Bar & Bench
Your Western Michigan Chapter Federal Bar Association Newsletter
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President's Letter

Assaults on the Privilege—Update

John W. Allen, President, Federal Bar Association, W.D. Michigan

The attorney-client privilege and work product protections continue to be under attack. Your FBA is responding to defend them.

In my last Presidential Message, we gave you background on this very important issue. The underlying rationale of the privilege is that legal compliance is enhanced by persons and businesses being able to seek and rely on confidential legal advice from their lawyers. Any waiver of the attorney-client privilege or work product protections derogates from a culture of confidential legal advice, which forms the principal incentive to seek and obtain advice; therefore, any waiver, especially if initiated by the government, holds a large potential for decreasing legal compliance in general.

For over a year, it has been my privilege to serve as a liaison member to the American Bar Association Task Force on Attorney-Client Privilege, which has been intensively studying recent attacks on the privilege and methods of countering them. Various materials and additional reports may be viewed at www.abanet.org/buslaw.attorneyclient. The principal topics continue to be:

- Compelled waivers demanded by government agencies;
- Waivers sought by auditors/CPAs.

Continued on page 2

In recent months, your W.D. Mich. FBA has been active. A special workgroup was formed (including Ron DeWaard, Ray Kent and John Allen) and met with W.D. Mich. U.S. Attorney Margaret Chiara and her staff regarding our concerns and how they might impact that office's policies developed in response to the October 2005 McCallum Directive. A similar meeting was also held with E.D. Mich. U.S. Attorney, Stephen J. Murphy III.

In the coming months, your FBA will host a Brown Bag CLE on "Privilege," which will include a summary of these current issues and efforts.

The ABA Task Force continues its work, focusing attention on increased requests for waiver of attorney-client privilege and work product protections by both governmental agencies and auditors. It continues to develop "white papers" on a variety of topics, with the objective of presenting one or more additional resolutions to the House of Delegates at the 2006 Annual Meeting in Honolulu.

The task force has also stepped up its efforts at distributing information on this issue, both to the profession and the general public. A number of state bar associations and other special-interest bar associations have formed their own parallel task forces, for the purpose of educating lawyers and the general public as to the importance of the attorney-client privilege and the threats presented by increased requests for waiver.

Tom Cranmer, president of the State Bar of Michigan, has named a Michigan Special Task Force on Attorney-Client Privilege through the State Bar of Michigan Business Law Section, mirroring the structure used by the ABA. I am honored to serve as co-chair of that task force.

The Michigan task force will accomplish several functions, including: contacting local U.S. attorneys regarding the development of policies for implementing the McCallum Memorandum (which has the potential to balkanize practices under the Thompson Memorandum, which established a national policy regarding the request of privilege waivers in Department of Justice investigations); issuing media releases, articles and other communications to the general public; and sponsoring informational programs, directed principally at lawyers. Look for those programs, beginning later this year.

Activity in the KPMG criminal prosecutions (regarding "abusive" tax shelters) has also generated considerable interest. After acceding to DOJ demands that it waive privilege and turn over its lawyers' files, KPMG was given a non-prosecution agreement and was not charged. Some of its partners were then indicted. As part of the deal, KPMG also promised that it would not honor its indemnification agreements to furnish legal defense expenses. The trial judge has issued opinions critical of the Thompson Memorandum and raised additional constitutional issues (such as potential violations of the Fifth and Sixth Amendments by DOJ policy discouraging corporate employers from paying defense counsel or litigation expenses on behalf of accused employees). Some of these issues appear destined for later appellate decisions.

The recent indictment of the Milberg Weiss law firm (regarding unauthorized payments to class-action plaintiffs) has also resulted in media interest, since it is widely reported that the indictment of the firm, *qua* firm, followed a DOJ demand that it might avoid being charged if it waived privilege and turned over the files of its lawyers. Even the *Wall Street Journal* has risen to Milberg Weiss's defense!

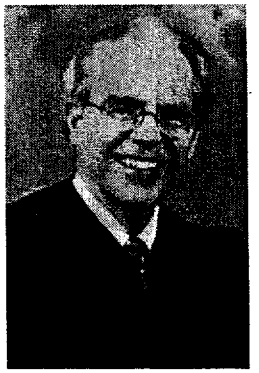
Most importantly, the U.S. Sentencing Commission has announced that it will amend the comments to the Federal Criminal Sentencing Guidelines so as to delete "credit" given to business defendants who waive attorney-client privilege regarding internal investigation and their work product. This provision of the Federal Sentencing Guidelines was frequently cited as a principal driver materially and adversely affecting decisions by businesses to waive attorney-client privilege and work product protections in response to requests by DOJ and other federal agencies.

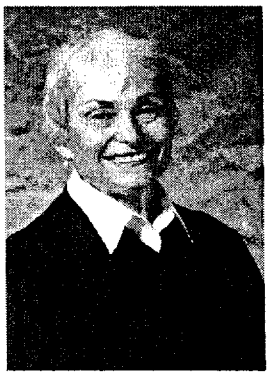
Last fall, your FBA Executive Committee adopted as a principal focus item the assisting in the defense of the attorney-client and work product privileges. We are pleased to report that we have been active and successful in those efforts, which will continue for the remainder of this year and into the future.

Please help us by attending the FBA Brown Bag CLE on "Privilege" (watch your E-news Bulletins for the date and time). We look forward to seeing you there.

President Bush Nominates Judges for Western District Vacancies


Robert J. Jonker


Hon. Paul L. Maloney


Hon. Janet T. Neff

On June 28, 2006, President George W. Bush nominated two Michigan judges and one attorney to fill vacancies on the Western District bench. The nominees are Grand Rapids attorney Robert J. Jonker, Berrien County Circuit Judge Paul L. Maloney, and Michigan Court of Appeals Judge Janet T. Neff.

Bob Jonker is a partner with Warner Norcross & Judd LLP, where he has specialized in environmental and commercial litigation since joining the firm in 1987. He is president-elect of the Western District Chapter of the FBA.

Hon. Paul Maloney has been on the Berrien County Circuit Court since 1995. Before joining the bench, he served for nearly a decade as county prosecutor and as a deputy assistant attorney general at DOJ.

Hon. Janet Neff was elected to the Michigan Court of Appeals in 1988. Before her service on the Court of Appeals, she was a lawyer and partner in private practice, an assistant U.S. attorney, assistant city attorney for Grand Rapids, and worked as a commissioner for the Michigan Supreme Court.

It is not known when the Senate Judiciary Committee will convene hearings on the nominations.

Announcements

Senior Judge Hillman to be Honored by State Bar

The State Bar of Michigan plans to present its annual Frank J. Kelley Distinguished Public Servant Award to the Honorable Douglas W. Hillman, senior judge of the Western District of Michigan. The award recognizes "extraordinary governmental service by a member of the State Bar of Michigan." Criteria for the award includes: "Service in public office . . . in a way that strengthens the system of justice under the law; demonstration of the highest standards of integrity, fairness, leadership, excellence, dedication to principle, and dedication to the ideals of democracy; and has made a significant lasting contribution to the nation, the state, or the community . . . ." Former recipients include Frank J. Kelley, Gerald R. Ford, Dorothy Comstock Riley, and Rep. John D. Dingell. The award will be presented at the State Bar Annual Meeting in Ypsilanti, Michigan on September 13, 2006. Congratulations, Judge Hillman!

Mark Your Calendar

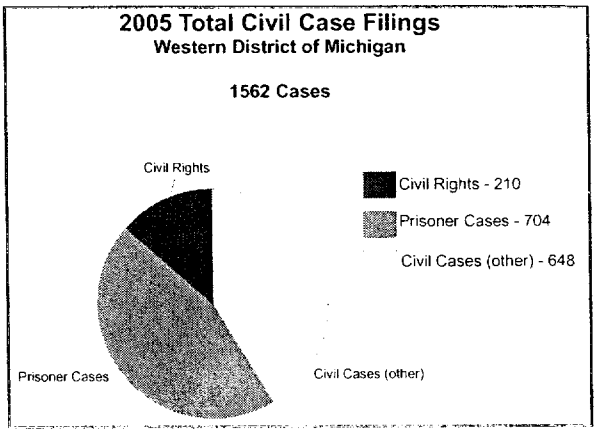
The Federal Bar Association Annual Meeting will be at noon on October 27, 2006, at the Frederick Meijer gardens. This year's speaker will be Sixth Circuit Judge Richard Allen Griffin.

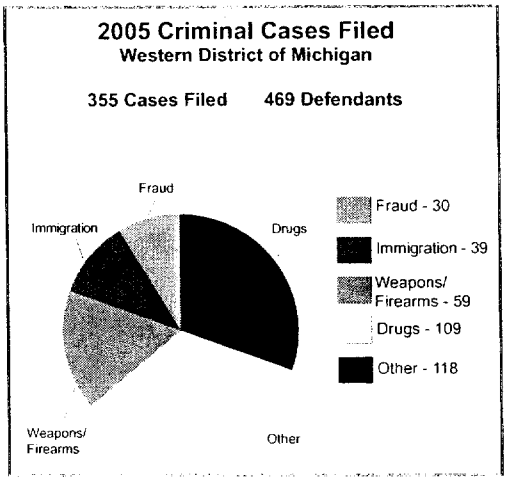
Another Eventful Sixth Circuit Judicial Conference

By Hon. Hugh W. Brenneman, Jr., United States Magistrate Judge

Attorneys from around the Sixth Circuit convened at the Marriott Renaissance Center in Detroit, Michigan, May 18-20 for the 66th Annual Conference of the Sixth Judicial Circuit of the United States. This year's conference was open to all federal judges and attorneys in the circuit.

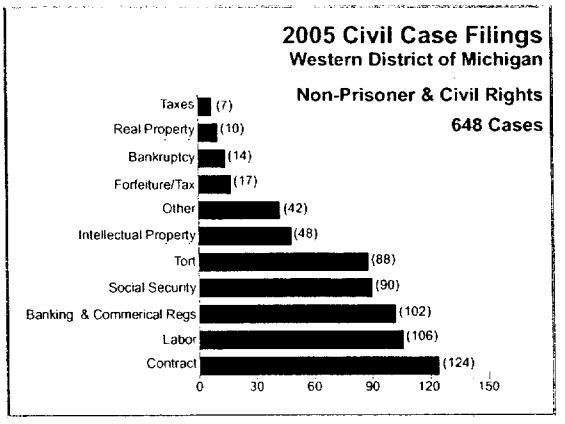
Circuit conferences, previously mandated by law and now continued by tradition, provide an excellent opportunity for attorneys and judges to mingle socially and professionally to address areas of common interest. This year's conference proved no exception. The Honorable Danny J. Boggs, Chief Judge of the Sixth Circuit, officially opened the conference promptly at 8:00 Thursday morning with a plenary session on "The Law, The Courts and the Future of the American Automobile Industry." This was followed by breakout sessions on employee and retirement benefit plans in bankruptcy, sentencing after *Booker*, professionalism, and first impressions of the Court of Appeals by the Hon. David W. McKeague and the Hon. Richard Allen Griffin, its newest members. The morning concluded with a plenary session of jurisdictional issues related to class actions.





Friday began with a Supreme Court update by Professor Erwin Chemerinsky of the Duke University School of Law, followed by observations on "The Independence of the Judiciary." Presenters for the latter included former Solicitor General of the United States from 2001 to 2004, Theodore Olson, from Washington, D.C.; Michael S. Greco, 129th president of the American Bar Association; and law professors from the University of Pennsylvania and the University of Wisconsin.

Remarks of United States Supreme Court Justice John Paul Stevens, along with Michael Barone, a widely-known political commentator for *U.S. News and World Report* and a former law clerk from this circuit, highlighted the Friday evening banquet. Justice Stevens gave the usual report card about how well Sixth Circuit cases had fared at the Supreme Court during the past year, and Barone spoke about the history of the Sixth Circuit. *(Michael Barone's remarks will be found in an upcoming issue of* The Stereoscope, *the Journal of the U.S. District Court for the Western District of Michigan.)*



The professional part of the program concluded on Saturday morning with breakout groups in which attorneys and judges could speak candidly and informally on issues concerning their districts. West Michigan attorneys met with Chief Judge Robert Holmes Bell and Senior District Judge Gordon J. Quist, along with Magistrate Judges Hugh Brenneman and Ellen Carmody, to discuss discovery, evidentiary, and procedural matters in the court. Judge Bell pointed out that according to recent statistics, 1,562 civil cases were filed in the Western District of Michigan during 2005 (see graphs). The largest number (704) were filed by prisoners, and another 210 were civil rights cases. Contract actions, labor, banking and commercial cases, social security and tort actions dominated the remainder of the civil category. There were also 355 criminal cases filed against 469 defendants, with drugs and firearms cases constituting nearly half of those cases.

Social events were open to all attendees and included the Life Members reception as well as visits to the Henry Ford Museum, Greenfield Village, the Ford Rouge Manufacturing Plant, and a tour of the Edsel Ford Home, with a luncheon at the Grosse Pointe Club. Much of the success of the program was due to the efforts of our sister chapter in the Eastern District.

Supreme Court Opens Door for Citation of Unpublished Opinions - But Debate Likely to Continue

By Joseph A. Kuiper[1]

The longstanding controversy over the citation of unpublished opinions took a sudden turn in April when the Supreme Court adopted an amendment to the federal rules to permit the citation of such decisions. The rule was recommended to the Supreme Court by the Judicial Conference of the United States. At the time, now-Chief Justice John G. Roberts and Justice Samuel A. Alito were members of the Appellate Rules Committee that recommended the change. The new rule applies prospectively and will allow citation of unpublished decisions issued on or after January 1, 2007.

Unpublished opinions originated in the 1960s as a space- and time-saving device for the federal courts. Since that time, the use of such decisions has grown dramatically. Based on statistics collected by the Administrative Office of the U.S. Courts, in 2005 approximately 82 percent of the decisions issued by the federal circuit courts were unpublished.[2] The rate of unpublished decisions varies by circuit, from a high of 92% in the Fourth Circuit to a low of 56 percent in the Seventh Circuit.[3] The Sixth Circuit lies somewhere in the middle, with approximately 84 percent unpublished.[4]

Four circuit courts–the Second, Seventh, Ninth, and Federal Circuits–currently ban the citation of unpublished decisions, except in unusual cases. The remaining nine permit such citations, although some courts, including the Sixth Circuit, have rules discouraging it.[5]

The new rule will appear as Federal Rule of Appellate Procedure 32.1 and will take effect December 1, 2006, unless Congress decides to veto it. As adopted by the Supreme Court, it reads:

> Rule 32.1. Citing Judicial Dispositions
>
> (a) Citation Permitted. A court may not prohibit or restrict the citation of federal judicial opinions, orders, judgments, or other written dispositions that have been:
>
> (I) designated as "unpublished," "not for publication," "non-precedential," "not precedent," or the like; and
>
> (II) issued on or after January 1, 2007.
>
> (b) Copies Required. If a party cites a federal judicial opinion, order, judgment, or other written disposition that is not available in a publicly accessible electronic database, the party must file and serve a copy of that opinion, order, judgment, or disposition with the brief or other paper in which it is cited.

The amendment was one of the most controversial ever made to the federal appellate rules. The Appellate Rules Committee received more than 500 comments on the proposal, the majority of which opposed it. Those in favor of the change argued that rules barring the citation of unpublished opinions reduce courts' accountability by permitting the issuance of decisions that cannot be cited and are not precedential. Those opposed argued mainly from the standpoint of judicial efficiency. In a 22-page letter to the Committee, Ninth Circuit Judge Alex Kozinski noted that unpublished opinions are often drafted entirely by law clerks or staff attorneys. He argued that if parties were allowed to cite unpublished opinions, judges would need to spend significantly more time drafting and editing them, which would take time away from the important cases that justify publication. "Given the press of our cases, especially screening cases, we simply do not have the time to shape and edit unpublished dispositions to make them safe as precedent," he wrote.

The new rule does not completely resolve the controversy surrounding unpublished decisions. For starters, some will surely question why the rule applies only to decisions issued on or after January 1, 2007. This limitation was reportedly added as a compromise to secure passage of the rule. However, there is no logical basis for distinguishing between opinions issued before the cutoff and those issued after. Courts and attorneys will also likely find the limitation confusing in practice, since unpublished opinions issued after the cutoff will be governed by the new rule, while those issued before the cutoff will continue to be governed by the local rules of each circuit.[6]

Another area of continuing controversy relates to courts' ability to designate unpublished opinions as non-precedential. Some argue that this practice violates Article III, and at least one federal court has so held. In *Anastasoff v. United States*, the 8th Circuit held, in an opinion by the late Judge Richard Arnold, that federal courts have no constitutional authority to decide which of their decisions are precedential and which are not.[7] As the court saw it, "Inherent in every judicial decision is a declaration and interpretation of a general principle or rule

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of law. This declaration of law is authoritative to the extent necessary for the decision, and must be applied in subsequent cases to similarly situated parties."[8] The court believed these principles were inconsistent with allowing courts to designate decisions as non-precedential: "At bottom, rules like our Rule 28A(i) assert that courts have the following power: to choose for themselves, from among all the cases they decide, those that they will follow in the future, and those that they need not. . . . [S]uch a statement exceeds the judicial power, which is based on reason, not *fiat*."[9]

The source of the Eighth Circuit's criticism in *Anastasoff* is not addressed by the amendment to Rule 32.1. As the Committee Notes explain, the Rule "addresses only the *citation* of federal judicial dispositions that have been designated as 'unpublished' or 'non-precedential.' . . . It says nothing about what effect a court must give to one of its unpublished opinions or to the unpublished opinions of another court."[10] Thus, while courts can no longer ban the citation of unpublished decisions, they can continue to treat them as non-precedential. It remains to be seen what course each of the circuits will take on this issue. Assuming some or all of the circuits continue to treat the decisions as non-precedential, this part of the debate will likely continue.

Finally, the change to the federal rules will likely intesify debate of no-citation rules at the state level. A number of states–Michigan excluded[11]–have rules banning the citation of unpublished decisions. As at the federal level, these rules are highly controversial and have been the source of continuing discussion among attorneys, courts, and legislators. In light of the change at the federal level, many of these states might now finally decide to modify or discard their no-citation rules.

Endnotes

1 Joe Kuiper is a partner at Warner Norcross & Judd LLP, where he focuses his practice on trial and appellate litigation.

2 *See* Statistics Div., Admin. Office of the U.S. Courts, 2005 Annual Report of the Director: Judicial Business of the United States Courts, 42 tbl. S-3 (2005).

3 *See id.*

4 *See id.*

5 *See* 6 Cir. R. 28(g) ("Citation of unpublished decisions in briefs and oral arguments in this Court and in the district courts within this Circuit is disfavored, except for the purpose of establishing res judicata, estoppel, or the law of the case. If a party believes, nevertheless, that an unpublished disposition has precedential value in relation to a material issue in a case, and that there is no published opinion that would serve as well, such decision may be cited if that party serves a copy thereof on all other parties in the case and on this Court.").

6 *See* Judicial Conf. of the United States, Committee on Rules of Practice and Procedure, Committee Notes to Fed. R. App. P. 32.1.

7 *See* 223 F.3d 898, *vacated as moot on other grds.* 235 F.3d 1054 (8th Cir. 2000).

8 *Id.* at 899-900.

9 *Id.* at 904. The decision in *Anastasoff* was vacated as moot by the Eighth Circuit on other grounds, and is therefore no longer binding in that Circuit. *See* 235 F.3d 1054 (8th Cir. 2000). Additionally, at least two federal courts have declined to follow *Anastasoff*. *See Hart v. Massanari*, 266 F.3d 1155 (9th Cir. 2001); *Symbol Technologies, Inc. v. Lemelson Medical*, 277 F.3d 1361 (Fed. Cir. 2002).

10 Judicial Conf. of the United States, Committee on Rules of Practice and Procedure, Committee Notes to Fed. R. App. P. 32.1 (emphasis in original).

11 Michigan permits citation of unpublished decisions, but only for persuasive value. *See* Michigan Court Rule 7.215(C)(1) ("An unpublished opinion is not precedentially binding under the rule of stare decisis. A party who cites an unpublished opinion must provide a copy of the opinion to the court and to opposing parties . . . .").

Say It to My Face:
The Supreme Court Continues to Rewrite the Rules on Hearsay Evidence in Criminal Trials

By Timothy VerHey

In June, the Supreme Court continued the process of re-defining the meaning of the Confrontation Clause, a project it began in 2004. The new focus on this constitutional guarantee will change how evidence will be admitted in criminal trials. The new case is *Davis v. Washington*, 126 S. Ct. 2266 (2006), a decision written by Justice Scalia for an eight-member majority.

Background

In any criminal case, the evidence consists of exhibits and testimony linking the defendant to the crime or tending to cast doubt on such a link. Statements made about the accused are not only subject to the rule against hearsay; they can run afoul of the constitutional right to confrontation. This constitutional guarantee states, "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." *U.S. Const. amend. VI.* The Confrontation Clause grants a criminal defendant two rights: the right to physically confront the witnesses against him, and the right to subject those witnesses to cross- examination. See *Pennsylvania v. Ritchie*, 480 U.S. 39, 51 (1987).

Up until 2004, criminal trial lawyers could assume that the protections of the Sixth Amendment were met as long as the offered statement did not meet the definition of hearsay, or fell within a "deeply rooted" hearsay exception. See *Ohio v Roberts*, 448 U.S. 56, 66 (1980). With very limited exceptions, most statements covered by Rules 803 and 804 were deemed admissible under the Confrontation Clause. See 35 *Geo. L.J. Ann. Rev. Crim. Proc.* 629-30 (2006). In other words, if a rule of evidence allowed the admission of a statement, the Confrontation Clause rarely presented an additional obstacle.

All this changed in 2004, when the Supreme Court decided *Crawford v Washington*, 541 U.S. 36 (2004). In *Crawford*, the defendant was charged in connection with a stabbing. The police possessed a tape-recorded custodial statement from the defendant's wife about the circumstances surrounding the stabbing. See 541 U.S. at 39. The tape was offered into evidence when the wife was kept off the witness stand as a result of the spousal privilege (see *Trammel v United States*, 445 U.S. 40 (1980)). The trial court ruled that the wife's statement fell within a deeply rooted exception to the hearsay rule and admitted the statement. See *Crawford*, 541 U.S. at 40.

Even though such a ruling would have been the end of the matter under *Roberts*, the Supreme Court decided it had more to say about the Confrontation Clause. The Court, with Justice Scalia as its spokesperson, ruled that the Confrontation Clause would prohibit some out-of-court statements from being introduced into evidence, even if they fell within firmly rooted exceptions to the hearsay rule. In short, if the offered statements are "testimonial," they must be excluded if the witness does not testify at trial. If they are not testimonial, they must only satisfy Rule 803 or 804, and the Confrontation Clause does not apply. *See Crawford*, 541 U.S. at 61. Applying this new test to the statement at issue, the Court found a violation of the Confrontation Clause and reversed the conviction. The ruling in *Crawford* has been recognized as a "fundamental re-conception of the Confrontation Clause." See *United States v Cromer*, 389 F.3d 662, 671 (6th Cir. 2005).

Crawford did not shed much light on the crucial question of what makes a statement "testimonial." The Court was satisfied to say that any statement made during custodial interrogation by the police fell into the category of "testimonial statement" regardless of the definition used, and left for another day further development of the definition. See *Crawford*, 541 U.S. at 53, n.4.

The Davis Decision: Some Questions Answered, Many Left Unanswered

That day arrived on June 19, 2006 when the Court published its decision in *Davis* and its companion case, *Hammon v. Indiana*. Both cases involved domestic assault, and in both cases the police possessed statements from the victims of the alleged assaults which were introduced at trial. In the *Davis* case, the police possessed a tape recording from a 911 call, where the 911 operator asked the assault victim questions about where she was calling from, the identity of the person assaulting her, and where he could be found. See 126 S. Ct. 2271. The victim did not to testify, and the tape recording was admitted into evidence over the defendant's objection that the statement violated his Confrontation Clause rights. See *id.*

In *Hammon*, the police were called to the scene of a domestic disturbance and obtained a written statement from the defendant's wife that he had thrown her into an area of broken

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glass, punched her, and had attacked her daughter. See 126 S. Ct. at 2272. The defendant was charged with domestic battery. When Hammon's wife did not appear at the trial to testify, the prosecution was permitted to introduce her statements as excited utterances and present-sense impressions, over the defendant's objections that his right to confrontation was being abridged.

The Supreme Court decided that using the 911 tape in *Davis* was not a violation of the Confrontation Clause. The Court reasoned that the information gleaned during the 911 call was not "testimonial statements" because the purpose behind the questions was not to collect evidence, but to respond to an emergency situation. See 126 S. Ct at 2276-77. In contrast, the written statement taken in *Hammon* should not have been admitted because the police officers' purpose there was to collect evidence for prosecution. See 126 S. Ct. 2278. The key in these cases, said the Court, was what the police intended when they took the statements:

> Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution.

126 S. Ct. at 2274.

This much is now clear: When a statement is made as a result of police questioning, the focus will center on the intent of the police when they asked the questions. Not much else has been clarified by *Davis*. The Court made it plain that it was only addressing the Confrontation Clause in the specific situation raised by these two cases and acknowledged that it was not providing much guidance for other circumstances. See 126 S. Ct. at 2278 n.5.

As a result of the Court's limited focus, much was left unanswered. For example, the Court was careful to note that even a voluntary statement made to someone other than a police officer could come within Confrontation Clause protection. The Court further muddied things by noting that "even when interrogation exists, it is in the final analysis the declarant's statements, not the interrogator's questions, that the Confrontation Clause requires us to evaluate." 126 S. Ct. at 2274 n.1. This suggests that a witness who answers questions made with the intent to make a case against an accused could be subject to the Confrontation Clause, even if the questioner did not have that goal in mind.

Using Witness Statements After *Davis*

What is clear after *Davis* is that it is dangerous to rely on Rules 803 and 804 in criminal cases. Without a clear definition of when the constitutional right of confrontation applies and when it does not, any use of these Rules invites reversal. Rulings on ordinary evidence issues are within the trial court's discretion and are not reversed unless the trial judge committed clear error and the error undermines the entire verdict. See *United States v Chambers*, 441 F.3d 438, 455 (6th Cir. 2006). In contrast, an error involving the Confrontation Clause must result in reversal unless a reviewing court can say the error was harmless beyond a reasonable doubt. See, *e.g.., United States v Moses*, 137 F.3d 894 (6th Cir. 1998) (Ryan, J. concurring). This means that a prudent trial practitioner will likely feel compelled to call live witnesses at trial no matter how trivial or noncontroversial the matter appears to be. It is possible that one result of *Crawford* and *Davis* will be trials featuring long parades of records custodians, 911 operators, doctors, and court reporters.

All is not lost for the practitioner who offers a testimonial out-of-court statement. *Davis* once again confirmed that a defendant loses his Confrontation Clause rights if he wrongfully secured the absence of the witness within the meaning of Fed. R. Evid. 804(b)(6). "We reiterate what we said in *Crawford*: that 'the rule of forfeiture by wrongdoing . . . extinguishes confrontation claims on essentially equitable grounds.'" *Davis*,126 S. Ct. at 2280. If it is more likely than not that a witness was "encouraged" to be absent from the courthouse, there is still a chance to introduce the statement.

It should also be remembered that no one benefits from tedious witness testimony and needlessly long trials. In situations where a piece of testimony is not controversial, responsible lawyers will be able to work out stipulations, that will allow an absent witness's statement to be presented to the jury so that the trial can focus more quickly on the contested issues. *Crawford* and *Davis* have made it more difficult to introduce witness statements in criminal trials, but they have not done away with the practitioner's ability to use common sense.

Recent Civil Practice and Procedure Decisions From the Supreme Court

By Daniel P. Lennington[1]

The Supreme Court's 2005 term included a number of interesting decisions involving civil practice and procedure. The following is a summary of the most notable decisions.

Unitherm Food Sys., Inc. v Swift-Eckrich, Inc., 126 S. Ct. 980 (2006)

Federal Rule of Civil Procedure 50 provides for motions for a directed verdict *prior* to submission of a case to a jury, and also for renewal of that motion *after* the jury verdict. But federal circuits had been split on the issue of whether a post-trial renewal motion was a prerequisite to appealing the jury verdict based on insufficiency of evidence. The Supreme Court settled this dispute and ruled that a post-trial renewal motion was necessary to challenge the jury's verdict on appeal.

In *Unitherm* (a case involving the enforceability of a patent), defendant ConAgra moved for a directed verdict prior to submission of the case to the jury. After receiving an unfavorable jury verdict, ConAgra did not renew that motion. Instead, ConAgra simply appealed the jury verdict, arguing that it was based on insufficient evidence. The Federal Circuit reversed and remanded the case, siding with ConAgra, and ruling that the jury's verdict was based on insufficient evidence.

This decision was wrong, according to the Supreme Court. To succeed on an appeal based on insufficiency of the evidence, the Court held, a losing party must first file a motion under Rule 50(b). The Court wrote, "This Court has determined that a party may only pursue on appeal a particular avenue of relief available under Rule 50(b), namely the entry of judgment *or a new trial*, when that party has complied with the Rule's filing requirements by requesting that particular relief below." The Court noted that an appeals court benefits from the trial court's perspective on a Rule 50(b) motion and cannot properly consider an appeal without it.

Wachovia Bank National Assoc. v Schmidt, 126 S. Ct. 941 (2006)

National banks are chartered by the federal government and not by any state, and typically a national bank's branches are located in several states. These circumstances created a quandary for courts when determining a national bank's citizenship for diversity purposes: Is the bank a citizen of all the states in which it has branches or only the state of its headquarters?

Interpreting the relevant national bank act, as well as its predecessors, the Supreme Court concluded that national banks are citizens of the state of their "main office," which is specifically listed on the bank's articles of association. The Court compared national banks to corporations: "For purposes of diversity, a corporation surely is not deemed a citizen of every state in which it maintains a business establishment." To rule that Wachovia was a citizen of every state in which it had a branch would have made Wachovia a citizen of 17 states. Such a construction, according to the Court, would frustrate congressional intent.

Buckeye Check Cashing v Cardegna, 123 S. Ct. 1204 (2006)

When parties place an arbitration clause in their contract, they generally agree to have their disputes resolved by an arbitrator. But what happens when one party argues that the arbitration clause, or even the entire contract, is invalid? Should the dispute be resolved by a court or an arbitrator?

In *Buckeye Check Cashing*, the Supreme Court applied a previous case, *Prima Paint*, and reaffirmed that the Federal Arbitration Act requires courts to decide whether an arbitration clause is valid. But if a party goes farther and argues that the entire contract is void for fraud, illegality, or other grounds, then

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the arbitrator must consider that claim as part of the dispute between the parties. The Court wrote, "We reaffirm today that, regardless of whether the challenge is brought in federal or state court, a challenge to the validity of the contract as a whole, and not specifically the arbitration clause, must go to the arbitrator." This principle, according to the Court, applies regardless of whether the challenge is brought in federal or state court.

Martin v Franklin Capital Corp., 126 S. Ct. 704 (2005)

When a defendant removes a case to federal court, the plaintiff may file a motion to remand the case back to state court if the case was improperly removed. If a plaintiff's motion is granted, then the district court "may" require the defendant to pay the plaintiff's "actual expenses, including attorney fees, incurred as a result of the removal." 28 U.S.C. § 1447(c). Prior to *Martin*, some courts had held that the award of attorney fees was mandatory if the case was remanded, while others held that attorney fees should usually be denied.

Chief Justice Roberts, writing his first opinion for the Court, held that "[a]bsent unusual circumstances, courts may award attorney's fees under § 1447(c) only where the removing party lacked an objectively reasonable basis for seeking removal. Conversely, when an objectively reasonable basis exists, fees should be denied." In *Martin*, the defendant's legal support for removal was based on a then-valid rule of law concerning the amount-in-controversy requirement. That rule was subsequently reversed by another court. Because the plaintiff did not challenge the reasonableness of the defendant's legal theory, the Court ruled that the plaintiff was not entitled to attorney fees.

Endnote

1 Daniel P. Lennington is an attorney with Warner Norcross & Judd LLP. He specializes in environmental and employment litigation.

New Court Order Requires Signed Plea Agreements to be Filed Before Plea Hearing

May 1, 2006 saw the introduction of a new filing requirement in criminal cases. U.S. District Court Administrative Order 06-038 requires that plea agreements in criminal cases be signed and filed prior to the guilty plea hearing. The Order provides:

> IT IS HEREBY ORDERED that, absent good cause, a fully executed plea agreement shall be filed with the Court by the United States Attorney's Office, pursuant to the Court's CM/ECF electronic filing system, no later than the day before the matter is set for the tendering of a guilty plea.

The signed copy must be electronically filed, and the United States Attorneys Office is responsible for retaining the original plea agreements as part of its records.

According to court sources, the new Rule was imposed because it is concerned about post-conviction claims by criminal defendants that they did not understand all of the terms of their plea bargain. Such claims usually include allegations that the defendant felt pressured to make the decision to plead guilty without sufficient time to consider the plea agreement or consult with the defense attorney about it. The court has concluded that requiring plea agreements to be signed before the day of the plea could prevent such claims.

Federal Defender Raymond Kent was consulted about this change and agreed that it was a good idea. Others predict that the inherent difficulty in finalizing the terms of a written agreement where the most important signatory – the defendant – is often incarcerated in a remote location, will result in adjournments and delays in plea proceedings.

Senior and Visiting Judges Help Court Cope with Judicial Vacancies

By Joseph A. Kuiper[1]

The U.S. District Court for the Western District of Michigan is in a state of significant flux. Over the past year, three of the court's four active judges have either stepped down from the court or switched over to senior status. Fortunately for the attorneys and litigants who appear before the court, numerous senior and visiting judges from as far away as Tennessee have stepped in to help with the court's caseload. With the added help from these judges, the court has managed to avoid any noticeable delays or backlogs of cases.

Currently, there is only one active district judge in the Western District of Michigan, Chief Judge Robert Holmes Bell. After long careers on the bench, Judge Richard Enslen and Judge Gordon Quist took senior judge status effective September 1, 2005 and January 1, 2006, respectively. Judge David McKeague left the Western District to take a seat on the Sixth Circuit, effective June 13, 2005.

In addition to its active and senior judges, the Western District is also home to a visiting senior judge from Tennessee. Judge Robert Allen Edgar has been a regular visiting judge to the Western District for some time now. Last year, the Sixth Circuit gave Judge Edgar an open-ended designation to serve as a senior judge in Western District for six months a year, effective October 7, 2005. Judge Edgar hears cases in Marquette from approximately May to October of each year.

Although the court is short on active judges, the docket shows no sign of slowing down to match. In 2005, 1,917 new cases were filed in the Western District, 81 percent of which were civil and 19 percent of which were criminal. By the end of the year, 2,042 of the total pending cases had been terminated, and there were 1,407 active cases in the District.

The docket looks similar in 2006. As of April 30, a total of 634 new cases had been filed, approximately 83 percent of which were civil and 17 percent criminal. By the same date, 597 cases had been terminated, and 1,464 total cases remained pending in the District, which is only a slight increase from the number of cases pending at the close of 2005. This is a clear indication of how the Court continues to move along despite the shortage of active judges.

With the current vacancies on the bench, the Court is relying heavily on the contributions of its active and senior judges. Chief Judge Bell and Judge Quist are taking a full caseload of both civil and criminal cases. Judge Enslen is taking only civil cases and is not being assigned any Northern Division cases of any type. The civil caseload for the Southern Division is being shared by four Western District judges, with Chief Judge Bell and Judges Enslen and Quist each taking 30 percent of the cases and Senior Judge Wendell Miles taking the remaining 10 percent.

A significant amount of work is also being handled by Judge Edgar. As of April 30, Judge Edgar had been assigned or reassigned 45 civil cases and 4 criminal cases filed in 2006. When added to his existing caseload, Judge Edgar had 84 pending cases, of which 18 were criminal and 66 were civil.

The court is also relying heavily on visiting judges from the Eastern District of Michigan. In 2005, 65 cases were assigned/reassigned to these judges via Administrative Order. This year, eight cases had been assigned/reassigned as of April 30, 2006. The Eastern District judges who have received cases are Chief Judge Bernard Friedman, Judge Marianne Battani, Judge Paul Borman, Judge Robert Cleland, Senior Judge Avern Cohn, Judge Nancy Edmunds, Senior Judge Paul Gadola, Judge Stewart Newblatt, Judge John Corbett O'Meara, and Judge Arthur Tarnow. As of April 30, these Eastern District judges had 33 pending cases from the Western District.

Endnote

1 I would like to thank Western District Clerk Ronald C. Weston, Sr. for his invaluable assistance with the statistics found in this article.