FOR THE DISTRICT OF OREGON

A Tri-Yearly Newsletter of the Oregon Chapter of the Federal Bar Association

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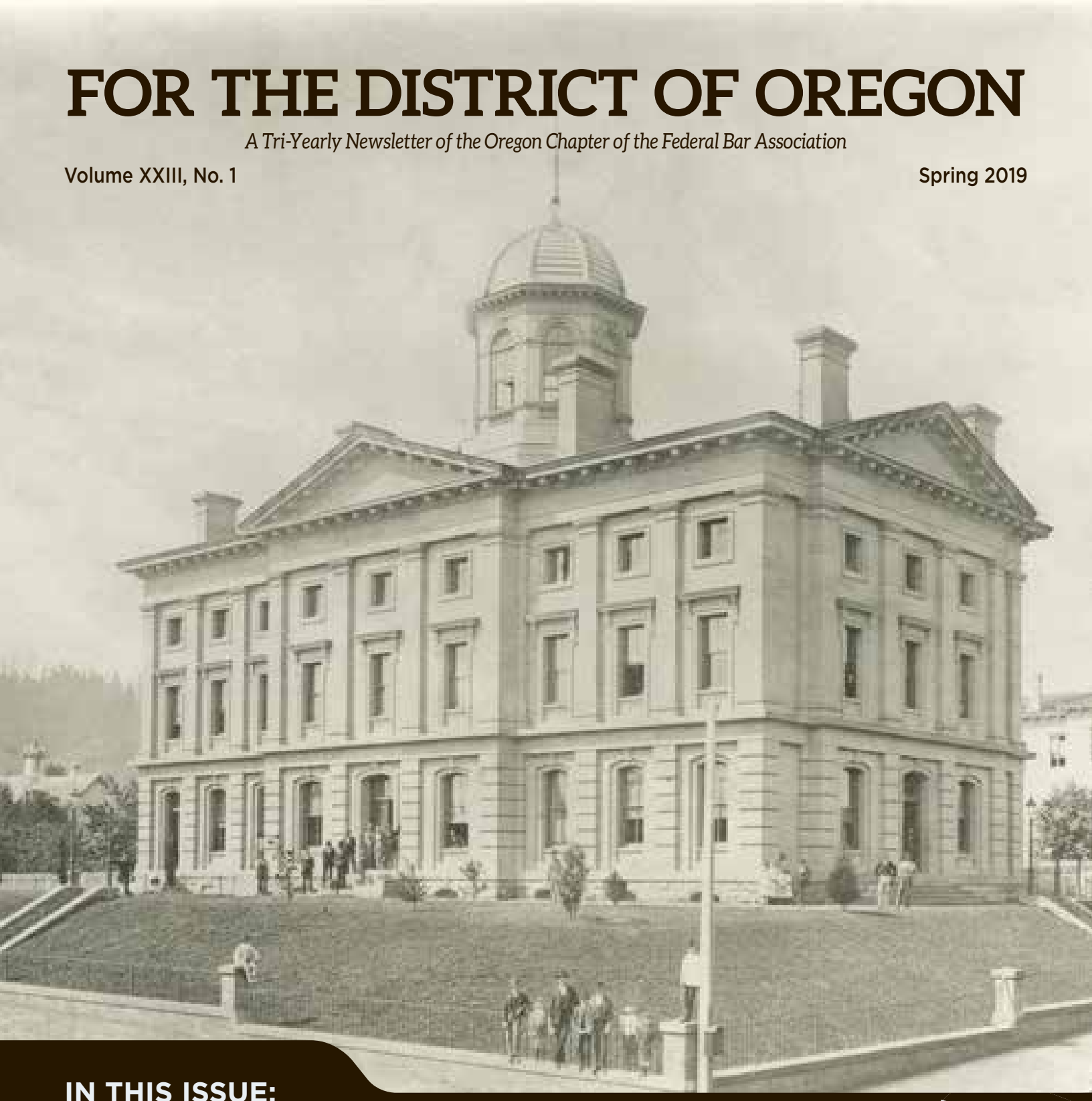

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In This Issue

2019 FBA Rising Professionals Symposium in Las Vegas

Nicole Elgin, Barran Liebman LLP

This February, Oregon Chapter Board Members Jack Scholz and Nicole Elgin had the opportunity to attend the second annual Federal Bar Association Rising Professionals Symposium. The Symposium spanned three days (January 31 – February 2) at the Four Seasons Hotel Las Vegas and aimed to help young FBA members develop litigation and professional skills to further their careers. The Symposium included attendees from over 20 states and the sessions ranged from discussion panels with in house counsel on how to fill the role of an effective outside counselor to an update from Chief Judge Gloria M. Navarro of the U.S. District Court for the District of Nevada.

The first day of the Symposium began with a reception to welcome attendees and the opportunity to network with the numerous Symposium speakers. The next day started off with a welcome from FBA Immediate Past President Kip T. Bollin highlighting the benefits of membership in both the FBA and engaging with the Young Lawyers Division. The day was full of interesting practice tips, business development insights, and a debrief on how the federal government shutdown was impacting court staff and federal practitioners nationwide. The "Practice Prowess" panel included one segment titled "Voir Dire – Win Your Case and Charm The Pants Off The Jury" and featured U.S. Attorney for the Northern District of Ohio, Marisa Darden, who highlighted how a new practitioner can still effectively advocate on the client's behalf, even when the judge heavily controls voir dire.

Another panel, called "In Your Newsfeed" covered topics from the latest legal developments on block chain technologies, data breach class actions, to how states are adapting outdated harassment and vicarious liability statutes to address increased prosecution of both children and parents involved in cyberbullying.

Next up was a great session with Funny or Die General Counsel, C.J. Lee-Vranca. With a spin on Zach Galifianakis' Between Two Ferns, C.J. spoke of the company's evolution, particularly from a legal compliance standpoint, since Will Ferrell first started the company in 2007. The audience learned of the many creative pathways to becoming an entertainment lawyer and how companies, particularly in Hollywood, are adapting their policies and practices in the wake of the #MeToo movement.

The final day of the Symposium ended with a powerful presentation from author Allison Leotta on criminal law, travelling despite the demands of a litigator's schedule, and making mid-life career changes. While Allison is known for her books including *Discretion* and *The Last Good Girl*, her expertise also stems from her 12 years of prosecuting sex-crimes in Washington DC. The entire event ended on a positive and comedic note when Comedian of Law, Joel Oster, energized the standard ethics CLE by having audience members compete to determine sanctions based on the stories of attorney or judicial misconduct.

National FBA plans to hold the Rising Professionals Symposium again next year and all Oregon Chapter members are encouraged to attend! You can contact Jack Scholz at jrs@hartwagner.com or Nicole Elgin at nelgin@barran.com to learn more.

District of Oregon's Pro Se Clinic— A Pilot Program and Now a Reality!

Hon. Judge Jolie A. Russo, United States District Court for the District of Oregon

Michael Fuller, Underdog Law Office, was our first volunteer attorney at the Free Federal Law Clinic.

When I last wrote in May 2018, I explained that the U.S. District Court for the District of Oregon offered only limited resources for self-represented civil litigants: a page on our website linking to various outside resources, a public terminal to access CM/ECF at the Intake counter, and a written "Guide for Self-Represented Parties." I discussed the struggles faced by self-represented litigants attempting to navigate the Court system and that meanwhile, the number of self-represented litigants in our District continued to grow. This resulted in a large volume of questions presented to Intake staff and Courtroom Deputies, as well as time-consuming and often complicated challenges presented to Judges and Law Clerks.

Acting upon inspiration from other districts throughout the Ninth Circuit, our Pro Bono Committee has worked very hard over the past several months to actualize the Pro Se Clinic's six-month Pilot Program approved by our Board of Judges. The three goals for our Clinic were to: (1) increase the access to justice; (2) improve the Court's administration of pro se cases; and (3) provide attorneys in our District with a meaningful volunteer opportunity as well as "hands on" legal experience.

We were able to officially open our doors in January 2019. The first item of business was to change the Clinic's name. We decided that many self-represented litigants would not necessarily understand what a "pro se clinic" might offer. Therefore, we opted for the plain-spoken and transparent name: Free Federal Law Clinic. The Clinic is open every other Thursday for a four-hour block of time (i.e., eight 30-minute appointments). Self-represented litigants are required to make an appointment with the Clinic Coordinator (either by phone or in person) for a 30-minute consultation. The Clerk's Office, Judges, and Judges' staff are encouraged to directly refer self-represented litigants to the Clinic. Some Judges are also referring litigants to the Clinic when a motion for appointment of counsel is denied.

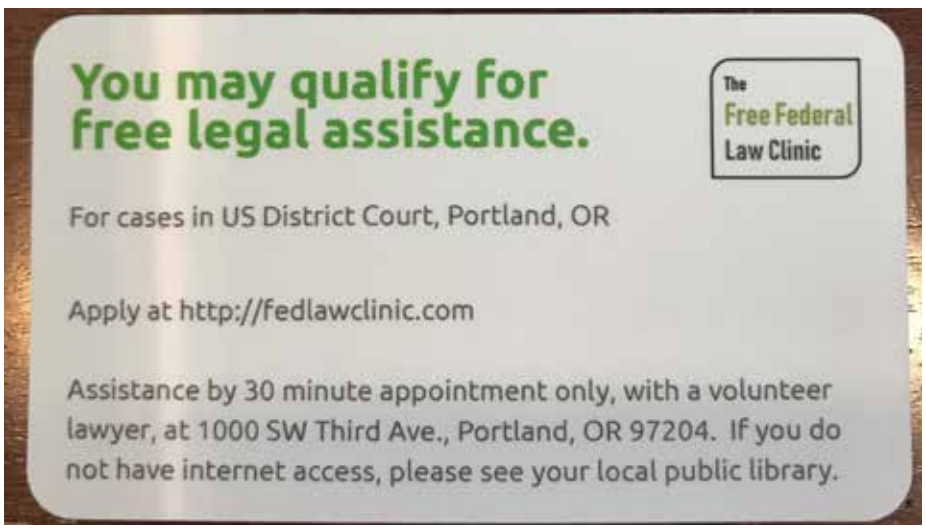
Our Clinic Coordinator is an individual graciously provided by an FBA Board member's law firm. The Coordinator forwards information about the litigants to the volunteer attorneys to conduct a conflict check, schedule the litigants, and remind attorneys of their upcoming volunteer shift. The Oregon State Bar has agreed that our volunteer attorneys may seek CLE credit for their work. We are also scheduled to honor and celebrate these attorneys at our Annual Pro Bono Awards

Luncheon where they will be recognized for their effort. We will also acknowledge their volunteer efforts in our Annual District Report for the Ninth Circuit.

The local chapter of the FBA coordinates and administers the Pilot Program. Judges have helped promote and advertise the Clinic as well as recruit volunteer attorneys by meeting with law firms to discuss the opportunity for pro bono service, as well as providing a meaningful training for new lawyers. The FBA also drafted a successful grant proposal to the national FBA's Litigation Section to obtain initial funding for the Clinic. To kick off the Clinic's opening, the FBA dedicated one of their monthly Luncheons to educate FBA members about the Clinic and promote volunteer attorney opportunities.

Locating our Clinic turned out to be a tricky issue. We ended up moving three times until we found our current (and hopefully permanent) home. We are now located in the Attorney Admission Lounge on a Courthouse floor accessible to the public. We have the services of a Court Security Officer during the Clinic's open hours. This space provides the volunteer attorney with telephone access as well as an internet connection. The Clerk of Court approved funding for a stand-alone CM/ECF terminal for use by the Clinic's volunteers and litigants, similar to the public terminal currently located at the Court's Intake counter. This allows our volunteer attorneys to review case material with the self-represented litigant during the clinic appointment at no cost to our volunteer attorneys. The volunteer attorneys may use their own laptop computers; however, we also purchased a laptop computer with a portion of our FBA grant money for use by our volunteer attorneys. In addition, we used grant money to purchase business cards and supplies for the Clinic. Finally, another FBA member generously donated their time to compile a three-ring notebook of forms that might be commonly used with self-represented litigants.

The Pilot Program would not have come together without the dedicated and continued work of each Committee stakeholder. I am convinced it was our shared vision and commitment to partnering that made the difference in our District. At the end of our six-month Pilot Program, the Pro Bono Committee will meet to discuss our success in satisfying our three goals outlined above. We are also keeping track of our numbers (both attorney volunteers and clients), as well as time spent at the Clinic. We have discovered so far that our biggest challenge is simply spreading the word to self-represented litigants that the Clinic is available for their use. The Clinic's use started very sporadically but is growing, albeit, slowly. Our hope is to return to the Board of Judges to review the Clinic's success and then submit a proposal for a permanent Free Federal Law Clinic. ■



Business cards have been made to distribute to the public.

Innovation Law Lab v. Neilsen

Nadia Dahab, Stoll Berne

Monday morning, June 25, 8:05 a.m. The courtroom gallery is packed with attorneys, community members, and reporters. The proceedings are called to order:

"THE COURT: Before we start with plaintiffs' argument, there one or two factual matters that I would to inquire about primarily from the government.

I'm trying to figure out whether or not this affects the pending motion or what, if anything, I'm supposed to do with it. . . . I believe it was yesterday, that the President stated, "When somebody comes in, we must immediately, with no Judges or Court Cases, bring them back from where they came." That was the President's Tweet yesterday at I believe 8:02 a.m. And as I understand from previous submissions by the Justice Department, the Justice Department acknowledges that the President's statements, whether by Tweet, speech, or interviews, are official statements of the President of the United States, and the defendants here, either directly or indirectly, report to the President.

What am I am to make of that statement? First of all, what does it mean[,] and does it play any role at all in these proceedings?

. . . .

[D]oes it mean that there's a possibility that the immigrant detainees at the federal detention center in Sheridan might be removed without having an asylum proceeding or an asylum application heard?

THE GOVERNMENT: I don't think so, Your Honor. There are federal rules and statutes and schemes in place for deportation proceedings."

In other words, there's the rule of law.

Innovation Law Lab v. Nielsen arose out of a decision by federal immigration authorities to transfer 124 immigrant men from the port of entry in San Ysidro, California, to the federal prison right here in Sheridan, Oregon. When the men arrived, they were placed in cells in the Sheridan prison and denied all meaningful access to family, friends, and lawyers. Between May 31, 2018, and June 25, 2018—when the Court issued the TRO—lawyers seeking to meet with their clients had been turned away, over and over, at the prison gates.

At the time, using a federal prison for immigrant detention was virtually unprecedented—but it was happening elsewhere across the country. Around the same date that the men were transferred to Sheridan, immigration authorities had transferred several other groups of immigrant men to federal prisons in California, Texas, Washington, and Arizona. Conrad Wilson, NPR, *ICE Appears to End Use of Federal Prisons for Immigrant Detainees* (Oct. 20, 2018), available at https://www.npr.org/2018/10/20/658988420/ice-appears-to-end-use-of-federal-prisons-for-immigrant-detainees.

The men who were transferred to Sheridan had been placed in so-called "expedited removal proceedings"—proceedings that, by statute, allow rapid removal on a massive scale in certain circumstances. See INA § 235, 8 U.S.C. § 1225. Each of the men was entitled to participate in what the Immigration and Nationality Act (INA) calls a "credible fear interview," or CFI, which is an interview with the asylum office to determine whether the individual has a credible or reasonable fear of

persecution or torture. If the asylum office makes a "positive determination" after a credible fear interview, the individual is placed into traditional removal proceedings and becomes statutorily eligible for release on parole. If not, the individual may immediately be deported.

On June 22, 2018, in response to the government's repeated denials of access to counsel for the individuals detained at the Sheridan prison, the Innovation Law Lab—with the ACLU of Oregon and Stoll Berne as counsel—filed a complaint in the U.S. District Court seeking declaratory and injunctive relief based on alleged violations of the Administrative Procedure Act, the INA, and the First and Fifth Amendments to the U.S. Constitution. They also filed an emergency application for a TRO, asking the Court to order the government to provide meaningful access to counsel and prohibit any CFIs from taking place before providing that access. The court issued the emergency TRO immediately after the hearing—ordering the government to, among other things, provide six hours of attorney access per day, seven days a week; to halt all CFIs until every individual had participated in a "know your rights" presentation; to install four nonmonitored telephone lines for individuals to contact legal service providers; and to provide the Innovation Law Lab with consistent access to two of the detention center's four attorney visitation rooms. In the court's order, it also prohibited the government from transferring any detained individual outside the District of Oregon.

Before the court issued that order—between May 31 and June 25—the balance of power at the Sheridan prison looked precisely as one might expect: tipped heavily toward the government. The immigrant men were effectively powerless—detained, practically incommunicado, and forced into an asylum system they did not know and could not understand. But on June 25, the court adjusted the scales—empowering the powerless by protecting the rule of law. *See Innovation Law Lab v. Nielsen*, 310 F. Supp. 3d 1150, 1155 (D. Or. 2018) ("We are nation under law, and the rule of law is one of our most cherished values. The right to counsel, which allows a person to receive timely legal advice, is firmly entrenched in the concept of due process and protected by the Fifth Amendment against governmental interference."). ■

U.S. Attorney Billy Williams Speaks to the FBA

The FBA Lunch Series kicked off 2019 with an update from United States Attorney for the District of Oregon Billy Williams. Much of the discussion was dominated by the effects of the federal government shutdown on the U.S. Attorney's Office and related criminal justice issues. He also discussed the unintended consequences of marijuana legalization by the state—but not federal—government, and his office's approach to the interesting and evolving legal issues that have emerged as a result.

The FBA would like to thank U.S. Attorney Williams for taking the time to speak with us about the important issues faced by his office. More information about the United States Attorney's Office for the District of Oregon can be found here: https://www.justice.gov/usao-or. ■

Settlement Negotiations: A Mediator's Insights Into Cross-Cultural Issues in Negotiation

Lisa Amato, Amato Mediation

Clients identify, assess, and evaluate risk through their lens of individual experiences and cultural perspectives. When two or more parties with different individual and cultural experiences are in a dispute, cross-cultural issues may be present.

Traditionally, cross-cultural issues were defined as those that involve international business deals, international disputes, and domestic disputes involving religious identity or affiliation with the non-Western culture. As our collective societal awareness grows and understanding matures, a more modern view of cross-cultural issues develops in which each client and each party, whether individual or corporate, views and moves through the world with their individual cultural experience. There is a recognition that our culture is shaped by our upbringing, religion, ethnic background, race, nationality, sexual identity, gender identity, political leanings, educational background, relationship preferences, our media choices, our hobbies and what we choose to do when we relax and recharge, just to name a few.

Our cultural experiences impact how we engage in conflict and how we engaged in negotiation and conflict resolution. In other words, how we experience the world shapes our attitudes, approaches, and goals in negotiation and litigation.

Clients and parties are expecting more from their attorneys and mediators to help them navigate through a dispute in a way that feels culturally appropriate for them. When that does not happen, clients and parties resist settlement options because cultural interests remain unrecognized or unmet. In direct negotiation and mediation, cross-cultural interests usually do not have to be squarely met to reach settlement; however, settlement is far more likely when cultural needs and interests of all parties are recognized and respected.

In the last few years of my mediation practice, I have seen a palpable shift in what moves a party toward seriously considering settlement proposals. Traditional risk assessment of the claims and defenses and the likelihood of success is becoming insufficient by itself. To be sure, we can press clients and parties on these matters alone, but often what makes the difference between an engaged and willing client or party and one who reluctantly accepts what they deem to be merely the financially less risky way out of the dispute is recognizing and honoring how the clients' and parties' cultural experiences shape how they view injury, responsibility, risk, and resolution.

As practitioners—advocates, negotiators, and dispute resolution professionals—we are better prepared to advance our clients' and the parties' interests and goals when we take time to evaluate if and to what extent cross-cultural issues are either embedded in or have some resonance within the dispute. Not every dispute has cross-cultural issues, and not every dispute that involves people from different cultures has embedded cross-cultural issues. Cultivating cultural

awareness and challenging our own biases and notions allows us to become more conscious and mindful of recognizing when cross-cultural issues are embedded in a dispute.

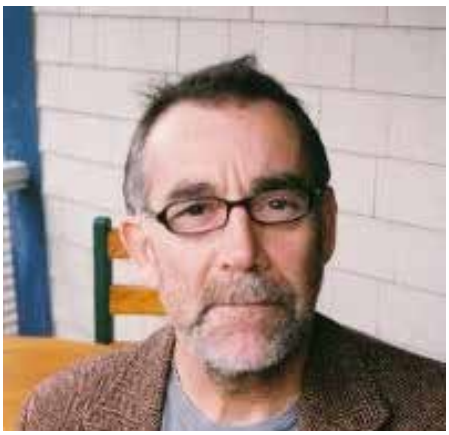
By way of just one example, different parties to a legal dispute may be asserting their rights or defenses through the lens of either an individualist or collectivist culture. In an individualist culture, personal freedom is important, and the emphasis is on individual redress and defense of individual interests. A collectivist culture emphasizes the well-being of the community as opposed to the individual. A comment of "I am doing this so what I experienced never happens to anyone else," reflects a collectivists culture lens.

The next time a client or the other party's position appears to be intractable and the reasons for that are not visible, take a moment to consider whether the parties' different cultural experiences are giving rise to any cross-cultural issues. Consider unpacking, examining, and respectfully asking questions to unearth cultural experiences and perspectives. Your discovery may reveal opportunities to negotiate armed with new information and strategies, and your client will appreciate your efforts to understand their priorities and goals better.

It is powerful to let people tell their stories. When listening to these stories, we can carefully and respectfully unwrap individual cultural experiences to understand how a person is experiencing the legal dispute, their goals, and how they may approach dispute resolution. In that way, we become better counsel to our clients and better mediators to the parties.

Amato Mediation Lisa Amato mediates civil litigation, business, and professional negligence cases, tribal matters, and public policy disputes throughout the Pacific Northwest. Lisa is a mentee in the International Academy of Mediators, chair of the Oregon Mediation Association Standards and Practices Committee, an editor of the OSB legal publication "ADR in Oregon," and is a speaker on mediation best practices, techniques and skill development.

Congratulations to the 2019 Honorable James M. Burns Federal Practice Award Winners



Left: James G. Rice

Right: Michelle Holman Kerin

Judicial Spotlight: The Honorable Judge Trish M. Brown

Alex Hadduck, Holland & Knight, LLP

What drew you to law school and the practice of bankruptcy law?
My dad was a title insurance lawyer in Montana. When I graduated from college in 1978, I thought I was going to practice with him. In law school I worked for a bankruptcy professor, and I also clerked for a United States District Judge in Virginia where I worked on his bankruptcy appeals. Though I started my legal career as a general litigator, I pretty quickly focused in on bankruptcy.

When did you first realize you were interested in the judiciary?
Pretty early on. Getting appointed is a long process. Once an opening is announced you have to fill out a long application. The application is then assessed by a local screening committee consisting of various judges and members of the bar. The screening committee narrows the pool down to two or three finalists. I was a finalist for two prior openings before finally being selected on my third attempt in 1999. A friend gave me an important piece of advice for that third attempt: "go into your interview with the attitude that there's room for you at the table." I found that to be a wonderful way of framing the type of attitude the committee was looking for.

What do you find most satisfying about your role on the bench?
I really like helping people. A very high percentage of bankruptcy cases in this district involve individual debtors. A lot of people have the perception that bankruptcy court is full of people that buy expensive Nikes when they shouldn't. The reality is that they're there because they were underinsured prior to an illness, a spouse became unemployed or a divorce occurs. I see a lot of people that don't start the bankruptcy process until after they've burned off all their retirement savings.

I try to be compassionate in my role. This means taking the time to make sure the individuals before me feel heard and understood, even if the rulings I make don't go their way. I might be the only judge an individual ever meets, and it is important to me that everyone feels listened to and understood. One individual before me actually asked me to officiate her wedding about a year after her case closed because she thought I treated her fairly.

I also enjoy working with debtors and creditors in settlement proceedings. When the parties are talking settlement, I'm not constrained by what rulings I'm legally allowed to make. Instead, I can be creative and help the parties come to a common-sense arrangement that works for them, even if I wouldn't have the authority to order that particular arrangement.

Is there a need for pro bono work in the realm of bankruptcy?
Yes. Several years ago we started getting petitions from Coffee Creek Correctional Facility, which is a women's correctional facility in Wilsonville, Oregon. I noticed the petitions were done incorrectly a lot of the time, which led to us implementing a bankruptcy and consumer-finance class at the prison

once or twice a year in order to increase the women's ability to properly take advantage of bankruptcy proceedings.

One of the guards at Coffee Creek remarked to the librarian a few years ago that it would be great to provide books to the children visiting the facility during the month of December. In 2015 we collected 815 new or gently used books to give to children visiting their mothers. In 2018, that number had grown to 1600. Now every time a child visits his or her mom at Coffee Creek, they come home with a book. It's remarkable that this relationship with Coffee Creek started just because they were doing their petitions wrong!

Also, Legal Aid runs debtor clinics that can always use more pro bono attorneys. Legal Aid trains the attorneys and then places them with pre-screened clients. You can find pro bono bankruptcy clinics sponsored by Legal Aid all over the place. I am a speaker once or twice a year before the clients meet with their attorneys.

What task do you do as a Bankruptcy Judge that people may be surprised to hear is part of your role?
I don't think the task is surprising, but I think the extent to which we focus on individuals instead of corporations is surprising to a lot of people.

What is the most difficult task of your job?
Worrying that I'm going to make the wrong decision. In individual cases you want to make sure you're making the right decision — it affects their lives so much.

What do you miss about practicing law?
Nothing!

What else do you do with your free time?
I'm a fencer. My daughter fenced in high school and college and my judicial assistant, Suzanne Marx, is and has been a member of several teams representing the United States at Veteran World Championships (I go with her as her Sherpa). There's a huge fencing community in Portland, and we've produced several Olympians.

I also travel a fair amount to help with settlement. For instance, there's a single Bankruptcy Judge in Alaska, and he can't do his own settlement conferences. I've been up to Alaska several times to help with settlements.

Aside from that, along with my pro bono work and doing weddings, I live on 5 acres with my husband and enjoy spending time with my dogs and horses.

Can you give a book or show recommendation?
My favorite book of all time is *To Kill A Mockingbird*. My husband actually had to replace my first copy because I wore it out. I encourage everyone to read or re-read it every few years. ■

Judge Brown Gives the State of the Bankruptcy Courts

Conde Cox, Law Office of Conde Cox

In the Jury Assembly Room at the Mark Hatfield Federal Courthouse, Chief Bankruptcy Judge Trish M. Brown for the District of Oregon offered her report on the status of the local federal bankruptcy court.

In attendance were a large number of federal court and debtor-creditor practitioners, as well as the three other Oregon bankruptcy judges, and Judge Susan Graber of the 9th Circuit Court of Appeals.

Judge Brown described during her report that strong local and national economy has caused the total number of bankruptcy case filings, nationwide and especially in Oregon, to dwindle steadily over the last few years. As a result, the Administrative Office of the US Courts will likely dictate that the total number of bankruptcy judges across the country will be slowly reduced, unless another severe recession emerges.

Indeed, Judge Brown disclosed during her presentation that she intends to retire when she turns 65 in 2020, stepping down from the federal bench after over 20 years of service. Given the small number of bankruptcy case filings, Judge Brown predicted that the Administrative Office will almost certainly not take steps to replace her. That will leave Oregon with only three federal bankruptcy judges, Judge Tom Renn in Eugene, and Judges David Hercher and Peter McKittrick in Portland, as of late 2020 or early 2021. Only a few short years ago, Oregon had five active serving bankruptcy judges.

Judge Brown also offered her remarks on two important bankruptcy cases now pending before the U.S. Supreme Court, one involving the treatment of trademark licenses when the licensor files for bankruptcy, and the other involving the availability of a good faith defense for creditors violating the statutory injunction against attempts at collection of discharged debts.

The FBA would like to thank Judge Brown for including us in this event, and we hope to partner with the bankruptcy court for future events. ■

FBA Labor and Employment Law Conference

Jack Scholz, Hart Wagner LLP

On February 21 and 22, attorneys and judges from across the country gathered in beautiful San Juan, Puerto Rico for the FBA 8th Biennial Labor and Employment Law Conference, sponsored by the FBA Puerto Rico Chapter. The one and a half day conference included a variety of CLEs on topics including employment discrimination, best practices for employment contracts, ERISA, trial strategies in employment cases, LGBT discrimination under Title VII, allegations based on #MeToo and Time's Up, e-discovery and evidentiary issues, and advice from in-house counsel. During the lunch hour, the Honorable Gustavo A. Gelpí, Chief Judge of the U.S. District Court for the District of Puerto Rico, and FBA National Past-President, provided an ethics CLE on common ethical issues attorneys face in employment cases. In the evening, attendees were treated to a rum themed cocktail reception on the beach during sunset.

Despite the devastating impact of Hurricane Maria, Puerto Rico continues to make major progress in recovery and remains a beautiful place to vacation, with no passport required for U.S. Citizens. The FBA Puerto Rico Chapter has always been a strong part of the FBA nationally and our fellow U.S. Citizens in Puerto Rico always serve as fantastic hosts for FBA conferences. Attorneys who practice labor and employment law should consider adding the FBA Labor and Employment Law Section to their membership as the section provides many valuable educational opportunities including this biennial conference.

Jack Scholz is an associate attorney at Hart Wagner LLP where he practices employment litigation and medical malpractice defense. He also serves as a Ninth Circuit Young Lawyer Representative to the National FBA. ■

Representing Clients in SEC Investigations

Dennis A. Stubblefield, The Law Offices of Dennis A. Stubblefield

I. INTRODUCTION TO SECURITIES REGULATION

The United States Securities and Exchange Commission ("SEC" or "Commission") is the independent federal agency charged with investigating potential violations of, and enforcing, the nation's securities laws. Although the SEC is most visible when it brings high-profile Ponzi scheme, insider trading, and public company accounting fraud cases, in fact the agency has jurisdiction over virtually any and all matters involving a "security," extending to the smallest deals encompassing just a few individuals and privately-held companies. This article is intended for non-securities lawyers who are asked to advise and represent individuals and privately-held companies who have been contacted by the SEC. It is beyond the scope of this article to address issues which arise almost exclusively in connection with publicly-traded corporations, such as insider trading, bribery of foreign officials, accounting fraud and the like, and in connection with "regulated entities" such as broker-dealers and investment advisers.

Under federal law, a "security" includes not only stocks and bonds but virtually every passive investment through the catch-all category of "investment contract," which is defined as an investment of money, in a common enterprise, in which the anticipated profits are to be derived from the significant, managerial efforts of others. *SEC v. Murphy*, 626 F.2d 633, 640–41 (9th Cir. 1980) (citing *SEC v. W.J. Howey Co*., 328 U.S. 293, 298–301 (1946)). Securities include many promissory notes (unless they bear a "strong family resemblance" to non-investment-oriented instruments such as commercial paper, *Reves v. Ernst & Young*, 494 U.S. 56, 58–68 (1990)), and the interests involved in very small "friends and family" deals. The breadth of the federal securities laws often catches entrepreneurs (like small real estate developers) by surprise: if they are raising money from passive investors, they are almost always selling "securities." One of the fundamental purposes of federal securities laws is the protection of investors through full and fair disclosure. *Landreth Timber Co. v. Landreth*, 471 U.S. 681, 687 (1985) (citing *Howey*, 328 U.S. at 299).

If a "security" is involved, it must be either 1) registered with the SEC (and/or qualified with various states where it will be sold), or, alternatively, 2) exempt from such registration/qualification. Securities Act of 1933 ("Securities Act"), section 5 [15 U.S.C. § 77e] (2011); *Murphy* 626 F.2d at 640-41. Just as all computer software code must be written as either a "One" or a "Zero" to be recognized, so, too, with securities: if they are being offered or sold, the transactions must be either registered/qualified, on the one hand, or, exempt, on the other (the most common exemption is the so-called "private placement"). This registration requirement exists in addition to basic "anti-fraud" statutes and regulations. *See* Securities Act section 17(a) [15 U.S.C. § 77q(a)] (2011); Securities Exchange Act of 1934 ("Exchange Act") section 10(b)

[15 U.S.C. § 78j(b)] (2011), Rule 10b-5 thereunder [17 C.F.R. § 240.10b-5] (2011). Resources for practitioners include: Loss and Seligman, Securities Regulation (3d ed., 1989) and Hazen, The Law of Securities Regulation (6th ed. 2009) (West).

II. THE CORE OF THE SEC ENFORCEMENT PROCESS

The two most significant aspects of the SEC's Enforcement process are: 1) its non-public investigations, and 2) its statutory authority to bring civil injunctive actions. The agency's Enforcement mandate is much broader (e.g., increasingly-used court and/or administrative tools seeking, *inter alia,* fines, penalties, and cease-and-desist orders). However, the most common interface with the SEC, when representing privately-held concerns and related individuals, will involve these two core components of the agency's program. Practitioner resources include Steinberg and Ferrara, Securities Practice: Federal and State Enforcement ("S & F"), particularly chapters 1-5 (West 2011), and McLucas, Taylor, and Matthews, *A Practitioner's Guide to the SEC's Investigative and Enforcement Process*, 70 Temp. L. Rev. 53 (1997) ("McLucas"). Two sources for current developments are "Securities Regulation and Law Report," and the blog "This Week In Securities Litigation,"available at www.secactions.com.

The SEC enjoys very broad investigative powers. Its investigations, virtually all conducted by staff of its Division of Enforcement ("Division"), are non-public fact-finding vehicles, in which there are no parties, no issues, and no adjudication of rights. S&F § 3:5, citing, *inter alia, SEC v. Jerry T. O'Brien*, 467 U.S. 735, 742 (1984). They fall into one of two categories. First in "Informal Inquiries," (also known as "Informal Investigations" and/or "Matters Under Inquiry") the Staff is permitted to request information and documents on a voluntary basis. Second, in "Formal Investigations" the staff secures from the Commission or the Division Director a "Formal Order [of Investigation]." In a Formal Investigation, the SEC has nationwide subpoena power to command the production of documents and giving of testimony. *See generally* S&F, Ch. 3.

In all SEC investigations, and in many Informal Inquiries, witnesses' testimony is transcribed, and under oath, and thus subject to both perjury laws and the "false statements" statute [18 U.S.C. § 1001] (2011). In both cases, witnesses are furnished with SEC Form 1662, which describes important information about the Commission's investigative and enforcement process, including the "Routine Uses" of information received by the agency. *See generally* S&F, Ch. 3.

If the Staff determines that there appear to be violations of the federal securities laws, it will typically seek authorization from the Commission to file a civil injunctive action in the appropriate United States District Court. By statute, the SEC may seek such injunctive relief "whenever it appears that a person 'is engaged or [is] about to engage in any acts or practices' constituting a violation of the [applicable provisions of the federal securities laws] . . . ." *Aaron v. SEC*, 446 U.S. 680, 700 (1980). The Staff's practice, however, is to first provide the intended defendants of such action the opportunity to furnish what is known as a "Wells Submission," essentially a legal brief in which such companies/individuals attempt to persuade the Staff to either abandon any intended enforcement action and/or to lay the foundation for the pre-filing settlement of the matter. The majority of proposed SEC actions are settled, which is understandable given the risks of an adverse outcome at trial, including the danger of collateral estoppel. *See Parklane Hosiery v. Shore*, 439 U.S. 322 (1979); *see generally*, S&F, §§ 3:54-3:73. Most settlements, however, still require the entry of an injunction by "consent," or "without admitting or denying" the SEC's allegations, and thus carry the risk of various "collateral consequences," such as damage to reputation, the threat of civil and/or criminal contempt if the injunction is violated, and the inability to rely on certain federal provisions/exemptions for

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securities offerings (additional consequences face regulated entities). *See* S&F §§ 5:10-5:12.

If the Commission files its action, it often applies for extraordinary relief, such as TROs, freeze orders, and the like, to prevent ongoing fraud. Unlike most common law injunctions which issue in equity under familiar principles, an SEC statutory injunction is qualitatively different. For example, the Commission need not prove "irreparable injury or the absence of an adequate remedy at law." S&F, § 5:3, p. 5-6 (citing *Aaron*, 466 U.S. 680). However, it is required to plead and prove the threat of recurrence: the "likelihood of future violations." 626 F.2d at 655–56 (discussion of factors considered by the court). Even if the past conduct is clearly violative, if there is no possibility of recurrence, a statutory injunction is improper. *See, e.g., S.E.C. v. Commonwealth Chemical Securities, Inc.*, 574 F. 2d 90, 99–100 (2d Cir. 1978). It is this "likelihood" element which becomes a strategically important factor in the decision of whether, and how much, to cooperate during the SEC's investigative stage.

III. KEY CONSIDERATIONS WHEN DEALING WITH THE SEC

Any contact by the SEC must be treated seriously. Several steps should be undertaken promptly. These include a brief interview with the key client contact to determine the likely focus of the Division Staff; written instructions regarding document preservation; a review of key documents which may be at issue; a courtesy call to the Staff person who initiated the inquiry (which will include, if applicable, a request for a copy of the Formal Order; this initial call is typically limited to obtaining basic information from the Staff, and undertaking to promptly evaluate the matter); a recommendation, if appropriate, to immediately cease any violative activity (often this recommendation must await further investigation).

After counsel has developed a basic understanding of the matter, the Staff should be contacted again. Counsel should seek to gather any further information (the Staff is usually very circumspect in light of the non-public nature of its investigations), if applicable, to narrow and clarify the scope of documents requested under subpoena, and to offer any initial information which could be helpful to the client (such discussions at the early stage need to be very circumspect, and the importance of accurate factual representations from the outset cannot be over-emphasized). Additional steps may include notification of appropriate insurance carriers, contact with auditors, instructions to line staff regarding the impact the matter may have on normal business activities, and review of major contracts to anticipate collateral consequences (e.g., clause in credit line agreement which provides that an injunction constitutes an event of default); if applicable, a rescission offer to investors.

Ideally, in any matter, counsel should review, analyze and organize (generally in chronological order) all potentially relevant documents, including e mails. In addition, all potentially relevant witnesses should be interviewed in depth after the documents have been analyzed. Counsel must be vigilant about resisting attempts by the client to take shortcuts in this process. Do not be surprised to hear from headstrong entrepreneurs suspicion and even contempt for what they may likely see as an intrusive process which is unnecessary (they are the experts in their business, and why should the SEC second-guess them just because the market didn't cooperate), unfair (they need to hire expensive lawyers when they didn't do anything wrong) and/or illegitimate (initiated by the agency which, in their view, got caught napping with Madoff, Stanford etc.). Any shortcuts are fraught with danger both to the client, and to counsel. The Commission has specific authority to regulate the integrity of the representation of professionals who practice before it. *See, e.g., Touche Ross & Co. v. SEC*, 609 F. 2d 570, 578 (2d Cir. 1979); *see also* S&F, §§ 4:15, 4:18, 4:29-4:34.

In most cases, the initial assessment will result in the determination to fully cooperate with the SEC in the production of relevant documents and making clients and witnesses available for interviews/investigative testimony. In Preliminary Inquiries, a pro-active, cooperative approach with the Staff is typically in the client's best interests, in the anticipation that this may obviate the necessity of a Formal Investigation. The detailed strategies, tactics and mechanics of dealing with the SEC in such investigations are beyond the scope of this article. Major aspects of this process include document production; significant issues relating to electronically stored data; the usually narrow circumstances under which a direct challenge to SEC subpoena power may be warranted; the specific rules which apply to SEC investigative testimony (which are materially different than those which apply to depositions in state or federal court); the importance of witness preparation, and witness demeanor; and various delicate issues including those regarding ethics/professional responsibility (e.g., multiple representation of witnesses, matters relating to the preservation of documents etc.). Practitioners should consult S&F (particularly chapters 3 and 10), and the numerous sources cited therein for detailed guidance in this area. In addition, the SEC's website includes its "Enforcement Manual," which sets out its investigative/enforcement process in detail. *See also* McLucas; Matthews, *Effective Defense of SEC Investigations: Laying the Foundation for the Successful Disposition of Subsequent Civil, Administrative and Criminal Proceedings*, 24 Emory L.J. 567 (1975).

In certain cases, however, cooperation might be imprudent or even dangerous. Securities law violations may be charged criminally by virtue of section 24 of the Securities Act [15 U.S.C. § 77x] (2011), and section 32(a) of the Exchange Act [15 U.S.C. § 78ff(a)] (2011). Securities enforcement has become increasingly criminalized in the last decade. S&F, § 7:2 (2011 Supp.). The SEC does not have criminal authority itself, but routinely and vigorously cooperates with prosecutorial agencies, particularly the U.S. Department of Justice, and its various U.S. Attorneys' Offices. Information regarding the SEC's practices in this regard is included in its Form 1662, and in its Enforcement Manual. Moreover, parallel civil and criminal proceedings are generally unobjectionable. Absent extraordinary circumstances amounting to government bad faith, such investigations and actions may be pursued either simultaneously or successively. *U.S. v. Stringer*, 535 F.3d 929 (9th Cir. 2008); SEC v. First Fin. Grp., 659 F.2d 660, 666–67 (5th Cir. 1981) (citing, *inter-alia, United States v. Kordel*, 397 U.S. 1, 11–12 (1970)).

Thus, counsel must promptly evaluate the likely risk of criminal prosecution. Major factors in this regard include the presence of blatant fraud and/or defalcation of substantial investor funds; a scheme, such as a "pump and dump," or a Ponzi scheme; and recidivism by key persons involved. Counsel should promptly seek to ascertain if the Staff has made, or is contemplating, a "criminal reference" of the matter, and, further, whether the particular client is a "target" of the investigation. See S&F §§ 7:14-7:18.

If it appears that the individual may need to invoke his/her Fifth Amendment right (corporations do not enjoy Fifth Amendment protection, *see, e.g., George Campbell Painting Corp. v. Reid*, 392 U.S. 286 (1968)), what are the likely costs of doing so? Typically there may be three basic consequences: first, the Staff of the Division will very likely construe the invocation as an admission of guilt. S&F § 3:21, (citing Glanzer, Schiffman & Packman, *The Use of the Fifth Amendment in SEC Investigations*, 41 Wash. & Lee L. Rev. 895, 914 (1984)). Second, if the Fifth Amendment is invoked in the subsequent SEC civil injunctive action, the Commission may seek to have an "adverse inference" drawn as to matters for which the privilege was invoked, *see Baxter*

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v. Palmigiano, 425 U.S. 308, 318–20 (1976). Third, a preclusion order may be entered preventing the introduction of evidence at trial on matters relating to the invocation during discovery, *see SEC v. Graystone Nash, Inc*., 25 F.3d 187 (3d Cir. 1994).

While the Fifth Amendment is a fundamental protection in the face of likely criminal prosecution, its cost and effect on the civil side can be catastrophic. In any situation in which the choice on the Fifth Amendment is not clear-cut, it is prudent to associate in specialized criminal defense counsel to advise on all available options, including issues relating to immunity. See S&F § 3:27.

Absent criminal concerns, it is generally in the client's own self interest to fully cooperate with the SEC. "Cooperation" here is not used in the same sense as it is in cases in which the Commission is investigating public company fraud. See S&F, § 2:1 (Supp. 2011) (discussing the development of such cooperation, and the SEC's policies and procedures regarding the same, e.g., typically entailing an extensive internal investigation, and the furnishing of such investigation, with waiver of the attorney-client privilege, to the Commission); *see also Enforcement Manual*, § 6; Section 21(a) Report ("Seaboard"), Securities Exchange Act Release No. 44969 (2001), available at http://www.sec.gov/litigation/investreport/34-44969.htm.

Although such level of "cooperation" is rarely warranted in cases involving small privately-held companies and individuals, certain analogous approaches may be prudent to insure the best possible outcome of the SEC investigation. For example, a company could conduct a limited internal investigation, taking requisite remedial steps such as the revision of policies and procedures, and/or necessary personnel changes. This process need not necessarily be prohibitively expensive, completely reduced to writing, nor entail the waiver of the attorney-client privilege. The company could then argue that, given the corrective measures taken, there is no likelihood of recurrence, and therefore no need for injunctive relief. Such an approach might be effective to convince the Staff to close the matter with no action, or to negotiate a relatively favorable outcome, with any necessary injunction limited to registration violations under Securities Act Section 5, or merely negligence-based charges, see Aaron, 466 U.S. at 695–700. In the event of litigation, such efforts can demonstrate that there is no need for an injunction.

IV. CONCLUSION

The SEC has formidable investigative powers and sweeping enforcement authority. If the agency has contacted your client, there is likely a very good reason. In most cases, the optimum approach is to be pro-active. The notion of "cooperation" is counter-intuitive, and even offensive to many clients, but, absent criminal exposure, is generally the most effective way to achieve the best possible outcome in a Commission investigation.

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Author's Note

Certain developments since the original publication of this article are noteworthy. The SEC's Enforcement Division in recent years has increased its utilization of administrative proceedings, as opposed to civil injunctive actions, although the latter remain the touchstone of anti-fraud enforcement, particularly with non-regulated entities and individuals. Particularly in the years when former Chair Mary Jo White presided, and to some extent since then, the Commission has insisted on admissions of wrongdoing in very egregious cases, rather than offering the long-standing "no admit or deny" feature in settlements, although the latter remains the norm. In

recent years, the Division of Enforcement has borrowed techniques more typically associated with DOJ criminal investigations, such as the use of reverse proffers. And, for the last several years, it has aggressively and creatively employed "Big Data/Analytics" to ferret out and investigate potential securities law violations.

Author's Bio

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Funny Money and the Big Bait and Switch

Calvin N. Souther, Jr.

Does everybody remember their Bills & Notes class in law school (UCC 4)? Probably not, and certainly not the people who created the currency portion of the U.S. money supply. Take a bill out and look at it closely. For something we all value (at the least) and take its legality for granted, the paper money of the United States bears more in common with Monopoly Money than it does with a bona fide bank note. Why, you might ask?

Okay, there are lots of reasons why what purports to be a bank note, fails miserably. Take a look at a $1 note (a George), a $5 note (an Abe), and a $20 note (an Andy). All bear the Heading "Federal Reserve Note." Looks good, looks quite official, but the problem is the Federal Reserve (the Fed) is not a bank, it is a "system." It is an agency of the federal government, governed by a 7-member Board of Governors, said to be independent of the Executive, Legislative, and Judicial branches of Constitutional government (made "independent" by act of Congress), and it exercises both regulatory powers over member banks and the nation's economy by manipulating the country's money supply, of which, "paper money" is but a small part. The latter function is performed by a statutory sub-agency—a constitutionally dubious sub-agency—known as the Federal Open Market Committee (FOMC).

Now, here's where things get a little tricky. (Actually, a lot tricky.)

Background: The Fed also, in addition to the large regulatory staff in Washington, D.C., has 12 regional Federal Reserve Banks as components. Each bank has

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a geographic region and within those regions are the commercial bank members of the respective Federal Reserve Banks. Member banks are required by law to buy stock in the regional banks. The boards of directors are elected by the member bank shareholders, and the regional bank presidents are elected by those boards of directors.

The FOMC: It is composed of the 7 Governors of the Federal Reserve System and the 12 regional bank presidents. Of the latter, only 5 are voting members. Of those 5, 4 rotate on an annual basis, while the New York Federal Reserve Bank president is a permanent voting member of the FOMC. It can be argued that the FOMC is the most powerful agency of government, even more than the Supreme Court of the United States:

- It controls the money supply of the country by manipulating interest rates, not by fiat, but by open market operations (meaning buying and selling statutorily limited debt securities on the open market).
- It controls the economy.
- It can ease and lessen the impact of recessions by stimulating the economy through lowered interest rates.
- It can dampen an over-heated economy by raising market interest rates (and it can create recessions when it goofs, which is often).

You might say this is a melded agency. Some commentators, who ought to know better, maintain the Fed is a private entity because the FOMC has voting members who are not appointed by the President of the United States and confirmed by the Senate. But the fact of the matter is, that this unholy alliance violates the appointments clause of the U.S. Constitution, as recently articulated in *Lucia. v. SEC*, --- U.S. --, 138 S. Ct. 2044 (2018). The Supreme Court's interpretation and application of the appointments clause has rendered it virtually impossible for authority delegated by the people to the Executive Branch of the federal government to be delegated by the government to private parties.

Bank Notes: As to the "bank notes" of the Fed, the prominent features are: (1) the heading or title; (2) the signatures; and (3) the seals. The heading—Federal Reserve Note—where's the bank? Older currency was titled "Federal Reserve Bank of New York." The Federal Reserve is not a bank, although frequently referred to as "the central bank." Instead the Fed is a "system" having 12 regional banks as subsidiary sub-agencies, which is to say, it is a government agency created by Congress to implement Congress's Article I power to "coin money, regulate the value thereof." As to its "independence," that is a fiction. If it ever gets to court, the Fed will be seen as an agency of the Executive Branch—because there is nowhere else to put it. So, the issuer of the newer bank notes isn't even a bank.

Signatures: Each note is executed by two signatories—the Treasurer of the United States, and the Secretary of the Treasury. What? These two are not officers of the Fed. They have no authority to represent the Fed. But they do represent the U.S. Treasury Department, which, under the coin and print laws is the official printer of coins and currency. This may explain why the seal of the U.S. Treasury Department is on the notes as well as the seal of the Fed. But how would the optics appear if the greenbacks were actually stated as promissory notes of the U.S. Treasury? Not too good. A larger question is what is the obligation of the purported Federal Reserve Note? And the answer is, not a thing. The note is absolutely irredeemable: Funny money other than the one thing that differentiates the greenback from Monopoly money—FIAT. No, I am not referring to an Italian sports car, but to the *Ipse Dixit* of a government order. That order is printed on the front of every such note: "This note is legal tender for all debts, public and private." So sayeth the sovereign and so it is accepted by the citizenry, both domestic and foreign.

Important fact: Currency (coins and non-bank bank notes) amount to 11.3%, more or less, of the broader money supply and 43% of the narrower, hot money,

dinero component of the money supply. To go any further into the minutiae of money would be over-esoteric, so we go no further. But, if coins and currency are only a small component of money supply, then what is money? Here's a hint: Bank deposits. But is a bank deposit really a deposit of something tangible? Remember the law of bailments? That is where the deposit trope, or head fake, originated, when merchants deposited gold coinage with commercial bailees for safekeeping. Eventually, through several evolutions, the bailment relationship gave way to contractual relationship, but the "deposit" lingo stuck, even though the meaning had totally morphed. And with contract came double-entry bookkeeping's debits and credits.

Nowadays, your deposit is a contractual transaction in which the "depositors" account is credited with the moola, meaning the legal tender of the realm, and a corresponding debit appears on the bank's books. And because of this double entry accounting of a contractual event, when coupled with the fractional reserve system of the Fed, more money can be created when loans are made by the banks, loans being assets which offset the debits from your so-called deposits. As con jobs go, this is a beaut of a bait and switch. Once your "deposit" is in the bank, it is converted by GAAP accounting rules into credits and debits. And when you withdraw your money, it isn't your money you are getting back, it's the banks, because you gave your money to the bank in exchange for rights set forth in a "deposit agreement." By now you probably are ready to engage in something more exciting, like watching grass grow, or an arm-waving demonstration by one of the more extreme politicians from the political party other than your own.

In conclusion: The sound-as-a-dollar notion is based on nothing but belief in the soundness of the dollar, because the government says it is so. And that is value-by-fiat money; it is as good as gold, because we are told that it is and we believe it to be true—also, and more practically, we have no choice in the matter. Once upon a time the world had a gold standard, but, according to Richard Nixon, it wasn't working for us because a minor-by-today's-experience bout of inflation was sucking the U.S. gold supply out of Fort Knox and putting it into foreigners' hands.

Further, because the dollar had become the world-trade medium of exchange, there wasn't enough new gold being mined in the U.S. to back up all the dollars needed for rapidly-expanding world trade. So tricky Dick used his phone and called Treasury Secretary John Connally with instructions to "close the gold window." Wow. That one is the mother of all executive orders and he didn't even use a pen—leaving no paper trail to evidence one of the most egregious Article II trespasses on Article I turf.

That set off decades of currency devaluation of the U.S. dollar relative to hard commodities, both precious and common, based on the substitution of fiat money, in all major economies and all U.S. trading partners. These trading partners actually have banks as their central banks, and, long story short, they all manipulate their currency relative to the U.S. dollar, the Japanese yen, Chinese renminbi, euro, Swiss franc, etc. It is called competitive devaluation and it interferes with the market-based demand for U.S. dollars, which theoretically, determines the relative cost of dollars to buyers of U.S. exports and of commodities priced world-wide in U.S. dollars, e.g., oil, and to repay bond interest and principal in foreign bonds denominated in dollars. This is done by countries such as Italy in order to sell bonds at a liveable interest rate.

So, while the public sees daily data tracking the value of the dollar against other currencies, and while government statistics report little, or no inflation, the truth of the matter is that, with the exception of petroleum, the dollar has collapsed against both a "market-basket of commodities," and specific individual commodities. Some examples: in 1970, gold was sold by the U.S. Treasury to central banks, only, for $32 per ounce,

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while today it trades for $1239 per ounce. Copper used to trade for $0.70 per pound, now hovers around $2.72 per pound, and many, many, many dollars have been created to meet the demand of foreign and domestic international traders for U.S. dollars.

In a perfect world—that being one where no one cheats—the market value of the dollar would be set by actual supply and demand factors. But it is not and, moreover, we live in a world where the underpinning of the world's most trusted currency is based on a phony bank note and money that is created out of thin air through the magic of the Fed's fractional reserve system and double entry accounting; and the Fed actually printing money by direct open-market purchase of bonds. How sound is that? What could possibly go wrong? ■

Upcoming Events

Here is a list of upcoming events. These events are subject to change. The best place to find the most up-to-date list of upcoming events is always the Oregon Chapter's website at: https://oregonfba.org/, or through twitter, https://twitter.com/fbaoregon, or Facebook, https://www.facebook.com/oregonfedbar/.

May 10, 2019:
District Court Conference

May 13, 2019:
Portrait Unveiling Ceremony for Judge Anna Brow nand Judge Paul Papak

May 16, 2019:
FBA Monthly Lunch with Judge Mustafa T. Kasubhai

June 27, 2019:
U.S. District Court Historical Society
Wild Wild History: The Rise and Fall of Rajneeshpuram

July 18, 2019:
8th Annual Nancy Bergeson Ardent Advocacy Series

August 4, 2019:
U.S. District Court Historical Society Picnic at Judge A Leavy's Hop Farm

November 7, 2019:
U.S. District Court Historical Society Dinner

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New FBA Members Welcome

Membership Eligibility. FBA membership is open to any person admitted to the practice of law before a federal court or a court of record in any of the states, commonwealths, territories, or possessions of the United States or in the District of Columbia, provided you are or have been an officer or employee of the United States or the District of Columbia, or you have a substantial interest or participate in the area of federal law. Foreign Associate Status is open to any person admitted to practice law before a court or administrative tribunal of a country other than the United States. Law Student Associate Status is open to any law student enrolled at an accredited law school. If you wish to join, please visit www.fedbar.org and click on the "Join" link.

Call for Submissions/Publication Schedule

For the District of Oregon schedule of release for 2019 is tentatively: Summer – August 1, 2019; Winter – December 1, 2019. We welcome submissions from everyone as well as our regular contributors. All submissions must be received 30 days prior to publishing date. Please direct inquiries to **Trisha Thompson** at Trisha.Thompson@hklaw.com.