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President's Letter

Ray Kent, President, Federal Bar Association, W.D. Michigan

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If the 70th Sixth Circuit Judicial Conference didn't get your blood pumping as a lawyer, it's probably time for a career change. Held May 4–7, 2010, in Columbus, the conference featured a veritable rock-star lineup of legal luminaries. The conference opened Tuesday and featured a presentation in the Ohio Statehouse on the speech delivered there by Abraham Lincoln in September of 1859, repudiating the idea of popular sovereignty and the extension of slavery.

Following opening remarks on Wednesday by Chief Judge Alice M. Batchelder, Solicitor General Elena Kagan took the stage amid rumors of her impending nomination to fill the seat of retiring Supreme Court Justice John Paul Stevens. Solicitor General Kagan led a panel discussion of recent Supreme Court decisions featuring Erwin Chemerinsky, Supreme Court scholar and founding Dean at UC Irvine School of Law, and Paul D. Clement, Solicitor General under George W. Bush. Not surprisingly, the panelists focused on *Citizens United v. Federal Election Commission*, finding a ban on corporate political speech unconstitutional, and *Salazar v. Buono*, the cross-in-the-desert case.

After a quick set change, Justice Stevens took center stage for an interview by two former law clerks, including Jeffrey L. Fisher, who successfully argued *Blakely v. Washington* and *Crawford v. Washington* in the Supreme Court. Wearing his signature bow tie, Justice Stevens, the fourth-longest-serving justice in the Court's history, and the Sixth Circuit's representative on the Court, shared a fascinating mix of personal and professional memories from his 35 years on the Court.



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Ruminating on the death penalty, Justice Stevens, who in 1976 voted with the majority in overruling *Furman v. Georgia* and reinstating the death penalty in federal court, allowed that his views on the death penalty had changed, due in no small measure to growing concerns over the issue of wrongful convictions. When asked about the secret to his longevity—the 90-year-old plays tennis three times a week—he credited his wife Maryan, saying, “marry a beautiful dietician, she’ll keep you young.” Justice Stevens also confirmed that Babe Ruth did call his famous shot in 1932. The justice attended the 1932 World Series as a boy in Chicago and saw the Sultan of Swat call the home run.

At lunchtime, a convoy of black Chevrolet Suburbans rolled up in front of the hotel. Attorney General Eric Holder and his entourage took the stage. After trash talking President Obama’s skills on the basketball court, Attorney General Holder discussed the obligation of federal prosecutors not simply to win but to do justice.

Wednesday evening, attendees were shuttled to the newly-dedicated Archie Griffin Ballroom in the Ohio State Student Union where they were treated to dinner and a speech by Chief Justice John G. Roberts, Jr., on Buckeye William Howard Taft, the 27th President and 10th Chief Justice of the United States, the only person to have held both offices.

Thursday included a discussion of practicing law in the current economy and globalization’s impact on the practice. Break-out sessions followed, including sentencing, immigration, forensic science and advocacy. The conference wrapped up Friday morning with the District break-out session. The open, frank and good-natured discussion between the bench and bar again reinforced how lucky we are to practice law in the Western District of Michigan.

Monday, I turned on the radio and found that the rumors concerning Solicitor General Kagan had been put to rest. President Obama had in fact nominated her to fill Justice Stevens’s seat. I don’t know whether I’ll ever again have the opportunity to hear the Chief Justice, a retiring justice, the nominee to fill his seat, the Attorney General and two Solicitors General speak on the same day, but this much I can say: attending the Sixth Circuit conference always reminds me why I entered the law in the first place and why, all these years later, it still it keeps me challenged, stretched and fully engaged. ■

Zubulake Revisited: The Obligations and Pitfalls of Document Preservation, Collection, and Production

By Kevin M. Kileen¹

Attorneys who encounter electronic evidence in their litigation practices recently obtained needed clarification of their obligations to preserve such evidence for discovery. In *Pension Committee of the University of Montreal Pension Plan, et al. v. Banc of America Securities, LLC, et al.*, Judge Shira Scheindlin, author of the now-famous 2004 *Zubulake* opinion, methodically details document preservation obligations and explains the consequences of failing to meet those obligations.² As has been the trend since *Zubulake*, lawyers must become familiar with the way clients store electronic information and guide employees through the preservation and collection process. Failure to do so may result in monetary sanctions, cost awards, or more severe penalties, including adverse inference instructions and even dismissal orders. In short, attorneys and clients must work together to, among other things:

- Issue written litigation holds as soon as litigation is anticipated;
- Direct all employees to preserve electronic documents, with specific instructions regarding potentially relevant subjects and time periods;
- Implement a clear and comprehensive method for collecting information, in both hard copy and electronic form;
- Identify all individuals who are or may become “key players” in the litigation, updating that list as appropriate;
- Ensuring the preservation of all information held by key players, which may include preserving files and electronic data after those people leave for other jobs;
- Exercise caution with respect to backup data: if that data is the only source for particular key employees’ data or other relevant information, the backup sources must be preserved; and

- Continually communicate regarding the status and nature of the litigation, to ensure the ongoing preservation of information and search for relevant material.

Background – *Zubulake*

In *Zubulake v. UBS Warburg LLC*, Judge Scheindlin described document preservation and production as a proactive process and far-reaching obligation, requiring written litigation hold instructions and ongoing efforts to preserve and produce relevant information.³ In that case, employees of the defendant, UBS Warburg, had deleted potentially relevant emails, allowed backup tapes to be destroyed, and otherwise failed to preserve and timely produce relevant evidence to the *Zubulake* plaintiffs. Judge Scheindlin awarded fees and costs related both to bringing the motion for sanctions and re-deposing various witnesses, and, most severely, issued an adverse inference instruction regarding the lost information.

In the years that have followed, *Zubulake* has gained wide acceptance; federal courts within the Third, Fourth, Fifth, Sixth, Seventh, Ninth, Tenth, and Eleventh Circuits have cited with approval or expressly followed at least portions of the *Zubulake* opinions.⁴ After *Zubulake*, parties and lawyers who fail to work together to preserve documents do so at their own peril.

Montreal Pension Plan

In *Montreal Pension Plan*, Judge Scheindlin has now issued an 85-page opinion titled “*Zubulake* Revisited: Six Years Later,” which re-emphasizes and expands upon the lessons of *Zubulake*. The opinion scrupulously describes document preservation obligations and the consequences of failing to meet those obligations. The opinion places the onus on lawyers and clients to anticipate issues, become familiar with the way clients

store electronic information, identify key employees, guide employees through the preservation and collection process, and take ongoing, affirmative steps to preserve documents and electronically stored information. *Montreal Pension Plan* also assigns culpability to parties who fail to meet affirmative discovery obligations and provides a framework for sanctioning oversights, carelessness, and worse.

Montreal Pension Plan involves a suit by a collection of investors who allegedly lost \$550 million following the collapse of their investments in several British Virgin Islands-based hedge funds. The manager of the funds went bankrupt in April 2003; the funds themselves were placed into receivership in July 2003. In February 2004, the plaintiffs brought suit against former directors, officers, and auditors of the funds, as well as the funds' prime broker and custodian. After a nearly three-year stay, one of the defendants brought to the Court's attention a number of apparent holes in the plaintiffs' document productions. The defendant alleged that the plaintiffs failed to preserve and produce documents, and that the plaintiffs had submitted misleading declarations detailing their production efforts. The defendant sought dismissal of the complaint, as well as any other sanctions the Court deemed appropriate.

The opinion scrupulously describes document preservation obligations and the consequences of failing to meet those obligations.

Judge Scheindlin declined to dismiss the lawsuit, but found the plaintiffs had engaged in either negligent or grossly negligent conduct. She ruled that some of the grossly negligent plaintiffs will be subject to adverse inference instructions at the jury trial. She also ordered two plaintiffs to further search backup tapes and produce responsive information, and assessed monetary sanctions against all plaintiffs.

Most importantly, Judge Scheindlin provided clear, though not necessarily bright-line, guidance on four interrelated discovery concepts: (1) the offending party's or parties' level of culpability when relevant information has been destroyed or lost; (2) the "interplay between the duty to preserve evidence and the spoliation of evi-

dence;" (3) which party should bear the burden of proving that evidence has been lost, and what consequences follow from that loss; and (4) the appropriate remedies for the spoliation of evidence.

Culpability: Negligence, Gross Negligence, Willfulness

Judge Scheindlin first addressed the "continuum" of discovery misconduct, including negligence, gross negligence, and willfulness. She defined and applied each term much as they are in more-familiar tort contexts. Negligence involves the failure of a party to do what is reasonable to "meet its obligation to participate meaningfully and fairly in the discovery phase of a judicial proceeding." Gross negligence differs "only in degree, and not in kind," and is the "failure to exercise even that care which a careless person would use." A finding of willful, wanton, or reckless conduct, on the other hand, requires that the party intentionally conduct itself "in disregard of a known or obvious risk that was so great as to make it highly probable that harm would follow."

Judge Scheindlin found that certain plaintiffs acted with gross negligence, while others were merely negligent. Though Judge Scheindlin cautioned that "[e]ach case will turn on its own facts and the varieties of efforts and failures is infinite," she offered the following non-exhaustive examples of negligent, grossly negligent, and reckless/willful misconduct, organized by stage in the process:

1. Preservation. The intentional destruction of relevant records, after the duty to preserve has arisen, is willful. Because *Zubulake* made clear the obligation to issue satisfactory written litigation holds, the failure to do so is now grossly negligent. Other failures to collect or preserve, resulting in the loss of relevant information, depending on the circumstances, may be negligent or worse.

In *Montreal Pension Plan*, plaintiffs' counsel failed to issue written litigation holds until 2007. In late 2003 (several months before filing suit in February 2004), after the funds were placed into receivership and certain investors retained lead counsel, lead counsel sent emails and memoranda to plaintiffs instructing them to be "over, rather than under, inclusive" in collecting information and explaining that emails and electronic

information should be included in the production to lead counsel.

These instructions failed to meet the standard for litigation holds because: (a) they did not direct employees of the plaintiffs to preserve all possible relevant records, discussing instead only the need to collect what they had; (b) they created no organized mechanism or method for collecting the preserved records. In short, the correspondences left document collection to individual employees' discretion, with no express instruction not to destroy records. Not until 2007 (the litigation was stayed for much of 2004 through early 2007) did counsel institute written litigation holds—more than two years after *Zubulake*. Though a close call, Judge Scheindlin did not find the failure to issue written litigation holds in 2003 or 2004 (or during the stay), by itself, reason to find any plaintiff grossly negligent. However, she left no doubt that the same failure today would be gross negligence.

2. Collection and review. Depending again on the exact circumstances, the failure to collect evidence or an egregiously sloppy review may be reckless or willful, as might the failure to identify key players and collect evidence from those key personnel. Attorneys and clients must work together to identify and collect documents from key players; this is a repeated line of demarcation in Judge Scheindlin's opinion. By contrast, a failure to obtain all documents from all employees who had even a passing connection with the subject of the litigation will likely fall nearer the negligence end of the culpability continuum.

Several of the “grossly negligent” *Montreal Pension Plan* plaintiffs failed to take any efforts to collect emails or other records, even after contemplating suit and retaining counsel. One plaintiff delegated its collection efforts to a single employee with no experience conducting searches, who received no instruction before beginning her collection efforts. As a result, she conducted a woefully inadequate search for emails, never searched backup tapes, and asked too few employees to search their electronic and hard-copy files. Other grossly negligent plaintiffs conducted similarly deficient searches, focusing on incomplete universes of key players, providing insufficient instruction regarding preservation and collection, and taking no efforts to preserve backup tapes.

Judge Scheindlin did clarify (see footnote 99 on page 43) that the duty to preserve backup data is not absolute. However, if those tapes/disks are the sole source of relevant information, as might be the case when certain key players no longer work for the client, the tapes should be segregated or preserved. When accessible data has already satisfied the duty to search for given information, backup tapes containing that information do not need to be saved or searched.

Though perhaps a unique wrinkle of the case, several of the “grossly negligent” plaintiffs also filed improper discovery declarations. After cross-referencing document productions among the various plaintiffs, the defendants discovered several holes in certain plaintiffs' productions. Upon motion by the defendants, Judge Scheindlin had ordered the plaintiffs to provide declarations detailing their efforts to preserve and produce documents. Those declarations were eventually discovered to have been executed by declarants without personal knowledge of the statements in the declarations, and in a fashion that was intentionally vague about the parties' discovery efforts. Some of those declarations were false or misleading.

In summary, the grossly negligent plaintiffs failed to: institute timely written litigation holds, preserve electronic documents until as late as 2007, request information from key players, properly supervise collection efforts and the personnel responsible for those efforts, preserve backup data containing responsive information, and/or submitted misleading or inaccurate declarations detailing their efforts.

Other plaintiffs were found merely negligent, in large part because their failures to issue written litigation holds in 2004 was not as careless as such a failure would be today. The totality of those plaintiffs' collection and production efforts did not rise to the same level of malfeasance as did the grossly negligent plaintiffs'; however, it bears repeating that courts following Judge Scheindlin's approach will likely treat present-day failures to issue detailed, written litigation holds as the mark of the grossly negligent.

Preservation and Spoliation

With the duty to preserve comes the power of the courts to enforce this duty through the doctrine of spo-

liation of evidence. In this section of the *Montreal Pension Plan* opinion, Judge Scheindlin explained that the duty to preserve evidence “arises when a party reasonably anticipates litigation.” Plaintiffs be warned: as the party initiating litigation, plaintiffs’ duties will be more often triggered before litigation commences. Such was the case in *Montreal Pension Plan*. Correspondingly, courts have the obligation to ensure the integrity of the judicial process, including the full exchange of relevant information. Courts exercise this power by imposing spoliation sanctions when parties fail to meet their duties to preserve, collect, and produce.

Burdens of Proof

Burdens of proof will vary depending on both the severity of the sanctions being considered and the offending party’s culpability. The innocent party will likely need only focus on the relevance of the missing information to justify lesser sanctions such as fines and cost-shifting. By contrast, before a court enters severe sanctions such as dismissal, preclusion, or adverse inference instructions, the innocent party should establish, through the use of extrinsic evidence, both that the missing information would have been relevant to the litigation and prejudice—that the information would have been helpful in mounting the innocent party’s claims or defenses. However, in cases where the spoliating party acted willfully or in a grossly negligent manner, courts may presume both the relevance of the missing information and prejudice resulting from the loss of that information.

Regardless of the presumptions at play and the initial conclusions of relevance and prejudice, the spoliating party should have the opportunity to answer and demonstrate that the innocent party did not suffer prejudice, again shifting any burden back to the innocent party. “The party seeking relief has some obligation to make a showing of relevance and eventually prejudice, lest litigation become a ‘gotcha’ game . . . [and] the incentive to find such error and capitalize on it [become] overwhelming.” If a spoliating party ultimately demonstrates the absence of any prejudice to the offending party, severe sanctions—including adverse inference instructions—should not be imposed.

In *Montreal Pension Plan*, Judge Scheindlin found that, once the defendant established the likelihood

that documents were destroyed, the “paucity of records produced by some plaintiffs and the admitted failure to preserve some records or search at all for others by all plaintiffs leads inexorably to the conclusion that relevant records have been lost or destroyed.” For those plaintiffs that were grossly negligent, Judge Scheindlin held the jury would be instructed that it could, subject to the plaintiffs’ rebuttal, conclude both that missing documents were relevant and that the defendants had been prejudiced by their omission (i.e., that the documents would have helped the defendants). For the negligent plaintiffs, however, the defendants needed to prove relevance and prejudice.

Remedies

Montreal Pension Plan indicates that spoliation sanctions should serve three purposes: “(1) deter the parties from engaging in spoliation; (2) place the risk of an erroneous judgment on the party who wrongfully created the risk; and (3) restore the prejudiced party to the same position it would have been in absent the wrongful destruction of evidence by the opposing party.” The available sanctions may range from ordering further discovery, to imposing fines and/or awarding costs, to adverse inference instructions (permissive or mandatory), to even dismissal of the case. Obviously, only the highest degrees of culpability, coupled with prejudice to the innocent party, can warrant dismissal and other severe sanctions. On the specific sanction of adverse inferences—which were considered and entered in *Montreal Pension Plan*—Judge Scheindlin explained that a court may either permit the jury to infer that the lost evidence was relevant and favorable to the innocent party, or instruct the jury that such is the case.

Again, Judge Scheindlin held that certain grossly negligent plaintiffs will be subject to permissive adverse inference instructions at the jury trial; Judge Scheindlin ordered two plaintiffs to further search backup tapes and produce responsive information; and all plaintiffs will be assessed monetary sanctions.

Conclusion

Six years after *Zubulake*, *Montreal Pension Plan* is a firm reminder that discovery is not a passive exercise. Even before litigation is contemplated, outside and inside counsel should undertake every effort to under-

stand their clients' information technology systems and the ways companies and individuals store information. When lawyers anticipate lawsuits, they should set the document preservation wheels in motion, interviewing employees, identifying key players relevant to the subject matter of the dispute, and sending written litigation holds that not only stress the need to preserve all information, but also explain why and how information must be collected. Lapses in communication risk leaving the integrity of the judicial process in the hands of employees who may not be as well-versed in the ever-deeper pitfalls that process contains. ■

Endnotes

- 1 Kevin M. Kileen is an associate in Warner Norcross & Judd LLP's Litigation Practice Group. Kevin is a 2004 graduate of the University of Illinois College of Law, and his practice is primarily focused in the area of commercial litigation. He has represented banks and accounting firms, as well as manufacturers and automotive suppliers.
- 2 See No. 05 Civ. 9016, 2010 WL 184312 (S.D.N.Y. Jan. 15, 2010).
- 3 229 F.R.D. 422 (S.D.N.Y. 2004).
- 4 *E.g.*, *Mosaid Techs, Inc. v. Samsung Elecs. Co.*, 224 F.R.D. 595 (D.N.J. 2004); *Nucor Corp. v. Bell*, 251 F.R.D. 191 (D.S.C. 2008); *Escobar v. City of Houston*, 2007 WL 2900581 (S.D. Tex. Sept. 29, 2007); *Inventory Locator Serv., LLC v. Partsbase, Inc.*, 2005 WL 6062855 (W.D. Tenn. Oct. 19, 2005); *Trade Finance Partners, LLC v. AAR Corp.*, 2008 WL 904885 (N.D. Ill. Mar. 31, 2008); *Housing Rights Center v. Sterling*, 2005 WL 3320739 (C.D. Cal. Mar. 2, 2005); *Cache La Poudre Feeds, LLC v. Land O'Lakes, Inc.*, 244 F.R.D. 614 (D. Colo. 2007); *Swofford v. Eslinger*, 671 F. Supp. 2d 1274 (M.D. Fla. 2009).

United States Supreme Court Historical Society: An Invitation to Membership

By Bruce W. Neckers¹

What is the United States Supreme Court Historical Society?

The United States Supreme Court Historical Society was formed at the suggestion of Chief Justice Warren E. Burger in 1994. Since that time it has gained a well-deserved reputation for preserving the history of the court. Justice Burger observed that, before the society was formed, the memorabilia, art, and documents that are so important to the history of the court were simply gathering dust in the court's storerooms. Now they are in places where they are accessible to the public and to those doing serious historical research about the workings of the court during its long and rich history.

Why should lawyers from the Western District of Michigan become members?

The Executive Committee of the Federal Bar Association ("FBA") for the Western District of Michigan has indicated that exploring and preserving the important history of the Supreme Court is in keeping with the mission of the FBA, in that it preserves one of our most cherished judicial institutions. Furthermore, on a quarterly basis the Society puts out *The Journal of Supreme Court History*, which is an excellent publication that includes interesting articles which place well known cases and the justices who participated in them into historical context.

How do you join?

Membership in the U.S. Supreme Court Historical Society is a small contribution to the institution of the court and is a way to support its ongoing purposes. More than that, it only costs \$50 and is tax deductible. Membership is by invitation. If you would like to receive an invitation, call Bruce Neckers at (616) 233-5217 or email him at bneckers@rhoadesmckee.com. ■

Endnotes

- 1 Bruce Neckers is an attorney at Rhoades McKee PC in Grand Rapids.

House Bill Would Clarify Jurisdiction and Venue Issues¹

A second defendant was added to a civil case in state court, months after the initial filing. The new defendant wants to remove the case to federal court—but the existing law is unclear on the timing of such removal.

H.R. 4113, the Federal Courts Jurisdiction and Venue Clarification Act of 2009, would clear up that question of law, as well as many other areas of confusion. The bill, recently introduced by Representative Lamar Smith (R-TX), ranking member on the House Judiciary Committee, and Representative Howard Coble (R-NC), ranking member on the Courts and Competition Policy Subcommittee, will make it easier to identify where—in state or federal court—certain actions should proceed. The legislation also will help reduce wasteful litigation over jurisdictional issues.

The Judicial Conference Committee on Federal-State Jurisdiction identified recurring problems encountered by litigants and judges in applying certain jurisdictional and venue statutes. Following years of study and consideration of the American Law Institute's Federal Judicial Code Revision Project (2004), the Committee crafted solutions that were subsequently endorsed by the Judicial Conference and transmitted to Congress.

Provisions in H.R. 4113 include those that would:

- Clarify that diversity jurisdiction does not exist in suits between a citizen of a state and a permanent resident alien in that state.
- Allow the amount in controversy to be adjusted every five years to keep pace with inflation when needed.
- Ensure that when a federal question claim is removed and otherwise nonremovable state law claims are attached to it, the federal question claim will proceed in federal court and the nonremovable state law claims will be severed and remanded to state court.

- Facilitate the use of stipulations by allowing plaintiffs, when they wish to remain in state court, to specify that the case involves less than the statutory minimum amount in controversy.
- Clarify the provisions governing timeliness of removal by giving each defendant 30 days after service to file a notice of removal, while allowing any earlier-served defendants to consent to the removal by the later-served defendant.
- Permit removal of a case after one year if equitable considerations so warrant.
- Clarify that a person is deemed to reside in the judicial district in which that person is domiciled.
- Provide that unincorporated associations will be treated the same as incorporated associations for determining venue, so that they also will be regarded as residents of any district in which they are subject to personal jurisdiction.
- Provide that a civil action may be brought in any division of a judicial district in which that case can be properly pursued, and that the court will have discretion to transfer a case to another division within the district upon its own motion or upon the request of a party.
- Delete the limitation on transfer of a case that it be to a district where it might have been brought, thereby broadening the availability of convenient locations for litigants. ■

Endnotes

- ¹ This article is reprinted from *The Third Branch: Newsletter of the Federal Courts*, Vol. 41, No. 12 (Dec. 2009).

Most Federal Court Filings Increase in 2009¹

Filings of civil, criminal and bankruptcy cases all increased during fiscal year 2009, as did the number of persons under post-conviction supervision and the number of cases opened in the federal pretrial services system. Only filings of appeals declined, due largely to a drop in appeals involving the Board of Immigration Appeals.

Statistics on the fiscal year 2009 workload of the federal courts, for the period from October 1, 2008 through September 30 2009, are available in the 2009 Judicial Business of the United States Courts, online at <http://www.uscourts.gov/Statistics.aspx>.

U.S. Courts of Appeals

In fiscal year 2009, overall filings in the regional courts of appeals declined 6 percent to 57,740. Filings rose for criminal and bankruptcy appeals, and in original proceedings. Criminal appeals rose to 13,710, an increase of 43 cases over last fiscal year. Bankruptcy appeals rose 3 percent to 793. Original proceedings increased 2 percent to 3,700.

Civil appeals declined 2 percent to 30,967. Administrative appeals fell 26 percent to 8,570, due mainly to a drop in appeals involving the Board of Immigration Appeals. Challenges to BIA decisions, which had grown 13 percent in 2008, fell 27 percent in 2009 to 7,518. Prisoner petitions declined 4 percent to 16,249, following a 9 percent increase in 2008.

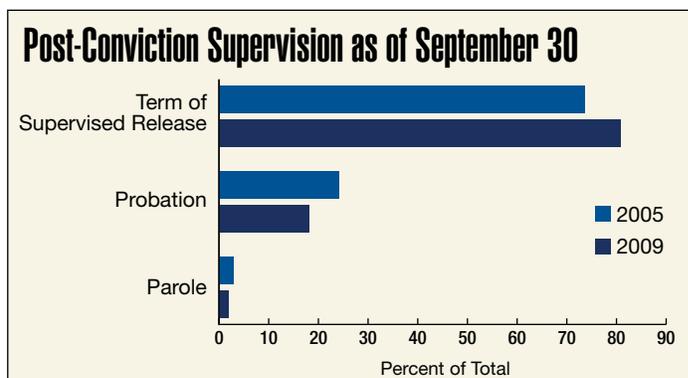
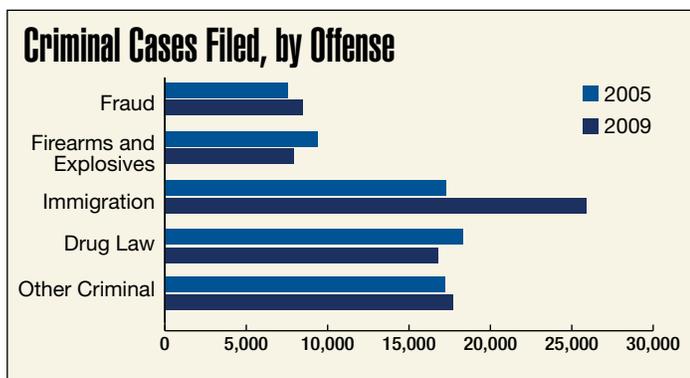
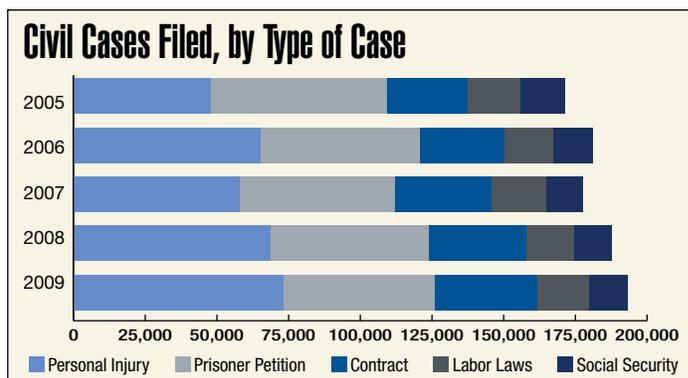
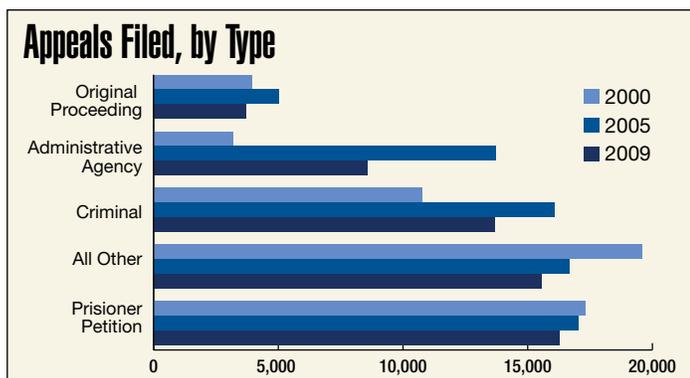
Appeals by pro se litigants declined 1 percent to 27,805, after climbing 11 percent in 2008. Nearly half of the pro se filings are prisoner petitions, which fell 3 percent in 2009 to 14,513.

U.S. District Courts

Total filings of civil and criminal cases in the U.S. district courts increased 4 percent to 353,052 in FY 2009.

Civil Filings

Civil case filings rose 3 percent, increasing by 9,140 cases to 276,397. The number of civil cases filed per authorized judgeship grew to 408 from 394 in 2008.



Federal question cases—those actions under the Constitution, laws, or treaties of the United States in which the United States is not a party in the case—grew 1 percent to 136,041.

Federal question filings involving consumer credit increased 53 percent (up 2,143 cases), in part because of the downturn in the economy. Contract actions grew 7 percent to 8,061 in response to increased filings of maritime attachment cases in the Southern District of New York involving tangible assets such as vessels, chattels, real property and bank accounts. Filings of federal question private foreclosure cases tripled to 1,517. Diversity of citizenship cases totaled 97,209 as the courts handled more cases related to asbestos and civil rights cases dealing with employment.

Filings with the United States as plaintiff or defendant declined 2 percent to 43,144. Filings related to immigration laws rose 39 percent to 2,277 as habeas corpus filings addressing alien detainees (up 398 cases) and other filings involving immigration (up 387 cases) jumped substantially.

Cases with the United States as plaintiff fell 8 percent to 8,834 as filings of defaulted student loans dropped 18 percent. Cases with the United States as defendant declined 1 percent to 34,310, mainly as a result of a 7 percent decrease in prisoner petitions.

The number of civil trials grew 1 percent to 5,309 as 46 of the 94 district courts reported higher numbers of civil trials.

Criminal Filings

Criminal case filings rose 8 percent to 76,655, and the number of defendants climbed 6 percent to 97,982 in 2009. This is the highest number of cases since 1932. Criminal cases filed per authorized judgeship grew from 105 in 2008 to 113 in 2009.

Increases occurred in cases related to immigration, fraud, marijuana, traffic and sex offenses. Immigration filings jumped 21 percent to 25,804. This growth resulted mostly from filings addressing improper reentry by aliens—80 percent of all immigration cases—and fraud and misuse of visas and entry permits.

Overall drug cases rose 5 percent to 16,636 cases and defendants charged with drug crimes grew 4 percent to 30,144. The 2009 rise in drug filings occurred mainly in the southwestern border districts.

Filings of fraud cases rose 8 percent to a new record of 8,355. In 2009 fraud filings surpassed firearms and explosives filings to become the third-largest offense category. The increase stemmed from a surge in filings addressing identification documents and information. Filings of cases involving attempts and conspiracy to defraud rose 35 percent.

Increases in immigration, drug, and fraud cases were largely a result of increased filings in one of more of the five southwestern districts: the District of Arizona, Southern District of California, District of New Mexico, Southern District of Texas, and Western District of Texas.

Excluding transfers, the federal courts concluded proceedings against 95,206 defendants, an increase of 4 percent over 2008. Of these defendants, 86,314 were convicted, a 91 percent conviction rate.

Bankruptcy Filings

In fiscal year 2009, a total of 1,402,816 bankruptcy petitions were filed in the U.S. courts, an increase of 35 percent from 2008 and the largest number of bankruptcy filings in any fiscal year since 2005. Filings exceeded 2008 totals in all districts except the District of the Northern Mariana Islands. The largest percent increases occurred in the District of the Virgin Islands (up 107 percent), the District of Arizona (up 83 percent), and the Central District of California (up 71 percent). Six additional districts—the Districts of Guam, Nevada, Utah, Hawaii, Delaware, and Wyoming—experienced increases of 60 percent or more.

During 2009, filings by debtors with primarily non-business debts totaled 1,344,095, a 34 percent increase over 2008. Filings involving primarily business debts totaled 58,721, a 52 percent increase over 2008.

Pretrial Services and Post-Conviction Supervision

The number of cases opened in the pretrial services system, including pretrial diversion cases, rose from 99,670 cases in 2008 to 105,294 cases in 2009, an increase of nearly 6 percent. Pretrial services officers prepared 100,959 pretrial services reports, up nearly 6 percent from 2008.

Immigration was the major offense involved in 36 percent of the cases opened. The proportion of pretrial services cases opened in which the major offense charged involved drugs fell from 31 percent in 2008 to 29 percent in 2009. Cases involving property offenses represented 13 percent of pretrial services cases opened this year. Cases involving firearms offenses dropped 4 percent.

In 2009 a total of 32,147 defendants were released with specified conditions such as pretrial services supervision or location monitoring. Substance abuse treatment and testing were ordered for more than 33 percent of the defendants.

On September 30, 2009, the number of persons under post-conviction supervision was 124,183, an

increase of nearly 3 percent over the 120,676 persons under supervision on the same date in 2008. Persons who served terms of supervised release following a release from a correctional institution rose more than 4 percent from 95,159 in 2008 to 99,140 in 2009.

The proportion of post-conviction cases successfully terminated remained the same at 73 percent. Of those cases closed successfully, 18 percent were closed by early termination. Technical violations accounted for nearly 63 percent of the 13,470 revocations reported in 2009. Revocations for new offenses accounted for 5,047, or 10 percent, of the 49,410 supervision cases terminated in 2009. ■

New Trust Account Overdraft Notice Rule Takes Effect September 15, 2010

New Rule 1.15A of the Michigan Rules of Professional Conduct, also known as the Trust Account Overdraft Notice Rule (TAON), takes effect on September 15, 2010. To review Rule 1.15A in its entirety, visit [MRPC 1.15A](#).

A brief summary of the requirements of the TAON Rule is provided below:

- Before the effective date of the TAON Rule, financial institutions doing business in Michigan must submit a signed agreement to the State Bar of Michigan to obtain approval to maintain lawyer trust accounts as defined by MRPC 1.15(a).
- Lawyers must confirm that their financial institutions are on the list of approved financial institutions posted on the State Bar's website.
- No further action is required by lawyers for their preexisting IOLTA accounts; these accounts have already been identified as lawyer trust accounts by financial institutions when opened by lawyers.
- After confirming that their financial institution is on the State Bar's list, lawyers must contact their financial institutions to change the name on their non-IOLTA accounts to include the term "trust" or "escrow" if not already included in the account name.
- After confirming that their financial institution is on the State Bar's list, lawyers may download

a form (Non-IOLTA Lawyer Trust Account Notice to Financial Institution) from the State Bar's website and submit the completed form to their approved financial institutions for each non-IOLTA trust account and must send a copy to the State Bar.

- Lawyers must continue to safeguard client and third-party funds held in trust to avoid all overdrafts to their IOLTA and non-IOLTA accounts.
- Approved financial institutions maintaining lawyer trust accounts must submit overdraft reports within five banking days of any overdrafts to the grievance administrator of the Attorney Grievance Commission.

The State Bar is in the process of communicating with financial institutions to invite their participation in the TAON program. The State Bar expects to begin receiving signed TAON agreements from financial institutions in May and will begin posting its list of approved financial institutions at that time. The State Bar will update the list of approved financial institutions as signed TAON agreements are received from financial institutions. Lawyers should wait until the name of their financial institution appears on the State Bar's list of approved financial institutions before submitting a completed non-IOLTA notice form.