



FEDERAL CLAIMS BAR ASSOCIATION

Spring 2007 Newsletter

SAVE THE DATE!
FIRST COURT OF FEDERAL CLAIMS
WEST-OF-THE-MISSISSIPPI
JUDICIAL CONFERENCE
OCTOBER 10-11, 2007
BOULDER, COLORADO
MORE INFORMATION INSIDE

Former Chief Judge Baskir Feted At Law Day



Our well-received May 2, 2007 Law Day celebration will no doubt be remembered for the insightful remarks of the **Solicitor General, Paul Clement**. But, the day was of special importance to the Court family, who honored my colleague and predecessor as **Chief Judge, Lawrence Baskir**, with the presentation of

his official portrait. The Court's affection for Judge Baskir was best conveyed by our mutual friend and colleague, **Judge Francis Allegra**, who has graciously allowed me to reprint the remarks he offered that day, and to which I give over this column.

Remarks of Honorable Francis Allegra Law Day, May 2, 2007 at the Willard Hotel

Good afternoon. I assume that the symbolism of this portrait is not lost on you. Indeed, the description is in the program inside. I suspect that Freud or perhaps Jung would have relished the opportunity to analyze a picture that includes a fedora, a gargoyle, a pink flamingo, a Picasso painting, and the ever-lurking mysterious black box.

When first asked to talk, I was tempted to analyze this portrait along the lines of the DaVinci Code – perhaps, finding some hidden meaning in these many symbols. Indeed, I even played with the letters in the title of Judge Baskir's book, hoping that I might discover a Bonacci sequence, revealing

Inside this Edition

Bar Association President's Message . . . 3
Bar Association Officers & Board 4
Web Site Continues Growing 4
Meet the Court: Profile of Carole Bailey . . 5

2007 CFC Brown Bag Series Opens 6
Summer Brown Bag Programs 7
Gala Anniversary Reception Announced . 7
Draft Judicial Conference Schedule 8

some hidden message. But, the more I pondered this portrait, the more I was struck by the symbolism of yet another object in it. You can easily spot it – it's that smiling, grey-goateed man in the black robe on the left.

For me, that gentle man has come to symbolize what it means to be a judge. It is not a well-kept secret around the courthouse that Judge Baskir and I make an almost daily run to Starbucks – we have, after all, twelve locations to pick from within a two-block radius of the courthouse. Truth be told, I have learned more about being a judge from those daily coffee runs than from any other single source.

Those conversations have revealed to me that Larry has a profound love for the law -- not just respect, mind you, but unabashed love. Trust me, he would no sooner warp or manipulate the law than to disfigure one of his own children. He approaches cases with an energy, a fascination and a doggedness that might more commonly be associated with a young attorney, yet with the wisdom that comes from long listening and experience. He is what Oliver Wendell Holmes, Senior, described as a three-story intellect. "There are one-story intellects, two-story intellects, and three-story intellects with skylights," Holmes once explained. "All fact collectors with no aim beyond their facts are one-story men. Two story-men compare reason and generalize, using labors of the fact collectors as well as their own." "Three story men," Holmes continued, "idealize, imagine, and predict. Their best illuminations come

from above through the skylight." Although I have known Larry Baskir for only eight years, I suspect – and many of you would know better – that he has always viewed the law not through the prism of indifference, nor through the lens of convenience, but rather through the caring and principled expanse of that Holmesian skylight. Now, I would be remiss if I did not briefly mention the contributions that my friend made when he was Chief Judge. His tenure, indeed, reminds me of something that Oliver Wendell Holmes, Junior, once said – *to wit*, that "[t]he secret of my success is that at an early age I discovered that I was not God."

As our chief judge, Larry Baskir led mostly by example, yet accomplished some significant things in a relatively short tenure. Among his accomplishments was to lay the foundation for many of the technological advances that we now commonly associate with the court, advances that, of course, were brought to fruition by the current chief. Suffice it to say, we were fortunate to have Judge Baskir as our chief, even for a little time.



So when, over the years, you stare at this portrait don't be too distracted by the flamingo, the gargoyle, the mysterious black box or the other symbols that, of course, enrich its meaning. Take a moment, rather, to savor the other symbol there – that guy on the left, a wonderful man, a truly outstanding jurist, and my friend, Judge Larry Baskir.

**To Join the Court of Federal
Claims Bar Association, Click
on "Membership Services" at
www.cfcbar.org**



President's Message

Never Too Busy



The comedienne Lucille Ball is credited with the well-known adage, “If you want something done, ask a busy person to do it.” Now, I know what you’re thinking—he’s going to ask me to do something. Well, I’m not.

But I am going to suggest that you ask yourself if there is something else that you should be doing, namely getting more involved in the Bar Association.

Perhaps you are thinking that you are already active in the Bar Association. You faithfully read each monthly issue of our new publication, *Executive Summary*. I am sure you will agree that this publication is unmatched in providing timely updates on recent Court of Federal Claims decisions and other important information.

You also went to the spectacular Law Day event at the Willard Hotel. Wonderful! You were one of the lucky people who got into this sold-out event and witnessed both a fascinating presentation by Solicitor General of the United States **Paul Clement**, as well as moving speeches by **Judges Lawrence Baskir and Francis Allegra** on the occasion of the presentation of Judge Baskir’s portrait to the Court.

But there is so much more to being a member of the Court of Federal Claims Bar Association. And I ask you to think about what you are missing by not becoming more involved. Few courts, if any, make the effort to work as closely with its bar as does the Court of Federal Claims. When this Court plans a judicial conference, it seeks the view of the bar on topics of interest. When this Court considers changes to its rules of practice, it provides the bar with an opportunity to offer comment. In fact, it welcomes unsolicited comments from the bar on proposed rule changes. Perhaps most significantly, this is a court that wants to work with the bar to help improve the overall quality of advocacy and ensure the efficient and fair dispensation of justice.

So, what else can you do? Join a committee. The Bar Association has many to choose from, all of which would welcome your contribution. Our Standing Committees include CLE, Communications, Judicial Conference, Membership, Publications and Rules. Our Substantive Committees include Government Contracts, Takings, Tax and Vaccine. All of these committees are open to the members of the Association. To join our committees, simply check the FAQ section of the Association’s website at www.cfcbar.org for instructions.

Equally important, each of these committees provides countless opportunities to interact with the judges of the Court and with your fellow practitioners while you share ideas and seek to effect change. The benefits – both tangible and intangible – are considerable. Don’t let the first time you meet a judge of the court be when you appear at oral argument. That goes for meeting your opposing counsel, as well. Believe it or not, there is much to be gained from interacting in a non-adversarial setting. Who knows-- maybe next time they won’t oppose your request for an enlargement of time!

Okay, I can’t promise that. But I can promise that you will find active participation in the Bar Association to be a rewarding and enjoyable experience, and well worth the time. I look forward to seeing you at one of our committee events in the near future.

Before I conclude, I would be remiss if I did not take this opportunity to thank some of the many people who are making our committees, and the Association as whole, so successful this year. In the last issue I thanked **John Williamson** for his outstanding work as Editor-in-Chief of *Executive Summary*. But as John will tell you, a publication such as this requires the regular contributions of many individuals, including Deputy Editor **Kristine Tardiff**, Government Contracts Committee Co-Chairs **Kyle Chadwick and John McCarthy**, Takings Committee Co-Chairs **Cecilia Fex and Jim Gette**, Tax Committee Co-Chairs **Charles**

Ruchelman and Rob Stewart, and Vaccine Committee Co-Chairs **Alexis Babcock and Ronald Homer**.

I also want to thank everyone who has been instrumental in planning our “Brown Bag” programs this year, in particular our CLE Committee Chair **Rich Rector**. In April we had a very successful Brown Bag program on claim accrual and the statute of limitations, sponsored by our Takings Committee. My thanks to Jim and Cecilia for organizing this program, and also to **Judge Christine Miller** for agreeing to participate on the panel alongside Cecilia, **Kathleen Doster, Steve Bryant** and myself. Many other Brown Bags are scheduled throughout the remainder of this year, and you can find information on these programs in this *Newsletter*.

Finally, I want to thank two people who have been instrumental in redesigning our website, **Evan Pritchard**, the Chair of our Communications Committee, and **Addi Berry**, the Court’s webmaster extraordinaire. Sadly for us, Addi will be leaving the Court in June. But we wish Addi well and thank her for her countless hours of assistance. If you haven’t looked at the website (www.cfcbar.org) lately, I encourage you to do so. It is filled with valuable information, including our publications, a new “find an attorney” search tool, information on all of our upcoming events, and helpful links. And, of course, you can use our website to sign up for our committees— I bet you didn’t see that coming!

Marc Smith, President
Court of Federal Claims Bar Association

2007 Bar Association Officers and Board of Governors

Officers

President – Marc A. Smith
President Elect – Brad Fagg
Secretary – Melonie J. McCall
Treasurer – Lewis S. Wiener

Immediate Past President – Nancie Marzulla
Ex Officio – Honorable Edward Damich

Board Members

Mary M. Abate	Elizabeth W. Newsom
Alexis Babcock	Gregory Page
Steven J. Gillingham	G. Evan Pritchard
Steven P. Hollman	Richard P. Rector
Luke Levasseur	G. Robson (Rob) Stewart
Scott M. McCaleb	John H. Williamson

WEBSITE GROWING

The Bar Association is excited to report that our website continues to grow as a great resource for both our members and the public at large! We have had a great response from our members to our new Attorney Search feature, which connects our member attorneys to the constant stream of businesses and individuals filing claims in the Court of Federal Claims every year. If you would like your name to be listed in the Attorney Search database, login to our website today at www.cfcbar.org and sign up! Signing up for the Attorney Search is now easier than ever thanks to the easy to follow instructions in our new FAQs section on the website!

While you are signing up to be added to Attorney Search, why not become more involved with the Bar Association by joining one of our substantive committees (government contracts, takings, tax, vaccine) or standing committees (CLE, Communications, Judicial Conference, Membership, Publications, Rules)? Joining a committee does not obligate you to make any particular time commitment, but allows us to better serve our members by knowing which issues are important to them and giving them an opportunity to make a difference! Instructions on how to join the committee of your choice can also be found in the FAQs section of our website. Login today and let us know what you think!

Meet the Court

(The first in a series of profiles of officers and employees of the Court of Federal Claims)



It's not often we think of a court of the United States as having (or needing) "a lawyer," but, since 2003, **Carole Bailey** has been just that to the

twenty-six judges, eight special masters, and approximately 100-member staff of the United States Court of Federal Claims. Serving as confidante to judges and administrators, sometime face of the Court, and a jack-of-all-trades ("if no one else can figure it out, ask Carole," is a frequent refrain), this former college and elementary school teacher, small business chief executive, Deputy to the Chair of the Administrative Conference of the United States, and mother of three (during law school!), serves as a real "court house lawyer" – in essence, the Court's general counsel.

Her client is "the Court," her most frequent customers, the judicial chambers, usually, **Chief Judge Edward Damich**, and the management staff, usually through the **Clerk of the Court, Brian Bishop**. "I get just about every question you can imagine of an institutional client," she explains, "and then some." The most typical range of services provided to chambers include: preparing reports on judicial misconduct cases (usually, filed by disappointed pro se claimants, she hastens to add); reviewing and preparing taxation opinions in response to bills of cost; reviewing attorney discipline cases arising in other jurisdictions concerning Court of Federal Claims practitioners; managing the Court's attorney discipline program and ensuring results are reported to other affected courts; assisting Senior Judges who, depending upon their case load, might have fewer law clerks; counseling the judges on a range of ethics questions, including hiring, outside employment, travel and outside activity restrictions, financial disclosure, and anything that might raise the

appearance of a conflict of interest; and coordinating with Congressional staff and others to provide information concerning the Court's operations.

For the management staff, in addition to serving as its Ethics Officer, she might advise the staff concerning procurement, fiscal law, employment law, and any of the myriad administrative regulations issued by the Administrative Office of the United States Courts. She also serves as the co-Employment Dispute Resolution Officer with the Clerk of the Court, instructs at and organizes orientation sessions for law clerks, and handles outside inquiries, administrative requirements, and an uncategorizable list of odd issues that no one else seems to know how to handle or resolve.

Listening to her describe even the most routine parts of the job, a visitor walks away with the impression that every aspect of her work conjures a memorable circumstance or relationship, and clearly is a labor of love. Invited, in 1985, to serve as law clerk and later Chief of Staff to **Judge Loren Smith**, the second Chief Judge of the United States Claims Court, Carole reveled in learning the Court's then-new jurisdiction and joining Judge Smith in his substantial outreach program ("There are people who don't even know you can sue the government," she instructs, "but, that's why it's 'The People's Court'"). Now, she delights in being the engine behind all of the Court's major outreach programs, including Law Day, the Judicial Conference, its partnership with the Court of Federal Claims Bar Association (she participates in the association's monthly meetings), myriad receptions and meetings at the Dolley Madison House, and "Brown Bag" legal seminars. She takes particular pride in her role in staging the Judicial Conference outside of Washington (this year, October 10-11 in Boulder, Colorado). "The response we have received from the Midwest bar associations is a validation of the idea that the Court truly is a national court and should reach beyond Washington," she explains.

When asked to explain her evident enthusiasm, she

begins with why she became a lawyer. “I always wanted to be in the courtroom,” she says. But, I started in private practice and, following an argument one day, just didn’t feel right.” I made the correct argument, she explains, but came to believe there was more to the practice of law. She accepted a position at the Federal Trade Commission, and it felt just right. Her later, extensive service with the Court confirmed she belonged in public service. “I didn’t start out wanting to be a bureaucrat, but I found there were good reasons to serve with the government. It’s a calling. I feel good about what I do.” She continues, “this is a great court.” When pressed to explain her devotion to the Court, she enthuses: the collegiality of the judges and attorneys (“I see judges wrestling with decisions, knowing it is going to be hard for a party to accept the outcome” I’ve seen attorneys willing to withdraw cases when they realize they lack merit”). In the end she says, it’s “the judges’ interest in doing what is right.”

The highlights? “In the early years, working with Judge Smith to elevate the profile of the Court,” she says. “Now, working with the Bar Association . . . the great events we’ve hosted . . . the great panels . . . it’s very gratifying.” She also mentions her 2006 award of the Randolph W. Thrower Award, awarded annually by the Bar Association for “Exceptional Service.” “I heard [then-President] **Nancie Marzulla** say all these wonderful things and then she said my name. I had no clue. I was shocked and gratified to be considered for an award named after the Bar Association’s first President, who himself did so much for the Court.”

Apparently, the highlights continue. “I’m having a great time!” she concludes.

* * * *

2007 CFC Brown Bag Series Opens with Takings Panel

On April 18, the takings committee sponsored the Federal Claims Bar Association’s first substantive brown bag lunch of 2007. The presentation – entitled “Accrual of a Takings Claim - Should the Court Apply a Single Unifying Approach When Deciding a Statute of Limitations Issue?” – provided an informative and lively discussion of the application of the Tucker Act’s statute of limitations. Panelists included the **Honorable Christine Miller** who discussed the available guidance from the Supreme Court and the Federal Circuit in addressing statute of limitations issues in the context of takings cases, and the difficulty in attempting to apply those decisions beyond the context of the specific facts in each case. Before Judge Miller’s concluding remarks, the audience heard from three practitioners, each of whom discussed statute of limitations issues within a particular sub-set of takings litigation.

Kathleen Doster, a trial attorney in the Department of Justice’s Environment and Natural Resources Division, focused on claim accrual in flooding and erosion cases, with an emphasis on the stabilization doctrine and three Federal Circuit cases applying the doctrine: Applegate v. United States (1994), Banks v. United States (2003), and Northwest Louisiana Fish & Game Preserve Commission v. United States (2006). **Cecilia Fex** of Ackerson Kauffman Fex, addressed claim accrual in rails-to-trails cases. She discussed case law that established the Notice of Interim Trail Use or Abandonment as marking the accrual of the claim, such as Caldwell v. United States (2004), and Barclay v. United States (2006). Finally, **Steve Bryant**, a trial attorney in the Department of Justice’s Environment and Natural Resources Division, discussed the elements of an overflight taking extending back to the seminal Supreme Court case, United States v. Causby (1946), as well as the application of the statute of limitations to overflight takings. He also addressed how plaintiffs can overcome this jurisdictional bar by establishing a second incremental taking, which can be predicated on substantial increases in the number of overflights, aircraft loudness, or substantially lower flight altitudes.



Summer Brown Bag Programs Announced

The Court of Federal Claims Bar Association will host a free, “brown bag” CLE program on proposed and potential changes to the Court’s “related case” rule. The one-hour program will take place at 12:00 pm on Tuesday, June 26th, in the Tayloe House, which is adjacent to the National Courts Building, 717 Madison Place, Washington, DC. Practitioners from government and private practice will lead the discussion, which will focus on the existing RCFC 40.2 and consider various changes that have been proposed by the Bar Association and other organizations.

Later this summer, the Bar Association will host a brown bag program on “Practice at the Court of Federal Claims.” The program will be designed primarily for law clerks and summer associates who may be interested in the Court’s practice areas. We expect several judges to speak at this event, as well as government and private bar practitioners. Topics are expected to include the Court’s practice areas, caseload, and procedures, as well as practical tips for new attorneys who may practice before the court in the future.

The Bar Association’s Brown Bag CLE programs are informal roundtable sessions that enable attendees to network and exchange ideas in a collegial, relaxed environment. Check back at our website, www.cfcbbar.org, for more information on these and other programs.

Save the Date: September 20, 2007

Gala Reception Honoring Court’s and Bar Association’s Anniversaries

A cocktail reception, sponsored by the Court of Federal Claims Bar Association, will be held in the courtyard of the Howard T. Markey National Courts Building, to celebrate two significant anniversaries. First, 2007 marks the 25th Anniversary of the National Courts Improvement Act, which created the Court in essentially its modern form (then referred to as the Claims Court), along with the U.S. Court of Appeals for the Federal Circuit. Second, the Bar Association this year marks its 20th Anniversary, and will commemorate the occasion by honoring the past Presidents of the Association. With the Judicial Conference being held this year in Boulder, Colorado, this event will provide a pleasant and convenient opportunity for the Court community to meet locally during the fall season, and to mark these anniversary milestones. More information will be announced soon!



University of Colorado Law School

Boulder, Colorado

Site of Court of Federal Claims Judicial Conference

October 10-11, 2007

Draft Judicial Conference Schedule Released!

The Court of Federal Claims has announced that it will hold its annual Judicial Conference on October 10-11, 2007 in Boulder, Colorado. This will be the first time that the Court had held its annual conference outside of the East Coast of the United States, and helps to fulfill the Court's goal of being truly a national court in all respects. The conference represents part of the Court's continuing effort at outreach to Bar members in other areas of the country.

The program's agenda will be focused on issues of importance to Western lawyers, including panel presentations on water rights, Native American claims, and Fifth Amendment takings of private property. The conference also will include a panel addressing patent litigation.

Set in the foothills of the majestic Rocky Mountains, and just a short drive from Denver International Airport, this judicial conference will certainly have no parallel in terms of venue! The plenary sessions will be held at the brand-new home of the Colorado University Law School. Dedicated in September 2006, this state-of-the-art building is also the home of the Natural Resources Law Center, the American Indian Law Clinic, and the Byron White Center for the Study of American Constitutional Law.

October 10, 2007

- | | |
|-----------------------|--|
| 2:00 p.m. - 2:30 p.m. | Registration - University of Colorado Law School |
| 2:30 p.m. - 2:45 p.m. | Welcome: David Getches, Dean |
| 2:45 p.m. - 3:00 p.m. | Welcome: Hon. Edward J. Damich, Chief Judge, U.S. Court of Federal Claims |
| 3:30 p.m. - 5:00 p.m. | Live Oral Argument with Technology Demonstrations
Hon. Francis M. Allegra, U.S. Court of Federal Claims |
| 5:00 p.m. - 6:30 p.m. | Reception - Meet the Judges |

October 11, 2007

- | | |
|------------------------|--|
| 8:00 a.m. - 8:30 a.m. | Registration |
| 8:30 a.m. - 9:00 a.m. | Introductory Remarks, Chief Judge Damich
The People's Court - What is it and What Does it do
Hon. Francis M. Allegra |
| 9:00 a.m. - 10:30 a.m. | Tribal Claims Against the United States
Moderator: Judge Emily C. Hewitt

Professor Gregory C. Sisk. Jurisdiction and Trust: Tribal Claims in the CFC

Discussion: Litigating Tribal Trust Claims: Meeting the Challenge.
From the Department of Justice Perspective: Tom Clark, Esq.
From the Tribal Plaintiff Perspective: Alan Taradash, Esq. |

Concluding Presentation: Professor Charles F. Wilkinson
Indian Nations and the Federal Government in the Next Decades: What Will
Justice Require?

10:30 a.m. - 10:45 a.m.

Coffee Break

10:45 a.m. - 12:15 p.m.

Takings of Private Property : Impact of Recent Decisions

Moderator: Hon. Marian Blank Horn, U.S. Court of Federal Claims

Panelists: Hon. George Miller, U.S. Court of Federal Claims

Professor John Echeverria, Georgetown Law School

Roger Marzulla, Marzulla Law

Marc A. Smith, Assistant Chief, Natural Resources Section, U.S. Dep't of Justice

12:15 p.m. - 1:45 p.m.

Luncheon

Keynote Speaker: Hon. S. Jay Plager

U.S. Court of Appeals for the Federal Circuit

1:45 p.m. - 3:15 p.m.

Water Rights: Water Water Everuwhere and Every Drop to Sue

Moderator: Hon. Loren A. Smith, U.S. Court of Federal Claims

Panelists: Nancie Marzulla, Marzulla Law

Hon. Gregory J. Hobbs, Jr., Colorado Supreme Court

Bennett Raley, former Ass't Sec'y for Water & Science, U.S. Dept. of the Interior

Alf Brandt, Chief of Staff, California Assembly, Water, Parks, and Wildlife Cmte.

Peter C. Monson, Assistant Chief, Indian Resources Sec., U.S. Dep't of Justice

3:15 p.m. - 3:30 p.m.

Break

3:30 p.m. - 4:45 p.m.

**Patents: A Need for Uniformity in the Law of Patents, Recent Supreme
Court Decisions, and Other Hot Topics**

Moderator: Steven Hollman, Hogan & Hartson

Panelists: Hon. Edward J. Damich

John Whealan, Deputy General Counsel, Patent & Trademark Office

Q. Todd Dickinson, Vice President, General Electric

5:00 p.m. - 6:00 p.m.

Closing Reception

For updates and information on registration,
be sure to check our website, www.cfcbar.org,

Remember, this is *your* Bar Association: To share your
thoughts on how we can better serve you, please email
President@cfcbar.org. Thank you for being a member.