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

Declawing the "Cat's Paw" Theory of Discrimination:

Examining the Latest Theory Behind Employment Discrimination Claims

by Dan Messeloff

A colorfully named new theory of employment discrimination is taking hold within federal courts around the country, including both the Sixth Circuit and the Northern District of Ohio. The "Cat's Paw" theory—in which an unwitting decision maker acts on behalf of a discriminatory supervisor—is not only drawing the attention of federal judges however, it is also providing attorneys for both employers and employees alike with new guidance for how to pursue, or avoid, discrimination claims.

As explained by the Sixth Circuit, the "Cat's Paw" theory finds its roots in the medieval fable made famous by French poet Jean La Fontaine, in which "a monkey convinces an unwitting cat to pull chestnuts from a hot fire. As the cat scoops the chestnuts from the fire one by one, burning his paw in the process, the monkey eagerly gobbles them up, leaving none for the cat."[1] In the context of employment discrimination, the "Cat's Paw" refers to "a situation in which a biased subordinate, who lacks decision-making power, uses the formal decision-maker as a dupe in a deliberate scheme to trigger a discriminatory employment action."[2]

This theory has been applied by the Sixth Circuit on several occasions, and it has also been applied by federal courts for both the Southern District and the Northern District of Ohio. In *Sextella-Wright v. Sandusky City School District* for example, the plaintiff, a principal in one of the defendant's elementary schools, claimed that she was discriminated against and retaliated against on the basis of her sex, among other grounds.[3] In particular, the plaintiff's contract was not renewed by the defendant's board members, although the plaintiff claimed that her own supervisor—who was not a board member—had acted in a discriminatory manner against her.[4] As such, the plaintiff sought "to impute the alleged animus of [her] supervisors … in influencing the Board's decision."[5] Judge Boyko held that, "if the neutral hiring authority acted as the conduit of the manager's prejudice—his cat's paw—the innocence of its members would not spare the company from liability. If, however, the hiring authority 'was not a mere rubber stamp, but made an independent decision to fire [the employee],' there would be no violation of federal anti-discrimination statutes."[6] Judge Boyko continued to add that, where a supervisor "set up [an employee]

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Dan Messeloff *is an associate in the Litigation and Labor & Employment practice areas with Ogletree, Deakins, Nash, Smoak & Stewart, P.C. He has played an integral role in the defense of several multimillion dollar employment lawsuits, including single-plaintiff discrimination claims as well as class and collective action claims against employers.*

Inter Alia is the newsletter of the Federal Bar Association Northern District of Ohio Chapter. It is published quarterly.

This issue of Inter Alia marks several "firsts." It is the first issue published in electronic format, and it is the first issue distributed to all attorneys admitted to practice in the U.S. District Court for the Northern District of Ohio. It is also the first edition in which the outgoing and incoming Chapter presidents have jointly published President's Podium messages—a "passing of the baton," if you will.

Our Chapter's new President, Carter Strang, and its officers and board members were sworn in on Oct. 7, 2009. Other than the President's Page comments by Carter and Ellen Toth, Immediate Past President, all articles in this edition of Inter Alia were submitted prior to and are reflective of Chapter titles as of the dates submitted.

You are encouraged to submit articles for future editions, to participate in our Chapter's events and to join our Chapter. See www.fba-ndohio.org for more information.

Fall 2009

President's Podium

By President Carter E. Strang

The FBA's motto is "Raising the Bar to New Heights." It is a motto our Chapter has followed and is descriptive of Ellen Toth's tenure as our President. I assure you that during my tenure as President, our Chapter will continue to raise the bar though innovative and varied activities/events that will further increase our presence in every corner of the Northern District of Ohio.

I thank Ellen, our officers and Board of Directors for all their hard work over the last year. I also want to thank everyone with U.S. District Court for the Northern District of Ohio, including Chief Judge James Carr and Clerk of Courts Geri Smith—we are truly blessed by the high level of participation by the judges and others with the Court in our Chapter activities/events.

Speaking of participation in our Chapter, I am excited to announce the addition of two Northern District of Ohio judges to our Chapter's Board of Directors. They are Magistrate Judge Benita Pearson and Magistrate Judge Greg White.

I also announce a first for our Chapter: the addition of Representatives to the Board of Directors. They include a citizen representative as well as law school representatives. All Chapter representatives will participate in Board of Directors meetings and will be invited to participate in all Chapter events.

Our citizen representative is Barb Paynter of Hennes Communications, who will assist with our Chapter's efforts to communicate effectively with its members and the public at large, thereby raising our profile in the community.

All the law schools in the Northern District have been invited—through the assistance of their respective deans—to assist in the selection of the law school representatives to the Board of Directors. The law school representatives include one for each school representing the faculty/administration and two representing law students (one 3L and one 2L). The law school representatives selected to date are listed in the Board of Directors/Representatives listing to the right.

Reaching out to the all the law schools in the Northern District through our representatives and events will increase our presence at the schools and in the communities they serve. It will also infuse our Chapter with new faces and ideas

A focus of our Chapter during my tenure as President will be on increasing our presence in Toledo, Akron, and Youngstown through CLEs, Brown Bag lunches and other events. We will more truly represent the Northern District as a result of our efforts. All the while, we will increase our profile in Cleveland, where the majority of our Chapter members presently live and practice law.

We will also have a signature project directly related to the practice of law. We will adopt a Cleveland Municipal Public School District mock trial team and prepare it to participate in the Cleveland Municipal Mock Trial competition in the spring of 2010.

Planning has already begun for additional members only Chapter events, including an "Evening at Severance Hall" in early August. Such events are free to Chapter members, and are another great reason (along with CLE and other discounts) to become a Chapter member.

We are looking forward to even more exciting and diverse events in 2009-2010.

- A joint program with the Cleveland Public Library on Oct. 26, 2009, featuring the co-authors of Picking Cotton, the true story of a rape victim and the man whom she identified as her rapist. He served eight years in prison until he was exonerated based on DNA evidence. Thanks to Dennis Terez and Ellen Toth for their work this on event.
- Our annual Advanced Federal Practice seminar on Nov. 6, with topics including MDL, consumer class action claims, e-discovery and corporate representative depositions. Judges Polster and Zouhary are featured participants in the program.
- Our annual Federal Employment Litigation CLE, featuring a presentation on the "Cat's Paw Theory" of proving discrimination. For a preview of this hot topic in employment law, see the article on page 1 by Dan Messeloff of Ogletree Deakins.

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I welcome your ideas and suggestions about how we can continue to follow our motto: "Raising the Bar to New Heights."

Carter E. Strang *is President of the Northern District of Ohio Chapter of the FBA. He is a partner in the Cleveland office of Tucker Ellis & West LLP. He is a trial lawyer who focuses on environmental, mass tort and product liability litigation. He has handled a broad range of matters in both state and federal court. He is a frequent lecturer and author regarding legal issues.*

President's Podium

By Immediate Past President Ellen Toth

As I end my year as President of the Northern District of Ohio Chapter of the FBA, I want to thank everyone for their support and participation in our Chapter. Our membership has grown, the number of chapter activities and programs has significantly increased and we have expanded the reach of our Chapter to sponsor more activities in Toledo, Akron and Youngstown. This has all led to the FBA being a more visible and vibrant voice in the legal community.

I sincerely appreciate the hard work and dedication of our 2008-2009 Officers— Carter Strang, President-Elect; Kip Bollin, Vice President; John Gerak, Secretary; Al Vondra, Treasurer and Tony LaCerva, Immediate Past President; as well as our Board of Directors. This core group of talented and hardworking attorneys has contributed leadership, ideas and many hours of their time to make this organization grow and strengthen over the past year. I thank outgoing Board of Director members Chris Carney, Robert Port, Hon. Nancy Vecchiarelli, Lori White Laisure and Al Vondra for their service.

I also want to thank the members of the bench in the Northern District of Ohio who have so generously devoted their time to our Chapter by speaking at our CLEs and other programs, writing articles for our *Inter Alia* newsletter and serving on our Board of Directors. We have also been fortunate to receive support from the Attorney Admissions Fund to help sponsor various programming throughout the year, including the recent State of the Court luncheon, the annual Summer Associate welcome reception, numerous Brown Bag lunches hosted by members of the N.D. Ohio bench and publication of *Inter Alia*.

We also had the opportunity in our 2008-2009 Chapter year to launch some new programs to our members, including:

- Our members-only Networking Breakfasts, which offer a chance for our members to meet face-to-face with other members to discuss their practice areas and emerging issues in the law. After hosting several Networking Breakfasts in Cleveland, we just hosted our first breakfast in Toledo and are planning one in Akron for this fall.
- Our New Lawyer Training Curriculum Series launched in 2009 and offered four seminars designed to train new practitioners on how to practice in federal court and meeting the new specialized New Lawyer training credits required for new attorneys in Ohio.
- In June, we presented our popular Advanced Federal Practice CLE in Toledo.
- In August, we held our "Party, Art and Law" event at the Cleveland Museum of Art— an exclusive, members-only event featuring a talk by S. Josh Knerly from Hahn Loeser and tours of the newly renovated museum.
- In September, we held our 4th Annual State of the Court Luncheon, which was attended by more than 430 attorneys from our district. Also in September, the Chapter presented a special Meet & Greet with Sister Helen Prejean, author of *Dead Man Walking: An Eyewitness Account of the Death Penalty in the United States*.

Thank you again for all of your support and encouragement this year. Good luck to Carter Strang as he takes over as President. I know he will have a fantastic year with all of your continued involvement and interest in the FBA.

Ellen Toth *is an attorney with Ogletree Deakins Nash Smoak & Stewart PC in Cleveland. Ms. Toth is Immediate Past President of the Northern District of Ohio Chapter of the FBA.*

Inside This Issue

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The Gavel

By Chief Judge James G. Carr

The Judge's Table

On the accession on August 15, 2009, of Circuit Judge Alice M. Batchelder as the second woman to serve as Chief Judge of the Sixth Circuit— and the first Chief Judge of that Court from Ohio since 1969, it seems appropriate to call to mind the first woman appointed to that Court and a treasured memento of her time on it.

The memento is an old, small, marble-topped table in the Cincinnati chambers of Senior Circuit Judge Cornelia Kennedy. As the second woman appointed to that Court, Judge Kennedy is a proud custodian of this artifact, the symbolism and significance of which considerably exceed its diminutive size.

This is the table on which U.S. Circuit Judge Florence Allen prepared her lunch—with the aid of a hotplate—while her male colleagues enjoyed a custom that continues to this day. The custom is that, while in Cincinnati for the Court's sessions, Judges of the Sixth Circuit have lunch together daily at Cincinnati's University Club. Judge Kennedy is among their company when they do. Judge Allen was not.

The custom is that, while in Cincinnati for the Court's sessions, Judges of the Sixth Circuit have lunch together daily at Cincinnati's University Club. Judge Kennedy is among their company when they do. Judge Allen was not.

When President Franklin Roosevelt appointed Florence Allen in 1934 as the first woman federal judge, the University Club welcomed and admitted only white males. So Judge Allen acquired the table to use in her chambers to prepare and have her solitary noontime meals.

Florence Allen was a remarkable woman. Born in 1884 in Salt Lake City and reared in the West, she was schooled in Ashtabula, Ohio. She attended Western Reserve University, from which she received a bachelor's degree in 1904 and master's degree in political science in 1906. Because that institution's law school—whose teachers later were to include Circuit Judge Karen Nelson Moore, and whose graduates were to include U.S. District Judge Kathleen M. O'Malley—did not admit women, Florence Allen attended the University of Chicago Law School for a year in 1909-10. The only woman among 100 students, she was second in her class.

Hoping to continue her legal studies at Columbia University, she had instead to enroll and graduate with her law degree from New York University. Columbia at that time did not admit women as law students. While at NYU, she became active in the suffrage movement.

She returned to Ohio and became an assistant Cuyahoga County prosecutor—the first woman to hold such position in the country. After adoption of the 19th Amendment, she was elected in 1920 by the largest majority ever then received as a judge of the Court of Common Pleas. She was the first woman to serve on a trial court of general jurisdiction in the country.

Her male colleagues greeted her with the suggestion that she be assigned domestic relations cases. She responded with the observation that, because she had never married, she was not nearly as well qualified as they for those assignments.

In 1922, Judge Allen stood for and was elected to a seat on the Supreme Court of Ohio, where, once again, she was the first woman in the country on a court at that level. She judged with distinction until President Roosevelt's nomination and senatorial confirmation in 1934.

Judge Allen served on the Sixth Circuit until retiring in 1959. During her last year of service, she was the Court's chief judge.

Mentioned from time to time as a possible nominee for a Supreme Court appointment, Judge Allen was

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Judge James G. Carr *is the Chief Judge of the U.S. District Court for the Northern District of Ohio. He has served as Chief Judge since 2005 and as a judge with the district court since 1994. He previously served as a magistrate judge with the Northern District of Ohio from 1978-1994.*

District Court Clerk's Corner

By Geri M. Smith

Nomination of Magistrate Judge Benita Y. Pearson to District Judge Vacancy —Youngstown

Magistrate Judge Benita Y. Pearson has been recommended by Sen. Sherrod Brown and Sen. George V. Voinovich to fill the district judge vacancy in Youngstown, Ohio. This vacancy was created when the Hon. Peter C. Economus took senior status on July 3, 2009. Judge Pearson began her eight-year term as Magistrate Judge with the Court in Akron, Ohio, on Aug. 29, 2008.

Change in Sixth Circuit Court of Appeals Chief Judge

Effective at noon on Friday, Aug. 14, 2009, Hon. Alice M. Batchelder of Medina, Ohio, became Chief Judge of the Sixth Circuit, succeeding Hon. Danny J. Boggs, who had served in that capacity since Oct. 1, 2003.

Magistrate Judge Vernellis K. Armstrong's Announced Retirement

United States Magistrate Judge Vernelis K. Armstrong, Toledo, advised the Court that she will be retiring Feb. 28, 2010. She will thereafter continue to perform her duties on "Recall" status, which is the equivalent for magistrate judges of senior status for district judges. The District Court presently anticipates securing approval in December to appoint a successor magistrate judge. Shortly thereafter, the vacancy announcement and application procedure will be publicized.

Modifications to LR 83.5 and LCrR 57.5 re: Admission to Practice

Local Civil Rule 83.5 and corresponding Local Criminal Rule 57.5 were modified in response to a Judicial Conference request that courts, both in regular and pro hac vice admissions, gather sufficient information to verify the state bar admission status of an applicant, and implement a procedure to verify that the information is correct.

The Court's procedure for processing regular admissions was already in compliance with Judicial Conference policy. However, attorneys seeking admission to practice pro hac vice will now be required to provide additional information including the name, admission date, and registration number for the highest state court to which they have been admitted as well as a statement regarding whether they have ever been disbarred, suspended or reprimanded by any court, department, bureau or commission.

If an attorney appears in a case and is not properly admitted to practice here, the Clerk's Office will docket the following notice:

> Notice to Attorney [NAME]. The Court finds no record of your being admitted to practice in the Northern District of Ohio. Pursuant to LR 83.5 or LCrR 57.5, please apply for admission or file a motion to be admitted pro hac vice within 10 business days. The local rules and the attorney admission application are available on the court's web site at: www.ohnd.uscourts.gov. If you are not the attorney of record in this case, file a motion to withdraw as attorney pursuant to LR 83.9 and LCrR 57.21 within 10 business days.

The modifications to the rules are listed below. The complete set of rules can be found at: www.ohnd.uscourts.gov/Clerk_s_Office/Local_Rules/local_rules.html

Local Civil Rule 83.5 and Local Criminal Rule 57.5 Admission of Attorneys to Practice In the Northern District of Ohio :

> **(h) <u>Permission to Participate in Particular Case</u>.** The Court's strong preference is that attorneys seek permanent admission to the Bar of this Court, however, any member in good standing of the Bar of any court of the United States or of the highest court of any state may, upon written or oral motion and payment of the pro hac vice admission fee (which is $100), be permitted to appear and participate in a particular case, or in a group of related cases. An attorney must pay the pro

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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. Smith is a member of the FBA-NDOC Board of Directors.*

Chapter's 4th Annual State of the Court Luncheon

The Chapter's 4th Annual State of the Court Luncheon took place at the Marriott Ballroom in Cleveland on Sept.14, 2009, and was attended by more than 430 attorneys. Chief Bankruptcy Judge Marilyn Shea-Stonum and Chief Judge James G. Carr provided overviews of their respective courts.

The Chapter presented its first Pillar of Justice Award to former Congressman Louis Stokes. The award is given to a person who "substantially contributed to the advancement of justice."

Carter Strang, Chapter President-Elect, introduced Louis Stokes by noting his rise from the Outwaite Public Housing Projects to the highest echelons of power in Congress, and his long and distinguished career as an attorney, which included the landmark 1968 Terry v. Ohio case argued before the U.S. Supreme Court, which addressed the limits of warrantless searches.

Louis Stokes, a 1953 Cleveland-Marshall College of Law graduate, spoke of his love for the practice of law and his use of it as a means to fight for justice for the poor of our society. In accepting the award, he said he did so on behalf of the many other attorneys who have also sought justice for their clients.

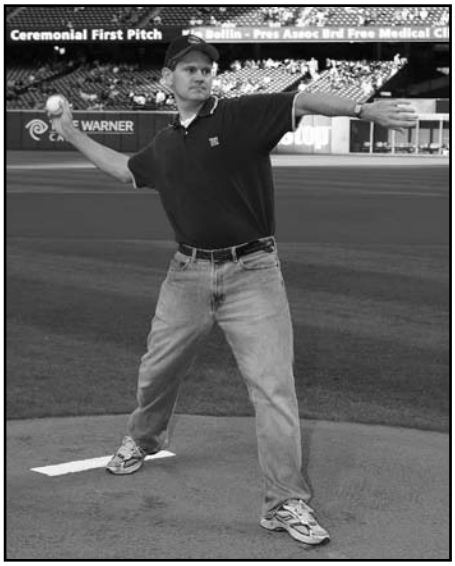
Louis Stokes served 30 years in Congress, beginning in 1969. He was the first African-American elected to the U.S. Congress from Ohio, a founder of the Congressional Black Caucus, and Chair of the House Select Committee on Assassinations and the Intelligence and Ethics Committees. He is presently Senior Counsel with Squire Sanders & Dempsey..

Carter Strang presents the Chapter's first Pillar of Justice Award to former Congressman Louis Stokes.

The 2009 State of the Court Luncheon Planning Committee Chair was Kip Bollin. Other committee members were Ellen Toth, Carter Strang, John Gerak and Steven Paffilas.

Pitching for a Good Cause

By Rocco I. Debitetto



On Sept. 11, 2009, Kip T. Bollin, President-elect of the Northern District of Ohio FBA Chapter, threw out the first pitch in the Cleveland Indians' home game against the Kansas City Royals. Bollin, a partner at Thompson Hine LLP, also serves as President of the Associate Board of the Free Medical Clinic of Greater Cleveland. The Free Clinic received a portion of all ticket sales for the game, enabling it to further its goal of providing quality health care services to the community free of charge. More information about the Free Clinic, including how to donate or volunteer, is available at www.thefreeclinic.org.

Rocco I. Debitetto, *Assistant Editor, Hahn Loeser & Parks LLP.*

FBA Brown Bag Luncheon Series

by Drew Odum and Adam Russ

The Northern District of Ohio Chapter of the Federal Bar Association sponsored two Brown Bag Luncheon events over the last several months as informal opportunities for members to meet judges of the Northern District of Ohio.

On April 22, 2009, the Hon. Patricia A. Gaughan shared her pet peeves of the legal profession with the nearly seventy members in attendance. Judge Gaughan offered substantive advice "from the bench" regarding such topics as trial briefs, temporary restraining orders and settlement conferences. For example, cautioning that many attorneys file improper trial briefs, Judge Gaughan noted that, like many judges, she sets forth specific requirements for trial briefs in each trial order and expects counsel to read those trial orders carefully. Also, Judge Gaughan advised that counsel should always be prepared in advance of attending a settlement conference. As for temporary restraining orders, Judge Gaughan believes that many are simply "not emergencies," and that any intended benefit from moving the Court for such relief may be outweighed by the judge's reaction to it.

Judge Gaughan also provided some best practices tips. She noted that professional courtesy goes a long way in the eyes of the Court. Judge Gaughan believes that, as advocates, attorneys should always look at each case objectively to see the "forest through the trees." Attorneys should refrain from filing motions merely out of rote procedure or merely because the parties cannot agree to scheduling details. Attorneys should never present misleading information to the Court, as it will read everything. Attorneys also should not merely cut and paste pleadings and briefs, as Judge Gaughan has read many that indicate the wrong parties, the wrong case number, and even the wrong judge.

The second Brown Bag Luncheon of the summer took place on Thursday, July 30, 2009, in the chambers of the Hon. Solomon Oliver Jr. With more than 60 people in attendance, Judge Oliver provided a candid glimpse into the inner workings of the mind of a judge and provided many useful tips for being successful in his courtroom.

As attorneys, one should become familiar with a judge's background, as it may provide valuable insight into how he or she views the world and potentially will interpret the applicable law. Judge Oliver discussed how growing up in the South during the civil rights movement and clerking with Judge William H. Hastie of the Third Circuit has helped shape his jurisprudence. He provided the audience with insight into what he expects to see from attorneys who enter his courtroom, as well as things he prefers not to see. Like Judge Gaughan, Judge Oliver expects all attorneys to appear on time and be prepared for case management conferences. He conducts the conferences himself and expects attorneys to be able to answer all reasonable questions about the case. He noted that too many attorneys show up unfamiliar with the merits of the case or of their client's settlement position. For settlements, he will try to resolve cases at the conference, but otherwise he will use the Court's mediation program. He also advised attorneys not to call the court and ask his clerks for decisions regarding a case. The judge made it clear that it is his courtroom. Like all judges, he makes the decisions, not his law clerks.

Drew Odum *is a 3L at Cleveland-Marshall College of Law. He clerked at the 8th District Court of Appeals this semester with the Honorable Judge Melody Stewart and at Tucker, Ellis & West LLP this past year. He is a Chapter Representative for Cleveland-Marshall.*

Adam Russ *is an associate in the Litigation and Labor & Employment practice areas with Frantz Ward LLP. His practice focuses on complex business litigation.*

Members in the News

FBA Chapter President Carter E. Strang, a partner with Tucker Ellis & West LLP, has been named a recipient of 2009 Ohio Association of Civil Trial Attorneys (OACTA) Distinguished Contributions to the Community Award. OACTA's award is given annually to members who "do wonderful things outside the practice of law with charitable groups and volunteer efforts to serve the community." The award will be presented on Nov. 12 at the OACTA Annual Meeting Awards Luncheon in Columbus.

Everything You Ever Wanted to Know About Filing a Qui Tam Under the False Claims Act

(but were afraid to ask)

By Alex Rokakis

"A billion here, a billion there, pretty soon it adds up to real money."

—Senator Everett Dirksen

"Oh what a tangled web we weave, when first we practice to deceive."

—Sir Walter Scott

It is no secret that the federal government has grown exponentially and there is no end in sight. According to White House data, the United States received a total of $588 million dollars in revenue in 1901, which will balloon to $2.7 trillion dollars by the end of the current fiscal year.[1] This 4,000 fold increase in revenue has resulted in a concomitant increase in spending, and not surprisingly, fraud by persons intent on illegally profiting from the United States. One of the most effective tools in this fight against fraud is the federal False Claims Act (FCA).[2] Passed during the Civil War and originally known as "Lincoln's Law" to recover monies from companies that defrauded the Union Army, the FCA has returned more than $21 billion dollars to the United States since 1987.[3]

The FCA provides what some believe are draconian penalties; treble damages and penalties of $5,500 to $11,000 per false claim for anyone who knowingly submits or causes to be submitted, a false or fraudulent claim to the United States.[4] For example, a contractor bills the United States through a series of invoices for airplane parts he has provided under a contract, which are required to meet certain specifications. The contractor submits a series of 12 invoices for payments totaling $20,000, which he knows are false because he has falsely certified that the parts meet the contract specifications. If the United States proves at trial that all of the claims for payment are false, the United States is entitled to recover treble damages, or three times the amount of payments for a total of $60,000. Additionally, the United States is entitled to recover at a minimum, $5,500 for each fraudulent claim for payment submitted, which equals $66,000, for a total of $126,000 owed the United States. In an action where the defendant submitted hundreds of false claims, the damages can quickly become astronomical. In one false claims act case filed by our office (not a qui tam), the defendants were trafficking in food stamps and the amount of stamps trafficked was more than $23 million. Arguably, using a broad definition of what constitutes a claim, each food stamp could be deemed a false claim, or alternatively, when the defendants deposited the food stamps in their bank accounts and redeemed them for cash, each deposit was a false claim for payment. It was estimated these deposits occurred hundreds of times over the course of a number of years. Because the number of false claims could not be calculated with any certainty, the United States moved for summary judgment requesting only treble damages and received a judgment against the defendants of $71,053,578.[5] It was estimated there at there were at least 3,120 false claims, which would have added an additional $17 million in damages, however, this was pointless because the defendants could not pay even a fraction of the smaller amount.[6]

The FCA underwent a major revision in 1986 and some additional revisions this past June.[7] As a result of the 1986 amendments and a greater awareness of the FCA, there has been a huge increase in the number of qui tams filed over the past 20 years. According to Justice Department statistics, in 1987 there were only 31 federal qui tams filed, peaking in 1999 with the filing of 493 cases. The FCA has been so successful that more than a dozen states have since passed their own versions of the law to recover state monies from wrongdoers, and Congress has rewarded states that have done so by allowing them to keep an additional 10 percent of monies recovered in Medicaid cases.[8] Additionally, it should be noted that the United States Attorney's Offices around the country and the Justice Department's Civil Frauds Section pursue numerous cases utilizing a False Claims Act theory of recovery despite the lack of the filing of a qui tam action. These are cases that have been initiated through various sources including cases arising from criminal prosecutions and complaints to the Office of Inspector General, Department of Health and Human Services. Since 1987, the Justice Department has recovered more than $4 billion on behalf of the Department of Health and Human Services in non-qui tam recoveries.[9]

False Claims Act cases come in two flavors: cases filed under seal by a private party, a qui tam action, and cases filed by the United States.[10] Both suits are prosecuted under the False Claims Act, but a qui tam action remains under seal while the Justice Department (the

Office of the U.S. Attorney and the Justice Department in Washington, D.C.) investigates the merits of the allegations. Perhaps the most important provision of the FCA (and the raison d'etre for this article) is the provision that a private citizen may file his or her own complaint under the statute and receive part of the recovery if the suit is successful, hence, the nickname, "whistleblower suit." Section 3730(b)(1) provides: "A person may bring a civil action for a violation of section 3729 for the person and for the United States Government." The FCA further provides an incentive for whistle-blowers to come forward and file suit.[11] In more than two dozen qui tams I have handled, every relator has been a disgruntled former employee who was upset his or her employer fired them and/or was upset his or her employer was cheating the United States. Each was always looking to cash in on the employer's wrongdoing. The person filing the suit, also known as the relator, is entitled to a portion of the proceeds ranging from 10 percent up to 30 percent, depending on whether or not the United States intervened, the assistance provided the United States if the government intervenes, or if the relator pursued the action on his or her own. Generally speaking, the better the quality of information provided by the relator and the more assistance provided to the Justice Department, the greater the percentage of recovery that will be awarded to the relator. Also, the difficulty encountered in recovering any money is also factored into the equation. Sometimes the fraud disclosed by the relator is sufficient to warrant the opening of a criminal investigation of the wrongdoer. If the criminal prosecution proceeds and the relator's assistance is crucial to both the criminal and civil cases, relator's counsel could make a strong argument that he or she is entitled to a greater share of the recovery.

Once the suit has been filed by the relator, the Justice Department has 60 days under the statute to decide whether or not it will intervene and prosecute the action on behalf of the United States.[12] Although this practice varies by district, it has been my experience with over two dozen qui tams that a FCA investigation takes a number of months and sometimes two or more years to fully investigate. In one case involving our office and other USAOs around the country, the qui tam case was prosecuted for almost 15 years because there were defendants throughout the country, millions of dollars were at stake, and the applicable facts and law were complicated. Whether or not a district court judge in your district will grant you adequate time to complete your investigation varies considerably around the country. If the Justice Department decides to intervene and prosecute the action, the relator now has the local U.S. Attorney's Office prosecuting the action and often an attorney from the Civil Frauds Section of the U.S. Department of Justice, Washington, D.C. Additionally, there are agents, usually criminal, from the involved agencies and in certain circumstances, an FBI agent. The amount of resources available to investigate the fraud depends on the resources in that district and the amount of the fraud alleged. If the Justice Department intervenes and the case is prosecuted by the United States, odds are the government and the relator stand a much better chance of recovering from the defendant.

According to Justice Department statistics kept since 1987, where the United States has declined to intervene, relators recovered a total of approximately $70 million dollars. However, where the United States has intervened, over $1.9 billion dollars has been paid to relators. It is clearly in the best interest of relator's counsel and the relator to prepare and file a complaint that convinces the local USAO and the Justice Department to intervene on behalf of the United States. The following guidelines are based on my own experiences with the qui tams I have handled over the past 14 years. Our office has intervened in less than half of the qui tam complaints filed in our district and the Department of Justice only intervenes in approximately 25 percent of qui tams filed. Following the simple rules below will hopefully not only increase your chances that the United States will intervene in the action, but additionally, are good rules of practice when filing any qui tam complaint, regardless of whether or not the United States intervenes.

1. Hit me with your best shot. First and foremost, do not file a case unless you believe it is viable. This may seem obvious, but it is not. Sometimes attorneys who have not filed qui tams before believe that they have nothing to lose by filing a complaint and everything to gain. Their faulty logic goes something like this: if the Justice Department investigates the case, intervenes, and recovers money, they will obtain a percentage of the recovery and the attorney fees provided for under the statute. Alternatively, if the USAO declines to intervene, they dismiss the case, and there's no harm, no foul. No matter how well the qui tam complaint is drafted, if the case lacks merit, the USAO will decline to intervene and you will be left to prosecute the action on your own. If at a later time you have another qui tam complaint to file, the Assistant U.S. Attorney (and possibly the district court judge) will likely remember the previous complaint that had no merit. With one exception, in

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Corporate Representative Depositions: Selection and Preparation

By Carter E. Strang and Arun J. Kottha

The selection and preparation of a corporate representative in response to a Rule 30 (b)(6) notice is of critical importance to the success or failure of the deposition. In this article—the second in a series on 30 (b)(6) depositions—important considerations in selection and preparation of a corporate representative will be discussed.[1]

Rule's Applicable Language

Rule 30 (b)(6) states, in applicable part, it is the noticed corporation's obligation to:

> [D]esignate one or more officers, directors, or managing agents, or other persons who consent to testify on its behalf, and may set forth, for each such person designated, the matters on which the person will testify.
>
> . . .
>
> The persons so designated shall testify as to matters known or reasonably available to the organization....

Pursuant to the Rule, the noticed corporation is obliged to provide "one or more" officers, directors, agents, employees or "other persons" (which may include former employees, experts, etc.) who "consent to testify" on its behalf in response to "matters known" or "reasonably available" to it. Once selected, such corporate representative(s) shall be "designated" (identified) as to each area of inquiry via a written response to the 30 (b)(6) notice.[2]

Counsel for the noticed corporation should take advantage of the opportunity to select and prepare the representative, who can then provide a compelling case as the "face" of the corporation. On the other hand, disaster can result for the noticed corporation where the selection or preparation is inadequate, leading to inaccurate testimony binding on the corporation, disclosure of work product/attorney client information, and/or sanctions.[3]

Duty to Provide a Knowledgeable Representative

The responding party has an obligation to: 1) "designate a deponent who is knowledgeable on the subject matter identified as the area of inquiry," 2) select "more than one deponent if multiple deponents are necessary to respond to all of the relevant areas of inquiry," 3) "prepare the deponent so that he or she can testify on matters not only within his or her personal knowledge, but also on matters reasonably known by [it]," and 4) "if it becomes apparent during the deposition that the designated deponent is unable to respond to the relevant areas of inquiry, [it] has the duty to substitute the designated deponent with a knowledgeable deponent."[4]

It is counsel for the noticed party, not counsel for the noticing party, that selects the representative(s) who will testify to the items in the notice. Thus, where counsel for the noticing party names—in its 30 (b)(6) notice—a specific corporate representative, requests a representative with "personal knowledge," or requests the person(s) "most knowledgeable," such notice is improper.[5] The Rule simply does not require such representatives be provided.[6]

Because the noticing party has a right under the Rule to know the noticed corporation's position on the items in the notice, the noticed corporation has "a duty to gather reasonable available information" to educate a representative—and thereby "create a spokesperson" if necessary—to be able to testify on behalf of the corporation.[7] The duty to educate means the noticed corporation must engage in "due inquiry," including searching its files and conducting interviews of its employees and officers, so that the representative is prepared to and can answer the questions "fully, completely, and unevasively."[8]

Corporate representative deposition responses of "I don't know" or "I don't remember/recall" equate to a failure to appear, creating a duty to substitute someone who does know or to the imposition of other sanctions.[9] Courts frown on corporations that try to play "hide the ball" with their representative by designation of someone with no knowledge where it is clear that others with knowledge could have been provided and were not.[10] However, for sanctions to be warranted "the inadequacies in a deponent's testimony must be egregious and not merely lacking in desired specificity in discrete areas."[11]

In a Southern District of Ohio case, the noticed party's representative knew "little or nothing" about many of the subjects described in the notice, which resulted in the noticing party filing a motion to compel.[12]

The court held the noticed corporation failed to meet its obligation to provide "an informed spokesperson" in response to the items in the notice so that the goal of "effective discovery" would not be thwarted.[13] It barred any later testimony by the corporation as to those responses that constituted a complete failure to respond, and ordered a replacement witness for those that were insufficiently answered.

In the best of circumstances, finding and preparing a corporate representative for deposition presents a challenge, but for certain types of cases (mass tort, environmental, etc.) with a long latency period and/or as a result of economic downturn, it may not be possible to find representatives with actual knowledge of some or all of the items in the notice.[14]

Commenting on this problem, one author noted after adoption of the Rule, "[o]rganizations began to discover that they simply did not employ persons with knowledge of the facts, as contemplated by the Rule" made worse by "the economic upheavals which began in the 1970s and resulted in lay-offs, downsizing, mergers and bankruptcies," which caused many corporations to "come up empty" when faced with the need to respond to a Rule 30 (b)(6) notice.[15]

In such situations, counsel for the noticed corporation may need to look to sources of information outside the corporation (former employees and officers, etc.) for use in educating the corporate representative and/or consider using such persons as their representative(s).[16]

It is generally held that a company cannot be "required to designate a retired employee to serve as a 30(b)(6) designee, because 'it cannot be supposed that ... former employees would identify their interests with those of their former employers to such an extent that admissions by them should be held to bind the employer.'"[17] Therefore, the noticed corporation is not obliged "to produce a non-party, such as a former employee, as a witness at a 30(b)(6) deposition," however it may at its option.[18] Such optional use of a former employee or any other person as a designee is fully permissible under the Rule.[19] As a last resort, where information is simply unavailable, the noticed corporation may assert its lack of corporate "memory"; however, in such cases, if the corporation intends to rely on third party testimony or documentation, the corporate deponent "must present an opinion as to why the corporation believes the facts so construed."[20]

Sometimes the person best able to provide information to the corporate representative is counsel for the noticed corporation.[21] That counsel's involvement, while central to proper preparation, needs to be considered in light of work product and attorney-client issues that are attendant to such preparation. These issues are the subject of the next article in this series.

Approaching a Rule 30 (b)(6) deposition like any other is a mistake. It will require more preparation time than a "typical" deposition because of its special nature, some of which has been addressed above (for example, a representative needs to be provided for every issue in the notice, even if lacking any personal knowledge). Information, including company records, prior depositions, and interviews with current and perhaps former employees/officers, will have to be located, reviewed, and analyzed so that the "corporate knowledge" regarding the noticed items is sufficiently clear to enable the representative to adequately prepare.[22] The potential representatives will then need to be screened, selected and prepared.

This process is likely to be very time consuming, so preparation for a 30 (b)(6) deposition should begin when the litigation is first filed, not upon receipt of the notice. Waiting until receipt of the notice will place counsel in a "catch up" mode that makes successful preparation less likely. Counsel is advised—even in the absence of a notice—to identify the likely issues that will be listed and engage in preparatory steps with the corporate client to anticipate such notice.[23] Such requested testimony for which the witness should be prepared includes the corporation's "subjective beliefs and opinions" including the corporation's "interpretation of documents" and its opinion on why facts should be construed a certain way.[24]

Selection of a representative is, clearly, of critical importance. As noted, it is the corporation's right—within limits, as discussed above—to select as its representative the person it feels "best suited" to be its spokesperson.[25] Factors to consider include not only familiarity with the noticed items, but also the person's demeanor and appearance, familiarity with the litigation process, and the ability of the representative to fully

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(Corporate representative depositions, continued from page 11)

devote the time and energy necessary to become fully prepared to testify and to work cooperatively with all involved with that process.[26]

In considering the number of representatives to use, time limits for such depositions should be considered. Each corporate representative deposition is limited to one day of seven hours of questioning without stipulation or leave of court.[27] However, where a single person is deposed in their personal and corporate representative capacities, presumptively two separate seven hour periods apply.[28] Further, for the purposes of the ten-deposition limit noted in the Civil Rules, a 30(b)(6) deposition counts as one, irrespective of how many people testify to fulfill the notice.[29]

It is important for counsel for the noticed corporation to control the selection and preparation process, including who talks to whom, about what, when, and in whose presence. A failure to control the process can exacerbate already problematic attorney-client and work product issues with such depositions.[30]

Scope of Testimony

In preparing the corporate representative, it is important to be aware of the permissible scope of the 30 (b)(6) deposition.

Generally, the scope of a Rule 30 (b)(6) deposition is as broad as Federal Rule 26 (b)(1) for the areas referenced in the notice. Thus, the corporate representative can be asked about any personal knowledge such person may have about the items referenced in the notice.[31] It is therefore imperative that as part of the preparation of such witness, counsel for the noticed party inform the witness of this fact, then discuss what personal knowledge the witness may have.

There is a split of authority as to whether the corporate representative must answer questions about which the deponent has personal knowledge but which are outside the scope of the notice.[32] Cases restricting questioning to the items identified in the notice state that to permit broader questioning would render the notice's "reasonable particularity" language meaningless.[33] Those permitting broader questioning note that Rule 30 (b)(6) was drafted to augment Rule 26, not replace it, and does not bar such inquiry.[34] Where it is permitted, the noticing party cannot allege "inadequate preparation" and request a different corporate representative be provided as to areas outside the notice.[35] Counsel for the noticed corporation should also discuss with the representative—as a component of the preparation process—how such questions will be handled at the deposition.

However, where the corporate representative is an officer or managing agent, and does answer questions based on personal knowledge that are outside the notice, the responses are binding on the corporation.[36]

Binding Testimony

As noted, the testimony of the corporate representative is binding on the corporation. However, it does not constitute a judicial admission on that party.[37] Generally, a 30 (b)(6) deposition is "evidence that, like any other deposition testimony, can be contradicted and used for impeachment."[38] However, a defendant corporation could not admit evidence showing it did not manufacture the product at issue to contradict the corporate representative's testimony that it had manufactured it, "absent showing that the company did not have access to relevant facts before the 30 (b)(6) deposition, or that the representative was confused or made an honest mistake."[39]

Judge O'Malley of our Northern District Court similarly permitted the admission of testimony by a corporate representative that contradicted the 30 (b)(6) testimony of its corporate representative, noting that "[g]enerally testimony from a 30 (b)(6) witness can be contradicted or used for impeachment at trial, just like any other deposition testimony."[40] However, Judge O'Malley drew a distinction between "more-responsive" and "non-responsive" corporate representative testimony, with the former being excludable:

> [I]t is only when a party first provides a non-responsive 30 (b)(6) deponent and later tries to call a more-responsive witness at trial that courts have excluded the witness.[41]

Thus, under such an analysis, providing a "responsive" 30 (b)(6) witness takes on an even more importance, because the responsive—but mistaken—testimony can be addressed by a later corporate witness; whereas, a failure to provide a "responsive" witness can negate such an attempt.

Duplicative Testimony/Documents

In responding to a 30 (b)(6) notice, the noticed corporation should consider designating prior deposition testimony and/or discovery response as responsive and binding on it, possibly obviating the need for a live witness to testify on the same subjects.[42] The party responding to the notice should do so by way of objection in response to the notice, asserting that the item(s) in the notice are duplicative, citing the prior testimony/documents.[43] If not done prior to the deposition, the noticed corporation risks losing the potential objection.[44]

If the noticing party receives such an objection, it should thoroughly analyze the proffered testimony/documents and determine whether it does, in fact, provide "verbatim" responses to the noticed items.

Courts are, however, reluctant to restrict the right of a party to conduct 30 (b)(6) depositions even where prior relevant depositions and documents may be available, though the decisions appear to be case-sensitive.[45]

Conclusion

Rule 30(b)(6) provides the mechanism for taking the deposition of a corporate representative. Such testimony is "binding" on the corporation. It is critical that the party responding to the notice provide a knowledgeable representative. Such preparation is likely to require considerable time and effort on the part of the corporate counsel to adequately prepare the witness, who may know little or nothing about the noticed items before such preparation. Adequate preparation includes inquiry about any personal knowledge the representative may have outside the notice and advance discussion about how counsel will direct the representative to respond to such inquiry. Counsel should also determine whether the notice is duplicative of prior discovery and whether to offer any such discovery in place of the noticed deposition, in whole or part.

Endnotes

[1]The first article was Corporate Representative Depositions: Notice Provisions of Rule 30 (b)(6)," co-authored by Carter E. Strang and Arun J. Kottha and published in the Spring, 2009 *Inter Alia*. It is available on the Chapter's Web site (www.fba-ndohio.org). As was true in the first article, "notice" shall be inclusive of subpoenas issued to non-parties, and the word "corporation" shall be inclusive of all the entities that can be noticed.

[2]The noticed corporation may designate as many representatives as necessary to enable it to fully respond to the notice. See *Phillips v. Manufacturers Hanover Trust Co.*, 1994 WL 116078, at *5 (S.D.N.Y.); U.S. v. Taylor, 166 F.R.D. 356, 360-361 (M.D.N.C. 1996). Time limit issues are discussed below.

[3]One commentator described the danger as the "modern equivalent to the Trojan horse" because the process seems innocent enough and too often is not sufficiently addressed by counsel for the corporation. See Bradley M. Elbein, *How Rule 30 (b)(6) Became A Trojan Horse: A Proposal for a Change*, FICC Quarterly, Vol. 46, No. 3, 365-378 (Spring 1996) (noting with particularity the work product and attorney client issues arising from preparation of such representative(s)).

[4]*U.S. ex rel Fago v. M & T Mort.Corp.*, 235 F.R.D. 11, 22–23 (D. D.C. 2006).

[5]Jerold Solovy & Robert Byman, *Discovery: Invoking Rule 30 (b)(6)*, NAT'L L.J., Oct. 26, 1998 at B13 (col. 1).; *Gucci America Inc. v. Exclusive Imports Int'l*, 2002 WL 1870293, at **8-9 (S.D.N.Y.) ("marginally adequate" witness was sufficient and did not require production of witness with actual knowledge); *Cruz v. Coach Stores, Inc.*, 1998 WL 812045, at *6 (S.D.N.Y.), vacated on other grounds by 202 F.3d 560 (2d Cir. 2000) (a prepared, not "most knowledgeable," witness is the Rule's requirement); *Reed v. Bennett*, 193 F.R.D. 689, 692 (D. Kan. 2000) (noticed party "is not required to designate someone with 'personal knowledge' to appear on its behalf at the Rule 30(b)(6) deposition."); but see discussion supra regarding a failure to provide a "responsive" witness, particularly where others were available but not produced. S.I. Schenkier, *Deposing Corporations and Other Fictive Persons: Some Thoughts on Rule 30 (b)(6), Litigation*, Vol. 29, No. 2, 23 (Winter 2003) (Magistrate Judge Schenkier of the Northern District of Illinois notes "you can search high and low in Rule 30 (b)(6) and not find a requirement that the corporation produce the 'most knowledgeable witness' "); Henry L. Hecht, *Effective Depositions*, 54 (1997) (need only provide deponent who can provide "complete, knowledgeable, and binding answers").

[6]Absent the egregious circumstances of the type seen in *Bucher, infra.*, the noticed corporation is generally free to select who it wants as its corporate representative, as discussed more fully below.

[7]*Elbein, supra*, at 368.

[8]See Candance A. Blydenbough, *Picking and Preparing Your Corporate Witness for Rule 30 (b)(6) Depositions*, Practical Litigator, Vol. 13, No. 4 (July 2002). *Mitsui v. Puerto Rico*, 93 F.R.D. 62, 67 (D.P.R. 1981); see also *Poole ex rel. Elliott v. Textron, Inc.*, 192 F.R.D. 494, 504 (D.Md. 2000) ("[A] corporation served with a Rule 30(b)(6) notice of deposition has a duty to produce such number of persons as will satisfy the request [and] more importantly, prepare them so that they may give complete, knowledgeable and binding answers on behalf of the corporation") (internal citation and quotation omitted).

[9]*Taylor, supra.* at 360-61 ("do not know" responses equate to a failure to appear); *Barron v. Caterpillar*, 168 FRD 175, 177 (E.D. Pa. 1996) (Rule 30 (b)(6) creates a duty to substitute—even if corporation had a good faith belief that the witness could properly respond); see also *Marker v. Union Fidelity Life Ins. Co.*, 125 F.R.D. 121, 126 (M.D.N.C. 1989); Mark A. Cymrot, *The Forgotten Rule*, Litigation, Vol. 18, No. 3 (Spring 1992); but see *EEOC v. American Int'l Group, Inc.*, Not Reported in F.Supp., 1994 WL 376052, at *3 (S.D.N.Y.) (deponent's inability to answer questions about the contents of an investigative file was not in violation of duty to adequately

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Changes Afoot on Drug Sentencing Laws

By Nick York and Michelle Waller

On April 29, 2009, Assistant Attorney General Lanny A. Breuer, head of the Department of Justice's Criminal Division, testified before the U.S. Senate's Committee on the Judiciary (Subcommittee on Crime and Drugs). His testimony was in common parlance a game changer in the area of federal criminal sentencing for drug-related crimes.

Echoing statements made by President Barack Obama prior to the November election, Breuer called for the elimination of the sentencing disparity between crack cocaine and powder cocaine crimes by challenging the 100-to-1 mandatory minimum sentencing ratio applicable to the two drugs. After analyzing the historical and statistical underpinnings of the sentencing disparity, Breuer concluded that:

> "this Administration believes that the current federal cocaine sentencing structure fails to appropriately reflect the differences and similarities between crack and powder cocaine, the offenses involving each form of the drug, and the goal of sentencing serious and major traffickers to significant prison sentences. We believe the structure is especially problematic because a growing number of citizens view it as fundamentally unfair. The Administration believes Congress's goal should be to completely eliminate the sentencing disparity between crack cocaine and powder cocaine."[1]

Attorney General Eric H. Holder Jr. further added to these winds of change by calling for a re-examination of some of the basic structures of the federal criminal sentencing system. In remarks in August at the American Bar Association's annual convention, the Attorney General challenged the Congress, the bench and the bar to create a criminal justice system that not only was tough on crime but also smart on crime. He brought into question a number of assumptions that have formed the underpinnings of our criminal justice system for many years.

One of the more far-reaching changes called for is a more deliberate consideration of alternatives to incarceration. "We will not focus exclusively on incarceration as the most effective means of protecting public safety. For although spending on prison construction continues to increase, public safety is not continuing to improve. Crime rates appear to have reached a plateau beyond which they no longer decline in response to increases in incarceration. Indeed, since 2003, spending on incarceration has continued to rise, but crime rates have flattened."[2]

The courts quickly reacted to these statements. Within three weeks after Assistant Attorney General Breuer's testimony before the Senate, a District Court in Iowa held that a 1-to-1 sentencing ratio was more appropriate.[3] The District Court for the District of Columbia in a lengthy analysis reached the same conclusion shortly thereafter.[4] Judges of our own District Court are reaching similar conclusions based in part on the historical and statistical information highlighted earlier this year by DOJ officials.[5]

Congress also quickly reacted. There are presently more than a half-dozen measures under consideration in the House and Senate in which some aspect of the drug sentencing laws is being dramatically reconsidered.[6] Whether a shift completely to a 1-to-1 sentencing ratio for crack and powder cocaine cases will occur remains to be seen.

Another issue that remains a question mark is whether any future legislation changing the 100-to-1 sentencing ratio for crack and powder cocaine crimes will have retroactive effect like the sentencing guideline amendments for crack cocaine cases promulgated by the United States Sentencing Commission towards the end of 2007. Congress will presumably need to note explicitly the retroactive effect of any such legislation in light of 1 U.S.C. §109, which provides in part that the "repeal of any statute shall not have the effect to release or extinguish any penalty ... under such statute, unless the repealing Act shall so expressly provide." While it is difficult at this time to imagine a Congress willing to take the political risk of applying such legislation retroactively, particularly given both the Executive and the Legislature's current primary focus on reforming health care in America, it is far too early in the process to rule out that possible result. Regardless of the exact nature of the change, judges and lawyers have already made sure that, following the Obama Administration's prompting, significant change is now afoot in the world of federal sentencing for drug-related crimes and possibly beyond.

Endnotes

[1]See judiciary.senate.gov/pdf/09 04 29BreuerTestimony.pdf, at 10.

[2]See www.usdoj.gov/ag/speeches/2009/ag speech 090803.html.

[3]*United States v. Gully*, 619 F. Supp. 2d 633 (N.D. Iowa, May 18, 2009).

[4]*United States v. Lewis*, 623 F. Supp. 2d 42 (D.D.C. June 9, 2009).
[5]See, e.g., *United States v. Raphael T. Griffin*, Case. No. 5:09CR08 (Gwin, J.).
[6]See, e.g., H.R. 1459: Fairness in Cocaine Sentencing Act of 2009; H.R. 3327: Ramos-Compean Justice Act of 2009; H.R. 2934: Common Sense in Sentencing Act of 2009; H.R. 18: Powder-Crack Cocaine Penalty Equalization Act of 2009; H.R. 265: Drug Sentencing Reform and Cocaine Kingpin Trafficking Act of 2009; H.R. 2178: Crack-Cocaine Equitable Sentencing Act of 2009; H.R. 1466: Major Drug Trafficking Prosecution Act of 2009; H.R. 3245: Fairness in Cocaine Sentencing Act of 2009; S. 495 and H.R. 1412: Justice Integrity Act of 2009; and S. 714: National Criminal Justice Act of 2009.

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Sister Helen Prejean Visits with FBA Members

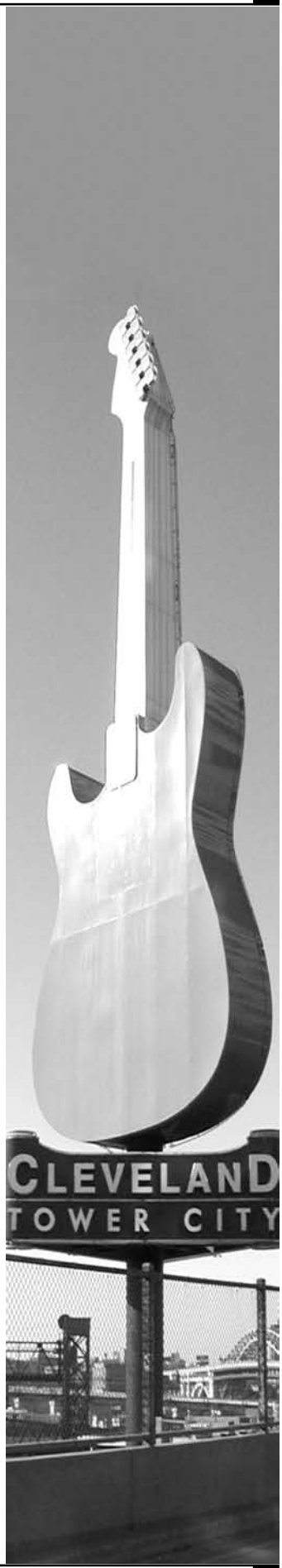
On Friday, Sept. 18, 2009, Sister Helen Prejean met with FBA members and other lawyers in town to share with them her thoughts regarding the death penalty in this country. Sister Prejean, who is a Roman Catholic nun and part of the Sisters of St. Joseph of Medaille, is one of the nation's foremost advocates for the abolition of the death penalty. She became internationally known for her work with death row inmates in Louisiana when her first book, "Dead Man Walking," was produced for the big screen by Hollywood producer Tim Robbins. The movie was nominated for four Academy Awards, winning one of them (Susan Sarandon for best actress in her role as Sister Prejean).

Sister Helen Prejean speaks to the attendees during the special meet and greet at Squire Sanders & Dempsey, LLP.

Sister Prejean was in Cleveland as part of Case Western Reserve University's constitutional law day events, and was this year's Frank J. Battisti Memorial Lecturer at CWRU's School of Law. The FBA had a meet-and-greet breakfast event in Sister Prejean's honor, hosted by Phil Calabrese at Squire, Sanders & Dempsey, LLP.

Sister Prejean's remarks were particularly timely during her visit. Earlier in the week, Governor Strickland gave a reprieve to Romell Broom because of problems encountered by prison officials when attempting to execute Mr. Broom. Sister Prejean used her visit to Cleveland to comment on the history of the death penalty in Ohio. Her visit included the FBA breakfast, a lecture at CWRU, and a presentation at the City Club of Cleveland as part of that organization's Friday luncheon series.

Sister Prejean's advocacy work against the death penalty is far-reaching. As part of her efforts to engage the public in a dialogue about the death penalty, Sister Prejean published a second book in 2004, "Death of Innocents: An Eyewitness Account of Wrongful Executions." In it, she recounts the execution of two individuals whom she believes were innocent of the crimes for which they were convicted. Sister Prejean is currently working on a third book that recounts her spiritual journey as she has furthered her advocacy against the death penalty. Her advocacy efforts are part of the Death Penalty Discourse Network, which she established. More information about Sister Prejean's efforts can be found at www.prejean.org.



The FBA Indian Law Conference, 34 Years and Shining Strong

By James W. Satola

This year's Federal Bar Association Annual Meeting and Convention, held in Oklahoma City Sept.10 through 12, featured an array of programs highlighting a unique and challenging area of the law faced by a number of federal practitioners. Indian law. In fact, a complete two day CLE track of the Annual Meeting was devoted to the area, with Thursday's opening day offering of programs on "Criminal Jurisdiction in Indian Country," "The Cherokee Freedmen," "Issues and Ethics for Lawyers Working with Corporate and Tribal General Counsel," and "Delivery of Veterans Services in Indian Country," followed by a Friday morning program on "The Roberts Court on Indian Law." Perhaps you attended the Annual Meeting, as I did, and learned more about this fascinating area of the law. But did you also know that for the past 34 years the Federal Bar Association has hosted the single largest Indian Law conference in the country, which now draws more than 750 attendees each year? It is a big deal. It is also an event every member of the Federal Bar Association should be proud of.

The 2009 FBA Indian Law Conference was held this past April 2 and 3, at the Hilton Santa Fe at Buffalo Thunder. The theme of the conference was "Coming Home to Indian Country." It is an apt title. This year marked the first time ever that the conference was held on the site of a tribal community, at the Pueblo of Pojoaque, just outside of Santa Fe, N.M. As a bit of background about the location, the Pueblo of Pojoaque is located in a rural, high desert area, approximately 12 miles north of Santa Fe. History traces its roots as occupied land to 1150 A.D. From 1540 to 1848, the Pueblo was under Spanish, then Mexican, domination. In 1848, it became a part of the United States, with its Spanish land grant confirmed by Congress in 1858, which was later patented by the United States in 1864. The grant of the Pueblo's land was confirmed as a quitclaim deed, and it has always been owned and held by the Pueblo in communal title— it has never been a federal reservation.

Our new FBA National President, Lawrence R. Baca, was chair of the FBA Indian Law Section for 15 years and for many years before that was chair of the FBA Indian Law Committee. In these roles, he has long been associated with the FBA Indian Law Conference. In fact, because of this association, many believe he was the founder of the Indian Law Conference. But, as Baca himself noted in an article for The Federal Lawyer a few years back, "Wuddn't me." The idea of the Indian Law Conference began with J. Thomas Ryland, the FBA's Executive Director from 1968 to 1986.

The first Indian Law Conference was held on May 25-26, 1976, at the Hyatt Regency in Phoenix, Ariz., and thereafter was held in Phoenix for nine of the first 10 years. In 1982, the conference's seventh year, the organizing committee decided to hold it in Fort Worth, Texas, to coincide with that year's FBA Annual Meeting. However, that year, only 75 people attended. In 1986 (in response to the State of Arizona's decision not to adopt observance of the Martin Luther King Day holiday), the Conference moved to Albuquerque, New Mexico, where it had been held ever since up until this year's meeting near Santa Fe. During the years the Indian Law Conference was in Albuquerque, a tradition developed of always having the Thursday evening reception as a barbecue at the Los Amigos Stables, a native-owned enterprise, with an indoor-outdoor dinner and dancing facility, including picnic tables and a dirt-and-sawdust floor on the inside and a welcoming bonfire out back.

Since its beginnings, the Indian Law Conference has tried to offer a mix of programming and speakers to represent each of the three government entities whose legal rights are impacted by Indian law—state, tribal and federal. Following that tradition, this year's conference featured programs on reservation-based economics, renewable energy, religious freedoms, environmental regulation, legal ethics, Supreme Court litigation and gaming.

The Conference has also sought to bring together those whose practices may have brought them to an unwitting introduction to Indian law. Capitalizing on such an audience became a successful marketing tool

created by current FBA President Lawrence Baca during his years as conference chair:

> Most lawyers who become involved in a case involving federal Indian law realize very quickly what they don't know. Trials take place when lawyers have been unable to find a way to settle a matter. If your case went to trial and the decision has been reported in the Federal Reporter, F. Supp., or F. Supp. 2nd, there is a high likelihood that one team of lawyers was probably schooled in Indian law the hard way; this is not an area of law that was offered at very many law schools. The committee tried to increase attendance uniquely: I suggested hiring temporary staff to review 10 years of the Federal Reporters and Supreme Court reporter and to collect the names of all the lawyers and law firms associated with these cases. The names were added to our mailing list, and attendance exploded.

Another road to success has been entering into partnerships with other Native American legal organizations to bolster each other's interests and audiences. For many years, the National Association of Indian Legal Services held its annual two-day training program in Albuquerque, N.M. on the two days preceding the FBA's Indian Law Conference so that attendees could attend both the training sessions and the Indian Law Conference without having to purchase two airfares. The National Native American Bar Association, the smallest of the national minority bar associations, schedules its annual meeting for the day following the conclusion of the Indian Law Conference.

The Conference has also had a long and fruitful association with the National Native American Law Student Association. To again borrow the words of Lawrence Baca:

> Subsidizing students to attend our programs at a reduced rate is like throwing grass seed on your lawn after a spring rain. The law students have a chance to meet people who can hire them or help them get hired. The students come back to the conference later as speakers themselves. And they also consider joining the FBA and becoming active members of the sections and divisions as well as chairs of the Indian Law Conference.

The Federal Bar Association's Indian Law Conference has been a fixed star in the FBA's programming constellation for 34 years. Here's hoping it shines on strong for another 34, and many more.

Author's Note: Due credit should be given where due credit is owed. Much of the information on the history of the FBA's Indian Law Conference was mined liberally from the fine article written by incoming (now installed) FBA National President Lawrence R. Baca, "Ignore the Man Behind the Curtain: A Brief History of Thirty Years of the Indian Law Conference," which appeared in the "At Sidebar" column of the March/April 2005 issue of *The Federal Lawyer.*

James W. Satola *is a senior attorney with Squire, Sanders & Dempsey, L.L.P., as well as a past president and current board member of the FBA Northern District of Ohio Chapter.*

Write an Article!

Members of the Northern District of Ohio Chapter of the Federal Bar Association are invited to submit an article for an upcoming issue.

If you are interested in writing an article, please contact me at (216) 706-3874 or sjett@taftlaw.com. **The deadline to receive articles for the Winter 2010 issue is Nov. 30.**

Stephen H. Jett
Taft Stettinius & Hollister LLP
2008-09 Newsletter Editor

Courtoon

Federal Defender-Federal Bar Criminal Practice Seminar

On Aug. 28, 2009, the Office of the Federal Public Defender held its annual Federal Criminal Practice Seminar, which our FBA chapter co-sponsored. The day-long program brought in presenters from around the country to discuss developments in federal criminal law and practical advice directed specifically at attorneys practicing criminal law in our Circuit. This year's large turn-out, with much of the capacity crowd of more than 400 people staying right to the end of the Friday program, reflected the popularity of this seminar.

As in previous years, the president of our chapter, Ellen Toth, welcomed the attendees to the program. Presenters this year included Lisa Monet Wayne, a prominent criminal defense lawyer in Colorado who lectures frequently across the country on trial tactics; Eric Voc, an assistant federal defender in Maine who writes and teaches on the topic of expert witnesses; J. Dean Carro from the University of Akron School of Law who provided an update on criminal law through a discussion of recent Supreme Court opinions; and Sumter Camp from the Middle District of Tennessee's Federal Public Defender Office who provided a similar update through a discussion of recent Sixth Circuit opinions.

This year marked a now three-year-long tradition for the annual seminar where the sitting president of the National Association of Criminal Defense Lawyers also served as a presenter. This year, Cynthia Hujar Orr was a presenter along with her partner, Gerald H. Goldstein, who is a former president of NACDL. Both lawyers discussed a range of issues including important developments in the area of white collar crime and Fourth Amendment protections.

Given the popularity of this year's program, five video replays have been scheduled: Friday, Nov. 13, 2009 (Rm. 114, U.S. Courthouse in Toledo and Rm. 345, Thomas D. Lambros U.S. Courthouse in Youngstown); Thursday, Oct. 29, 2009 and Friday, Dec. 4, 2009 (7th Floor Auditorium, Carl B. Stokes U.S. Courthouse in Cleveland); and Friday, December 11, 2009 (Rm. 578, John F. Seiberling Federal Building and U.S. Courthouse in Akron). The video replay programs begin at 8:30 a.m. at all locations. The program agenda and a registration form for the video replays can be found on the Court's website. See www.ohnd.uscourts.gov/Notice_of_Seminar.pdf. For further information, please contact Christine Sason at the Office of the Federal Public Defender, (216) 522-4856.

Top Litigators Speak at "A Whole Trial in 3 Hours" CLE

A veritable "Who's Who" of top litigators spoke at the Chapter's "A Whole Trial in 3 Hours CLE," held Sept.18, 2009, at the Carl Stokes Federal Courthouse in Cleveland, Ohio. The CLE was part of the Chapter's ongoing New Lawyer Training Curriculum.

The 58 attendees were treated to presentations by former Cuyahoga County Prosecutor John Mitchell, now Thompson Hine LLP, who talked about voir dire; former Oklahoma City bombing prosecutor, Geoffrey Mearns, who is Dean of Cleveland-Marshall College of Law and who discussed opening statements; Dennis Terez, Federal Public Defender and Chapter Board. member, who discussed examination of witnesses; and Ann Rowland, Assistant U.S. Attorney who is coordinating the Cuyahoga County corruption scandal and who discussed closing arguments.

Carter Strang and Ken Kowalski were program co-chairs. A reception followed the CLE, hosted by Legal Images and Rennillo Deposition & Discovery.

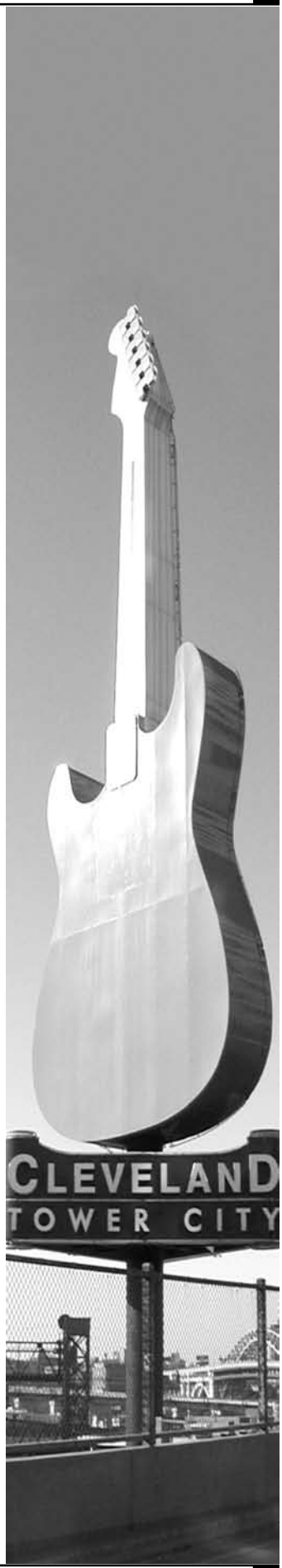
FBA on the Road

Aaron Bulloff, FBA member and a director for the Northern District of Ohio Chapter, recently traveled to Poland.

During his trip he was fortunate enough to visit Poland's Supreme Court, appearing in the top-right photograph. The front of the building and the right-hand pillars are a memorial to the August-September 1944 Polish uprising against the Nazis. Substantial resistance occurred precisely where the court stands.

The bottom-right photograph is a portion of the memorial reflecting soldiers being blessed by a priest before entering the sewers during battle.

Photo credits: Ania Osinska-Bulloff (top-right); Fran Bulloff (bottom-right).



Cooper & Walinski Hosts Toledo Inaugural Networking Breakfast

On Sept.15, 2009, Cooper & Walinski LPA hosted the first FBA Northern District of Ohio Chapter Networking Breakfast in Toledo. Judge David A. Katz welcomed everyone to the breakfast and spoke briefly about the virtues of FBA membership. President Ellen Toth thanked Margaret Lockhart as well as Cooper & Walinski, for hosting the inaugural breakfast. Ellen also noted that Judge Katz was the first judge ever to attend a networking breakfast. She also thanked all who attended the State of the Court Luncheon held the day before in Cleveland. Those in attendance at the breakfast introduced themselves and chatted about their areas of practice as they enjoyed fruit, pastries, coffee and juice.

A Night at The Museum

Art and Law Event at Cleveland Museum of Art

Art and the law merged as more than 100 FBA members and their guests were in attendance on Aug. 5, 2009, for the FBA's summer evening party at the newly reopened Cleveland Museum of Art. Members and their guests from across the district enjoyed casual conversation as the evening began with hors d'oeuvres, wine and beer. Members of the judiciary in attendance included former Judge Matia, Judge Polster, Magistrate Judge Gallas, with Geri Smith representing the Clerk's Office.

President Ellen Toth presented opening remarks on behalf of the FBA and thanked all who attended this special event. One of the event's organizers, Tony LaCerva, made brief remarks to the members in attendance noting the museum's newly opened East Wing. Aaron Bulloff, also a co-organizer for this event and the evening's photographer, could be seen snapping pictures of members as they enjoyed many of the delectable culinary delights on hand. Josh Knerly regaled the crowd with a brief but fascinating discussion on art and law before members were offered the opportunity to embark on tours of the 1916 Building. Collections ranging from the classic masters to the contemporary delighted those on the private guided tours.

The evening culminated with coffee and luscious desserts, as members continued to socialize and renew old acquaintances.

S. Josh Knerly Jr. of Hahn, Loeser & Parks, LLP leads a discussion on art and law.

Jessica and Jim Warren enjoy the evening with 2009-2010 FBA-NDOC President Carter Strang and his wife, Deedra.

Bracy Lewis and Annette Butler enjoy an evening at the Cleveland Museum of Art.

Welcome New Chapter Members

Frank Piscitelli, Attorney at Law
Matthew Stanley, Attorney at Law
Richard Charles, Attorney at Law
Jason Eshelman, Eshelman Legal Group
Mitchell Blair, Calfee Halter & Griswold LLP
Michael Drain, Attorney at Law
Robert Chudakoff, Ulmer & Berne LLP
Jack Landskroner, Landskroner Grieco & Madden Ltd.
Michael Hamed, Kushner & Hamed Co., LPA

(Cat's Paw, continued from page 1)

to fail," and then portrayed that employee to a decision maker "in the worst possible light," the decision maker's actions are "tainted by the supervisor's prejudice."[7] Although Judge Boyko found that the plaintiff did not meet her burden in establishing her supervisor's discriminatory animus, the lesson learned in this case, like so many others, is that an employer's "ignorance" does not insulate an employer from liability for a supervisor's discrimination.[8]

Practical advice for all employment attorneys to be gained from the "Cat's Paw" theory of discrimination is to train "decisionmakers," i.e., those employees who have the authority to make employment decisions on behalf of others, to conduct independent investigations and not to rely on only one source of information, the fabled "monkey," before implementing an adverse employment action.

End notes

[1]*Roberts v. Principi*, 283 Fed. Appx. 325, 2008 WL 2521094, *7 n.4 (6th Cir. June 25, 2008) (citing *EEOC v. BCI Coca-Cola Bottling Co.*, 450 F.3d 476, 484 (10th Cir.2006)).
[2]Id. See also *Arendale v. City of Memphis*, 519 F.3d 587, 604 n. 13 (6th Cir.2008) ("When an adverse hiring decision is made by a supervisor who lacks impermissible bias, but that supervisor was influenced by another individual who was motivated by such bias, this Court has held that the employer may be held liable under a 'rubber-stamp' or 'cat's paw' theory of liability.").
[3]2006 WL 3526792 (N.D. Ohio, Dec. 6, 2006).
[4]Id. at *9.
[5]Id.
[6]Id. at *10 (citations omitted).
[7]Id.
[8]Id.

For more insight into the Cat's Paw Theory, be sure to register for the FBA-NDOC Second Annual Federal Employment Litigation Seminar, which will be held Tuesday, Dec. 1. Julie Galassi, a partner from Hasselberg, Rock, Bell & Kuppler, LLP of Peoria, Ill., will be speaking on the topic. She will analyze the plaintiff's burden of proof in such cases and the split of authorities among the federal judicial circuits. Galassi is the plaintiff's attorney in the leading case on the subject from the 7th Circuit, *Staub v. Proctor Hospital*, 560 F.3d 647 (7th Cir. 2009). A petition for a writ of certiorari is currently pending before the U.S. Supreme Court.

For more information on the Dec. 1 CLE, go to www.fba-ndohio.org.

(The Gavel, continued from page 4)

aware and acknowledged that being a first had its limits. She knew, she said, "that a Supreme Court appointment will never happen to a woman while I am living." President Harry Truman, otherwise a model of presidential courage in so many realms and respects, was, according to some reports, dissuaded from nominating Judge Allen to our Highest Court by the opposition of the nine men on it at the time.

Judge Cornelia Kennedy is not only a proud custodian of Judge Allen's table: she is a worthy custodian as well. Appointed in 1970 by President Richard Nixon to the District Court for the Eastern District of Michigan as the fifth woman to be a federal judge (and Nixon's only female appointee), Judge Kennedy is a 1947 graduate of the University of Michigan Law School and the second female judge in the Sixth Circuit. Daughter of a lawyer, she met Judge Allen as either a law student or recent law graduate when she accompanied her father when he argued a case before the Court of Appeals. Appointed in 1979 by President Jimmy Carter to the Sixth Circuit Court, she was the first woman on that Court following Judge Allen, who had died in 1966.

When Judge Kennedy joined the Court, the University Club in Cincinnati still did not admit women. Someone suggested that her husband apply for membership, so that she could accompany her male colleagues at lunchtime. She declined that suggestion—and became the Club's first woman member.

Then Chief Judge Harry Phillips gave Judge Allen's table to Judge Kennedy. Recently she had a small brass plaque honoring Judge Allen affixed to the table's underside.

Women are no longer a novelty in our law schools or profession or on our federal or state courts. In addition to its present Chief Judge, our Circuit Court includes Senior Judge Margaret Craig Daughtrey and Judge Julia Gibbons from Tennessee, Judge Karen Nelson Moore and Judge Deborah Cook from Ohio, and Judge Helene White from Michigan. The nominee for Judge Daughtrey's position is also a woman.

Perhaps, and hopefully, in time Judge Allen's table will become more of a curio—an historical oddity—than the revered artifact that it presently is. But it still will be preserved, and remain an emblem of the determination, dedication and courage that met challenges, overcame difficulties, and, ultimately, gained equality that is, at last and forever, celebrated.

(District Court Clerk's Corner, continued from page 5)

hac vice admission fee each time he or she seeks pro hac vice status. A certificate of good standing **not older than 30 days** from the aforementioned court(s) or an affidavit swearing to applicant's current good standing must accompany the motion for admission pro hac vice along with a check for the pro hac vice admission fee payable to: Clerk, U.S. District Court. In addition to showing proof of current good standing, any attorney moving for admission pro hac vice must contemporaneously provide his or her typewritten name, address, telephone number, facsimile number, e-mail address, ~~and bar registration number~~ **highest state court admitted, highest state court admission date, highest state court bar registration number, a statement, including specific details, indicating whether the attorney has ever been disbarred or suspended from practice before any court, department, bureau or commission of any State or the United States, or has ever received any reprimand from any such court, department, bureau or commission pertaining to conduct or fitness as a member of the bar.**

(i) Change of Address. All attorneys admitted to practice in this Court are required to submit a written notice of a change of business address and/or e-mail address to the Clerk upon the change in address.

(j) Continuing Maintenance of Good Standing. It shall be requisite to the continuing eligibility of attorneys to practice in this Court that they are currently in good standing with the highest court of any state, territory, the District of Columbia, an insular possession, or in any district court of the United States, and that their private and professional characters appear to be good. All attorneys admitted to practice in this Court are deemed by their signature on any pleading, written motion, and other paper to certify that they are currently in good standing of the Bar of a Court of the United States or of the highest court of any state. **Should the status of an attorney change so that they are no longer in good standing in such court, they shall notify the Clerk of Court of this Court in writing no later than 10 days from the change in status.**

Court Calendar

You may not be aware that courtroom calendars are available from the home page of the Court's web site at www.ohnd.uscourts.gov. Using the menu on the right side of the page, click on "Courtroom Calendars" and select the desired location (Akron, Cleveland, Toledo, Youngstown). Information is provided for events scheduled over the next several days.

Information provided includes: case number, caption, type of proceeding, judge, room and time. Please note that proceedings are subject to change without notice. The direct Web addresses for the calendars are:

Akron
www.ohnd.uscourts.gov/daily_calendar/akron.htm

Cleveland
www.ohnd.uscourts.gov/daily_calendar/cleveland.htm

Toledo
www.ohnd.uscourts.gov/daily_calendar/toledo.htm

Youngstown
www.ohnd.uscourts.gov/daily_calendar/youngstown.htm

Electronic Public Access Program/PACER Assessment Currently Underway

The federal judiciary has undertaken a year-long, comprehensive program assessment. The goal of the assessment is to identify potential enhancements to existing services and new public access services that could be provided. They are gathering information through focus groups, interviews, and surveys. I am pleased to advise that representatives from the NDOH have been asked to participate in one of the focus groups.

Electronic Filing Update (CM/ECF)

The electronic filing system for the U.S. District Court for the Northern District of Ohio was upgraded to CM/ECF Version 4 on Saturday, Aug. 8. You can learn about the changes and new features by visiting the Court's electronic filing web page at: www.ohnd.uscourts.gov/Electronic_Filing/electronic_filing.html

Perhaps the most significant change has been made to the user interface for adding parties to a case. This change will be of particular interest to those who electronically file complaints and amended complaints. Attorneys and law firm staff who file new civil cases electronically should also review the new case opening documentation. The Web page includes:

1) A Guide to the new features for attorneys;
2) New case opening documentation;

3) A four-minute video demonstrating filing documents and attachments; and
4) A nine-minute video demonstrating case opening.

Temporary Judgeship

The Northern District of Ohio is served by 12 judgeships, one of which is a "temporary" judgeship, originally created in 1991. The current extension of the temporary judgeship expires with the first vacancy occurring on or after Nov. 14, 2009. On Sept. 8, 2009, Sen. Leahy introduced the Comprehensive Judgeship Bill, which includes a recommendation for a five-year extension, until 2014, for this judgeship. Should there be any risk of losing the temporary judgeship, we are hopeful, that, at a minimum, another one year extension of the judgeship will be sought as part of the appropriations bill.

Videoconferencing with BOP Milan and CCA/NEOCC Youngstown

Both facilities have completed construction and have installed videoconferencing equipment in multiple rooms. We have completed test calls to both facilities. Milan has provided its Standard Operating Procedures and is now live. CCA/NEOCC issued their Standard Operating Procedures (SOP), including email, phone numbers, and fax numbers to make reservations. We will be able to use these facilities for courtroom hearings (arraignments, guilty pleas), for inmate meetings with probation/pretrial officers and defense counsel, including CJA panel attorneys and the Office of the Federal Defender. More information regarding procedures and available locations for videoconferencing will be posted on the Court's website www.ohdn.uscourts.gov.

Time Changes Coming to Federal Rules Effective, Dec. 1, 2009

The Administrative Office of the U.S. Courts recently published the following article about the time change amendments to the Federal Rules:

> In March 2009, the Supreme Court approved amendments to Appellate Rule 26, Bankruptcy Rule 9006, Civil Rule 6, and Criminal Rule 45, to simplify the method of computing time deadlines in the federal rules. Consistent with these amendments, time periods in a total of 91 federal rules and 28 federal laws were also adjusted. Both the federal rules amendments, if Congress takes no action, and the legislation will take effect on December 1. The changes are intended to make calculating time periods simpler, clearer, and consistent. The current rules exclude intervening weekends and holidays for some short time periods, resulting in inconsistency and unnecessary complication," said Judge Lee H. Rosenthal, chair of the Judicial Conference Committee on Rules of Practice and Procedure. "For years, lawyers and litigants have complained that the rules governing how to calculate time periods and deadlines are inconsistent and unnecessarily confusing. The biggest problem came from excluding weekends and legal holidays when figuring out some deadlines but not others.

The Committee decided to change the method by which the deadlines in the Federal, Appellate, Bankruptcy, Civil, and Criminal Rules were computed. "Now, the amended rules are consistent and simple: count intervening weekends and holidays for all time periods," Rosenthal said.

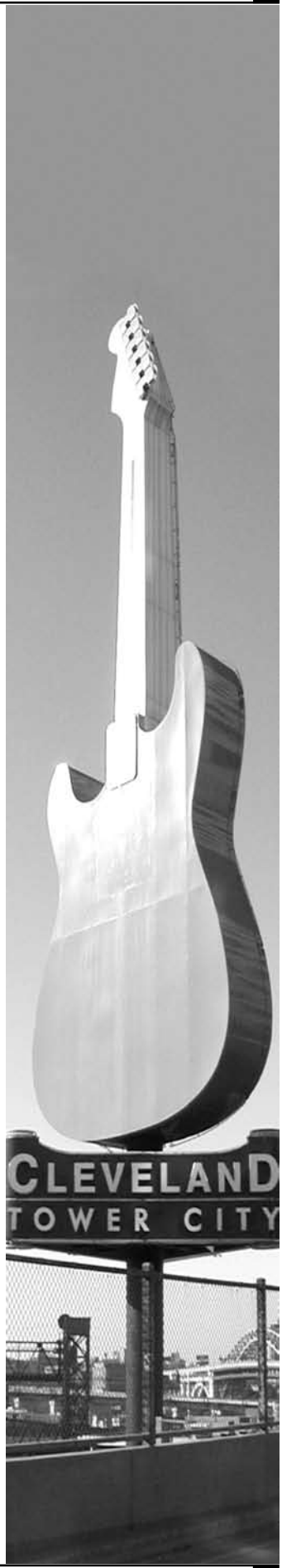
But including weekends and holidays effectively shortens many existing periods of less than 11 days in appellate, civil, and criminal proceedings, and 8 days in bankruptcy proceedings. In a major undertaking, the Committee looked at every time period in all the rules and made adjustments to take this into account. Most short periods were extended to offset the shift in the time-computation rules and to ensure that each period is reasonable. "Five-day periods became 7-day periods and 10-day periods became 14-day periods, in effect maintaining the status quo," said Rosenthal.

Periods shorter than 30 days were also revised to be multiples of 7 days, to reduce the likelihood of ending on weekends. Other changes to the federal time-computation rules affect how to tell when the last day of a period ends, how to compute hourly time periods, how to calculate a time period when the clerk's office is inaccessible, and how to compute backward-counted periods that end on a weekend or holiday. The Committee identified a number of statutes with time periods involving court filings and worked closely with Congress to make them consistent with the amended rules. Legislation was enacted in April 2009.

There is one more necessary step before the task is completed.

"The amended rules will affect some local rules and standing orders, especially those that set short deadlines," Rosenthal warned. "To maintain consistency with the national rules and to avoid confusion, we ask that courts review the time periods in their local rules and standing orders and make the necessary adjustments." She stressed the importance that the adjustments take effect on December 1, 2009, the same date as the national rules change.

(continued on page 24)



(District Court Clerk's Corner, continued from page 23)

The time-computation rules amendments are at www.uscourts.gov/rules.

A PowerPoint presentation explaining the amended rules and their operation in court proceedings is available at www.uscourts.gov/rules/presentations.html.

MDL Docket

The following multidistrict llitigation cases are before the Court:

2066 Oral Sodium Phosphate Solution-Based Products Liability (Aldrich) 1:09-sp-80000

2044 Vertrue Inc. Marketing and Sales Practices Litigation (Gaughan) 1:09-vm-75000

2003 National City Corp. Securities, Derivative and ERISA Litigation (Oliver) 1:08-nc-70000

2001 Whirlpool Corp. Front-Loading Washer Products Liability Litigation (Gwin) 1:08-wp-65000

1953 Heparin Products Liability Litigation (Carr) 1:08-hc-60000

1909 Gadolinium Contrast Dyes Products Liability Litigation (Polster) 1:08-gd-50000

1742 Ortho Evra Products Liability Litigation (Katz) 1:06-cv-40000

1535 Welding Fumes Products Liability (O'Malley) 1:03-cv-17000

1561 Travel Agent Commission Antitrust Litigation (Economus) 1:03-cv-30000

1490 Commercial Money Center, Inc., Equipment Lease Litigation (O'Malley) 1:02-cv-16000

Federal Courts Podcast Page Offers Listening Options

For those of you who have not checked it out, the judiciary now offers a new podcast page on its website, giving you the choice of listening on your computer, subscribing via RSS feed, downloading the MP3 to import into any MP3 player, or subscribing via iTunes. See www.uscourts.gov/podcasts/

Federal Holidays

Veterans Day Wednesday, Nov. 11
Thanksgiving Day Thursday, Nov.26
Christmas Day Friday, Dec. 25

(Qui Tam, continued from page 9)

every case I have handled where the United States has declined to intervene, relator's counsel subsequently dismissed the qui tam complaint without any further investigation or prosecution of the case. Perhaps relator's counsel never should have brought these cases; if the United States declined to intervene and the case was viable, relator's counsel could have pursued the action on their own.

2. Do Your Homework. Health care fraud is probably the most fertile area for qui tam filings; the majority of qui tams our office has received involve allegations of Medicare and Medicaid fraud.[13] A well-drafted health care fraud complaint should clearly explain the nature of the fraud and specifically reference which CPT codes are implicated.[14] Additionally, the complaint should, if at all possible, provide some calculation of the amount of damages to the United States based on the false claims submitted. If it is alleged that a physician is spending only five minutes with a patient (CPT code 99211) and is billing a 40-minute evaluation and management code (CPT code 99215), the complaint should specifically list all of the involved CPT codes and provide at least a ballpark calculation of the damages to the United States. If the relator cannot estimate the amount of damages with the help of their attorney, how can the assistant U.S. attorney assigned to the case be expected to make this same calculation? Although the assistant U.S. attorney will ultimately make his or her own calculation of the damages in question, it will help the investigation and give some credence to the complaint if an estimate of the amount of loss is included.

Some information may be obtained through a Freedom of Information Act request directed to your state's Medicaid program. For example, if the relator tells you that her employer, an oncologist, is up-coding the amount of time spent with patients under evaluation and management codes, you may request from your state Medicaid program the CPT data for the physician in question and the amount of money paid under that particular code.[15] Armed with this information, you should be able to get a better idea of the amount of the fraud. The same request may be made of the Medicare program through a Freedom of Information Act request to obtain the information required. Yes, admittedly, gathering all of this information may take weeks or even months, but you definitely want to put your best foot forward and this will help you to do that.

Under the statute, the relator serves the complaint and "written disclosure of substantially all material evidence" on the Government pursuant to Rule 4(d)(4) of the Federal Rules of Civil Procedure.[16] This written disclosure is commonly known as the "Confidential

Disclosure Statement"and is not filed with the Court.[17] In the disclosure statement, the relator provides all of the evidence in its possession to assist the United States in its investigation. In the disclosure statement, the relator has the opportunity to sell the Justice Department on the viability of their case. In this district, the USAO schedules a meeting to meet with the relator and his or her counsel to assess the case.

Although the assistant U.S. attorney will likely schedule a meeting to meet with the relator and the agents to discuss the allegations of the complaint, the disclosure statement should contain documents and evidence to show the United States that the case has merit. The disclosure statement should not be just a stack of documents; it should be a clear narrative of the fraud allegations—explaining the documents attached (hopefully)—of the alleged false claim, which trace the claim through the payment by the United States. The disclosure statement is your chance to make a good first impression as to why the case is viable. Do not waste this opportunity.

Be patient as the investigation progresses. Make an offer to help the assistant U.S. attorney and the Justice Department's attorney assigned to investigate the case along with the case agent(s). But investigations may take over a year if the allegations involve health care fraud. In many health care fraud cases, there are numerous steps involved. To investigate a health care fraud claim, it is usually necessary to sample some representative claims from the health care provider in question. The sample used to be known as a statistically valid random sample, but it is now known as a Statistical Sampling of Overpayment Estimation or SSOE. A statistician must be hired and an often immense amount of data must be requested from the contractor employed by CMS to begin the SSOE.[18] The statistician must then determine the sample size and how the claims will be examined or stratified, and then the claims must be chosen from the SSOE. Thereafter, all of the medical files in question must be requested from the provider being examined because they will require a review. Next, either the Medicare contractor or an expert will be hired to conduct a review of the files selected to determine whether or not the provider is fraudulently billing the Medicare/Medicaid program.

3. Follow the Money. The complaint should plead fraud with particularity. Although there have not been many Federal Rule of Civil Procedure 9(b) motions filed in our district, in many districts these motions are a real concern. If the United States intervenes, the assistant U.S. attorney may file his or her own complaint. Regardless, your complaint should be able to withstand a 9(b) motion. Also, the complaint should clearly delineate how the false claim is presented to the United States. The claim presented to the United States needs to be traced and explained. If a hospital submits a false claim for reimbursement, this is fairly straightforward; however, there are many times where the money trail is much more convoluted. What if the Department of Labor gives a training grant to a city that contracts with a private company to provide job training services? The private company then hires a subcontractor to do the actual job training. It is then alleged that the subcontractor did not provide the job training and is guilty of submitting a false claim. This is obviously more problematic.

4. Get Real. Although not directly related to the filing of the FCA complaint, relator's counsel should speak realistically to the relator about the chances for success and the potential recovery. I recall a relator who claimed that his whistle-blowing activities caused him to be black-balled from his industry and precluded him from getting additional employment in his field. The relator's life spiraled out of control and he believed the qui tam would be the ticket (first-class) to his financial success. Despite admonitions to the contrary, the relator pinned his hopes on the recovery from the qui tam. Because of a parallel criminal prosecution, the case took more than five years to complete and, although the relator received a six figure settlement, he filed bankruptcy and most of his settlement went to his creditors. Three and one half years after the case was settled, the relator now wants to re-visit the case arguing we should have recovered more for the United States (and the relator as well).

5. We have no secrets. The secret to filing a successful qui tam is that there are no secrets or shortcuts. When drafting a complaint, do more than cut and paste the standard FCA history and Medicare Program language from other FCA cases. Research your case thoroughly with your relator and put together a well-drafted complaint with a Confidential Disclosure Statement and documents that support your claims. Cooperate with the assistant U.S. attorney assigned to the case and be patient. The Justice Department often declines to intervene in qui tams; for the fiscal year ending 2008, the Justice Department intervened in 138 cases but declined to intervene in 566 cases.[19] If you follow the above guidelines, you certainly are not guaranteed success, but at least you have laid the groundwork for a successful qui tam.

The opinions and views expressed herein do not constitute the official policy of the Justice Department nor the Office of the U.S. Attorney, N.D., Ohio. Alex Rokakis has been an Assistant U.S. Attorney since 1987.

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(Qui Tam, continued from page 25)

Endnotes

[1]Historical Tables, Budget of the United States Government, Fiscal Year 2007, www.whitehouse.gov/omb/budget/fy2007/pdf/hist.pdf.

[2]31 U.S.C. §3729, et seq.

[3]United States Department of Justice Press Release, Nov. 10, 2008, www.usdoj.gov/opa/pr/2008/November/08-civ-992.html.

[4]Although the FCA states it is $5,000-10,000 per false claim, this amount has actually been increased to $5,500-11,000 per false claim under the Federal Civil Penalties Inflation Adjustment Act of 1990, 28 U.S.C. §2461.

[5]*United States of America v. Mohammed Salti, et al.*, U.S. Dist. Ct. No. 96CV1065.

[6]The defendants operated four grocery stores and it was estimated they made an average of 5 bank deposits at each store per week over the course of at least 3 years. This totaled 20 deposits X 156 weeks = 3,120 false claims X $5,500 = $17,160,000.

[7]The Fraud and Enforcement Recovery Act of 2009, FERA. The amendments broadened the definition of the presentment of a claim under the FCA, effectively reversing the Supreme Court decision in *Allison Engine Co. v. United States, ex rel. Sanders*, 128 S. Ct. 2123 (2008).

[8]In health care fraud cases if there is Medicare fraud, there is usually Medicaid fraud as well. Although state Medicaid programs are funded in part by individual states, the majority of the monies are federal. If there is a Medicaid recovery, the monies are split between the United States and the state on a pro rata basis (in Ohio the split is approximately 60 percent federal and 40 percent State of Ohio). But if a state passes its own FCA which is "[a]s effective in rewarding and facilitating qui tam actions for false or fraudulent claims as those described in sections 3730 through 3732 of Title 31," then that state may keep an additional 10 percent of the recovery for its own state coffers. 42 U.S.C. §1396h.

[9]www.usdoj.gov/opa/pr/2008/November/fraud-statistics1986-2008.htm.

[10]FCA cases are also commonly known as qui tam actions which is short for "'qui tam pro domino rege quam pro se ipso in hac parte sequitur,' which means 'who pursues this action on our Lord the King's behalf as well as his own.'" *Ragsdale v. Rubbermaid, Inc.*, 193 F.3d 1235, 1237 n.1 (11th Cir. 1999).

[11]Individuals may not, however, file qui tams pro se. *Stoner v. Santa Clara County Office of Educ.*, 502 F.3d 1116, 1127 (9th Cir.2007); *U.S. ex rel. Mergent Services v. Flaherty*, 540 F.3d 89 (2d Cir. 2008); *Timson v. Sampson*, 518 F.3d 870 (11th Cir. 2008); *U.S. ex rel. Brooks v. Lockheed Martin Corp.*, 237 F.ed. App'x. 802 (4th Cir. 2007).

[12]31 U.S.C. §3730(b)(2).

[13]According to Justice Department statistics, the best year for qui tam recoveries for the Department of Health and Human Services occurred in 2006 when $1,047,745,714 was recovered.

[14]Current Procedural Terminology (CPT) is an AMA listing of descriptive codes for reporting medical services and procedures performed by physicians.

[15]Up-coding is the practice of billing the provider a higher level of service than what is actually provided, i.e., billing for a 60 -minute office visit, when in fact, the service provided was only a 15 -minute office visit.

[16]31 U.S.C. §3730(b)(2).

[17]31 U.S.C. §3730 (b) (2).

[18]The Centers for Medicare and Medicaid Services (CMS) is the federal agency responsible for administering the federally funded Medicare and Medicaid Programs. It was formerly known as HCFA, or the Health Care Financing Administration.

[19]All of these cases were filed in various years and these totals are cumulative.

(Corporate Representative Depositions, continued from page 13)

prepare because Rule 30 (b)(6) "is not designed to be a memory contest . . . [and it is unreasonable] to expect any individual to remember every fact in an EEOC investigative file.").

[10]*FDIC v. Bucher*, 116 FRD 196, 199 (ED Tenn. 1986) aff'd, 116 FRD 203 (1987) (corporation engaged in "intransigent behavior," where it withheld a key "six-part memorandum" from the designated representative who was completely unprepared to discuss it where the employees who prepared the memorandum were available to testify about it); *Resolution Trust v. Southern*, 985 F. 2d 196, 196-198 (5th Cir. 1993) (sanctions were appropriate where the corporation possessed documents clearly identifying an employee as having personal knowledge of the subject of the deposition, but where it did not furnish those documents or designate the employee until after it had designated two other employees "who possessed no knowledge relevant to the subject matters identified in the Rule 30(b)(6) notice").

[11]Kent Sinclair and Roger P. Fendrich, *Discovering Corporate Knowledge and Contentions: Rethinking Rule 30 (b)(6) and Alternative Mechanisms*, 50 Ala. L. Rev. 651, 674 (1999) (internal quotation and citation omitted).

[12]*Prosonic Corporation v. Stafford*, 2008 WL 2323528, at *1-2 (S.D. Ohio).

[13]Id.

[14]The notice may, as an example, request a representative to identify all company practices or procedures that go back some half-century or more ago.

[15]*Elbein, supra*, at 367-368.

[16]See *Kiryas Joel Local Dev. Corp. v. Insurance Co*. of North America, 1991 WL 41667, at *2 (S.D.N.Y. 1991) (use of former employee who consents to testify).

[17]Sinclair and Fendrich, *supra*, at 665 (internal quotation and citation omitted); Lapenna v. Upjohn Co. 110 F.R.D. 15, 23 (E.D. Pa. 1986); but see *Sierra Rutile Ltd. v. Katz*, 1995 WL 9312 (S.D.N.Y.) (court ordered use of former employee as corporate representative).

[18]*Sinclair, supra*.

[19]Id.

[20]*Taylor, supra*, at 361.

[21]The same can be said for in-house counsel for the noticed corporation.

[22]*Dravo Corp. v. Liberty Mut. Ins. Co.*, 164 F.R.D. 70, 75 (D. Neb. 1995); see also *Buycks-Roberson v. Citibank Federal Sav. Bank*, 162 F.R.D. 338, 343 (N.D. Ill. 1995).

[23]Such efforts can nicely dovetail with other discovery preparation (responses to interrogatories, requests for production, etc.).

[24]Joseph W. Hovermill and Matthew T. Wagman, *When Nobody Knows What the Company "Knows": A Look at the Options Available to a Company in Meeting its Rule 30 (b) (6) Obligations While Protecting its Best Interests*, For the Defense, Toxic Torts and Environmental Law, DRI, 52-56 (Nov 2008).

[25]See n. 8, *supra* (duty to provide person who can provide "meaningful" information about the noticed issues, not the "most knowledgeable"). American Bar Association Civil Discovery Standards, §V(19).

[26]30 (b)(6) depositions are usually videotaped by the noticing party and as a result, have a "long shelf life," which makes the representative's appearance and demeanor even more important. Blydenburgh, supra, provides a nice practical overview of the selection and preparation process, including how to work with in-house counsel, including a "check list" for the process.

[27]Siegrun D. Kane, Trademark law: a practitioner's guide §14.17.3 (4th Ed. 2002) (citing Fed. Civ. R. 30(d), advisory committee note).

[28]Id. (citing *Sabre v. First Dominion Capital, LLC*, 2001 WL 1590544 (S.D.N.Y.)).

[29]Id. (citing Fed. Civ. R. 30(a), advisory committee note).

[30]Again, work product and attorney client issues will be addressed in the next article in this series; however, see *Blydenburgh, supra*, and *Elbein, supra* for their discussion of the issue.

[31]Counsel for the noticing party should, of course, be sure to inquire about any personal knowledge at the deposition, just as he/she should inquire about all with, or formerly, with the corporation that may have any knowledge about the items in the notice.

[32]See *Paporelli v. Prudential Ins.*, 308 FRD 727 (D. Mass. 1985) (held such questioning is not permitted); and *King v. Pratt & Whitney*, 161 FRD 475 (S.D. Fla. 1995), aff'd without opinion, 213 F. 3d 247 (11 Cir. 2000) (permitting such questioning).

[33]See *Paporelli, supra*.

[34]See *King, supra*.

[35]Id. at 476.

[36]*GTE Products v. Gee*, 115 FRD 67, 69 (D. Mass 1987).

[37]*Ruth v. A.O. Smith Corp.*, 2006 WL 53388, at *10 (N.D. Ohio).

[38]*Industrial Hard Chrome, LTD v. Hetran*, 92 F. Supp. 2d 786, 790; see also *Hyde v. Stanley Tools*, 107 F.Supp.2d 992, 992-993 (E.D. La. 2000) ("[W]here the non-movant in a motion for summary judgment submits an affidavit which directly contradicts an earlier [30(b)(6)] deposition and the movant has relied upon…the prior deposition, courts may disregard the later affidavit" however, "[c]ourts have allowed a contradictory or inconsistent affidavit to nonetheless be admitted if it is accompanied by a reasonable explanation.").

[39]*Hyde v. Stanley, supra* at 992.

[40]*Ruth, supra* (court permitted the opposing party to: 1) introduce the corporate representative's testimony in its case-in-chief, 2) tell the jury the second witness for the corporation was not designated until after the 30 (b)(6) deponent had been deposed, and 3) use the 30 (b)(6) testimony for "any other relevant purpose" including impeachment of the 30 (b)(6) witness).

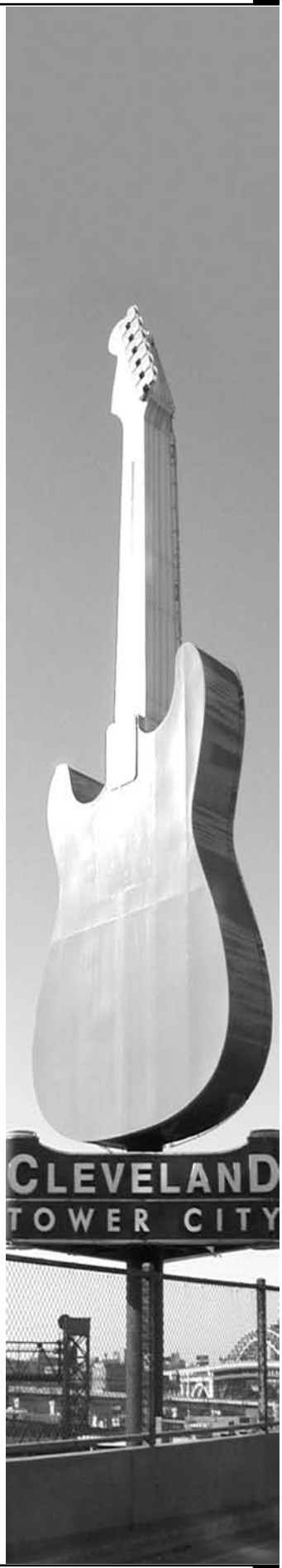
[41]Id.(emphasis in original).

[42]*E.E.O.C. v. Boeing Co.*, 2007 WL 1146446, at *2 (D.Ariz.); but see where the topics listed in the 30 (b)(6) notice are duplicative of information sought via other discovery mechanisms, the Court allowed the repetitive testimony subject to Rule 26(c) ("undue burden or expense"); however, the Court noted "the clock is ticking against the seven-hour limit in Rule 30(d)(2), and every moment wasted on a useless question is lost and cannot be used to ask a meaningful question."

[43]*Prosonic Corp. v. Stafforn, supra*, at *4.

[44]Id.

[45]*Fresenius Medical Care Holdings, Inc. v. Roxane Laboratories, Inc.*, 2007 WL 1026439, at *1 (S.D. Ohio) (court permitted 30 (b)(6) depositions after prior individual depositions of same corporate officers that covered same issues (or could have) to be addressed in Rule 30 (b)(6) notice, noting "unfortunately" there is nothing in the rules "which requires the parties to conduct their discovery in the most efficient way possible," absent "countervailing circumstances," such circumstances require a showing that the questioning would be "unduly or unreasonably"—not just "somewhat"—burdensome or duplicative or that the burden of the discovery outweighs its benefit).



Calendar of Events

November 13
New Lawyer Training Curriculum Seminar, "What You Need to Know About … ," Cleveland

November 14
Brief Advice and Referral Clinic, Cleveland

December 1
Federal Employment Litigation Seminar, Cleveland

December 7-9, 2009
CLE Seminar Video Replay Week, Cleveland

December 11, 2009
2010, A Law Oddity—Ethics, Professionalism and Substance Abuse Seminar, Cleveland

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