authorization to use ADR, but have not implemented a specific program. Six percent of the district courts reported using ADR in a limited number of cases.

In addition, one of the panel members reported that the following four district courts presently maintain a mediator on staff: Western Dist. of Missouri, Northern Dist. of California, Dist. of Rhode Island, and Dist. of the District of Columbia.

The panel members acknowledged that based upon the foregoing statistics as well as other surveys, although many of the district courts are using ADR, just as many district courts are not. Although ADR programs, such as mediation, are practical and have become a reality in the litigation process in both the state and federal court systems, the district courts have opposed the ADR process. The panel members discussed three primary problems regarding ADR: education, funding, and time.

The panel members also focused upon the following policy issues. District courts are concerned about requiring a litigant to seek mediation for which the parties must pay. To the extent the district courts use volunteers in the ADR process, an issue arises regarding the quality and consistency of a volunteer program. The district courts also have expressed their concern that there might be an expectation of favors in the future among the volunteers in the private sector. Finally, the panel members addressed the due process implications regarding the rights of the parties if district courts send cases to attorneys developing a private mediation practice dependent upon a referral service.

At the conclusion of the meeting, the panel members and various FBA members discussed the FBA's involvement in resolving these issues and addressing the district courts' concerns regarding ADR so that the district courts would better use the resolution process in the future. One suggestion was the need for updated statistics regarding the district courts' use of the various ADR programs.

With regard to the district courts that have been using an ADR program for a period of time, it may be worthwhile to obtain additional information regarding the benefits and problems pertaining to the system that is in place. Any information on the resolution of problems and the success of a program may

assist other district courts in examining ADR. Perhaps with specific surveys, the ADR concerns could also be identified and addressed. The panel members also suggested that an FBA liaison work with a liaison from the American Bar Association and members of the Federal Judiciary Center in obtaining district

court information about ADR and in making the resolution process more effective.

ERRATA

Membership Directory

A number of section members have indicated that they need to refer litigation to attorneys outside their home areas or find local counsel for their clients from time to time. They feel a reference book, somewhat more manageable than *Martindale-Hubbel*, especially designed for federal litigators would be helpful. We want to be responsive to the members of our section; therefore, we are exploring the possibility of compiling a directory of members. The directory would list all section members and also identify those members who are particularly interested in referrals by practice areas and by region.

The initial thought is that every member will be listed alphabetically and separate sections will geographically list those members who would like referrals or to be listed as local counsel by speciality. In order to defray cost of printing we would ask everyone who is listed in the referral/local counsel section to pay a modest amount; we envision a \$5 price. Government lawyers and those who are not interested in referrals or in being local counsel would only be listed alphabetically and would not need to contribute to printing costs. The directory, to be published annually, will be distributed with an edition of *Sidebar*.

We would like to have input from the general membership of the section to determine the extent of interest. Please e-mail your comments and thoughts to Joe Dattilo, section membership chair at jdattilo@brouse.com.

Electronic Discovery Project

The Federal Litigation Section announces its Electronic Discovery Project. In conjunction with the Federal Judicial Center and the Mecklenburg County (North Carolina) Bar, we are creating a book *Electronic Discovery: The Challenges and Opportunities of Electronic Evidence* and a two-hour video presentation of information and mock courtroom scenes based on six hypotheticals that illustrate issues encountered in discovering electronic evidence (e.g. e-mails). Filming for the video will begin in August with the assistance of the Federal Judicial Center, Mecklenburg County Bar, U.S. District Court for the Western District of North Carolina and Central Piedmont Community College.

One copy of the book and video (on DVD) will be given to each chapter along with a teacher's manual/pamphlet that contains additional hypotheticals. The pamphlet will also help the chapter locate people in its vicinity to supplement the DVD and integrate live and DVD portions to produce a half-day CLE seminar.

The book will be both a sourcebook for the CLE program and a reference for participants to take home. Books for each participant should be purchased from the section prior to the program. The book will include not only introductory material, cases, and newly created articles, but also motions, sample discovery, and briefs in hard copy and electronic version for litigators to tailor to their own needs. Of course, the book will be available for any section member to purchase irrespective of attendance at a CLE event. The section plans to have a demo video and flier to give to each chapter at the FBA Annual Meeting and Convention in Tucson, and the books/DVDs sent to each chapter in late fall or early winter.

More on Electronic Discovery

Are you computer literate? Are you really ready to engage in electronic discovery? If any of the following anecdotes apply to you, better let someone else do the work. You are *computer challenged!*

1. Compaq is considering changing the command "press any key" to "press return key" because of the flood of calls asking where the "any key" is.

2. SAT technical support had a caller complaining that her mouse was hard to control with the dust cover on. The cover turned out to be the plastic bag the mouse was packaged in.

3. Another SAT customer was asked to send a copy of her defective diskettes. A few days later a letter arrived from the customer along with photocopies of the floppies.

4. A Dell Computer customer called to say he couldn't get his computer to fax anything. After 40 minutes of troubleshooting, the technician discovered the man was trying to fax a piece of paper by holding it in front of the monitor screen and hitting the "send" key.

5. A confused caller to IBM was having trouble printing documents. He told the technician that the computer had said it "couldn't find printer." The user had also tried turning the computer screen to face the printer but his computer still couldn't "see the printer."

6. An exasperated caller to Dell Computer tech support couldn't get her new computer to turn on. After ensuring the computer was plugged in, the technician asked her what happened when she pushed the power button. Her response, "I pushed and pushed on this foot pedal and nothing happens." The "foot pedal" turned out to be the mouse.

7. Another customer called Compaq tech support to say her brand-new computer wouldn't work. She said she unpacked the unit, plugged it in and sat there for 20 minutes waiting for something to happen. When asked what happened when she pressed the power switch, she asked "What power switch?"

8. Another IBM customer had troubles installing software and rang for support. "I put in the first disk, and that was OK. It said to put in the second disk, and I had some problems with the disk. When it said to put in the third disk, I couldn't even fit it in... ." The user hadn't realized that "insert disk 2" meant to remove disk 1 first.

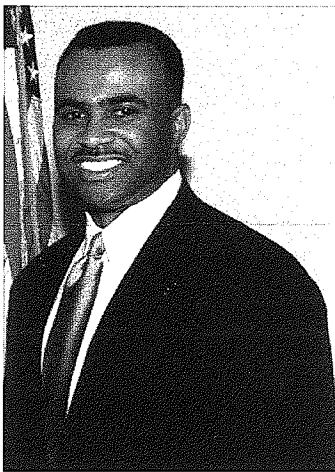
9. In a similar incident, a customer had followed the instructions for installing software. The instructions said to remove the disk from its cover and insert into the drive. The user had physically removed the casing of the disk and wondered why there were problems.

10. A woman called the Canon help desk with a problem with her printer. The tech asked her if she was running it under "Windows." The woman responded, "No, my desk is next to the door. But that is a good point. The man sitting in the cubicle next to me is under a window and his printer is working fine."

MEMBER PROFILES

An intimate look at the people who make up our section

Ken Lawson, Esquire



Employer: U.S. Attorney's Office, Tampa, Fla. I work as a criminal federal prosecutor.

Birthplace: I was born in Gainesville, Fla. It is one of the finest places on the earth.

Family: I am married to Sonia Lawson. Not only is she wonderful, but she also is a civil attorney in Tampa.

Pets: We have two dogs, Sage and Max.

First job: My first job as a lawyer was as a Marine judge advocate. At Camp LeJeune, N.C., I was assigned as a special assistant U.S. attorney (SAUSA). It was great traveling all over the Eastern District of North Carolina representing the United States in federal court.

Biggest professional challenge overcome: Becoming an assistant U.S. attorney. After being a SAUSA, I knew that I wanted to become an AUSA. I applied to nearly every office in the country, received tons of rejection letters, three interviews and one job offer in Tampa. I was extremely proud when then-U.S. Attorney Donna Bucella told me I was hired.

Biggest challenge ahead: I have submitted my application to become the U.S. attorney for the Northern District of Florida. Of course, it is up to the selection committee and the President of the United States to decide who is best qualified to serve in this honorable position. But, I just hope that they think I am qualified and worthy enough to serve the people of the Northern District of Florida.

Biggest regret: My biggest regret was never going to Okinawa when I was in the Marines. As kid, it was one of my dreams to travel to Japan to live and work. In college, I studied Japanese culture and language. I never spoke Japanese very well, but I had hoped to master the language with a military assignment to Okinawa. However, it did not happen. I will get there one day.

Pet peeve: Impolite and unprofessional people.

Sports/Hobbies: I enjoy watching Tampa Bay Buccaneer and Florida State University football games. In terms of hobbies, I run, lift weights, and study acting and singing. Over the last two years, I have been in two summer musicals.

Practice area: Federal criminal law.

Most interesting case: Rev. Henry Lyons was the head of the National Baptist Convention, the largest African-American church group. He used his position to defraud his church and donors in order to maintain a lavish life style. Our office charged him with tax evasion, wire fraud, and other offenses. The case was fascinating because it brought together issues regarding religion, race, sex, money, and power.

Future plans: If the President thinks I am worthy, I hope I may serve the people of North Florida as the U.S. attorney. If not, I will continue enjoying my profession.

Last book read: *Strategy* by B.H. Lidell-Hart. It is about the indirect method of battle, reviewed from the Greeks until World War II.

Things usually found in my refrigerator: Cartons of Tropicana orange juice. It is the best drink in town!

FAMOUS TRIALS*

Sentencing in the Case of United States vs. Susan B. Anthony

On Nov. 1, 1872, in Rochester, N.Y., Susan B. Anthony convinced New York election inspectors to register her to vote. Four days later, she voted in the election. Two weeks later she was arrested and charged with knowingly casting an illegal vote in a federal election. Anthony hoped to use her case to secure from the Supreme Court a ruling that the recently enacted "citizenship" and "privileges and immunities" provisions of the Fourteenth Amendment guaranteed to women as citizens the "privilege" of voting.

At the close of the case, the trial judge instructed the jury to find Anthony guilty, which they promptly did. Here is the colloquy between the court and Anthony during sentencing:

Judge Hunt: (Ordering the defendant to stand up) Has the prisoner anything to say why sentence shall not be pronounced?

Miss Anthony: Yes, your honor, I have many things to say; for in your ordered verdict of guilty, you have trampled under foot every vital principle of our government. My natural rights, my civil rights, my political rights, my judicial rights, are all alike ignored. Robbed of the fundamental privilege of citizenship, I am degraded from the status of a citizen to that of a subject; and not only myself individually, but all of my sex, are, by your honor's verdict, doomed to political subjection under this, so-called, form of government.

Judge Hunt: The court cannot listen to a rehearsal of arguments the prisoner's counsel has already consumed three hours in presenting.

Miss Anthony: May it please your honor, I am not arguing the question, but simply stating the reasons why sentence cannot, in justice, be pronounced against me. Your denial of my citizen's right to vote, is the denial of my right of consent as one of the governed, the denial of my right of representation as one of the taxed, the denial of my right to a trial by a jury of my peers as an offender against law, therefore, the denial of my sacred rights to life, liberty, property and ...

Judge Hunt: The court cannot allow the prisoner to go on.

Miss Anthony: But your honor will not deny me this one and only poor privilege of protest against this high-handed outrage upon my citizen's rights. May it please the court to remember that since the day of my arrest last November, this is the first time that either myself or any person of my disfranchised class has been allowed a word of defense before judge or jury ...

Judge Hunt: The prisoner must sit down — the court cannot allow it.

Miss Anthony: All of my prosecutors, from the 8th ward corner grocery politician, who entered the compliant, to the U.S. marshal, commissioner, district attorney, district judge, your honor on the bench, not one is my peer, but each and all are my political sovereigns; and had your honor submitted my case to the jury, as was clearly your duty, even then I should have had just cause of protest, for not one of those men was my peer; but, native or foreign born, white or black, rich or poor, educated or ignorant, awake or asleep, sober or drunk, each and every man of them was my political superior; hence, in no sense, my peer. Even, under such circumstances, a commoner of England, tried before a jury of Lords, would have far less cause to complain than should I, a woman, tried before a jury of

men. Even my counsel, the Hon. Henry R. Selden, who has argued my cause so ably, so earnestly, so unanswerably before your honor, is my political sovereign. Precisely as no disfranchised person is entitled to sit upon a jury, and no woman is entitled to the franchise, so, none but a regularly admitted lawyer is allowed to practice in the courts, and no woman can gain admission to the bar—hence, jury, judge, counsel, must all be of the superior class.

Judge Hunt: The court must insist—the prisoner has been tried according to the established forms of law.

Miss Anthony: Yes, your honor, but by forms of law all made by men, interpreted by men, administered by men, in favor of men, and against women; and hence, your honor's ordered verdict of guilty; against a U.S. citizen for the exercise of "that citizen's right to vote," simply because that citizen was a woman and not a man. But, yesterday, the same man made forms of law, declared it a crime punishable with \$1,000 fine and six months imprisonment, for you, or me, or you of us, to give a cup of cold water, a crust of bread, or a night's shelter to a panting fugitive as he was tracking his way to Canada. And every man or woman in whose veins coursed a drop of human sympathy violated that wicked law, reckless of consequences, and was justified in so doing. As then, the slaves who got their freedom must take it over, or under, or through the unjust forms of law, precisely so, now, must women, to get their right to a voice in this government, take it; and I have taken mine, and mean to take it at every possible opportunity.

Judge Hunt: The court orders the prisoner to sit down. It will not allow another word.

Miss Anthony: When I was brought before your honor for trial, I hoped for a broad and liberal interpretation of the Constitution and its recent amendments, that should declare ... equality of rights the national guarantee to all persons born or naturalized in the United States. But failing to get this justice-failing, even, to get a trial by a jury not of my peers — I ask not leniency at your hands — but rather the full rigors of the law.

Judge Hunt: The Court must insist. (*Here the prisoner sat down.*) The prisoner will stand up. (*Here Miss Anthony arose again.*) The sentence of the Court is that you pay a fine of \$100 and the costs of the prosecution.

Miss Anthony: May it please your honor, I shall never pay a dollar of your unjust penalty. All the stock in trade I possess is a \$10,000 debt, incurred by publishing my paper, *The Revolution*, four years ago, the sole object of which was to educate all women to do precisely as I have done, rebel against your man-made, unjust, unconstitutional forms of law, that tax, fine, imprison, and hang women, while they deny them the right of representation in the government; and I shall work on with might and main to pay every dollar of that honest debt, but not a penny shall go to this unjust claim. And I shall earnestly and persistently continue to urge all women to the practical recognition of the old revolutionary maxim, that "Resistance to tyranny is obedience to God."

Judge Hunt (in a move calculated to preclude any appeal to a higher court): Madam, the court will not order you committed until the fine is paid.

*From Professor Doug Linder's Web site at www.law.umkc.edu.

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