FEDERAL BAR ASSOCIATION
of the Western District of Washington

NEWS NEWS NEWS NEWS

VOL. 29 NO. 1 FALL 2007

PRESIDENT'S MESSAGE

by Steve Y. Koh

We are fortunate to have a distinguished bench that is deeply supportive of the lawyers who practice within this District. Led by Chief Judge Robert Lasnik, the Court is now at full strength with the appointments of Judges Benjamin Settle and Richard Jones, and enjoys very different but equally beautiful courthouses in Tacoma and Seattle. The role of the Federal Bar Association of the Western District of Washington is to serve the needs of the bench and bar in all aspects of federal practice.

I have had the privilege of serving as your President in 2007. To be more precise, my term began on December 7, 2006, the evening of the Association's Annual Dinner, and will end on December 5, 2007, shortly before we gather to enjoy our 24th Annual Dinner at Seattle's Fairmont Olympic Hotel. In between these mileposts, the work of the Association has been accomplished by fifteen committees, with the support of four officers and five trustees. We have had a very productive year.

For example, the FBA-WDW presented several well-attended programs that were either free or discounted for our members, including:

- A "View from the Tacoma Bench" roundtable program organized by our Ethics and Practice Committee, which featured a panel of the Tacoma district court, magistrate and bankruptcy judges moderated by J. Richard Creatura, and an "interview" of Judge Settle conducted by John Wolfe.

- A series of three free CLEs presented by the Appellate Practice Committee: Ninth Circuit practice, presented by Clerk of Court Cathy Catterson; writing effective amicus briefs, presented by former Judge Robert Alsdorf and Kristina Bennard; and preserving errors for appeal, featuring Judges Betty Fletcher, Richard Tallman and Robert Bryan.

- A swearing-in ceremony for new admittees, arranged by our Membership Committee in connection with the annual District Meeting. The ceremony was conducted by Chief Judge Lasnik, with support from Judge Tallman and Judge Philip Brandt, and was preceded by a panel of clerks and practitioners who provided tips to the new lawyers.

- The annual bankruptcy bar breakfast organized by the Bankruptcy Committee, featuring Judge Thomas Zilly who recently concluded his term as Chair of the Judicial Conference's Advisory Committee on Bankruptcy Rules.

- The annual CLE presented by our CLE Committee, which included many of our judges and prominent practitioners addressing "ADR at Middle Age," "Individual Rights and Due Process in an Age of Terrorism," and "The New Electronic Discovery Rules."

The Association's other committees have also been hard at work on their respective projects. For instance, the Local Rules Committee is working with the Court on local patent rules, a revision of the local rules primarily to conform to the ECF system, and changes to Local Rule

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On the cover: Dale Chihuly's "End of the Day" chandelier, in the rotunda of the Union Station Courthouse in Tacoma.

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TACOMA JUDGES SHARE PRACTICE POINTERS

by Merrilee A. MacLean

On Tuesday, November 6, 2007, 91 practitioners joined eight of the judges having chambers in Tacoma for a "View From the Tacoma Federal Bench" roundtable program focusing on ethics, practice and procedures in federal court. Following the program was a reception honoring the judges and welcoming the newest member of the Tacoma bench, the Honorable Benjamin Settle. The program was sponsored by the Ethics and Practice Committee of the Federal Bar Association of the Western District of Washington.

J. Richard Creatura addresses the attendees at the Tacoma roundtable program.

U.S. District Judges Ronald Leighton and Benjamin Settle, Senior District Judge Franklin Burgess, Magistrate Judges J. Kelley Arnold and Karen Strombom, and Bankruptcy Judges Philip Brandt and Paul Snyder participated in the roundtable, which was moderated by J. Richard Creatura of Gordon, Thomas, Honeywell, Malanca, Peterson & Daheim, PLLC. The materials included "How to Win Cases and Influence Judges – Some Do's and Don'ts for the Trial Lawyer," prepared by Judges Leighton and Bryan; as well as the Pre-trial and Trial Codes of Conduct established by the American Trial Lawyers Association. Creatura polled the judges on examples of good and bad practice in their courts, and discussed ethical challenges facing the bench and bar. The judges shared their thoughts on discovery disputes, telephonic conferences, the benefits of oral argument, and their desire to make the administration of justice as efficient as possible. The judges and audience also reviewed the Ninth Circuit Jury Improvement Task Force Report, and discussed possible changes in procedures for civil cases – including attorney-conducted voir dire, procedures for entertaining questions from jurors during the course of a case, and the possibility of allowing deliberations prior to the conclusion of the case. No decisions were reached, but the discussion was lively.

Following the roundtable, the focus turned to Judge Settle, the newest appointee to the Tacoma bench. Responding to questions from John Wolfe, who had served on the Judicial

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Judge Settle

FILLING THE GAP: HOW THE FEDERAL CIVIL RIGHTS LEGAL CLINIC IS MAKING A DIFFERENCE

by Tracy M. Morris

Two years ago, the Pro Bono Committee of the Federal Bar Association of the Western District of Washington approached the King County Bar Association's Neighborhood Legal Clinic Program with a proposal to pilot a federal legal clinic focused on an underserved population in our District – federal pro se litigants. In March 2006, under my direction and with the help of six dedicated volunteer attorneys, the Federal Civil Rights Legal Clinic was launched.

The origins of the Clinic date back to 2003, when an FBA-WDW taskforce studied the availability of legal services for low-income civil litigants in federal court in this District. The taskforce identified several gaps in legal services and determined how best to address them. One such gap was the lack of a designated resource to assist pro se litigants with federal legal questions. The taskforce proposed that the FBA-WDW establish a periodic federal legal clinic to assist this population with their unmet legal needs.

According to the taskforce's findings, the majority of pro se cases filed each year are civil rights related, with particularly high numbers of employment and prisoner rights cases. While the District employed several pro se law clerks to handle pro se prisoner filings, and provided a comprehensive pro se handbook to assist such litigants, the District lacked a designated resource to directly assist individuals with their federal legal questions. The KCBA, along with local government agencies, handled some of the non-prisoner caseload, but the service gap remained.

With the support of then-FBA-WDW President Valerie Hughes, and in partnership with the KCBA, the Clinic was created to channel much of this overflow to one location where competent and free federal legal guidance could be provided. Nearly 100 clients later, the Clinic is fulfilling its mission. Over the past eighteen months, the Clinic has provided legal advice to clients with employment discrimination, disability, housing, prison misconduct, and excessive force claims. Approximately thirty percent of these cases have involved employment-related issues.

Navigating the federal courts can be daunting for even the most sophisticated legal practitioner, and for the many pro se litigants in our District who seek access to our courts, the system can seem impenetrable. By providing limited legal representation together with self-help materials, the Clinic is able to make a difference in the lives of this underserved population.

The FBA-WDW wishes to thank both the KCBA for its continued partnership, and the following volunteer attorneys (past and present) who have given so generously of their time to the Federal Civil Rights Legal Clinic: Theodore Angelis, Karina Bull, Sunny Choi, Sarah Dunne, Lisa Hanna, Daniel Johnson, Tracy Morris, Paula Olson, G. Val Tollefson, Roger Townsend, Thomas Wong and Todd Wyatt.

Tacoma Judges
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Selection Committee, Judge Settle discussed his background, including his years of service as a JAG officer and his private practice in Shelton, Washington.

Lawyers and judges alike commented on the success of the program in providing a collegial and open forum in which to share perspectives and become better acquainted. The Ethics and Practice Committee is considering similar programs in the future, and welcomes participation by members of the FBA-WDW. To discuss joining the committee, please contact Alex Baehr or Merrilee MacLean, co-chairs.

2007 PRO BONO SERVICE AWARD RECIPIENTS

The Federal Bar Association of the Western District of Washington breaks with tradition this year and honors three distinct pro bono panels of attorneys. These attorneys have given generously of their time and expertise to countless federal pro se litigants in this District. The Association applauds each of them for working to make justice accessible to a segment of the population whose legal needs would otherwise go unmet.

Pro Bono Screening Panel

Carolyn Cairns
Charles Eberhardt
Clifford Freed
Gregory J. Hollon
Amanda E. Lee
Sidney J. Strong
Marcella Fleming Reed
Philip A. Thompson

Pro Bono Panel

Alexander A. Baehr
Lonnie G. Davis
William E. Fitzharris
Jared D. Hager
Gloria S. Hong
Patrick J. Kang
Jerry R. Kimball
Mathew J. Lysne
Kenneth M. Odza
Laurence A. Shapero
G. Val Tollefson
Todd W. Wyatt

Federal Civil Rights Legal Clinic

Theodore J. Angelis
Karina Bull
Sarah A. Dunne
Lisa R. Hanna
Daniel F. Johnson
Tracy M. Morris
Paula T. Olson
Roger M. Townsend
Thomas Wong
Todd W. Wyatt

President's Message
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5(g) on the sealing of court records. The Pro Bono Committee continued to improve and strengthen its already successful screening panel that reviews for merit potential pro bono cases received from the Court and maintains a roster of attorneys willing to take the cases. The Committee's new Federal Civil Rights Legal Clinic is described on page 5 of this issue of the FBA-WDW News. The ADR Committee, which assists the Court in administering Civil Rule 39.1 and is responsible for supporting the process of certifying mediators and arbitrators, has organized an intensive 16-hour program over four days in January and February 2008 to provide the training necessary to initially qualify for certification on the District's register of neutrals.

Finally, this year, the Association undertook a number of special projects. The Website/ Communications Committee developed the first ever logo for the FBA-WDW, of which we are very proud. We are also in the process of considering potential changes to modernize the oath of attorney admission (you may recall having promised to "demean [your]self uprightly"). Finally, at the suggestion of Chief Judge Lasnik, the Association has begun a project to take the oral histories of our senior judges. Joe McMillan is leading that effort, which you will hear more about in 2008.

I hope the foregoing not only gives you a sense of what your Association does in between our December gatherings, but perhaps also sparks an interest in participating on one of our committees.

I look forward to seeing you at the Annual Dinner and CLE!

PROFILE OF JUDGE BENJAMIN H. SETTLE

by Paula T. Olson

The newest member of the U.S. District Court for the Western District of Washington at Tacoma comes from outside the District's major metropolitan areas and is not a familiar I-5 corridor face. Judge Benjamin H. Settle, a native of Olympia and Shelton, Washington, is a warm, genuine and thoughtful person, eager to get to know the members of the Federal Bar Association of the Western District of Washington.

Judge Settle and his four siblings were raised in Olympia by their father, a radiologist, and mother, a homemaker and community volunteer. After graduating from high school, Judge Settle attended Claremont McKenna College (previously known as Claremont Men's College), from which he graduated in 1969. He was an Army ROTC Cadet, and upon graduation was commissioned as a Second Lieutenant in the Infantry to serve out a two-year military commitment. The Army gave him permission to attend law school during his period of military service, and he graduated from Willamette University School of Law in 1972.

Judge Settle joined the Army JAG Corps and was initially stationed at Fort Bragg, North Carolina, where he prosecuted military crimes. He was then transferred to Fort Lewis to work as a defense attorney. He was somewhat more challenged by that position, which allowed him to help defendants navigate the military justice system and possibly find new direction in their lives. In 1976, a little more than three years after his transfer to Fort Lewis, Judge Settle left the Army and went into private practice.

His first office was with an Olympia lawyer named Don Miles. Judge Settle did primarily criminal defense work, in part under contract with Mason County. One day he received an unsolicited call from a well-known and respected trial lawyer, Frank Heuston, with an offer to join Heuston's law practice in Shelton. Judge Settle's reaction was mixed. He appreciated the excellent opportunity to work with a lawyer of Heuston's stature, but he had no desire to move to Shelton. There was no harm in discussing the offer, though, so Judge Settle agreed to meet Heuston at his office.

Upon arriving in Heuston's office, Judge Settle discovered that Heuston still had a manual typewriter and no computer. Even in the early 1980's, this was a bit behind the times. Heuston, with his feet on his desk, welcomed Judge Settle and they talked about employment. Throughout the discussion, Judge Settle listened for the billable hour requirement and salary. Since that information was not provided, he finally asked. Heuston told him, "You take care of the profession and the profession will take care of you." Intrigued, Judge Settle accepted a position with the firm.

From there, his career took off in many directions. At the beginning of his association with Heuston, Judge Settle was a "jack of all trades," litigating whatever cases came in the door. In the mid-1990's, he stopped litigating and began representing utilities, hospitals, and municipal and private corporations as general counsel. He also entered into a contract to serve as Shelton's City Attorney from 1989 to 2002, ending that relationship only when the city made the position full-time. Judge Settle continued his Shelton practice until he took the federal bench in July 2007.

Judge Settle never felt a strong call to the bench. When Mason County opened a second seat on the Superior Court, he thought briefly about that position, but the prospect of taking over a docket consisting mostly of criminal cases was not as appealing as continuing his private practice. Given his love of intellectual discourse, Judge Settle actually thought that an appellate judgeship might be more to his liking. Years later, in 2005, when U.S. District Judge Franklin Burgess assumed senior status, several

of Judge Settle's friends – citing his temperament, broad legal experience, and integrity – suggested that he throw his hat into the ring. Although taking a judicial position had not been in Judge Settle's career plans, he decided to give it some serious thought. His practice, although satisfying, was not as stimulating as it had once been, and a federal judgeship would certainly be challenging and give him another opportunity to serve his country. He submitted an application, and the rest, as they say, is history. Judge Settle is somewhat disappointed that he did not receive the appointment call directly from President Bush, but he hopes to meet the president one day.

Asked to describe his strengths, Judge Settle cites his analytical mind, his easygoing nature, his litigation experience, and the wide range of issues on which he advised individuals and corporate clients. He is known for his ability to see both sides of any argument, and that ability – together with his strong sense of fairness – will guide his resolution of the difficult issues that will undoubtedly come before him as a federal judge. Judge Settle says his weaknesses are primarily that he will only sit as an active judge for about ten years (he just turned 60), although his intends to hear cases as long as his health allows; and that he has no prior experience litigating in federal court.

Judge Settle has four primary judicial role models: Judges Frank Baker, Hewitt Henry, and Robert Doran; and Justice Gerry Alexander. He particularly admires these jurists for their willingness to take the time to train young lawyers; and for their strong sense of, and commitment to, justice and service to the public. Judge Settle will work to emulate those qualities in his new position.

In his free time, Judge Settle enjoys reading – primarily non-fiction historical narratives like *John Adams* by David McCullough. Judge Settle finds these books as entertaining as fiction, but much more interesting because they are about real people. For every four non-fiction books, he reads one work of fiction. He is also an avid outdoorsman, hiking and skiing whenever possible. And of course he is a devoted husband and father, having married his wife, Lynn – a third-grade teacher at Mason County Christian School – thirty-four years ago. He and Lynn have five children. With the youngest now in college, Ben and Lynn Settle are almost empty nesters. Two of their daughters are teachers, and a third will earn her teaching certificate next year. Their son is in law enforcement in Seattle.

Judge Settle's chambers staff is well able to assist him. His judicial assistant, Trish Graham, worked for Judge Carolyn Dimmick and Judge William Dwyer for many years. Law clerk Deidra Nguyen was trained by Judge Robert Bryan before she transferred to Judge Settle. Law clerk Kyle Smith grew up next door to Judge Settle. After excelling at the University of Miami Law School, he stayed in Miami to begin his legal career. When he learned that Judge Settle was a candidate for a federal judgeship, he saw that as an opportunity to move back to Washington.

Judge Settle is in the process of redecorating the chambers of Judge Jack Tanner, whom he regrets not having had a chance to get to know before his passing. So far, Judge Settle has not sighted Judge Tanner's spirit. Advice and opinions regarding color schemes would be welcome.

Judge Settle has a couple of tips for lawyers who will appear before him. First, get to the heart of the matter as soon as possible. Most cases can be evaluated within a month of arriving in the office, and the client is best served when lawyers zero in on the optimal resolution without going down "bunny trails." And second, make a bona fide effort to settle early. In cases where attorney fees may be awarded to the prevailing party, Judge Settle will always look to see if the attorneys were more interested in large fees than in protecting the interests of their clients through early alternative dispute resolution.

The next time you see Judge Settle, be sure to introduce yourself and welcome him to the family of federal practitioners in the Western District of Washington. The District is very fortunate to have him on board.

JUDGE RICHARD A. JONES CONFIRMED

On October 4, 2007 the U.S. Senate confirmed King County Superior Court Judge Richard A. Jones as a U.S. District Judge. Judge Jones will fill the seat left vacant by Judge John Coughenour when he took senior status in 2006. Judge Jones will be profiled in an upcoming issue of the FBA-WDW News.

NINTH CIRCUIT JUDICIAL CONFERENCE

WAIKIKI, HAWAII, JULY 2007

by Paula T. Olson

This year's Ninth Circuit Judicial Conference had a definite northwest flair because its chair was our own Chief Judge Robert Lasnik. Intermixed with excellent, informative programs were wonderful meals, entertainment, and opportunities to greet new and old friends – judges and lawyers alike. Because most of the programs were in a panel format with presenters from different disciplines, the topics were discussed from a variety of perspectives, providing for a more in-depth and interesting analysis.

One interactive program reexamined the nation's drug abuse policies by discussing appropriate methods of addressing criminal behavior involving drugs: imprisonment, probation, and treatment. Panelists and participants expressed differing opinions on the effectiveness of various governmental drug policies.

Secrecy in the courts was also a hot topic, giving participants the opportunity to learn about changes in confidentiality brought about by the electronic age and how to juggle and protect the interests of the media, the public, corporations, litigators and judges. Roundtable discussions gave everyone a chance to voice opinions on the appropriate ways to address these issues in the courtroom.

Break-out sessions for individual practices also included some exceptional programmatic gems. For example, in the bankruptcy program, Professor Melody Kapilialoha MacKenzie gave a fascinating historical and legal overview of the presence of native Hawaiians in the State of Hawaii and their efforts at self-determination. In the same program, incoming Chief Judge Alex Kozinski told us a little about how he sees his role as chief. He revealed nothing startling, as he intends to feel his way at first and seek more involvement from other judges in decision-making.

Another session provided an enlightening statistical overview of the 2006-2007 Supreme Court term and how the Ninth Circuit fared. We learned that the Supreme Court decided 73 cases in 2006-2007, 10 fewer than in the previous term. That number was also substantially fewer than the 150 cases decided 20 years ago and 100 cases decided 10 years ago. Of the 73 cases decided last term, 21 came from the Ninth Circuit and 19 of those were reversed in full or in part. The next closest circuit in terms of the number of cases reviewed was the Sixth Circuit, with seven cases and four reversals. 42.1% of the Ninth Circuit reversals were unanimous, and 31.6% were by a 5-4 vote. The justice who voted most often to reverse was Justice Clarence Thomas, with 20 reversal votes, followed by Chief Justice John Roberts, Jr. and Justices Antonin Scalia and Samuel Alito, Jr. with 19 reversal votes apiece, and Justice Anthony Kennedy with 18 votes. Justice John Paul Stevens found the least fault with the Ninth Circuit, voting only 10 times to reverse, closely followed by Justices David Souter (11), Ruth Bader Ginsburg (12) and Stephen Breyer (12).

A most timely and controversial topic was the role of the courts in times of war. The panel of distinguished experts in this area of law discussed the history of action and inaction by the courts on cases arising in a wartime context, including current issues pertaining to the confinement of suspected terrorists at Guantanamo Bay.

I particularly enjoyed a program featuring a conversation with Justice Stevens. A soft- spoken, delightful man, he answered questions from panelists, demonstrating an amazing memory and articulate speech, and leaving no doubt that his advanced age was no impediment to carrying out his responsibilities as a Supreme Court Justice. He assured us, however, that he has designated someone to tell him

when it is time for him to step down – that is, if his wife doesn't do so first. Morning Suduko, bridge, swimming, tennis, golf and family keep him fit and happy.

Acknowledging the statistics, Justice Stevens stated that he does not intend to pick on the Ninth Circuit in the selection of cases to decide, although he cannot speak for his colleagues. He particularly took umbrage with judicial fact finding, using the case of *Scott v. Harris*, ___ U.S. ___, 127 S.Ct. 1769, 1781 (2007), to make his point. There, the opinion centered on the interpretation of a videotape of a disputed police chase. Believing that the courts had engaged in fact-finding, he had called his fellow justices "jurors" in his dissent, and he told us that he had almost begun his opinion with the words "My fellow jurors...." He explained that the smaller number of cases decided by the Supreme Court in recent terms was a function of the court using better judgment about what cases to hear. He said that the workload in the past had been "unbearable."

Washington's Western and Eastern Districts were honored to have Justice and Mrs. Stevens join us for the joint district dinner. Justice Stevens has ties to Washington due to his military service, and he and Mrs. Stevens seemed to enjoy reminiscing with us.

With the end of her term as Chief Judge approaching, the Circuit expressed its appreciation of Judge Mary M. Schroeder in a poignant video biography recounting her many accomplishments and her rise to Chief Judge. Clearly surprised by this acclamation, Judge Schroeder graciously accepted our gratitude and, in turn, expressed her thanks to the Circuit's judges and her staff.

The conference was not just about legal issues. Perhaps most fascinating was a presentation on asteroids and the danger they present to Earth. Several scientists dispassionately and convincingly explained that Earth is in danger of colliding with a huge "killer" asteroid within the lifetimes of our great-grandchildren. Not leaving anything to chance, science is addressing the problem with a special device designed to deflect any such asteroid away from Earth in time to avoid the collision. The amazing technology of this venture stifled any audience snickers, and the opportunity to feel and hold chunks of asteroids made the situation all the more real.

A presentation on ocular health changed many participants' attitudes toward the care and wellbeing of their eyes. The session explored various conditions of the eyes in middle age and older, the many options that are available to correct those conditions, and prophylactic measures that can be taken to prevent the conditions from ever arising. The bottom line: use eye drops before or as soon as your eyes start to feel dry.

A resolution was passed by the vote of the judges and district lawyer representatives that the ban on photographing, recording, and broadcasting of district court civil proceedings should be reevaluated. Factors taken into consideration were the number of times Ninth Circuit proceedings had been electronically covered with positive results, the significant advances in technology since the ban was instituted, the promotion of public understanding of the role and function of the federal judiciary, and the support of the Lawyer Representative Coordinating Committee. The resolution provided that the Circuit would appoint a committee to prepare a presentation to the Judicial Conference of the United States proposing a change in the current rule.

Congratulations are due to Fred Tausend for receiving the John P. Frank Award, which recognizes an outstanding lawyer practicing in the Ninth Circuit. A video told the story of his amazing career, and members of his family gave us insights to the man outside the office.

Entertainment included a concert by The Highwaymen, a golden folk group popular in the 1960's, with Circuit Judge Steven Trott playing guitar and mandolin. Participants also toured Pearl Harbor and visited the Bishop Museum. The conference ended with enthusiastic kudos to Chief Judge Lasnik, Circuit Judge Richard R. Clifton (Program Chair), and their respective committees for an informative and provocative conference. The next Judicial Conference is scheduled to take place in Sun Valley, Idaho in July 2008.

SECOND WILLIAM L. DWYER JURY PROJECT AWARD GIVEN

by Kevin D. Swan

On May 29, 2007, at a ceremony at the University of Washington School of Law, I announced the winners of the second William L. Dwyer Jury Project Award writing competition on the American jury system.

Through the generosity of various contributors from the local bar, the program was able to give two awards this year. First place and a $1,500 award went to John Goldmark for his article titled "A Better Cross-Section of the Community: Bolstering the Quality, Function, and Legitimacy of the Jury." That article is published in this edition of the FBA-WDW News. Second place and a $500 award was given to Arleta Young for her article titled "Public Perception of the Jury Trial: Cause and Effect." Finally, honorable mention was given to Woo Koo (Chris) Choi (a visiting exchange student from Korea) for his article titled "The Japanese Jury System."

Associate Dean Penny Hazleton, Professor Stewart Jay, and current Trustee of the FBA-WDW Andrew Salter all attended the presentation. Also in attendance were several dozen law students, who may have been drawn by the sunshine, pizza and beer, but who stayed to hear about their colleagues winning this award and about the importance of the jury system.

The Association and the University of Washington School of Law established the William L. Dwyer Jury Project Award in memory of the Honorable William L. Dwyer, a universally-respected Western Washington trial lawyer and federal judge. The writing competition is to be held annually, and is open to all UW Law School students who have completed at least one year of law school in the pursuit of a J.D. or LL.M. degree at any accredited institution. Participation in this year's competition was significantly bolstered by encouragement from local lawyer Fred Tausend, who taught a seminar course at the UW Law School called The Jury Trial that was inspired by Judge Dwyer's book on the jury system titled *In the Hands of the People*. Fittingly, each winner received a copy of that book as well, thanks to a generous donation by Mrs. Vasiliki Dwyer.

A BETTER CROSS-SECTION OF THE COMMUNITY: BOLSTERING THE QUALITY, FUNCTION, AND LEGITIMACY OF THE JURY

by John Goldmark[1]

I. INTRODUCTION

The Sixth Amendment to the United States Constitution guarantees a criminal defendant the right to a trial "by an impartial jury" of citizens of the community.[2] The United States Supreme Court has found that an impartial jury is one drawn from a "representative cross section of the community."[3] This fair cross-section requirement has been consistently enforced by the Supreme Court as a constitutional right[4] and incorporated into the jury selection process at the state and federal level.[5] Each step of the jury selection process threatens the cross-section requirement if certain sections of the community are excluded, either by design or through self-selection. Scholars have written extensively on how the last stage of jury selection – voir dire, with its "for cause" and peremptory challenges – affects jury composition.[6] But the goal of guaranteeing defendants a trial by a jury representative of the community begins, in the first place, with assembling a diverse jury pool or "venire" at the courthouse. This article therefore focuses on the causes of under-representative venires and proposes changes to create jury venires that better represent a fair cross-section their community.

II. A FAIR CROSS-SECTION OF THE COMMUNITY IS ESSENTIAL TO THE QUALITY, FUNCTION, AND LEGITIMACY OF THE JURY SYSTEM

In addition to the right to an impartial jury, a representative jury serves at least three important purposes: (1) improving the quality of decision making; (2) enhancing the jury's political legitimacy as a democratically inclusive institution; and (3) advancing the jury's function as a check on government power and as an educative process for the citizenry.

A representative jury improves the quality of jury decision-making. The jury utilizes citizens with diverse backgrounds who pool their varying experiences and perceptions to arrive at a verdict that comports with the common sense and values of the community. Juries also provide the anchor in a trial process designed to determine facts and reach verdicts in accordance with legal and normative standards. The results of one study suggest that diversity of gender and age has a positive impact on the tone and thoroughness of jury deliberations and on juror satisfaction with the experience and verdict.[7] The exclusion or under-representation of a section of the community threatens to remove valuable perspectives from the deliberative process. As a result, representation of different groups aids in the jury's determination of facts and rendering of its judgment by bringing into the jury room a wider array of experiences, perspectives, and knowledge.

A jury representative of the community also carries more political legitimacy because its verdicts are more likely to be perceived both by the litigants and the public as worthy of acceptance. Perceptions of fairness are directly correlated to the perceived impartiality of the decision-maker.[8] In one study, Ellis and Diamond demonstrated that observers perceived a trial to be fairer and the verdict more accurate where the jury was racially heterogeneous.[9] Similarly, a telephone survey of California residents in the wake of the O.J. Simpson trial found that 67 percent of respondents agreed that "decisions reached by racially diverse juries are more fair [sic] than decisions reached by single race juries."[10] Such studies demonstrate that heterogeneity is essential to the jury's perceived fairness and legitimacy. Thus, when juries are broadly representative of different groups of the community, their verdicts can more readily be accepted as legitimate and representative of the consensus of the community.

A representative jury is also better able to carry out its functions as a community check on government power and as an educative process for the citizenry. The jury utilizes the common-sense judgment of the community to guard against overzealous or mistaken government prosecution.[11] The exclusion of distinctive groups from the venire erodes the jury's ability to function as an appropriate and representative check on government power. Moreover, a jury composed of a fair cross-section of the community educates members from different groups about the nature and importance of civic participation. Alexis de Tocqueville wisely remarked that the "jury is both the most effective way of establishing the people's rule and the most efficient way of teaching them how to rule."[12] Good trial judges recognize the educational importance of jury service and take the opportunity to teach the jurors about the legal process, civic responsibility, and self-government.

III. CREATING A BETTER CROSS-SECTION OF THE COMMUNITY

The loss of prospective jurors during jury selection is not random. A comparison of the demographic characteristics of the adult citizenry in a geographic area with the jury venire in the court drawing from that area typically reveals a systematic under-representation of minorities, younger individuals, and those at lower income levels.[13] Common-sense changes can address some of these imbalances and help create juries more representative of their community. These changes should implement policies that focus on increasing juror summons response rates for under-represented groups and decreasing the need for financial hardship excuses. Increasing juror compensation is essential to achieving both of these goals.

A. Juror Compensation in Most States is Inadequate

Juror compensation in most states is inadequate to cover the costs of jury service. In federal court, jurors receive $40 per day.[14] Compensation in state courts varies widely, and jurors receive anywhere from $4 to $50 per day.[15] Thirty-eight states fail to guarantee the federal level of juror compensation[16] and many have not increased juror pay

in decades.[17] An expert in jury studies has noted that the "minimal size of the daily fee means that few persons making more than minimum wage can afford the sudden involuntary cut in pay imposed by jury service."[18] Similarly, according to the chair of the American Jury Project, "the inadequacy of juror pay is probably the biggest obstacle to jury service."[19] A juror wage that barely covers the cost of lunch and parking imposes an undue economic hardship on those in lower-income groups, especially when employers refuse to provide support for jury service.

Compensation in many states is also inconsistent with the minimum wage and fails to account for lost wages. For example, as of early 2007 the federal minimum wage was $5.15 an hour,[20] and a laborer making that wage earns roughly $40 in typical eight-hour day—an amount equivalent to juror compensation in federal court. Notwithstanding criticism of the federal minimum wage as inadequate for failing to adjust for cost of living increases over the past nine years, the federal juror compensation rate is at least consistent with its minimum wage. In contrast, Washington State has the highest minimum wage in the country, $7.93 an hour,[21] but it guarantees its jurors only $10 a day.[22] A minimum wage laborer in Washington can make over $60 working an eight-hour day, but loses $50 per day (an 80 percent pay cut) in order to serve on a jury. This inconsistency ignores the economic practicalities faced by those who depend on a daily wage and work for employers that do not support jury service. Jurors are not entitled to be free from all hardships that may result from performing their civic duty. Nevertheless, jury duty and the ability to participate in self-governance should not be so cost-prohibitive that it becomes something enjoyed only by certain segments of society.

B. Increasing Juror Compensation Creates a More Representative Jury by both Reducing Financial Hardship on and Increasing Summons Response Rates for Under-Represented Groups

Providing adequate and fair compensation to jurors may be the most effective method to create a jury that is a more representative cross-section of the community. Because juror fees do not adequately compensate jurors, many potential jurors, particularly blue-collar workers who are paid by the hour, cannot afford to serve on a jury. Money is often the bottom line. Members of under-represented groups either do not respond to juror summonses or provide judges with compelling reasons to be excused for economic hardship.

Reasonable compensation will increase summons response rates for members of groups typically under-represented on juries. The most common reason people do not respond to a summons and skip jury service is that they cannot afford to serve.[23] Numerous studies confirm that summons response rates and juror compensation are directly linked. For example, in the late 1990s, only 22 percent of people summoned to jury duty in El Paso, Texas actually showed up to court.[24] At that time, El Paso officials paid jurors a mere $6 per day.[25] In 1999, residents voted to increase juror pay to $40 per day.[26] The results were astounding and encouraging: the summons response rate jumped from 22 percent to 46 percent within a year and by 2002 it climbed to 60 percent – nearly tripling in three years.[27] The El Paso experiment is illustrative of similar results obtained in a number of jurisdictions following increased juror fees. Such reforms provide a model for changes that will assemble a more representative jury.

Adequate compensation will also reduce the number of excuses for economic hardship. Many judges automatically exclude laborers and sole business proprietors who claim jury service will cause them to lose their daily wage or close up their business.[28] A judge is also more likely to excuse hourly-wage earners from long trials because extended jury service will impose undue economic hardship.[29] If jurors were adequately compensated either by the court or their employer, judges would have little reason to consistently excuse lower-income individuals.

Increasing juror compensation to an adequate level is easier said than done. Political and fiscal practicalities, such as tight state budgets and the absence of a strong lobbying force representing jurors' interests, reduce the likelihood that legislatures will allocate significant funds to compensate jurors.[30] Juror compensation, however, need not come solely from state budgets. Creative, multi-level measures requiring cooperation from the business community and legislators are

necessary to address current inadequacies in juror compensation.

C. A Modest Increase in Juror Compensation Should be Implemented and Augmented by Additional Support Measures

Inadequate juror compensation should be addressed by implementing three principal changes: (1) states should increase juror pay to at least the federal rate and incorporate additional increases relative to cost of living adjustments; (2) states should implement strict laws requiring larger employers to compensate their employees for jury service; and (3) states should impose a modest civil filing fee to provide supplemental compensation to jurors in need for longer trials.

Juror compensation should be linked to cost of living adjustments so that increases in the minimum wage are followed by proportionate increases in juror compensation. This correlation makes sense because many individuals in under-represented groups earn the minimum wage, living paycheck to paycheck. These people have fixed costs such as food, rent, and car payments that must be met. As a result, they cannot afford to serve on a jury unless the compensation is enough to allow them to pay their bills and attain basic necessities. States should, at a minimum, increase juror compensation to reflect the minimum wage and match the federal rate of $40 per day. As the minimum wage increases, so too should juror compensation.

Further, states should implement strict laws or policies requiring larger employers to compensate employees for jury service. Employer support is critical to ensuring representative public participation in the jury. New York City's successful jury reforms are particularly instructive on this point. In 1995, the City was bordering on a crisis as only 12 percent of those summoned showed up to court.[31] Following a number of reforms, such as increasing juror pay from $10 to $40 and requiring larger businesses (with more than 20 employees) to pay their employees for jury service, public response to summonses jumped from 12 percent to 39 percent.[32] The City's increased summons response rate was due in part to its requirement that larger businesses pay employees who are called to jury service.[33] Importantly, the percentage of hourly-wage earners participating in the jury process rose significantly following this reform.[34]

Jury duty is a civic responsibility for all persons. Because corporations obtain special benefits through their status as "legal persons," they should also bear the responsibilities of that status by supporting employee jury service. In one study, 86 percent of the people who did show up for jury duty were receiving full salary during their service.[35] Employer compensation would go a long way toward enabling members of under-represented groups to serve on juries.

Finally, states should adopt measures to secure additional funds to adequately compensate those jurors for whom extended jury service imposes significant economic hardships. These funds should be used to enable jurors who are unemployed, self-employed, or otherwise not sufficiently compensated by their employers to participate in lengthy trials. Arizona, a leader in jury reform, created a lengthy trial fund ("LTF") that provides additional compensation to jurors when a trial lasts more than ten days.[36] The LTF, which is funded by a $15 civil filing fee, compensates unemployed jurors at least $40 per day from the fourth day of trial to the completion of jury service.[37] Jurors who are not compensated by their employers become eligible to receive $100 per day between the fourth and tenth day of service and $300 per day thereafter.[38] The program has been widely successful, and the additional filing fee generated more than enough funds (roughly $480,000 remained in the fund after the first year) to adequately compensate jurors in need.[39]

Other states should follow and expand upon Arizona's lead. The burden imposed on litigants by a small filing fee is well worth the benefits gained by assembling a more representative jury. The filing fee need not be large and, as Arizona demonstrated, could be as little as $15 and likely still keep up with increased payments for long-term jury service. (States could even start with a $10 filing fee to create a fund that provides additional compensation to unemployed and under-compensated jurors beginning on the fourth day of trial, and increase that fee if needed.) Whatever the amount of this supplemental fee, if surplus revenue were created, the state could lower the number of days before compensation kicked in, increase the amount of additional compensation, or reduce the

filing fee accordingly. This flexibility would allow states to tailor their programs to keep the filing fee as low as possible while still providing enough funds to adequately pay jurors that need financial support to be able to serve in longer trials.

IV. CONCLUSION

Creating juries that represent a fair cross-section of their community is essential to the continued vitality and institutional credibility of the jury system. While the jury has come a long way in becoming a more inclusive democratic institution, the economic burdens imposed by jury service undermine its representative character by removing certain segments of the community from the venire. Inadequate juror pay is the key contributor to low juror summons response rates and to the frequent financial hardship excuses for members of under-represented groups. Juror compensation should be addressed by increasing the daily rate of compensation, requiring support from larger employers, and imposing a civil filing fee to create a fund for longer trials. These changes will bolster the quality, function and legitimacy of the jury system by creating juries that better represent a cross-section of their community.

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2 U.S. Const. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed....").

3 *Taylor v. Louisiana, 419 U.S. 522, 528 (1975)*.

4 *See id.* at 529–30 (explaining that "the requirement of a jury's being chosen from a fair cross section of the community is fundamental to the American system of justice"); *see also Holland v. Illinois, 493 U.S. 474, 493 (1990)* (stating that "the traditional understanding of how an 'impartial jury' is assembled" includes the notion of a fair cross section).

5 *See, e.g.*, Jury Selection and Service Act, 28 U.S.C. § 1861 *et seq.* (1968); Uniform Jury Selection and Service Act, 13 U.L.A. 437 (1970).

6 *See, e.g.*, Antony Page, *Batson's Blind-Spot: Unconscious Stereotyping and the Peremptory Challenge*, 85 B.U. L. Rev. 155 (2005); Notes, *Judging the Prosecution: Why Abolishing Peremptory Challenges Limits the Dangers of Prosecutorial Discretion*, 119 Harv. L. Rev. 2121 (2006).

7 Nancy Marder, *Juries, Justice & Multiculturalism*, 75 S. Cal. L. Rev. 659, 663 (2002).

8 E. Allan Lind, *Procedural Justice, Disputing, and Reactions to Legal Authorities*, in Everyday Practices and Trouble Cases 177 (Austin Serat et al. eds., 1996).

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10 Hiroshi Fukurai & Darryl Davies, *Affirmative Action in Jury Selection: Racially Representative Juries, Racial Quotas, and Affirmative Juries of the Hennepin Model and the* Jury de Medietate Linguae, 4 Va. J. Soc. Pol'y & L. 645, 665 (1997).

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12 Alexis de Tocqueville, Democracy in America 254 (J.P. Mayer ed., 1988) (1850).

13 Shari Diamond, *Truth, Justice, and the Jury*, 26 Harv. J.L. & Pub. Pol'y 143, 148 (2003).

14 *See* 28 U.S.C. § 1871 (permitting $40 per day and an additional $10 per day for jurors "required to attend more than 30 days in hearing one case").

15 Paula Hannaford-Agor & Tom Munsterman, *Jury Management: Promising Innovations, National Association for Court Management*, Annual Conference (July 16, 2006).

16 *See id.*

17 G. Thomas Munsterman & Cary Silverman, *Jury Reforms in Arizona: The First Year*, 45 Judges' Journal 19 (2006).

18 Harry F. Mooney, *A Jury of our Peers: Is That Right?* 71 Def. Couns. J. 106, 112 (2004) (quoting a statement by G. Thomas Munsterman, the Director of the Center for Jury Studies at the National Center for State Courts).

19 Ted Stellwag, *The Verdict on Juries*, 27-JUN Pa. Law 15, 21 (2005) (quoting Patricia Lee Refo).

20 Timothy Egan, *For $7.93 an Hour, It's Worth a Trip Across a State Line*, N.Y. Times, Jan. 11, 2007, available at http://www.nytimes.com/2007/01/11/us/11minimum.html?ex=1326171600&en=c2afdb2d7e43c6b5&ei=5088.

21 *Id.*

22 Hannaford-Agor & Munsterman, *supra* note 15.

23 Robert C. Walters, *A Jury of our Peers: An Unfulfilled Constitutional Promise*, 58 SMU L. Rev. 319, 331 (2005).

24 Mark Curriden, *Extra Money Helps El Paso Lure More Prospective Jurors*, Dallas Morning News, Oct. 24, 2000.

25 *Id.*

26 *Id.*

27 *Id.*

28 Hiroshi Fukurai, *Sources of Racial Disenfranchisement in the Jury and the Jury Selection System*, 13 Nat'l Black L.J. 238, 265–66 (1994).

29 Mark A. Behrens & Cary Silverman, *Five Ways the Kentucky Legislature Can Improve Jury Service*, 42 Brandeis L.J. 1, 6 (2003).

30 *See id.* at 7 (describing tight state budgets and the failure of Kentucky's legislature to pass proposals to increase the juror fee); *see also* J. Walter Sinclair & Mark A. Behrens, *Making Jury Duty a Little Friendlier*, 46-Oct Advocate (Idaho) 23, 24 (2003) (describing similar situation in Idaho).

31 Walters, *supra* note 23, at 351.

32 *Id.* at 351–52.

33 *Id.* at 353.

34 *See id.*

35 *Id.* at 331.

36 Munsterman & Silverman, *supra* note 17, at 19.

37 *Id.*

38 *Id.* at 20.

39 Hannaford-Agor & Munsterman, *supra* note 15.

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