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

New Avenues for Advocacy after Booker

by Dennis G. Terez

The Supreme Court's landmark decision of *United States v. Booker* 11 months ago made this past year very interesting for litigators in criminal law.[1] By making the federal sentencing guidelines advisory rather than mandatory, the Supreme Court dramatically expanded opportunities for advocacy by both the plaintiff and the defendant. Two areas where that expansion is perhaps most noticeable are sentencing mitigation and sentencing enhancement.

Prior to *Booker*, the sentencing guidelines and case law restricted prosecutors and defense counsel in their efforts to seek adjustments in guideline sentences. Some guidelines spell out so-called specific offense characteristics that allow for upward or downward adjustments in sentences depending on the nature of the characteristics. At the time of sentencing, counsel advocated these enhancements if the facts supported their position, and the decision as to whether the specific offense characteristic applied was left to the sentencing judge.

In addition to specific offense characteristics, chapter 5, part K of the guidelines describes categories of conduct or facts that may warrant a sentence either higher or lower than the calculated guideline range. These grounds for departures are based largely on the nature of the crime or the characteristics of the defendant relevant to the crime. For example, a downward departure might be sought if the defendant was coerced into the criminal conduct. An upward departure might be appropriate if the defendant was the leader in a criminal enterprise. This sentencing guideline chapter and related statutes also give the government authority to seek a downward departure if the defendant provides the government with substantial assistance in investigating criminal conduct.

From time to time, statutory restrictions trump the guidelines, which in turn reduces the lawyers' opportunities to advocate on behalf of their clients. The scenario where this occurs most often is when a defendant faces a mandatory minimum sentence. Statutory mandatory minimum sentences apply regardless of facts that may support a ground for a downward departure. One example is the penalty for gun possession when the defendant already has three prior felony convictions for serious crimes of violence. The facts may strongly and undisputably support a substantial downward departure, but the statutory penalty of a mandatory minimum 15 years of imprisonment must nevertheless be applied.[2] A similar situation applies to drug trafficking cases, except that in those instances the government (not the defendant) may seek a downward sentencing departure below the mandatory minimum sentence specified by statute if the defendant has provided the government with substantial assistance.

By eliminating the mandatory nature of the sentencing guidelines, *Booker* changed significantly the opportunity for advocacy at the sentencing phase. All of the grounds for possible upward and downward departures under the sentencing guidelines are still valid. Indeed, the Supreme Court instructed that the guidelines must still be considered even if they are advisory. But the government now is not limited to a defendant's leadership role in a crime or other explicit guideline enhancement as a basis for requesting an upward departure in a sentence. Furthermore, the government is no longer limited to the set guideline offense level adjustments for specific offense characteristics that increase a defendant's sentencing exposure. If the sentencing guideline calculation results in an adjusted offense level of, say, 12 for a mail order scam but the victims most hurt by the crime were the elderly, nothing (with the exception of language in a plea agreement as discussed below) prevents the government from arguing for a sentence above the guideline range.

The defense also has new opportunities for advocacy. Drug addiction or distressed family circumstances, for instance, are normally not grounds for a downward departure from the sentencing guidelines. That avenue is now open since *Booker*. Possible grounds for departures indeed are limited for the most part only by the lawyer's creativity.

A good example of such creativity in sentencing advocacy is a booklet entitled *108 Easy Mitigating Factors* by Michael R. Levine of Portland, Ore.[3] The booklet does precisely what the title promises: It lays out more than 100 possible grounds for sentencing variances—in other words, sentences outside the calculated guideline range. Admittedly, a case may provide facts to support only one or two grounds for departure, if that. Nevertheless, booklets such as this one provide lawyers with creative ways to address some of the new opportunities for advocacy that *Booker* created.

Lawyers practicing criminal law should bear in mind three important cautions related to these burgeoning opportunities for advocacy. First, at least from the

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Winter 2006

The President's Corner

by Lori White Laisure

On Oct. 20, 2005, the chapter had its installation ceremony at the House of Blues. Chief Judge James Carr swore in the Board of Directors. In his remarks afterwards, Chief Judge Carr announced that he is in the process of creating a statewide liaison between the Ohio State Bar Association, Federal Bar Association, CCA and seven metropolitan bar chapters and wanted representation from our chapter. Two of our board members volunteered to help: Kenneth Bravo, Ulmer & Berne LLP, and Anthony LaCerva, McDonald Hopkins LLP.

The ceremony was very special for me because I was sworn in by my father, Ret. Chief Judge George W. White. If any of you remember practicing before my father, I'm sure you can recall that although he was serious on the bench, his demeanor off the bench was usually jovial. He often used laughter as a means of getting lawyers to talk and, if they could talk, then maybe they could resolve whatever dispute was pending. I was expecting him to tell a joke and conclude by congratulating the board of directors. Instead, he spoke about "Tikun Olam," the imperative to repair the world by employing the values of justice, compassion and peace. His message was echoing the sentiment expressed in an article by Robyn Spalter, the national FBA President, "Tikun Olam: Aiding and Rebuilding a Legal Community" (*The Federal Lawyer*, October, 2005). Spalter's article discussed the FBA's establishment of a fund within the foundation of the FBA, to aid our members affected by Hurricane Katrina. This chapter volunteered to help by donating $1,000 to the foundation to assist members affected by Hurricane Katrina. But our community outreach efforts have not stopped there.

The chapter is sponsoring the Credit Abuse Resistance Education program (CARE). The CARE program is designed to promote financial education to help college students improve their money management skills. The chapter has partnered with North Central State College. The CARE financial education series was held in November and December. For more information, see www.ncstatecollege.edu- "Credit Abuse Resistance Series." The chapter has also stepped up to help Cleveland Public Schools with our Books For Kids Initiative chaired by Kip Bollin of Thompson Hine, LLP. The chapter has partnered with the Cleveland Bar Association to deliver new and gently used books to several local schools. In addition, the chapter participated in the Cleveland-Marshall College of Law networking event, which was chaired by Timothy Duff of Berns, Ockner & Greenberger LLC.

The chapter continues to assist the legal community by offering quality continuing legal education. On Nov. 18, 2005, the chapter sponsored a unique CLE, "Handling The Media: Lawyers, The Press, And The Courts." The judiciary speakers included Chief Judge Carr, Judge Nugent and Judge Vecchiarelli. The chair of this CLE was Carter Strang of Tucker, Ellis & West. Our annual ethics seminar was held Dec. 9, 2005. The chair of this CLE was Jim Satola of Squires, Sanders & Dempsey.

Historically, this chapter has served as a model nationwide. I believe that is in large part due to the quality of our board of directors and support we receive from our judiciary. Please visit our Web site at www.fedbar.org, NDOH Chapter, and see all the exciting events we have planned for this year.

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A Book of Your Own

by Kip T. Bollin

Magistrate Judge Patricia Hemann and Judge Morgenstern-Clarren began reading to children in Cleveland schools about 10 years ago. As part of their project, the judges would give the students books throughout the year with the thought that they could add to their own libraries at home. The judges quickly learned, however, that the children by and large did not have personal libraries to add to. Indeed, most of the children had no books at home. So in the middle of the night (literally), Judge Hemann hatched a plan to collect new and gently used books from the legal community to give to students for their home libraries. It is a great way for adults to revisit their favorite books and for parents and children to go through bookshelves together.

Judge Hemann called on the Northern District of Ohio Chapter of the Federal Bar Association, and the chapter's Younger Lawyer Division (YLD) members to help make her vision a reality. As this issue goes to press, together, we are collecting books from law firms and offices in Northeast Ohio.

More specifically, the FBA is contacting lawyers across the area and asking for new and "gently used" books appropriate for students, grades K-8. The books will be reviewed, sorted and then distributed by the Judge and FBA lawyer volunteers to media specialists at Cleveland city schools, who will in turn give the books as gifts or awards to students. Through the project, some students might be receiving their first books, and it is hoped that over time as the students' interest in reading grows, they will have the beginnings of a personal library to nurture that interest.

The book collection took place throughout December and will proceed in tandem with another book project that Judge Hemann has appropriately named "Books For Kids" that is being organized and run by the Cleveland Bar Association's Justice For All program. The CBA is collecting donations that will be used to help stock the libraries of several Cleveland public schools.

With the FBA on board, Judge Hemann is now raising her expectations "I originally told Kip my goal for 2005 was 5,000 books, but I think that was way too low," said Judge Hemann, "my jury room can easily accommodate 10,000."

So how can you help?

The YLD does need your help. We have tried to reach out to as many law firms and offices as possible, but we may have missed yours. If you do not know who the FBA/CBA book coordinator is at your office (or if you do not have one), contact us. If you want to help with the collecting, sorting and/or delivery of the books to the schools, let us know. Finally, if you have new or "gently-used" books (or new or gently-used dollars) to donate, bring them to your office and help fill the book box. If you missed the drop-off in December and would still like to donate books, please contact Kip Bollin at Kip.Bollin@ThompsonHine.com. We will make sure the books get to the students who need them.

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New Developments on the Coolidge Front

By David A. Campbell

Perhaps no Ohio Supreme Court decision has created so much stir in the employment law setting over the last five years as *Coolidge v. Riverdale Local School District*.[1] Based on the *Coolidge* Court's continued references to "public policy," many believed that the *Coolidge* decision represented a landmark holding in the context of common law wrongful discharge claims. However, recent decisions addressing *Coolidge* have proved otherwise.

Coolidge v. Riverdale Local School District

In *Coolidge*, the Ohio Supreme Court reviewed the absenteeism-based discharge of a public school teacher who was receiving ongoing temporary total disability compensation under the Workers' Compensation Act. The teacher's temporary total disability was the result of an injury suffered by the teacher when she was assaulted by one of her students. The teacher was provided with a leave of absence following the injury. However, after the teacher exhausted all available leave and she was unable to return to work, the school board voted to consider terminating the teacher's contract. Pursuant to R.C. 3319.16, the teacher demanded a hearing before a hearing officer.

The hearing officer found good and just cause for the discharge—failure to return to work following the expiration of all available leave time. Thereafter, the school board terminated the teacher's contract. The teacher appealed the board's order of termination to the Hancock County Court of Common Pleas. Although the trial court sided with the teacher, the court of appeals reversed, finding that good and just cause existed.

The issue before the *Coolidge* Court was whether good and just cause existed under R.C. 3319.16 for the termination of the school teacher's contract. Although the *Coolidge* Court reviewed Ohio's "public policy," the teacher was not asserting a common law public policy claim. Rather, the claim was one in contract and the public policy was reviewed to determine whether good and just cause was present. The *Coolidge* Court adopted the minority rule and held that the teacher's contract was terminated unlawfully.

Chamber of Horrors

The common law wrongful discharge claim was first recognized by the Ohio Supreme Court in *Greeley v. Miami Valley Maint*.[2] The Greeley Court found that a wrongful discharge claim is "an exception to the employment-at-will doctrine," and will, under certain circumstances, permit a discharged employee to maintain an action for wrongful discharge.[3]

Failing to recognize that the plaintiff in *Coolidge* was not asserting a common law wrongful discharge claim, both the employee and employer bars believed that the *Coolidge* Court created a new cause of action unrestrained by prior Supreme Court holdings. First, because the teacher in *Coolidge* was employed pursuant to a contract, many believed that *Coolidge* implicitly overruled the Supreme Court's prior decision in *Haynes v. Zoological Society of Cincinnati*.[4] The Haynes Court held that "in order for an employee to bring a cause of action pursuant to *Greeley v. Miami Valley Maintenance Contractors, Inc.* that employee must have been an employee at will."[5] Second, many argued that *Coolidge* was a public policy distinct from the statutory workers' compensation retaliation claim, R.C. 4123.90, and that plaintiffs asserting *Coolidge* claims did not have to comply with the strict time requirements of R.C. 4123.90 (prelitigation letter must be received by employer within 90 days of adverse action and the litigation must be initiated within 180 days of the adverse action).

Recent Decisions Addressing Coolidge

Recent Ohio and federal court decisions have proven the chamber of horrors' argument wrong. First, Ohio and federal courts have uniformly rejected the argument that *Coolidge* implicitly overruled the requirement that only at-will employees may assert wrongful discharge claims. No less than eight post-*Coolidge* state and federal court decisions have held that only at-will employees may assert a common law wrongful discharge claim.[6]

The most relevant of these decisions is the Summit County Court of Appeals decision in *Deadwyler v. Akron Pub. Sch*.[7] As in *Coolidge*, the plaintiff in *Deadwyler* was a public school teacher employed pursuant to a contract. Unlike *Coolidge*, the plaintiff in *Deadwyler* asserted a common law wrongful discharge claim. The *Deadwyler* court rejected the common law cause of action because the teacher was employed pursuant to a contract:

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(Coolidge, continued from page 10)

> Deadwyler was a teacher and was subject to a contract for his employment. Contrary to Deadwyler's arguments, the contract was not at-will employment, because, as the trial court stated in the record, it was for a specific term: September 2000 until June 2001. Therefore, Deadwyler's remedy lies in contract subject to R.C. 3319.16 and not in a common law cause of action.[8]

The argument that a *Coolidge* claim is distinct from the statutory workers' compensation claim has also been soundly rejected. In *Brooks v. Qualchoice, Inc.*, the Cuyahoga County Court of Appeals recently addressed the interrelationship between *Coolidge* and R.C. 4123.90.[9] The plaintiff in *Brooks* alleged that she was terminated in violation of *Coolidge*, but she failed to comply with the notice and time requirements of R.C. 4123.90. The *Brooks* court explicitly rejected the argument that *Coolidge* created a new cause of action that exempted the plaintiff from compliance with R.C. 4123.90—"Coolidge does not create a public policy exception for absenteeism to at-will employment situations." Rather, the court held that *Coolidge* simply "expanded the type of action that constitutes retaliation under R.C. 4123.90. . . ." Based on this finding, the *Brooks* court affirmed the dismissal of the plaintiff's complaint, holding that the plaintiff's failure to comply with R.C. 4123.90 was fatal to her cause of action.

The *Brooks* holding is consistent with an Aug. 10, 2005, decision of the Summit County Court of Appeals in *Coon v. Technical Construction Specialties, Inc.*[10] In *Coon*, the plaintiff asserted both a statutory R.C. 4123.90 claim as well as a common law wrongful discharge claim based on *Coolidge*. At the trial court level, a jury awarded the plaintiff damages and attorney fees in excess of $100,000. On appeal, the *Coon* court reversed the verdict, holding that a plaintiff may not piggyback a common law wrongful discharge claim on a statutory R.C. 4123.90 claim because the statute provided an adequate remedy. Based on this holding, the verdict was reversed because R.C. 4123.90 does not give a plaintiff the right to a jury.

Current State Of *Coolidge*

Although the Ohio Supreme Court has not yet had the opportunity to clarify its holding in *Coolidge*, the great weight of authority limits the holding to a mere expansion of rights under R.C. 4123.90. Specifically, R.C. 4123.90 now prohibits the termination of an employee on temporary total disability leave for absenteeism. However, *Coolidge* plaintiffs must comply with the notice and timeliness requirements of R.C. 4123.90. Moreover, *Coolidge* plaintiffs are limited to the remedies set forth in R.C. 4123.90 and cannot piggyback common law wrongful discharge claims.

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[1]100 Ohio St.3d 141 (2003).
[2]*Contractors, Inc.*, 49 Ohio St.3d 228 (1990).
[3]49 Ohio St.3d at 233-234.
[4]73 Ohio St.3d 254 (1995).
[5]*Haynes*, 73 Ohio St.3d at Syllabus (emphasis added).
[6]*See Ferguson v. Lear Corp.*, 155 Ohio App.3d 677, 685 (Erie Co. 2003); *Scarabino v. East Liverpool City Hospital*, 155 Ohio App.3d 576, 583 (Columbiana Co. 2003); *Deadwyler v. Akron Pub. Sch.*, No. 21549, 2003 WL 23094837, at *3 (Summit Cty. Dec. 31, 2003); *Collins v. Yellow Freight System, Inc.*, 93 Fed.Appx. 854, 863 (6th Cir. March 30, 2004); *Creusere v. Board of Education*, 88 Fed.Appx. 813, 823 (6th Cir. Dec. 18, 2003); *Lawrence v. Dixon Ticonderoga Co.*, 305 F.Supp.2d 806, fn1 (N.D.Ohio 2004); *Humenik v. Dietrich Industries*, Case No. 4:04CV319, 2005 WL 1123549, *4 (N.D.Ohio 2005).
[7]No. 21549, 2003 WL 23094837, at *3 (Summit Cty. Dec. 31, 2003).
[8]*Id.* at *3 (cites omitted).
[9]Case No. 85692, 2005 WL 2386479 (Cuyahoga Co. Sept. 29, 2005).
[10]Case No. 22317, 2005 WL 1875811 (Summit Co. Aug. 10, 2005).

Fisher Receives Award

David A. Schaefer (left) presents Stanley Fisher (right) with the Federal Bar Association Northern District of Ohio Chapter inaugural Lifetime Achievement Award for his dedication to the FBA. A special reception was held for him Aug. 4, 2005.

Clerk's Corner

by Geri M. Smith

The Hon. Lesley Wells
The Hon. Lesley Wells has advised the court of her intentions to take senior status when eligible, Feb. 14, 2006. At that time, another vacancy will be created on our bench, in addition to the current vacancy created in the Western Division, when the Hon. David A. Katz took senior status on Jan. 1, 2005. Judge Wells relocated from her chambers in the Carl B. Stokes Court House, returning to her former chambers on the third floor of the Howard M. Metzenbaum Court House in early December 2005. All criminal proceedings presided over by Judge Wells, however, will continue to be heard in the Carl B. Stokes Court House.

Senior district judges' contributions
The continuing contributions of senior district judges Manos, Aldrich, Dowd and Katz continue to be invaluable to the court and the bar in handling the workload of the court. During the 2005 calendar year, the number of cases that these four judges were responsible for closing was equivalent to the average case closings of three active district judges.

Magistrate judge consents
The number of cases consented to the jurisdiction of magistrate judges rose 3.7 percent from 371 in 2003 to 385 in 2004. Prorated estimates for 2005 suggest, however, that consents will be down by more than 20 percent from 2004 to 2005. Using the prorated figures, general consents would be down 31 percent from 265 in 2004 to 183 in 2005. Social Security consents would be down 4.3 percent from 118 to 113. *Habeas corpus* consents would rise 50 percent from 2 in 2004 to 3 in 2005.

Related criminal cases—LR 57.9 Amendment
Effective Sept. 29, 2005, LR 57.9 was modified so that:

> The United States Attorney's Office shall, in any case which is, or might be considered, related to another case, file a motion/notice with both District Judges advising the Court of the relationship. A new violation resulting in a federal indictment or information may be considered related to the previously filed case. The United States Attorney's Office shall notify the Court pursuant to this paragraph. (4) Re-filed Cases. If an action is discontinued and subsequently re-filed.

Free Written Opinions
In the spirit of the E-Government Act of 2002, modifications have been made to the district court CM/ECF system to provide PACER customers with access to written opinions free of charge. The modifications also allow PACER customers to search for written opinions using a new report that is free of charge. Written opinions have been defined by the Judicial Conference as "any document issued by a judge or judges of the court sitting in that capacity, that sets forth a reasoned explanation for a court's decision." The responsibility for determining which documents meet this definition rests with the authoring judge.

The new report is available under the Reports menu. PACER customers can also access opinions through existing reports and queries, such as the docket report, and will not be billed for accessing the written opinion document itself, but will be billed for the report or query used to identify the document. For example, if a PACER customer runs a docket report, the customer will be charged for the docket report. If the customer then clicks on the document number hyperlink for a written opinion document, the customer will not be charged for viewing the document.

If you have any questions, please contact the PACER Service Center at pacer@psc.uscourts.gov.

The Northern District of Ohio Advisory Group
The Northern District of Ohio has maintained an active advisory group for the past 14 years, ever since the court was named a demonstration district under the Civil Justice Reform Act.

Members of the advisory group meet with the court twice each year, in May and November, and are charged with bringing to the court's attention matters of interest to the bar and the community, and to assist the court in the implementation of court-adopted programs such as electronic filing and electronic courtrooms. Members also meet with each other throughout the year as needed. The advisory group is comprised of about 50 attorneys appointed by the court including representatives from the U.S. Attorney's Office, the Federal Public Defender's Office, the Federal Bar Association and each of the five law schools located within the district. The advisory

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group is chaired by Dennis R. Rose of Hahn Loeser & Parks and has three standing committees as well as *ad hoc* committees as needed. The standing committees are the Civil Rules Committee chaired by Steven W. Funk of Roetzel & Andress; the Criminal Rules Committee, chaired by John F. McCaffrey of McLaughlin & McCaffrey LLP; and the ADR Committee chaired by Assistant U.S. Attorney Richard J. French. Additional information about the advisory group is available on the court's Web site.

Budget outlook FY2006

The Senate passed its version of H.R. 3058, the FY 2006 Transportation, Treasury, the Judiciary, and Housing and Urban Development (TTHUD) Appropriations Bill on Oct. 20, 2005. Overall, the judiciary received $5.768 billion, an increase of 6.5 percent over FY 2005, and nearly $11 million more than the House passed bill. The salaries and expenses account, which funds the courts, was increased by 6.1 percent. While the recommended funding levels in both the House and Senate bills are positive, there is tremendous pressure in Congress to offset the cost of emergency recovery and reconstruction efforts along the Gulf Coast. Across-the-board cuts in discretionary spending to finance these efforts are a real possibility judging from public statements made by the House leadership. Chief Judge Carr and other members of the court continue to communicate with our congressional representatives urging them to support the recommended funding levels as they educate them about the impact further reductions may have on judiciary operations. The court appreciates the support of the Federal Bar Association in these efforts.

New CVB Web site allows online payment

The Central Violations Bureau (CVB) has launched a Web site for payment of violation notices. The site will allow defendants to pay violations online using a credit card or bank account. In addition, the site provides answers to frequently asked questions (FAQs) and contact information for the CVB. The site is located at www.cvb.uscourts.gov and is available 24 hours a day, seven days a week.

Use of telephone interpreting

The court has been using telephone interpreting to provide remote interpretation in situations where certified or otherwise qualified court interpreters are not locally available. The program is ideal for short proceedings, such as pretrial hearings, initial appearances, arraignments, motion hearings, and probation and pretrial services interviews.

Telephone Interpreting Program offers the following benefits:

- Provides easy access to interpretation services when resources are not available locally.
- Provides certified and otherwise qualified interpreters to ensure quality interpreting services.
- Increases court personnel efficiency in locating certified or otherwise qualified interpreters for scheduled court proceedings.
- Reduces expenditures because staff interpreters as well as contract interpreters can be used for multiple assignments on the same day.
- Reduces time and travel costs associated with importing certified and otherwise qualified interpreters from outside of the area.
- Ensures the defendant's access to a certified interpreter or otherwise qualified interpreter in court proceedings.
- The district is fortunate, however, that two certified Spanish interpreters now reside in the Northern District of Ohio and are now available, as well.

Survey shows many courts have cut public hours

Thirty percent (56 of 187) of district and bankruptcy clerks' offices nationwide reported some level of reduced hours they are open to the public as a result of funding and staffing restraints. Of the 56 clerks' offices that reduced hours, 36 report plans for continuing reduced hours indefinitely.

Those figures were obtained from an administrative office survey of the 187 district and bankruptcy clerk's offices in August 2005. The survey was conducted following a request from a congressional subcommittee for data on the reduction of hours at clerks' offices resulting from the anticipated budget allotment reductions.

Reduced hours reported by the courts covered three categories: current regular hours; periodic, unscheduled office closings resulting from staffing shortages and with little or no possible advance notice to the public; and other conditions that have forced reductions in public hours. The Cleveland office has had to return to the district-wide practice of opening to the public at 9 a.m. (after having experimented with opening for several months at 8:15 a.m.) due to staffing and workload issues. We will always, however, make ourselves available to address your needs, outside of these hours.

"I know that providing high quality service to the public is taken very seriously by clerks' offices in every federal court, and that reducing public of-

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Unraveling the New Value Defense

Counseling Clients Dealing with Insolvent Debtors, Part II

By Ronald M. McMillan, Esq.

In the last issue of *Inter Alia*, I discussed the impact of the "ordinary course of business" defense to an action by a bankruptcy debtor to recover payments made by that debtor during the 90 days preceding a petition for bankruptcy protection. The second of the two most common defenses, the "new value" defense set forth in 11 U.S.C. §547(c)(4), comes into play in situations like the following:

Client: So you are telling me that, because I asked for my last payment from Debtor Corp. in COD form as opposed to our normal 30-day terms, I can't use that ordinary course defense you just told me about?

You: Probably not. Getting paid on terms not within your normal practices with Debtor—particularly when the new terms are more aggressive—usually takes a payment outside the protection of that defense.

Client: And my widgets still belong to Debtor? I don't even get credit for the widgets that Debtor failed to pay for?

You: That depends. When did you send them?

The new value defense provides that, where a creditor, after receiving a $10,000 payment from a debtor, ships another $10,000 in goods, the payment from the debtor cannot be recovered by the estate. In essence, the creditor has already "repaid" the estate for the otherwise preferential payment by shipping new goods, or providing "new value," to the estate.

The June 2005 issue of *The Federal Lawyer* contains an article by Paul Avron discussing one of the new value issues with which courts regularly wrestle. (Also, the October 2005 issue, in addressing changes to the bankruptcy laws, has helpful, concise explanations of this and other preference litigation issues.) Assume that the debtor made two $10,000 payments (Payments A and B) within the 90-day "preference period." Assume also that the creditor shipped $10,000 in goods in between those two payments. Does Payment B "pay off" the interim shipment, thus making that shipment unavailable as a new value reduction of Payment A? In other words, as the title of Mr. Avron's article asks, "Must 'New Value' Remain Unpaid in Order for a Preference Defendant to Assert the New Value Defense?"

Mr. Avron notes the split in the circuits on this issue, and I will not restate his article here. In my opinion, however, the real problem with the new value defense is not whether your client might find itself in a "new value must remain unpaid" jurisdiction. The problem is that the definition of the type of payment that undoes new value is confusing to the point of being a stumbling block to settlement. The statute provides that a subsequent shipment of goods counts as new value only if "on account of which new value the debtor did not make an otherwise unavoidable transfer to or for the benefit of such creditor."[1] Circuit split notwithstanding, the plain language of the statute says that new value is usable unless it has been repaid by an otherwise unavoidable transfer—for example, if the second $10,000 payment in my previous hypothetical was made in the ordinary course of business between the creditor and debtor—on account of that particular shipment. And therein lies the rub.

The new value defense should be a simple matter of calculating dates. The debtor sends Payment A to the creditor on date X. It ships more goods on date X+5. If that is the end of the parties' dealings, the payment is not recoverable. If the debtor sends Payment B on date X+10, and Payment B is an otherwise unavoidable transfer, then the shipment cannot constitute new value and Payment A is recoverable. But what constitutes an "otherwise unavoidable transfer" is open to interpretation and argument. If parties ordinarily deal on 60-day terms, what if Payment B was made 61 days after invoice? 70 days? 75 days? In many cases, one cannot be sure whether an "otherwise unavoidable transfer" has been made until the court has ruled on which of the debtor's payments fall within the ordinary course of the parties' past dealings. The analysis is further complicated by the general failure of courts to examine whether Payment B was made in order to pay off the interim shipment or whether it just happened later in time.

Arguably, however, it all comes out in the wash. In the above payment-shipment-payment hypotheticals, the debtor cannot recover both payments. If Payment B is avoidable, then it cannot be used to cancel the shipment, which is then used to negate Payment A. Debtor recovers the second, but not the first, payment. If, on the other hand, Payment B is not avoidable, it cannot be recovered; but it cancels out the new value, leaving Payment A subject to recovery. Debtor recovers the first, but not the second, payment.

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Most preference actions, like most other civil litigation, settle before trial. For purposes of settling preference cases, and in light of the "comes out in the wash" nature of new value analysis, I would encourage attorneys to address the new value defense at a simpler level. If a payment is followed by a shipment, reduce the payment by the amount of new value. Then look at the payments that were not knocked out by new value to see whether the ordinary course defense applies. With a smaller universe of payments still at issue, settlement is more likely.

One further note on the new value defense. Simply having sent goods for which payment has not been received, by itself, does not entitle a creditor to a defense. For example, if the creditor sends $10,000 in goods on dates X, X+5, X+10 and X+15, and the debtor makes Payment A on date X+16, none of the prior shipments can constitute new value. The new value must be shipped after payment is made. All in all, however, the defense allows nice creditors not to finish last. Your client may not get payment for the final shipment sent to a customer spiraling into bankruptcy, but, if the timing is right, that last gesture of business goodwill can protect your client from having to repay monies previously received.

[1]11 U.S.C. §547(c)(4)(B).

Ronald M. McMillan *is associated with the litigation department of Calfee, Halter & Griswold LLP. His experience in general business and commercial litigation includes the prosecution and defense of preference actions.*

December 6, 2005

To: All Attorneys Who Practice Before this Court

Subject: **All Attorneys Must File Electronically - Effective January 1, 2006**

Approximately eight months ago, I wrote to all attorneys practicing in the District expressing a strong preference that all filings be made electronically. The United States District Court for the Northern District of Ohio has permitted attorneys to file documents electronically for ten years. Originally, the Court strongly encouraged electronic filing but it soon became an expectation of the Court. The electronic filing program has proven to be an overwhelming success saving time and money for both the parties and the Court.

Effective January 1, 2006, all attorneys will be required to file electronically pursuant to modifications to Local Civil Rule 5.1(c) and Local Criminal Rule 49.2(c) which will take effect at that time. The modified rules will state:

> (c) The Court requires attorneys to receive notice of filings electronically and to file documents electronically, absent a showing of good cause, unless otherwise excused by the rules, procedures or Orders of the Court. While parties and pro se litigants may register to receive "read only" electronic filing accounts so that they may access documents in the system and receive electronic notice, only registered attorneys, as Officers of the Court, will be permitted to file electronically.

Effective Janaury 1, 2006, any request to file any pleading on paper (except an original complaint or document otherwise excused by the rules, procedures or Orders of the Court) shall be preceded by a written motion, a showing of cause to permit filing to occur other than electronically, and approval of the Judge to whom the case is assigned.

Electronic filing in the U.S. District Court for the Northern District of Ohio is governed by the Court's Electronic Filing Policy and Procedures Manual, which is available on the Court's web site (www.ohnd.uscourts.gov) and as an attachment to the Local Rules. Electronic filing registration forms, training materials and tutorials are also available on the web site.

Attorneys and law firm staff can arrange to receive electronic filing training by calling the Clerk's Office at:

Cleveland:	216-357-7010
Akron:	330-375-5764
Toledo:	419-259-6412
Youngstown:	330-746-0019

Sincerely yours,

James G. Carr
Chief Judge

Corporate Compliance Programs

The Federal Government Says "Jump" to Corporate America

by Jonathan Leiken

In January 2005, in *United States v. Booker*, the U.S. Supreme Court declared the U.S. Sentencing Guidelines unconstitutional.[1] The declaration came as little surprise to federal prosecutors and criminal defense attorneys, who had been waiting for months for such a ruling based on a number of hints placed by the Court in prior decisions. What has come as a surprise, however, in the aftermath of *Booker*, is the guidelines' lingering relevance in a number of areas despite their unconstitutionality as previously applied. Indeed, the guidelines continue to play a vital role not only in federal criminal sentencing but in a number of other important areas. One of these areas concerns the guidelines' pronouncement that corporations must maintain "effective" corporate compliance programs.

More than ever, federal regulators and prosecutors are focusing on the "effectiveness" of an organization's compliance program—as defined in detail in the recently trumped up Guidelines Section 8B2.1—in determining whether to prosecute an organization for any wrongdoing that occurred within the corporate ranks. Corporate clients and general counsel, therefore, are well served in understanding: (a) what the guidelines are, (b) how they are used by prosecutors and regulators even after *Booker,* and (c) what the guidelines say about the "effectiveness" of a corporation's compliance program.

A. The Organizational Sentencing Guidelines: Before and After *Booker*

The U.S. Organizational Sentencing Guidelines, which became Chapter 8 of the U.S. Sentencing Guidelines Manual, were promulgated in 1991 for the primary purpose of establishing rules for the sentencing of organizations that had been convicted of a crime. Critics have denounced the guidelines' regime of "calculator justice," which uses "culpability points" and grids to determine the range of a corporation's criminal sentence (potential sentences for organizations include monetary fines, probationary periods, or at the extreme, the forced dissolution of the corporate entity).

The secondary purpose of the Organizational Sentencing Guidelines was to influence corporate behavior in the United States by providing incentives for corporations to act ethically. These incentives are built in to the organizational guidelines in the form of subtractions from a corporation's culpability score based on the presence of certain mitigating factors. Among these factors are the corporation's cooperation with the government's investigation (including a waiver of the corporation's attorney-client privilege, another hot-button issue) and the effectiveness of the corporation's compliance program.

Though the Supreme Court held in *Booker* that the guidelines were unconstitutional as previously applied, to the surprise of many the Court refused to throw out the guidelines entirely. Instead, the Court held that sentencing judges must at least consider the calculated guidelines sentencing range before imposing a sentence. And so, the guidelines and the U.S. Sentencing Commission have remained firmly on the scene.

B. How Prosecutors and Regulators Use the Guidelines: Charging Decisions

Even more importantly for our corporate clients, federal prosecutors and regulators have continued to use the guidelines' incentives for ethical corporate behavior in making a determination that tends to be far more important to corporations than federal criminal sentences: the decision whether to charge a corporation with a crime in the first place. Arthur Anderson, of course, is the cautionary tale: Corporations doing business in America cannot afford to be charged with a crime.

One need only open the newspaper or turn on the television to find stories of prosecutors or regulators searching for white collar criminal wrongdoing within organizations or institutions. The increased searching, not surprisingly, has resulted in increased findings of such wrongdoing by corporate employees. Invariably in these cases, corporate defense counsel argue to the prosecutor that the corporation should not itself be charged with a crime—we frequently urge the government not to throw out the entire barrel because of a "few bad apples."

In support of our plea for leniency, we point to all of the efforts by the company to maintain an ethical workplace, which, these days, leads the prosecutor to pull out Guidelines Section 8B2.1. Line by line, the prosecutor considers whether the company's compliance efforts comport with the guidelines' exacting standards for "effective" corporate compliance programs.

(continued on page 11)

(Corporate Compliance, continued from page 10)

C. What the Guidelines Say: An Effective Corporate Compliance Program

In November 2004, prompted by the Sarbanes-Oxley Act, a series of amendments to the Organizational Sentencing Guidelines went into effect, including amendments to Section 8B2.1. In essence, the amendments place responsibility on an organization's board of directors and high-level management to create and monitor a living, breathing compliance program that includes, among other things: (a) regular compliance training for employees; (b) periodic risk assessment; (c) incentives for ethical behavior and (d) well-publicized opportunities for employees to report compliance violations without fear of retaliation. Corporations should not be lulled into the belief that compliance with the reporting provisions of Sarbanes-Oxley, by itself, is enough to comply with Section 8B2.1.

While most corporations will never face criminal sentencing, it is a reality of doing business in America today that virtually all corporations will interact with government investigators, prosecutors and regulators in their unending search for corporate wrongdoing. Paying heed to the guidelines' pronouncements on effective compliance programs can insulate and protect corporations in these instances. In addition, corporations can expect additional benefits from stringent compliance programs, including the prevention of wrongdoing, protection against civil lawsuits and increased employee morale.

Even more importantly, in this post-Enron, Sarbanes-Oxley era, when the federal government says "jump," can our corporate clients afford to hesitate about their response?

[1]123 S.Ct. 785 (2005).

***Jonathan Leiken**, a former federal prosecutor in the Southern District of New York, practices in the corporate criminal investigations group at Jones Day in Cleveland, where he advises corporate clients on compliance measures, conducts internal corporate investigations and represents businesses and their employees in criminal and related civil proceedings. Mr. Leiken is also an adjunct assistant professor at Case Western Reserve Law School, where he teaches courses on White Collar Crime: Prosecution and Defense and Counterterrorism Law and Policy.*

(Clerk's Corner, continued from page 7)

fice hours is done only as a last resort," Administrative Office Director Leonidas Ralph Mecham said.

Multidistrict litigation

The Northern District of Ohio is now the transferee court for seven multidistrict litigation (MDL) matters. The Judicial Panel on Multidistrict Litigation is authorized to transfer civil actions pending in more than one district involving common questions of fact to any district for consolidated pretrial proceedings on the panel's determination that the transfer "will be for the convenience of the parties and witnesses and will promote the just and efficient conduct of such actions" pursuant to 28 U.S.C. §1407. Although no single factor is used to determine where cases will be transferred, the panel often gives deference to the parties if they express a preference. Among the benefits of conducting multi-litigation in Northern Ohio expressed by attorneys are the central location of the district; convenient access to local airports, particularly the Burke Lakefront Airport in downtown Cleveland; the court's use of video-conferencing and the availability of electronic filing and electronic courtrooms; and the willingness and availability of the judges to handle these matters. The seven MDL matters currently pending before the court are the Welding Fume Products Liability Litigation (Judge Kathleen M. O'Malley, 5,280 cases), the Meridia Products Liability Litigation (Judge James S. Gwin, 114 cases), the Commercial Money Center, Inc., Equipment Lease Litigation (Judge O'Malley, 37 cases), the Sulzer Orthopedics Inc. Hip Prosthesis and Knee Prosthesis Products Liability Litigation (Judge O'Malley, seven cases), the Ford Motor Co. Panther Platform/Fuel Tank Design Products Liability Litigation (Judge Donald C. Nugent, six cases), and the Travel Agent Commission Antitrust Litigation (Judge Peter C. Economus, three cases).

***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.*

Bankruptcy Court Update

by Kenneth J. Hirz

Relocation to Howard M. Metzenbaum U.S. Courthouse

The Cleveland division of the U.S. Bankruptcy Court for the Northern District of Ohio relocated to the Howard M. Metzenbaum U.S. Courthouse (HMM) effective June 20, 2005. The Bankruptcy Court returned to the historic courthouse after 11 years in leased space at Key Tower. The court was temporarily housed in Key Tower while awaiting the completion of the Carl B. Stokes U.S. Courthouse, which occurred in 2002, and the three-year renovation of the HMM courthouse. The U.S. Bankruptcy Judges moving into the new Courthouse include Hon. Randolph Baxter, Chief Judge, Hon. Pat E. Morgenstern-Clarren and Hon. Arthur I. Harris. The new address is:

Howard M. Metzenbaum U.S. Courthouse
201 Superior Avenue
Cleveland, Ohio 44114

The main phone number is (216) 615-4300. A complete directory and contact information can be found on the court's Web site at www.ohnb.uscourts.gov.

The Howard M. Metzenbaum U.S. Courthouse was constructed between 1902 and 1910. Originally known as the Cleveland Federal Building and United States Courthouse, it was designed to serve as the U.S. Post Office, Custom House and Courthouse. The neo-classical style building was designed by architect Arnold W. Brunner of New York City and was the first building erected under the Cleveland Group Plan. The five-story building contains 235,632 square feet and houses the following agencies: U.S. Bankruptcy Court, U.S. District Court (two ceremonial courtrooms), U.S. Trustee's Office, U.S. Department of Labor (Contract Compliance Programs), U.S. Department of Agriculture OIG, U.S. Marshal Service and the General Services Administration (GSA). The GSA undertook the $44.6 million renovation project, which was designed to modernize the courthouse by improving the HVAC, plumbing, fire/life safety, lighting and power systems throughout the building. A new open light atrium area in the middle of the building was added to improve public circulation and functionality. A new sprinkler system, four air handlers and a new handicapped access at the building's front entrance were also added. Construction was completed through the use of 19 trades representing 600 workers. 5,400 tons of demolition waste was recycled and new material was added including 71 miles of cabling, 20,000 square feet of marble, 2,114 sprinkler heads, 571 miles of electrical cabling and 5,000 gallons of paint. The court is excited to reoccupy this newly restored courthouse and pleased that the renovation restored the building to its original luster and historical significance. All are welcome to visit and view this truly remarkable architectural presence on Public Square.

New Bankruptcy Legislation

The Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 was enacted on April 20, 2005. The new law makes substantial changes to Title 11 of the U.S. Code. The effective date of the legislation is Oct. 17, 2005, and includes the following changes. It institutes a "means test" for chapter 7 debtors; requires debtors to file copies of tax returns; adds a new in for*ma pauperis* filing category; creates a new chapter 15 dealing with cross-border insolvency; makes chapter 12 permanent; includes family fishermen as a new group entitled to relief under this chapter; and requires a credit briefing as a precondition to filing a consumer petition and credit counseling as a precondition for receiving a discharge. There are also case audit requirements for chapter 7 and 13 cases by the Office of the U.S. Trustee. The Act requires substantial changes to the Federal Rules of Bankruptcy Procedure, the Official Bankruptcy Forms, the Director's bankruptcy forms, noticing provisions, modification of the court's case management/electronic case filing (CM/ECF) system, including the collection of statistical data, and a new filing fee structure. There are numerous Judicial Conference committees working to effectuate the changes required by the act, with the support of the Administrative Office of the U.S. Courts. Significant work lies ahead throughout the summer and fall by the judges and clerk's office to ensure a smooth transition to incorporate the new law and procedural requirements.

Case Filing Increase

Case filings in the Bankruptcy Court for the Northern District of Ohio have been on the increase since calendar year 2000, catapulting this district into the number four position among 94 bankruptcy districts nationally. There were 27,971 cases filed in 2000 followed by 36,950 in 2001, 41,993 in 2002, 48,350 in 2003 and 47,583 in 2004. The passage of the new bankruptcy legislation in April prompted additional increases in case filings with 28,136 cases filed in the first six months of 2005. This represents a 15 percent

(continued on page 14)

GENERAL ORDER NO. 2005-17

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO

IN RE:	)	
	)	
OHIO STATE SUPREME COURT	)	ORDER NO. 2005-17
SUSPENSION OF ATTORNEYS	)	
FOR FAILURE TO PAY	)	
REGISTRATION FEES	)	

The United States District Court for the Northern District of Ohio has become aware, through newspaper articles, that the Ohio State Supreme Court has suspended about 2,500 attorneys for failure to pay registration fees, and removed over 11,000 other attorneys from its active roles because they are thought to be dead or no longer practicing in the state. Some of those attorneys may be admitted to practice before this Court pursuant to Local Rule 83.5 and Local Criminal Rule 57.5 which require that attorneys be admitted to practice in the highest Court in their state in order to practice in the United States District Court for the Northern District of Ohio.

In order to avoid inconvenience to this Court, and to minimize the risk that someone who remains eligible to continue practicing before this Court may be misidentified as no longer being eligible, this Court will suspend taking action against those attorneys who may "technically" be ineligible to practice in the United States District Court for the Northern District of Ohio until the Court receives official notification from the Ohio Supreme Court and this Court has the opportunity to review this matter.

In conclusion, until further notice is provided by this Court, those attorneys admitted to practice before this Court who are subject to the Ohio Supreme Court suspension for failure to pay registration fees will remain in active status with the United States District Court for the Northern District of Ohio. Those attorneys are strongly encouraged to take whatever steps are necessary to be restored to active status before the Ohio Supreme Court as quickly as possible and to provide this Court with proof that they have been restored to active status so that this Court can avoid suspending them from practice in the United States District Court for the Northern District of Ohio.

This Order shall remain in effect until February 5, 2006, at which time it will be reviewed at the regular bi-monthly Judges' Meeting scheduled for that date.

IT IS SO ORDERED.

For the Court

James G. Carr
Chief Judge
United States District Court

(Booker, continued from page 1)

defense side, a mitigation expert may be needed; and if so, the expert needs to enter the picture well in advance of sentencing. The role for a mitigation expert was often nonexistent in many cases prior to *Booker*, since the grounds for possible departures were so limited. Even though those grounds under the guidelines remain the same after *Booker*, the advisory nature of the guidelines opens previously prohibited grounds for sentencing advocacy. If no mitigation expert is engaged to assist defense counsel, then defense counsel must take the laboring oar to make sure that possible grounds for departures are uncovered, evaluated and developed. This means at a minimum more planning and preparation in advance of sentencing. A lawyer acts at his or her own peril by waiting until the last minute to prepare for a sentencing hearing that may require the search for and evaluation of documents that demonstrate a terribly troubled and abusive past for a defendant—information that now may support a possible downward departure. The legwork to investigate possible grounds for departures and to gather materials to support those grounds needs to begin as early as possible.

Second, while the avenues opened by *Booker's* rationale may call for new creative approaches to sentencing, whether from the plaintiff's or the defendant's perspective, the sentence must still be "reasonable" to pass appellate review. This means at least that the sentencing guidelines, as one of a number of factors under 18 U.S.C. §3553(a), must be considered at the time of sentencing. Courts, including the 6th Circuit, are still reluctant to hold that sentences within a properly calculated guideline range are *per se* reasonable.[4]

Third, many times written plea agreements contain language to the effect that the parties agree in advance that a sentence within a properly calculated sentencing guideline range is reasonable. In the absence of contrary language or a further explanation of the parties' rights at the time of sentencing, this type of agreement could well preclude the parties from arguing for a sentence outside the guideline range. In short, what *Booker* may have given the parties in terms of additional sentencing flexibility may be waived through language in a written plea agreement. Certainly by pleading to the indictment without a written plea agreement, the parties preserve their respective rights and opportunities under *Booker* to argue for a sentence outside the guideline range. Pleading to a crime without a written agreement as to the appropriate sentencing range creates a risk for both sides—but it will also open up an opportunity to argue points in favor of either a higher or lower sentence that may have been absent prior to *Booker*. That risk of a sentence outside the guideline range is the price for the advocacy now allowed under *Booker*. But for the party whose position is ultimately adopted by the court, the risk and the additional effort put forward to advocate that position are typically well worth it.

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[1] ___ U.S. ___, 125 S. Ct. 738, 160 L. Ed. 2d 621 (2005).

[2] *See* 18 U.S.C. §924(e).

[3] Mr. Levine was formerly an assistant federal public defender in California and Oregon, and the first federal public defender in Hawaii. A pre-*Booker* version of his publication is entitled *Eighty-eight Easy Departures*. Mr. Levine can be reached at michaellevineesq@aol.com.

[4] *See, e.g.*, *United States v. Webb*, 403 F.3d 373, 385 n.9 (6th Cir. 2005); *United States v. Cunningham*, ___ F.3d ___, 2005 WL 3029083 (7th Cir., Nov. 14, 2005) (citing *Webb*, *supra*, and *United States v. Winters*, 416 F.3d 856, 860-61 (8th Cir. 2005)). In *Webb*, the 6th Circuit declined "to address whether a district judge must always calculate the precise appropriate Guidelines range in order to comply with *Booker*. See *[United States v.] Crosby*, 397 F.3d [103,] at 112 [(2nd Cir. 2005)] (indicating that 'precise calculation of the applicable Guidelines range may not be necessary' in certain situations where the district judge imposes a non-Guidelines sentence)." *Webb*, 403 F.3d at 384 n.6.

(Bankruptcy, continued from page 12)

increase over 2004 and a straight-line projection would project reaching more than 56,000 cases by the end of the year. This would actually double the filing rate of calendar year 2000. There are eight bankruptcy judges authorized by Congress to sit in the Northern District of Ohio. Despite the filing increase, there has been no corresponding increase in judgeships. The clerk's office staff has increased only about 10 percent during this period, not including a half-dozen temporary staff hired to assist in handling the anticipated case filing increases this year. The clerk's office has fully benefited from the efficiencies of CM/ECF and the move to less paper in managing bankruptcy cases that traditionally had been a paper-intensive process.

Case Management/Electronic Case Filing (CM/ECF)

Our court has been live on the electronic case filing system since Oct. 1, 2002. Attorneys have been required to file documents electronically since Jan. 1, 2004. At this point we have more than 3,200 registered ECF attorneys and more than 500 claims agents. In June 2005, the designation of Professional Persons was added to allow accountants, appraisers and auctioneers to file electronically as well. In the last year there have

(continued on page 15)

been more than 300,000 transactions, or 24 percent, created by attorneys in ECF. Trustees have docketed about the same amount of events as have court staff. The remainder of the events are being autodocketed by the system. These latter events include the docketing of the notice on return from the Bankruptcy Noticing Center (BNC). The benefits of ECF for attorneys have been to allow simultaneous access to electronic documents and to file documents 24/7, immediate e-mail noticing, elimination of paper files and savings in copying and courier service. Attorneys interested in registering for ECF can find the registration form and instructions on the court's Web site at www.ohnb.uscourts.gov. The registration form can be found in the ECF section and can be faxed to the clerk's office at (216) 615-4364.

Kenneth J. Hirz *is the clerk of court for the U.S. Bankruptcy Court for the Northern District of Ohio.*

Congratulations to the Newly Elected 2005-06 Officers and Board Members

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United States Attorney's Office

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