President’s Podium

2018 is nearly a quarter over, the days are staying light longer, and our Chapter of the FBA is in the midst of a busy year.

Since the last newsletter, our Chapter has hosted brown bag lunches for our members (and others) to meet Magistrate Judge Parker and the Northern District of Ohio’s new U.S. Attorney, Justin Herdman. We presented a year-end CLE program, which was complimentary for our members, centered on how the continuing national focus on sexual harassment affects lawyers, both as practitioners representing clients and in our own workplaces.

Thanks to the leadership of Steve Newman, the Northern District of Ohio’s Federal Defender, Max Chandler, and others, our Chapter has stepped up our outreach to and support of our veterans through the Wills for Veterans Program. Further, with the national organization, we are developing a Military Mondays program that will continue these efforts. Our Chapter is in the second year of a mentoring program for law students that has become a model for the national FBA. And the list goes on.

We also have several exciting programs and events in the works to build on these efforts and allow lawyers to connect with the federal bench. One of my goals this year has been to have our Chapter increase its presence throughout the Northern District. To that end, we have already held a Board meeting at the University of Akron’s beautiful new law school facility. We are planning a CLE program and reception in Akron later this spring. Look for details on that soon.

Additionally, we are planning a program at the Pro Football Hall of Fame in Canton for later this year, which will hopefully coincide with the Browns’ return to relevance and, dare we hope, mediocrity (at least).

We will also have our April board meeting in Toledo and are working on programming around that date as well. Probably most exciting of all, we will hold our annual summer social at Cedar Point on Friday, August 3. Please hold that date.

These efforts to get our Chapter to various corners of the Northern District take on a whole new level in our ongoing efforts to revamp the Chapter’s website and provide mobile access on smart phones and tablets. Those efforts are proceeding in partnership with students at John Marshall IT and the Cleveland Metropolitan School District. We all live our lives today on smart phones. Through this partnership, our Chapter will meet and serve our members in this digital space and position us to serve the next generation of lawyers as Millennials fill our membership ranks.

Regards,
Phil Calabrese
Events In the News

On December 15, 2017, Northern District of Ohio Chapter of the Federal Bar Association members Sean Kelly, Marisa Darden, and Sarah Cleves celebrated the 226th birthday of the Bill of Rights with the fourth grade classes at Campus International School in Cleveland, Ohio. The students received a copy of the Bill of Rights and discussed what it protects. Sean and Marisa explained how the Bill of Rights applies to their work as a solo practitioner and an Assistant United States Attorney, respectively. We also had cake with the students. Both the students and the teachers were engaged and seemed to love the event! Special thanks to the National Education Project for sponsoring the event.

The first Reach Out Legal Assistance Seminar and Clinic for this year was held on March 15, 2018. This seminar and clinic is a collaborative effort of our local chapter of the Federal Bar Association, the Northeast Ohio Chapter - Association of Corporate Counsel - America (NEO ACCA), and the Cleveland Metropolitan Bar Association (CMBA). It was very well attended and a successful evening.
BUCHANAN LANGUAGE: IDR STUDENT LOAN PAYMENTS DURING CH 13 BANKRUPTCY

By: Dawn Kennedy, FBA NDOH Member

It is widely understood that student loans taken out for the purpose of educational expenses under 34 CFR §472 are not automatically dischargeable under chapter 7. For both the chapter 7 & 13 filers, there is an automatic stay of collection activities placed on creditor after filing the petition, and this includes student loans. This article is not about the student loan borrower who files bankruptcy, and then files the adversarial proceeding to have the student loans discharged for undue hardship. The vast majority of non-business bankruptcies are still chapter 7 across all of the circuits, and for those filers an undue hardship analysis under Title 11 §523 (a)(8) may be appropriate.

Rather this article describes the ability for debtors to make payments on student loan debt either as a special class of debt, or outside of the bankruptcy estate, allowing for the debtors to participate in reduced payment programs and keep the “clock running” toward eventual forgiveness. For debtors who reorganize under the Chapter 13, the trustee makes the payments to creditors under a confirmed chapter 13 plan as described in §1126. In bankruptcy, student loans are treated as “unsecured non-priority debt” and payments to all debts in this class would be paid “pro-rata” share according to the plan. During this time, interest and penalties continue to accrue on the unpaid amount of the student loan.

The path currently followed is the creditor Department of Education places the loans in a type of “forbearance” for the period of the bankruptcy. Only payments made within the estate, if any, address any default or arrearages, typically for the term of around 5 years. This administrative forbearance period (when no payments are made at all) may be beneficial for debtors who need time and the room in the budget to maintain payments in the Chapter 13 plan and will address student loan debt after discharge. For others, the ability to qualify for, and make payments during the chapter 13, perhaps under an income driven repayment plan (IDR), would be a benefit for the debtor’s long term financial health.

Benefits to the client when Paying Student Loans During Chapter 13

In some jurisdictions, student loans can receive a separate classification to address the: 1. non-dischargeability of the debt, 2. the “fresh start” purpose of a bankruptcy to the debtor, and 3. the public policy goal of repayment. The debtors have been given permission to pay a larger share of the chapter 13 payment to student loans. The ability to repay during the Chapter 13, can for example, preserve the ability for a debtor to participate in the Public Service Loan Forgiveness (PSLF) program, where 120 consecutive payments must be made without default.

When a client’s account is placed in forbearance during the time they are in a Chapter 13 bankruptcy, they lose the months of time that could have moved the loan term toward federal loan forgiveness. Based on the repayment program the client qualifies for, the repayment terms can be as long as 25 years. The debtor’s losing an average of 60 months in payment credits sets back the client and resets the clock toward eventual forgiveness. Under the Income Driven Repayment plan, payments are as low as 10% of the borrower’s “discretionary” income, in reality, as low as $0.00.
Importantly, the ability to qualify and enter the IDR programs (there are four) and make payments consecutively each month (even if at $0.00) count.

“Under all four plans, any remaining loan balance is forgiven if your federal student loans aren’t fully repaid at the end of the repayment period. For any income-driven repayment plan, periods of economic hardship deferment, periods of repayment under certain other repayment plans, and periods when your required payment is zero will count toward your total repayment period.”

The “Buchanan Provisions”

The Department of Education previously “pushed back” on treating student loans differently and allowing debtors in bankruptcy to participate in income driven repayment. This trend has been changing. After In re Buchanan (Case No. 6:14-bk-51161), decided June 2015 vi the Department has permitted participation in IDR where the following language is present (and the jurisdiction has adopted this approach).

*Buchanan Provisions* vii

- The Debtor is not seeking nor does this Plan provide for any discharge, in whole or in part, of her student loan obligations.
- The Debtor shall be allowed to seek enrollment in any applicable income-driven repayment (“IDR”) plan with the U. S. Department of Education and/or other student loan servicers, guarantors, etc. (collectively referred to hereafter as “Ed”), without disqualification due to her bankruptcy.
- Ed shall not be required to allow enrollment in any IDR unless the Debtor otherwise qualifies for such plan.
- The Debtor may, if necessary and desired, seek a consolidation of her student loans by separate motion and subject to subsequent court order.
- Upon determination by Ed of her qualification for enrollment in an IDR and calculation of any payment required under such by the Debtor, the Debtor shall, within 30 days, notify the Chapter 13 Trustee of the amount of such payment. At such time, the Trustee or the Debtor may, if necessary, file a Motion to Modify the Chapter 13 Plan to allow such direct payment of the student loan(s) and adjust the payment to other general unsecured claims as necessary to avoid any unfair discrimination.
- The Debtor shall re-enroll in the applicable IDR annually or as otherwise required and shall, within 30 days following a determination of her updated payment, notify the Chapter 13 Trustee of such payment. At such time, the Trustee or the Debtor may, if necessary, file a Motion to Modify the Chapter 13 plan to allow such direct payment of the student loan(s) and adjust the payment to other general unsecured claims as necessary to avoid any unfair discrimination.
- During the pendency of any application by the Debtor to consolidate her student loans, to enroll in an IDR, direct payment of her student loans under an IDR, or during the pendency of any default in payments of the student loans under an IDR, it shall not be a violation of the stay or other State or Federal Laws for Ed to send the Debtor normal monthly statements regarding payments due and any other communications including, without limitation, notices of late payments or delinquency. These communications may expressly include telephone calls and e-mails.
In the event of any direct payments that are more than 30 days delinquent, the Debtor shall notify her attorney, who will in turn notify the Chapter 13 Trustee, and such parties will take appropriate action to rectify the delinquency.

The Debtor’s attorney may seek additional compensation by separate applications and court order for services provided in connection with the enrollment and performance under an IDR

This approach to balancing the “fresh start” for debtors and the student loan debt that will be exist after chapter 13 discharge is gaining attention. In January 2018, a chapter 13 was confirmed with this Buchanan provision: In Re: Hyland Case No.:8-17-bk-01564-CPM. After that case adopted language for that jurisdiction, modeled after Buchanan, it will be adopted for chapter 13 cases in the district. It is still jurisdiction specific, of course, and has not been recognized by many chapter 13 trustees.


http://www.gamb.uscourts.gov/USCourts/content/re-pracht-11-30594

https://studentaid.ed.gov/sa/repay-loans/understand/plans/income-driven

These provisions were first published in the NCBankruptcyexpert.com 2 October 2015. 


Dawn Kennedy is a member of the Federal Bar Association NDOH chapter, and a current board member for the FBA Veterans and Military Law Section. She practices Student Loan and Veterans Law in Van Wert, Ohio. Contact Dawn dawn@dawnkennedylaw.com
A CIVIL RIGHTS LIFE*


Reviewed by Jonathan L. Entin

David L. Brennan Professor Emeritus of Law

Case Western Reserve University

Nathaniel Jones has had an extraordinary career: the first African-American Assistant United States Attorney in the Northern District of Ohio; assistant general counsel of the Kerner Commission; general counsel of the NAACP; and, for nearly a quarter-century, judge of the United States Court of Appeals for the Sixth Circuit. Now, at the age of ninety, Judge Jones has written an engaging, often impassioned memoir. This book should be of great interest to anyone interested in civil rights, especially in the North and West.

The title, Answering the Call, alludes to a document that played a key role in the NAACP’s formation. Issued on the centennial of Abraham Lincoln’s birth, “The Call” urged a renewed struggle for racial justice at a time when segregation seemed to be firmly entrenched. Invoking the document that catalyzed the founding of the NAACP reflects Judge Jones’s long connection with the organization, which dates to his teen years when he came under the wing of Maynard Dickerson, a black lawyer and entrepreneur in his hometown of Youngstown.

Dickerson got him involved in NAACP activities. Jones became president of the local NAACP youth council, helping to organize protests against racial discrimination in parks, restaurants, swimming pools, and other establishments. The group even engaged in sit-ins long before the iconic 1960 Greensboro demonstration. All these efforts achieved at least modest results. And as an undergraduate at what is now Youngstown State University, Jones organized a campus NAACP chapter that successfully challenged institutional discrimination.

Almost predictably, in light of his close relationship with Dickerson, Jones decided to go to law school. Especially influential in that decision was Culver v. City of Warren, 83 N.E.2d 82 (Ohio Ct. App. 1948), a successful challenge to the segregation of a municipal swimming pool. Jones had the opportunity to sit in on strategy sessions with the lawyers handling the case and also with Thurgood Marshall, who was not formally involved in the litigation but offered strategic advice to local counsel.

His deep roots in the community prompted Jones to enroll in the now-defunct night law school that had become affiliated with his undergraduate college. During his first year, the mayor appointed Jones as director of Youngstown’s Fair Employment Practices Committee. Then in 1961, Jones became the first African American Assistant United States Attorney in the Northern District of Ohio.

* This is an abridged version of a review essay that appears in Volume 68, Issue 2 of the Case Western Reserve Law Review. It is published here with the permission of the Case Western Reserve Law Review.
After six years as an AUSA, Jones became an assistant general counsel of the Kerner Commission, which was established after the 1967 Detroit riots. In that position, he oversaw teams that obtained information related to the urban violence that had occurred over the previous several years and coordinated commission hearings.

II

Jones became the NAACP’s general counsel in 1969. The best parts of the book chronicle his decade there. Some of the stories are offbeat, such as how the NAACP came into possession of the ashes of the writer Dorothy Parker; others are moving, such as how Clarence Norris, the last surviving Scottsboro defendant, received a pardon from Alabama Governor George Wallace forty-five years after he and eight other young black men were falsely accused of raping two white women and sentenced to death.

The heart of the discussion emphasizes the NAACP’s litigation against segregated schools, particularly in the North and West. Jones reviews the conflict between the NAACP’s national office and its Atlanta branch when the local group endorsed a plan that provided for more black administrators and less desegregation. This controversy reflected a long-running debate within the NAACP that dated back to the 1930’s. After documenting massive disparities between segregated white and black schools, the organization considered two different legal strategies: equalization of the separate schools and a direct attack on the constitutionality of segregation. This was part of a broader argument about whether segregation promoted distinctive black institutions and social mobility for black professionals, or whether segregation served to oppress and dehumanize African Americans.

The organization ultimately committed to the direct attack in Brown. While there were some skeptics, the NAACP’s support of the direct attack reflected the clear majority view among African Americans. But the situation seemed more complicated when the Atlanta flap arose later. What would it mean to “integrate” a school system in which more than 85 percent of the students were African American?

Judge Jones and the national NAACP kept faith in integration; they sought a metropolitan remedy that would involve the overwhelmingly white suburban schools. Indeed, Judge Jones was arguing for precisely that remedy in Detroit and believed that the Atlanta dissidents were undercutting his position. Although Jones prevailed in the lower courts, the Supreme Court rejected a metropolitan remedy in Milliken v. Bradley, 418 U.S. 717 (1974). That ruling made it extremely difficult to include suburban districts in any desegregation remedy and narrowed the scope of relief in other cases.

When Brown was decided, segregation was legally required only in southern and border states. In the early 1960’s, the NAACP began to argue that children in other schools with overwhelmingly black enrollment suffered the same harms as children in schools that were segregated by law. But courts recognized a distinction between de jure segregation and de facto segregation, racial imbalances that do not directly arise from discrimination by government. Although Judge Jones regards the distinction as a “fiction,” he points out that challenges based only on de facto segregation generally failed. Successful challenges would require proof of official actions or policies that sought to promote racial separation in education.

Judge Jones chronicles many cases in which the NAACP brought de jure segregation claims in the North and West. He discusses lawsuits in Boston, Dayton, Detroit, Grand Rapids, and Youngstown. The latter case, Alexander v. Youngstown Board of Education, 454 F. Supp. 985 (N.D. Ohio 1978), aff’d, 675 F.2d 787 (6th Cir. 1982), involving his hometown school district, was especially frustrating because the district court “refused to recognize the cumulative effect of segregative acts” and the court of appeals accepted that “flawed analytical process.”

*Craggett* arose from the official response to overcrowding in predominantly African-American schools. Beginning in 1955, the board of education operated relay classes at those schools: half the pupils attended school in the morning, the other half in the afternoon; none received a full day’s worth of instruction. Parents objected, so the board began to bus black children from their overcrowded neighborhood schools to nearby, overwhelmingly white schools. But the African-American children were almost completely separated from the white pupils at the receiving schools.

Meanwhile, the board of education authorized a crash program to build new schools to relieve overcrowding. But that reinforced racial isolation and led to the emergence of the United Freedom Movement. After trying unsuccessfully to negotiate with the board to integrate the schools, UFM began widespread demonstrations. Tragedy struck on April 7, 1964, when Bruce Klunder, a young white minister who was vice-chair of the Cleveland chapter of the Congress of Racial Equality, died when he was accidentally run over by a bulldozer while protesting at a school construction site. *Craggett* was filed soon afterward. The district court declined to enjoin construction of the new schools, finding that the board did not seek to promote segregation but simply was adhering to longstanding policies favoring neighborhood schools.

The Cleveland NAACP continued to press for school integration over the next several years. When talks broke down, it went back to court in December 1973.

Judge Jones recounts the negative reaction to the *Reed* lawsuit by some influential local African-Americans. Shortly before trial, a meeting was arranged at which Jones and his legal team discussed the case with dubious African-American community leaders. Judge Jones says that, in the end, at least some of the initially hostile influentials were persuaded not to oppose the lawsuit. He does not speculate about why they were so skeptical about the litigation. But the skepticism about integrating the Cleveland schools seems quite similar to the black opposition to school desegregation in Atlanta that was unfolding at about the same time.

Judge Jones does provide a detailed summary of the district court’s findings, including more than 200 instances of intentional discrimination, and the remedial order. He also alludes to the challenges that arose during the implementation phase, notably the 1985 suicide of Superintendent of Schools Frederick Holliday, who shot himself on a Saturday morning in one of the city’s high schools.

Otherwise, Judge Jones does not carry the discussion much beyond 1979, when he was nominated to the Sixth Circuit. In fact, the case concluded about a quarter-century after it began. The parties entered into a consent decree in 1994, *Reed v. Rhodes*, 869 F. Supp. 1274 (N.D. Ohio 1994), and the district court concluded that the Cleveland Metropolitan School District had attained unitary status several years later, *Reed v. Rhodes*, 1 F. Supp. 2d 705 (N.D. Ohio 1998), *aff’d per curiam*, 215 F.3d 1327 (6th Cir. 2000).

III

Judge Jones devotes nearly a full chapter to describing the convoluted process that led to his ascension to the bench. The possibility of an appointment arose in June 1978, but it took nearly eleven months for President Carter to announce the nomination. Confirmation went uneventfully, and Judge Jones heard his first case on October 15, 1979.
He talks sparingly about his judicial cases, but he does discuss his efforts to diversify the legal profession. And he addresses two painful situations: a lawsuit relating to whether the House Judiciary Committee could obtain access to grand jury materials in connection with the impeachment of Judge Alcee Hastings, who had been acquitted in a criminal trial; and the controversy over Chief Judge Frank Battisti’s leadership of the U.S. District Court for the Northern District of Ohio.

Judge Jones retired from the bench in 2002, at age seventy-six, but he did not head for the golf course or a cruise ship. Rather, he became of counsel in the Cincinnati office of Blank Rome LLP. Retiring while still energetic and in good health would enable him to continue “to answer the Call” in ways that continued service on the bench would not. Along the way, he has some pointed criticisms of the Supreme Court and some trenchant observations about current issues affecting African Americans.

There is much more in *Answering the Call*. This memoir is an engrossing chronicle of the civil rights movement outside the South, and it should be a valuable source for years to come.
NATIONAL LABOR RELATIONS BOARD V. MURPHY OIL, INC.: CLASS AND COLLECTIVE ACTION WAIVERS IN EMPLOYEE ARBITRATION AGREEMENTS HANG IN THE BALANCE

By: Matthew T. Wholey and Rebecca J. Bennett, Ogletree, Deakins, Nash, Smoak, & Stewart, P.C.

The United States Supreme Court is considering three consolidated cases that most likely will decide the future of class and collective action waivers of employment claims. The cases – National Labor Relations Board v. Murphy Oil, Inc., Epic Systems Corp. v. Lewis, and Ernst & Young LLP v. Morris – each arise from the National Labor Relations Board’s (“NLRB” or the “Board”) controversial decision in D.R. Horton, Inc., 357 NLRB 2277 (2012). In D.R. Horton, the NLRB ruled that the National Labor Relations Act (“NLRA”) prohibits the enforcement of class, collective, and joint action waivers in arbitration agreements between employers and employees. Employers have used waivers to prevent employees from asserting class and collective action claims such as disparate impact discrimination, pay equity, and wage and hour claims under the Fair Labor Standards Act (“FLSA”). The Board based its ruling on the grounds that, in the Board’s view, such waivers unlawfully abridge employees’ substantive right to engage in “concerted activities” under Sections 7 and 8(a)(1) of the NLRA.

From 2012 to 2016, many federal courts, including the Second, Fifth, and Eighth Circuits, rejected the NLRB’s position, explaining that the Federal Arbitration Act (“FAA”) makes arbitration agreements enforceable on their terms, subject to certain limited exceptions, and the NLRA, for its part, says nothing about class actions or any other litigation procedure. In 2016 and 2017, however, the Sixth, Seventh, and Ninth Circuits sided with the NLRB. The Supreme Court granted certiorari in Murphy Oil, Lewis, and Morris to address the issue and resolve the circuit split. Since oral argument on October 2, 2017, employment attorneys around the country have eagerly awaited the Court’s ruling.

Following oral argument in October, the Court seemed poised to rule in favor of the employers and overrule the NLRB’s decision in D.R. Horton. Justice Kennedy, who will likely be the deciding vote, asked certain pointed questions that favored the employers’ position. It is possible that the Court could come to a ruling that is narrower than a simple up-or-down decision on the future of class and collective action waivers. Justice Breyer, for example, asked at oral argument whether the Court might decide only the narrow issue of whether the arbitration agreements at issue are unlawful under the NLRA because they prohibit employees from filing joint claims in a single proceeding and leave for some later case the question whether class and collective action waivers, in general, violate the NLRA. Such a result seems unlikely, but it is a conceivable way forward. A less probable, but still possible, result is that the Court could uphold the NLRB’s decision in D.R. Horton and thereby render essentially all class action waivers in employee arbitration agreements illegal and unenforceable.

According to the employees’ briefs in the Murphy Oil cases, should the Court rule in favor of employers, employees will lose the only effective means available to them to address claims against their employers. They claim that class and collective actions are the only reasonable vehicles available to enforce certain statutory rights. For example, an individual action to enforce the minimum wage and overtime requirements of the Fair Labor Standards Act, may require the expenditure of significant litigation costs and attorney fees that easily eclipse a plaintiff’s potential recovery on an individual basis. See, e.g., Sutherland v. Ernst & Young LLP, 768 F. Supp. 2d 547, 552 (S.D.N.Y. 2011), rev’d, 726 F. 3d 290 (2d Cir. 2013) (individual recovery for the named plaintiff estimated at about $1,900 while uncontested evidence showed the estimated costs to proceed, including attorney fees, to be around $200,000).
Based on those simple economics, the employees in the *Murphy Oil* cases argue that, if the Supreme Court upholds the legality of class and collective action waivers in mandatory arbitration agreements, then potential employees are faced with the Hobson’s choice of remaining unemployed or forfeiting those statutory rights.

Employer advocates argue that position is a bit of a stretch. In the FLSA context, for example, an award of reasonable attorney fees “shall” be “paid by the defendant” to prevailing plaintiffs. *See* 29 U.S.C. § 216(b) (the Court “shall, in addition to any judgment awarded to the plaintiff or plaintiffs, allow a reasonable attorney’s fee to be paid by the defendant, and the costs of the action”); *see also* *Fegley v. Higgins*, 19 F.3d 1126, 1134 (6th Cir. 1994), *cert. denied*, 513 U.S. 875 (1994) (FLSA’s mandatory fee provision “insure[s] effective access to the judicial process by providing attorney fees for prevailing plaintiffs with wage and hour grievances,” and thus “encourage[s] the vindication of congressionally identified policies and rights”). Assuming the plaintiff has a valid claim under the FLSA, the fees and costs could be included in an arbitrator’s award against the employer, rendering the costs a much less burdensome obstacle for employees. Moreover, assuming a plaintiff’s attorney is able to find multiple would-be plaintiffs to assert FLSA claims, the attorney can file multiple suits and obtain a fee award in each one.

While FLSA claims, rather than die out, could just as simply morph into a possibly more tedious process for all involved, including multiple arbitrations regarding identical issues, it is true that certain claims may die on the vine in the absence of class procedures. Many class action lawsuits have been filed— and will continue to be filed— based on claims that do not include an automatic attorney fee component for prevailing plaintiffs. In those cases, assuming that the individual damages amount is small enough, the inability to pursue class-wide claims could result in a situation where plaintiffs are, practically speaking, unable to pursue their claims. But, in many cases, such as arbitration before the American Arbitration Association pursuant to its Employment Arbitration Rules, the employer is responsible for all except a fraction of the forum fees. *See* American Arbitration Association Employment Arbitration Rules, *available at* https://www.adr.org/sites/default/files/Employment%20Rules.pdf.

And, in any event, a ruling in the employers’ favor would not ensure, by any means, the doom of all “concerted” activity by employees, even in the context of litigation and arbitration. Employees remain free to team up, pool resources, and hire the same attorneys to prosecute their claims, thus achieving many of the economies of scale that class and collective procedures provide. *See, e.g.*, Compl. ¶¶ 1 & 2, 20/20 Communic’ns, *Inc. v. Blevins et al.*, No. 4-16cv-810-A (N.D. Tex. Aug. 31, 2016), ECF No. 1 (noting 18 current and former employees, subject to individual arbitration agreements, filed coordinated individual arbitrations, represented by same attorney and asserting the same claims); Aff. Rebecca S. Predovan ¶¶ 1-10, *Kicic v. Hobby Lobby Stores, Inc.*, Case No. 2:16-cv-197 (S.D. Ind. June 24, 2016), ECF No. 16-1 (noting two former employees subject to individual arbitration agreements were represented by the same attorneys and simultaneously filed individual arbitrations alleging same claims). In other words, while a joint, collective, and class action waiver prevents the employees from appearing on the pleadings together, they may still work together to achieve the same ends. And, outside of litigation, employees have every right to engage in those concerted activities expressly provided for under the NLRA— i.e., (1) “self-organization,” (2) “form[ing], join[ing], or assist[ing] labor organizations” and (3) “bargain[ing] collectively.” *See* 29 U.S.C. §157.

Whatever the result in the *Murphy Oil* trio of cases, the Supreme Court’s decision will have a profound effect on the means available to employee-plaintiffs for litigating their claims.
LET’S TALK ABOUT MEDIATION*

BY: David A. Schaefer, Esq.
McCarthy, Lebit, Crystal & Liffman Co., L.P.A.

I. INTRODUCTION – HISTORICAL NOTE

Mediation, in a sense, dates back many hundreds of years to the days when village elders settled controversies in small towns throughout the world. In modern times, mediation was primarily limited to labor law as a method for resolving union/management disputes.

In the late 1980’s, state courts in certain states, e.g., California, began requiring mediation of civil litigation, but the mediation movement really did not gain much momentum until passage of federal legislation in 1988, 28 U.S.C. §651, 652 et seq. (1988). After that, federal courts adopted local rules requiring mediation, or some other form of alternate dispute resolution (“ADR”) in civil cases.

II. CHARACTERISTICS OF A GOOD MEDIATOR

A. DON’T BE RESTLESS

A good mediator needs to be patient, as do counsel and the parties. A “standard” mediation can be tedious and time consuming. Indeed, I have a colleague who says nothing happens in mediations until 2:00 in the afternoon. While I don’t mediate in this fashion, I, wearing my advocate’s hat, completely understand what he means. Often mediators get blamed for the slow pace and/or length of a mediation, but, in my experience, counsel and the parties are equally responsible.

B. DON’T GIVE UP

A good mediator also needs to be persistent. Now, you certainly do not want to irritate counsel and the parties, but a “never say never” approach is recommended. Early in my career as a mediator, I adjourned a mediation when I believed an impasse, despite using a reliable technique (see below), could not be resolved. The next day I received a call from one of the attorneys who inquired as to why I had adjourned the mediation. After I explained myself, he said, “Well, we had more authority.” I inquired as to why he didn’t tell me that at the mediation, and he had no response. The case was resolved shortly thereafter through the use of “telephone mediation.” Perhaps if I’d been more persistent, the case would have been resolved, and a mediation settlement agreement executed, at the mediation itself.

C. BE INTERESTED

A good mediator has to be a very good listener. To some parties, the mediation is their “day in court.” To some attorneys, the mediation is an opportunity to at least showcase their advocacy skills. The words that counsel and the parties speak to the mediator are important. These words, at times, are part of a lengthy speech, and it is tempting to let your mind wander. The mediator should not allow this to happen; somewhere in the lengthy discourse is likely to be a pearl or two that will move the mediation closer to a resolution.

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*This article was originally presented at the Leadership Institute of the Ohio Women’s Bar Foundation on February 9, 2018.


2Most federal courts already had local rules regarding arbitration, but new forms, such as Early Neutral Evaluation and Conciliation, were adopted. Most state courts then followed suit.
“Listen, listen, listen” is tantamount to “location, location, location” in the world of retail. To not listen, frankly, is not productive and is discourteous, certainly not a trait anyone wants in a mediator.

D. **BE MORE THAN A MESSENER**

In my view, which is not shared by everyone in the ADR community, a good mediator also needs to be evaluative, i.e., offer opinions when appropriate, rather than facilitative, i.e., simply conveying positions of the parties. There are times when it is appropriate to simply convey messages of the parties, most notably when the mediation evolves into simply “trading numbers”, i.e., numbers exchanged with little or no explanation. The parties expect, and deserve, thorough preparation by the mediator. Thorough preparation, especially by a mediator experienced in the subject matter, leads to substantive opinions. Communicating them can often help move a party to a position more prone to result in a settlement than otherwise. There is a caveat here—the mediator must maintain neutrality.

E. **IF YOU BUILD IT, THEY WILL COME**

A good mediator must build trust among himself on the one hand and the parties/counsel on the other hand. Presumably, counsel already trust the mediator or they wouldn’t have selected her/him. The parties, however, only have the word of their counsel as to the mediator’s ability, trustworthiness, etc. So, how does/should the mediator accomplish this task? At least two commentators, believe one method is through “rapport talk.” "Rapport talk” is conversation, sometimes even unrelated to the mediation itself, that helps to develop and build a relationship. This is contrasted with “report talk”, the purpose of which is to share information. Regardless of how it is done, there is no question that a mediator must find a way to build trust.

III. **TRIGGER POINTS**

An important, but underrated, factor in mediation involves timing. I have mediated cases at many different times in the dispute process, and my experience, to some extent supported by the literature, follows.

A. **BEFORE THE SWORD FALLS**

Pre-litigation mediation seemingly has become more common. My own experience is that the probability of settlement at this point is substantially less than 50%. This is because, in my view, the parties and their counsel have not: fully explained their claims and defenses, lived long enough with the dispute, spent enough time and money to foster resolution, and are not emotionally ready to resolve the matter. Nevertheless, some disputes can be settled before or without litigation, and it is worth a try.

B. **DIP YOUR TOE IN THE WATER**

Some mediations occur after the pleadings are complete, but before any discovery has been conducted. My experience is that the settlement rate is not much better than pre-litigation mediation for the same reasons. Mediation at this point does have a slight advantage in that at least plaintiff’s legal theories and defendant’s defenses are known and can be explored in the mediation statements and at the mediation.

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3 As a mediator, maintaining neutrality is often taken for granted by the parties and their counsel. This is not surprising since counsel likely described you as a “neutral”. Staying neutral, however, can be difficult when a party or counsel take an unreasonable position.

4 Jan Frankel Schau and Nina Meierding, Negotiating Like A Woman – How Gender Impacts Communication Between the Sexes.

5 Id.
C. **Let's Save Money**

A fair number of mediations occur after paper discovery has been completed but before any depositions have been taken. This is usually a good time for a mediation because many of the facts have been disclosed in the documents, and the cost of depositions, easily the most expensive discovery tool especially in complex cases, has yet to be incurred. The potential cost of proceeding through trial is probably at its highest point it will ever be in the dispute, and this fact can be useful in moving a dispute to resolution. There is usually a better than 50% chance of reaching settlement.

D. **The Pressure is Mounting**

Another frequent trigger point is after depositions are completed, but motions for summary judgment have not been filed. By this point, virtually all facts are known to counsel and the parties. The seemingly inevitable motion for summary judgment or partial motion for summary judgment is yet to be filed but has probably been threatened by one side or the other. If so, it can be used as a talking point by the mediator. In my experience, many cases are resolved at mediation.

E. **Uncertainty Can Help**

Many mediations occur after summary judgment(s) have been filed, but no decision has been made by the judge. Most mediators agree that the uncertainty of a ruling is an advantage in mediation. While I understand this viewpoint, I do not totally agree with it. A motion for summary judgment that has been decided provides a clear signal from another neutral, i.e., the judge, as to her/his view of the dispute. This can be very valuable despite counsel’s confidence in their ability to persuade the jury. Typically, a mediation at this point occurs within 4-6 weeks of the trial date so, depending upon the complexity of the case, there could still be a lot of expense to be incurred, which usually helps the case get resolved. In the less complicated cases, however, the cost of preparing for and trying the case is not so significant. Accordingly, a mediation at this point can sometimes be “too late.”

F. **Don’t Let the Show Begin**

Mediations, after a ruling on summary judgment, within 2-3 weeks of trial, in my experience, do not occur frequently, but the settlement rate is surprisingly high. Eve of trial mediations tend to occur in less complicated cases as counsel, insurance representatives, and the parties become more concerned about the possible outcome.

IV. **WHAT TO DO AT IMPASSE?**

Mediators must be able to apply different techniques when the parties are at impasse or near an impasse arising out of traditional (ping pong style) negotiations. If your mediator doesn’t suggest these, you should.

A. **Brackets – The Range of Resolution**

When I first started serving as a mediator years ago, I did not like using brackets because the parties and their counsel immediately focused on the mid-point of the proposed bracket, which, in part, defeats the purpose of using them. The real purpose of brackets is to inform the other party of the range within which you are willing to negotiate.

Bracketing is a type of high-low bargaining. In a recent mediation, where plaintiff originally demanded $2 million and defendant originally offered $100,000, the negotiations stalled after three rounds. Plaintiff then proposed a bracket with the high number of $1.7 million and a low number of $600,000. Defendant countered with a bracket of a high number of $600,000 and a low number of $300,000. The parties then returned to single number demands and offers, and the case was settled. Brackets saved time and accelerated the timing of the settlement. In more recent years, I have found brackets to be useful tool to speed up the negotiations, particularly when the parties or their counsel are becoming impatient.
A simple variation of this approach is when one or both parties ask the mediator to propose a bracket. Not surprisingly, this is referred to as a “mediator’s bracket.” In making such a proposal, the mediator should be guided primarily by the prior negotiations.

B. **Mediator’s Number / Mediator’s Proposal—After All, You Picked Her/Him**

This is usually used when traditional negotiations and/or brackets do not resolve the impasse. If this technique is used at the mediation, I refer to it as a “mediator’s number”. If it is used after the mediation, usually the next day, I communicate it by email and refer to it as a “mediator’s proposal.”

In either situation, the mediator proposes a single number to resolve the case. The responses are kept confidential. If both sides accept the proposal, then the mediator informs both sides that there is a settlement. If one side accepts the proposal, and the other side rejects the proposal, the party that rejects is not told that the other party accepted. The party that accepted is told that the other party rejected because both sides are told that no settlement has been reached. If both sides reject, the mediator simply tells both sides that no settlement has been reached.

C. **Private Numbers**

With this technique, both sides provide the mediator with their near final numbers. The mediator keeps them confidential and decides if the parties are within striking distance. If they are, the parties are told that they are within striking distance, and then typically the parties return to traditional ping pong negotiations.

If the parties are not within striking distance, then they are told that this is the case and that there are now several options. The one that is chosen is often a function of the length of time spent at the mediation. The most common one is a mediator’s proposal made the next day by email. The parties can also return to traditional negotiations, they can try a mediator’s number or they can adjourn for the day and let the negotiations “rest” to be continued another time either by phone or a second mediation session.

In this approach, the mediator usually determines what constitutes “striking distance”. A variation of this approach is to have the parties agree on what constitutes striking distance. The advantage here is that the parties have more control over the process. The disadvantage is that it removes the element of the mediator’s judgment, which is somewhat counter-intuitive because the parties picked the mediator to guide the process.

D. **Med/Arb—ADR’s Split Personality**

While there are too many forms of med/arb to cover in this article, this approach typically involves arbitration after mediation has not resulted in a settlement of the case. The arbitration sometimes is a full blown traditional arbitration hearing that leads to an adjudicated decision by the arbitrator who can be, and often is, the same person who served as the mediator. Using the same person for both causes concern because the parties and their counsel worry that facts disclosed during the mediation, but not admitted into evidence during the arbitration, will be used by the arbitrator to decide the case. I suggest to you that this concern is overblown and can be solved simply by waiting 60 days to have the arbitration hearing after the mediation has been completed. By that time, most mediator/arbitrators will have forgotten what they have been told in the mediation and will not review their mediation file prior to or during the arbitration.

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6A variation of this is sometimes referred to as “online mediation” in which both sides (rather than the mediator) submit confidential settlement offers. If the offers fall within a certain range, the case is settled half-way between them. See New Trends in Mediation, Texas Trial Handbook §5:12 (3d ed.)

7These techniques (brackets, mediator’s number/proposal, private numbers) are considered hypotheticals. If they don’t result in a settlement, it is as if they never occurred.
E. **ARB/ Med – Split Personality Revisited**

This approach reverses the sequence of the previous one. After an arbitration hearing, the arbitrator prepares an award but does not disclose it to the parties. The parties then mediate their dispute, and if the mediation results in a settlement, the matter is concluded with an executed settlement agreement. If the mediation does not result in a settlement, the award is disclosed and is binding. This process provides more information to the mediator and the parties going into the mediation and obviously avoids the issue of the mediator using information learned in the mediation when deciding the arbitration. The primary disadvantage to this process is cost.

F. **ARB/ Med/ Arb – Are You Kidding**

This approach begins as an arbitration, and either at a break between hearing days or simply because of the arbitrator’s intuition, a mediation is conducted. If the mediation does not result in a settlement, the arbitration is reconvened so that the hearing can be completed and an award can be issued. If the mediation results in a settlement, the matter is concluded with an executed settlement agreement.

V. WHY MEDIATIONS “FAIL”

The ultimate goal, of course, of a mediation is to resolve the dispute at the mediation. When this does not occur, most litigators and their clients will say that the mediation “failed”. To view mediation in this fashion is to, at least sometimes, elevate form over substance.

A. **Setting the Table**

Many mediations do not settle on the day of the mediation, but the “table is set” for a settlement, either by the judge in an upcoming settlement conference or by the mediator through telephone negotiations. This has occurred in many of my mediations, and without the mediation itself, a settlement would not have been reached. Thus, it is not accurate to say that the mediation “failed”.

B. **Hunt for Information**

Even a mediation that does set the table for settlement, typically results in the exchange of information previously unknown to counsel and the parties. While this is sometimes characterized as “free discovery”, such characterization is not accurate because the clients are paying their counsel, the mediator, and spending their own time at the mediation. Nevertheless, information received at a mediation is typically less expensive than that obtained through the discovery process. This is another example of the mediation not being a failure.

C. **“Lack of Authority”**

The reason the heading is in quotes is because, as a mediator, one never knows if there actually is a lack of authority or whether that is an excuse for not wanting to continue the mediation. If it is sincere, then a phone call to a supervisor or a chief financial officer can be made. Often, such phone calls are successful in allowing the mediation to continue and move toward settlement. Before the advent of cell phones, another statement frequently heard was “I can’t reach anyone with more authority.” On rare occasions, that is still true, but I am usually skeptical when told that such a person cannot be reached.

D. **Seeking Victory**

It would seem obvious that no party “wins” a mediation. Nevertheless, some parties and their counsel come to a mediation with the goal of “winning”, which apparently is measured by the amount saved from what the defendant is actually willing to pay or the amount increased over what the plaintiff was willing to accept. Another type of “win” for the defense is to spend most of the time dwelling in the weeds about the merits without making any serious monetary offer. From the mediator’s standpoint, this is extremely frustrating, and when I encounter this, I wonder why did the defendant agree to mediation. The converse can be, but in my experience is less often, true.
That is to say that plaintiff may also get lost in the weeds without making even a semi-serious demand until near the end of the day.

E. **LET’S BLAME THE MEDIATOR**

If a mediator lacks the characteristics referred to previously, *supra* pp. 1-3, and/or lacks knowledge of impasse breaking techniques or both, the mediation may fail. Astute counsel, however, even when faced with such a mediator, can prevent the mediation from failing by being aggressive with their offers and counter-offers and making suggestions to, or even instructing, the mediator how to proceed. In the latter situation, the mediator actually becomes a facilitator simply carrying messages from room to room and occasionally offering an observation of her/his own.

F. **IT DOES HAPPEN**

In my experience, some mediations are truly failures. Invariably, it is because one side (or in a multiple party mediation, several sides) came to the mediation with virtually no intention of resolving the case. They view the mediation as a “hoop” to jump through on their way to summary judgment, trial, or settlement on the eve of trial. This type of defendant perceives the eve of trial to be the point at which it will have to pay the least amount or, for a plaintiff, the highest amount it can obtain with neither side truly taking into account the amount of time and money spent to get to that point. I can’t speak for other mediators, but I find this type of attitude very frustrating. Several years ago, I actually had an attorney tell me, about two hours into the mediation, that his client had no intention of settling and simply agreed to mediate to obtain “inexpensive discovery”. Nevertheless, he continued the mediation process for approximately an additional two hours before he was willing to adjourn.

Another reason mediations fail is because of unrealistic expectations. Relatively recently, I mediated a case on two separate occasions. At the end of the second mediation, the parties agreed to consider a mediator’s number. The defense accepted the mediator’s number, which was rejected by plaintiff. The case went to trial, and the jury awarded $25,000 less than my mediator’s number. Thus, I wasn’t the only one who viewed plaintiff’s expectations as unrealistic.

VI. **TRENDS**

A. **FREQUENCY – THEY ARE HERE TO STAY**

The most obvious trend regarding mediation is that virtually every civil case is mediated at least once. Indeed, many civil cases are mediated twice with two in-person sessions or at least with a second session by phone. It is fair to say that, especially with complex disputes, mediation can be more of a process than an event.

B. **OPENING STATEMENT – THEY ARE VANISHING**

When mediation first began in civil litigation, it was common for counsel to make jury style opening statements. This practice, quite properly in my opinion, has fallen into disfavor, and the overwhelming trend is to dispense with this type of opening statement. Alternatives to this type of opening statement⁹ are informational openings, i.e., non-inflammatory statements, a simple meet and greet session or even no initial joint session at all.

C. **INITIAL JOINT SESSION – NICE NOT KNOWING YOU**

There is somewhat of a trend to dispense with the initial joint session and commence the mediation immediately with caucus sessions. This works well particularly in highly contentious cases, such as shareholder disputes and “business divorces.” The reason for this is that the parties, and sometimes even their counsel, are so angry about the facts and the litigation that to have them sit in the same room is simply not a good idea.

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⁹This is not only the trend in Northeast Ohio, but also in other parts of the country. See, *Mediation Trends in West Virginia*, 2010 Jun., W. Va Law 48.
VII. GENDER DIFFERENCES IN MEDIATION

Gender may matter in dispute resolution, but other factors, especially in such an interactive field of behavior, may trump or smooth out or make more complex any gender differences in the pursuit of dispute resolution. In short, gender matters, but context may matter more.

A. THE LITERATURE

This sub-topic is much too large for a detailed presentation, but I will try to mention what I view as some of the more important points. The literature is vast regarding gender differences in negotiation. Surprisingly, the literature is meager regarding gender differences in mediation, which, of course, is a type of negotiation, but the presence of a neutral substantially alters the model. Indeed, the neutral is part of the context referred to by Ms. Menkel-Meadow, a leading author in this field.

Stated concisely, the literature on negotiation differences is not all that enlightening. It refers to the stereotypes of women being more caring and collaborative while men are more direct and combative. It refers to men being more assertive and tending to try and dominate while women are less assertive and more subtle. And, it bolsters the idea that men tend to interrupt more while women are more patient and, frankly, more polite.

Menkel-Meadow's article does, fortunately, focus on gender differences in alternate dispute resolution. From my standpoint, a significant point made by Menkel-Meadow, which she refers to as “context”, is the number of variables at issue in trying to assess gender differences in mediation. What is the nature of the dispute? Is the mediator male or female? Are the parties male or female or a mixture? Are the lawyers male or female or a mixture? If a mixture, is the plaintiff represented by a male or female? The defendant? In a multiple party mediation, do the female lawyers outnumber the male lawyers? Do the female parties outnumber the male parties?

Tamara Relis found that women, as parties in mediation, were more concerned with emotional, as opposed to compensatory, aspects of their cases and were more likely to want defendants to attend the mediation with a hope for direct communication about legal and “extra-legal” aspects of their disputes.

The studies as to female mediators versus male mediators are even more rare than those already referred to. Relis found that female plaintiffs were more likely to be overpowered by a male mediator than were male plaintiffs, and she acknowledges that gender differences are still part of the experience.

B. REFLECTIONS

Some words about my own experience. An obvious, but important, point is that generalizations are dangerous. Thus, I will avoid them, as the following observations are specific to mediations where I was either the mediator (a substantial majority) or counsel for one of the parties.

A good number of the cases in which I have served as a mediator involved construction disputes over expensive homes. All the mediations, except one, were attended by husbands and wives, as plaintiffs. Without question, the wives (most of them were working outside the home) had stronger feelings, perhaps grounded in emotion, than the husbands. Without question, they were tougher negotiators. While they started out as less direct, conforming if you will to one of the stereotypes, they certainly did not remain that way as the mediations progressed.

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11See e.g., F. Peter Phillips, Gender and Negotiation: An Interesting Study of a Perennial Topic.
12Tamara Relis, Perceptions in Litigation and Mediation: Lawyers, Defendants, Plaintiffs and Gendered Parties (2009).
13Id. at 220-225
In those mediations, all parties were represented by male attorneys. Had there been some female attorneys (see below), I tend to think that the process would have been somewhat different, but I’m not sure the outcome would have changed.

I have also mediated several cases with husband and wife teams as defendants. In those, I found the female part of the team to be somewhat submissive and happy, as best I could tell, to let their male counterparts and their counsel do most of the talking.

As to female counsel, I have seen no discernible differences between them and their male counterparts.

As an advocate, I have represented parties where the mediator was female, although the sample size is small. The female mediators were slightly calmer than their male colleagues and more nuanced.

VIII. CONCLUSION

Mediation is obviously here to stay. It is a serious process. When handled properly by all involved, it saves time, money and, not the least of all, stress.

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CLEARING THE JUDICIAL FOG: CODIFYING ABSTENTION*

By James Bedell, J.D. Candidate, 2018, Case Western Reserve School of Law

In 2014, “Grand Juror Doe” filed a § 1983 claim, asserting that a statement of St. Louis County Prosecuting Attorney Robert P. McCulloch—describing a grand jury’s purportedly “collective” decision, based on “all possible evidence,” not to indict Darren Wilson, the police officer who had shot and killed Michael Brown three months earlier in Ferguson, Missouri—was profoundly misleading and should be corrected with facts from the grand jurors themselves.¹

To this day, the merits of this federal claim have not been addressed except by a state judge. The federal district court, on May 5, 2015, decided to abstain from hearing the case, citing the Pullman² abstention doctrine as its justification.³ Grand Juror Doe appealed the decision, and the United States Court of Appeals for the Eighth Circuit upheld the abstention on June 20, 2016.⁴ Grand Juror Doe was forced to bring her claim to Missouri state court, and the case was dismissed with prejudice on December 13, 2016.⁵ Almost exactly a year later, on December 12, 2017, the Missouri Court of Appeals affirmed the trial court’s dismissal.⁶ As of this writing, her motion for a transfer to the Supreme Court of Missouri is pending.⁷

After exhausting her state-court appeals—pursuant to Pullman abstention and an England reservation⁸—Grand Juror Doe may ultimately return to the Eastern District of Missouri at the conclusion of all state court proceedings. Potentially, Pullman abstention will have resulted in the chilling or silencing of constitutionally protected speech for an extended period of time while Grand Juror Doe bore the expense of years of litigation before her day in federal court to decide a federal question about the scope of the First Amendment.

Abstention is a collection of doctrines allowing courts to decline to exercise otherwise proper jurisdiction. The doctrines create enormous waste that overwhelms the perceived benefits of their implementation. Inefficiency in the judicial system leaves litigants with high transaction costs from added proceedings, extended delay in reaching a resolution, and a potentially elongated chilling effect on constitutional rights. Not only does abstention create unnecessary obstacles for litigants, but abstention is needlessly complicated, leading to situations in which litigants are further burdened by judicial error. These problems can be solved through legislation codifying the entirety of abstention in federal courts so as to streamline judicial efficiency and promote clarity within the doctrines.

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⁴ Doe v. McCulloch, 835 F.3d 785, 788–89 (8th Cir. 2016). Grand Juror Doe successfully moved to proceed under a pseudonym in the district court. The Eighth Circuit followed suit by using feminine pronouns for Grand Juror Doe, and this Note does the same. Id. at 786 n.1.
Problems in Abstention

Litigation can be an arduous process. A case can take years after filing to be resolved, and it can generate substantial expenses in the process. Abstention increases these costs. Consider a situation in which a party brings a state claim and a federal claim in federal court. If the court decides to abstain through either a dismissal or a stay of proceedings, that order is immediately appealable. If the litigant is adamant on having his claim heard in federal court, he must then bear the expense of appealing the decision in the federal courts. Should that not produce a favorable outcome, the litigant must then move to the state courts and pursue the case there. This could further include more appeals at the state level before potentially allowing the litigant back into the federal court he chose in the first place.

Much of the reasoning behind the “state law trio” of abstention doctrines stems from deference to the state court system by the federal court system. An assumption here is that the state court—by nature of being the state court ruling on unclear issues of state law—is inherently more likely to be correct on the issue than a federal court could be. The error in this assumption is that “[t]he standard . . . refers to the highest court of the state.” In many ways, a lower state court decision has little more precedential weight than a ruling from the federal court. So is the resulting cost to the litigant justifiable in this instance?

If one wants to argue that the state court has the right to take ownership over the issue, then maybe abstention is justified. The Pullman decision cites avoiding “friction” as a motivating factor to abstain from ruling, but does not explain further. Federal courts often decide issues of state law, regardless of whether the state’s highest court has spoken on the issue. How much weight should we give to any inherent ownership right of the state courts? When the benefit is only slight, and the cost of the litigants is so great, the importance of preserving this deference to the state courts lessens. Judith Kaye, former Chief Judge of the New York Court of Appeals, recognized the delay and expense caused by abstention, and concluded that “it soon became apparent that abstention was not an effective solution to the problem of federal courts seeking to ascertain state law.”

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9 See Quackenbush v. Allstate Ins. Co., 517 U.S. 706, 713–14 (1996) (finding that an appeal to an abstention stay was proper because it put the litigants “effectively out of court”).
10 The “state law trio” refers to Pullman, Burford v. Sun Oil Co., 319 U.S. 315 (1943), and Louisiana Power & Light Co. v. City of Thibodaux, 360 U.S. 25 (1959), which all deal with some aspect of an unclear state law.
11 See R.R. Comm’n of Tex. v. Pullman, 312 U.S. 496, 500 (1941) (“Few public interests have a higher claim upon the discretion of a federal chancellor than the avoidance of needless friction with state policies . . . .”).
12 See Martha A. Field, Abstention in Constitutional Cases: The Scope of the Pullman Abstention Doctrine, 122 U. PA. L. Rev. 1071, 1091 (1974) (finding that abstention discussions frequently assume the state court will come to the correct decision on remand).
13 Id.
14 312 U.S. at 500.
15 See, e.g., Chatlos Sys., Inc. v. Nat’l Cash Register Corp., 635 F.2d 1081, 1086 (3d Cir. 1980) (“New Jersey has not taken a position on this question, so . . . we must predict which view the New Jersey Supreme Court would adopt . . . .”); Blankenship v. USA Truck, Inc., 601 F.3d 852, 856 (8th Cir. 2010) (“When there is no state supreme court case directly on point, our role is to predict how the statesupreme court would rule if faced with the [same issue] before us.”) (quoting Northland Cas. Co. v. Meeks, 540 F.3d 869, 874 (8th Cir. 2008)).
In Grand Juror Doe’s case, the federal district court originally abstained under *Burford* and *Pullman*, and it dismissed her entire case. On appeal, Grand Juror Doe argued that *Burford* abstention was inappropriate while also noting that the court should have retained jurisdiction if abstaining under *Pullman*. Despite this, the Eighth Circuit extrapolated Grand Juror Doe’s argument into “whether and to what extent the [grand jury secrecy] statute applies to her.” In a sense, the district court’s confusion over which abstention doctrine to apply led to Grand Juror Doe being forced to argue in favor of moving her case out of federal court temporarily pursuant to *Pullman*, because the alternative—the court abstaining under *Burford* and dismissing the case—would shut her out of federal court until a potential Supreme Court review of the Missouri Supreme Court.

Even outside the merits and procedural elements, Grand Juror Doe’s case indicates the uncertainty of abstention. Judge Roger Wollman wrote the opinion for the Eighth Circuit in both *Doe v. McCulloch* and *Sprint Communications Company v. Jacobs*, the latter of which was a *Younger* abstention case reversed by the Supreme Court. At oral argument in *Doe*, Judge Wollman quipped that he was “still smarting in a way from the unanimous decision that overruled . . . one of [his] opinions in the *Sprint* case.” Wollman continued to joke that the Supreme Court “had to rub it in” when explaining the ruling, characterizing the Court as saying, “dumb-dumb can’t you read our cases?”

Two major procedures are typically discussed in conjunction with abstention: *England* reservations and certified questions. An *England* reservation preserves the ability for a litigant to return to the federal district court, but “issue preclusion generally binds an abstaining federal court to those state court findings that are necessary to the state court’s holding.” So while the *England* reservation serves an important function in preserving the litigant’s rights, it can sometimes be seen as doing too little, too late—or preclude additional litigation entirely—should a state court ignore a litigant’s plea for separation of the federal and state issues, or when such separation is impracticable.

A certified question can be used to clarify an unclear law; it is a process by which a federal court presents a question of law to a state supreme court. Individual states have adopted certified question laws, and the Supreme Court has supported states’ efforts to help “build a cooperative judicial federalism.” A judge on the United States Court of Appeals for the First Circuit made much less flattering remarks about them.

Certified questions are, on their face, an innovative concept that theoretically solves many abstention-related problems. They suffer, however, from the lack of uniformity across the states. This is seen from the perspective of both timeliness and quality of the answer.

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17 Doe v. McCulloch, 835 F.3d 785, 788 (8th Cir. 2016). The district court’s usage of *Burford* as the driving force of its decision is peculiar. Not only was abstaining under *Burford* wholly inappropriate given the circumstances, but neither party cited the case in the numerous briefs on the issue. Abstaining under *Burford* is significant because, unlike *Pullman*, *Burford* abstention requires that the court dismiss the case, as opposed to simply issuing a stay of proceedings.

18 Brief of Appellant at 20, 33, Doe v. McCulloch, 835 F.3d 785, 788 (8th Cir. 2016) (No. 15-2667).

19 *McCulloch*, 835 F.3d at 788.

20 690 F.3d 864 (8th Cir. 2012).


23 Id.


27 Selya, supra note 25, at 681 (“[T]he beauty of certification, like the beauty that Hollywood cherishes, is only skin-deep . . . .”).
Unfortunately, certified questions will only help expedite a case so long as the highest court in the state answering the question is willing to cooperate.

Access tends to be the first bar to a successful certified question. The highest court in some states will outright refuse to hear a question posed from certain courts. The certified question procedure has gained popularity in the country over the years, but still has not reached every state.\textsuperscript{28} Even if every jurisdiction implements a certified question procedure, the variation in courts allowed to present such a question means a litigant’s ability to have her case fully decided in the federal forum of her choice could be at the mercy of a state supreme court’s policy on the procedure.

Even when access itself is not an issue to presenting a certified question, variation still exists on the quality of the response to the question. The highest court in New York has been open to certification, even reframing the question to “make [it] more readily answerable, and to remove . . . other obstacles that may not have been apparent at the time of certification.”\textsuperscript{29} The court has similarly made an effort to answer the question as completely as possible, even when that pertains to issues not explicitly presented in the question.\textsuperscript{30} New York has also done well to consider timeliness when answering questions, at one point holding an average initial response time—whether the court will accept or reject the question—of six weeks and answer production in six months.\textsuperscript{31} While New York may exemplify some of the more beneficial aspects of certification, other courts illustrate how a lack of uniformity in the process creates disparate outcomes for litigants in different parts of the country.\textsuperscript{32}

Timeliness lies at the crux of easing the burden on litigants, and state courts vary in their ability to satisfy that element through certified questions. Judge Bruce Selya of the United States Court of Appeals for the First Circuit noted that after certifying a question to the Supreme Court of Puerto Rico, the court responded \textit{years} later that it would not be answering the question.\textsuperscript{33} While this incident lies on the extreme side, it is not an uncommon occurrence.\textsuperscript{34}

The mechanisms currently in place—\textit{England} reservations and certified questions—both do well in an ideal world. An \textit{England} reservation does well to ensure that the right to return to a federal district court is protected, but protecting against the additional burdens of abstention is beyond the scope of the mechanism. Certified questions have the potential to help ease the burden on litigants significantly, but its usefulness is largely controlled by the state courts, and it suffers from a lack of uniformity to be a conclusive answer to the difficulties abstention creates.

**Proposing Changes to Abstention**

Certified questions are a source of untapped potential. While in some jurisdictions the process works quite well, it suffers from a lack of uniformity across the country.\textsuperscript{35} Since this is still largely a state-controlled mechanism,

\textsuperscript{28}Gregory L. Acquaviva, \textit{The Certification of Unsettled Questions of State Law to State High Courts: The Third Circuit’s Experience}, 115 \textit{Penn St. L. Rev.} 377, 383–85 (2010) (noting that only four states had a certified question procedure in 1967, but now only North Carolina lacks such a process).

\textsuperscript{29}Kaye & Weissman, \textit{supra} note 16, at 420.

\textsuperscript{30}\textit{id.} at 420–21.

\textsuperscript{31}\textit{id.} at 397.

\textsuperscript{32}It is worth noting that while New York’s response quality and timeliness are laudable, the state does not allow for questions to be posed from federal district courts. 22 N.Y.C.R.R. 500.27(a).

\textsuperscript{33}Selya, \textit{supra} note 25, at 681.

\textsuperscript{34}See \textit{id.} at 681 n.18 (noting that delay is the biggest problem in the procedure and collecting cases in which the state court delayed answering certified questions by a range of thirteen months to six years).

\textsuperscript{35}See \textit{id.}
there is only so much that can be done, but adding federal guidelines built around the notion of certified questions can allow for federal courts to maneuver with greater ease regardless of a given state’s disposition on the subject. \(^{36}\)

The first step would be to introduce a provision that leads the federal courts away from abstention in favor of certified questions where available. This provision would bar the courts from abstaining from a case when a certified question would otherwise resolve the issue. The next consideration would be the timing of the answer to the question. New York prided itself on being able to answer questions in an average time of six months. \(^{37}\) Pennsylvania requires all questions be resolved within sixty days. \(^{38}\) California does not specify a time for answering certified questions, but the California Constitution suspends the salary of any judge before whom a cause remains pending for ninety days after being submitted for decision—although this does not account for the amount of time it takes from certification to submission. \(^{39}\) To ensure uniformity over timing, the proposed legislation would include a provision requiring the federal court to withdraw the question if an answer has not been produced within six months. This would give the state court adequate time to respond, but also protect litigants from having to postpone their cases for longer than necessary to reasonably allow the state to be heard on the issue.

Should the state court decline to answer the question, the federal court would continue to move forward with the case. If the state court ignores the request, the federal court can treat that non-response as implied approval for a federal decision on the state law issue. In many cases regarding \textit{Pullman} and \textit{Burford} abstention, this process could essentially obviate their use.

This provision could, first and foremost, pose a great risk of “friction” the \textit{Pullman} Court warned about. \(^{40}\) While potentially a step forward for efficient litigation in federal courts, it would undoubtedly impose burdens on the highest courts in each state. Increasing the number of questions posed could lead to the state courts simply declining to answer the questions, especially if this process begins to erode cooperative federalism in the courts.

A more optimistic look on the provision would be that the state courts can utilize truncated proceedings to exercise more control over how federal courts interpret unsettled areas of law. Should state courts look to the provision as an opportunity, the consequences would rise above adding more work without increased results. Should the state court look to the provision as an insult, \(^{41}\) the uniform timing would at least prevent the litigant from being too negatively impacted by a long delay. \(^{42}\) A compromise, if necessary, could be to allow the state courts, in their response, to decline to answer while simultaneously requesting abstention from the federal courts. \(^{43}\)

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\(^{36}\) As a theoretical exercise, Judge Selya opined on Congressional action requiring state courts to accept and answer certified questions. Aside from constitutional concerns, Judge Selya noted that such a one-way provision would never work, as “cooperative judicial federalism cannot be force-fed to the states without destroying both the spirit and the utility of the practice.” \textit{Id.} at 684.

\(^{37}\) \textit{Kaye & Weissman, supra} note 16, at 397.

\(^{38}\) \textit{Cal. R. Ct. 8.548; Cal. Const. art. VI, § 19.}

\(^{39}\) \textit{Pa. Sup. Ct. Internal Operating P. 8(D).}

\(^{40}\) While this Note takes the position that communication and collaboration—principles with which this proposed legislation was designed—promote harmony between the state and federal courts, this may not be a widely accepted position. \textit{See Justin R. Long, Against Certification, 78 Geo. Wash. L. Rev. 114, 162 (2009)} (”[S]tate courts have the power and duty to address federal questions . . . . When a state court answers a certified question, however, it has been deprived of this power.”)

\(^{41}\) \textit{See id.} at 166 (“Federal judges confronted with an open and challenging question of state law should see the case as a reason for harder work and deeper thought, not quiting the field. The alternative is not comity, but disrespect for state . . . .”). This Note agrees with Professor Long that federal judges should be inclined to tackle unanswered questions, even if they pertain to state issues, but further argues that certified questions are much better suited than abstention in the rare circumstances outlined above.

\(^{42}\) Judge Selya’s two to three year wait time to hear that the Supreme Court of Puerto Rico will be declining to answer the certified question is completely unacceptable. \textit{See Selya, supra} note 25, at 681.

\(^{43}\) Whether the federal court grants the request is the first in a potentially long series of questions about this approach, but this Note takes the stance that cooperative federalism can be made stronger through communication.
their response, to decline to answer while simultaneously requesting abstention from the federal courts.43

In the context of *Pullman* and *Burford*, rather than putting the focus on how unclear a state law may be or how complex a state regulatory system may be, the focus should fall onto the possible outcome. The federal district judge should abstain from ruling on the case only if the state’s interest in hearing the case first is both overwhelmingly strong, and a decision on the state-law issue will have a unique impact on the state.44 This is meant as an extremely high bar to act as a general deterrence against the use of abstention in these circumstances. Abstention should be discretionary for the judge, and an appellate court can review the decision for abuse of discretion. While determining whether to abstain or hear the case, a federal district judge should always analyze the situation with a weight already placed on the side of not abstaining.45

The general aim of this proposal is to promote leaving the case within federal jurisdiction. Possible consequences could be abuse of discretion by district judges, as they could abstain for subjective reasons. An appeal on a decision to abstain would increase litigation costs, but with this method the hope is to avoid an unnecessary journey through the state-court system.

Ultimately, creating a better use of abstention is difficult given the elements of federalism at play between the federal and state court systems. Legislation can only make an impact on the federal side of this issue, but it can achieve the goal of ensuring efficient litigation in an adequate forum, doing its best to ensure the plaintiff’s choice of venue. Reforming abstention doctrines into a federal law not only promotes a more streamlined judicial system, but it also gives more clarity to judges confronted with these situations. Both outcomes hopefully work to create a more efficient judicial system for those who choose to utilize it.

44While this language is purposely vague, the circumstances in *Reetz v. Bozanich* come to mind as a proper use of abstention for this reason. Because of the unique and powerful impact commercial salmon fishing has on Alaska and its residents, abstaining to allow Alaska a chance to shape the issue moving forward was the correct decision. See *Reetz v. Bozanich*, 397 U.S. 82 (1970).

In the event that a state’s highest court requests abstention in a certified question response, the weight should instead be placed on the side of abstaining.
A DAY OF DISCOVERY AT AKRON LAW
April 6, 2018 from 9am-5pm

New issues and trends in Federal Civil Discovery
6 hours of CLE are available
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Professor of Law, Emory University
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Pre-registration is required, cost is $50 including lunch
To register visit https://commerce.cashnet.com/LAWEXP
For questions email robin4@uakron.edu
In the wake of recent natural, and in some cases very unnatural, disasters, please keep in mind that the FBA is there to help. Our SOLACE program provides a way for the FBA legal community to reach out in small, but meaningful and compassionate ways, to FBA members and those related to them in the legal community who experience a death, or some catastrophic event, illness, sickness, injury, or other personal crisis. SOLACE is open to all FBA members and those related to them within the legal community—judges, lawyers, court personnel, paralegals, legal secretaries and their families—not just lawyers. If you would like to submit a SOLACE request for help, please click here and submit the request electronically, or feel free to contact our FBA Chapter SOLACE Liaison, Rob Chudakoff, at rchudakoff@ulmer.com. Additional information about SOLACE can be found on the FBA website at http://www.fedbar.org/Outreach/SOLACE.aspx.

**SOLACE Success Story**

FBA SOLACE sent out a request for help to our members, and within 24 hours help was provided. We received the following report from our FBA member: "I am incredibly pleased to confirm that my sister-in-law was able to find something via a Solace offer. On a related note, the response from so many has been truly incredible. By my count (depending on whether people who emailed via group/on behalf of others are counted separately or together), we had somewhere between 20 and 30 responses/offers within a 24-hour time-period. . . . I cannot tell you how moved we have been by this experience. We are so very thankful for all of the responses."

SOLACE works! Way to go FBA members! Together, we can make a real difference.

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**STATEMENT OF THE FEDERAL BAR ASSOCIATION BOARD OF DIRECTORS ON JUDICIAL INDEPENDENCE**

Judicial independence, free of external pressure or political intimidation, lies at the foundation of our constitutional democracy. An independent judiciary needs to remain free of undue influence from the legislative and executive branches and to remain beholden only to the maintenance of the rule of law and the protection of individual rights and personal liberties. We affirm the right to challenge a judge's ruling for reasons based in fact, law or policy. However, when robust criticism of the federal judiciary crosses into personal attacks or intimidation, it threatens to undermine public confidence in the fairness of our courts, the constitutional checks and balances underlying our government and the preservation of liberty.

The Federal Bar Association is comprised of over 10,000 public and private sector lawyers practicing in our federal courts, hailing from all fifty states and the U.S. Territories. The Federal Bar Association is a non-partisan professional organization created to promote the sound administration of justice and integrity, quality and independence of the judiciary.
Federal Bar Association

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Joining the FBA entitles you to membership within the national organization as well as within your local FBA chapter. Members receive a host of special benefits designed to uphold the mission of the FBA and support each member’s career within the federal legal system. Association activities and member benefits are organized into five primary categories.

You're in Good Company

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<th>Years in Practice</th>
<th>Gender</th>
<th>Types of Practice</th>
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Note: Chart only includes practicing attorney members of the Association.

Advocacy
The organization’s headquarters are located outside of Washington, D.C., in Arlington, Va., giving it the proximity necessary to remain engaged on behalf of its members.
- Government relations efforts as defined by the FBA Issues Agenda
- Annual Capitol Hill Day
- Monthly updates on recent government relations developments

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The FBA is large enough to have an impact on the federal legal profession, but small enough to provide opportunities for networking and leadership. The FBA is governed by a 15-member elected Board of Directors and numerous volunteer members.
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- Five career divisions
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As part of your membership, you will receive and have access to:
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### Calendar of Events:

**March 26, 2018** Judge Zauhary presenting on Civility

**April 16, 2018** A Day of Discovery at Akron Law

**April 18, 2018** FBA-NDOC Board Meeting

**April 19, 2018** Cleveland Jury Improvement Lunch

**April 19, 2018** Criminal Law Committee Social

**April 26, 2018** Joint event with the CMBA Women in Law Section Honoring the 1987 Commission on Women in Law

**April 26, 2018** Capital Hill Day

**April 27-28, 2018** Chapter Leadership Training in Washington D.C.

**May 10, 2018** Reach Out Legal Assistance Seminar & Clinic

**May 16, 2018** FBA-NDOC Board Meeting

We add events to our calendar often so please check our website for upcoming events that may not be listed here.

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### Save The Date

**2018 Annual Meeting and Convention**

New York Marriott Downtown

A discounted block of rooms has been reserved for conference attendees at the New York Marriott Downtown (85 West St, New York NY 10006) at $275/night (plus state and local taxes). Check-in time is 4:00 p.m. and check-out is 11:00 a.m.

Reservations must be made by 5:00 p.m. ET on **August 22, 2018**. Any reservations received after the above date or until the block is full, whichever is sooner, will be accepted based on a room-type and rate-available basis.


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### Editor for the Spring 2018 Newsletter:

Stephen H. Jett  
Chair, Newsletter Committee  
Ulmer & Berne LLP  
216.583.7138  
sjett@ulmer.com

**INTER ALIA is the official publication of the Northern District, Ohio Chapter of the Federal Bar Association.**

If you are a FBA member and are interested in submitting content for our next publication please contact Stephen H. Jett no later than June 15, 2018.

Next publication is scheduled for Summer 2018.