



Federal Bar Association

Northern District of Ohio Chapter

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Spring 2021

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Inside This Issue:

President's Podium

FBA News:

2 *FBA NDOH Statement Condemning Hate and Violence*

3 *Civics Literacy Survey*

3 *Greater Cleveland Food Bank*

Awards and Events in the News:

4 *Press Release— New Magistrate Judge in Toledo*

5 *FBA Honors CWRU Law Student*

Clerk's Corner:

6 *Sandy Opacich*

Articles:

8 *The Qualified Immunity Paradox and the Sixth Circuit's Moderwell Opinion: A Harbinger of Better Things to Come?*

11 *Diversity in the Legal Field Requires Communication, Trust, and Support*

15 *ADS, Announcements & Membership Benefits*

17 *Calendar of Events*

PRESIDENT'S PODIUM

Summer has arrived and changes are abound! I am excited to share that the board of directors has resumed in-person monthly meetings starting in June, with the option to continue to attend via Zoom. Seeing our colleagues in-person has been a welcome change to what was previously an endless stream of virtual video conferences.

April was an exciting and eventful month for the Chapter. We hosted a program on Restarting Trials in the Northern District of Ohio, the purpose of which was to address the Court's modified trial procedures and provide attorneys with guidance on case and trial preparation during the ongoing pandemic. Due to the importance of this topic this program was provided at no charge and continues to be available On Demand through the Chapter website.

Our first Immigration Trial Practice Skills CLE in April was also a resounding success. We were fortunate to have Assistant Chief Immigration Judge James McCarthy to provide recommendations on how to prepare for trial before the Immigration Court Judge McCarthy provided attendees with substantive examples of best practices and a unique perspective of what judges are interested in hearing through client testimony and documents.

We ended the month with a virtual brown bag lunch featuring U.S. District Judge Michael J. Newman, of the Southern District of Ohio. The luncheon was a great opportunity to get to know Judge Newman on a more personal level and we would continue to encourage Chapter members to take advantage of these unique opportunities in meeting members of the federal judiciary, who have been very gracious in donating their time to the Chapter.

Despite the challenges of the pandemic, our mentoring committee adapted and initiated several virtual programs for law students this spring, including a discussion on Civil Practice Experience and Remote Practice During the Pandemic and Virtual Bar Exam Preparation & Summer Associate and Law Clerk Tips. While we are looking forward to resuming a more traditional mentoring program in the fall, these programs have been a welcome substitute and provide important opportunities for our newer colleagues in the bar to receive guidance and advice from more experienced practitioners.

Thus far, June has gotten off to a great start with the How a Spreadsheet Could Change the Criminal Justice System: Focusing on Data in State and Federal Sentencing CLE that was offered earlier in the month. The newer lawyers committee also put together an all-star lineup of panelists, including Justice Michael P. Donnelly, Supreme Court of Ohio, Judge Pierre H. Bergeron, Ohio First District Court of Appeals, Neil Steinkamp, consultant at Stout, and Paul Hofer, former analyst at the Sentencing Resource Counsel.

The Diversity Committee remains active and engaged. On September 10, 2021, we will be hosting Dr. Kate Masur, Associate Professor at Northwestern University and author of *Until Justice Be Done: America's First Civil Right Movement, From the Revolution to Reconstruction*. Dr. Masur will be in Cleveland for an important discussion about America's historical movement in the field of civil rights, which will be followed by a book signing. In anticipation of this event, the Diversity Committee's next book club read is *Until Justice Be Done*.

As we continue to transition back to pre-COVID normalcy, please mark your calendar with a few save the dates. October 1, 2021 will be our annual State of the Court Luncheon and Officer Swearing in Ceremony at the Hilton Downtown Cleveland, which will promise to be an exciting and eventful occasion where we hope to see many of you in attendance. Additionally, the 2021 FBA Annual Meeting & Convention will be September 23-25 in Miami, Florida, registration for which is available online. Finally, Sixth Circuit Judicial Conference will be held at the Hilton Downtown Cleveland Hotel on December 15-17; details are expected to be forthcoming in late August. Otherwise, I can likely speak for all my Officer colleagues that we are looking forward to seeing you all at a happy hour soon.



FBA NDOH STATEMENT CONDEMNING HATE AND VIOLENCE

The Northern District of Ohio chapter of the Federal Bar Association joins organizations around the country in condemning the recent acts of hatred and violence against Asian Americans. We are appalled by the nearly 3,800 hate incidents reported to Stop AAPI Hate since March 2020 as well as the many others that have gone unreported. It is intolerable for any member of our community to live in fear of abuse—whether physical, verbal, or emotional.

The Asian American community is a vital and vibrant part of the American tapestry. The recent misguided attempts to sunder our connection to that community are an assault not only on the victims themselves, but the values that both our country and the Federal Bar Association hold sacred. We are at our strongest when we cherish and strengthen the threads that bind us to one another.

So we will not be silent in the face of these hate crimes against Asian Americans across the country. We will not be silent in the face of irresponsible xenophobic rhetoric that has become much too common in public discourse. And we will not be silent as members of the Asian American community endure fear, anguish, and anxiety in the face of bigotry and hate crimes.

We stand in solidarity with the Asian American community, denounce targeted racial violence (or, indeed, violence of any kind), and utterly reject rhetoric that associates the coronavirus with any particular nation or group. We extend our deepest sympathy to the victims of racial violence against Asian Americans, their families, and friends. We call upon federal, state, and local authorities to promptly and vigorously prosecute hate crimes against Asian Americans. And we urge our members and Americans at large to use their own voices and platforms as bridges rather than wedges between communities.

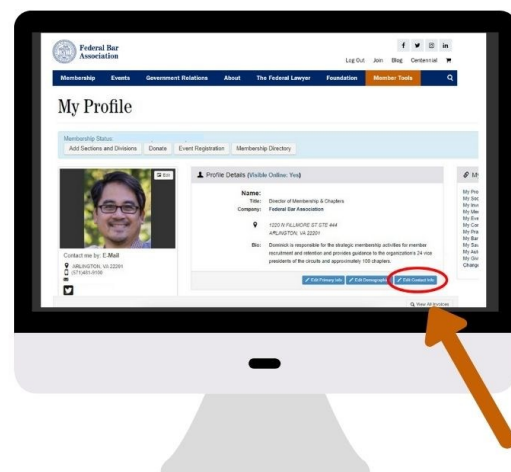
March 25, 2021

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CIVICS LITERACY SURVEY

Test your civics literacy with a survey of 13 multiple-choice questions measuring your knowledge of the basics of U.S. democracy, with questions based on the current U.S. Naturalization Test! The results of the survey will be published in the next newsletter. Survey results are anonymous. Please click here to participate in the Civil Literacy Test: <https://forms.gle/8GJF7d6EhTcrycf6A> . Brought to you by the Civics Committee of the Federal Bar Association Northern District of Ohio.



**Greater Cleveland
Food Bank**

Dear Contributing Members,

On behalf of the Federal Bar Association's Northern District of Ohio Chapter and the Chapter's Newer Lawyers Committee, thank you for your generosity and support of our virtual food drive. With you help we were able to raise over \$3,000 for families in need throughout the Greater Cleveland area. This has been a challenging year for all of us, but through your donation you have made things just a little less challenging for our neighbors and friends in need this winter. We wish you health and happiness in this new year and are truly grateful for your contributions.

Best regards,

The Newer Lawyers Committee

Federal Bar Association, NDOH Chapter

[Click here to visit our personal page.](#)

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http://support.greaterclevelandfoodbank.org/site/TR?px=2769861&pg=personal&fr_id=1141&et=eM1sIQdoep2OP4H8YfLyDg&s_tafId=2156

[Click here to view the team page for FBA Young Lawyers Food Drive](#)

If the text above does not appear as a clickable link, you can visit the web address:

http://support.greaterclevelandfoodbank.org/site/TR?team_id=3141&pg=team&fr_id=1141&et=Frg62B2A-sApAlhmT226hg&s_tafId=2156

Awards and Events in the News

New Magistrate Judge in Toledo



The United States District Court for the Northern District of Ohio

FOR IMMEDIATE RELEASE May 14, 2021

Judge Patricia A. Gaughan, Chief Judge of the United States District Court for the Northern District of Ohio, announced that Darrell A. Clay, Esq. was sworn in today to serve an eight-year term as a United States Magistrate Judge in Toledo, Ohio. He succeeds Magistrate Judge James R. Knepp, II, who was elevated to District Judge on November 19, 2020.

Magistrate Judge Clay was a partner at Walter | Haverfield LLP in Cleveland, Ohio, where he practiced law since 1997 as a litigator with years of courtroom experience in civil, criminal, and administrative matters throughout the United States. Previously, Magistrate Judge Clay was an associate attorney with Monroe & Lemann, P.C. in New Orleans, Louisiana, and a Judicial Law Clerk to Judge Steven R. Plotkin in the Louisiana Fourth Circuit Court of Appeals.

Magistrate Judge Clay has served since 2015 as a member of the Ohio Supreme Court's Board of Commissioners on Character & Fitness and has been its Chair since 2019. In 2017-18, he served as President of the Cleveland Metropolitan Bar Association. He currently serves as President-Elect of the Lawyer-Pilots Bar Association and will serve as its President in 2021-2022.

Magistrate Judge Clay holds Bachelor's and Master's degrees in political science from the University of South Florida. In 1994, he received his Juris Doctor from Tulane University School of Law, *magna cum laude*, where he was a member of the *Tulane Law Review* and part of the team that won the 1994 J. Braxton Craven Memorial Moot Court Competition at which he was named Best Oralist.

Chief Judge Gaughan said, "We are very excited to have Darrell Clay join the Court as a Magistrate Judge. We know he will be an invaluable asset to our Bench."

The United States District Court for the Northern District of Ohio has court locations in Cleveland, Akron, Toledo, and Youngstown and serves 6 million citizens in the 40 northern most counties in Ohio.

CONTACT: Sandy Opacich, Clerk of Court

(216) 357-7068

Awards and Events in the News Cont.



FBA HONORS CWRU LAW STUDENT

Jonathan L. Entin

CWRU Faculty Representative,

FBA-NDOC Board

This year's chapter-sponsored Federal Bar Association award for obtaining the highest grade in Constitutional Law at Case Western Reserve University School of Law went to Jesse Wynn. He received his prize at CWRU's awards ceremony in May and received his J.D. degree later that month.

A native of Strongsville, Ohio, Jesse received his B.S. in biology with minors in chemistry and legal studies from the University of Mount Union. He also was president of the student government after having served as vice-president, campus life chair, and student representative; he also received the Dean Taylor leadership award for his work in that area.

He has been a star law student at CWRU. Jesse received the top grades in more than half a dozen courses, including Torts, Professional Responsibility, Sales, Appellate Practice, the first-year legal skills course and an upper-class skills course. He was an articles editor of the *Case Western Reserve Law Review*, and his Note on patents as public franchises appears in Volume 71 of the *Review*. He received the award for best brief in the law school's Dunmore Moot Court Competition and was also on the National Moot Court Team.

While in school, he was an extern for Judge Karen Nelson Moore of the U.S. Court of Appeals for the Sixth Circuit and a summer associate at Jones Day. Next year he will be a law clerk for Chief Judge Patricia Gaughan of the U.S. District Court for the Northern District of Ohio.

Clerk's Corner:

FBA Article – April 2021

CLERK'S CORNER

As the COVID-19 pandemic continues to throw us curveballs, we seem to be growing accustomed to it, and, from time to time, we manage to hit one of the balls over the fence! That has happened recently with the completion of the first virtual civil jury trial in the Northern District of Ohio.

Since the beginning of the pandemic in March 2020, many courts across the country have suspended jury trials and in-person proceedings, creating concerns about how the backlogs would eventually be addressed. These concerns prompted several districts such as the Western District of Washington, the District of Minnesota, and the Middle District of Florida to launch virtual civil jury trials in an effort to keep current. The Northern District of Ohio did likewise on March 23, 2021.

We took our cues from the work done in the Western District of Washington, who hosted a national training session on conducting a virtual civil jury trial and provided guidance on the logistical and technical challenges inherent in such an effort. We owe our success to their willingness to share best practices and lessons learned, and I can now share our story with you.

Preparing for Trial

There was a great deal of planning put into ensuring we had the right technology to successfully empanel a jury and fully support a virtual jury trial. The judge and entire chambers staff actively participated in two planning meetings so that we all understood the judge's trial plan and preferences. Our IT staff quickly settled on using Zoom as the platform for the trial and Box.com for managing exhibits. Jury staff issued summons to prospective jurors along with questionnaires to identify jurors who might need assistance with equipment, space, or internet access in order to serve. We were ready to provide iPads to any juror who lacked the equipment to serve, and space in the courthouse for any juror who did not have a place at home that was free from distractions or who did not have a secure and reliable internet connection. All in all, twenty-three individuals participated in voir dire; twenty-one did so remotely, and two came to the courthouse. Ten jurors were seated, eight served on the trial remotely from home, and two participated using space and equipment in the courthouse.

Court staff, in partnership with IT, prepared detailed handbooks and reference guides for jurors and attorneys. Prospective jurors were provided instructions for downloading and navigating Zoom. IT staff provided training to attorneys on the use of Box.com for trial and refreshers on Zoom best practices to ensure a good experience for all participants.

However, the factor that most contributed to a successful effort was practice, practice, practice! One week before the virtual trial, participants from chambers, the jury department, and the Clerk's Office conducted the first dry run. Other court staff members volunteered to be attorneys, jurors and witnesses so that we could simulate the dynamics of a trial and ensure that we could manage all phases of the trial seamlessly. A separate dry run was held with attorneys to focus on the use of Box.com in managing evidence and to practice the transitions in a trial using Zoom. The last practice session was with the jurors on the Friday before trial. Court staff assisted jurors with questions about Zoom and spent time troubleshooting issues with audio and video. Once the jurors were comfortable with the technology, court staff presented the jury orientation over Zoom to provide even more exposure to the platform during this session. Come Monday, everyone would be ready.

Clerk's Corner Cont.

During the Trial

Clerk's Office staff greeted and assisted jurors travelling to the courthouse to use equipment, space, or our internet connection. Chambers staff managed the process of admitting participants to the trial and breakout rooms and monitored Zoom to ensure participants were connected at all times. IT staff also monitored the technology and stood ready to assist for any unexpected challenges. Rather than "all hands on deck," we had "all eyes on the screen"! We had a few instances of jurors losing connectivity for a few minutes, all of which were quickly resolved. Much like an in-person trial, technical glitches can and do arise from time to time. Our IT staff was well-prepared to minimize any time lost in troubleshooting.

I believe a key factor in the success of the virtual format in this instance was the judge's introductory comments to the trial participants. The judge reiterated key tips to all participants for the successful use of Zoom, described how breaks would be handled, explained how to get help with a technical problem or question, and generally put all the jurors at ease, particularly those who were less experienced using videoconferencing technology. Our first virtual civil jury trial lasted four days.

Pro Tips for Participating in a Virtual Jury Trial

With one virtual civil jury trial behind us and a few more on the calendar, we will continue to fine-tune our preparations, training, and guidance for all trial participants. Following are some tips that we think are especially pertinent to attorneys who may find themselves participating in a virtual jury trial in the Northern District of Ohio:

- Select a neutral, non-digital backdrop when appearing via Zoom. The effects of a digital background on Zoom may result in video delays (e.g., lips are not in sync with audio, blurring your image when moving) that are distracting.
- Use a lavalier-style microphone, if possible. If not, test the audio if you move your head when speaking (e.g., when referring to notes) to ensure the audio does not change volume or become unintelligible.
- Use an external camera, if possible, rather than your internal laptop camera. In most cases, external cameras provide a better image. You can also position the camera so that you are looking into it and will appear to be speaking to the audience. Similarly, if you are using your internal laptop camera, be sure it is positioned so that you are looking directly into the camera.
- Test your video image and audio in the location where you will be seated during the virtual trial. Consider the impact of overhead glare and light from nearby windows which may change throughout the day.
- When presenting evidence:
 - Have an associate assist you in the virtual courtroom to avoid delays in navigating to the proper location or inadvertently displaying the contents of your Windows Explorer, email, etc. It also allows you to concentrate on the presentation, not the "driving".
 - Be sure to stop evidence screen sharing during argument. In the physical courtroom, jurors would simply look at you, but in the virtual environment, they do not have that option.
 - If audio accompanies evidence, be sure to check the "Share Audio" box.
- After a year of pandemic-driven virtual proceedings, it seems reasonable to recognize the benefits of the virtual environment as an additional tool for the administration of justice. To that end, we continue to work to assure that our technology and practices are ready to support both virtual proceedings and a return to in-court proceedings as pandemic-related restrictions begin to ease.

Stay safe and well!

Sandy Opacich

THE QUALIFIED IMMUNITY PARADOX AND THE SIXTH CIRCUIT'S *MODERWELL* OPINION: A HARBINGER OF BETTER THINGS TO COME?

Doron M. Kalir, Clinical Professor and Director, Appellate Practice Clinic, Cleveland-Marshall College of Law

On May 12, 2021, the Sixth Circuit issued *Moderwell v. Cuyahoga County*.¹ The opinion constitutes a rare instance where qualified immunity was *denied* both at the District Court level (Judge Boyko of the Northern District of Ohio) and by the Court of Appeals, which affirmed (opinion by Judge Clay, joined by Judges Cole and Griffin).

This § 1983 lawsuit tells the tragic story of Larry Johnson, a former inmate at the Cuyahoga County Correctional Center. On June 20, 2018, Johnson was arrested on charges of petty theft. Nine days later, despite repeated alerts of suicidal risk—one by Johnson himself—the correctional staff did nothing, and Johnson hanged himself.

His estate sued, claiming a § 1983 violation. To simplify, the lawsuit involved two classes of defendants: The Correctional Defendants, who included officers working at the jail at the time; and the Executive Defendants, who included the Cuyahoga County Executive, the County's Sheriff, and others.

The District Court allowed some of the charges to proceed against both classes. The Court of Appeals affirmed. Before addressing the qualified immunity issues at hand, however, it is important to note the horrific conditions that Johnson and other inmates had to face at the facility, including “overcrowding . . . so severe that residents, including two pregnant women, were observed sleeping on mattresses on the floor.” Op., at 4 (citing DOJ Report on the Facility's Conditions).

In addition, although it is well known by now that America's largest mental healthcare system can be found in jail,² *this* jail was far from prepared for the task. The Court chided the facility for having an “inadequate medical program,” which included “numerous members of the medical staff [who] lacked proper licenses, comprehensive mental health appraisals [that] were not conducted in a timely manner, and . . . no mental health nurse practitioner.” Op., at 4 (citing same).

Following the complaint, both defendant classes moved for judgment on the pleadings under Fed. R. Civ. P. 12(c). The District Court allowed some claims to proceed, concluding that plaintiff has “sufficiently alleged a § 1983 claim of excessive force as against the Correction[s] Defendants,” and “sufficiently alleged a § 1983 claim of deliberate indifference to serious medical needs” and “set forth a plausible Supervisory Liability Claim” against the Executive Defendants.” Op. at 5. The District Court also refused to dismiss the case based on qualified immunity, recognizing that the Sixth Circuit “has cautioned against dismissing a case on qualified immunity grounds based only on the pleadings.” Op., at 6. In this short note, I would like to address this qualified immunity issue.

¹ <https://www.opn.ca6.uscourts.gov/opinions.pdf/21a0104p-06.pdf>.

² See, e.g., Matt Ford, *America's Largest Mental Hospital is a Jail*, THE ATLANTIC, June 8, 2015, available at <https://www.theatlantic.com/politics/archive/2015/06/americas-largest-mental-hospital-is-a-jail/395012/>

The Qualified Immunity “Clearly-Established” Paradox

Typically, when a Plaintiff claims a § 1983 violation, the defendants-officials would respond by asking to dismiss the suit based on qualified immunity. To overcome such a defense, a plaintiff must show “(1) that the official violated a statutory or constitutional right, and (2) that the right was “clearly established” at the time of the challenged conduct.” Op. at 7.

When is a right “clearly established”? According to the Sixth Circuit, to be clearly established, “a legal principle must have a sufficiently clear foundation in *then-existing precedent*. There does not need to be a case directly on point, but existing precedent must have placed the statutory or constitutional question beyond debate.” Moreover, “[t]he ‘clearly established’ standard also requires that the legal principle clearly prohibit the officer’s conduct in the *particular circumstances* before him. The Supreme Court has repeatedly stressed that courts must not ‘define clearly established law at a high level of generality, since doing so avoids the crucial question whether the official acted reasonably in the particular circumstances that he or she faced.’” Op. at 7 (emphasis added).

In other words, to win over a qualified immunity defense, the plaintiff must show that *someone else*, facing similar “*particular circumstances*,” has already prevailed over a qualified immunity claim, thus establishing an “*existing precedent*.” But that, of course, leads to a paradox of infinite regression: How could a plaintiff prevail for the *first time*, if each time—in order to prevail—they must show that someone else has already won? Assume, for example, that a police officer continuously places his knee on the neck of a restraint suspect, who is also handcuffed, for eight minutes and 46 seconds, causing the suspect’s death; assume, in addition, that this set of “*particular circumstances*” has never occurred before. How, then, could a § 1983 plaintiff prevail over a qualified immunity defense if there is no “*existing precedent*” on hand to support him?

Or take another example. On June 7, 1995, Larry Hope, a prisoner at an Alabama state prison, was punished severely: “Four guards subdued Hope, handcuffed him, placed him in leg irons and . . . [tied him to a] hitching post. The guards made him take off his shirt, and he remained shirtless all day while the sun burned his skin. He remained attached to the post for approximately seven hours, [during which] he was given water only once or twice and was given no bathroom breaks.”³ The Eleventh Circuit, expectedly, found this treatment to amount to “cruel and unusual punishment” under the Eighth Amendment; and yet, because that conclusion was not supported by “earlier cases with materially similar facts,” it held that defendants were entitled to qualified immunity.

Solving The “Clearly Established” Paradox

In *Hope* (properly named), the Supreme Court reversed the Court of Appeals and resolved the paradox. The Court held that “Respondents violated clearly established law. . . . *The obvious cruelty inherent in this practice* should have provided respondents with some notice that their alleged conduct violated Hope's constitutional protection against cruel and unusual punishment. Hope was treated in a way antithetical to human dignity.”⁴

³ *Hope v. Peltzer*, 536 U.S. 730, 734-35 (2002).

⁴ *Id.* at 744-45 (emphasis added).

The Court, in other words, recognized that there are certain situations that are *so obvious*, that despite the lack of a clear “previous precedent” a reasonable officer should know that such behavior is constitutionally proscribed. More recently, in *Taylor v. Riojas*,⁵ the Supreme Court repeated this principle. In *Taylor*, an inmate was subject—again—to truly inhumane conditions of incarceration, the likes of which one would be surprised to know still exist in this country. Again the Fifth Circuit—despite finding that such behavior clearly violated the Eighth Amendment—granted qualified immunity, explaining that there was no “clearly established” law and that the guards had no “fair warning” about their conduct. Again the Supreme Court reversed, citing *Hope*, explaining that “no reasonable correctional officer could have concluded that, under the extreme circumstances of this case, it was constitutionally permissible to house Taylor in such deplorably unsanitary conditions for such an extended period of time.”⁶

Legal commentators took notice. Professor Joanna Schwartz argued that “the Court’s decision in *Taylor* sends the signal to lower courts that they can deny qualified immunity without a prior case on point—a very different message than the Court has sent in its recent qualified immunity decisions.”⁷ Similarly, Professor Lawrence Rosenthal wrote that, based on *Taylor*, “the Court has stressed that on egregious facts, qualified immunity should be denied regardless whether there are factually similar precedents.”⁸

Back to *Moderwell*

In *Moderwell*, the Sixth Circuit affirmed the District Court’s decision to deny qualified immunity, based in large part on the *early stage of the proceedings* in which the motion was filed (prior to discovery). Still, the court took great pains to emphasize the lessons of *Hope* and *Taylor*. It also approvingly cited the academic articles quoted above. And it concluded by saying that the rule, as it stands today, holds that “when no reasonable correctional officer could have concluded that the challenged action was constitutional, the Supreme Court has held that there does not need to be a case directly on point.” Op. at 7.

In that, the Sixth Circuit has both resolved the “clearly established” paradox and provided much hope for better days to come.

⁵ 141 S. Ct. 52 (2020) (per curiam).

⁶ *Id.* at 53.

⁷ Joanna A. Schwartz, *Qualified Immunity and Federalism All the Way Down*, 109 GEO. L.J. 305, 351 (2020).

⁸ Lawrence Rosenthal, *Defending Qualified Immunity*, 72 S.C. L. REV. 547, 593 n.193 (2020).

DIVERSITY IN THE LEGAL FIELD REQUIRES COMMUNICATION, TRUST, AND SPONSORSHIP

Marisa T. Darden

It's no longer enough for practitioners to promote "diversity and inclusion." For a truly diverse profession, attorneys need to develop a new way of communicating with attorneys of color within their organization.

Diversity and inclusion have become the hottest buzzwords in the legal marketplace. It is encouraging to see that practitioners across the profession are finally seeing the value and benefit to creating a work force tapestry that mimics the world. However, the enthusiasm belies the statistics and the abysmal track record our profession has in this regard. The American Bar Association's 2020 Profile of the Legal Profession explained that White men and women are "still overrepresented" in the profession, and there are less diverse professionals in the profession now than there were in 2010.¹ Just over two percent of all law firm partners are African American in the United States.² The statistics within the federal family are also challenging, including the Offices of the U.S. Attorney and the Federal Defender, the Immigration Court, and the Federal Bench. In 2020, of 93 United States Attorneys, two were Black; seven were women.³ Certainly strides have been made, but in most federal courthouses across the country, practitioners can name the attorneys of color that appear frequently on one or two hands. These metrics do not come close to reflecting our federal bar family, the clients we serve, or the goals our profession has committed to espousing. Conceptually, people understand that race alone is not a determinative indicator of the quality or capability of any attorney. But optics matter.

How do we affirm to African American men in the criminal justice system that the process is fair and objective, when almost everyone around them, including a jury of their peers, appears vastly different? What assurances can we give clients that their issues and cultural nuances can be addressed if their only options are attorneys from majority communities? In today's climate, where corporate clients are demanding diverse representation and racial accountability in staffing their matters, how can the profession begin to meaningfully invest in a pipeline of diverse talent that reflects the community at large? Publicly, lawyers and law firms have touted diversity as a priority for years. But partnership and leadership metrics remain abysmal. Why is the success rate so low? More to the point, how can law firms attract and retain attorneys of color and groom the next generation of leadership so we are not still having this conversation in twenty years?

We cannot afford to wait any longer to do something bold and meaningful in diversifying our ranks. However, to engage on this topic, namely how we got here and where we are going, requires a few ground rules be laid in your organization:

A. Approach the Topic with a Willingness to Listen and Learn

I hear from my white colleagues often that they are afraid to discuss issues of race, particularly in a professional setting, for fear of offending, saying the wrong thing, or having their words misconstrued. In my experience, this reticence is less often an issue when the majority person is in listening posture, rather than in an assertive, opinion-espousing posture. Though we all have our experiences, our opinions, and our politics, to engage on this sensitive and emotional topic requires all participants be willing to earnestly listen to others, and approach the subject from a sense of wonder and desire to learn, rather than a desire to educate. Ultimately, this requires humility and patience, traits lawyers do not always possess in abundance. Resist the temptation to lecture or opine, and do more listening.

¹ American Bar Association Profile of the Legal Profession (2020) at p. 37, available at <https://www.americanbar.org/content/dam/aba/administrative/news/2020/07/potlp2020.pdf> (last accessed May 3, 2021).

² National Association for Law Placement 2020 Report on Diversity in United States Law Firms at p. 4, available at https://www.nalp.org/uploads/2020_NALP_Diversity_Report.pdf (last accessed May 3, 2021).

³ Zoe Tillman, "There Are 93 US Attorneys. Seven Are Women and Only Two are Black," BuzzFeed News, June 28, 2020, available at <https://www.buzzfeednews.com/article/zoetillman/trump-us-attorneys-lack-diversity-justice-department> (last accessed May 3, 2021).

B. Do Not Assume People of Color Will Do the Work

Often, chairs of diversity committees, mentors to young lawyers of color, and other leaders in the diversity space are attorneys of color themselves. If they volunteer, great! If they are the best person for the job for some reason other than the color of their skin, that's also fine. But do not assume that just because you have a Black partner, a Latinx senior associate, or a minority staff member, that person is best equipped to run your team's diversity projects. This is problematic for a host of reasons: it saddles your minority staff with more responsibilities for which they are often not compensated, and it signals to majority team members that minority mentorship and retention is not their problem. Similarly, change on these issues cannot always be led by people of color. Leadership, specifically white leadership, must demonstrate a commitment to enhancing diversity from the top by creating and maintaining a culture of inclusivity and open dialogue, and consistently communicate a desire to foster meaningful change throughout an organization's ranks.

C. We Are More Similar Than Different

This seems intuitive, but I often remind myself that, despite politics, geography, racial differences, and other chasms that seem difficult to bridge, we are all more alike than we are different. As attorneys and members of the bar, we all became lawyers for a reason. We all suffered through a bar exam, and struggled to overcome difficulties to become successful practitioners. These experiences bind us, and allow us to connect with the most different among us and begin from a place of empathy and understanding.

The tragic death of George Floyd, and the international outrage it caused, eventually filled me with cautious optimism about the fate of our nation. Never have I seen a communal willingness to have the hard conversations, to engage on the concept of race in America, and to understand the Black and minority experience in this country and in our profession. I am heartened by my white colleagues' willingness to approach these complicated topics with humility, and a real desire to effectuate change. This opportunity cannot be squandered. Law firms, but really, all of us, can make incremental changes to provide junior attorneys of color a better way forward in the profession by focusing on these areas of growth:

1. Create a Culture of Trust

Younger attorneys, women, and attorneys of color need to know that their place of employment is a safe space for which they can focus on work. This is an intangible difference between majority and minority attorneys that is difficult to explain. In my experience, and through an informal polling of my colleagues of color, the added responsibility of being one of a handful of African American attorneys can be taxing. To put it plainly, in even the best, most inclusive workplaces, issues arise that require minority attorneys to endure an added level of pressure and responsibility.

There are the explicit (note I speak only of my experiences here, but I know I am not alone): I have been mistaken for a secretary, a paralegal, a court reporter – anything but the lead attorney on my case. Once informed that I am in charge, adversaries have refused to address me and only addressed my (often white) male colleagues, whom they assumed had more authority than me, or insisted on speaking to my supervisor. On more than one occasion, colleagues felt comfortable extolling the abolition of affirmative action and preference hiring programs, asking me “won't it be freeing to know you got the job only on merit, and not because you are Black?” For the better part of my tenure at one place of employment, judges, defense attorneys, colleagues, and other employees regularly confused me for the other African American female who worked in my department, though we look nothing alike.

Then there is the implicit, which is harder to curb. Often, as an attorney of color, there is no presumption of competence associated with your work.⁴ This breeds a pervasive concern that you are being treated differently because you are a minority or female, founded or not. The internal dialogue this creates is a lot to bear, and your designation as “other” feels stark because your surroundings are constantly reinforcing the fact that you’re the only one (or one of the only).

Concerns run rampant regarding all sorts of considerations that might otherwise be innocuous in any other circumstance: your communication style (too aggressive?), your dress, hair, and personal aesthetic choices (Mainstream? Acceptable to the majority?), perceived slights or exclusions from social and informal networking activities (purposeful or do they just assume I don’t like golf?), subtle statements during performance reviews (“we’d like to see you connect/smile/ more;” “we are concerned you are not the best ambassador for our brand.”), etc.

To ameliorate both the subtle and overt requires diligent modeling from the top down, and a commitment to training attorneys on implicit bias, particularly majority attorneys in leadership. Consider mandating implicit bias and racial diversity training for all senior leaders. Encourage staff to speak up and report real issues and concerns, and ensure their speaking up will not negatively impact career prospects. Create an environment that encourages people of color to speak openly about their experiences amongst their colleagues. Designate a senior attorney to be the go-to person to speak openly about issues that do come up, to provide a safe space for younger attorneys to seek advice and direction on whether to escalate more serious aspersions.

2. Invest Heavily in the Pipeline

Your firm or organization should be investing in its younger generation both externally and internally.

For those junior attorneys of color already hired, create an active culture for mentorship and sponsorship. Most firms already have a formal mentoring program, but consider designating a structure just for minority and female mentorships, and pair them with a non-minority attorney who has buy-in on the organization’s diversity goals. Consider tying the senior attorney’s annual review or performance goals to successful mentorship outcomes. Similarly, consider pairing young attorneys of color and women with a separate sponsor, a senior leader who would be willing to extend their capital to advocate for the junior attorney in management and performance review discussions. These informal relationships can make or break a young attorney’s success.

Externally, determine whether your team can aggressively recruit outside the traditional schools and channels. If your organization does not already participate, the National Black Law Students Association (BLSA) has national and regional job fairs. Consider recruiting at law schools associated with Historically Black Colleges and Universities like Howard University School of Law in Washington D.C. and North Carolina Central School of Law. Create strategic partnerships, scholarship opportunities, pipeline initiatives and other outreach with local BLSA chapters in your area, and offer to conduct mock interviews, let the organizations use your space, and create other informal touch points with meaningful follow up. Let law school leadership know your firm is prioritizing diversity and wants to partner to assist in diverse recruiting efforts.

3. Mark Clear Trajectories for Success and Promotion

There must be more transparency and accountability in metrics for firm success. Many firms have adjusted their associate review process to include clear requirements, guidelines, and/or parameters for financial and seniority advancement. But a promotion into partnership remains elusive. Those in power are often purposefully vague on the necessary requirements to be voted into partnership, and senior leadership rightly retains authority to consider a number of factors. However, the less transparent those metrics are, the harder it is to instill a culture of attainability.

⁴ See Cassens Weiss, “Partners in Study Gave Legal memo a Lower Rating When Told the Author Wasn’t White,” available at https://www.abajournal.com/news/article/hypothetical_legal_memo_demonstrates_unconscious_biases (last accessed October 5, 2020).

This is true for everyone, but disproportionately affects women and people of color. And it is not often intentional. Somewhat unique to other organizations, success in a law firm is partly predicated on the ability to forge quality relationships within. People need to like you and respect you to succeed. To be liked requires an ability to connect. Connection is harder when the person in a position of power cannot innately see and draw upon obvious commonalities.

A clear, written, discernable path to partnership abrogates reliability on the intangible. Law firms would benefit from having a more transparent set of goals for associates to attain that make partnership elections objective. This would also incentivize minority associates to stay at the firm; if attorneys know exactly what they have to do, and can largely rely on the promise that if they achieve the metrics, they will be rewarded, then they can build their career on those promises, rather than leaving law firms to enter government or the private sector (which largely have adopted objective metrics for advancement).

There is no one-size-fits-all answer to a problem that has existed for decades. Our profession has historically been a national leader on issues of equity and advocating for what is right. There is no reason why that cannot be the case in the diversity space. The future of our profession necessitates it. To that end, the Federal Bar Association and its local chapters should continue to discuss these issues, encourage frank discourse, and push members to think of creative solutions to a problem we can work to improve and eradicate over time.

Marisa T. Darden is a principal at Squire Patton Boggs LLP in Cleveland, Ohio. She is a former Assistant United States Attorney for the Northern District of Ohio, and a former Assistant District Attorney at the New York County District Attorney's Office. She is the FBA-Northern District of Ohio Diversity Committee Chair. The views expressed are her own.

**Save the Date and Join us for the Fifteenth Annual
2021 State of the Court Luncheon
&
Installation of FBA Board Officers**

Friday, October 1, 2021

12:00 — 1:30 p.m.

Doors open at 11:30 a.m.

**Cleveland Hilton Downtown
100 Lakeside Ave.
Cleveland, Ohio 44114**

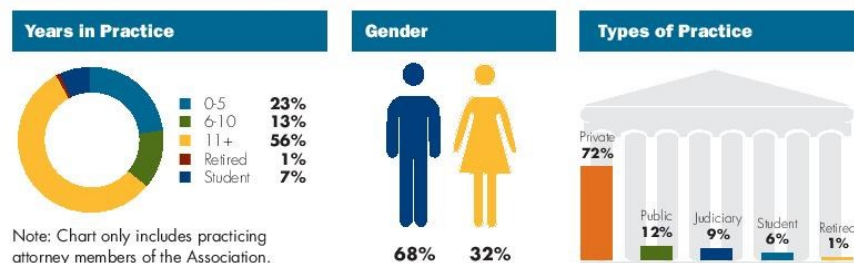
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Federal Bar Association

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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.

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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.

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- annual Capitol Hill Day
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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.

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- 22 practice area sections
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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.

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FBA-NDOH Calendar of Events:**July 21, 2021** *FBA-NDOH Board Meeting***August 18, 2021** *FBA-NDOH Board Meeting***September 15, 2021** *FBA-NDOH Board Meeting***October 1, 2021** *State of the Court Luncheon & FBA Installation of Board Officers*

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



Federal Bar Association

Northern District of Ohio Chapter



Federal Bar Association

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 19,000 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.

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If you are a FBA member and are interested in submitting content for our next publication please contact Stephen H. Jett, Prof. Jonathan Entin or James Walsh Jr. no later than August 30, 2021

Next publication is scheduled for Summer 2021.

SOLACE

Support of Lawyers/Legal Personnel - All Concern Encouraged

Our Chapter supports the FBA's SOLACE program, which 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. For more information, please follow this link:

<http://www.fedbar.org/Outreach/SOLACE.aspx>, or contact our Chapter Liaison Robert Chudakoff at rchudakoff@ulmer.com or mailto:rchudakoff@ulmer.com

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