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From the editor in chief

Duke Law Center for Judicial Studies and many faithful volunteers.

That is not all. Professor Daniel Capra and attorney Joseph Tartakovsky contribute to this edition with a comprehensive article on whether autopsy reports are "testimonial" under the Sixth Amendment’s Confrontation Clause. And with the United States leading the world in mass incarceration, we appropriately turn our attention to this important issue with an article from Judge Lynn Adelman and his law clerk, Jon Deitrich, on "How Federal Judges Contribute To Mass Incarceration and What They Can Do About It." As a national conversation about criminal justice reform is underway, this timely article aims to both contribute to the conversation and to further provoke more discussions.

This edition also presents another inspirational installment from the Storied Third Branch series titled “One-in-A-Generation Kind of Judge,” a profile of North Carolina State District Judge Anna Elizabeth Keever, by Justice Patricia Timmons-Goodson. Additionally, two knowledgeable lawyers, Andrew Pincus and Elizabeth Cabraser, present a “Point-Counterpoint” on claims-made class actions, exchanging thoughts on whether courts should award attorney’s fees based on potential settlement amount or amount actually paid out to the class members. Finally, Aaron Ford contributes with a review of Reimagining Courts: A Design For The Twenty-First Century, a book that proposes reforms in our judicial system.

As we said in our inaugural edition, we see Judicature as a forum for discussion among the bench, bar, and academia. Please let us know what you think of the issues presented in this edition and whether we are succeeding in our efforts to bring you relevant, thought-provoking, and conversation-inspiring articles of interest to both judges and lawyers.

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Nancy Joseph, Editor in Chief
U.S. Magistrate Judge, Eastern District of Wisconsin
(Pictured above with Duke Law Dean David F. Levi)
Cy pres awards need attention

I am writing with respect to the article, “Once More unto the Breach? Further Reforms Considered for Rule 23” [May 2015], by Richard Marcus, which briefly discusses various topics currently being explored by the Advisory Committee on Civil Rules, including the issue of cy pres – the practice of distributing leftover settlement money to third-party charities. As the article recognizes, the current version of Federal Rule of Civil Procedure 23 “says nothing about cy pres arrangements.”

Should the Advisory Committee go forward with a proposal authorizing cy pres settlements, it should address the role of cy pres distributions in determining attorney’s fee awards. After all, one of the main problems with cy pres awards is that they are sometimes used to justify fee awards in settlements from which class members receive little or no direct benefit. In order to address this growing problem, any cy pres-related amendment to Rule 23 should make clear that fee awards should be based primarily on the benefits that actually reach class members rather than cy pres payments. As explained in the ALI Principles of Aggregate Litigation, “because cy pres payments . . . only indirectly benefit the class, the court need not give such payments the same full value for purposes of setting attorney’s fees as would be given to direct recoveries by the class.”

The Third Circuit recently reiterated this principle, declaring that “[w]here a district court has reason to believe that counsel has not met its responsibility to seek an award that adequately prioritizes direct benefit to the class, . . . it [is] appropriate for the court to decrease the fee award.” A rule that embodies this principle would help rein in fee requests that bear little relation to the direct benefits actually realized by class members.

JOHN BEISNER, SKADDE, ARPS, SLATE, MEAGHER & FLOM, LLP
WASHINGTON, D.C.

“Authentication” a help to judges and lawyers

As a trial judge with many years on the bench, in the trenches, and in front of classrooms, I can still experience moments of near panic when I am suddenly faced with ruling on the admissibility of a piece of electronic evidence. Gregory Joseph’s article “[Authentication: What Every Judge and Lawyer Needs to Know about Electronic Evidence,” August 2015] is a welcome reminder that electronic evidence is simply evidence, and the fundamental rules still apply. As the article emphasizes, the proponent’s Rule 901 burden is not heavy, and there is plenty of room for common sense (“Sometimes, common sense must intrude”). The Judicial Conference of the United States has published for comment proposed changes to a couple rules that pertain to electronic material. The proposed amendments and accompanying memorandum from the Advisory Committee on the Federal Rules of Evidence make a nice supplement to Mr. Joseph’s article. They can be found online at www.uscourts.gov/rules-policies/proposed-amendments-published-public-comment.

One Committee proposal is to eliminate Federal Rule of Evidence 803(16), on the ground that older doesn’t necessarily mean wiser when it comes to documents. Common sense tells us that might be especially true with electronic material because it is so easily created, changed, and disseminated. An online ruckus that doesn’t deserve to be admitted in a court of law does not become more deserving by sitting on a server for 20 years. Rule 803(16) refers to authentication pursuant to Rule 901(8)(C), to which no change is currently proposed. Two additions to Rule 902 are, however, included in the proposed changes. Possible new Rules 902(13) and (14) would let a qualified person certify that certain electronic evidence is authentic.

Judges and lawyers in state and federal court will benefit from Mr. Joseph’s article. With the article as background the reports available on the Judicial Conference website should prove doubly enlightening. Improved understanding of this relatively new sort of evidence should help lawyers lay the necessary foundation efficiently and confidently — and in a way that keeps judge and jury awake. Improved understanding on the other side of the bench should prove helpful in maintaining a calm judicial demeanor!

JOAN N. ERICKSEN, U.S. DISTRICT COURT JUDGE, DISTRICT OF MINNESOTA

Musings on New Pleading

Prof. [Scott] Dodson’s “A Closer Look at New Pleading in the Litigation Marketplace” [August 2015] offers many invaluable insights on the “new pleading,” whatever it may turn out to be. Without conveying any sense that the continuing evolution has reached full maturity, he provides a reassuring sense that the sky has not fallen. And his emphasis on the need for diligent empirical work is right on target. There is no reason to attempt to elaborate on this fine work. But it may be useful to sketch some of the musings prompted by reading his concise but far-ranging thoughts.

One way to understand Twombly is as an invitation to the lower federal courts to experiment with pleading in a common-law attempt to improve on the balance among pleading, at times voluminous discovery, and summary judgment that changed progressively from 1938. The Court gave the lower courts license to do openly what many had been doing in more or less clandestine fashion – to apply more demanding standards of pleading in some cases. After an uneven start, we may be entering a more measured period that will generate identifiable consensus on some matters, with more divergence on others. It seems likely that some substantial stability will be reached. “[T]he defendant negligently drove a motor vehicle against the plaintiff” should survive as a sufficient pleading, no matter that it mingles legal conclusion with implicit fact and might be characterized as “threadbare.”

Stability is not always a good thing. Although clarity in the rules can reduce the costs of uncertainty, clear bad rules may impose costs
out of all proportion to any gain. So how does “fact” pleading fare?

One clue may be provided by Prof. Dodson’s reminder that “only eight states . . . have maintained their liberal pleading standard in the wake of Twombly.” Given that many states had fact pleading all along, is the acceptance of Twombly in states that had earlier followed relaxed notice pleading in the former federal manner the result of bullying by the Supreme Court? A mere wish to keep life simple for lawyers by adhering to a common pleading standard that can be followed in both state and federal courts? Or a sense of relief that it is now more acceptable to do something they prefer to do?

Another clue may be provided by the observation that “[p]laintiffs always have generally tended to put more information in their complaints than necessary, even before Twombly . . . .” Why would they do that? One reason is to assert control over the structure and focus of the action. The defendant must respond by pleading to everything in the complaint, as Prof. Dodson so clearly shows. This may increase the defendant’s costs at the first stage. But it also may improve the steps that follow. The parties can assist the court in framing a more effective scheduling order. Disclosures and discovery can be better focused, with or perhaps without guidance in the scheduling order. The last consideration of pleading standards by the Civil Rules Advisory Committee before Twombly was decided, indeed, was prompted by alternative drafts of a revised Rule 12(e), the most ambitious of which provided a motion for a more definite statement that would enable the court to manage the litigation. Something like that might emerge through further development of case-derived pleading standards.

Yet another clue may emerge as courts confront the challenges that Prof. Dodson identifies in integrating pleading standards with discovery. Encouraging active judicial management has been one central purpose of repeated rounds of discovery amendments beginning in 1983, and the closely related revisions of the Rule 16 pretrial procedures. That purpose carries forward in the package of amendments that were transmitted by the Supreme Court to Congress last April, to take effect, Congress willing, on Dec. 1. Even under the present rules, there is room to permit discovery in aid of pleading once an action is filed and the complaint is challenged by a motion to dismiss. At a minimum, the plaintiff can be allowed to identify the facts it hopes to support by discovery so that they can be pleaded. A more ambitious approach might ask the defendant what facts would make for a sufficient complaint, and ask whether the defendant has access to information about those facts. No doubt other approaches will be devised, in part to avoid the mild embarrassment for federal procedure that would result if plaintiffs take up Prof. Dodson’s suggestion that, when state practice permits, discovery to aid in framing a (federal) complaint might be sought in a state court.

EDWARD H. COOPER, PROFESSOR, UNIVERSITY OF MICHIGAN LAW SCHOOL
Interest in increasing or repealing mandatory judicial retirement ages is growing in the legislatures – but not among voters

Mandatory judicial retirement ages have existed in the states since the nation was founded. In 1789 Alexander Hamilton noted in Federalist No. 79 that New York had a mandatory judicial retirement age of 60 and argued against the practice for both the federal and state judiciaries. Some 225 years later, many state legislatures show continued interest in raising the mandatory retirement age or abolishing it altogether. Voters, on the other hand, remain wary.

There are in practice three forms of mandatory retirement for state judges. The first is the most direct: On the day a judge reaches the applicable age, his or her birthday party doubles as a retirement party. Some states allow for service until the end of the applicable month or year, and on rare occasions the person may serve out the term in which the specified age is reached. The second version links the retirement age to retirement benefits. A judge is not automatically removed from office on a particular birthday, but if he or she refuses to retire on that day some or perhaps all retirement benefits may be forfeited. The third version is perhaps more accurately described as an electoral disqualifier: A judge who has reached a particular age may continue to serve but may not be elected or appointed to any additional terms.

Thirty-two states plus the District of Columbia currently impose some sort of retirement age on appellate or general jurisdiction court judges. Interestingly, most states do not impose a mandatory judicial retirement on limited-jurisdiction court judges; for that group, the states mostly are silent on the subject or allow local appointing bodies to set mandatory retirement ages. But of those 32 states with mandatory retirement ages, 70 is the most common retirement age. Some set retirement at 72, 74, 75, or, in the case of Vermont, 90. Most states codify retirement ages in state constitutions, and both the legislature and the public must vote in order to make changes, though in some instances, the legislature has latitude to set the age. In the past two decades, the legislatures in the 32 states with mandatory retirement ages have debated and in many instances passed efforts to raise or eliminate them. The focus has been on efforts to raise, rather than eliminate, retirement ages, with most moving from 70 to 72 or 75.

Advocates of raising mandatory retirement ages argue that increased life expectancy and vitality, along with the oversight of disciplinary bodies that can remove a judge who has aged into — as Alexander Hamilton put it — “inability,” make later retirements feasible. Some proponents argue that mandatory retirement ages are wholly unfair, especially because the other two branches do not have similar requirements.

Those who oppose changing mandatory retirement ages generally say the loss of retiring judges does not harm the judiciary and in fact creates vacancies and opportunities.
for newer, younger judges. In some instances, legislators do not want to extend existing terms for a particular judge or judges and therefore vote against any change. Case in point: In New Jersey, a plan to raise the mandatory retirement age for judges met resistance until the Supreme Court was exempted. Some have voted for retirement age increases that apply only to those judges who are elected or appointed after some future date.

**CHANGES IN STATUTES**

Recent changes to mandatory judicial retirement ages mostly have been in those states with statute-based policies. Indiana, where a legislatively set retirement age for trial judges was repealed in 2011, nearly repealed the mandatory retirement age for appellate judges in 2014. Virginia’s legislature, after debating and voting on the subject for nine years in a row, approved a limited retirement-age increase in 2015: The retirement age for Virginia appellate judges increased from 70 to 75; the increase will apply only to those trial judges elected or appointed after July 1, 2015.

Legislatively passed constitutional amendments to raise or repeal these ages have appeared on ballots 11 times in nine states since 1995, but with little success — particularly in the last decade. Efforts to raise retirement ages failed in Arizona (2012), Louisiana (1995 and 2014), Hawaii (2006 and 2014), New York, (2013), and Ohio (2011). Also a failure: a 2012 effort in Hawaii to permit judges who were forced out by mandatory retirement to be called back into service by the chief justice for up to three months.

The 2012 Arizona proposition is of particular note: The increase to the mandatory judicial retirement age was bundled with a series of other changes to the state’s judiciary article, including a plan to give the governor more power over the state’s merit selection system. Opponents of Proposition 115 focused mainly on those provisions without expressing particular concern over raising the mandatory retirement age from 70 to 75. Several bills in other states have coupled increases to judicial retirement ages with increasing guber-

**RESULTS OF ELECTIONS TO INCREASE OR REPEAL MANDATORY JUDICIAL RETIREMENT AGES**

<table>
<thead>
<tr>
<th>STATE</th>
<th>YEAR</th>
<th>PROVISION</th>
<th>RESULT</th>
</tr>
</thead>
<tbody>
<tr>
<td>Louisiana</td>
<td>1995</td>
<td>Increase age from 70 to 75</td>
<td>Failed 38-62%</td>
</tr>
<tr>
<td>Pennsylvania</td>
<td>2001</td>
<td>Serve remainder of year reach 70</td>
<td>Approved 68-32%</td>
</tr>
<tr>
<td>Vermont1</td>
<td>2002</td>
<td>Repeal mandatory retirement age, let legislature set at least 70</td>
<td>Approved 64-36%</td>
</tr>
<tr>
<td>Louisiana</td>
<td>2003</td>
<td>Serve remainder of term reach 70</td>
<td>Approved 53-47%</td>
</tr>
<tr>
<td>Hawaii2</td>
<td>2006</td>
<td>Repeal mandatory retirement age</td>
<td>Failed 35-58% (7% not voting)</td>
</tr>
<tr>
<td>Texas</td>
<td>2007</td>
<td>Serve remainder of term reach 75, but only if already served 4 years of 6 year term</td>
<td>Approved 75-25%</td>
</tr>
<tr>
<td>Ohio</td>
<td>2011</td>
<td>Increase age from 70 to 75</td>
<td>Failed 38-62%</td>
</tr>
<tr>
<td>Arizona</td>
<td>2012</td>
<td>Increase age from 70 to 75, give governor more power over judicial selection</td>
<td>Failed 27-73%</td>
</tr>
<tr>
<td>New York</td>
<td>2013</td>
<td>Increase age from 70 to 80 (court of last resort only), allow judges of lower trial court to be given 2-year extensions from 70 to 80 (currently up to 76)</td>
<td>Failed 40-60%</td>
</tr>
<tr>
<td>Louisiana</td>
<td>2014</td>
<td>Repeal mandatory retirement age</td>
<td>Failed 42-58%</td>
</tr>
<tr>
<td>Hawaii2</td>
<td>2014</td>
<td>Increase age from 70 to 80</td>
<td>Failed 22-73% (5% not voting)</td>
</tr>
<tr>
<td>Oregon</td>
<td>2016</td>
<td>Repeal mandatory retirement age</td>
<td>On 2016 ballet</td>
</tr>
<tr>
<td>Pennsylvania</td>
<td>2016(?)</td>
<td>Increase age from 70 to 75</td>
<td>Approved by 2013-14 legislature. Must be approved by 2015-16 legislature before appearing on ballot.</td>
</tr>
</tbody>
</table>

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1 Vermont legislature enacted law setting age at end of calendar year judge reaches 90.
2 Hawaii requires a constitutional amendment be approved by a majority of all voters casting ballots. Non-votes are therefore tabulated and reported.

**WHAT’S NEXT?**

Oregon voters will decide in 2016 on an outright repeal of that state’s retirement age. Pennsylvania’s legislature approved an increase to the end of the term in which a judge reaches age 75, up from the end of the term in which a judge reaches 70) in its 2013-14 session, and the state’s 2015-16 House has given second-round approval. Movement toward constitutional changes occurred this year in Alabama (approved in House), Maryland (approved in Senate), and Wyoming (approved by House), and Indiana (approved by Senate) and North Carolina (approved by House) took steps to change statutes with mandatory retirement ages. Where such measures will land is unclear, but the issue of when a judge should retire seems likely to stay on the legislative and popular agenda for years to come.

— WILLIAM E. RAFTERY is the author of Gavel to Gavel, a newsletter of the National Center for State Courts that tracks legislative activity that affects the courts.
JUDICIAL HONORS

The Shelby County Commission in Tennessee voted to rename the county courthouse the D’Army Bailey Courthouse Building in honor of the late D’ARMY BAILEY. Judge Bailey served on Tennessee’s 13th Judicial District from 1990 to 2009 and from 2014 to 2015. He also was an author, actor, and civil rights activist who helped to preserve the crumbling Lorraine Motel – where Dr. Martin Luther King Jr., was assassinated – and convert it into the National Civil Rights Museum.

ALAN D. MOATS of the 19th Judicial Circuit of West Virginia received a Board of Directors Award during the 2015 meeting of the Barbour County, West Virginia, Chamber of Commerce. Judge Moats is known in his community as an aggressive leader in West Virginia’s statewide initiative to reduce truancy and school dropouts. He is past president of the West Virginia Judicial Association, chairman of the mass litigation panel of the West Virginia Supreme Court of Appeals, and a founding member of the West Virginia Courthouse Facilities Improvement Authority.

CARLOS CHAPPELLE, the late presiding district court judge of Tulsa County, Oklahoma, was honored at a gathering of attorneys, judges, and courtroom staff in celebration of his retirement in June, just weeks before he passed away. He began his judicial career as a special judge in Tulsa County District Court in 1991 and served on nearly every docket.

HAROLD MELTON of the Supreme Court of Georgia was named the Daily Report’s 2015 Rising Star Luminary. Justice Melton was appointed to the bench in 2005. He previously served as executive counsel to Gov. Sonny Perdue. Justice Melton also spent 11 years in the Georgia Department of Law, leading the Consumer Interests Division.

ELLEN BREE BURNS was recognized for nearly four decades of judicial and community service by the National Association of Women Judges, District 2. Judge Burns was appointed by President Jimmy Carter in 1978 to the U.S. District Court for the District of Connecticut. She served as chief judge from 1988 to 1992, when she assumed senior status. Judge Burns retired in March.

The Gloucester County Italian Heritage Commission honored Retired Assignment Judge SAMUEL G. DESIMONE with its Italian-American Citizen of the Year Award in recognition of his service as Superior Court Judge and for his contributions to Southern New Jersey.

STEPHEN ROY REINHARDT U.S. Court of Appeals for the Ninth Circuit

JOSE ANTONIO FUSTE U.S. District Court, District of Puerto Rico

LYNN NETTLETON HUGHES U.S. District Court, Southern District of Texas

ALAN BOND JOHNSON U.S. District Court, District of Wyoming

ALEX KOZINSKI U.S. Court of Appeals for the Ninth Circuit

ROBERT LOWELL MILLER JR. U.S. District Court, Northern District of Indiana

STEPHEN VICTOR WILSON U.S. District Court, Central District of California

HENRY TRAVILLION WINGATE U.S. District Court, Southern District of Mississippi

WILLIAM J. ZLOCH U.S. District Court, Southern District of Florida

OVERHEARD An honor, an obligation, a promise

… And here I am before you, the first Latina to be appointed a judge in Yolo County. Today is an honor. But more than an honor, it’s an obligation, an obligation to fulfill the duties entrusted to me, to turn the wheels of justice, to create an atmosphere where both sides are heard in a dignified manner, and [to be] accurate and skilled in my decisions. I am committed to carrying out my duties with fairness, impartiality, with absence of bias. I am determined to have a courtroom which exemplifies patience, dignity and courtesy for all those who appear before the bench. But today is also about a promise, a promise I made to myself as a young girl to give back to the community and society that has supported me and my family.”

– JUDGE SONIA CORTÉS, at her swearing-in ceremony, Yolo County Superior Court, California