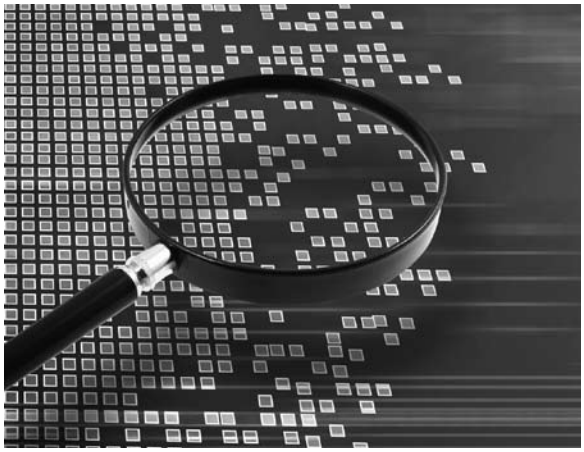
INTER ALIA
the Newsletter of the
Northern District of Ohio Chapter of the Federal Bar Association

E-discovery standards: An initial critique of Local Rule, Appendix K

by Donald Wochna

The new Appendix K to the Local Rules, District Court, Northern District of Ohio, establishes default e-discovery standards that apply at the commencement of the Rule 16 scheduling conference "until such time, if ever, the parties reach agreement and conduct e-discovery on a consensual basis." The "if ever" reference may suggest a certain frustration with attorneys who seem able, ad infinitum, to argue about every detail in electronic discovery. While Appendix K appears to settle certain discovery issues, it contains ambiguities that could easily cause more contentious motion practice than it avoids. These ambiguities relate to the legal status of the e-discovery coordinators; the technical characteristics of data and search technologies; and the relationship between and among format, content and metadata for purposes of efficiently searching and organizing electronic data.



E-discovery coordinator

Appendix K requires each of the parties in litigation to identify and designate a person as being "most knowledgeable" regarding the party's electronic document retention policies (the retention coordinator) and a person to be the party's e-discovery coordinator. The e-discovery coordinator may be "an attorney (in-house or outside counsel), a third party consultant or employee of the party." The e-discovery coordinator must be able to explain the party's electronic systems and capabilities, be knowledgeable about electronic document storage, organization and format issues; and participate in resolving discovery disputes related to electronically stored information.

Appendix K does not define the legal status of representations made by the e-discovery coordinator, although the rule states that the attorneys and parties are ultimately responsible for responding to and complying with e-discovery requests. The ambiguity arises when the coordinator's knowledge or representation of the technical aspects of electronic document storage, organization and format issues arising in e-discovery is challenged. This might occur, for example, in response to the coordinator's explanation of the manner in which relevant electronic information came to be stored on a party's computer system. It is expected that the coordinator would necessarily explain the system by relying on technical knowledge and specialized language grounded in an understanding of the file storage processes related to the system. In that regard, the coordinator's explanations would constitute expert testimony under Rule 702, Federal Rules of Evidence, because it would be based on "scientific, technical, or other specialized knowledge."[1]

The issues related to the legal status of the e-discovery coordinator might loom larger than appear at first blush, as attorneys transition from making statements in legal arguments about the capabilities of their client's electronic system to making the same statements as representations as e-discovery coordinator. For example, it is common today for attorneys to argue the cost/benefit analysis underlying discovery of information that the client has identified resides on sources that are not reasonably accessible. Under Appendix K, outside counsel acting as e-discovery coordinator might easily attempt to persuade a judge of the inaccessibility of systems by making technical, factual, representations regarding those systems. In what capacity are those representations made? Is outside counsel an expert at this point? What are the consequences of these representations later being proven to be wrong? It is significant to note that it is not clear whether the duties of outside counsel as attorney might conflict with duties as e-discovery coordinator in situations, such as sanction motions and hearings, where the actions of the attorney as coordinator are being challenged as negligent. It is also unclear whether

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Donald Wochna *combined his 22 years as a practicing attorney with his experience in the computer forensics and digital investigation fields to form Vestige Digital Investigations, headquartered in Cleveland. As chief legal officer, Mr. Wochna is helping attorneys and IT professionals recognize and respond to the legal and technical issues related to discovering facts that have been created, processed, stored or hidden by electronic means.*

Fall 2007

THE 2007 NATIONAL CONVENTION

The National Convention of the Federal Bar Association was held in Atlanta, Sept. 6-9. The convention hosted double-tracked CLE; two nights of social events; leadership training meetings; various award luncheons; meetings of the Foundation and of the Building Corporation; the fundraiser auction of the Foundation; the business meeting of the Association; and the Presidential Installation Banquet. The convention was fairly well attended. Delegates attended from as far away as the Hawaii and Alaska chapters and included a number of judges. Our chapter was represented by David Parham, who is the vice-president of the 6th Circuit office; Stan Fisher, former national president; Bob McNew, former national president and outgoing Foundation president; and former chapter presidents Margaret Wong, Jim Satola and Aaron Bulloff.

The CLE programs included subjects on class action, claims under the Pregnancy Discrimination Act; emerging issues in Wage and Hour class actions; an employment law update; appellate advocacy (whose panel included 6th Circuit Judge Jeffrey Sutton, 10th Circuit Judge Timothy Tymkovich and 11th Circuit Judge William Pryor); two assessments of the Supreme Court (one on recent Supreme Court popular literature, another on the upcoming term); ADR; e-discovery; IP; and with local flavor, "Civil Rights in the South." The written course materials were excellent, especially in the employment law field. The Civil Rights course may well have been the gem of the convention, because its panel participants included people who were "there," shoulder-to-shoulder with Martin Luther King, including the Rev. Joseph Lowery.

The Thursday night social event was a tour of the Margaret Mitchell ("Frankly, Scarlett, I don't give a damn") house with a Southern dinner; ante-bellum dressed dancers who "reeled" in several attendees (including Bob McNew, who will never make it to the second week of "Dancing With The Stars"); and a quartet of musicians playing period instruments and songs. The Friday night event was a tour of Atlanta's High Art Museum that included dinner, a jazz band and an extraordinary Annie Leibowitz exhibit (including the original Demi Moore pregnancy Vanity Fair cover shot) and an exhibit of paintings by the turn-of-the century American realist and figure painter Cecilia Beaux, both of which were part of a special exhibition featuring the works of great American women artists. The chapter training meetings on Saturday morning allowed chapter officers from around the country to exchange successful program ideas. In our circuit, some potentially interesting ideas discussed with us were a CLE program on issues facing younger attorneys (Memphis Chapter); compilation of district judges' jury instructions (Kentucky); a presentation of CLE programs available from FBA National, including one on e-discovery (Southern District of Ohio); conducting collective swearing-in ceremonies (U.S. Supreme Court and Circuit); and the preparation of local district court practice manuals (various chapters). The Northern District of Ohio Chapter offered our "A Book-Of-Your-Own" program, Supreme Court swearing-in program, and our annual State-of-the Court luncheon program. Our chapter should feel quite lucky in at least two regards. First, there is a terribly long line for chapters to be visited by William Suter, clerk of the Supreme Court, with some chapters expressing little hope of landing him in the near future for such a program. We have had two recent visits by General Suter, with the promise of more. Perhaps for our next swearing-in ceremony, we can invite nearby chapters to have their members join us in Cleveland for the program. Second, most of the chapters nationwide do not have their district court clerk working with them or being an active member of their chapter or board. All of us know how much easier our FBA lives are having Geri Smith as our clerk and active board member.

Two luncheons of note were the fellows lunch and the awards lunch. Out of 169 Fellows of the Foundation of the FBA, our chapter boasts 20 members. The fellows luncheon speaker

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Federal Bar Association
Northern District of Ohio Chapter
www.fba-ndohio.org
(877) 322-6364

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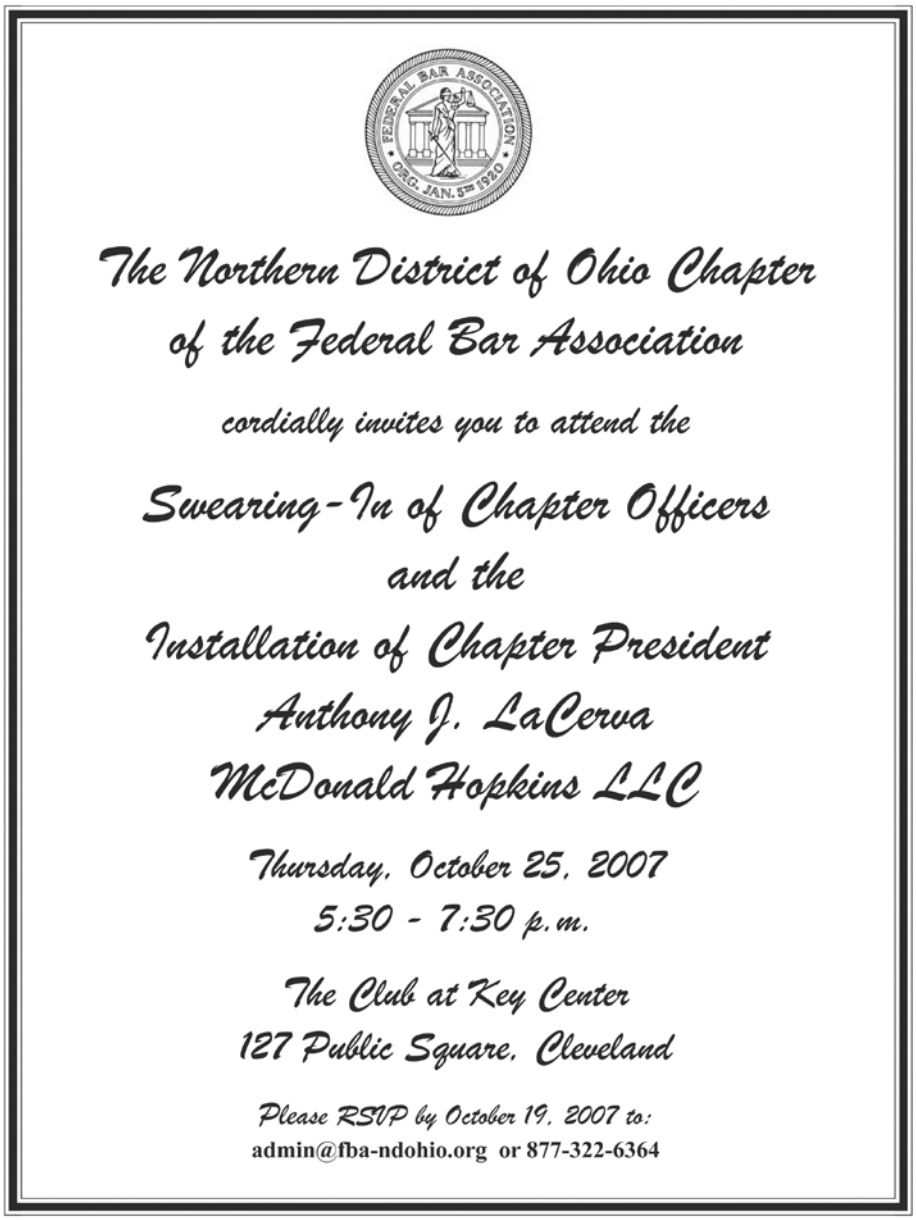
Calendar of Events

Oct. 25, 2007
Chapter Investiture at the Club at Key Center

Dec.14, 2007
Professionalism, Ethics and Substance Abuse Seminar

Please visit our Web site for updates to the calendar:
www.fba-ndohio.org/calendar.html.



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2215 M Street, N.W. ,
Washington, DC 20037
(202) 785-1614
(202) 785-1568 (fax)
fba@fedbar.org

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Clerk's Corner

by Geri M. Smith

Chief Judge James G. Carr addressed the bar at the annual State of the Court luncheon in Cleveland Sept. 5. Judge Carr welcomed Judge Sara Lioi who joined the court on March 16 as the district's 53rd district judge. Judge Lioi had previously served as a judge in the Stark County Common Pleas Court after 10 years of practice in Canton.

Magistrate Judge Patricia A. Hemann has announced that she will retire in early 2007. Magistrate Judge Hemann joined the court in April 1993, after practicing with Hahn Loeser. She leaves the court with a reputation of competence and dedication and as a highly regarded mediator/settler of disputes. The court has appointed a magistrate judge selection panel to review applications to fill the upcoming vacancy. The panel will recommend five candidates to the court for its consideration. A selection by the court is expected to be made this fall and a decision will be announced after the mandatory FBI and IRS background investigations are completed.

A magistrate judge selection panel has also been appointed by the court to make a recommendation regarding the reappointment of Magistrate Judge William H. Baughman whose first eight-year term as a magistrate judge in Cleveland will end next year. Magistrate Judge Baughman has served the court since Feb. 16, 2000.

Chief Judge Carr also recognized the innovative and effective leadership of Dennis Terez who was appointed federal defender for the Northern District of Ohio by the U.S. Court of Appeals for the 6th Circuit in early 2007.

Judge Carr reported that the city of Akron is no longer currently pursuing plans to build a parking deck and office building adjacent to the Akron Federal Courthouse. The original plan, which would have placed a public parking structure within one foot of the courthouse, was viewed as a serious security threat given 9/11 and the bombing in Oklahoma City.

The court continues to be concerned about the status of its temporary judgeship. The court is authorized 12 district court judgeships (11 permanent and 1 temporary). The temporary judgeship was created in 1992 and has been renewed approximately every five years. The most recent term of the temporary judgeship has now expired. Absent congressional action the court will not be permitted to fill the next district court judgeship vacancy and the number of authorized judgeships will be reduced to 11. Senate Bill 1327, which would extend the judgeship for an additional five years, has been pending without action since May. Chief Judge Carr requested that those with contacts to our senators/representatives express to them the importance of this issue.

Of the pending legislation directly affecting the judiciary, Chief Judge Carr talked about the Sunshine in the Courtroom Act of 2007, which would allow, at the discretion of the judge, the "photographing, electronic recording, broadcasting, or televising to the public of any court proceeding over which that judge presides." Televising of jurors would not be allowed, and nonparty witnesses could ask that their faces and voices be obscured. The bill provides that the Judicial Conference may promulgate advisory guidelines on the management and administration of photographing, recording, broadcasting or televising. Authority for cameras in district courts would sunset three years after enactment of the legislation.

The Chief Judge also spoke about the importance of the Federal Judiciary Salary Restoration Act of 2007 and its potential impact on the judiciary's ability to continue to attract and retain well-qualified judges. He said that in 1969, district judges earned approximately as much as partners in major firms and more than law deans and law professors. Since then, however, the average wage of American workers has risen 18.5 percent, adjusted for inflation, while the earnings of federal judges has decreased 24.8 percent, creating a net "pay gap" of 43.4 percent. The court has witnessed the impact of this trend as former Chief Judges Thomas D. Lambros, George W. White and Paul R. Matia have each left the court upon reaching retirement age to return to private practice rather than stay on as senior judges. The lack of adequate compensation not only hinders the ability of the judiciary to attract and retain well-qualified judges, but also places a hardship on those younger judges who seek to provide for their families and who must look forward to the financial costs of sending their children to college. The court appreciates the support of the Federal Bar Association for the Northern District of Ohio on this matter.

Overall, civil case filings declined 16 percent for the court's statistical year ending June 30 due to a large decrease in new MDL cases. Traditional civil cases filings, however, rose 6 percent during the same

period from 3,267 to 3,477. Chief Judge Carr noted three perceptible case filing trends: decreasing filings in employment cases due to the use of mandatory arbitration clauses in employment contracts; a shift to filing FELA cases in state, rather than federal courts; and an increasing number of foreclosure cases, which rose from fewer than 10 per year in the early part of the decade to 387 in 2006 and 758 through August 2007. The influx of foreclosure cases has caused the court to appoint a Panel of Master Commissioners to oversee the sale of real property in these cases. During the last year, our new foreclosure procedures have reduced the average time from case filing to the date the property is sold from 332 days to 161 days.

Criminal case filings declined 11 percent from 642 to 573 for the statistical year ending June 30th. During the same period, the number of new criminal defendants dropped 17 percent from 1,087 to 907. However, there has been an increase in complex criminal cases, including two capital cases that will soon go to trial.

Despite the general decline in case filings, Chief Judge Carr stressed the importance of retaining the district's temporary judgeship making an analogy to a firehouse. You may not always need it, but you sure are happy that it is there when the need arises.

Early this year the court established a Civil Pro Bono Protocol for providing representation to individuals without counsel. Pursuant to our plan, counsel may be assigned to represent a pro se litigant in a civil case at the discretion of the judicial officer. Assignment of counsel is not a right of a pro se litigant but may be utilized in those limited cases where the judicial officer believes such an assignment is warranted. Under the protocol, a judicial officer may instruct the clerk's office to select counsel with experience in the subject matter of the case from the list of attorneys who have volunteered to provide pro bono services. The court will reimburse assigned counsel, pursuant to the Pro Bono Civil Case Protocol, for certain expenses incurred in providing representation up to $1,500. Currently, about 54 attorneys have volunteered to serve as appointed counsel and pro bono counsel have been appointed in 11 cases. If you are interested in participating in this program, please contact the clerk's office or complete the pro bono application that is available on our Web page.

The court now provides wireless Internet connectivity to attorneys at all court locations. Registration forms to obtain an ID and password are available online and at each clerk's office location.

For additional information about the court, please visit our Web site at: www.ohnd.uscourts.gov.

Processing CJA vouchers

The NDOH Web site has detailed information listed under the Attorney/CJA section. Both the in-court and out-of-court worksheets along with the CJA26 Supplemental Information Statement Forms are available online as fillable forms and also do calculations. Also, please remember to use the Web site to check current mileage and hourly rates.

Sixth Circuit Judicial Conference May 7-10, 2008, Chattanooga, Tenn.

For more information go to www.tned.uscourts.gov/circuitconf/.

Proposed amendments published for public comments—August 2007 (Important information)

The Judicial Conference Advisory Committees on the Appellate, Bankruptcy, Civil, and Criminal Rules have proposed amendments to federal rules and official forms, which are available for public comment. Most of the amendments are proposed in conjunction with the adoption of uniform time-computation rules. The proposed amendments are posted at www.uscourts.gov/rules. The public comment period ends Feb. 15, 2008.

Comments sought on Internet access to some criminal case file documents

The federal judiciary is seeking comment on the privacy and security implications related to public Internet access to certain documents in criminal case files. The Court Administration and Case Management Committee of the Judicial Conference of the United States is studying these issues so the conference can develop policy guidance for the federal courts.

The committee is interested in comments on a proposal to restrict public Internet access to plea agreements in criminal cases, which may contain information identifying defendants who are cooperating with law enforcement investigations.

The request for public comment addresses both the privacy and security implications of Internet access to these files and potential policy alternatives.

All comments are due by Oct. 26, 2007, and must include the name, organization (if any), mailing address and telephone number of the commentator. All comments should also include an e-mail address and a fax number, if available, as well as an indication of whether the commentator is interested in participating in a public hearing, if one is held.

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Subprime mortgage lending

Economic implications and response from the political and legal communities

by Rob Folland

Lately it has been difficult to scan the daily newspaper or any business publication without finding some discussion on the subprime mortgage crisis. This topic has dominated in the media in recent months, due to both the overall impact on the U.S. economy and the local problems the subprime meltdown has caused in America's neighborhoods and communities. The impact of this crisis has certainly hit close to home, as Northeast Ohio is a leading region for home foreclosures nationally. The negative economic effects resulting from the subprime mortgage collapse have prompted politicians and lawyers to propose and initiate innovative methods for handling these problems and potentially increased activity in the courts.

Subprime lending

Subprime lending is a general term that refers to the practice of making loans to borrowers with lower than average credit ratings. Subprime lenders generally incur higher risk of default than that present in a traditional home mortgage. This risk is increased by the types of loans commonly utilized in subprime mortgage lending, including interest-only loans, loans that are highly leveraged, loans with variable interest rates or "teaser" introductory rates, and loans with balloon payments after a specified number of years. Subprime borrowers typically display various credit risks, including multiple late payments in the previous year, past bankruptcy filing, and a standard credit risk score of less than 620 (on a scale of 300 – 850). Statistically, 25 percent of the U.S. population falls into this category.

The market for subprime mortgages surfaced in the early 1990s and has rapidly expanded since. In 1993, only $35 billion in mortgages fell into this class. In 2006, lenders extended $600 billion in subprime mortgages and this class accounted for roughly 20 percent of all domestic home loans. The majority of subprime mortgages are now sold by the initial lenders, packaged into securities and sold as investment vehicles.

Subprime lending has been a highly controversial topic for years, and the recent spike in foreclosures has only fueled that controversy. Proponents generally argue that providing mortgage loans for borrowers with poor credit history gives many families an opportunity at home ownership that they would not otherwise have. Skeptics view the practice as a form of predatory lending, arguing that lenders take advantage of unsophisticated borrowers by lending them money at a high rate and collecting high up-front fees, knowing all along that borrowers may have difficulty making their payments.

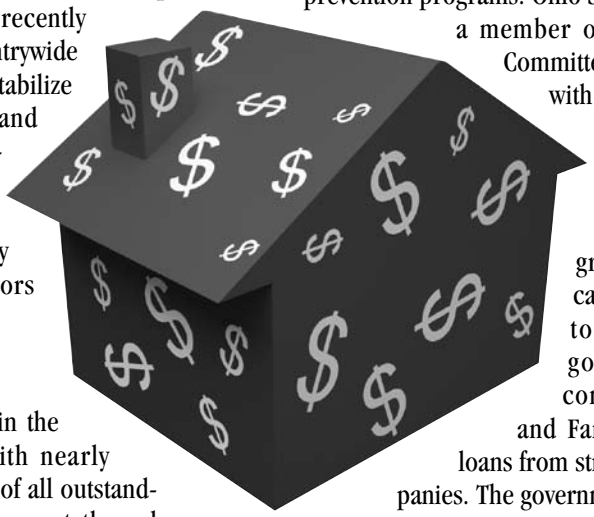
Economic implications

There are multiple causes of the recent meltdown in the subprime lending arena. First, increased competition among lenders forced many to lower their credit standards. The rapid growth of this industry since the early-1990s made this type of lending attractive to a wide range of financial institutions. The influx of new lenders created more options for borrowers and reduced or eliminated the due diligence lenders performed prior to extending credit. Additionally, because most of the new loans were ultimately being repackaged into securities and sold to third-party investors, the initial lenders were not necessarily accountable for potential default on the loans. The ultimate result was that borrowers with lower credit scores were able to get home loans, which many were not able to afford in the long term.

In 2006, lenders extended $600 billion in subprime mortgages and this class accounted for roughly 20 percent of all domestic home loans.

Furthermore, the increase in interest rates and decline in home values have greatly contributed to the problem. Many of these loans were initially made when interest rates hit a low-point in the early-2000s. For borrowers with variable rate loans, rate hikes have resulted in substantial increases in monthly payments, which many borrowers have been unable to make. The drop in housing prices toward the end of 2006 has also caused a large problem, as borrowers have been unable to refinance their home loans prior

to default. As a result of the losses on loan portfolios, more than 50 nationwide lenders have filed for bankruptcy protection since the beginning of 2007. These lenders include American Home Mortgage Corp., All Star Mortgage Financial Corp., Ownit Mortgage Solutions, Inc., Mortgage Lenders Network USA Inc., People's Choice Financial Corp., Aegis Mortgage Corporation, ResMae Mortgage Corp. and New Century Financial Corp. In late July, Wall Street suffered its worst week of losses in nearly five years, with both the Dow and the S&P 500 falling more than 4 percent. Most analysts suggest this sharp decline was closely tied to the woes of the subprime market. Additionally, in August Countrywide Financial Corp., the nation's largest home lender, was forced to draw on an $11.5 billion line of credit in order to continue operations. Bank of America recently purchased $2 billion in Countrywide preferred stock, helping to stabilize the declining share value and bringing a small bit of optimism to other lenders. Nonetheless, this wave of Chapter 11 filings will likely continue to concern investors for the remainder of 2007.



Local effects

In 2006, Ohio ranked first in the nation for foreclosures with nearly 79,000. Roughly 20 percent of all outstanding mortgages are subprime, yet these loans accounted for nearly two-thirds of all foreclosure filings, according to the Coalition on Homelessness and Housing in Ohio. In the first seven months of 2007, there were 13,600 foreclosures filed in Cuyahoga County. In previous years, the majority of foreclosures had taken place within the City of Cleveland. However, recently this trend has gained momentum outside the city limits. Foreclosures jumped about 17.5 percent in the suburbs of Cuyahoga County during the first half of 2007. This increase has contributed to declining home values in neighborhoods all over Cuyahoga County. The Center for Responsible Lending estimates that each foreclosure results in roughly a one percent decline in the value of nearby homes, impairing the ability of lenders to refinance and perhaps leading to even greater default rates.

The increase in foreclosures has not only impacted the local housing market, but also has had a profound effect on local business as well. In March, National City Bank had to write off $11 million in losses related to its subprime mortgage portfolio. These losses, coupled with the sharp decline in refinancings and local home sales, have forced National City to merge its National Home Equity business into the existing Mortgage Company. The merger resulted in the elimination of 300 local jobs.

Responses from the political and legal communities

The adverse economic effects and negative impact of the subprime collapse has prompted lawmakers and attorneys to seek innovative solutions to this problem. Earlier this year, New York Senator Charles Schumer recommended that the federal government offer troubled borrowers hundreds of millions of dollars to bail them out of subprime loans. He has also recommended the allocation of funds to local foreclosure prevention programs. Ohio Senator Sherrod Brown, a member of the Senate Banking Committee, is currently working with other senators to craft legislation addressing the foreclosure problem.

Democrats in Congress have also recently called for the government to lift restrictions on government-sponsored companies Freddie Mac and Fannie Mae to purchase loans from struggling mortgage companies. The government placed restrictions on these lenders in 2006 after corruption and accounting compliance issues surfaced. The Bush Administration has maintained that the economy is fundamentally strong, and that the recent turmoil is merely a sign of the market making natural adjustments.

In an attempt to protect consumers and punish brokers, lenders, appraisers and others involved in arranging for subprime mortgage loans, Ohio Attorney General Marc Dann has filed lawsuits in four Ohio counties against 10 mortgage companies alleging undue influence over appraisers. These suits allege that the defendants have committed unconscionable acts or practices in violation of the Consumer Sales Practices Act by compensating, instructing, inducing, coercing or intimidating home appraisers, with the purpose of improperly influencing their independent process. Dann is seeking declaratory judgments and permanent injunctions against the companies, which include both local and national lenders. He is also seeking a civil penalty of $25,000

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U.S. Supreme Court issues

New significant business law decisions in the area of antitrust and business law

by Stephen W. Funk

At the end of its regular term in June 2007, the U.S. Supreme Court issued three major, business law decisions in the area of antitrust and securities law. A summary of each the Supreme Court opinions is set forth below.

***Leegin Creative Products, Inc. v. PSKS, Inc.*: Minimum resale price agreements are no longer per se invalid under antitrust laws.**

The first major, business law decision is *Leegin Creative Products, Inc. v. PSKS, Inc.*[1] In *Leegin*, the Supreme Court reversed a 1911 precedent that previously invalidated minimum-resale-price agreements as a per se violation of the antitrust laws. Based upon a prior Supreme Court decision issued in 1911, the federal courts have long held it was per se illegal for a manufacturer and a distributor/retailer to agree on the minimum price that the distributor/retailer can charge for a manufacturer's goods. Rather, at most, manufacturers could only establish "suggested" minimum retail prices, so long as there was no explicit or implicit "agreement" between the parties or retribution taken by the manufacturer if a retailer sold goods at a lower price. Since this 1911 case, however, economics literature has been replete with articles on the pro-competitive justifications for a manufacturer's use of resale price maintenance. Among other things, minimum resale price maintenance can stimulate inter-brand competition among manufacturers selling different brands of the same type of product by reducing intra-brand competition among retailers selling the same brand. Yet, under the per se antitrust rules, these pro-competitive effects were irrelevant and impermissible to justify a minimum resale price agreement.

In *Leegin*, however, the U.S. Supreme Court overturned and reversed this 1911 precedent and replaced the per se rule with a rule of reason. The Supreme Court agreed with the economics literature that a single manufacturer's use of vertical price restraints can tend to eliminate inter-brand price competition, which in turn encourages retailers to invest in services or promotional efforts that aid the manufacturer's position as against rival manufacturers. Moreover, the Court observed that resale price maintenance can give consumers more options to choose among "low-price, low-service brands; high-price, high-service brands; and brands falling in between" and facilitate market entry for new firms and brands by encouraging retail services that would not otherwise be provided. Accordingly, the Court held that minimum resale price agreements were not per se invalid, but can be lawful under the antitrust laws unless an antitrust plaintiff can establish that they have an anti-competitive effect in a given case.

***Tellabs, Inc. v. Makor Issues & Rights, Ltd*: Plaintiffs must satisfy heightened pleading standards to avoid dismissal of securities fraud complaint.**

The second major, business law decision recently issued by the Supreme Court is *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*[2] In *Tellabs*, the issue involved whether a class-action complaint for securities fraud should be dismissed for failure to plead sufficient facts to establish "scienter" i.e., that a corporate defendant acted with "intent to deceive, manipulate, or defraud." Under the Private Securities Litigation Reform Act of 1995 (PSLRA), a plaintiff's complaint cannot merely allege that the defendant acted with scienter. Rather, the complaint must allege specific facts that would create a "strong inference" that a corporate defendant made false or misleading statements with the "intent to deceive, manipulate or defraud."

Since 1995, a number of securities fraud plaintiffs have been successful in overcoming this heightened pleading standard by arguing that the federal courts must construe the allegations of the complaint broadly and must accept any "reasonable or permissible" inferences as true. In *Tellabs*, however, the Supreme Court rejected this argument and established a more heightened standard of review for determining whether a complaint should be dismissed under the PSLRA. Although the Court held that a federal judge must accept the facts alleged as true, the Supreme Court held that the judge is not required to accept the plaintiff's inferences as true, and may take into account other, plausible opposing inferences that may be drawn from the facts alleged. Thus, the Court held that the inference that a defen-

dant acted with scienter must be more than merely "reasonable," it must be "cogent and compelling" and thus strong" in light of other explanations. Accordingly, in the future, securities fraud complaints will be dismissed at the outset unless the plaintiff can allege facts that create an inference of fraudulent intent that is "at least as compelling as any plausible opposing inference one can draw from the facts alleged."

Credit Suisse Securities (USA), LLC v. Billing: Federal securities laws preclude antitrust laws in regulating the securities markets

A third recent, business law decision is *Credit Suisse Securities (USA), LLC v. Billing*.[3] In *Credit Suisse*, a putative class of investors brought an antitrust complaint against underwriting firms for illegally entering into contracts with purchasers of securities distributed in initial public offerings (IPOs). The plaintiffs' lawyers complained that the underwriters violated the antitrust laws by unlawfully agreeing to not sell newly issued securities to a buyer unless the buyer committed to buy additional shares of that security later at escalating prices (known as laddering); to pay unusually high commissions on subsequent security purchases from the underwriters; or to purchase from the underwriters other less desirable securities (known as tying). Because initial public offerings are already regulated by the Securities and Exchange Commission, the defendants moved to dismiss, arguing that the federal securities laws impliedly precluded the private party plaintiffs from suing for trebled damages and attorneys fees under the antitrust laws.

On review, the Supreme Court agreed. The Court held that antitrust laws did not apply to the regulation of the securities market because there already was a regulatory agency with supervisory authority to regulate the conduct under the securities law and there was a risk that the securities and antitrust laws may produce conflicting guidance, requirements, duties, privileges or standards of conduct. Thus, in light of the potential conflict, the Court held that the security laws were controlling and that the plaintiffs could not sue for any antitrust violations as a matter of law. By so doing, the Supreme Court created a bright-line rule that frees the financial securities market from fear of possible antitrust lawsuits for engaging in conduct relating to the marketing and sale of securities that is already subject to regulation by the SEC under the federal securities laws.

Endnotes

[1]127 S.Ct. 2705, 75 USLW 4643 (June 28, 2007).
[2]127 S.Ct. 2499, 75 USLW 4462 (June 21, 2007).
[3]127 S.Ct. 2383, 75 USLW 4449.

Stephen W. Funk *is a partner with the law firm of Roetzel & Andress in Cleveland and Akron. Mr. Funk's practice focuses on business and public law litigation, where he has been involved in representing a large number of private and public sector clients, prosecuting and defending complex claims for breach of contract, constitutional violations, antitrust and securities violations, fraud, professional malpractice, defamation, and director and officer liability. He is a graduate of the Harvard Law School, a former law clerk to U.S. District Judge Ann Aldrich, and a former Senior Litigation Counsel with the U.S. Department of Justice.*

(Subprime mortgage, continued from page 7)

from each and an order requiring the companies to reimburse consumers for losses sustained by these practices. Earlier this year, Dann sought and was granted a T.R.O. in Cuyahoga County Common Pleas Court preventing New Century Financial Corp. from operating in Ohio.

Other means to combat this problem how come from the private sector as well. In April, Cleveland attorney Ed Kramer, founder of the nonprofit Housing Advocates, Inc., filed a class action lawsuit against Argent Mortgage Company and Wells Fargo Bank for alleged violations of city, state and federal fair housing laws. This suit represents a departure from the typical case-by-case mechanism for handling cases of predatory lending and directly attacks the policies and procedures of the financial institutions involved. This vehicle may be used by others in the coming months as the subprime crisis continues to unfold.

Robert C. Folland*, Thompson Hine LLP, is a partner in the firm's Bankruptcy and Public Finance practice groups. He focuses his practice on bankruptcy (primarily Chapter 11 reorganizations) and creditors' rights, out of court business restructurings, lender liability and consumer lending liability defense, and other financially distressed business issues. Rob has significant experience representing secured lenders, debtors, creditors' committees, indenture trustees, landlords, trade creditors and parties desiring to acquire assets in bankruptcy proceedings.*

Uneven odds for employers attempting to get even

The status of retaliation claims after *Burlington Northern*

By Patricia A. Wise, Esq.

By now, most practitioners understand that the Supreme Court's 2006 *Burlington Northern* decision broadened the scope of potential employer liability for retaliation.[1] Much remains to be seen about the breadth of that liability, however, and the language of the case insured continued interpretations by the lower courts of the new standards. Fact intensive inquiries will be necessary in most cases, making summary judgment more difficult for employers. And as we already know, it is possible for a retaliation claim to survive a motion for summary judgment, because of its fact specific nature, even when an underlying claim of discrimination has failed.

The most significant expansion of liability came in the Court's interpretation of the scope of the anti-retaliation provision of Title VII. The Court held that "the anti-retaliation provision does not confine the actions and harms it forbids to those that are related to employment or occur at the workplace."[2] In comparing the anti-retaliation provision of Title VII, Section 703(a), the Court noted significant differences in application. The retaliation provision broadly prohibits discrimination against an employee or job applicant.[3] The discrimination provision, however, specifically prohibits discrimination "against any individual with respect to his compensation, terms, conditions, or privileges of employment."[4]

The Court interpreted this difference as a reasonable distinction by Congress to ensure access to the protections of Title VII. If the prohibition was confined to workplace retaliation, this would not provide adequate protection. The Court reasoned that an employer could effectively retaliate against an employee by threatening conduct or by causing harm outside the workplace.

In reaching this conclusion, the Court did address an existing circuit court split regarding the seriousness of adverse action necessary to support a claim of actionable retaliation. Prior to *Burlington Northern*, the 7th Circuit and the District of Columbia Circuit, and the EEOC defined retaliation broadly, considering actionable any adverse treatment "reasonably likely to deter the charging party or any others from engaging in protected activity."[5] The 6th, 4th and 3rd circuits had held that the challenged action had to adversely affect the terms, conditions or benefits of employment.[6] The 5th and 8th circuits imposed the most difficult standard for potential plaintiffs, requiring an "ultimate employment decision" for an actionable claim.[7] Interestingly, however, the facts at issue in the *Burlington Northern* case did not require resolution of this issue at all. All of the alleged retaliation against plaintiff Sheila White occurred at the workplace, and affected the terms and conditions of her employment. Nonetheless, the Court resolved the dispute and adopted the broadest and least restrictive standard, making summary judgment more difficult for employers.

Justice Breyer, writing for the unanimous Court, touted its standard as an objective test, prohibiting employer actions that are "materially adverse to a reasonable employee or job applicant," meaning "harmful to the point that they could well dissuade a reasonable worker from making or supporting a charge of discrimination."[8] While establishing this "objective" test, the Court went on to say that "the significance of any given act of retaliation will often depend on the particular circumstances. Context matters," thereby injecting subjectivity into the objective standard.[9]

> *"Context matters" will of course become the mantra of the plaintiffs' bar, encouraging fact intensive analysis of each of these cases.*

"Context matters" will of course become the mantra of the plaintiffs' bar, encouraging fact intensive analysis of each of these cases. The Court attempted to provide some guidance, stating again that Title VII does not impose a general civility code, and adopting Title VII precedent in distinguishing "significant from trivial" harms, and requiring something more than "petty slights," "minor annoyances" or "simple lack of good manners."[10] In examples

destined to become iconic, the Court said that a schedule change might not be actionable for most employees, but could be "enormously" significant to a young mother with children in school.[11] Also, a supervisor's refusal to invite an employee to lunch might be trivial, unless it was a training lunch and could effect an employee's professional development.[12] Thus, context and distinguishing significant actions from trivial harms, taking into account any "unique vulnerability" of an employee, will be the battleground for motions for summary judgment.[13]

One of the most important stated reasons for the Court's *Burlington Northern* ruling was to ensure that employees would not be dissuaded from making or supporting charges of discrimination. In retrospect, this may have been predictable given the Court's 2005 decision creating a private retaliation claim in the context of Title IX.[14] In that case, the Court recognized that teachers who could identify discrimination might be better positioned to make complaints against the federal funding recipient than students. In that case, Roderick Jackson, a physical education teacher and girls' basketball coach, complained that his team was not receiving adequate funding, equipment or facilities. His complaints were ignored and he began to receive negative performance reviews. Eventually, he was removed as the girls' coach. He successfully alleged that the school board retaliated against him for complaining about the violations of the girls' Title IX rights. Even though Title IX does not include any reference to or prohibition of retaliation, a private cause of action for retaliation was necessary to achieve the purpose of Title IX. Thus, the male girls' basketball coach had his own private claim of retaliation against his public school employer, when he complained of sex discrimination on behalf of the female basketball players.

It is also interesting, in light of this express rationale by the Court, that the *Burlington Northern* plaintiff was not at all dissuaded in making her claims. The Court found actionable retaliation in that case, even though White filed three separate EEOC charges, a federal lawsuit, and successfully utilized both the internal complaint and grievance procedures. It is clear that defense arguments that a plaintiff employee was not actually dissuaded will not support the claim that a "reasonable employee" would not be dissuaded.

Finally, because the scope of the anti-retaliation prohibition is significantly broader than that of discrimination, defense practitioners must be diligent to avoid misapplication of the standard, or blurring of this distinction. Already, this appears to have occurred in at least two circuits. The 7th Circuit applied the *Burlington Northern* standard in a gender disparate treatment claim.[15] Phelan alleged that she was terminated because of her gender (although she was reinstated with pay four months later). The Court specifically cited the *Burlington Northern* adverse action standard in deciding Phelan's gender discrimination claim in her favor. The D.C. Circuit also applied *Burlington Northern* language in a disparate treatment gender discrimination case involving a challenge to a lateral transfer with no loss in pay.[16] That Court cited the *Burlington Northern* adverse action standard, in a case in which there were no allegations of retaliation whatsoever. It is important to guard against this misapplication to avoid any broadening of the concept of adverse impact in discrimination cases.

On the whole, prospects for defense summary judgment success are more limited following *Burlington Northern*'s expansive interpretations. At least six Circuits have reversed grants by lower courts of defense summary judgment motions in eight cases following *Burlington Northern*.[17] The Court's subjective instruction that "context matters" in interpreting its objective standard virtually ensures difficulty in avoiding fact intensive disputes. Eventually, case law will provide some parameters, and standards will develop that permit employer summary judgment in some situations. Until then, defense counsel should focus on the general civility code defense, and remain diligent to ensure that the broader retaliation standards are not improperly applied to discrimination cases.

Endnotes

[1]*Burlington Northern & Santa Fe Ry. v. White*, 126 S. Ct. 2405 (2006).
[2]*Id.* at 2409.
[3]Pub. L. 88-352, §704; 42 U.S.C. §2000e-3(a).
[4]Pub. L. 88-352, §703; 42 U.S.C. §2000e-2(a).
[5]*Washington v. Ill. Dep't of Revenue*, 420 F.3d 658 (7th Cir. 2005); *Rochon v. Gonzales*, 438 F.3d 1211 (D.C. Cir. 2006); *EEOC Compliance Manual*, §8-11(D)(3).
[6]*Burlington Northern & Santa Fe Ry. v. White*, 364, F.3d 789 (6th Cir. 2004); *Von Gunten v. Maryland*, 243 F.3d 858 (4th Cir. 2001); *Robinson v. Pittsburgh*, 120 F.3d 1286 (3rd Cir. 1997).
[7]*Mattern v. Eastman Kodak Co.*, 104 F.3d 702 (5th Cir. 1997); *Manning v. Metropolitan Life Ins. Co.*, 127 F.3d 686 (8th Cir. 1997).
[8]*Burlington Northern & Santa Fe Ry. v. White*, 126 S. Ct. 2405, 2409 (2006).
[9]*Id*. at 2415.
[10]*Id.*
[11]*Id.*; *Washington v. Ill. Dept. of Revenue*, 420 F.3d 658 (7th Cir. 2005).
[12]*Burlington Northern & Santa Fe Ry. v. White*, 126 S. Ct. 2405, 2415-16 (2006).

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(E-discovery standards continued from page 1)

malpractice insurance covers error or omissions made by counsel concerning the technical capabilities of electronic storage systems while acting as both outside counsel and e-discovery coordinator in a matter.

Search methodology

The e-discovery coordinator is charged with assisting the parties to agree on the method of searching, and the words, terms and phrases to be searched. This obligation requires a technical familiarity with the manner in which electronic data is stored, the state of data on electronic media, and the scope and operational characteristics of electronic search and extraction tools. Appendix K requires the parties to disclose "any restrictions as to scope and method which might affect their ability to conduct a complete electronic search of the electronically stored information." Attorneys unfamiliar with electronically stored information might erroneously believe that relevant information can be found simply using keyword searches applied to the systems storing the information. This is not the case. There are thousands of ways in which search and extraction methods can fail to identify relevant data. For example, graphic images, spreadsheets, presentations, and myriads of other information will not be found using simple text-based search tools. Outlook Express cannot be used to locate e-mails created and stored in Microsoft Outlook, notwithstanding the similarity of applications. Similarly, data that is in a compressed state, such as a Zip file, cannot be searched. Compressed files will simply be "skipped over" by text-based search tools. Whole folders and countless relevant files could easily be missed simply because the e-discovery coordinator for one party was unaware that the data was in a compressed state.

Attorneys unfamiliar with electronically stored information might erroneously believe that relevant information can be found simply using keyword searches applied to the systems storing the information.

Negligent search methodology may be grounds for sanctions, although it is unclear whether a party might waive these grounds under Appendix K's obligation to "reach agreement as to the method of searching, and the words, terms and phrases to be searched." The issue is more complicated in the situation in which a client relies upon the search methodology recommended by outside counsel as e-discovery coordinator and fails to locate significant, relevant information resident on its systems.

Format

Format issues related to electronically stored information are very technical and can significantly affect the efficient use of the information being produced. The technical issues include the best techniques for "freezing" or "petrifying" a file's content while allowing the file to be searched and organized electronically. The proper format choice will create an image of the text in each of the files and link each image to a database of the words in all the files produced and link the proper metadata from the proper source (end-user, file system, operating system, or application) to the files. This technique creates individual image files in which content has been "petrified" (thereby preventing any changes), but which can nevertheless be searched and organized in the same way as the native file.

The Appendix K default format is to be used whenever the parties cannot agree to the format for document production. The default format is an image file such as PDF or TIFF. The default standard appears to be an attempt to standardize the format for file content while obligating the producing party to "preserve the integrity of the document's contents, i.e. the original formatting of the document, its metadata and, where applicable, its revision history."

Appendix K does not clearly state whether some or all of the application, file system, operating system or end-user created metadata associated with the native file (such as creation, modification and access dates) must also be produced so that the data can be organized electronically. This ambiguity could be exploited by producing thousands of pages of TIFF e-mails without the proper portions of the application metadata. The receiving party would incur substantial costs to process these e-mails so as to be able to electronically search and organize them. In this example, because e-mail content would have been imaged in a TIFF format, each image would need to be processed by an optical character recognition program to create a text-searchable database of words related to each e-mail. Thereafter, individual e-mails would need to be read and their internal, text-based dates manually added to the text-based database to allow the receiving party to electronically search and organize the data. While these search and organizational functions could have been performed electronically in seconds on the im-

age files if the metadata were present, performing them on image files without the proper metadata can easily take weeks and cost thousands of dollars.

In addition to its organizational value, some types of metadata may be necessary to render the content of data meaningful. The most common example is spreadsheet data, in which the values that are visible in the spreadsheet are the results of formulaic expressions contained in certain application metadata fields. Without these fields, a spreadsheet is meaningless; providing image files of spreadsheet data would completely defeat the purpose of meaningful discovery.

Finally, Appendix K does not clearly indicate the manner in which a party is to bring to the court's attention its needs for specific file system, operating system, application or end-user created metadata in order to search and organize the information or to render it intelligible in the same manner as the producing party is able to do using native format. Indeed, comparing the search and organizational functionality of the native file available to the producing party with the default format ought to provide insight into whether the default format must include certain metadata.

But the option to produce in a reasonably usable form does not mean that a responding party is free to convert electronically stored information from the form in which it is ordinarily maintained to a different form that makes it more difficult or burdensome for the requesting party to use the information efficiently in litigation. If the responding party ordinarily maintains the information it is producing in a way that makes it searchable by electronic means, the information should not be produced in a form that removes or significantly degrades this feature.

Committee Note, Rule 34, Federal Rules of Civil Procedure

While the Appendix K default format appears to bring order to a contentious relationship amongst attorneys in discovery, it appears that it could easily empower and reward the obstinate attorney by increasing the cost and time of discovery. At a minimum, it may require attorneys to file additional motions to modify the default format to include those metadata fields necessary to electronically search, organize or render intelligible the electronically store information that they seek in discovery.

[Author's note: I have been practicing law for almost 25 years. For the past nine years, I have been assisting attorneys to identify, preserve, extract, understand, and produce electronically stored information. In that regard I have had to become knowledgeable about the data structures and organization of files, file systems and operating systems. I am confident that only an electronic evidence professional can understand the ever-changing technical characteristics of data resident on electronic devices, including personal computers, cell phones, thumb drives, blackberry, etc. As the devices proliferate on which electronic evidence resides, the future of litigation will require that electronic evidence professionals access and extract the evidence that attorneys will then use to litigate matters on behalf of their clients.]

Endnote

[1]See for example *U.S. v. Ganier,* No. 05-6350, Sixth Circuit Court of Appeals (decided and filed November 15, 2006) (explaining the manner in which search terms came to reside upon the defendant's computer, and the interpretation of searching software was an expert function, notwithstanding government's arguments that it was observations of a lay witness).

(Uneven odds, continued from page 11)

[13]The employee's "unique vulnerability" made a schedule change actionable in a 7th Circuit decision where the employee was required to take leave each day to care for her disabled son because of the revised schedule. *Washington v. Ill. Dept. of Revenue*, 420 F.3d 658 (7th Cir. 2005). This case was cited with approval in the *Burlington Northern* decision.

[14]*Jackson v. Birmingham Bd. Of Edu.*, 544 U.S. 167 (2005).

[15]*Phelan v. Cook County*, 463 F.3d 773 (7th Cir. 2006).

[16]*Czekalski v. Peters*, 475 F.3d 360 (D.C. Cir. 2007).

[17]*Lemaire v. La. Dep't of Transp. & Dev.*, 480 F.3d 383 (5th Cir. 2007); *Pryor v. Wolfe*, 196 F. App'x 260 (5th Cir. 2006); *Kessler v. Westchester County Dep't of Social Servs.*, 461 F.3d 199 (2nd Cir. 2006); *Moore v. City of Philadelphia*, 461 F.3d 331 (3d Cir. 2006); *Mickelson v. N.Y. Life Ins. Co.*, 460 F.3d 1304 (10th Cir. 2006); *Taylor v. Roche,* 196 F. App'x 799 (11th Cir. 2006); *Halfacre v. Home Depot, U.S.A., Inc.*, 221 F. App'x 424 (6th Cir. 2007).

Patricia A. Wise is an Ohio State Bar Association Board Certified Labor and Employment Law Specialist. She has also been appointed as special counsel for the Ohio Attorney General since 2003. In addition to her law practice, she has been a visiting professor at the University of Toledo College of Law since 2006, and was an adjunct professor from 1999-2006. She is also on the faculty of The Graduate School of Banking at the University of Wisconsin in Madison.

(Clerk's Corner, continued from page 5)

Submission of comments by e-mail is highly encouraged. They may be submitted to privacy comments@ao.uscourts.gov. Comments may be submitted through the U.S. mail to:

The Administrative Office of the U.S. Courts
Court Administration Policy Staff
Attn: Privacy Comments
Suite 4-560, One Columbus Circle N.E.
Washington, D.C. 20544

More information about the judiciary's privacy policy is available at www.privacy.uscourts.gov.

Transcripts of federal court proceedings nationwide to be available online

The Judicial Conference of the United States voted to make transcripts of federal district and bankruptcy court proceedings available online through the Judiciary's Public Access to Court Electronic Records (PACER) system.

Under the new policy, transcripts created by court reporters or transcribers will be available for inspection and copying in a clerk of court's office and for download from PACER 90 days after they are delivered to the clerk. Individuals will be able to view, download or print a copy of a transcript from PACER for 8 cents per page.

During the initial 90-day period, transcripts will be available at the clerk's office for inspection only or may be purchased from the court reporter or transcriber.

Implementation of the Case Management/Electronic Case Files (CM/ECF) system over the past decade has allowed remote electronic access to most federal case files. The only type of court document not yet publicly available online nationwide has been the transcript of court proceedings.

The conference also voted to continue implementing its cost-containment program by adopting a series of recommendations relating to law clerks and the judiciary's Court Personnel System in general. At its September 2004 session the Judicial Conference adopted a sweeping cost-containment strategy to help courts cope with projected funding shortfalls. In the last three years, steps have been taken to reduce the costs of courthouse rent, information technology, probation and pretrial services, and several other judiciary programs.

Continuing its cost-containment effort, the conference agreed to modernize its Court Personnel System benchmarks, which will affect the classification and grading of staff positions nationwide. It also voted to give local courts greater autonomy in managing and paying their personnel, and to develop national performance guidelines for local implementation.

With regard to law clerks, the conference agreed that each judge will be limited to one career law clerk. Those 291 career law clerks now in chambers where more than one career law clerk is employed will be able to retain their career status in those chambers, with the assent of their judge. In addition, any career law clerk now in place can be hired as a career law clerk by another judge, even if that judge already employs a career law clerk, if their current judge dies, retires, resigns or is otherwise unable to retain a law clerk. Most federal law clerks are "term" clerks and typically serve one or two years. "Career" law clerks are expected to serve four or more years. This new policy limits a term law clerk's term of employment to no more than four years, to be applied prospectively for current term law clerks. Another step replaces law clerk salary matching with a system aimed at achieving salary parity between those law clerks who gain their work experience within the judiciary and those who gain their experience outside the judiciary.

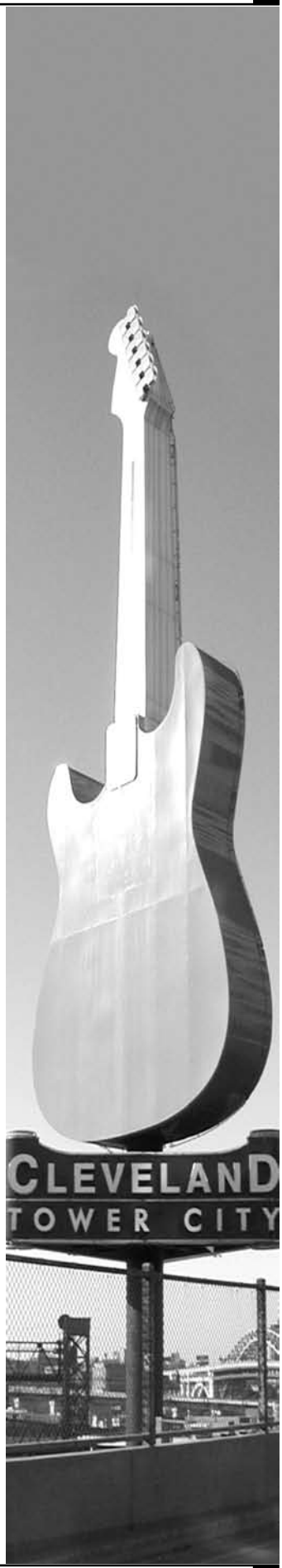
In other matters, the conference:

- Approved establishment of a joint pilot project in which the Government Printing Office and the Administrative Office of the U.S. Courts will provide free PACER access to the public at approximately 15 federal depository libraries.
- Encouraged district courts to examine how jurors are summoned and to consider adopting changes, if local circumstances permit, regarding how long jurors are on call or how frequently they are required to serve, to make their service on juries less burdensome.
- Voted to seek an amendment in federal law to increase from $1,000 to $5,000 the maximum civil penalty for employers who retaliate against employees serving on jury duty.
- Directed the various circuit judicial councils to continue implementation of the recommendations of the Judicial Conduct and Disability Act Study Committee, which was chaired by Justice Stephen Breyer, by encouraging the courts in their respective circuits to create committees of local lawyers to serve as intermediaries between individual lawyers and the formal complaint process; requiring all courts covered by the Judicial Conduct and Disability Act to provide information about filing a complaint on the homepage of the court Web site and take other steps to publicize the Act; and ensuring the submission of timely and accurate statistical information about complaint filing and terminations. This summer the Judicial Conference's Committee on Judicial Conduct and Disability released its draft Rules Governing Judicial Conduct and Disability Proceedings for 90 days of public comment, which

concluded Oct. 15, 2007. The committee also held a public hearing regarding the draft rules on Sept. 27, 2007, at the U.S. Courthouse in Brooklyn.

Are you looking for federal court statistics?
If you are looking for compiled statistics on federal court cases, the federal judiciary publishes them on the Web in two places. The official federal court Web site www.uscourts.gov has numerous statistical reports available free of charge. The reports are available for viewing at www.uscourts.gov/library/statisticsalreports.html. In addition, the PACER Service Center hosts a number of federal case statistical reports on the U.S. Party/Case Index. These reports include the F-2, F-5a, and the Civil Justice Reform Act reports. The historical F-2 reports show the total business and nonbusiness bankruptcy filings for multiple years by chapter, district and circuit. The F-5a provides a summary of the number of business and non-business bankruptcy petitions filed, by chapter of the bankruptcy code, for a 12-month period. It displays totals by county, as well as each circuit and judicial district. The Civil Justice Reform Act reports provide summary and detailed information on pending motions, bench trials, three-year-old cases, bankruptcy appeals and Social Security appeal cases. These files will be updated as new data are released by the administrative office. The reports are available under the menu option "Statistical Reports" on the U.S. Party/Case Index. The reports hosted on the U.S. Party/Case Index are available for 8 cents per page. If you have any questions or comments, please contact the PACER Service Center at pacer@psc.uscourts.gov.

Geri M. Smith *was appointed the Clerk of Court for the U.S. District Court Northern District of Ohio on July 1, 1991, having joined the Court in 1982. She serves as the chief administrative officer of the court as well as the administrative assistant to the Chief Judge.*



Welcome new chapter members!

June
Timothy Billick, John D. Clunk Co. LPA
Allen Bohnert, U.S. District Court Northern District of Ohio
Duncan Brown, U.S. Attorney's Office
Kristi Brown, John D. Clunk Co. LPA
Timothy Cleary, Cleary & Associates Co. LPA
Robert Folland, Thompson Hine LLP
Jason Hill, Connelly Jackson & Collier LLP
Edward Kramer, The Housing Advocates
Linda Lagunzad, Brent Coon & Associates
Klaus Luhta
Thomas Parker, Parker Leiby Hanna & Rasnick LLC
Ryan Reaves
Gregory Sasse, U.S. Attorney's Office
Peter Turner, Meyers Roman Friedberg & Lewis
Robert Van Der Velde, Eastern Michigan University
Philip Wiese, Buckingham Doolittle & Burroughs LLP
Deborah Wilcox, Baker & Hostetler LLP

July
Ann Marie Hawkins, Hawkins & Company LLC
Timothy Hanna, Parker Lieby Hanna & Rasnick LLC
Michael Hennenberg, Dinn Hochman & Potter LLC
Grant Monachino, Baker & Hostetler LLP
Philip Eichorn, Robert Brown LLC
Walter Rekstis, III, Squire Sanders & Dempsey LLP
Kristina Walter, Ian N. Friedman & Associates
Benjamin Yale, Yale Law Office
James Yavorcik, Cubbon & Associates Co. LPA

August
Jennifer Burke, Thompson Hine LLP

(Convention continued from page 2)

was Larry Thompson, formerly at Jones, Day and former U.S. deputy assistant attorney general under President Bush, and now general counsel for PepsiCo. Thompson spoke candidly about his concerns with department overreaching in pressuring corporations to assist government investigations, as his position was previously set forth in his "Thompson Memorandum."

The awards luncheon was kudos to our chapter. It won the highest FBA Presidential Chapter Award for its overall chapter activities throughout the year, the highest FBA Chapter Newsletter award, and a special award, the Ilene and Michael Shaw Public Service Award, which was presented to the chapter at Saturday evening's Presidential Banquet, for the chapter's "A Book of Your Own" project. Congratulations to Kip Bollin, Chris Carney and the chapter! Stan Fisher and Jim Satola presented the Elaine R. "Boots" Fisher Award to the Hon. Margaret McKeown, district court judge in San Diego, for her extensive efforts to protect the rights of immigrant workers and for her numerous contributions to local and regional charitable programs.

The Foundation Auction raised approximately $5,000 to benefit the charitable and

James Satola (NDOC), David Parham (NDOC and 6th Circuit VP), Aaron Bulloff (NDOC), and William LaForge (FBA national president).

educational activities of the Foundation. Approximately six to seven years ago, the Foundation had virtually no assets available for its legal policy and grants program. Today is has more than $400,000 to fund the various FBA Foundation programs.

The business meeting of the convention centered on the president's annual report; the board approved budget for 2008 (income and expenses of $2.96 million); the treasurer's July 31, 2007, report (total assets $2.65 million; total net assets $2.44 million); the Foundation's report; the Government Relations Committee's report (agenda for 2007-2008 attached); and a report on the status of the headquarters building.

The FBA is moving soon to new permanent quarters from its temporary rental quarters in Crystal City (Arlington), Va., to an office condominium unit in Clarendon (Arlington), Va. The old FBA building recently sold for a profit of almost $4 million. The new space, after build-out, will eventually return a possible $1.5 million to $2.5 million of that profit to the FBA Building Corporation's two shareholders, the Foundation of the FBA and the FBA itself. The new space is new; the old space had both layout and maintenance difficulties.

The final event installed James Richardson, of Washington, D.C., as president for 2007-2008. As noted earlier, the evening's presentation included our chapter's receipt of the Ilene and Michael Shaw Public Service Award for its books program. The FBA Sarah T. Hughes Civil Rights Award was presented to the Hon. Stephanie K. Seymour, the first woman appointed to the 10th Circuit Court of Appeals (Tulsa) as its recipient for her many contributions to protecting women's rights, prisoner's rights, and racial and cultural equality. The banquet concluded with two DJs and dancing to Def Leppard and other favorites.

See you next September in Huntsville, Ala., highlighted by the installation of Juanita Sales Lee as the next FBA president.

FEDERAL BAR ASSOCIATION
NORTHERN DISTRICT OF OHIO CHAPTER
ADMINISTRATIVE OFFICES
P.O. Box 16562
COLUMBUS, OH 43216-6562

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