



FEDERAL CLAIMS BAR ASSOCIATION

Fall 2008 Newsletter

At the Court, Fall is “Forward”



The mantra for adjusting our clocks in the fall, when Daylight Savings Time comes to an end, is to “fall back.” At the court, fall is always a time to look forward.

The fall season begins in earnest after Labor Day, when the court hosts its annual “Welcome” breakfast for new and returning law clerks. The breakfast

reception and meeting, co-sponsored by the Bar Association, affords an occasion for the law clerks to mix and mingle as well as for the judges to introduce them one-by-one to the court. The recitation of their credentials is captivating, for they bring to the court a wealth of impressive academic

achievements and a litany of extra-curricular talents and experiences that is amazing at this stage in their careers. Each year’s “class” seems to be brighter and better prepared for clerking than the year before.

Brad Fagg, President of the Bar Association, opened the meeting with remarks emphasizing the value of clerking to the law clerks’ professional development, the importance of the contacts they will make with colleagues and especially with their respective judges, and the benefits of membership in the Bar Association itself. The court is grateful as always to the Bar Association for its sponsorship of the reception.

At the judges’ monthly meeting in September, the court approved the posting of proposed changes to

REGISTER NOW

- **Court of Federal Claims 21st Judicial Conference**, November 19th at the Capitol Hilton
- **Special “Evening Before” reception**, November 18th at the Dolley Madison House

To register for one or both of these events, and to submit questions for the “Ask the Judges” session, visit www.cfcbar.org. Space is limited so act now!

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the Rules of the Court of Federal Claims (RCFC). The rules changes are designed to incorporate the “plain English” re-styling of the Federal Rules of Civil Procedure as it applies to the RCFC. The court’s Rules Committee, under the leadership of Senior Judge **John P. Wiese**, spent nearly a full year carefully reviewing the existing rules and drafting the changes. The changes are not intended to be substantive, but rather a more consistent application of terms and organization according to accepted conventions of drafting and editing.

The proposed rules were posted on September 11, with October 14 as the deadline for public comment. The Bar Association provided such comment on a handful of the changes. It was the only set of comments received. Upon consideration of the input from the Bar by the Rules Committee (only a technical correction was recommended by the Committee) and with the favorable vote of the judges, the court has approved the rules effective November 3. The RCFC, as revised, are now posted on the court’s website at www.uscfc.uscourts.gov.

October 1, 2008, was the 20th anniversary of the court’s Office of Special Masters (OSM) and jurisdiction over claims under the Vaccine Injury Compensation program. Again with the co-sponsorship of the CFC Bar Association, on Friday, October 10, the court celebrated this milestone with a reception, cake, and a toast to the success of the program.

While on the subject of the Office of Special Masters, let me note the judges’ confirmation of Special Master **Gary Golkiewicz**, who wears the hat of Chief Special Master as well, to another four-year term. Gary has presided over the Office of Special Masters since its inception and has played an invaluable role over these 20 years in its continuing professionalism and progress.

Last summer, the court bid adieu to Special Master **John Edwards**, who departed our court to take a position as an Administrative Law Judge in Portland, Maine, with the Social Security Administration. John’s colleagues and staff at OSM held a going-away party for him in mid-July for his friends throughout the court. He is sorely missed. In the meantime, the court has posted a vacancy announcement to fill that position. The deadline for

application is December 1. The announcement can be also be found on the court’s website.

In addition, the court will soon be bidding farewell to long-time court employee, **Richard Sienkiewich**, as he heads to retirement as of January 2. Richard has been with the court since 1978! In addition to his regular responsibilities within our Systems Department, Richard willingly stepped up to the plate in the spring of this year to take on the duty as Acting Systems Manager. I intend to sing Richard’s praises at greater length on another occasion, but am utilizing the opportunity in this letter to advise that the court has also posted an announcement to fill the position of “Director of Information Technology” on our website. The deadline for applications for this position is November 24.

Bar Association members and practitioners may find of interest that the judges of the court recently held a highly informative and quite interactive meeting on the subject of the court’s “related cases” rule with members of the court’s Advisory Council Ad Hoc Committee on Related Cases. Over the past two years, the CFC Bar Association, the Tax Section of the ABA, and the CFC Advisory Council have weighed in with recommendations for improvements in the rules for handling related cases. On October 28, the judges met with six of the members of the Advisory Council’s Ad Hoc Committee for a thorough airing of the considerations that led to the Council’s unanimous recommendation of a rules change. Despite the principled differences among the judges about the necessity or mechanics of changing the related cases rule (the judges have not formally discussed the proposed rule changes among themselves as a group), the court thoroughly appreciates the considerable investment of time and thought that practitioners have expended in this regard.

On Wednesday, November 19 (with an evening reception at the court on November 18), the court will co-host with the Bar Association its annual Judicial Conference. For more information, please visit the Bar Association’s website, www.cfcbar.org. It will be a terrific program, for which special thanks go to Judge **Margaret M. Sweeney** for taking charge of the planning. Needless to say, all of the judges of the court look forward to seeing and hearing from members of the Bar Association in particular and court practitioners in general at this conference.

On Tuesday, December 16, the court will host a lunch-time reception and panel on practice before the court sponsored by the Young Lawyers Committee of the ABA Section of Public Contract Law. The program, to be co-sponsored by the CFC Bar Association, will help increase the visibility of the court's jurisdiction in the field of government contracts, serve to acquaint young lawyers in the Section with the benefits of membership in the CFC Bar Association, and continue the growth and vitality of the CFC Bar. I trust it will be a full-house and we hope a fitting conclusion to the fall "semester" at the court.

A final note of house-keeping – the court will be officially closed on the Friday after Thanksgiving, November 28.

President's message



Several significant milestones for the Bar Association and for the Court community are on tap for this Fall season. Of particular note, the annual Judicial Conference will be returning to Washington D.C. this year, on November 18-19. The conference begins with an "Evening Before" reception at

the Dolly Madison House on the 18th, followed with a full and substantive day on November 19 at the Capital Hilton. The topic of this year's conference is "The State of the Law." On behalf of the Bar Association, we are proud and honored to partner with the Court on this important annual event. The 2008 conference promises to be especially substantive and informative.

And this focus on the "substantive" is a theme about which I would like to share a few additional thoughts. I also want to announce (if you have not already heard) an especially significant and long-anticipated substantive accomplishment that we believe will greatly benefit all Bar Association members.

Although the activities of the Bar Association are

many and varied, the contributions that I believe are particularly exciting are the ones that address, tackle, or in some way deal with substantive issues of law. During my involvement with the Bar Association over the years, I have seen increasing substantive engagement by members and practitioners, outside of the courtroom. This engagement is manifested in any number of ways, including well-attended Brown Bag seminars, substantive publications such as the Executive Summary, Rules initiatives and commentary, and many other outlets for debate and conversation about the important issues facing the Court. Getting your mind around a thorny legal or policy issue, and hearing views contrary to your own or previously unrealized perspectives, is a joy of our profession—I think it is why many of us went to law school, and continue to do what we do. The opportunity to complement our daily legal endeavors with exposure to the substantive views of the Court and other practitioners, and to thoughtfully discuss what the law is and should be, can only enrich your practice. It is a special aspect of being involved with the Bar Association, and I urge you to take advantage of it.

Of all of the substantive endeavors in which the Bar Association is engaged, there is one this year that warrants particular recognition. At this year's Judicial Conference, we will be distributing the long-awaited, updated Fifth Edition of the **Deskbook For Practitioners**. It is hard for me to overstate how thrilled I am with this accomplishment. The Deskbook is an invaluable overview and starting point for understanding the substantive law applicable to all of the major subject matters that come before the Court. The new edition has been reorganized in a user-friendly format, and, in addition to review of major legal principles in multiple areas of the law, includes helpful practical and interesting historical information. The Fifth Edition also, for the first time, includes substantive contributions from both private and government practitioners. The breadth and scope of the collaborative effort that went into the project were truly extraordinary.

The people who made the publication of the Fifth Edition possible are too numerous to name here, and I cannot even begin to estimate the number of hours that were selflessly contributed by so many. While I cannot thank everyone individually, I would be remiss if I did not note the special efforts of

Bryant Snee. Bryant, a Deputy Director in the National Courts Section of the Commercial Litigation Branch of DOJ, and a member of the Board of Governors of the Bar Association, took on the role of “quarterback” (or maybe “coach,” or “producer,” or “director,” but you get the idea) of the project. His tireless prodding of contributors, Board members, vendors, and colleagues kept the wheels turning, and ultimately got us to the finish line. Thank you, Bryant.

The Deskbook is free to members of the Bar Association. Copies will be available for distribution at the Judicial Conference. For those that are not able to attend the Judicial Conference, shame on you, but the Bar Association will nevertheless make subsequent arrangements for delivery by mail. Extra copies of the Deskbook will be available for purchase by non-members. Ultimately, plans are to make the Deskbook available electronically (for Bar Association members only, through our secure log-in) on the website, and to pursue more frequent updates of chapters, as warranted. All in all, the Deskbook is an exciting development for the Bar Association, for the Court, and for the entire Court community. I am delighted that its publication was achievable during my tenure as President. I hope you will find it as useful as we believe it will be.

Thank you and best regards.

Brad Fagg
President, Court of Federal Claims Bar Association

Standing-Room-Only Crowd Attends October Brown Bag Lunch Addressing Settlement With The United States

On October 22nd, a capacity crowd filled Tayloe House for the continuing brown bag lunch series sponsored by the Court of Federal Claims Bar Association. The October session addressed the issue of “Reaching Settlement with the United

States.” A panel lead by Judge **Nancy Firestone**, which included private and government practitioners, provided practical information on the process of negotiating and approving settlements within the Department of Justice, as well as perspectives on the unique aspects of settling cases in which the United States is the defendant.

Judge Firestone opened the panel discussion by discussing ways in which members of the Court have instituted procedures, such as the automatic assignment of settlement judges, to assist parties in reaching settlement. The Judge also addressed the need to consider the unique aspects of settling cases with the United States, particularly the fact that the government does not settle cases simply based upon nuisance value. Rather, private parties hoping to settle with the United States must do their best to clearly demonstrate the government’s liability based upon a strong legal and factual analysis. Judge Firestone concluded on a light note, reminding practitioners that the essence of settlement was captured well by the Rolling Stones when they sang “you can’t always get what you want; but if you try sometimes you just might find, you get what you need.”

The panel also included **Reginald Blades**, an Assistant Director in the Department of Justice’s National Courts Section, who discussed the regulatory rules that govern settlement procedures and approval within the Department of Justice. He also commented upon the various legal, pragmatic, and precedential factors that the Department of Justice considers when evaluating settlement proposals. Co-panelist, **Lewis Wiener**, of the Sutherland law firm, offered a unique perspective as someone who has negotiated settlements in the Court of Federal Claims as both a government lawyer and as a private practitioner. Mr. Wiener addressed approaches and techniques that practitioners should employ when approaching settlement with the United States and provided his perspective that precedent, and not money, is what drives settlements with the United States. Finally, **James Gette**, of the Department of Justice’s Natural Resources Section, provided a view on settlement negotiations from the perspective of a DOJ trial attorney. Mr. Gette addressed the unique situation of negotiating settlements when the authority to approve settlements rests much higher up the chain of command within the Department of Justice and when representing what often seem to

be multiple competing interests. He reminded practitioners to make their best effort to step into the shoes of their negotiating partner when analyzing the best approach for settling cases.

participate in Association matters.



Government Contracts Brown Bag Lunch To Be Held On December 16th

On **Tuesday, December 16th**, the Court of Federal Claims Bar Association will conclude its 2008 Brown Bag lunch series with a program co-sponsored by the American Bar Association's Section of Public Contract Law. The program will address current issues in government contracts as they relate to practice before the Court of Federal Claims. Additionally, the program will include a discussion of practice before the Court geared toward young practitioners beginning their careers as government contract practitioners. The panel will include a Court of Federal Claims judge, as well as private and government practitioners. A free lunch will be provided to those attending. The event will be held in Tayloe House, which is adjacent to the National Courts Building, 717 Madison Place, Washington, D.C. Watch the Bar Association's web site (www.cfcbar.org) for further announcements and to RSVP for this event.

Membership Has Its Benefits

Join today and start receiving all of the benefits of membership now. In addition to discounted member rates for the November 19 Judicial Conference and other Court events, members also will receive a copy of the entirely new edition of the acclaimed *Deskbook for Practitioners* when it is published later this year. Members also receive the Court of Federal Claims Bar Association's monthly *Executive Summary*, which highlights the month's Court of Federal Claims decisions of interest, and may participate in the Bar Association's substantive committees (takings, government contracts, tax, vaccine) or standing committees (CLE, Communications, Judicial Conference, Membership, Publications, Rules). To start enjoying your benefits of membership, visit www.cfcbar.org and join today.

Past Bar Association President Named Chief Of DOJ Tax Division's Court Of Federal Claims Section

On October 6, 2008, the Assistant Attorney General of the Department of Justice's Tax Division named **Steven I. Frahm** as the new Chief of the Tax Division's Court of Federal Claims Section. Steve is a past president of the Court of Federal Claims Bar Association and he continues to actively



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