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LITIGATION NEWS

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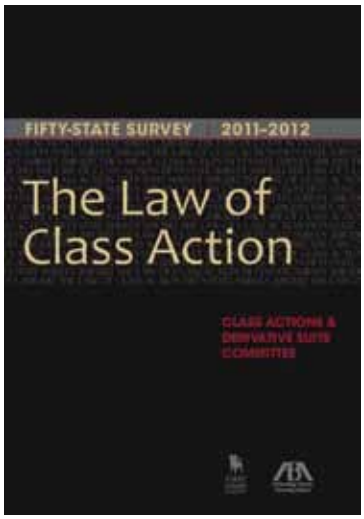

For the first time, this 50-state survey is in print. The survey contains a succinct analysis of class action law in each of the 50 states. It is a valuable tool for both in-house and outside counsel who confront the prospect of litigating class actions in state forums with which they may have little or no experience and have to make informed recommendations on removal.

The summaries are prepared by litigators from each state and address changes in rules and statutes as well as significant case law. These summaries are useful in understanding state court rules essential to practitioners and parties alike.

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AMERICAN BAR ASSOCIATION
Section of Litigation

The Section of Litigation is often the vanguard of changes in today's litigation environment, influencing the course of the law and the adversary system for the benefit of the public and the trial bar. The goal of *Litigation News* is to advance the art of advocacy by informing litigators of Section activities and other news of professional interest.

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IS EMPLOYEE MISUSE OF COMPANY DATA A CRIME?

CIRCUITS SPLIT ON INTERPRETATION OF "EXCEEDS AUTHORIZED ACCESS" UNDER CFAA

By Natasha A. Saggar, Litigation News *Associate Editor*

Misuse of information from a computer in violation of an employer's policy is not a federal crime under the Computer Fraud and Abuse Act (CFAA), according to an en banc ruling of the Ninth Circuit Court of Appeals. In reaching this result, the Ninth Circuit has split with at least five other circuits that have addressed the question.

The appellate court's 9–2 decision narrowly construes the statutory term "exceeds authorized access" as restricting *access* to information, but not restricting *use*. This holding stands in stark contrast to the First, Fifth, Seventh, Eighth, and Eleventh Circuits, which have all found either civil or criminal violations of CFAA based upon a defendant's use of accessed material.

FACTS UNDERLYING *U.S. V. NOSAL*

In *U.S. v. Nosal*, a former employee of an executive search firm convinced his still employed former colleagues to download and send to him confidential source lists and client contact data from the firm computer to help him start a competing search firm. While the employees were permitted to access the database, the firm's policy prohibited them from disclosing the information.

Nosal was criminally indicted on multiple counts, including CFAA violations for aiding and abetting his former colleagues in "exceeding their authorized access" to the firm's database with intent to defraud. The U.S. District Court for the Northern District of California dismissed CFAA allegations under 18 U.S.C. § 1030(a)(4), which prohibits access to "a protected computer without authorization" or exceeding "authorized access" knowingly and "with intent to defraud."

The government appealed the dismissal, leading to the Ninth Circuit's en banc split of opinion. Chief Judge Alex Kozinski wrote for the majority; Judge Barry G. Silverman wrote for the dissenters.

NINTH CIRCUIT'S NARROW APPROACH

In its initial decision by a three-judge panel, the Ninth Circuit reversed the district court's dismissal. The panel held that an employee "exceeds authorized access" under § 1030 when he or she violates the employer's computer access restrictions, including use restrictions.

In its en banc ruling, the Ninth Circuit reversed the panel decision and affirmed the district court's dismissal of CFAA charges against Nosal. The majority adopted a more narrow interpretation of CFAA, finding that the phrase "exceeds authorized access" does not extend to violations of use restrictions.

This narrower interpretation is "a more sensible reading of the text and legislative history of a statute whose general purpose is to punish hacking—the circumvention of technological access barriers—not misappropriation of trade secrets," the Ninth Circuit, sitting en banc, opined. The majority expressed concern that a broader interpretation would expand the scope of criminal liability to include any unauthorized use of a computer. This may include common and innocuous activity, such as chatting with friends or watching sports highlights. Such activities are typically prohibited by many computer use policies.

Applying the rule of lenity, the court construed the criminal statute narrowly, "so that Congress will not unintentionally turn ordinary citizens into criminals." The majority stated,

> Employees who call family members from their work phones will become criminals if they send an email instead. Employees can sneak in the sports section of the *New York Times* to read at work, but they'd better not visit ESPN.com. And Sudoku enthusiasts should stick to the printed puzzles, because visiting www.dailysudoku.com from their work computers might give them more than enough time to hone their Sudoku skills behind bars.

CRITICISM OF THE MAJORITY DECISION

The *Nosal* dissent, which adopts the view of at least five other circuits, criticized the majority for parsing a "plainly written statute" in a "hyper-complicated way." It also balked at the majority opinion's use of "far-fetched hypotheticals" involving "innocuous violations of office policy" rather than the theft and intentional fraud present in *Nosal*.

"There is no question that what the defendant did here was inappropriate and would go beyond any gray areas or petty uses of employer's resources that

people might otherwise think would expose them to criminal liability," says Darryl G. McCallum, Baltimore, Programs Subcommittee cochair of the ABA Section of Litigation's Employment & Labor Relations Committee.

"CFAA was intended to protect against exceeding authorized use for the purpose of doing something malicious or obtaining something of value," notes John P. Hutchins, Atlanta, cochair of the Section of Litigation's Technology for the Litigator Committee cochair. It was not meant to apply to harmless behavior, like checking Facebook, he says.

Admittedly the majority's opinion "contains a bit of hyperbole," opines Aaron M. Danzig, Atlanta, chair of the Cybercrimes Subcommittee of the Section's Criminal Litigation Committee. Danzig supports the ruling, however, and notes that it drives home the point that "CFAA is really an anti-hacking statute, and that is what it should be limited to."

OTHER CIRCUITS ADOPT BROADER DEFINITION

As the dissent in *Nosal* points out, other circuit courts have adopted a broader view of what constitutes "exceeding authorized access." In *United States v. Rodriguez,* the Eleventh Circuit found a Social Security Administration employee criminally liable under CFAA for accessing 17 individuals' personal records for non-business reasons. The court specifically rejected a defense that Rodriguez had not violated CFAA because he accessed databases he was authorized to use as an employee.

Similarly, in *United States v. John*, the Fifth Circuit found a defendant bank account manager criminally liable under CFAA for accessing customer account information to incur fraudulent charges on those accounts. The court reasoned that CFAA limits use of information obtained by permissible access where the use is in furtherance of a crime.

In *United States v. Teague*, the Eighth Circuit also adopted this reasoning in upholding a conviction under § 1030 where a government contractor employee used her privileged access to a government database to obtain President Obama's private student loan information.

In the civil context, the First Circuit determined that a lack of authorized access "may be implicit, rather than explicit." *EF Cultural Travel BV v. Zefer Corp.* The Seventh Circuit reasoned that once an employee breaches his duty of loyalty to an employer by planning to start a competing business, he terminates his agency relationship, and with it, his authority to access information belonging to the employer. *International Airport Ctrs., LLC v. Citrin.*

RESOLVING THE SPLIT

Absent clarifying legislation, the U.S. Supreme Court may ultimately resolve the conflict among the circuits. A series of bills recently introduced in both the U.S. Senate and the House of Representatives seeks to amend the definition of "exceeds authorized access" to exclude access in violation of a contractual obligation or agreement, such as an acceptable corporate use policy if that violation is the sole basis for determining that access to a protected computer is unauthorized. Until an amendment to the definition becomes law, we will not know what the final revision looks like or how it will impact the different interpretations of "authorized access."

ADVICE FOR EMPLOYERS

Even though the circuits are split as to CFAA's reach, employers still have available civil contractual and tort remedies. An employer may also seek criminal prosecution for theft of trade secrets in each of the jurisdictions.

Finally, employers can "protect themselves by having a clear policy on computer use and confidentiality in company documents, and mak[ing] sure that that policy is clearly and consistently enforced," advises Danzig. Those policies should be "realistic," keeping in mind that employees will use their work computers to engage in some amount of non-business activity, like checking personal email, adds Hutchins.

A web version of this story, including links to cases and statutes cited, is available at http://tinyurl.com/LN-37-4-Saggar.

PENDING LEGISLATION, PROPOSED AMENDMENTS TO CFAA'S DEFINITION OF "EXCEEDS AUTHORIZED ACCESS," 18 U.S.C. § 1030(E)(6):

Cyber Crime Protection Security Act, 2012 S. 2111.

Secure IT Act of 2012, 2012 H.R. 4263.

Personal Data Privacy and Security Act of 2011, 2011 S. 1151.

Ethical Pitfalls in Question-and-Answer Websites

By Bethany Leigh Rabe, Litigation News *Associate Editor*

The South Carolina Bar Ethics Advisory Committee recently weighed in on attorneys' participation on a question-and-answer website, finding it improper. While not the first ethics opinion on Internet marketing, its detailed analysis of a particular format is somewhat unique.

JustAnswer.com is a website where members of the public may ask questions of various professionals—such as doctors, lawyers, mechanics, or plumbers—and obtain an answer online. The professionals are referred to as "experts" on the site. As described in the Advisory Committee opinion, after the user submits a question and the professional answers it, JustAnswer.com pays a fee to the professional.

The opinion "is a good reminder to people of the limitations on these types of sites," offers Michael P. Downey, St. Louis, cochair of the Rules and Regulations Subcommittee of the ABA Section of Litigation's Ethics and Professionalism Committee. The opinion flags issues related to (a) communicating with people about their legal needs through third-party providers, (b) formation of the attorney-client relationship, and (c) compensation from someone other than a client.

To begin, the Advisory Committee found JustAnswer.com's use of the word "expert" in reference to lawyers problematic. Rule 7.4 of the South Carolina Rules of Professional Conduct limits the manner in which a lawyer may describe any specialization or expertise to avoid misleading the public. According to the opinion, the site also provides testimonials and endorsements for individual lawyers without qualification, which the Advisory Committee found could also be misleading.

A second troubling aspect of the website is that it invites the submission of specific, detailed questions by the user. This could be seen as establishing an attorney-client relationship with the answering attorney.

The site's attempts to disclaim such a relationship did not impress the Advisory Committee. It determined that the crossover into specific advice and the potential for the formation of attorney-client relationships "is irreconcilable with the site's disclaimers."

Finally, the opinion flagged the issue of third-party compensation as potentially violative of South Carolina Rule 1.8(f), the conflicts of interest rule on accepting compensation from someone other than a client. "You have to be very careful with issues related to fee splitting and referral fees," Downey explains.

According to the opinion, participation is acceptable only to the extent that the lawyer "(1) is limited to providing information of general applicability, and (2) the lawyer's individual responses clearly advise against any reliance on the information as advice or application of it to a specific situation without a more thorough consultation with counsel."

If a lawyer is willing to create an attorney-client relationship on a website, all of the Rules and other applicable laws apply. The Advisory Committee "specifically cautions lawyers to treat online communications with potential clients just as they would a live meeting," for example, to undertake a conflict check before answering any fact-specific questions.

RESOURCES:

Full story and links to cases at http://tinyurl.com/LN-37-4-na-Rabe.

Exercise Care in Flat-Fee Agreements

By Jonathan B. Stepanian, Litigation News *Associate Editor*

Alternative billing and fixed-fee agreements may be increasingly popular, but it may not be as simple as it seems. An Iowa lawyer learned this the hard way after he refused to return a $2,500 nonrefundable retainer paid by the client when it turned out the case required substantially less work than either party had anticipated.

An Iowa criminal defense attorney entered into a fee agreement under which the client agreed to pay $225 per hour with a $2,500 retainer. The fee agreement stated that $2,500 would also be the minimum fee for the criminal defense representation.

Prepared to defend the case, the attorney entered his appearance in the criminal proceedings. Shortly after entering his appearance, however, the court dismissed the charges against the defendant at the request of the state.

The client requested return of the retainer and an accounting. The attorney ignored his requests until the state disciplinary board became involved. At that point, it became apparent that the attorney worked a total of 3.7 hours in the case, including one hour responding to the request for an accounting.

The Iowa Supreme Court found that the attorney fee, notwithstanding the minimum fee agreement, was unreasonable. "The bottom line is that it is unethical for a lawyer to enter into a nonrefundable advance-fee contract except in a case involving a general retainer," according to the court's opinion.

Iowa Rule of Professional Conduct 32:1.5(a) and ABA Model Rule 1.5(a) require that counsel fees be reasonable. Both rules prohibit charging or collecting an "unreasonable fee" and estab-

lish eight factors used to assess the reasonableness of a fee.

Disciplinary boards of several states have distinguished between flat fees and general retainers. For instance, the Michigan Discipline Board has indicated that flat fees paid in advance are not earned until work commensurate with the amount of the fee is completed. The District of Columbia Bar Legal Ethics Committee also reached a similar conclusion.

By contrast, however, the North Carolina Bar Ethics Committee issued an opinion expressly permitting minimum fees and noting that such fees are earned upon payment. The committee, in its opinion, stated that the lawyer does not have to refund a minimum fee simply because the value of the total representation did not rise to the amount of the fee. The fee, however, must still be reasonable.

When to measure reasonableness of a fee is subject to debate, with different states reaching different results. "Some states will focus on the term 'agreed' in Model Rule 1.5 and look at whether the fee agreed to is reasonable at the outset and will not necessarily look at what happened afterwards," offers Gregory R. Hanthorn, Atlanta, cochair of the ABA Section of Litigation's Ethics and Professionalism Committee.

"Other states will focus on the 'charging and collecting' language of Rule 1.5 to assess whether subsequent developments occurred that render collection of the agreed-upon fee unreasonable," he adds. In civil cases, flat or minimum fees paid in advance may be acceptable if the fee is in exchange for something done, or to be done, by the attorney.

In any event, "a careful attorney would, in the engagement agreement, point out that all or a portion of a nonrefundable fee is deemed earned at the outset by virtue of the lawyer no longer being able to represent competitors of the client on other similar matters," says Hanthorn.

RESOURCES:

Full story and links to cases at http://tinyurl.com/LN-37-4-na-Stepanian.

Fiduciary Duty Exception to Privilege Inapplicable in Illinois

By Oran F. Whiting, Litigation News Associate Editor

In a recent legal malpractice case, the Illinois Court of Appeals declined to recognize a fiduciary duty exception to the attorney-client privilege. Consequently, the attorney-client privilege shielded communications between the defendant law firm and both its in-house and outside counsel regarding the plaintiff-client's legal malpractice claim.

In *Garvy v. Seyfarth Shaw LLP*, the plaintiff-client initiated a legal malpractice lawsuit against the defendant law firm. Garvy initiated the suit at a time when the law firm represented him in a chancery proceeding in his capacity as a shareholder in his family's company.

After being advised to seek it by Seyfarth, Garvy retained independent counsel who ultimately initiated a malpractice suit against the defendant firm. Garvy offered to waive the conflicts of interest and executed a tolling agreement concerning his malpractice action.

During settlement negotiations and before withdrawing from the chancery proceeding, the defendant firm communicated with its in-house and outside counsel regarding the malpractice claims. Following the firm's withdrawal from the chancery proceeding, Garvy sought production of those communications. The trial court ordered the law firm to produce the documents.

The Illinois Court of Appeals reversed. It held that the communications were privileged, citing a 2011 U.S. Supreme Court case, which explains the history and proper application of the fiduciary duty exception to the attorney-client privilege. The court of appeals declined to apply this exception, however, noting that the exception had not been adopted in Illinois.

"The First District obviously did not want to use this case as a vehicle to create new law or to adopt this [fiduciary duty] exception," opines John C. Martin, Chicago, cochair of the ABA Section of Litigation's Ethics and Professionalism Committee. "Certainly there are more compelling claims with more compelling facts, because this case does not present a good set of circumstances for the fiduciary to be entitled to the exception."

"The plaintiff should have had an uphill battle for production of the documents given that the fiduciary exception has not been adopted in Illinois," says Jennifer B. Bechet, New Orleans, cochair of the Section of Litigation's Ethics and Professionalism Committee. "As the appellate court pointed out, the plaintiff wanted it both ways: the firm's continued representation in one case and access to what are clearly privileged documents in another," she says. "The plaintiff asked for the world and almost got it."

"Ethically speaking, there are many curiosities in this case," according to Bechet. For example, there is "an ethical question as to whether the plaintiff could actually waive the conflicts that were presented. Although the firm's communications with its attorneys are clearly privileged, why even take the chance of being compelled, incorrectly, to produce them? In fact, that is exactly what happened here."

Martin agrees. "The one interesting spin on the question presented in this case is whether the firm has an obligation or duty to disclose to a client that it has done something wrong if the client neither knows nor is aware of it," he says. "Certainly, a firm's judgment may be impeded if it is nervous about ending up in a legal malpractice claim."

RESOURCES:

Full story and links to cases at http://tinyurl.com/LN-37-4-na-Whiting.

Is Prohibition of Non-Lawyer Ownership of Firms ANTIQUATED?

New York rejects British model of expanded law firm ownership

By Sean T. Carnathan,
Litigation News *Associate Editor*

Non-lawyer ownership of law firms may be an idea whose time has come, or at least the time has come to debate it. The latest public discussion centers on a controversial opinion from the New York State Bar Association Committee on Professional Ethics rejecting a request to permit New York lawyers to become shareholders in a United Kingdom law firm with offices in New York.

The U.K. firm has an alternative business structure under the U.K. Legal Services Act 2007 (U.K. Act). The U.K. Act permits entities with non-lawyer owners to provide legal services.

The N.Y. Ethics Committee concluded that the proposed arrangement would violate New York Rule of Professional Conduct 5.4(a), which forbids a lawyer from sharing fees with a non-lawyer. The Committee also stated that the arrangement would violate Rule 5.4(d), which forbids a lawyer from practicing law for profit with an entity that includes a non-lawyer owner or member.

"If you look at the broader picture of non-lawyer ownership, it's a very difficult issue," says Barry E. Cohen, Washington, D.C., cochair of the Multi-Jurisdictional Subcommittee of the ABA Section of Litigation's Committee on Ethics and Professionalism. "On the one hand, you can see how multidisciplinary offerings would be useful to clients. On the other hand, we read about the excesses of Wall Street and how the Wall Street community at times looks out for themselves first and their clients second, which is antithetical to what we do," says Cohen.

LAWYERS AS DECISION-MAKERS

"The New York position is hardly surprising," says Gregory R. Hanthorn, Atlanta, cochair of the Section's Committee on Ethics and Professionalism. "It reflects the traditional rule that lawyers really are different. The opinion reflects the view that to best fulfill our roles and duties to the client and the judicial system itself, certain decisions must be made by lawyers. Broadening ownership to include non-lawyers puts our system's unique structure at risk."

Non-lawyer firm ownership also potentially undermines attorney-client confidentiality, comments Hanthorn. "Reporting to shareholders could create discoverable documents," he notes, adding that he foresees possible difficulties in matters such as harmonizing statements to shareholders with other statements lawyers are called upon to make from time to time concerning ongoing legal matters, including the auditing process.

D.C. AND U.K. NON-LAWYER OWNERSHIP

The District of Columbia is the only U.S. jurisdiction that currently permits non-lawyer law firm ownership. Under D.C. Rule of Professional Conduct 5.4(b), non-lawyers may hold an ownership interest in a law firm subject to certain restrictions.

Notably, the D.C. rule requires that non-lawyer owners assist in providing legal services, and the firm must not provide non-legal services to clients. According to Cohen, although the D.C. rule has been in effect since the early 90s, it has not been widely used.

In the U.K., non-lawyer ownership of law firms is generating much greater enthusiasm. The U.K. Legal Services Act 2007 went into effect this past October 2011, and on January 3, 2012, the U.K. Solicitors Regulation Authority began accepting applications by law firms to convert to alternative business structures under the Act. In just the first three weeks of eligibility, 65 firms applied.

JACOBY & MEYERS LITIGATION

Non-lawyer ownership is a hotly contested topic in the courtroom these days as well. Jacoby & Meyers, a personal injury firm with offices in New York, New Jersey, and Connecticut, is pursuing lawsuits in all three states, challenging the rules of professional conduct that ban non-lawyer ownership of law firms. According to Jacoby & Meyers, this rule inflicts higher costs of capital on law firms and impairs their ability to provide cost-effective legal services.

Jacoby & Meyers calls the prohibition on non-lawyer ownership "antiquated and inappropriate," and asserts that it "ignore[s] the current globalization of legal services, the proliferation of online legal outsourcing, and the need for lawyers to have access to diverse and competitive capital markets." According to the firm, independence of judgment and access to capital are distinct concepts, and an "ethical practitioner will not become less so if adequately capitalized."

Jacoby & Meyers's results to date are mixed. They have lost in New York and have been moved to the Supreme Court in New Jersey; they await a ruling on a motion to dismiss in Connecticut.

On March 8, 2012, Judge Lewis A. Kaplan of the U.S. District Court for the Southern District of New York dismissed one of the firm's actions. Judge Kaplan concluded that Jacoby & Meyers lacked standing, because it challenged only New York Rule of Professional Conduct 5.4, and other provisions of New York law barred the equity investments Jacoby & Meyers sought. Judge Kaplan agreed with defendants that Section 495 of New York's Judiciary Law prohibited non-lawyer law firm ownership in New York. Accordingly, striking down Rule 5.4 as unconstitutional would not remedy Jacoby & Meyers's injury, and any such ruling would be purely advisory.

Just the day before, however, on March 7, 2012, Judge Peter G. Sheridan of the U.S. District Court for the District of New Jersey denied dismissal of another of Jacoby & Meyers's actions and submitted the issue to the New Jersey Supreme Court for review and analysis. In a brief opinion, Judge Sheridan concluded that the New Jersey Supreme Court was responsible for enforcement of Rule 5.4 and that it had not yet considered Jacoby & Meyers's request to approve non-lawyer firm ownership.

In the U.S. District Court for the District of Connecticut, on March 19, 2012, Judge Robert N. Chatigny held oral argument on defendants' motion to dismiss. As of this writing, the motion is under advisement. Both the Connecticut Bar Association and the Connecticut Trial Lawyers Association (CTLA) appeared as amicus parties.

The CTLA primarily argued against Jacoby & Meyers's assertion that lack of access to equity capital impaired its abil-

ity to offer legal services to those of limited means. According to the CTLA, the existing contingent fee system addresses this problem, and little would be gained by permitting non-lawyer firm ownership.

In contrast, the CTLA argued that allowing non-lawyer owners would put lawyers in the position of answering to owners who are not subject to the same ethical restrictions as lawyers. This arrangement, according to the CTLA, would threaten a host of protections that clients currently enjoy under the rules of professional conduct.

SUPPORT FROM THE ABA COMMISSION ON ETHICS 20/20

The ABA has studied the issue with care. In 2009, the ABA formed the Commission on Ethics 20/20 to "perform a thorough review of the ABA Model Rules of Professional Conduct and the U.S. system of lawyer regulation in the context of advances in technology and global legal practice developments." Among the issues the Commission has investigated is whether the ABA should adopt a model rule permitting law firm ownership by non-lawyers.

As noted in the Commission's April 5, 2011, Issues Paper Concerning Alternative Business Structures, the analysis includes considering how to honor the profession's "core principles of client and public protection while simultaneously permitting U.S. lawyers and law firms to participate on a level playing field in a global legal services marketplace."

In a December 2, 2011, discussion paper, the Commission signaled that it intended to recommend changing the model rules to mirror the structure allowed by the District of Columbia with some additional restrictions. The Commission described its proposal as a "modest liberalization of the current Model Rule 5.4 prohibitions."

COMMENTS LEAD COMMISSION TO WITHDRAW SUPPORT

After soliciting comments on the discussion paper and upon further consideration, however, the Commission announced in an April 16, 2012, press release that it would not recommend any change to the rules to allow non-lawyer ownership interests in law firms. The Commission concluded in light of the comments it received that "the case had not been made for proceeding even with a form of non-lawyer ownership that is more limited than the D.C. model."

Among the comments opposing the Commission's original plan were submissions by the State Bar of Arizona, Illinois State Bar Association, U.S. Chamber Institute for Legal Reform, German Federal Bar, and a group composed of the general counsel of nine major U.S. corporations. The overwhelming majority of comments opposed the original proposal, echoing concerns about potential impact on a lawyer's independent professional judgment and client confidentiality.

Those in favor of permitting alternative ownership law firm structures included the ABA Commission on Law and Aging, Consumers for a Responsive Legal System, National Federation of Paralegal Associations, and Professor Thomas D. Morgan of the George Washington University Law School. Consumers for a Responsive Legal System argued that "consumers nationwide would welcome the lower prices and new combinations of services that true innovation in the delivery of legal services would bring." Professor Morgan emphasized that the traditional view of the law firm depended on viewing lawyering as an individual rather than a team effort, and that today legal services are often a team effort.

PHILADELPHIA BAR ASSOCIATION'S CONTRARY VIEW

Because the New York ethics opinion bars association by New York lawyers with lawyers who comply with the rules of their jurisdiction, George W. Jones Jr., Washington, D.C., cochair of the Commission on Ethics 20/20, expressed reservations about the New York opinion. "The risk of non-lawyer interference with lawyers practicing in a different jurisdiction is remote," believes Jones. "Permitting this arrangement would be a reasonable accommodation of the fact that different jurisdictions have reached different conclusions on whether a non-lawyer should be permitted to have an ownership interest in a firm."

Indeed, in September 2010, the Philadelphia Bar Association Professional Guidance Committee issued an ethics opinion that reaches the contrary conclusion to the New York opinion. The Philadelphia Committee concludes that although its rules also bar fee sharing with non-lawyers, its rules permit fee sharing with lawyers in other jurisdictions. If the lawyers in the other jurisdiction share fees with non-lawyers in accordance with their own bar rules, the Philadelphia Committee concluded that it remains permissible for Pennsylvania lawyers to share fees with them.

THE U.K. AS A LABORATORY

"The ABA Commission on Ethics 20/20 reached the right decision [not to recommend a change in the ABA Model Rules] based on the state of the evidence," concludes Jones. Nevertheless, "it is quite possible," he says, "that law firms in the U.K., experimenting with non-lawyer ownership may demonstrate that non-lawyer partners are quite useful and allow firms to provide better or more efficient legal services."

Jones recounts a story about a survey taken in the early 1980s, before cell phones were widely used. When asked if they would use such a device, the overwhelming majority of respondents said, no, they had no interest in carrying a phone with them. Today, of course, cell phones are ubiquitous. "If it turns out that non-lawyer ownership builds a better mouse trap," says Jones, "then those firms will take market share and U.S. firms will start saying, 'why can't we?'"

A web version of this story, including links to cases and statutes, is available at http://tinyurl.com/LN-37-4-Carnathan.

+ ABA Offers Legal Support to Immigrants in Removal, Detention
+ ABA Supports Single Privilege Rule for Bank Regulators
+ ABA Testifies on Sentencing Guidelines

AND MORE . . . *BY STEVEN J. MINTZ*, LITIGATION NEWS *ASSOCIATE EDITOR*

Executive Branch

Immigration

The ABA expressed support for improving access to counsel for persons in immigration removal proceedings and urged the Executive Office for Immigration Review to strengthen the requirements for individuals seeking accreditation by the Board of Immigration Appeals to provide those services. Separately, the ABA Commission on Immigration released an updated version of "Know Your Rights," an educational video for individuals held in immigration detention facilities. The video offers information on how to navigate the court system. The Commission is working with U.S. Immigration and Customs Enforcement to distribute the video to 250 detention centers.

Congress

Brady Material

A bipartisan bill would help establish uniform practices for U.S. attorney offices to disclose exculpatory evidence required by *Brady v. Maryland*, 373 U.S. 83 (1963). Section 2197 would require federal prosecutors to make early disclosure of evidence favorable to a defendant, regardless of whether the evidence is deemed material to the case by the prosecutors. The legislation would give judges a broad range of remedies for failure to abide by *Brady* obligations. The ABA, which has approved several resolutions calling for steps to improve the disclosure process, and, last year, adopted a policy urging enactment of federal legislation to implement the *Brady* disclosure, supports the bill.

Medical Liability

The House passed medical liability reform legislation that would, among other things, cap non-economic and punitive damage awards in medical malpractice cases. The Protective Access to Healthcare Act, H.R. 5—passed on a largely party-line vote—would impose a $250,000 cap. It also would repeal the limited antitrust exemption for health insurers provided by the McCarran-Ferguson Act. The ABA opposes federal legislation to preempt state medical liability laws to limit compensation to patients injured by malpractice.

Privileged Information/Banking

The House passed legislation that would create a single standard for the treatment of privileged information submitted to all federal agencies that supervise banks, including the new Consumer Financial Protection Bureau (CFPB). H.R. 4014 would clarify that when banks submit privileged information during examinations or other regulatory processes, the privilege would not be waived as to third parties. The ABA supports the legislation, which has bipartisan support in the Senate. Separately, the ABA sent a comment letter to the CFPB, objecting to a proposed rule insofar as the rule seems to give the agency the right to demand that banks and other supervised entities submit privileged information during examinations. The ABA letter questioned the agency's legal authority to compel production of attorney-client and work-product privileged materials.

Sentencing/Mandatory Minimums

The ABA expressed opposition to pending Senate bills (S. 409, S. 605, and S. 839) because they would enact new mandatory minimum sentences for various drug crimes. In a letter to Sen. Rand Paul (R-Ky.), who the ABA acknowledged for his opposition to the bills, the ABA expressed concern about Congress's continued federalization of crime and corresponding expansion of the federal criminal justice system.

U.S. Supreme Court/Judiciary

Sentencing Guidelines

The U.S. Sentencing Commission held a hearing on the impact of *United States v. Booker*, 543 U.S. 220 (2005), in which the Supreme Court held key elements of the 1994 Sentencing Reform Act unconstitutional, thereby effectively rendering the federal sentencing guidelines advisory rather than mandatory. The ABA's liaison to the Commission testified that the current system of advisory guidelines is the best means available for achieving the original goals of the Act. The use of advisory guidelines has not resulted in a decrease in average sentence length. The ABA also noted that the most pressing problem is not disparity of sentences but the criminal justice system's overreliance on incarceration. The guidelines could be improved by more collection, publishing, and use of sentencing data.

You've Got Mail, but Have You Been Served?

COURTS DEBATE SERVING PROCESS ON FOREIGN DEFENDANTS BY MAIL

By Teresa Rider Bult, Litigation News Associate Editor

Reminding litigators that something as straightforward as service of process is not simple in the complex world of international law, a U.S. District Court for the Eastern District of Kentucky has reopened the hotly contested question of whether mailing a summons and complaint to an international defendant affects service. The court's opinion in *Dierig v. Lees Leisure* highlights a continuing circuit split as to whether Article 10(a) of the Hague Service Convention authorizes service by postal channels.

COURT SUSTAINS INTERNATIONAL MAIL SERVICE

In *Dierig*, a Canadian defendant to a U.S. products liability lawsuit was served in Canada via certified mail. The defendant moved to dismiss for insufficient service of process, arguing that use of certified mail was not proper. The parties agreed the Hague Convention applied, but disagreed about whether Article 10(a)'s use of the word "send" authorizes service by postal channels.

Article 10(a) states that the Convention "shall not interfere with the freedom to send judicial documents by postal channels directly to persons abroad" provided the state of destination does not object. Finding the issue "unsettled" in the Sixth Circuit, the Kentucky District Court denied defendant's motion and instead followed what it called "the sound decisions" of circuits that have found mail to be a proper means of service.

THE 1965 HAGUE SERVICE CONVENTION

The Hague Service Convention was one of several treaties signed in 1965 by more than 60 countries participating in the Hague Conference on Private International Law. The treaty's purpose was to provide a simpler way for complainants to initiate service of process internationally while at the same time affording adequate notice to defendants.

The treaty provides several ways to affect international service of process, including by serving a "central authority" or diplomatic or consular agents designated by the foreign country. Countries can agree to participate in the treaty yet submit reservations to certain provisions.

Even with the Convention's process, international service methods remain at times costly and time-consuming, leaving litigators to seek alternative methods, including regular mail. The federal rules of civil procedure allow service of a foreign entity to be made by any "internationally agreed means of service that is reasonably calculated to give notice," including those authorized by the Convention.

DOES "SEND" EQUAL "SERVE"?

As noted in *Dierig,* the current split among the circuits arises from their interpretation of the word "send" in the Convention's Article 10(a).

Relying on principles of contract interpretation, the Fifth and Eighth Circuits concluded that if the treaty's drafters had intended to refer to "service" in Article 10(a), they would have used the word "serve"—which appears in the next two subsections of the same Article—rather than the word "send." The Fifth Circuit specifically rejected the "fickle presumption" that the delegates engaged in "careless drafting" by using the word "send" instead of the word "serve."

The Second and Ninth Circuits, and now the Eastern District of Kentucky, have reached a different result, concluding that the word "send" was indeed intended to mean "serve." *Dierig's* analysis focused on the treaty's legislative history, including evidence that the U.S. delegate to the 1965 Convention believes international service by mail was anticipated.

Dierig did not address whether regular, rather than certified, mail would suffice. The Ninth Circuit, however, held in 2004 that something more than ordinary, international first-class mail is required to affect service.

WHY LITIGATE SERVICE ISSUES?

Why pursue a service issue that could be resolved through an alternative means of service? To begin, there is often enough at stake in such cases to make the battle worth it, points out John B. Pinney, Cincinnati, former arbitration subcommittee cochair of the ABA Section of Litigation Trial Practice Committee.

"It takes forever to serve an international defendant through channels other than U.S. mail," Pinney says. "In some countries, it may take as long as a year to get a complaint served through those

MAIL SERVICE AUTHORIZED

Ackermann v. Levin, 788 F.2d 830 (2d Cir. 1986).

Brockmeyer v. May, 383 F.3d 798 (9th Cir. 2004).

MAIL SERVICE NOT AUTHORIZED

Nuovo Pignone Spa v. Storman Asia M/V, 310 F.3d 374 (5th Cir. 2002).

Bankston v. Toyota Motor Corp., 889 F.2d 172 (8th Cir. 1989).

paths." By that time, collection efforts on a domestic lawsuit are weakened, at best, he notes.

While all methods typically require translation as a cost, using channels other than mail for service often costs $1,000 (or more). By comparison, the price of a postage stamp is minimal, Pinney adds. He believes the *Dierig* court reached the correct and "more workable" decision.

EXPEDIENCY, BUT AT WHAT COST?

Others disagree. "I understand there are a lot of tactical reasons why district courts are going to want to uphold service in these circumstances, even if the text of the statute doesn't get them to where they want to go, since there is an interest in getting a foreign bad actor into our court system," says Anthony P. Ellis, New York, an active member of the Section of Litigation's International Litigation Committee. Even so, "service is a very defined term within the law; it has a specific meaning in every U.S. state and federal law book and handbook," says Ellis. "It is hard to believe that a word [that] is used so deliberately everywhere else was inadvertently omitted in the treaty," Ellis opines.

"Ignoring the specific words used in the treaty to allow for service of process by mail is inappropriate judicial legislation," says J. Chad Mitchell, Chicago, another active member of the Section's International Litigation Committee. "The entire Hague Convention is trying to put into place extremely rigid procedures for service from one country to another," Ellis notes.

The "biggest issue" with the international service question, according to Ellis, is the inconsistency in the formulaic intent of the treaty and the ease of service by mail. It seems "backwards" that the convention would put these rules together—listing very detailed and sometimes complicated procedures for service—only to allow a plaintiff to bypass all those requirements by simply dropping a letter in the mail, he adds.

As a practical matter, Pinney observes that the service issue arises with relative infrequency. "The only time a plaintiff must undertake the service provisions provided under the Hague Convention is in the fairly rare circumstance where an international defendant has enough minimum contacts to satisfy U.S. personal jurisdiction, but cannot be served domestically because they do not have a physical presence in the U.S.," Pinney says.

A web version of this story, including links to cases and statutes, is available at http://tinyurl.com/LN-37-4-Bult.

NEW DISCOVERY PROTOCOLS FOR FEDERAL EMPLOYMENT CASES

Reporting on a pilot program for the federal district courts, United States Courts blog, *The Third Branch*, details new pretrial procedures for certain types of federal employment cases. The protocols, which are designed to encourage more efficient and less costly discovery, replace initial disclosures with initial discovery in employment cases alleging adverse action. According to Southern District of New York Judge John Koeltl, who helped develop the program, the protocols cut cost and delay by requiring exchange of a set of information from both parties within 30 days of a responsive pleading or motion. District judges may choose to adopt the protocols, which do not require changes to the local rules. The protocols do not apply to class actions; cases in which the allegations relate only to discrimination in hiring, harassment, or hostile work environment; or certain legislation-based causes of action, such as the FLSA, ADA, FMLA, or ERISA.

http://tinyurl.com/LN-37-4-pn-1

ARE LAWYERS LOUSY COLLABORATORS?

Addressing poor collaboration skills among lawyers, *At the Intersection* blog guest contributor Douglas Richardson initially notes that the ability to collaborate has become a core competency in the evolving legal profession. Still, he argues, "so many people who self-select into a legal career are hard-wired to work independently and crave the rewards of individual achievement." Richardson says people will collaborate only if three conditions are met: (1) they are motivated to collaborate; (2) perceived rewards of collaborating outweigh perceived risks; and (3) everyone collaborating understands his or her role. By way of incentive, compensation is often not sufficient, and employers should learn individual lawyers' motivational drivers and build that into personalized incentives. Richardson also suggests that many of the problems with lawyers' collaboration come from poor instructions. One of the best ways to promote collaboration is to spend more time explaining a project at its outset, define each individual's role in the overall project, explain the sequence of the project's phases and tasks, and disclose the standards by which performance and success will be measured.

http://tinyurl.com/LN-37-4-pn-5

FIRST AMENDMENT IMPLICATIONS FOR FACEBOOK "LIKES"

In a recent federal district court decision, *Bland v. Roberts*, the Eastern District of Virginia held that Facebook "likes" do not qualify as protected First Amendment speech because no actual substantive statement is made. Disagreeing with the decision, UCLA School of Law Professor Eugene Volokh states on his blog, *The Volokh Conspiracy*, "A Facebook 'like' is a means of conveying a message of support for the thing you're liking. That's the whole point of the 'like' button; that's what people intend by clicking 'like,' and that's what viewers will perceive. . . . To be sure, the message isn't highly detailed; it doesn't explain why one is supporting the 'liked' person or cause. But the First Amendment protects speech even when the speech is not rich with logical argument, or is even vague or ambiguous." If the plaintiffs appeal, Professor Volokh predicts the Fourth Circuit will reverse the district court.

http://tinyurl.com/LN-37-4-pn-4

Lindsay Sestile, Litigation News Associate Editor, monitors the blogosphere.

TERMINATION FOR MEDICAL LEAVE FRAUD

When can an employer fire an employee for medical leave fraud? Even with reliable reports of an employee on medical leave, engaging in strenuous recreational activities or working another job, the *Employment & Labor Insider* blog recommends conducting an investigation and referencing the employee's medical restrictions before termination. "It could be that the employee's 'recreational' activity, or even alternate employment, is within his medical restrictions while your job [for him] is not. In fact, most doctors would recommend that employees engage in some activity while on medical leave. It can speed recovery and help to ward off depression . . . [and] help pay those doctor bills that you, as the employer, are not already paying."

http://tinyurl.com/LN-37-4-pn-2

RAISING AWARENESS OF LOAN REPAYMENT OPTIONS FOR PUBLIC SERVANTS

Acknowledging that the "rising cost of tuition and burden of repaying mortgage-sized student loan debt prevents many lawyers from pursuing public service careers," *The Justice Blog* reports on a myriad of loan repayment assistance programs available to public employees. Congress enacted the John R. Justice Prosecutors and Defenders Incentive Act, for example, to provide loan repayment assistance for public defenders and state prosecutors who agree to remain in their positions for at least three years. Public agencies are also encouraged to publicize loan repayment programs, including the Income-Based Repayment and Public Service Loan Forgiveness (PSLF) programs. Income-based repayment programs allow borrowers to make payments based on a percentage of their income, resulting in lower payments. The PSLF program also offers federal student loan forgiveness after 10 years of public service employment.

http://tinyurl.com/LN-37-4-pn-3

EMPLOYMENT CONTRACT ADVANTAGES FOR EMPLOYERS

In her *Continuing Education of the Bar Blog*, Julie Brook recently recommended employers consider employment contracts as the economy improves and hiring increases. According to Brook, the main advantage of an employment contract is that "it provides certainty by defining the essential terms of the employment relationship. Terms that aren't defined in the contract can be defined by the parties later, and these later agreements serve as modifications of the original agreement." There are four major reasons employers benefit from employment contracts: (1) it prepares for termination of employment and specifies the employer's and employee's powers of termination as well as consequences that flow from that termination; (2) it attracts and retains employees for special purposes—in some cases for a specific period of time; (3) it protects an employer's intellectual property; and (4) it can provide for faster resolution of disputes outside the court system.

http://tinyurl.com/LN-37-4-pn-6

THE CREDIBILITY OF THE TURNCOAT WITNESS

"Not all witnesses are saints," opens jury consultant Ken Broda-Bahm, Ph.D. in his post about testing and bolstering the credibility of turncoat witnesses on his blog, *Persuasive Litigator*. To prevent juries from viewing a witness's disloyalty as a negative that cannot be overcome, Broda-Bahm suggests bolstering the witness by exploring the story that explains and reframes any perceived disloyalty. He also recommends giving careful forethought about using apparently disloyal witnesses by (1) adding "loyalty" to your calculations when assessing a witness's credibility; (2) identifying transcendent loyalty by determining whether a witness's disloyalty can be presented as loyalty to some higher cause; and (3) running a witness credibility test by holding a limited mock trial and giving jurors a brief overview of the case and a preview of the witness's testimony. By doing so, "[y]ou'll get good feedback on whether the witness is believable or not, and more importantly, on the factors and themes that serve to increase or decrease that believability."

http://tinyurl.com/LN-37-4-pn-7

IS SUMMER CAMP TAX-DEDUCTIBLE?

In her *Taxgirl* blog for *Forbes*, attorney Kelly Phillips Erb analyzes whether summer camp expenses are deductible. The bad news, according to Erb, is that almost everything parents buy to send their kids to camp is non-deductible, including sports equipment and clothing. The good news, however, is that some of the expenses involving preparing for camp may be deductible, including physicals and shots. Additionally, some of the costs of camp may qualify as child and dependent-care expenses, which can be used to claim a credit on tax returns. Even camps focused on a particular activity (e.g., soccer) may be considered a qualifying expense, but overnight camps do not qualify for the credit. Finally, Erb reminds parents that the devil is in the details—to claim the credit, parents must be able to identify the care provider by name, address, and bona fide tax ID number and must also include their child's name and Social Security number on their tax return.

http://tinyurl.com/LN-37-4-pn-8

By Mark A. Drummond, Litigation News Associate Editor

A PEER MAY BE YOUR CLIENT'S WORST JUROR

DO YOU WANT YOUR PEERS JUDGING YOU?

When I first started trying cases, the selection of the jury was the part that made me the most nervous. I could plan for opening, direct, cross, and closing. With jury selection, I felt I was working without a net. So, I started reading everything I could find on the topic.

Some of the books and articles on jury selection from the 1950s were absolutely hilarious. One book—I have forgotten the title—advised that if you were doing insurance defense work, to pick Norwegians because they were conservative. So, I found myself in the cornfields of Illinois, looking for guys named Olaf to be on my jury.

From high school civics and on, we have heard the phrase "a jury of your peers." The phrase does not actually appear in the U.S. Constitution. The Magna Carta appears to be the source of the concept of being judged by your peers or equals. The concept back then, however, was that you would be judged by persons of your same social standing, status, or peerage as opposed to the crown.

As a young attorney, I took a rather simplistic approach. I wanted jurors who were like my client. After years of trying cases, my question now is: Do you really want a jury of your peers?

ANECDOTAL EXPERIENCES WITH PEERS

Several anecdotes from real life bring the question into focus. Early in my career, I defended a young, female teenage driver. So, I picked as many young, female teenage drivers as I could find in the venire. I truly tried to get a jury of her peers.

On what I thought was an open-and-shut case, the jury was out for hours. Eventually, they found in our favor. When I interviewed the jurors who were willing to stick around, they told me that I had made a mistake by picking her peers. When I asked why, they said they were willing to give her the benefit of the doubt, but that her peers judged her much more harshly.

I usually tell this story in my one-day advocacy seminar. After I do, attorneys often come up to me and share their own "jury of peers" stories.

A prosecutor told me he was preparing to try his first case of sex with a minor. His supervisor asked his jury selection strategy. He told her that he was going to pick as many females who had daughters the same age as the victim.

His supervisor, who was a veteran of these cases, told him to pick as many men as he could find as close to age of the defendant. He was dumbfounded and asked "Why?" She said that the men will be disgusted by this guy, look down on him, and view themselves as the young victim's protectors. He won the case and was shocked when five of the male jurors showed up for the defendant's sentencing. This had never happened before.

On the defense side, a black public defender shared this story. She said when she started practicing, she tried to get as many blacks as possible on the jury if her defendant was black. She said she lost many cases.

So, she decided to switch her strategy and packed the jury with as many white jurors as possible. She started winning cases and hanging juries. She believed that the black jurors in her community judged the black defendant more harshly than the white jurors did.

RESIST THE URGE TO STEREOTYPE

A jury of my peers would be a group of overweight, balding, white male judges. Would I really want a jury made up of people like me? Wouldn't they tend to judge me more harshly than perhaps persons different from me?

So why do we do it? Why do we stereotype people when in our hearts we know that human behavior is so complex? Why do we stereotype when we know that even if we had a day to question each juror, we could only touch the surface of their life experience?

"Do not overestimate the significance of demographics," says Theodore O. Prosise, Ph.D., Seattle, Tsongas Litigation Consulting, Inc. "Characteristics such as race, gender, or class can be useful, but they are extremely error-prone and can be highly misleading. The attractiveness of data that is easy to collect and stereotype is hard to overcome."

"Experiences and attitudes are far more important," continues Prosise. "A lot of times people look at the surface and judge poorly or misinterpret just because they are only looking at the demographics."

"My admonition is usually the juror you think you want is not the one you want, or the easy way to say it is that stereotypes never hold true," advises Anthony N. Upshaw, Miami, codirector of the Section's Division IV—Procedural. "For example, I may be defending and the plaintiff may be a well-off, Caucasian female bringing a wrongful death action for the death of her husband." "On first impression, you might think that you

wouldn't want jurors that are also well-off, older, white females," Upshaw continues. "Yet they may feel entirely different due to their own life experiences. Knowing their beliefs on a topic is much more important than any stereotype or superficial evaluation of a particular juror," he concludes.

BE WARY OF PUTTING "EXPERTS" ON THE JURY

"We take the approach of jury de-selection or eliminating those people that, because of bias or prejudice, are going to be potentially more critical of a party than they should be," advises Prosise. "When we are on the defense side of an employment case, one of the highest risk jurors are ones with HR (human resources) experience. While they may be a peer of the person who made the decision for the defendant, you risk having them become a non-testifying expert in the jury room where the rest of the jury looks to them as an opinion leader."

So, do you really want a doctor or a nurse on the jury in a medical malpractice case? Do you really want an accountant on the jury in an accounting malpractice case? If you are defending, that juror may be your client's peer but may also be your client's worst nightmare in the jury room. They may bring in their own life experiences, advice, and standards, and apply them to your client.

"Another concern is where a juror may contradict the law as the judge would give it, based upon their personal experience," cautions Prosise. "In construction defect cases where we would be representing the general contractor, the legal instruction is that the general has a right to rely on the expertise of the subcontractor. We've had plenty of instances in mock trials with a subcontractor on the jury who says, 'Oh that's not the case at all. The general contractor is responsible for anything, and
if I make a mistake,
it is their fault.'"

In terms of strategy, it seems clear from our experts on the topic that attitudes and experiences clearly trump basic demographics. Simply stated, I guess we have arrived at the old saying "You can't judge a book by its cover."

HOW TO REMOVE THE JUROR GRACEFULLY

So let's say that you are able to probe attitudes and experiences. You find out that a potential juror who, on the surface, looks like a peer of your client, is not good for you. You don't want him or her on your jury. What message do you send to the rest of the venire when you kick the nurse off a medical malpractice case or an ironworker off a construction case? How do you avoid sending a message that you don't want people who may know the most about the topic on the jury?

Well, if you have to exercise your challenges in front of the entire venire, you are kind of stuck. You can try to question whether they can set their experiences in the field aside and base their decision on the evidence presented so as to sensitize the entire panel and them of your concern. Then, if they try to dominate the deliberations, the other 11 jurors will remind that juror of his promise to you to leave his experiences at the door and base the verdict only on the evidence at trial.

A better approach is to have the judge excuse the juror. All challenges are made outside the presence of the venire. If this procedure is agreed to at the start, neither side is disadvantaged. The venire does not know who excused which potential juror or for what reason, thus eliminating one aspect of gamesmanship for both sides. As anecdotally noted above, both sides may have very good reasons why their clients' peers would not be the best judges of them.

RESOURCES

A related article, "Shadow Juries: A Unique Advantage in Civil Trials," may be found at http://tinyurl.com/LN-37-4-MAD01.

Why You Must Read the Local Rules

By Charles S. Fax, Litigation News *Associate Editor*

In the Winter 2012 edition of *Litigation News*, this column considered the proliferation of local rules, forms, and guidelines in U.S. district courts throughout the country. The question posed was whether the unbridled expansion of such local rules advanced the intent of the Federal Rules' drafters that the codified rules of procedure further "the just, speedy, and inexpensive determination of every action and proceeding." While suggesting that the answer was "no," I acknowledged that, as a practical matter, the trend toward expansion of local rules would likely continue.

This means that counsel must know not only the local rules in the lawyer's home district but also the local rules in every district in which he or she is prosecuting or defending an action. Nothing can be taken for granted. A couple bicoastal examples illustrate why.

The U.S. District Court for the Central District of California—based in Los Angeles—has a Local Rule 7-3, titled "Conference of Counsel Prior to Filing of Motions." This sounds like the "meet and confer" requirement incident to the filing of a discovery motion under Rule 37(a) of the Federal Rules. In fact, Rule 7-3 does not apply to discovery motions, which are governed by a separate set of local rules. Rather, Rule 7-3 applies to virtually all other motions, including motions to dismiss and motions for summary judgment. The rule requires that:

> [C]ounsel contemplating the filing of any motion shall first contact opposing counsel to discuss thoroughly, *preferably in person*, the substance of the contemplated motion and any potential resolution. If the proposed motion is one which under the F. R. Civ. P. must be filed within a specified period of time . . . then this conference shall take place at least five (5) days prior to the last day for filing the motion; otherwise, the conference shall take place at least ten (10) days prior to the filing of the motion. If the parties are unable to reach a resolution which eliminates the necessity for a hearing, counsel for the moving party shall include in the notice of motion a statement to the following effect: "This motion is made following the conference of counsel pursuant to L.R. 7-3 which took place on (date)."

Assume that you are a D.C. lawyer whose client in New York was served two weeks ago with a complaint filed against him in the Central District of California. You read the complaint and quickly conclude that you have a winning Rule 12(b)(6) motion to dismiss. You instruct your associate to draft the motion, which you file within the 21 days allotted under Rule 12(a)(1)(A)(i) for responses to complaints. While that seems pretty straightforward, your otherwise-winning motion to dismiss is liable to be denied for failure to follow Local Rule 7-3.

Conversely, assume that the client is in California and has just been sued in the Eastern District of New York, based in Brooklyn. Same complaint, same deadline, same motion. It may be denied for an entirely different reason. At least one judge in that court has an "Individual Rule" requiring that a party filing a motion under Rules 12, 15, or 56, or for a change of venue, first file a request for a pre-motion conference with the court in a "letter not to exceed three pages in length setting forth the basis for the anticipated motion." The respondent may serve a response not to exceed three pages. The court will then consider whether to hear the motion on the merits.

The imposition of these additional procedural hurdles—and the risks in ignoring them—might seem contrary to the goal of streamlining the litigation process. One could argue that the denial of a substantively winning motion to dismiss for failure to state a claim on the ground that moving counsel failed to discuss with opposing counsel the merits of the motion in advance, or failed to submit to the court a letter requesting a pre-motion conference, needlessly prolongs—rather than simplifies—the litigation process. The judges who enforce these rules, however, would argue that in their experience the opposite is true, and that the requirement for consultation ultimately saves time and expense. In either event, counsel proceed at their own peril when they overlook these variegated local rules that the district courts take very seriously.

A web version of this story, including links to cases and statutes, is available at http://tinyurl.com/LN-37-4-Fax.

WE WANT to HEAR from YOU!

The goal of *Litigation News* is to inform litigators and to advance the art of advocacy. Feel free to lend a hand. Do our feature articles address your perspective? How do these issues affect your practice? What practical advice will improve the profession? What topic should we cover in the next issue? Share your comments at **feedback@litigationnews.org**.

Prometheus's Patent Ruled a Myth

By Katerina E. Milenkovski, Litigation News *Associate Editor*

By unanimous decision, the U.S. Supreme Court recently held that a patent on a diagnostic medical test was invalid and that, essentially, the application merely attempted to patent a "law of nature." The decision potentially calls into question the validity of a number of similar medical and biotechnical patents.

The patent in question in *Mayo Collaborative Services v. Prometheus Laboratories, Inc.* covers a blood test that helps doctors determine the proper dosage for a drug that is used to treat certain autoimmune illnesses. Prometheus Laboratories, Inc., is the exclusive licensee of the patents in question and sells diagnostic tests that employ the processes the patents cover.

On reconsideration from an initial remand by the Supreme Court, the Federal Circuit upheld patentability for a second time. Again the Supreme Court granted certiorari and then issued its decision finding the claims were not patentable.

"To transform an unpatentable law of nature into a patent eligible application of such a law, a patent must do more than simply state the law of nature while adding the words 'apply it,'" wrote Justice Stephen Breyer for the Court. "We conclude that the patent claims at issue here effectively claim the underlying laws of nature themselves. The claims are consequently invalid."

PATENT ELIGIBILITY AND PATENTABILITY

Laws of nature, along with physical phenomena and abstract ideas, traditionally are not considered patent eligible subject matter under Section 101 of the Patent Act. An application of a law of nature, however, can be entitled to a patent if the additional steps of the process add enough to meet the patentability criteria of Sections 102 and 103 of the Patent Act.

"With the Supreme Court, the trend has been to limit patentability, so it is not surprising that this case does the same," observes Kim R. Jessum, Philadelphia, cochair of the ABA Section of Litigation's Distance CLE Committee and a patent attorney. "However," she adds, "Section 101 is not commonly used by patent examiners to reject claims and has not been used as effectively as Sections 102 and 103 to invalidate claims in patent cases."

In an earlier case, *Diamond v. Diehr*, the Supreme Court held that courts must consider a patent claim as a whole, and not dissect or examine the individual elements. Despite quoting heavily from *Diehr* in its *Prometheus* analysis, the Supreme Court nevertheless did exactly what *Diehr* instructed not to do, according to Robert M. Asher, Boston, cochair of the Patents Subcommittee of the Section of Litigation's Intellectual Property Litigation Committee. "All patents that have method claims may be subject to the same analysis the Court used here, namely the dissection of claims to remove the portions that define laws of nature and then a consideration of whether the remaining parts of the claim were known in the art," says Asher.

FAR-REACHING IMPLICATIONS

"While the case dealt with biotech, it has far broader ramifications, especially for business methods cases," predicts Asher. "*Prometheus* leaves a lot of room for litigation of Section 101, which may become a threshold issue for many cases."

"There are many existing patents on diagnostics in the pharmaceutical and biotechnology industries," adds Jessum, "so this case will have a major impact on enforceability of those patents." Specifically, she says, "[b]y eliminating patent protection on diagnostics, there will be less financial incentive to invest a lot of research dollars in diagnostics. Other investment in R&D should not be affected for now, but some may be worried that there may be further limitations on patentable subject matter in the near future."

The patent bar should not panic just yet, according to Asher. "Justice Breyer implied that non-obviousness or novelty played a role in patentability; *Diehr* was quite explicit that you don't look at the novelty of individual steps. Breyer made no attempt to overrule *Diehr*. Thus, I believe *Diehr* is still good law. I also think it's premature to raise alarms about this decision quashing R&D," says Asher. "That's an overreaction at this point. The *Myriad* case will be much more telling in terms of its impact on R&D and biotech."

The patents at issue in *Association for Molecular Pathology (AMP) v. Myriad Genetics, Inc.*, cover isolated DNA molecules and related methods useful for assessing risk of developing breast cancer. The U.S. District Court for the Southern District of New York found gene patents to be invalid.

On appeal, the Federal Circuit rejected much of the district court's reasoning. Just a few weeks after the *Prometheus* decision, the Supreme Court vacated the *Myriad* decision and sent it back to the Federal Circuit for consideration in light of *Prometheus*. "Industry needs to hope that the *Myriad* decision will calm fears," says Asher.

"One take away from the *Prometheus* decision is the importance of drafting claims that cover the invention in different ways if possible. [This way], if one type of claim becomes invalid, then the patent owner can rely on the other claims for enforcement," instructs Jessum.

A web version of this story, including links to cases and statutes, is available at http://tinyurl.com/LN-37-4-cp-Milenkovski.

Settlement Negotiations Discoverable in Patent Dispute

By Jannis E. Goodnow, Litigation News *Associate Editor*

Settlement negotiations in litigation are protected by an evidentiary rule intended to encourage resolution of disputes by the litigants and not the courts. A recent Federal Circuit decision, however, raises an important consideration for confidential settlements in multiparty litigation.

In a case of first impression, the U.S. Court of Appeals for the Federal Circuit held that settlement negotiations between a plaintiff and settling defendants in a patent dispute were discoverable by a non-settling defendant in the same case. The Federal Circuit's opinion, *In re MSTG*, declined MSTG's request to create a new settlement negotiation privilege under Federal Rule of Evidence 501. It also found that the district court had not abused its discretion in ordering MSTG to produce discovery related to its prior settlement negotiations with other defendants.

MSTG initially sued several defendants for patent infringement of its 3G telecommunication technology. Eventually, it settled with all parties but AT&T.

MSTG's damages, if it proved AT&T infringed MSTG's patents, was the amount of a reasonable royalty. AT&T sought discovery not only of MSTG's ultimate licensing settlement agreements with the other defendants, but also of its licensing/settlement negotiations.

Federal Rule of Evidence 501 authorizes federal courts to recognize new privileges only by interpreting "the principles of the common law . . . in the light of reason and experience." In addressing whether to recognize a settlement negotiation privilege under Rule 501, the court first noted a split among the circuit courts of appeal and district courts, with the Sixth Circuit, Southern District of California, and Eastern District of Texas adopting a settlement negotiation privilege, and the Seventh Circuit, Northern District of California, and District of Columbia refusing to do so.

Next, the court analyzed decades of Supreme Court jurisprudence and summarized six factors identified by the Court to assess the propriety of defining a new privilege under Rule 501: (1) the policy decisions of the states; (2) whether Congress had considered that or related questions; (3) the list of evidentiary privileges recommended by the Advisory Committee of the Judicial Conference in its proposed Federal Rules of Evidence; (4) whether the proposed privilege will effectively advance a public good; (5) potential exceptions to the new rule; and (6) other effective methods to limit the scope of discovery to protect settlement discussions and promote settlement.

The court concluded that none of the factors weighed in favor of adopting a new settlement negotiation privilege. Rather, courts' discretionary ability to limit discovery under Rule 26 should provide sufficient protection from abusive discovery.

The court also noted that many states have statutes creating a privilege for settlement negotiations that take place in the context of mediation. Finally, the court pointed out that while the settlement negotiations were discoverable, the court was specifically not ruling on whether they might be admissible under Rule 408.

"There is a definite tension" between the *In re MSTG* decision and the federal courts' interest in promoting settlement, says Joan Archer, Kansas City, MO, cochair of the ABA Section of Litigation's Pretrial Practice and Discovery Committee. The decision "is a bit troubling because it creates a disincentive for early settlements in complex cases," she adds, "[and] you may become more cautious because you don't know where the line will be drawn" regarding what is discoverable.

The decision should not have a chilling effect on negotiations, believes Joseph Drayton, New York, cochair of the Section of Litigation's Intellectual Property Litigation Committee, because it maintains the status quo that there is no federal settlement negotiation privilege. The decision "gives practitioners a better idea of what they can seek in discovery," Drayton adds, as settlement negotiations in the patent licensing context "are definitely probative on the issue of whether licenses are comparable for damages purposes."

In re MSTG will be binding precedent only over the matters subject to the Federal Circuit's limited jurisdiction. Nonetheless, practitioners may cite the case as persuasive authority on the absence of settlement negotiation privilege outside of the IP context, Drayton believes. "I might try to use it" beyond IP litigation," muses Archer, as the decision "was not limited to IP."

Full story and links to cases and statutes at http://tinyurl.com/LN-37-4-na-Goodnow.

Supreme Court Limits FMLA Claims

By Lisa R. Hasday, Litigation News *Associate Editor*

State employees cannot sue their employers for money damages under the Family and Medical Leave Act (FMLA) provision allowing leave for self-care, according to a recent U.S. Supreme Court decision. The Eleventh Amendment's sovereign immunity bars such suits.

Petitioner Daniel Coleman worked for the Maryland Court of Appeals in procurement and contract administration. Coleman was placed under a doctor's care and requested sick leave. A supervisor told Coleman that he would be fired if he did not resign. Coleman's claims included violations of the FMLA.

The district court dismissed the FMLA claim. The U.S. Court of Appeals for the Fourth Circuit affirmed, holding that Congress unconstitutionally abrogated the states' immunity when it passed the FMLA provision. The self-care provision requires employers to grant up to 12 weeks of unpaid, job-protected leave for self-care of a serious health condition in certain situations.

In a 5–4 decision, with one justice concurring only in the judgment, the Supreme Court found that the statute's attempt to abrogate the states' immunity exceeded Congress's power under Section 5 of the Fourteenth Amendment. In the plurality opinion, Justice Anthony M. Kennedy states that Congress failed to "identify a pattern of constitutional violations and tailor a remedy congruent and proportional," a test that the Court previously established for determining Congress's Fourteenth Amendment powers.

According to Justice Ruth Bader Ginsburg, the self-care provision responds to state-sponsored sex discrimination against pregnant women. Her dissent argues that pregnant women were not mentioned specifically because "Congress sought to ward off the unconstitutional discrimination it believed would attend a pregnancy-only leave requirement."

Moreover, Justice Ginsburg explains that Congress included the self-care provision to prevent discrimination against women based on an employer's belief that they would be more likely than men to take FMLA leave. She observes that Congress "had good reason to conclude that the self-care provision—which men no doubt would use—would counter employers' impressions that the FMLA would otherwise install female leave."

Options for state employees still remain. "If the State agrees with petitioner that damages liability for violations of the self-care provision is necessary to combat discrimination against women," the plurality opinion offers, "the State may waive its immunity or create a parallel state law cause of action."

Justice Ginsburg notes two other options: The employee may seek injunctive relief against the state official, or the U.S. Department of Labor may sue the state under the FMLA and recover monetary relief on the employee's behalf.

"In light of this decision, state employers might want to reevaluate their leave policies and practices to ensure that they are being structured and administered in a non-discriminatory manner," advises Ann Marie Painter, Dallas, former cochair of the ABA Section of Litigation's Employment and Labor Relations Committee.

Full story and links to cases and statutes at http://tinyurl.com/LN-37-4-na-Hasday.

This article presents the views of the author alone and not those of her employer, the U.S. Department of Justice.

Computer Expert May Identify Keyboard User

By John W. Joyce, Litigation News *Associate Editor*

A computer forensics expert may identify a specific person who downloaded information on particular computers based on the user's access to the computers and a similarity of "file structures." Although experts appear split as to whether such testimony is permissible, a recent Eighth Circuit decision provides insight on this issue for litigators using computer forensics experts.

In *United States v. Huether*, Ray Leon Huether's girlfriend, "CT," filed a complaint with the Minot, North Dakota, police department, alleging that Huether sexually abused her daughter. The police searched two residences owned by Huether—one in Minot and the other over 250 miles away in Fargo.

At the Minot residence, police seized computers and optical discs containing child pornography. At the Fargo residence, officers interviewed Huether for about two

hours, and Huether made incriminating statements about his sexual abuse of CT's child and the pornography found at the Minot residence. Law enforcement seized a laptop from the Fargo residence.

At trial, a computer forensic specialist for the state testified that Huether put the child pornography on the hard drives. The expert based his opinion on the "detailed file structure and the way that they were consistent among all the computers that we discovered child porn," and the fact that "the only person that was at both residences was Ray Huether." Huether was convicted by a jury for knowing receipt of child pornography and knowing possession of child pornography.

On appeal, Huether argued that expert's testimony violated Federal Rules of Evidence 702 on the grounds that it was not helpful to the jury. He further argued the testimony violated Rule 704 because it embraced the ultimate issue—that Huether put the child pornography on the hard drives in both Minot and Fargo.

The Eighth Circuit rejected Huether's arguments under Rule 702, reasoning that "[b]ecause knowledge of computers and internet use differ widely among lay jurors, [the expert]'s testimony appropriately helped [the jury] better understand the evidence." With respect to the arguments under Rule 704, the court pointed out that the rule itself permits testimony on the ultimate issue.

"The court simply allowed an expert to explain computer processes that were beyond the ken of people of ordinary intelligence and to suggest the inferences to be drawn from his expert and specialized knowledge," says Jeffrey A. Beaver, Seattle, cochair of the ABA Section of Litigation's Committee on Expert Witnesses. Beaver believes the court was correct to permit the expert testimony.

The better question might be whether the court properly permitted the expert to identify Huether. "When an expert is comparing file structure patterns on multiple computers, the expert may offer an opinion that the same person used the computers, but to identify a specific individual stretches too far," says Richard S. Stockton, Chicago, cochair of the Section of Litigation's Technology for the Litigator Committee.

Beaver suspects that the absence of a defense expert impacted the court's analysis regarding the admissibility of the government's expert. "Often times that decision comes down to a battle of the experts," suggests Beaver. "I am surprised in this case that there is no mention of a competing expert to advance the argument that the government's witness could not offer the expert testimony," he says.

Full story and links to cases and statutes at http://tinyurl.com/LN-37-4-na-Joyce.

SOX Whistleblower Protection Limited

By Sara E. Costello, Litigation News *Associate Editor*

Employees of private companies that contract with public companies cannot take advantage of the Sarbanes-Oxley Act's (SOX) protection for whistleblowers, according to the Court of Appeals for the First Circuit. Noting that this case "raises important questions of first impression," the First Circuit reached its conclusion relying primarily on statutory interpretation.

SOX includes protection for whistleblowers who provide evidence of violations of either federal securities law, U.S. Securities and Exchange Commission (SEC) rules and regulations, or any "federal law relating to fraud against shareholders." In *Lawson v. FMR LLC,* plaintiffs Lawson and Zang each separately sued their corporate employers for unlawful retaliation.

Each worked for "private companies that provide advising or management services by contract to the Fidelity family of mutual funds." The Fidelity mutual funds are public companies that are required to file reports under the Securities Exchange Act of 1934. The mutual funds, which have no employees of their own, were not named in the lawsuits.

The defendants moved to dismiss the cases, arguing in part that SOX's whistleblower provision, 18 U.S.C. § 1514A, did not cover Lawson and Zang. Specifically, they argued that SOX protects only employees of public companies and not the employees of private companies that contract (or subcontract) with public companies. The plaintiffs countered that "Congress meant to cover all whistleblowers" in SOX.

The district court rejected the defendants' theory and held that SOX protects "employees of private agents, contractors, and subcontractors to public companies." The First Circuit then took up the issue on interlocutory appeal.

The First Circuit reversed the district court, finding that the "protected employee" within § 1514A(a) "refers only to employees of the public companies." The First Circuit also contrasted § 1514A(a) with other broader whistleblower statutes that clearly protected "employees of contractors to the entities regulated by those statutes."

Both the SEC and the U.S. Department of Labor (DOL) supported the plaintiffs' broader interpretation of the statute. The First Circuit, however, gave no deference to the views of the federal agencies.

"Congress chose not to give authority to the SEC or the DOL to interpret the term 'employee' in § 1514A(a)," the court stated, so "there is no basis" for deference under *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.* Further, the appellate court found that deference was not necessary because the definition of "employee" in the statute is not ambiguous.

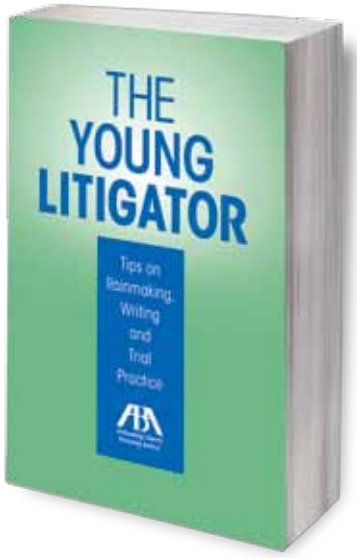
The opinion of the panel was not unanimous. Sharply critical of the majority opinion, Judge O. Rogeriee Thompson noted that the ruling improperly bars "a significant class of potential securities-fraud whistleblowers from any legal protection."

In general, whistleblower statutes are written broadly and "courts struggle with their interpretation," says Brian W. Koji, Tampa, vice-chair of the ABA Section of Litigation's Employment and Labor Relations Law Committee. Koji predicts that there may be a split within the circuits on the issue.

Though this case presents a "tough question," the majority opinion "got it right," says John R. Bielema, Atlanta, vice-chair of the Section of Litigation's Commercial and Business Litigation Committee. The "main driving force" behind the First Circuit's interpretation is the "title and caption of the statute—they are pretty unambiguous," Bielema notes.

Full story and links to cases and statutes at http://tinyurl.com/LN-37-4-na-Costello.

The Young Litigator: Advice on Building a Successful Career



By Caitlin Haney, Litigation News *Guest Editor*

One cannot open a law-related publication without being reminded of the impact of the economy on the law profession. Even law schools are under attack for inflated claims of employment as more and more new lawyers find themselves hanging out a shingle out of necessity as opposed to choice.

According to statistics gathered by the National Association for Law Placement, 44,258 law school graduates entered an already oversaturated legal market in 2010. Even for attorneys in a law firm, increased internal competition coupled with clients' reluctance to pay the cost of going to trial creates pressure to distinguish oneself as a competent litigator early in one's career.

A litigator cannot fully succeed in the business of law without the ability to gain and manage clients, write persuasively, and conduct a trial. Luckily for new attorneys, *The Young Litigator: Tips on Rainmaking, Writing and Trial Practice* compiles the resources they need to build the foundation of a successful litigation career.

The Young Litigator is published jointly by the ABA Section of Litigation's First Chair Press, whose mission includes publishing books of interest to young lawyers, and the Young Lawyer Leadership Program. *The Young Litigator* serves as a "best of the best" of hundreds of how-to materials from Section of Litigation newsletters, journals, websites, and other sources. The result is 37 resources amassed in a single, easy-to-access paperback.

The book is a useful reference tool for the young litigator committed to becoming a valuable asset to clients and employers. The articles are organized into sections on rainmaking, writing, and trial practice. Longer articles that explore issues in depth help orient attorneys facing a problem for the first time. For attorneys more familiar with a topic but wanting a quick refresher, shorter articles outline relevant considerations in helpful checklists.

The first part of the book demystifies perhaps the most important part of being a successful lawyer in private practice: rainmaking. Articles here provide guidance on building a professional network through healthy mentor relationships, community and alumni associations, and social networking.

This section warns against a variety of pitfalls, from committing ethical violations to creating a relationship of dependency with superiors, the latter of which is particularly likely to arise in a litigator's early years. It also includes tips for creating a successful business plan, a process that should begin prior to law school graduation, and, which, if followed, should help the diligent young litigator take control of her career.

The second part of the book reminds litigators what they learned in their legal research and writing classes. Encouraging readers to avoid the temptation of "sounding like a lawyer," the articles include dozens of tips for writing with clarity and persuasiveness.

The final section explores general trial practice. It includes practical advice on planning, preparing, and working within a trial team. Authors share their own (often hilarious) stories of failure and success that illustrate the unpredictability of litigation.

Pragmatic discussions of proper courtroom etiquette give young litigators the tools they need to build good working relationships with the judge, courtroom staff, and opposing counsel. For example, something as simple as having your up-to-date calendar information at court so that you may schedule future hearings conveys both your preparation and a respect for the time of the court. Articles on persuasive oral and written advocacy are included in subsections on oral argument and motion practice.

Although the book provides valuable advice, there are some areas where it could be improved. In general, the book is directed toward attorneys on the "traditional" path. This assumes that readers will not only be employed, but also be employed in a more traditional law firm setting. This is an assumption that, sadly, may no longer reflect reality for far too many recent law school graduates.

Some of the subsections further appear to assume the young attorney will be working in an environment with substantial resources. Attorneys working in government or non-profit work, as well as lawyers who are unable to find work and instead are forced to go out on their own, are often faced with financial constraints that the book appears to ignore. Inclusion of some content directed toward making the most of a modest budget would round out the offering and increase the potential audience.

Those minor criticisms aside, client cultivation, writing, and trial advocacy remain essential skills for all litigators. Thus, even the experienced litigator is likely to find valuable new (or perhaps just forgotten) advice in *The Young Litigator.*

CDO ISSUERS MAY QUALIFY AS DEBTORS

In a decision with significant implications for the distressed CDO (collateralized debt obligation) market, the U.S. Bankruptcy Court for the District of New Jersey has held that CDO issuers may, in fact, be debtors under the Bankruptcy Code. While the decision may come as a surprise to some investors, it serves as a reminder that there is a reason why these types of entities are characterized as "bankruptcy-remote" and not as "bankruptcy-proof." The Spring 2012 Corporate Counsel newsletter discusses CDOs, the battle that was waged resulting in a high-profile CDO issuer being in Chapter 11, and its outcome.

http://tinyurl.com/LN-37-4-wh01

TRACKING THE IMPACT OF RULE 26 AMENDMENTS

On December 1, 2010, several amendments to Federal Rule of Civil Procedure 26 took effect. The goal was to address the "undesirable effects" of the 1993 amendments to Rule 26 that permitted for "routine discovery into attorney-expert communications and draft reports." The four main changes included (1) narrowing the subject-matter of a testifying expert's disclosure; (2) extending work-product protection to draft expert reports; (3) providing new work-product protection to attorney-expert communications; and (4) clarifying which testifying experts are required to provide written reports. For those cases pending when the amendments came into effect, courts were permitted to apply them when it would be deemed "just and practicable." As is not surprising in light of the standard, cases examining whether it would be just and practicable are highly fact-driven and have come down on both sides. The Spring 2012 Commercial & Business Litigation newsletter examines the case law interpreting the amendments and discusses a number of potentially significant issues that have already emerged.

http://tinyurl.com/LN-37-4-wh2

THE PATH TO AGGREGATE SETTLEMENTS

Aggregate settlements have increased in popularity over the past decade, driven in part by mass-tort litigation and the liberal joinder rules in some states. The proliferation of attorney advertising has meant that plaintiffs' counsel often represent hundreds or even thousands of people asserting the same type of claim against a common defendant. These claims do not qualify for class-action treatment, but counsel nevertheless seeks to leverage the sheer number of plaintiffs into a settlement. "Lead counsel" often associate with lawyers across the country and then find themselves representing claimants they have never met and perhaps will never meet. Attorneys who represent multiple parties, and those negotiating with them, must understand the ethical and practical considerations involved in proposing or accepting aggregate settlements. The Spring 2012 Mass Torts Litigation committee newsletter analyzes the unique set of potential conflicts and risks that arise for both plaintiffs and defense attorneys in connection with these situations.

http://tinyurl.com/LN-37-4-wh3

"What's Hot—Committees and Practice Areas" is compiled by Daniel S. Wittenberg, Litigation News *Associate Editor. More information on committee activities can be found on the Section of Litigation's committee webpages at apps.americanbar.org/litigation/committees/newsletters.html.*

GENDER-BIASED SPEECH IN THE WORKPLACE

The proliferation of the daily use of offensive gender-biased terms in popular music and on network television is an unfortunate reality. Although the use of such provocative language seems more widespread, it is still prohibited in the workplace under Title VII of the Civil Rights Act of 1964. There is no "free pass" for this type of language in the workplace—or anywhere that is a reasonable extension of the workplace. This includes the company picnic where workplace business is discussed, and perhaps even the private hosted backyard barbecue among work colleagues. The Spring 2012 Pro Bono and Public Interest newsletter analyzes the federal and state laws concerning discrimination and harassment in connection with the use of gender-biased speech.

http://tinyurl.com/LN-37-4-wh4

ABA Section of Litigation
AMERICAN BAR ASSOCIATION

American Bar Association
321 N. Clark Street
Chicago, IL 60654

countdown

DO YOU REALLY WANT A JURY OF YOUR PEERS?

01 Keep in mind that a defendant's peers may judge the defendant more harshly.

02 Do not rely on a superficial evaluation of a particular juror. Ask enough questions to make sure that you are not misled by your first impression.

03 Find out about potential jurors' experiences and beliefs. It is more important to know about what potential jurors have done and how they feel than to rely on stereotypes.

04 Be aware that potential jurors may feel very differently than you expect on a topic due to their life experiences.

05 Know the pitfalls of selecting experts with significant experience in the same area as jurors. Other members of the jury may look to them as opinion leaders.

06 Consider whether you really want, for example, a nurse on the jury in a medical malpractice case or a CPA in an accounting malpractice case. Such jurors may, based on their background knowledge and familiarity with the subject, apply their own standards of conduct to your client or contradict the law stated by the judge.

07 Resist the urge to make decisions based on race, gender, or class. Demographics can be useful but are error-prone and can be misleading.

08 Try to question expert potential jurors on whether they can set their background in the field aside and decide based on the evidence.

09 Ask the judge to excuse the jurors so that any substantive challenges to a juror take place outside the presence of the venire.

10 Don't judge a book by its cover. Attitudes and experience trump basic demographics.

Each issue of *Litigation News* features 10 tips on one area within the field of litigation. This list complements the article by Mark A. Drummond on page 16.

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