



The FORUM

Newsletter of the District of Columbia Chapter of the Federal Bar Association

Wendy M. Miller, Newsletter Production Editor

Fall 2004



We invite you to come to the DC Chapter's monthly meetings. We meet on the third Wednesday of every month, at the FBA, 2215 M Street, NW, Washington, DC, at 6:45 p.m. The next meeting is December 15.



Looking for E-Mail Addresses

We send out announcements of upcoming events. Don't be left out! Send your e-mail addresses to: Wendysww@aol.com.

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President's Message

By Ronnie A. Yoder,
Chief Administrative Law Judge, U.S. Department of Transportation

I am very happy and proud to report that the Chapter has elected me as the first President ever to serve two consecutive terms at its helm. There are still some refinements of the Bylaws to be completed, but the Chapter has been materially strengthened by the amendments approved last year, which enable all officers to serve for two consecutive years. The new slate of officers and Board members listed in our last *FORUM* was unanimously elected at the annual meeting in July:

- President: Judge Ronnie A. Yoder (Past President)
- President-Elect: Cary Devorsetz
- Vice President: Kathleen Duignan (Past President)
- Treasurer: Christie Burnett
- Secretary: Silvio Krvaric
- National Council Delegate: Louis Ferrand

- Immediate Past President: Ann Clarke (Past President)

The elected Board members for the 2004-2005 year are: Mark Allenbaugh, Scott M. Alter, Robie Beatty, Marcus Cohen, Robert Cohen, John Connolly (Past President), Chris Corchiarino, Ron Crump, Eugene I. Kane, Jr. and Steven Miller. In addition, I have appointed Past President Miles F. Ryan to the Board.

We are fortunate to have so many Past Presidents participating actively on the leadership of the Chapter. There are still appointee positions available on the Board. If any members are interested, please contact me at: Ronnie.yoder@ost.dot.gov, with a copy of your resume and any area of particular interest, or come to the meetings of the Board, which are held at 6:45 p.m. on the third Wednesday of each month at FBA headquarters, 2215 M Street, NW, Washington, DC. Presently, constituted committees include: Bylaws, Budget

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Update

Sentencing Guidelines Task Force

By Mark H. Allenbaugh, Chair

The Chapter's Sentencing Guidelines Task Force was established in 2003 to monitor developments with respect to Federal Sentencing Guidelines and recommend action by the Chapter, the FBA, and the Congress. Its recent report formed the basis for FBA action supporting the preservation of judicial discretion in

sentencing. The Task Force has now moved to broaden its membership to include a federal judge, a federal prosecutor, defense attorneys, law professors, and members of non-profits, such as: Families Against Mandatory Minimums and the Heritage Foundation, and plans

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The Honorable Ronnie A. Yoder: President
Cary Devorsetz: President-Elect
Kathleen A. Duignan: Vice President
Darnellena C. "Christie" Burnett: Treasurer
Silvio Krvaric: Secretary
Louis G. Ferrand: National Council Delegate
Ann Clarke: Immediate Past President

Board of Directors:

Mark H. Allenbaugh; Scott M. Alter; Robie A. Beatty; Marcus Cohen; Robert A. Cohen; John F. Connolly; Christopher Corchiarino; Ronald C. Crump; Eugene I. Kane, Jr.; Steven R. Miller; Miles F. Ryan III

Past Presidents:

George A. Avery; Cyril F. Brickfield; The Honorable Arthur L. Burnett, Sr.; Ann Clarke, Sherman Cohn; John F. Connolly; Ronald C. Crump; Romulo Diaz; Justin Dingfelder; Kathleen A. Duignan; Marsha A. Echols; Louis G. Ferrand; Lauren Fuller; Mary Garner; Bonnie Gay; Larry Gilbertson; Sarah Hertz; Mark Joelson; Kevin D. Judd; Eugene I. Kane, Jr.; Earl Kintner; Roscoe Long; Thomas Madden; William G. Malone; Brian C. Murphy; Eileen O'Conner; Jeanus Parks; Hon. Carl Frederick Paul; Leo Pellerzi; Miles F. Ryan III; Patricia Ryan; Bernard Smyth; Michael Stein; Gwyn Ann Taylor; Simon Trevas; Paul Treusch; F. Trowbridge Vom Bauer; Chair Whitaker; Rosalyn Wilcots

The FORUM Staff:

Newsletter Production Editor: Wendy M. Miller

The District of Columbia Chapter's approximate 1,200 person membership includes members of the judiciary, every department and agency of the federal government, numerous law firms, trade associations, corporations, unions and law schools. A portion of your dues funds the production of this newsletter. **The FORUM** also seeks sponsors for each issue of the publication. Inquiries should be directed to the DC Chapter, Federal Bar Association, P.O. Box 75861, Washington, DC 20013-5861 or e-mail—Wendy M. Miller at Wendysww@aol.com. **The FORUM's** editorial staff welcomes and appreciates articles, letters and suggestions from readers.

President's Message, Continued from page 1

CLE, Federal Judiciary, Law School Liaison, Membership, Past Presidents, and Sentencing Guidelines. We are always ready to consider new areas of interest.

We are happy to report that under the able leadership of our Treasurer, Christie Burnett, we finished FY 2004 with a demonstrably balanced budget—without encroaching on the reserves which have been diminishing in recent years but are still substantial. In that regard, the Chapter is considering proposals to provide front-end funding for CLE programs sponsored by other organizations, where they show promise of covering their costs and benefiting the Bar and the public at large. Any organizations interested in obtaining such funding should contract President-Elect Cary Devorsetz at cdevorsetz@a-dlaw.com providing details of the proposed program.

For six years, we have sponsored and funded a reception for the Administrative Judiciary at the FBA headquarters in Washington, DC. This year, we cosponsored an expanded reception for Article III, District of Columbia, and administrative judiciary, with the DC Bar and the FBA Judiciary Division on October 20, 2004. At the request of the US District Court for the District of Columbia, we are considering various other activities to enhance our relationship to and support of the federal courts. As indicated in this issue of *The FORUM*, the DC Chapter has already written to members of Congress, supporting greater funding for the Article III courts. (See Cary Devorsetz's article on page 3.) In addition, the Sentencing Guidelines Task Force continues to study that problem and support FBA policy and the Courts in protecting their independence in determining sentences in federal cases. (See Mark Allenbaugh's article on page 1.)

We look forward to another exciting and fulfilling year. ■

Sentencing Guidelines Task Force, Continued from page 1

to draft a white paper in Spring 2005, to deal with key issues that result from pending federal cases.

Since November 1, 1987, when the initial set of Federal Sentencing Guidelines was promulgated, it has been the job of federal judges to decide those facts that determine the sentence under the Guidelines. For example, in the case of a defendant convicted of fraud, it has been the role of the sentencing judge to determine the amount of fraud involved, for that amount determines, in part, the appropriate sentence under the Guidelines. Other so-called "sentencing factors" include: the defendant's role in the offense, the type and number of victims involved, and the motive of the defendant in committing the offense.

While the Guidelines are presumptively mandatory, judges may depart above or below the Guidelines when aggravating or mitigating circumstances take the particular defendant and/or offense outside of the typical case presented for such offense.

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DC Chapter Supports Increased Congressional Funding for Federal Judiciary

By Cary Devorsetz

In July, the DC Chapter sent a letter to area Congressmen and Senators at the request of Joyce Kitchens, the FBA's President, concerning the funding crisis faced by the federal courts. President Kitchens had detailed potential funding "hard freezes" for the next fiscal year, and the possibility that 5,000 federal judiciary employees (out of 21,000 total) might lose their jobs as a result of Congress's reduction of up to 50 percent of the judiciary's budget.

The District of Columbia Chapter's Board of Directors responded promptly, authorizing and directing the transmission of a letter by me, the Chapter's 2004-05 President-Elect, to Senators Paul Sarbanes and Barbara Mikulski (Maryland), Senators George Allen and John Warner (Virginia), Congressman Frank Wolf (Virginia), Congressman Jim Moran (Northern Virginia), Congressman Frank Wolf (Virginia; Chairman of the Commerce-Justice-State and the Judiciary Appropriations Subcommittee), and Congressman Jose Serrano (New York; Ranking Minority Member of the House Commerce-Justice-State, and the Judiciary Appropriations Subcommittee).

The letter noted that from 2002 to 2004, criminal cases are expected to increase by 10 percent, bankruptcy filings by 11 percent, and Criminal Justice Act representations by 19 percent. Despite these increased burdens, court operating expenses, excluding salaries, have been reduced and staff cuts are causing court operations to endure difficulties that will only get worse if funding is not increased. The increasing workload and decreasing resources raise the specter that the courts may have to cut their expenses in half and fire or lay off probation officers and clerks' office personnel. Other dangers include: decreased testing and supervision of released prisoners, the inability to collect criminal fines and victim restitution monies, a significant reduction in available funds for court-appointed counsel for indigent criminal defendants and the drying up of funds for payment of jurors in civil cases—threatening their suspension.

The letter noted that many of the DC Chapter's members practice before the federal courts located in the District of Columbia, Alexandria, Virginia and Greenbelt, Maryland, and the Chapter is concerned about the immediate need to ensure that the courts provide prompt justice to local citizens. It urged the Congressmen and Senators to "insist that funding for the federal judicial system remain a high priority and that congress appropriate the funds necessary for the fulfillment by the courts of their constitutional and statutory responsibilities."

Should you wish to receive a copy of the letter sent out, or if you are interested in assisting our Chapter with this issue, please e-mail me, Cary Devorsetz, at cdevorsetz@a-dlaw.com.■

Sentencing Task Force, *Continued from page 2*

For example, where the defendant's conduct is "unusually heinous, cruel, brutal, or degrading to the victim," the court may sentence above the presumptive Guideline sentence. Conversely, where the defendant had suffered from "significantly reduced mental capacity" the court may sentence below the presumptive Guideline range.

In *Blakely v. Washington*, 124 S. Ct. 2531 (June 24, 2004), the Supreme Court held (5-4) that in a state court sentencing "the maximum sentence a judge may impose [is one based] solely on the...facts reflected in the jury verdict or admitted by the defendant." (Emphasis in original). Because Blakely had not admitted the facts supporting the 90-month "exceptional" sentence, the court found that the sentence violated the Sixth Amendment, inasmuch as "every defendant has the right to insist that the prosecutor prove to a jury all facts legally essential to the punishment." (Emphasis in original). Thus the Court apparently ruled that not just facts supporting upward departures, but *all* facts used to determine a sentence must be treated as if they were elements of an offense.

Despite the Court's statement in *Blakely* that "[t]he Federal Guidelines are not before us, and we express no opinion on them," the similarity between Washington State's guidelines and the Federal Guidelines left many wondering whether the Federal Guidelines were also constitutionally infirm. U.S. District Courts began to rule that the Guidelines in fact were unconstitutional in light of *Blakely*. *United States v. Croxford*, 124 F. Supp. 2d 1230 (D. Utah July 7, 2004). Others have ruled that parts of the Guidelines remain constitutional, while others have held they are unconstitutional in their entirety. *United States v. Montgomery*, 124 F. Supp. 2d 1266 (D. Utah July 8, 2004). Some are imposing two sentences, one using the Guidelines, and the other a non-Guidelines sentence pending further clarification from the Supreme Court (*United States v. Mueffelman*, 327 F. Supp. 2d 79 (D. Mass July 26, 2004). Still others have postponed sentencings altogether.

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Sentencing Guidelines Task Force, *Continued from Page 3*

The Supreme Court recently granted certiorari and heard two post-*Blakely* cases: *United States v. Booker* and *United States v. Fanfan*. These cases may clarify whether *Blakely* applies to the Federal Sentencing Guidelines. Whatever the outcome, the Chapter's Federal Sentencing Guidelines Task Force will be monitoring closely the developments of *Blakely's* legacy on the Federal Criminal justice system. For anyone interested in participating or for more information on the Task Force, please contact Mark H. Allenbaugh at (714) 899-2870 or email at: mark@federalssentencing.com. ■

DC Chapter Presented With FBA's Presidential Achievement Award

By Cary Devorsetz

At the Federal Bar Association's annual convention in Cincinnati on October 5, 2004, the District of Columbia Chapter was presented with the FBA's Presidential Achievement Award. Board Member Miles F. Ryan and I received the award on behalf of our Chapter at the convention's awards luncheon before an audience representing the FBA's chapter and national leaders. The award recognizes active chapters that maintain a good relationship with the national FBA, that sponsor speakers, CLEs, and social and community events, that encourage judicial participation, that actively market and encourage new members to join, that regularly publish a newsletter such as this one, whose Board members attend FBA annual meetings, and whose officers attend FBA training. In summary, they look for a well-rounded Chapter.

Among the activities that we emphasized in our award application, was our Chapter's Sentencing Task Force, headed by Board member Mark H. Allenbaugh. That Task Force published a position paper regarding the Federal Sentencing Guidelines,

the material terms of which were adopted by the FBA's National Council. We also highlighted our annual judicial reception and our Distinguished Lawyer luncheon series.

We were one of five chapters to receive the award. There are over 80 FBA chapters nationwide. ■

Congratulations to Judge Arthur Burnett



During the February 2005 ABA Midyear Meeting, the ABA Commission on Racial and Ethnic Diversity in the Profession will present the Spirit of Excellence Award to Former DC Chapter President Judge Arthur Burnett, to recognize his distinguished career. We extend to Judge Burnett our heartfelt congratulations. ■



Call for Articles

The FORUM encourages contributions of informative, relevant, timely articles and upcoming events. The submissions deadline for our Winter Edition is December 14, 2004. Send your submissions to Wendy M. Miller, Newsletter Production Editor, via e-mail to: Wendysww@aol.com. All articles will be reviewed by the editorial committee. Please include the identifying captions with all photos submitted. ■