sideBAR

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Opening Statements

Message from the Chair

Alan Blakley

As the new year opens, we have some interesting projects in the works. We also have the talent and ability to help chapters put on programs and hope that more chapters and other organizations will be contacting us to co-sponsor events. If you have any ideas, please let me know as soon as possible and we will try to pursue them.

In February, I will be traveling to Williamsburg, Virginia to represent the Federal Litigation Section in our co-sponsorship of the International Conference on the Legal and Policy Implications of Courtroom Technology being held at William and Mary Law School's Courtroom 21. This exciting conference, also co-sponsored by the American Bar Association and with support from the Federal Judicial Center, will look at the efficiencies of courtroom technology but also the issues surrounding availability of that technology to all parties.

As I have told you before, I am working as the chair of the Sedona Conference's Working Group on Protective Orders, Confidentiality, and Public Access. We have gathered quite an impressive group of people (many of whom are Federal Bar Association members) to come together and work on questions of public access to documents produced in litigation. As many of you know, many state legislatures are currently considering sunshine in litigation legislation, and some federal courts have adopted local rules about sealing documents. However, many courts and most attorneys do not know the implications of the legislation, the rules or the precedents that are already out there. We have gathered in The Working Group some attorneys who have worked on the seminal cases as well as in-house counsel for major corporations, representatives of media groups, and private attorneys. We also have a representative group of state and federal court judges. The output of this Working Group co-sponsored by the Federal Litigation Section should be impressive. The output of the first Sedona Conference Working Group on electronic discovery has already been cited in many court precedents.

Our electronic discovery and electronic information products continue to be useful. Please remember, if you need materials for personal use or for a CLE on electronic information, they are available from the national office. Thank you again for your support of the Federal Litigation Section. If there is anything we can do to provide better service to you, please let us know.

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Inside

Message from the Editor

Michelle Hamilton

In the last issue of Sidebar, I wrote about recently leaving my criminal defense practice of over 15 years to work as a prosecutor in the U.S. Attorney's Office. The transition from private practice to federal government practice has unexpectedly been more of an adjustment than the transition from defense lawyer to prosecutor. I felt no unease walking into federal court prepared to advocate for the government as opposed to the accused. The law is the law and the mastery of its vast labyrinth is nothing short of an achievable and laudable goal. The mastery, however, of government requisitioning is not for the weak in resolve.

The time it takes to complete the paperwork necessary to obtain a $4.00 parking reimbursement would have cost a private client a mortgage payment. The steps one has to go through to

Opening Statements continued on next page

Opening Statements continued from previous page

check out a government vehicle closely resembles the index to a multi-issue appellate brief. One gets the picture.

I got the picture pretty quickly, and honestly, it is a very small thing. I have to say I even anticipated this arguable "downside" to government work. The upside . . .and very clearly a positive finding, is that the lawyers I work with are on average just as hard-working, bright and talented as, on average, those I worked with in private practice. Perhaps the small statistical sample that comprises my world doesn't mean much. Perhaps if people weren't inclined to generalize, I wouldn't feel compelled to say anything!

The article in this edition of Sidebar concerning the decrease in the number of cases that are actually tried in federal court should make the litigator (has anyone ever noticed how closely the word sounds like alligator?) pause. What significance might this have on the meting out of justice by our courts? The federal sentencing guidelines, and the current administration's move for ever stricter adherence to them, should result in more trials, not fewer. If the U.S. Congress passes legislation limiting punitive damages, what effect might this have on these trial statistics? I have a difficult time believing that the high cost of trials and/or judgments is driving this change. My guess would be that the relative costs haven't changed much over time. The question seems to me, without more information, unanswered.

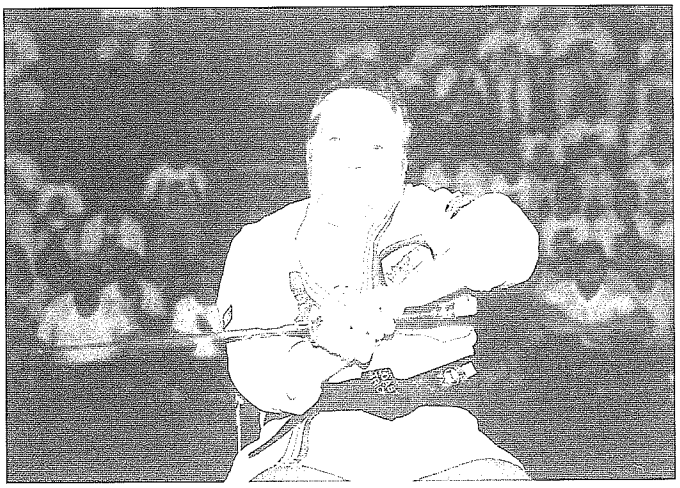
I look forward to future articles that address this issue, which is the perfect segue into an invitation to the reader to submit articles for publication in this newsletter. We have a readership of approximately 2,500 lawyers: not an unworthy captive audience!

Quotable: "The law hath not been dead, though it hath slept." William Shakespeare (1564-1616)

Member Profiles

An intimate look at the people who make up our section

Pat Flanagan



Employer: Hale Lane Peek Dennison & Howard.

Birthplace: Pittsburgh, P.A.

Pets: Deceased (life is easier now).

First job: Paperboy for Newsweek on Long Island (those who read it understand how difficult it was to fold and throw).

Biggest professional challenge overcome: Getting into the courthouse in a wheelchair.

Biggest professional challenge ahead: Adapting to life as a quadriplegic.

Biggest regret: Not seeing the truck in time.

Pet peeve: People who say "can't."

Sports/Hobbies: Martial Arts — I was awarded my 3rd degree black belt 2 years after being released from the hospital.

Practice area: White Collar Criminal Defense — Thank you DOJ!

Most interesting case: Appointed as 'stand-by counsel' for condemned teenager who waived all appellate rights in order to be executed because he believed in the Resurrection of Christ in defiance of the wishes of his parents (represented by the FPD) who argued that this belief was proof of an irrational mind. A surrealistic experience. He was executed on April 16, 1999 — Good Friday.

Future plans: After I complete my term as president of the State Bar of Nevada, I intend to get my 4th degree black belt.

Last book read: *49 pages*: A book about Thomas Paine's *Common Sense* and the role it played in shaping the debate which lead to the American Revolution.

Things usually found in your refrigerator: Apples, cheese, and a chilled bottle of Chardonnay.

NEWS IN BRIEF

The Madrid Protocol Making an International Mark May Be Easier

by Jennifer Van Kirk and Christy Hubbard

Exciting changes have arrived for state companies that do business internationally.

Beginning last November, U.S. companies can file a single trademark application that covers 60 countries. Before that, companies had to file separate trademark applications in each country or geographic region, resulting in large amounts of work and expense.

This change comes about as a result of the Madrid Protocol Implementation Act, 15 U.S.C. § 1141, which made the U.S. a member of an international treaty called the Madrid Protocol. The Protocol is a mechanism that simplifies international registration of trademarks through an "International Registration." International Registrations are filed through the U.S. Patent and Trademark Office and administered by the International Bureau of the World Intellectual Property Organization (WIPO).

Who can file an International Registration? Any person, company or association that is a national of the United States or has a "real" and "effective" industrial or commercial establishment or domicile in the United States is eligible to apply for it. It is not clear yet how the United States will define these standards, but, at a minimum, it would include any U.S. citizen or any entity that has a legal presence (*e.g.*, corporation, nonprofit corporation, LLC, partnership) in the states. The process also allows foreign companies to extend their foreign-based applications or registrations into the United States.

For many companies, the Madrid Protocol will simplify the logistics of seeking international trademark protection. However, these companies must make sophisticated strategic choices between this new option and traditional country-by-country protection. One place to begin is to examine some of the advantages and disadvantages of this new approach.

Jennifer Van Kirk is a lawyer with Lewis and Roca LLP. She is a partner and co-chair of the firm's Intellectual Property and Technology Practice Group. She has litigated cases involving trademark infringement and dilution, copyright infringement, domain name disputes, trade secret misappropriation, false advertising and violations of restrictive covenants. She also counsels clients on trademark clearance, prosecution and licensing matters, advertising and promotions, and copyright issues generally and in the online context.

Christy Hubbard is a senior associate in Lewis and Roca's Intellectual Property and Technology Practice Group.

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Advantages of International Registration include:

- Sixty countries are members of the Madrid Protocol, including China, Japan, Australia and all 15 European Union members.
- One application, in one language and one currency.
- Easy to renew, update addresses and transfer ownership.
- Expedited examination and registration.
- Less need to hire foreign counsel.
- Long-term cost savings.

Disadvantages include:

- International Registrations can only be owned by and sold to companies that are nationals of or have a real and effective industrial or commercial presence in a Madrid Protocol Member country.
- An International Registration application based in the United States may have a more limited description of goods and services—and thus more limited protection—because the United States is notoriously strict about how goods and services are identified (other countries' rules are more lenient).
- Certain key countries are not members of the Madrid Protocol, including Canada, Mexico and many Latin American countries.
- For the first five years, the entire International Registration is dependent on the base application or registration from the Office of Origin (for U.S. companies, the U.S. application or registration). If it is canceled or abandoned, the entire International Registration is also canceled, though applicants have an opportunity to transform their International Registration into individual applications in each country.
- In some cases, regional applications, such as the European Union's Community Trade Mark (CTM), may grant broader protection than an International Registration. For example, use in a single EU country is sufficient for a CTM. An International Registration must satisfy each country's use requirements.

Sidebar

News and Notes

Free Legal Resources from Law Schools and News Publications on the Internet

By Aaron R. Resnick, Esq.

There is an abundance of free legal information on the internet. In fact, some of the best legal web sites are hosted by law schools. In addition, there is a wealth of free legal news that attorneys can access with just a few clicks. The sources should not be overlooked and should be used in the practice of law with greater frequency. That is, given the growing expense of legal research and high cost of subscribing to legal publications, it would be foolish not to utilize these sources in our daily practice.

For instance, the Legal Information Institute (LII) created by Cornell Law School contains incredible amounts of information on different legal topics. Each topic includes a general description as well as links to related statutes and decisions. Especially helpful are all the federal and states rules of evidence, procedure and the entire Uniform Commercial Code. Users can also search opinions of the Supreme Court, United State Circuit Courts, selected United State District Courts, and selected Bankruptcy Courts. Also included are a directory of lawyers, lists of court opinions that are in the news, and publications by the LII. Particularly interesting is a section titled 'Law Events in the News' which highlights top legal news stories and cases.

The Jurist, maintained by the University of Pittsburgh Law School, includes current legal news, links to working papers by professors from other law schools, information organized by legal topic, links to online law review web sites, and links to federal and state court information and opinions. The Meta-Index of Georgia State University Law School provides links to searchable databases of federal legislation, federal codes, law review articles, and Supreme Court and Circuit Court opinions. The web site for Emory Law School includes links to official federal court web sites and a searchable database all Circuit Court opinions. WashLaw, the Washburn University School of Law web site, provides links to official state and federal web sites, and a searchable database of federal and state cases, statutes, and codes. The site also has links to law libraries, law journals, legal forms, bar information, and directories. Law school libraries for almost every law school can also be accessed and searched. Links to these libraries organized by state are available at Findlaw.

Not only can one access such legal information for free from law school web sites, the internet is also an excellent resource for finding the most up-to-date legal news.

CNN's Legal News (CNN) is frequently updated throughout the day and provides information on the latest legal news. Also accessible are archives of past stories and viewable video excerpts on breaking news. CNN also provides a free email subscription service of the weekly "Law Watch" which summarizes the week's important legal news and major trial verdicts.

FindLaw's News provides a list of the top legal headlines organized by legal subject matter, access to the latest press releases, and access to legal documents from breaking news stories. Users can also receive free newsletter emails of daily headlines, weekly case summaries for different legal topics, daily opinion summaries from selected jurisdictions, or one of the other 50 free subscription choices.

Law.com's Newswire and Jurist News provide daily articles relating to the law collected from different news sources. Law.com also provides the ability to have the day's legal news articles emailed to subscribers for free.

Court TV has a web site with legal news headlines, information on current trials, and special reports. Users can also find video and audio excerpts from major trials, including excerpts of depositions, trial testimony, attorney opening and closing statements, and news reports.

LexisOne's News provides headline legal news collected from different news sources. The site also organizes news under legal topics including business litigation and bankruptcy, family law, and criminal law. Lexis also hosts legal news from Mealeys, which has news of recent cases in the areas of insurance, toxic torts, drug and medical devices, product liability, intellectual property, health, international, and securities.

Lawyers Weekly USA is a newspaper designed for small firms. The web site allows access to free excerpts of articles from the paper and the full text of the article of the week. For major cases, the site includes a summary of the case's major issues and briefs for the case. There is also a list of recent verdicts and settlements. The full text of articles and access to archives are only available to paid subscribers of the newspaper.

National Law Journal also has an online version of their publication. Information on the site includes recent Federal Circuit Court decisions, verdicts and settlements, legislative information, information on the current Supreme Court docket, and special reports on legal issues. The site provides access to archives for no cost, but full case reports are available for a fee.

Court News provides news on recent court rulings and information on new civil cases in federal and state courts. Summaries of developments in Federal Appellate Court cases are organized by circuit. The site also includes information on proposed legislation.

The online ABA Journal has articles on newsworthy case developments and articles relating to the legal profession, such as articles on experiences of practicing attorneys and reports on legal reform. American Lawyer has an online version of their magazine and is focused on news about lawyers, law firms, and tips for legal practice.

As lawyers, we should utilize the free services that are available to us. They will make lawyering easier, more economic and in some cases more interesting.

Sidebar

Law School Web sites

Legal Information Institute (http://www.law.cornell.edu)

Jurist (http://jurist.law.pitt.edu)

Meta-Index (http://gsulaw.gsu.edu/metaindex)

Emory Law School (http://www.law.emory.edu/caselaw)

WashLaw (http://www.washlaw.edu)

Findlaw (http://stu.findlaw.com/schools/usaschools/index.html)

Legal News Web sites

CNN's Legal News (http://www.cnn.com/LAW)

FindLaw's News (http://news.findlaw.com)

Law.com's Newswire (http://www.law.com/newswire)

Jurist News (http://www.jurist.law.pitt.edu/morenews.htm)

Court TV (http://www.courttv.com/home_news/index.html)

LexisOne's News (http://www.lexisone.com/news)

Mealeys (http://www.mealeys.com/index.html#lawnews)

Lawyers Weekly USA (http://www.lawyersweeklyusa.com)

National Law Journal (http://www.nlj.com)

Court News (http://www.courtnews.com)

ABA Journal (http://www.abanet.org/journal/redesign/home.html)

American Lawyer (http://www.americanlawyer.com)

Aaron R. Resnick, Esq. Mr. Resnick is a commercial litigator at Gunster, Yoakley & Stewart, P.A., www.gunster.com, and specializes in litigating commercial fraud cases.

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FOOD FOR THOUGHT

U.S Suits Multiply, but Fewer Ever Get to Trial, Study Says

By Adam Liptak

On television and in the popular imagination, lawsuits and prosecutions end in trials, in open court before a jury. In reality, according to a new study, trials have become quite uncommon.

In 1962, the study says, 11.5 percent of all civil cases in federal court went to trial. By last year, that number had dropped to 1.8 percent. And even though there are five times as many lawsuits today, the raw number of civil trials has dropped, too. They peaked in 1985 at 12,529. Last year, 4,569 civil cases were tried in federal court.

"What's documented here," William G. Young, the chief judge of the Federal District Court in Boston, said in a telephone interview, "is nothing less than the passing of the common law adversarial system that is uniquely American."

The percentage of federal criminal prosecutions resolved by trials also declined, to less than 5 percent last year from 15 percent in 1962. The number of prosecutions more than doubled in the last four decades, but the number of criminal trials fell, to 3,574 last year from 5,097 in 1962.

The study, based on data complied by the federal court system, was prepared by Marc Galanter, who teaches law at the University of Wisconsin and the London School of Economics, for the American Bar Association.

"This is a cultural shift of enormous significance," said Arthur Miller, a law professor at Harvard.

Opinions vary on whether the shift is a positive one. Negotiated settlements may satisfy both sides in a way a win-or-lose trial cannot, and pretrial dismissals of cases by judges may avoid needless trials of frivolous claims. Both of these alternatives to trial are less cumbersome, less expensive and more efficient.

On the other hand, some studies suggest that individuals suing companies fare considerably better before juries than they do in settlements and before judges, meaning that a decline in the number of trials may hurt plaintiffs with valid claims.

Judges, scholars and lawyers gathered over the weekend in San Francisco for a bar association symposium to discuss the study. Among the possible explanations for what the meeting's organizers call "the vanishing trial" is a growing antagonism to trials by lawyers and judges, who consider them costly and risky. They prefer negotiated settlements and pretrial determinations by judges based only on paper submissions.

"There is a striking philosophical, ideologically driven view that is hostile to trials," said Judge Patrick E. Higginbotham of the United States Court of Appeals for the Fifth Circuit, in New Orleans. He attributed the view to those who prefer mediation to adjudication.

Others view the trend as progress.

"If a trial occurs," said Samuel R. Gross, a law professor at the University of Michigan, "it usually means a whole lot of efforts by a whole lot of people have failed."

Paul Butler, a law professor at George Washington University, disagreed. He said the loss of this form of dispute

Food for Thought continued on next page

Food for Thought continued from previous page

resolution was a devastating one. "Nobody does trials like Americans," Professor Butler said. "We made it an art form. It's almost as fundamental a part of our culture as jazz or rock'n' roll."

Data from the state courts, which handle most lawsuits, are less complete and harder to interpret. Legal experts at the National Center for State Courts have studied the available data and say the patterns in them, particularly as they concern jury trials as opposed to those before only judges, are broadly consistent with those in the federal courts.

Judge Higginbotham recalled his life as a federal trial judge in Texas a quarter-century ago. "When I went on the bench," he said, "we tried cases. I sometimes had three juries deliberating."

In 1962, the average federal judge conducted 39 trials a year, including both civil and criminal cases. These days, that number has fallen to 13. Judges spend the rest of their time doing such things as supervising the exchange of information between parties, deciding pretrial motions and urging or approving settlements and plea bargains.

The dearth of trials has resulted in a sort of vicious circle. Many lawyers who call themselves litigators have little trial experience, which may in turn make them wary of taking cases to trial.

"We're almost moving into a barrister model," said Patricia Lee Refo, an Arizona lawyer and official of the American Bar Association, referring to the separate caste of lawyers who try cases in Britain.

On the criminal side, there is almost no dispute that the falling number of trials in the federal courts is because of the revisions in sentencing laws. Defendants who insist on a trial can face much longer sentences than those who accept a plea bargain.

The civil trend is harder to explain, and legal experts have many theories.

Some point to the rise of arbitrations and other less formal means of resolving disputes. Though the number of cases filed in court has continued to increase, it may be that some sorts of cases have gone to other forums. Injury and contract cases, which represented 74 percent of all federal civil trials in 1962, accounted for 38 percent last year, according to Professor Galanter. Those categories of cases, he said, have largely been replaced by employment discrimination and other civil rights cases, which now represent a third of all federal civil trials.

The sheer complexity and cost of litigation, others say, make settlements more attractive. The cost of a trial can exceed the cost of a settlement, giving defendants an incentive to settle. Plaintiffs and their lawyers, on the other hand, often prefer the certainty of a settlement to the possibility of recovering nothing at trial.

"The striking problem," Professor Gross said, "is that we have generated a procedure that is way too expensive if actually employed."

But Gillian Hadfield, a law professor at the University of Southern California, said settlements might actually be in decline.

"We need to follow up on this initial study to confirm these numbers," Professor Hadfield said, "but at this point it looks as though the percentage of cases terminated in settlement has fallen by between 10 and 15 percentage points, from approximately 50 percent in 1970 to between 35 and 40 percent during the 1980's and 1990's."

By contrast, she continues, "nontrial adjudications" — written decisions by judges typically based only on papers submitted by the parties — have risen to 50 percent from 32 percent since 1970.

Professor Miller said such judicial decisions can be troubling. "We speak glowingly of letting people have their day in court," he said. "Now they have their day on papers."

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FEDERALLY SPEAKING

Attorneys at ABA Conference Discuss Changes to Rule 23

Perhaps the most controversial change made this year to Fed.R.Civ.P. 23 is the new provision set forth in subsection (e)(3) giving courts authority to set a second opt-out period in settlement cases, according to class action experts discussing the latest changes to the federal class action rule, which took effect Dec. 1. The discussions were held Nov. 7 as part of the American Bar Association's Seventh National Institute on Class Actions.

New Rule 23(e)(3) provides a second opt-out opportunity to members of a Rule 23(b)(3) class when the original opt-out period has expired before settlement terms are known.

The new second opt-out provision was not made mandatory, Judge Lee Rosenthal explained, because in civil rights cases and other litigation with modest monetary goals, the cost of notice may be too great. However, the class action subcommittee of the U.S. Judicial Conference's Advisory Committee for Federal Rules of Civil Procedure, which drafted the changes, felt that it would be necessary in some cases, particularly if the settlement terms changed significantly between the time the original class notice was sent and the time a settlement was consummated, she said.

Rosenthal, of the U.S. District Court for the Southern District of Texas, chaired the class action subcommittee that developed the latest rule changes. She is now chair of the civil rules committee.

Dinita James, of Ford & Harrison, Tampa, Fla., moderator of one panel discussion on the rule changes, asked other panelists to comment on use of the second opt-out provision. Brian Wolfman, of the Public Citizen Litigation Group, Washington, D.C., who often represents objectors, said that the second chance to opt out would be important in "at least half the cases" in which the claims "have relatively high value." The important consideration will be "the size of the claims at issue and whether the claims would support individual litigation."

Defense attorney John Beisner, of O'Melveny & Myers, and plaintiffs' attorney Cyrus Mehri, of Mehri & Skalet, both in Washington, D.C., each had praise for the new rule. Beisner observed that, "I would be very concerned about a system where second opt outs were impossible" and likewise where they were mandatory. Mehri observed that the rule "encourages class counsel to take its role as seriously as possible." If there is monetary relief available, people should have the right to opt out, he said.

At a later panel discussion, plaintiffs' attorney John P. Coffey, of Bernstein Litowitz Berger & Grossmann, New York, said he would not ask for a second opt-out period if he had a good deal because it is "dangerous to global peace." Defense attorney Peter L. Winik, of Latham & Watkins, Washington, D.C., agreed, though he thought the provision might be useful in a case where a collateral attack could be anticipated.

Plaintiffs' attorney Lisa Mezzetti, of Cohen, Milstein, Hausfeld & Toll, Washington, D.C., said that she thought the second opt-out provision was created by professional objectors, and predicted that it would be requested over and over for some time. The only time she would want to use it would be when the original notice went out years earlier.

Class Action Fairness Act. During the first panel discussion, Beisner also summarized the Class Action Fairness Act, which has passed the House as H.R. 1115, but is still pending in the Senate as S.B. 1751. A recent attempt to bring the bill before the Senate failed by one vote.

The legislation would expand federal court jurisdiction over large, interstate class actions by requiring only that one plaintiff and one defendant be citizens of different states, a concept known as "minimal diversity." The bill provides for removal of all cases with $5 million in aggregate damages, and includes "mass actions" from states that do not certify class actions. An amendment by Sen. Dianne Feinstein (D-Calif.) would prohibit removal of suits in a defendant's home state when twothirds of the class members are also residents of that state.

The measure also targets what proponents refer to as "abuses of interstate class actions," including huge attorneys' fees at the expense of class members, state court judges ruling on issues of national import, "venue shopping" by attorneys seeking favorable rulings by state court judges, and coupon settlements— settlements that require the plaintiff to purchase something from the defendant in order to obtain a benefit from the settlement.

The House and Senate versions of the bill differ somewhat, with the House bill allowing a right of appeal of all class certification rulings, while the Senate bill would stay with discretionary review under Rule 23(f). The House bill would also give some of the changes retroactive effect.

Wolfman said that plaintiffs and consumer advocates oppose the bill because it "sweeps far too broadly." He noted that "choice of forum is extremely important in many circumstances," and research shows that lawyers know which courts are better for their cases. In federal cases, plaintiffs win 71 percent of the time when they file in federal court, but only 30 percent of the time when the case is removed.

Mehri called the bill "overreaching." He suggested that real reform would be either a multidistrict panel for state courts, or legislation limiting state cases to statewide, rather than nationwide, jurisdiction.

Rosenthal said that the rules committee adopted a "nuanced" statement that "large nationwide and multistate class actions" belong in federal court, and that state courts should have jurisdiction over state cases. However, the Judicial Conference has not taken a position on the jurisdiction issue because it is a political question that belongs in Congress, Rosenthal said.

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Sidebar is published by the Federal Litigation Section of the Federal Bar Association. The views expressed herein do not necessarily represent those of the FBA. Send all articles or other contributions you may have to: Michelle Hamilton, U.S. Attorney's Office, Two Renaissance Square, 40 North Central, Suite 1200, Phoenix, AZ 85004, (602) 514-7500, michham@hotmail.com.

Federal Bar Association Membership Application *Raising the Bar to New Heights*

1. Please tell us about yourself *(Please Print)*

First Name M.I. Last Name

Title

○ Male ○ Female Date of Birth __/__/__

First Admission to Bar in U.S. (required, unless applying for law student or foreign associate status)

Court State Bar Date

Please supply both your business and home addresses below.

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Type of Practice

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○ Government ○ Corporate ○ Judiciary

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Signature Date

The undersigned hereby applies for membership in the Federal Bar Association and agrees to conform to its Constitution and Bylaws and to the rules and regulations prescribed by its National Council.

X
Signature of Applicant *Date*

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