President’s Podium

To All,

As the new President of the FBA’s Northern District of Ohio Chapter, I have big shoes to fill.

In September 2016, our Chapter hosted the FBA’s national convention. Hundreds of Judges and federal practitioners from around the country spent five days in Cleveland at five programs, meetings, and social events that were universally acclaimed as among the best the FBA has offered—at least since the last time our Chapter hosted the FBA national convention back in the year 2000.

At the FBA’s most recent national convention in September, our Chapter received the Presidential Excellence Award. This award recognizes the superior job our Chapter did in the past year meeting and exceeding the standards and goals the FBA sets for its Chapters around the country.

It is difficult to see how to top these nationally noteworthy successes achieved in consecutive years. But we are fortunate to have an active Chapter that enjoys the strong support of the federal bench and counts as its members the leading practitioners in all areas of practice in the Northern District.

We are also fortunate that one of our own members, Kip Bollin, a past President of our Chapter, is now the President of the FBA nationally. In many respects, the fact that the FBA’s national President hails from our Chapter speaks to the strength of our Chapter and the leadership it provides to the organization across the country.

With the energy, ideas, and work of our members, and the support of our federal judicial officers, our Chapter will continue to lead the FBA as an organization and set the standard for achieving the FBA’s mission of strengthening the administration of justice in the federal legal system—even without hosting another national convention.

While we as a Chapter can take pride in our accomplishments, we should not rest on our laurels. I encourage all our members to redouble their efforts on behalf of our Chapter. And I invite federal practitioners in the Northern District who are not members to join and take an active role in advancing the interests of federal practitioners and the administration of justice in the federal legal system.

Regards,

Phil Calabrese
FBA Secretary Amanda Knapp Becomes ALJ

Congratulations to Amanda Knapp, who currently serves as Secretary for the Northern District of Ohio Chapter of the Federal Bar Association, on her recent appointment by the Social Security Administration as an Administrative Law Judge based in Akron, Ohio.

Administrative Law Judges in the Social Security Administration conduct de novo hearings to determine eligibility for retirement, survivors, disability insurance and supplemental security income benefits.

Judge Knapp received a B.A. from the University of Pennsylvania and her J.D. from Harvard Law School. Before becoming an Administrative Law Judge, she was a litigator at the Cleveland office of Roetzel & Andress.

Barbara Paynter Inducted into Prestigious College of Fellows

Barbara Paynter was recently inducted into the Public Relations Society of America (PRSA) College of Fellows, an honorary organization that recognizes senior practitioners and educators who have left a significant footprint on the public relations profession. The induction ceremony took place at a special dinner on Saturday, Oct. 7, in Boston.

Election to the College is considered the pinnacle of a professional’s career. To qualify for admittance, applicants must have at least 20 years of experience, hold the Accredited in Public Relations (APR) credential, and have demonstrated exceptional capability and accomplishment in the practice or teaching of public relations. Fewer than 2 percent of PRSA members are accepted into the College of Fellows.

“These 11 College of Fellows inductees are prime examples of the standard of excellence all practitioners are striving to achieve,” said PRSA 2017 National Chair Jane Dvorak, APR, Fellow PRSA. “They demonstrate strategic leadership that includes serving as sage counsel, mentors and role models for the entire profession.”

Paynter has served as public representative on the FBA-NDOC Board of Directors since 2009. She has more than 30 years’ experience in public relations, and has her own consulting firm specializing in strategic communications, reputation management, crisis communications and issues management. She has helped clients communicate effectively during high-stake situations, including environmental incidents, sudden leadership changes, accusations of unethical and criminal behavior, labor disputes, medical malpractice, data breaches and product recalls. Her work has been recognized with numerous awards, including two PRSA Silver Anvils, the industry’s highest honor, and a “Best of Show” Cleveland Rocks Award from the Cleveland Chapter of PRSA. A graduate of the University of Missouri, she began her career as a newspaper reporter.

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](http://www.fedbar.org/Outreach/SOLACE.aspx) and submit the request electronically, or feel free to contact our FBA Chapter SOLACE Liaison, Rob Chudakoff, at [rchudakoff@ulmer.com](mailto:rchudakoff@ulmer.com). Additional information about SOLACE can be found on the FBA website at [http://www.fedbar.org/Outreach/SOLACE.aspx](http://www.fedbar.org/Outreach/SOLACE.aspx).

Mock Trial Event at Case Western Reserve University Law School

On Wednesday, August 23, 2017, Stephen H. Jett, a partner at Ulmer & Berne LLP, participated in a mock trial at Case Western Reserve University Law School for first year law students and LLM students. This mock trial is an annual event, and it is intended to give law students their first look into how an actual trial proceeds. Steve represented the Defendant and Aaron Minc, from Meyers Roman, represented the Plaintiff. Federal Magistrate Judge Jonathan D. Greenberg from the Northern District of Ohio presided as the judge.

Both Counsel were well prepared and the trial lasted over 3 hours. The trial was well-received by both students and faculty.
Kari Hehmeyer recently joined the Columbus Office of Reminger Co., LPA

Kari focuses her legal practice on a variety of areas, including government liability, employment litigation, professional liability, and general casualty. Kari originally joined Reminger as a law clerk and worked in a wide variety of practice groups.

Kari graduated summa cum laude from Capital Law University Law School, and was 2017 Class Valedictorian. While in law school, Kari served as the Peer Coordinator for Capital Law’s Peer Advisor Program. She was also a member of Capital University Law Review, Volume 44. Kari served as a judicial extern for the Southern District of Ohio for the honorable Judge George C. Smith, and as a legal extern for the Office of the General Counsel at OhioHealth. Kari received her undergraduate degree in Marketing from the Fisher College of Business at The Ohio State University.

She is a member of several professional organizations, including the Ohio State Bar Association, the Federal Bar Association, and the Ohio Association of Civil Trial Attorneys.

Before law school, Kari worked for more than ten years in the health and fitness industry.

Andrew T. Illig recently joined the Cleveland Office of Reminger Co., LPA

Andrew’s practice focuses on professional liability defense, securities litigation and arbitration, and business and commercial litigation. Andrew previously worked as an associate at another Cleveland law firm, where he gained valuable experience in a variety of civil litigation matters.

Andrew earned his juris doctorate, cum laude, from Pennsylvania State University, where he served as a Senior Editor for the Penn State Law Review. He received his undergraduate degree, magna cum laude, from Miami University, where he also played varsity football for the Miami RedHawks.

He is a member of the Cleveland Metropolitan Bar Association, the Ohio State Bar Association, and the Federal Bar Association.
Carter Strang (FBA-NDOC president ’09-’10) received the 2017 Green Sustainability Award from the Cleveland Metropolitan Bar Association Green Initiative Committee. Carter was instrumental in the creation of the CMBA’s Green Initiative Committee in 2008 and served as the first chair that same year. He has continued as an integral member of the committee, helping develop its: Green Certification program, which now includes 46 certified firms; Greener Way to Work Day, which has since expanded into Greener Way to Work Week; and the Green Sustainability Award, which was first given to a firm/office but is now reserved for individuals. During his CMBA presidency (’12-‘13), he promoted sustainability and helped develop the CMBA’s first Great Lakes Symposium, providing a focus on the importance of the Great Lakes. Carter has also had a significant impact on the culture and green practices at his law firm, helping make Tucker Ellis a green leader in the profession and community.

CWRU Law School Symposium—National Security, National Origin, and the Constitution: 75 Years After Executive Order 9066

By: Professor Jonathan Entin

The Case Western Reserve Law Review sponsored a daylong symposium on “National Security, National Origin, and the Constitution 75 Years After Executive Order 9066.” That order authorized the internment of Japanese Americans during World War II.

The symposium took place on Friday, November 17, in the Moot Courtroom of the Case Western Reserve University School of Law. Approval for 5.5 hours of CLE credit is pending. Cosponsors include the law school’s Institute for Global Security Law and Policy as well as the university’s Inamori International Center for Ethics and Excellence. The Attorney Admissions Fund of the U.S. District Court for the Northern District of Ohio also has made a grant of financial support.

The program featured a wide range of legal scholars and social scientists who will address the many questions that have arisen about the appropriate ways to address issues of national security and civil liberties during periods of international crisis. Among those issues are the scope of executive power, the authority of Congress, the legitimacy of national origin as a factor in immigration policy, and the role of the judiciary.

The symposium was keynoted by Geoffrey R. Stone, the Edward H. Levi Distinguished Service Professor of Law at the University of Chicago, a preeminent scholar in Constitutional Law whose many books include Perilous Times—Free Speech in Wartime: From the Sedition Act of 1798 to the War on Terrorism and War and Liberty: An American Dilemma, 1790 to the Present. Other confirmed speakers include Sahar Aziz of Rutgers University, Robert Chang of Seattle University, Elizabeth Price Foley of Florida International University, David Forte of Cleveland State University, Dean Hashimoto of Boston College, Peter Margulies of Roger Williams University, Hiroshi Motomura of UCLA, and Eric Muller of the University of North Carolina.
October 2, 2017 State of the Court Luncheon at the Silver Grille
Photos of Bruce Moyer’s visit to Cleveland

Bruce Moyer spoke at a luncheon to a small group of Board and Chapter members. He also spoke in the afternoon at a meeting of the Northern District of Ohio Advisory Group, which several judges from the court also attended. Here is some info on that group:


October 26, 2017 Installment of 2017-2018 FBA-NDOC President and Board Officers
November 9, 2017 Will for Veterans Program

We would like to offer a special thank you to those that volunteered and contributed to this successful event.

Center table: Mrs. Kelly Newmen and Ms. Laura Jones Administration Officer, Office of the Federal Public Defender. They were doing the witnessing of will signatures.


Ms. Patty Stauffer, Paralegal - Tucker Ellis

Max Chandler

Not Pictured: Bryan O'Mallay (Of Counsel, Valore & Gordillo) and Mohammed J. "Mo" Bidar (Cavitch Familo & Durkin), Chris Albreckston, (Assistant Executive Director/Lawyer Referral Service, Dayton Bar Association, also associated with Ohio Wills for Heroes). Rebecca Ruppert McMahon and Samantha M. Pringle of the CMBA, and Sarah Phillips and Kristen Parker, Community Relations, Stokes VA Center.

VA assistant was there to provide information to Vets about being buried in VA cemeteries.
Articles In the News

Consumer Litigation

Powerful New Tools in Mortgage

By Marc Dann

Just two years ago when mortgage loan servicers moved forward to foreclose on a homeowner, even though that homeowner was actively engaged with the servicer in attempting to modify their loan (a phenomenon identified as dual tracking in the national mortgage settlement) that borrower had no remedy or private right of action. The same impediments prevented a borrower bringing claims for mistakes in escrow calculations or unfair corporate advances or late fees or against lenders who failed to send easy to understand monthly mortgage statements.

On Jan. 10, 2014, the Consumer Finance Protection Bureau (CFPB) enacted a powerful new regulatory scheme under the Real Estate Settlement Protection Act (RESPA) 12 U.S.C. 2601 et seq, and the Truth in Lending Act (TILA) 15 U.S.C. 1026 et seq that set new high standards for the conduct of mortgage loan servicers. Lawyers who work with clients who have potential issues with their home mortgage lenders and bankruptcy practitioners in particular should be on the look out for potential claims that their clients may have against their mortgage loan servicer.

Awareness of potential liability of mortgage loan servicers has become even more important in light of the recent decision by many national bank loan servicers to get out of the loan servicing business resulting in more and more mortgage loans being serviced by small, thinly capitalized non-bank servicing companies.

Regulations X and Z in a Nutshell

Powerful new regulations that have been promulgated by the CFPB, under RESPA and TILA, create a private right of action when mortgage loan servicers fail to properly and promptly respond to requests for information, correct irregularities with application of payments, assessments of fees and charges, or to comply with new strict timelines for handling applications for loan modifications, deeds in lieu of foreclosures and short sales.

Clients Who Could Benefit From Reg X and Z Case Review

- Borrowers who have been recently discharged from Chapter 13 or Chapter 7.
- Borrowers who have filed bankruptcy to avoid foreclosure but who had an application for loss mitigation pending.
- Borrowers who had a contract to sell their home by way of a short sale, the servicer failed to make a decision within 30 business days from submission of application and the buyer withdrew.
- Borrowers with loan modifications where the loan modification has not been honored by a loan servicer or successor loan servicer.
- Borrowers who have trial loan modifications that last beyond three months.
- Borrowers with lender placed or forced placed insurance.
- Borrowers with excessive escrow deficiencies.
- Borrowers with a loan modification that is not recognized by a new servicer.

Practitioners should be on the look out for the following fact patterns that form the basis of a RESPA claim:

1. When homeowner/borrowers have submitted a facially complete loan modification application and loan servicer moves forward in any way to foreclose. This includes referral to foreclosure counsel, filing of a foreclosure complaint in a judicial foreclosure state, filing or recording a foreclosure notice in a non-judicial state, filing a motion for relief from stay in bankruptcy, filing a dispositive motion in a judicial foreclosure, setting a date for a sheriff’s sale or failing to avoid a judgment or withdraw a sale.

2. When a mortgage loan servicer fails to honor an agreed to loan modification.

3. When a mortgage loan servicer fails to make a decision on a short sale within 120 days past due.

4. When a mortgage loan servicer refers for foreclosure before a borrower is 120 days past due.

5. When a mortgage loan servicer fails to properly calculate escrow or an escrow shortage and overcharges to amortize escrow shortages. Note that a servicer may only hold a two-month cushion for taxes, homeowner’s insurance and private mortgage insurance in escrow.

6. Charging for unnecessary appraisals, legal fees, property inspections and other corporate advances. Practitioners should also be aware of potential claims under TILA:

1. When a mortgage loan servicer fails to provide correct information on monthly statements to borrower (borrowers in bankruptcy are currently exempted) For example, for someone who is 45 days behind, each statement is required to show a six-month history.

2. When a mortgage loan servicer fails to send statements at all (borrowers in bankruptcy or discharged from bankruptcy are currently exempt). This happens more often than one might think.

3. When a mortgage loan servicer fails to apply payments on the same day as they receive them.

4. When a mortgage loan servicer applies payment to fees or corporate advances before principal interest taxes and insurance are brought current.

5. When a mortgage loan servicer fails to provide the name of owner, master servicer and servicer within 10 business days of the date of receipt of written request, payoff or reinstatement figures within seven business days of receipt of written request.

Former Ohio Attorney General Marc Dann has been fighting for homeowners, consumers and small businesses since he began his private practice in 1999. Upon leaving office in May 2008, Dann volunteered to represent homeowners facing foreclosure and became more concerned about the standing of certain servicers to foreclose on his clients. Recognizing that the problem of fraudulent foreclosure practices was epidemic in Ohio, Marc Dann established the Dann Law Firm representing more than 500 homeowners in foreclosure in more than 85 different counties in Ohio.
President Trump has nominated Cleveland lawyer David C. Tryon as Chief Counsel for Advocacy for the U.S. Small Business Administration ("SBA"). On October 3, 2017, the President sent the nomination to the Senate, and Mr. Tryon is now awaiting confirmation. The U.S. Senate Committee on Small Business & Entrepreneurship will hold a nomination hearing and, if approved, the nomination will be sent to the full Senate for confirmation.

Appointed by the President and confirmed by the U.S. Senate, the Chief Counsel for Advocacy directs the Office of Advocacy. Created by Congress in 1976, the SBA’s Office of Advocacy is an independent voice for small business within the federal government. As the federal office responsible for examining the contributions and challenges of small businesses in the U.S. economy, the Office of Advocacy constantly looks for answers to small business questions—those that intrigue researchers, challenge business organizations, enlighten policymakers, and vex small business owners.

David Tryon is a litigation partner at Porter, Wright, Morris & Arthur LLP. In addition to more than 30 years of experience practicing law, Mr. Tryon is a member of the Ohio Advisory Committee for the United States Commission on Civil Rights and President of the Cleveland Lawyers Chapter for the Federalist Society for Law and Public Policy. He is a graduate of the University of Michigan Law School and has a business degree from Brigham Young University. Born and raised in Cleveland, Mr. Tryon has served as the President of the Brecksville/Broadview Heights School Board and is currently an Executive Board Member for the Boy Scouts of America, Lake Erie Council. He is also a lay clergyman in The Church of Jesus Christ of Latter-day Saints.

Click [here](#) to read the official White House press release.
Stressed and discouraged by the political environment? Cable news making you anxious and wired? To top it off, the case on your desk is driving you crazy and the jerk of a lawyer on the other side is driving you to drink? Chill. Take a break. Reset. Try some civility and collegiality.

The legal profession has wrestled with these issues for a long time. I can point you to cases dating back to the 1800s where judges scolded lawyers who misbehaved in the courtroom, exceeding the “boundaries of courtesy and decorum.” Forty years ago, it was serious enough to warrant the passage of rules of professional conduct. But rules alone won’t fix things: education and accountability are key.

Local culture varies, and that culture is crucial in developing an atmosphere of civility. Northwest Ohio is a model for the legal profession. We call it “the Toledo way.” Judges here usually do not tolerate the aggression or misbehavior that might be accepted elsewhere, and our local rules discourage the vulgarities and highly charged rhetoric one might expect to see in the movies. That kind of drama may be entertaining, but it is not how most of us prefer to practice -- nor is it helpful in resolving disputes.

We are lucky here. In a community like Toledo, lawyers tend to be repeat players. You know you will encounter opposing counsel again, whether it’s in the courtroom, at church, or at a community or sporting event. Reputation is invaluable in the legal community (as it is in the wider world), and you tend not to misbehave when you know your opponent.

To that end, in a recent dispute that escalated over several weeks, I brought the lawyers in, sat them down around the table, and started the conversation by asking them to tell each other a little bit about themselves -- family, children, hobbies. Instead of talking at each other, I encouraged them to talk with each other -- in other words, to cooperate. We could all use a bit more of that.

What is the reason for increased incivility? I have a few suspicions. There are many more lawyers vying for a smaller piece of the pie. This increased competition can bring out the worst in some. At the same time, young lawyers lacking self-confidence may mistakenly believe they need to play hard ball to get ahead, or clients may be under the misguided impression that this scorched-earth approach is what they’re paying for. This creates a vicious cycle, where bad behavior on one side encourages the other to fight fire with fire. As many judges can attest, this usually ends with both sides getting burned, and as in law, so in life -- it’s not difficult to draw parallels between the experiences of the legal profession and what we see playing out on the news and in our communities.

Difficult though it may be, when faced with unprofessional conduct, lawyers owe it to their clients (and each other) to remain calm, focus on the bigger picture, and de-escalate the conflict. A good lawyer knows not only how to think, but how to behave. I commend this standard not just to our profession, but to our elected representatives and leaders at all levels of government.
“Reasonable Certainty” in Expert Opinions—What’s it Worth?”

By: Stephen Buffo

The term “reasonable degree of certainty” has been oftentimes used in conjunction with the presentment of expert testimony, dating back to at least as early as 1935.1 Its use with respect to the proffering of scientific evidence has extended to various scientific disciplines, and indeed to additional types of testimony such as financial and statistical evidence.

In the Federal courts, although Daubert and Federal Rules of Evidence 702-705 have been well established as the framework for evaluating the admissibility of expert evidence, they have not necessarily precluded the use of “reasonable certainty” terminology in the presentation of otherwise admissible evidence. Consequently, in recent years there has been an increasing focus on the presentation of evidence of any particular discipline that attempts to present its findings and conclusions through a “reasonable certainty” lens.

In 2016, the National Commission on Forensic Science (“NCFS”)2 concluded that “reasonable...certainty” terminology should be removed from expert testimony altogether, noting that “such statements have no scientific meaning and may mislead factfinders when deciding whether guilt has been proved beyond a reasonable doubt.”3

The NCFS went on to note that “multiple problems abound with phrases such as ‘scientific certainty’ or ‘[discipline] certainty.’ These include the following:

- There is no common definition across science or within disciplines as to what threshold establishes ‘reasonable’ certainty. Therefore, whether couched as ‘scientific certainty’ or ‘[discipline] certainty,’ the term is idiosyncratic to the witness.
- Use of the term ‘scientific’ cloaks the opinion with the rigor, acceptance and reproducibility of scientific study.
- Coupled with the term ‘reasonable,’ a juror might equate it with certainty at the level demanded by the ‘beyond a reasonable doubt’ standard of proof.
- The term invites confusion when presented with testimony expressed in probabilistic terms. How is a lay person, without either scientific or legal training, to understand an expert’s ‘reasonable scientific certainty’ that evidence is ‘probably’ linked to a particular source?4

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2 The NCFS, a 30-member advisory panel of scientists, judges, crime lab leaders, prosecutors and defense lawyers, was established under the Obama Administration in 2013 by the Department of Justice (DOJ) as a Federal Advisory Committee, in partnership with the National Institute of Standards and Technology (NIST), to enhance the practice and improve the reliability of forensic science. In April 2017, at the end of its second two-year term, Attorney General Jeff Sessions announced that he would not renew the NCFS.


4 Id.
HBO’s John Oliver recently devoted an episode of his popular “Last Week Tonight with John Oliver” show to the misleading and erroneous outcomes from forensic scientific evidence presented under the imprimatur of “reasonable certainty.” Mr. Oliver’s witty presentation serves up several examples of forensic evidence and testimony that is dubious at best; spurious and false at worst. One of his lead examples involved a bite-mark identification expert—which, interestingly, was the same type of case that the NCFS used to illustrate the susceptibility of the term to varying definitions of certainty, noting:

…it seems doubtful that a jury would understand that the term “reasonable scientific certainty” meant only “more probable than not” – that is, any probability greater than 50%. It is more likely that the jury would understand the term to mean 95% certain or perhaps “beyond a reasonable doubt.”

Of note is the probabilistic inference that might be drawn from the term “reasonable certainty,” implying that there is a certain tipping-point approach to such evidence – i.e., that as long as it is at least 51% convincing then the trier of fact may therefore believe that it is reasonable to draw from such evidence a more absolute conclusion. Such implications and inferences could prevent consideration of the finer points of evaluating the weight of evidence (either in absolute or relative terms), or at least in a more deliberate and nuanced fashion.

Variability versus Probability

Certainly, the four-part Daubert test provides the Federal courts’ framework for evaluating the reliability of expert evidence:

1. whether the expert’s theory or technique can, or has been, tested;
2. whether the theory or technique has been subjected to peer review and publication;
3. the known or potential rate of error of the technique or theory for a particular scientific technique; and
4. whether the theory or technique is generally accepted in the relevant scientific community.

The third of these four, whether there is a known or potential rate of error, focuses on the variability associated with a quantitative conclusion rather than the probability of a particular outcome. Indeed, the concept of a rate of error shifts the measurement metric away from a sliding scale of “reasonableness” ranging between 0% certainty and 100% certainty, and instead toward a “relevant range” approach (e.g., plus or minus x%).

Dollars and Cents: Money Damages

5."Last Week Tonight with John Oliver," HBO, Season 4, Episode 55, October 1, 2017.

This debate around the reliability, admissibility, and certainty of forensic and scientific evidence has invariably turned to matters of money damages, particularly where estimates and projections are involved. This is frequently the case in matters involving expectation or reliance damages, where projections of a party’s financial results in a “but for” world form the basis for making the plaintiff whole.

While the fact of damages may be required to be proven to a higher degree of certainty, and therefore lend itself to the probabilistic 0% to 100% scale, the amount of damages is typically not required to be calculated with precision and is therefore afforded a greater degree of expected variability.\(^7\)

That being said, the Restatement (Second) of Contracts brings the “reasonable certainty” principle into the assessment of the quantum of damages: “Damages are not recoverable for loss beyond an amount that the evidence permits to be established with reasonable certainty.”\(^8\) So while the forensic science community has expressed its desire to remove “reasonable certainty” from expert testimony, it may prove more difficult to extinguishing its use altogether from the assessment of damages.

**Insights from the Accounting Literature**

Accounting principles provide some additional perspective on how uncertain future amounts may be evaluated for purposes of determining whether they should be recorded on the books and records of an entity. Specifically, when evaluating uncertain future loss contingencies, the accounting profession has focused on whether amounts are “probable” and “reasonably estimable.”\(^9\) Accounting standards use two primary approaches to deal with uncertainty when accounting for losses: 1) recognition of probability threshold; and, 2) measurement using a fair value recognition.\(^10\)

Accounting codification uses a qualitative scale to assess probability—i.e., the accountant must apply judgment to assess the likelihood of whether a future loss would occur and therefore satisfy one of the criteria for booking a loss contingency. The probability is evaluated on a scale ranging from slight (or “remote”) to likely (or “probable”) An event where the occurrence is slight is said to be “remote,” while an event that is likely to occur is defined as being “probable.” All areas in between remote and probable are defined as being “reasonably possible.”\(^11\)

\(^7\) [Source for flexibility in proving amount of damages versus the fact of damages—see Litigation Services Handbook]

\(^8\) Restatement (Second) of Contracts, §352. Comment (a) to §352 concedes, however, that “damages need not be calculable with mathematical accuracy and are often at best approximate.”

\(^9\) The principles outlined in this section trace to Statement of Accounting Standards No. 5 (or “FAS 5”), “Accounting for Contingencies,” promulgated in 1975 by the Financial Accounting Standards Board. It should be noted that the AICPA professional standards that apply to the preparation of economic damages calculations are set forth in CS section 100, Consulting Services: Definitions and Standards. Consequently, damages calculations are not directly governed by the accounting standards referenced here. Nonetheless, the framework for evaluating contingencies provides insight into the process of evaluation of uncertain future amounts undertaken by accountants.

\(^10\) ASC-450-20-05. Accounting Standards Codification 450, “Contingencies,” is the current accounting standard that supersedes FAS 5. The FASB Accounting Standards Codification™ is the source of authoritative generally accepted accounting principles (GAAP) recognized by the FASB to be applied by nongovernmental entities.

\(^11\) ASC-450-20.
This first element of the accounting standard mirrors the “probability greater than 50%” issue that the NCFS took issue with, and if it were the only accounting criterion would suffer from the same limitations of causing potential confusion or misinterpretation.

However, the accounting principle requires amounts to be not only “probable” but also “reasonably estimable.” This does not limit the amount to one particular number or point estimate, but rather allows that if a range of amounts is what is reasonably estimable, then the minimum amount in the range should be accrued.\(^{12}\) The objective of a reasonably estimable accrual is to prevent the accrual of amounts so uncertain as to impair the integrity of the financial statements. It is this second element of estimating within a range that parallels the “known or potential error rate” principle of Daubert—i.e., the assessment of the potential variability of the estimated amount.

Additionally, the American Institute of Certified Public Accountants published a Forensic & Valuation Services Practice Aid in 2015 on “Attaining Reasonable Certainty in Economic Damages Calculations,” with the objective “to identify information and factors courts have found to be relevant when evaluating testimony and proof of damages.”\(^{13}\) It summarized four factors, considerations, or “rules” (originally outlined by Robert M. Lloyd in the Tennessee Journal of Business Law) that are frequently cited in court decisions when evaluating expert testimony and proof of damages:\(^ {14}\)

<table>
<thead>
<tr>
<th>“Rule”</th>
<th>Question</th>
<th>General Application</th>
</tr>
</thead>
<tbody>
<tr>
<td>Fact and Amount</td>
<td>If the fact that a plaintiff suffered damages can be proven with reasonable certainty, what level of precision is required to calculate the amount of loss?</td>
<td>A higher degree of certainty is required to determine whether the plaintiff incurred some damages than is required to determine the amount of damages incurred.</td>
</tr>
<tr>
<td>Wrongdoer</td>
<td>How should the defendant’s wrongdoing affect the plaintiff’s ability to recover damages?</td>
<td>A plaintiff should not be precluded from recovering damages just because the amount is difficult to calculate. If the defendant caused the harm, it cannot avoid damages simply because it is difficult to estimate the precise amount.</td>
</tr>
</tbody>
</table>

\(^{12}\) ASC-450-20-05.


Mr. Lloyd then lays out six factors that he believes are considered by courts when assessing reasonable certainty in damages calculations:

- the court’s confidence that the estimate is accurate;
- whether the court is certain that the injured party suffered at least some damage;
- the degree of blameworthiness or moral fault on the part of the defendant;
- the extent to which the plaintiff produced the best available evidence of lost profits;
- the amount at stake; and
- whether there is an alternative method of compensating the injured party.

For these factors, a series of considerations may apply to help frame the evaluation of each:

<table>
<thead>
<tr>
<th>Factor</th>
<th>Considerations</th>
</tr>
</thead>
<tbody>
<tr>
<td>Confidence that the estimate is accurate.</td>
<td>Is the claim supported by verifiable data? Whether the business has a track record. The number of difficult-to-quantify risks in the business projections. The extent to which lost profits fall within a defined range.</td>
</tr>
<tr>
<td>Whether the injured party suffered at least some damage.</td>
<td>How clear is the damage causation? Can the damages be quantified at all?</td>
</tr>
<tr>
<td>The degree of blameworthiness or moral fault on the part of the defendant.</td>
<td>Often not relevant to the damages expert’s calculations, and it is fact and circumstance specific. Influenced by the wrongdoer rule.</td>
</tr>
<tr>
<td>Whether the plaintiff used the best available evidence to prove its damages.</td>
<td>As the quality of the data used in the damage analysis improves (for example, because it is verifiable), the likelihood that the related calculation will be accepted increases.</td>
</tr>
<tr>
<td>The amount that is at stake.</td>
<td>There are usually more complexities and nuances in cases involving large dollar amounts. In addition, a jury may place more scrutiny on the data and methods applied to calculate damages as the absolute amount of the asserted damages increases.</td>
</tr>
<tr>
<td>Where alternative methods exist to compensate the injured party.</td>
<td>Is lost profits the best measure of damages? Can lost business value based upon (for example, contemporaneous purchase offers) be used as an alternative to otherwise less certain projections?</td>
</tr>
</tbody>
</table>
The manner in which these factors are brought to bear will depend on the financial, economic, and accounting facts and circumstances of each case—which vary significantly from one to the next. However, to the extent that these factors provide a more granular framework upon which to evaluate damages calculations, they may offer a meaningful supplement to the Daubert factors.

What’s it all Worth?

The use of the term “reasonable certainty” may continue to be questioned as to whether it adds anything meaningful to the proffering of expert opinions, particularly with regard to purely probabilistic inferences of a scale of certainty ranging from 0% to 100%.

For quantitative opinions such as those expressed by damages experts, the principle of a relevant range can provide a meaningful accompaniment that may dovetail well with Daubert. In addition, the consideration of certain rules, factors and considerations that have been regularly brought to bear in court opinions allows for additional insight to supplement the Daubert framework.
The FBA Younger Lawyers Committee is hosting a Fall Happy Hour!

Come enjoy drinks and complimentary appetizers with the YLC at Cleveland Chop

**When:** Thursday, November 30, 2017

**Where:** Cleveland Chop
824 W. St. Clair Ave., Cleveland

**Time:** 5:30-7:30 pm

$5 for law student FBA members, $10 for FBA members, and $15 for non-members

FBA members and prospective FBA members of all ages are welcome to attend!

Feel free to contact Eleanor Hagan at eleanor.hagan@squirepb.com or Elizabeth Collins at ecollins@collins-scanlon.com with any questions. Payment can be made at the link below or at the door.

We look forward to seeing you there!

All paid registrations are non-refundable.

More information and online registration: Younger Lawyers Fall Happy Hour Social

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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 15,000 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

Benefits of Membership

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

<table>
<thead>
<tr>
<th>Years in Practice</th>
<th>Gender</th>
<th>Types of Practice</th>
</tr>
</thead>
<tbody>
<tr>
<td>0-5</td>
<td>68%</td>
<td>Public: 77%</td>
</tr>
<tr>
<td>6-10</td>
<td>32%</td>
<td>Judicial: 12%</td>
</tr>
<tr>
<td>11+</td>
<td>6%</td>
<td>Student: 9%</td>
</tr>
<tr>
<td>Retired</td>
<td>7%</td>
<td>Private: 6%</td>
</tr>
</tbody>
</table>

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

Networking and Leadership
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.
- more than 95 chapters across all federal circuits
- 22 practice area sections
- five career divisions
- volunteer leadership opportunities within each chapter, section, and division

Education
The FBA offers more than 700 credit hours of continuing legal education (CLE) at both the national and local level throughout the year.
- national CLE conferences
- biannual CLE webinars
- local chapter sponsored CLE events

Publications and Communication
As part of your membership, you will receive and have access to:
- FBA website (www.fedbar.org)
- The Federal Lawyer magazine (10x per year)
- bimonthly newsletter
- section, division, and chapter newsletters (printed)
- Judicial Profile Index (archived)

Legal Career Center
The Legal Career Center is an online resource for both employers looking to hire and job seekers looking for a position within the federal legal community. Employers have the option of posting jobs available to the FBA Legal Career Center only, or to the Legal Job Exchange Network that reaches thousands of potential candidates through the network of partner job boards. Job seekers have free access and can use the Legal Career Center to post resumes, search for jobs, and prepare for interviews, as they launch their careers.

Member-Only Advantages
- Member Plus affinity program
- online membership directory
- optional public directory listing
- online specialty firm catalog
- discounted rates for CLE, networking events, publications, and other services

Become a Sustaining Member

Support
Sixty dollars of every sustaining membership is used to support educational programs and publications of the FBA.

Save
Sustaining members save five percent on national event registrations and publications orders, and are recognized annually in The Federal Lawyer and at FBA events.

Sustaining Members also receive one free CLE webinar per year—a $99 value!

Make your mark within the federal legal community.
Sign up for membership today at www.fedbar.org/join.

Contact the FBA at (571) 481-9100 or membership@fedbar.org for more information.
Registration:
*Discounted rates if you attend both seminars.
**BONUS—register for one or both seminars
and enjoy a complimentary Brown Bag Luncheon (BBL) with Magistrate Judge Thomas M. Parker.
- **Introduction to Federal Practice Seminar 
  Registration includes continental breakfast with seminar.
  - $300 BBA Member
  - $515 Non Member
  - Free BBA with Mag. Judge Thomas M. Parker
- **New Lawyer Training Seminar 
  - $195 BBA Member
  - $310 Non Member
  - Free BBL with Mag. Judge Thomas M. Parker
- **New Lawyer Training & Introduction to Federal Practice Seminars 
  Registration includes continental breakfast and seminar.
  - $165 BBA Member
  - $280 Non Member
  - Free BBL with Mag. Judge Thomas M. Parker

Name:

Attorney Registration:

Firm:

Address:

City/State/Zip:

Phone:

Email:

Enclosed is a check payable to the Federal Bar Association.
Send by Nov. 25, 2017 and mail to:
FBA, Northern District of Ohio Chapter,
PO Box 14760, Cleveland, OH 44114
Or register online via credit card.

Cancellation deadline is 5:00 p.m., three business days prior to the seminar will receive a full refund, less than three business days prior to the seminar will be refunded a $25 administrative fee; no shows will not receive a refund.
All cancellations need to be in writing via email sent to admin@fba-ndohio.org

Introduction to Federal Practice &
New Lawyer Training Seminars
Friday, December 1, 2017
Carl B. Stokes U.S. Court House
Cleveland, Ohio

Cleveland Bar Association
Northern District of Ohio Chapter

Join us for 2.25 CLE credit hours of Introduction to Federal Practice and 3.0 New Lawyer Training credit hours. These seminars are a must for new attorneys! BONUS—register for one or both seminars and enjoy a complimentary Brown Bag Luncheon with Magistrate Judge Thomas M. Parker.

More information on events and registration:
Federal Bar Association
Northern District of Ohio Chapter
PO Box 14760
Cleveland, Ohio 44114
Phone: 877-326-6364
E-mail: admin@fba-ndohio.org
www.fba-ndohio.org

Introduction to Federal Practice
Friday, December 1, 2017
8:30 am - 12:30 pm
Carl B. Stokes U.S. Court House, Courtroom 19A
2.25 Hours of Ohio CLE Credit
(Open to the public for the introduction to the jurisdiction of the Magistrate Judge and Magistrate Judge David A. Ruiz)

8:30 a.m.
Registration

9:00
Welcome and Introduction 
Chief Judge Patricia A. Goughan
U.S. District Court, ND Ohio

9:30
Role of the Magistrate Judge 
Magistrate Judge David A. Ruiz
U.S. District Court, ND Ohio

Magistrate Judge Ruiz will review the role of the Magistrate Judge in the federal system and the benefits to the parties and the Court of consent in the jurisdiction of the Magistrate Judge in civil cases.

9:45
Court Programs, Accessing Court Information and Electronic Filing
Sandy Opple, Clerk of Court

The Clerk of Court and Chief Deputy Clerk will provide an overview of the Court, current on recent developments, and describe the Court programs that are available to attorneys. The Clerk also provided an introduction to the Court's website and describe the electronic filing system through which all attorneys must file and receive notice of filings.

10:30 Break

10:45
Local Rules and Practice
Catherine Garcia-Feetham
Career Law Clerk to Judge Jeffrey J. Neight

Sharon K. Derflin
Career Law Clerk to Judge Sara Lisi

The Clerks will review key Local Rules related to attorney admission, case assignments, discovery, motion practice and Alternative Dispute Resolution, with an emphasis upon the District's Case Management Plan by which the Court manages its civil dockets.

11:30
Electronic Courtrooms
David J. Zondio
Automation Supervisor
U.S. District Court, ND Ohio

The Court clerks to provide insight into the current state of electronic filing in the District, including the use of video conferencing, electronic submissions, and the like.

11:45
Swearing-In Ceremony
Sandy Opple
Clerk of Court

Participants who have completed the course and otherwise meet the requirements of Local Rule R3.5, will be sworn in to practice in the Northern District of Ohio.

Brown Bag Luncheon with 
Magistrate Judge Thomas M. Parker
Friday, December 1, 2017
12:30 pm - 1:30 pm
Carl B. Stokes U.S. Court House, Courtroom 19A
Attend for free if you register for one or both seminars.

New Lawyer Training
Friday, December 1, 2017
1:30 pm - 4:30 pm
Carl B. Stokes U.S. Court House, Courtroom 19A
1.0 Hours NCT Credit—Law Office Management
1.0 Hours NCT Credit—Client Financial Management
1.0 Hours NCT Credit—Professionals

Course Description:
This seminar will provide new attorneys with training on law office management, client financial management, and professional conduct and relationships. It fulfills the three hours of NCT credit on professional, law office management, and client financial management required by the Ohio Supreme Court for newly admitted Ohio attorneys.

Detailed Time of Program:
1:00 p.m.
Registration
1:25 p.m.
Welcoming Remarks
1:30 p.m.
Law Office Management
1:45 p.m.
Client Financial Management
2:30 p.m.
Professional Conduct and Relationships
3:30 p.m.
Program concludes

For more information and online registration click here.
BROWN BAG LUNCHEON

This informal luncheon will feature a Question and Answer Session with Magistrate Judge Thomas M. Parker, United States District Court for the Northern District of Ohio.

Date/Time:
Friday, December 1, 2017
12:30 p.m. - 1:30 p.m.

Location:
Carl B. Stokes U.S. Court House, Courthouse 19A
801 West Superior Avenue
Cleveland, OH 44113
Lunch will be provided.

Note: Anyone that has registered for the Introduction to Federal Practice Seminar and/or New Lawyer Training Seminar can attend the luncheon at no charge.

REGISTRATION FORM

Brown Bag Luncheon with Magistrate Judge Parker—Friday, December 1, 2017
Following the Introduction to Federal Practice Seminar and before the New Lawyer Training Seminar

Registration Fees:
- Law Students: Free
- FBA Member: $20.00
- Non-member: $25.00
- Complimentary—Registered for Introduction to Federal Practice Seminar and/or New Lawyer Training Practice Seminar.

Registration Deadline: Friday, November 24, 2017

Name _______________________________________________________
Firm _________________________________________________________
Address ______________________________________________________
City/State/Zip _________________________________________________
Phone ________________________________________________________
E-mail _________________________________________________________

☐ Enclosed is a check payable to the Federal Bar Association.
Mail to: FBA, Northern District of Ohio Chapter,
PO Box 14760, Cleveland, OH 44114
or
Click here to register online and pay via credit card.

Email: admin@fba-ndohio.org Phone: 877-322-6364

For more information and online registration click here.
PROFESSIONALISM CLE
Friday, December 15, 2017
9:00 a.m. to 12:00 p.m.
Carl B. Stokes U.S. Court House
7th Floor Auditorium
2.50 Hours of Professionalism Credit (accreditation approval pending)

SEMINAR AGENDA

Course description: #MeToo: Is Sexual Harassment Still a Problem in the Legal Profession?

Agenda:
8:30 a.m. to 9:00 a.m.: Registration and continental breakfast
9:00 a.m. to 9:45 a.m.: Professor Sharona Hoffman - The definition of harassment and related topics.
9:45 a.m. to 10:30 a.m.: Christopher Thornman - Different types of sexual harassment cases filed, trends in liability and the "new frontier" with Weinstein, Spacey, Louis CK and related celebrity cases.
10:30 a.m. to 10:45 a.m.: Break
10:45 a.m. to 11:30 a.m.: Laura Hauser - Sexual Harassment in the Legal Profession - A real world discussion of specific examples of sexual harassment in law firms, how firms have responded, the effectiveness of response and training programs, and the conflicts that women face in trying to promote (or just survive) their careers.
11:30 a.m. to 12:00 p.m.: Q and A and Program Concludes

Speaker Bios:
Professor Sharona Hoffman, CWRU Law School, click here for bio.
Christopher Thornman, Thornman Petrov Group click here for bio.
Laura Hauser, Hauser Law LLC, click here for bio.

DATE AND LOCATION

Professionalism CLE
Friday, December 15, 2017
9:00 a.m. - 12:00 p.m.
Carl B. Stokes Courthouse, 7th Floor Auditorium
801 West Superior Avenue, Cleveland OH

Cancellations received by 5:00 p.m., three business days prior to the seminar will receive a full refund; less than three business days prior to the seminar will be refunded less a $25 administrative fee; no shows will not receive a refund.
All cancellations need to be in writing via email sent to admin@fba-ndohio.org

REGISTRATION FEES

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<thead>
<tr>
<th></th>
<th>FBA Member</th>
<th>Non-Member</th>
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<tbody>
<tr>
<td>Pre-registration</td>
<td>FREE*</td>
<td>$99</td>
</tr>
<tr>
<td>Walk-in registration</td>
<td>$25</td>
<td>$145</td>
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</tbody>
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*Note: Pre-registration is REQUIRED to attend this seminar for free. To join the FBA-NDOC and attend this seminar for free, please contact our administrative office at admin@fba-ndohio.org or 877-322-0364.

Enclosed is a check payable to the Federal Bar Association.
Send by December 8, 2017: FBA, Northern District of Ohio Chapter, PO Box 14760, Cleveland, OH 44114
Or click here to register online via credit card.

Name________________________Supreme Court No.________________________
Firm________________________Phone________________________
Address______________________E-mail________________________
City/State/Zip__________________Fax________________________

CLE COMMITTEE MEMBERS

Seminar Co-Chair: Lori Riga, Federal Public Defender, & Brian Ramm, Benesch, Friedlander, Coplan & Aronoff, LLP

For more information and online registration click here.
**Editors for the Fall 2017 Newsletter:**

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

**FBA-NDOC Officers**

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Philip Calabrese, Porter Wright

**President Elect:**  
Rebecca J. Bennett, Ogletree Deakins Nash Smoak & Stewart PC

**Vice President:**  
Deneen LaMonica, Ziccarelli & Martello

**Secretary:**  
Hon. Amanda Knapp, U.S. Social Security Administration

**Treasurer:**  
Derek E. Diaz, Hohn Loeser & Parks LLP

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**Calendar of Events:**

**November 30, 2017**  
Younger Lawyers Fall Happy Hour Social

**December 1, 2017**  
Introduction to Federal Practice Seminar

**December 1, 2017**  
Brown Bag Luncheon with Magistrate Judge Thomas M. Parker

**December 1, 2017**  
New Lawyer Training Seminar

**December 15, 2017**  
Professionalism Harassment CLE

**December 20, 2017**  
FBA-NDOC Board Meeting

**January 17, 2018**  
FBA-NDOC Board Meeting

**February 21, 2018**  
FBA-NDOC Board Meeting

**March 21, 2018**  
FBA-NDOC Board Meeting

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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.