Bar & Bench
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President's Letter

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Federal Bar Association, W.D. Michigan

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Happy New Year!

As I reflected on my many blessings this holiday season, I noted with gratitude that I will have the privilege of serving as your president during the year in which we celebrate the 150th anniversary of the appointment of Solomon Withey, the first United States District Judge for the Western District of Michigan. I am so grateful for this opportunity!

We are already off to a great start this year with exciting and educational programming. Our annual meeting in October 2012 drew a near-record crowd as we welcomed William K. Suter, Clerk of the United States Supreme Court, as our guest speaker. General Suter shared anecdotes from his more than 20 years with the Court and presided over a swearing-in ceremony in which forty-four of our FBA members were admitted to the Supreme Court Bar. Special thanks to my predecessor, Scott Brinkmeyer, who spent countless hours planning this amazing program. Completing this "supreme" fall programming, in early December 2012, Michigan Solicitor General John Bursch and Assistant U.S. Attorney Don Davis reprised their ever-popular Supreme Court review. Of particular note, SG Bursch shared insights from his experience arguing two significant cases in the 2011 term.

Looking forward, two great brown-bag lunches will kick off our 2013 educational programming. On February 4, 2013, Seattle attorney Harry Schneider, one of the attorneys who represented Salim Hamdan (Osama bin Laden's driver) will present a program on Hamdan's trial, the first war crime trial of a Guantanamo detainee. This promises to be an exceptional talk about one of the most

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important criminal cases since the Nuremberg trials. And on February 28, 2013, Chief Judge Maloney will report on the state of the District. Given the precarious state of federal budget matters, this program will be especially informative.

To commemorate the District's 150th anniversary, the Historical Society is planning a spectacular sesquicentennial celebration on March 12, 2013, complete with a civil war band, Abraham Lincoln impersonator, and renowned author-historian Richard Norton Smith as keynote speaker. The FBA is proud to be a sponsor of this milestone event.

Finally, I'm pleased to announce two new initiatives. First, our chapter treasurer, Clare Freeman, will serve as chair of a new Younger Lawyers Committee. Designed to foster collegiality, develop tomorrow's leaders, and promote diversity and inclusiveness, the Committee will host social functions, explore ideas for utilizing technology to improve communication (think "tweets"), and develop programming geared toward the younger lawyer. Second, we are starting an FBA book club! Our first selection is *Incognito: The Secret Lives of the Brain*, by David Eagleman, a neuroscientist who writes about how the subconscious brain affects human behavior and presents provocative ideas for reshaping the way we think about "free will" and its implications for our legal system, among other things. Eagleman, an engaging speaker who has appeared on *The Colbert Show*, will participate via live video feed in our book discussion, date TBD in Spring 2013. The book is well-reviewed, described variably as "fascinating," "original," "provocative," and "a fun read by a smart person for smart people." Get reading FBA members!

—Jennifer L. McManus, President

U.S. Attorney Investiture Speech

Patrick A. Miles, Jr. was sworn in as U.S. Attorney for the Western District of Michigan on September 7, 2012. In attendance were numerous state, local, and federal officials, including Attorney General Eric Holder. Below is a transcript of Mr. Miles' speech from the event.

Love and Justice

Thank you. Mr. Attorney General, thank you for your remarks and for joining us here today. We are privileged to have you here. Chief Judge Maloney, thank you for presiding here today and your gracious comments. To all of our judges, thank you.

I thank the elected government officials and Tribal Leaders who are with us today. There are too many to recognize. But your presence is much appreciated. Special thanks to Ottawa Hills High School and Principal Rodney Lewis for their hospitality. I also very much appreciate each of you being here today. It means a lot to me to see so many from my family, friends, and colleagues.

Special thanks to all the staff who worked so hard on this event. Great job.

It gives me a humbled heart to have the honor to serve as your United States Attorney. I am grateful to President Obama for this appointment and his trust in bestowing this vital position on me. I am grateful to the United States Senate for confirming my nomination, and to our two great Michigan Senators, Carl Levin and Debbie Stabenow, in particular, for their support and for their service to this great State. Senator Stabenow is here today and she will give some remarks when I finish in a couple hours. {Just kidding}

I thank Attorney General Eric Holder for his outstanding leadership and am very excited to be a part of his team and the Department of Justice.

Each day I give thanks to God. I am thankful he gave me wonderful parents and a loving, supportive family. I learned the importance of faith, selfless love, integrity, education, and service from my mom and dad. From many of you here today I learned important life lessons. I am blessed.

When we look around, we can see that West Michigan is very blessed. We have a wise and experienced bench, a collegial and ethical bar, a strong community spirit, and wonderful natural resources. The Western District of Michigan has 49 of Michigan's 83 counties, including the entire Upper Peninsula and the state capital of Lansing. It covers over 700 miles from the southern border to the northwest border – over 35,000 square miles. There are eleven Federally recognized Native American Tribes. 3.4 million people live in the District.

The Western District's diversity—among our people and our resources—reflects the strength of our great nation's tapestry:

> We have aging and renewing urban cities, growing suburbs and large rural areas; we have heavy industrial manufacturing and high tech research, vast farms on fertile soil; shipping lanes in three of the Great Lakes, and mines in the hard Michigan rocks.

Here, we are hardworking and committed to leaving a better Michigan to our children. We were given much, and much is expected. That is not just a saying. It is a calling. People live it here. We understand that everyone must work to preserve, protect, and defend these treasures we hold dear.

Those who violate the social compact – whether wearing a mask and brandishing a weapon or wearing a suit and holding a pen – will be brought to justice. This job allows me to help do that. It also forces me to see everything through the lens of justice.

A couple weeks ago our U.S. Attorney Office in West Michigan worked with the United States Marine Corps and hosted a ceremony honoring four Grand Rapids men – two posthumously – who were among the first African Americans to serve in the U.S. Marine Corps during World War II. These four Montford Point Marines received the Congressional Gold Medal, the highest American civilian award. But they were not able to attend the formal award ceremony in Washington, D.C. So we held one here in Grand Rapids to honor them and hear their story.

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While in a segregated boot camp and in the service, they endured hardships for their country. They made sacrifices – in blood, sweat, and tears – not only fighting, but just for the opportunity to fight for others. Some of those they were fighting for were denying them equal treatment and rights. But they did it anyway – for love of country and others. The same was true of the Tuskegee Airmen who fought courageously in the skies above Italy and Germany in World War II.

Also during World War II, Japanese-Americans enlisted in the U.S. Armed Forces and fought in Europe and elsewhere even though many of their families in America were subject to internment in detention centers. One Japanese-American unit, the 442nd Regimental Combat Team was the most highly decorated regiment in the history of the U.S. Armed Forces, and had 22 Medal of Honor Recipients.

As I stood before the two surviving Montford Point Marines in my office, I reflected on these incredible stories of sacrifice and selflessness, and I thought about justice. Not just about the injustices these men faced. But also about the essence of justice, and it's opposite.

I realized that every crime is based in selfishness. Conversely, if everyone was truly self*less*, no laws would be broken and we would not need criminal law. {It's okay lawyers, don't worry, we would still need civil attorneys and judges.}

A shorter and more powerful word for selflessness is love. In my Christian faith, love is the over-arching message and the overriding commandment. It is, in my opinion, the meaning of life – to demonstrate one's ability to be a loving person. It's not easy. Sometimes just talking about love is ridiculed. It's hard to sacrifice for a stranger. It's difficult to care about people who are from a different race, ethnicity, religion or culture.

But I believe that is why each of us is created different. So we can learn to love others, despite differences.

Loving others doesn't mean one has a bleeding heart that is weak or soft. It means you're strong enough to care for someone else and are willing to bleed for them. It's obvious that love leads to peace. Justice also leads to peace. Therefore, love equals justice.

Think about "*E Pluribus Unum,*" "Out of Many, One," an American motto from our nation's birth. This nation was built to be diverse and to be united: To care about each other. To have a shared destiny. To love peace. To seek justice. To live free. These things make us strong. They made us the greatest nation in the history of the world.

It's a truism that without justice, there is no peace. Dr. Martin Luther King, Jr., who among other achievements, authored the appropriately named book "Strength to Love," one of my dad's favorites. It does take strength to love. Dr. King once said, "Peace is not the absence of war, but the presence of justice."

An inscription over an entrance to the Department of Justice Building in Washington, D.C. says, "Justice in the life and conduct of the State is possible only as it first resides in the hearts and souls of the citizens." Justice is in the same place where love is. The ancient Egyptians knew this too. They believed sun god Ra's daughter, Ma'at -- etymologically the source of the word Magistrate -- helped Osiris judge the dead by weighing their hearts on the scale of justice.

Justice must be in the heart and soul of every American, especially those in law and law enforcement.

I've been U.S. Attorney for two months, and I love it. I love that Justice is both the name and the mission of the Department I now work in and which the Attorney General so ably leads. It is said that good prosecutors get convictions but great ones get justice. Pursuing justice requires strength, vigor, and commitment.

I consider myself a "pragmatic idealist." My idealistic nature seeks love and justice. My pragmatic nature works to get there. As to the pragmatic goals for this office, we are creating a new strategic plan that emphasizes clear objectives and accountability. We are forming task forces to be pro-active in preventing and prosecuting crimes in a variety of areas. Yes, we can help prevent crime:

> Through education, outreach into the community, and deterrence. Those are part of our mission.

In this regard, our attorneys will work with the investigative agencies, local law enforcement, and communities. Collaboration is a West Michigan value. We work together to get things done.

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We are going to continue focusing on vigorously prosecuting and preventing violent and organized crimes, financial frauds, child exploitation, anti-terrorism, and drug trafficking. But we also are going to put more resources into Health Care Fraud cases, Public Corruption cases, and enforcing Federal Civil Rights laws.

This office has some excellent and hard-working attorneys and staff. I'm already impressed with their abilities and dedication. Aside from hiring the best and most talented people to work in the Western District of Michigan office, I want my legacy as U.S. Attorney to be that we achieved our goals, and increased diversity and inclusion in the office.

I also want to be an advocate for effective prisoner re-entry programs. If one of the objectives of incarceration is rehabilitation, then we owe it to American taxpayers and citizens to prevent 40 percent of federal prisoners and two-thirds of state prisoners from committing additional crimes and returning to prison within two years of their release. This means access to services to address addiction and mental health issues, strong community resources, and employment opportunities. This effort takes collaboration. This office will be a promoter of that work.

We have a number of Grand Rapids Public High School students here today. I am a product of the Grand Rapids Public Schools, a proud graduate of this high school, Ottawa Hills. I walked these halls and sat in these classrooms. I shot baskets in the gym – missed more than I made. I swam in the pool. I played varsity baseball and wore the orange and black on the field.

Students, I know that what your friends and classmates think is important to you now. But every adult in this room will tell you, there is a lot of life beyond high school. The formula for success isn't a secret, but it's not always easy. It often requires sacrifices. But, probably less sacrifice than those I mentioned earlier who served in World War II.

You need to think about the future and consequences, make good choices, learn as much as you can, work hard, believe in yourself, keep your life on track, and you can live your dreams.

I am. You can too.

Thank you very much. ▪

Thank You

By Cori E. Barkman[1]

Thank you to those who taught me about balancing the tight rope walk between career success and not going "off the track" at work or at home

I am at counsel table during a homicide trial in Wayne County Court. I am a law student intern, sitting second chair with one of my mentors from the Prosecutor's Office, Kam Towns, a full time Wayne County Assistant Prosecuting Attorney in the prestigious Homicide Unit, and full time mother of three young boys. Kam effortlessly cross examines a criminal defendant standing trial for killing two young women in Highland Park, Michigan, and letting their bodies decompose in his mother's basement while he invited guests over to hang out and party at his mother's house.

As I watch her put the Defendant through the verbal ringer, I am impressed with her skill as a trial lawyer. She is not even using notes! I wonder if someday I can even hope to come close to the display of confidence and skill in the courtroom I am witnessing. Most amazingly, a few hours before, Kam was dressing two little boys for elementary school and one for day care, packing lunches, and making sure that each child had exactly what supplies that he needed for school that day. I also wonder if I will ever have the stable, loving home life that Kam seems to have – complete with a supportive husband and three adorable sons. It seemed to me that Kam was living a dream life with an action filled successful career and a family.

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Fast forward ten years.

It is 10:00pm on a Wednesday night. I am in the midst of trial. I have just eaten a handful of almonds and sucked down a Diet Coke for dinner and I am finally ready to work on my closing argument for what will hopefully be the last day of what has been a four day trial so far. I mistakenly told my husband the trial would only be two days, so he agreed to handle pick up and drop off of our three year old twins at daycare on trial day one and two. But, as a regional project manager for a large hazardous waste firm, his work schedule would not permit him to drop off and pick up the twins on unexpected trial day three and four due to out of state travel. I have already put in a full workday in trial and then some. I have been up since 5:00 AM looking over last minute trial materials, roused the twins from a deep sleep at 6:30 to take them early to daycare so that I could try to be in court early. But instead of ending up in court early as hoped, I was just barely on time.

After a full day of trial, I left the courthouse, picked up my twins at the daycare, took them to swimming lessons, swam with them for awhile, took them to dinner at Subway, took them home, and put them to bed. And now, I must put in a few more hours before I can think of sleep because my closing has not yet solidified in my mind.

Just as I reflect on my case at the end of the day, I also briefly reflect on my life and how I got here. Sometimes, after a day like the one described above, when everything seems like a blur of activity and fatigue, I wonder, am I privileged or cursed? Sometimes it seems like a little of both. Can I continue to walk this tightrope between needing to be on top of things to present a credible, winnable case to a jury or a judge? Am I paying proper attention to my life outside of my professional work? On one hand, I am thankful for my wonderful family and my interesting job, though it can sometimes be a physical and mental marathon and having the strength to carry on can seem impossible. But, even when I have days like the one described, I always think back to my past, my work at the Wayne County Prosecutor's Office, which I firmly believe set me up to "though out" the hard days in trial, the marathons with work and family, and the physical, but never mental void I sometimes feel when its all said and done.

Even as an intern at Wayne County, as a young single woman with no responsibility other than paying my rent, passing my law school classes, passing the bar, and ultimately finding a decent job. I had discussions with Kam and others in the office, not only about the cases that we were handling but about how they managed their successful careers with the demands of busy home lives with families and activities outside of work. Many of these people took it upon themselves to offer me practical advice about life, and that advice makes more sense now than it did then.

Kam once told me a story about how she had bumped into a law school classmate of hers at Costco. The classmate was there with her young children. The classmate said "I guess we just couldn't do it all," and the discussion turned to life with families and careers. The classmate had found that the demands of work and family were so great that she had decided to suspend her legal career to focus on work at home. Kam told me that she responded to the woman by just politely nodding her head in agreement with the classmate while inside she was thinking: "I'm doing it all and I'm going nuts!"

One Detroit Police Department Homicide Sergeant, the father of three children, told me that the key for him to being able to manage the rigors of investigating numerous and daily homicides, and still stay somewhat sane was never to take work home. At the time, I took that literally, thinking that he meant to never physically take a file home. I wondered how it would be possible as an attorney to "never take work home" and still be prepared. I often saw the homicide prosecutors end a first degree murder trial on Friday late afternoon and begin jury selection on another first degree murder case on the following Monday. Obviously, some work must have been taken home for one to be ready and on top of their game on Monday morning

I have to admit, when I heard Kam and some of the other APAs and Detectives speak about their families, and the difficult juggling act to make sure that business was taken care of on all fronts, I was a bit jealous. These individuals "made it look easy." They seemed to be able to effortlessly juggle career and fulfilling family lives. After all, I did not witness the arguments between spouses, the stress of transporting children around and making sure they are well taken care of, or even the

daily rigors of reconciling parenthood with a profession where one cannot survive by simply doing the same thing over and over again – since an attorney must constantly brush up on the facts and the law, and gain familiarity with both.

I sometimes look back on my law school days at Wayne State University and think "those were good times." After all, little did I know, my responsibility level was at an all time low. I had no clients to be concerned about, I had a small maintenance free apartment in the City of Detroit on a street where neighbors looked out for one another and often brought me barbecue dinners on Sunday afternoons, knowing I would be studying. And, though I was responsible for making sure that I was well prepared for class and for presentations in the mock trial group that I was involved with, ultimately, I set my own schedule. I decided when and where I would study and when I would relax.

Those days are long gone. Now, I handle a busy caseload day and all of the rest of my time is devoted to parenting. There have been times when I have left a deposition or a meeting with a witness from behind prison gates only to rush to my children's day care for a holiday party. There have been times when I've dropped my kids off at day care, only to rush to court in Grand Rapids, Detroit, Marquette, or even Cincinnati to make my best argument on a case involving an issue of constitutional magnitude.

And now, I suppose, I am in Kam's role. A trial lawyer and part of a family with young children where both my husband and myself have time consuming careers. And somehow, like Kam and many others, we just get through it.

I recently had the privilege of bumping into Kam at the retirement party. Luckily, I was able to thank her for the great example of a hard working, well prepared prosecutor that she was, for her mentoring of me, and her practical advise about juggling a busy career and young family. I explained to her that I now really appreciated the difficulties, the triumphs, and the low points that she shared with me during the two years that I worked as an intern in the homicide unit. I think that without some of those early examples of hard work, perseverance, and how it looks to operate on adrenaline, that I might not have had a "paved path" to follow like I feel I do now.

And, I think I have finally figured out the advice about not taking work home. It is not about whether you are literally "taking work home." It is about one's attitude toward the work. I find that when I am very busy and need to look things over at home to prepare for the next day, I will make a conscious effort to not even think about what must be done while I am trying to enjoy my children. I might pick up a transcript to read, or write some of a brief after they go to sleep for the night, but I have decided that I will not cloud their evening with my concerns over work. The brief will be written. The deposition will be taken. The motion will be argued. The trial will proceed. Why not limit those concerns to "business hours." There is no harm in putting any work related stress or worry aside and focus on what is important at the moment.

To sum up, I am so thankful to Kam and all of my other mentors along the way, at the Prosecutor's Office, at the Attorney General's Office, where I work in the Corrections Division, and in my life. These personal and professional mentors have provided encouragement along the way when balancing everything seems out of reach.

Therefore, based on my experience following those like Kam, who has been kind enough to "go first," and provide me with a template to success in navigating the fine line between home and work success, I encourage any newer or younger lawyer and any law student to seek out experienced veterans in the work/family balancing act when things begin to feel as if they might spin off track. Talk to your mentors. Seek out their help and advice. They will provide you with encouragement along the way when any sort of a healthy medium seems out of reach. Believe me, you are not alone. ▪

Endnote

1 Cori Barkman practices in Lansing as an Assistant Attorney General for the State of Michigan Corrections Division.

A Policy Of Variance: Downward Departures from Child Pornography Sentencing Guidelines

By Emily Bakeman and Sarah Riley Howard[1]

I. Introduction

Child pornography offenses are serious crimes. Accordingly, the Federal Sentencing Guidelines for these offenses[2] impose severe punishments – but maybe too Draconian, according to many judges. A 2010 survey by the United States Sentencing Commission revealed that 70% of district judges believe that the child pornography Guideline range for possession is too high, 69% believe the range is too high for receipt, and 30% believe it is too high for distribution.[3]

Courts' disagreement with the current guidelines is more than just talk. In 2011, child pornography offenses had the highest rate of below-Guideline sentences,[4] with 44.9% of sentences for child pornography trafficking and possession below the Guideline range, as compared to 17.4% of sentences for all offenses.[5] While judges are permitted to deviate from any Guideline if they have compelling reasons for doing so,[6] basic policy disagreements are consistently invoked to deviate from the Guidelines for child pornography sentences.

II. Recent Sixth Circuit Development in Policy-Disagreement Jurisprudence

As discussed further in this article, a number of courts have permitted categorical, policy-based departure from child pornography Guidelines because Congress has been directly involved in instructing the Commission about offense levels as to these particular crimes, reflecting an apparently widely-held belief that these Guidelines are less empirically sound.[7] However, the Sixth Circuit recently became the first circuit in *United States v. Bistline*[8] to hold that Congressional involvement in setting a child pornography Guideline's development alone was an inadequate basis on which to deviate from the Guideline.[9]

In that case, the district judge departed downward from a Guideline range of 63 to 78 months in prison when sentencing an individual for possession of child pornography, sentencing him instead only to one night in the courthouse lockup and ten years of supervised release.[10] The Supreme Court denied a petition for certiorari in the case, and the district court is in the middle of a continuing hearing regarding re-sentencing. Mr. Bistline is expected to be re-sentenced on January 4, 2013.

Judge Kethledge, who authored *Bistline,* called a categorical criticism of a Guideline based only on the fact of its mandate from Congress "misguided."[11] While acknowledging the ability of a district judge to depart based on a policy disagreement with a Guideline, the Sixth Circuit's holding requires that the trial court articulate substantive reasons for the policy disagreement, and not just procedural objection to the policymaker at issue:

> For our purposes, however, the relevant point is one of constitutional context: namely, that the Constitution merely tolerates, rather than compels, Congress's limited delegation of power to the [Sentencing] Commission. And that context, we think, puts in a different light the various complaints, both within and without the judiciary, that Congress has encroached too much on the Commission's authority with respect to sentencing policy. That is like saying a Senator has en-croached upon the authority of her chief of staff, or a federal judge upon that of his law clerk. And thus we disagree with the complaint—to the extent it is one—that Congress's amendments to § 2G2.2 "evince a 'blatant' disregard for the Commission and are 'the most significant effort to marginalize the role of the Sentencing Commission in the federal sentencing process since the Commission was created by Congress[.]' " Congress can marginalize the Commission all it wants: Congress created it.[12]

The Court there also wrote that there is nothing requiring the reasoning behind a Guideline to be entirely empirically-based, and even solely value-based judgments

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that a crime is so reprehensible that a message needs to be sent via the offense level cannot be categorically rejected.[13] (According to *Bistline*, Congress's directives as to child pornography Guidelines were based on both its specific empirical and value judgments calculated to achieve retribution and punishment.[14])

Accordingly, the Sixth Circuit instructed in *Bistline* that a district court that has a *Kimbrough* policy-based disagreement with a Guideline and departs on that basis "must contend with" all of the grounds behind the reasoning of the Guideline – whether those of the Commission or of Congress – to justify the departure.[15] When the reasoning is that of Congress, the Sixth Circuit called the district court's job to explain its own justification to depart downward from the Guideline offense level a "formidable task."[16] In *Bistline,* the district court judge made no specific effort to explain why downward departure was appropriate based on a policy disagreement, and so remand for re-sentencing was ordered. In any event, it seems evident from the opinion that there is no possible reasoning that will survive on appeal to justify a departure of the magnitude in Bistline's original sentence. Thus far, this holding has been recognized only within the Sixth Circuit, and courts in other circuits continue to cite Congress's involvement alone as a basis for deviation.[17]

III. History of the Child Pornography Sentencing Guidelines

The involvement of Congress in the child pornography Guidelines makes them "fundamentally different than most."[18] While Guidelines are usually developed by the Sentencing Commission "using an empirical approach based on data about past sentencing practices," the current child pornography Guidelines, as noted above, are the result of recurrent Congressional involvement.[19] Since the child pornography Guidelines' introduction in 1987, Congress has directed the Sentencing Commission on multiple occasions to amend the Guidelines and has amended the Guidelines directly through legislation in order to impose increasingly harsher penalties for child pornography offenses, despite the Commission's open opposition to those changes.[20]

In 1995, prior to the majority of the Congressionally-directed amendments, the average sentence for child pornography offenses was under 30 months and only 23% of sentences were below-guideline sentences.[21] By 2011, the average sentence for these offenses was 119 months, despite the fact that 44.9% of sentences fell below the Guideline range.[22] Currently, child pornography offenses have the fourth-highest sentence length, surpassed only by murder, kidnapping, and sexual abuse.[23]

IV. Policy-Based Deviation from Child Pornography Sentencing Guidelines

In *Kimbrough v. United States,*[24] the United States Supreme Court held that courts could vary from the crack cocaine Guidelines based on the belief that those Guidelines did not appropriately serve the purposes of sentencing.[25] Later, in *Spears v. United States,*[26] the Supreme Court clarified that its previous holding was a "recognition of district courts' authority to vary from the crack cocaine Guidelines based on policy disagreement with them," thus permitting categorical rejection of those guidelines. This was based on the belief that the Guidelines did not "exemplify the Commission's exercise of its characteristic institutional role," considering Congress's involvement.[27]

While *Spears* specifically addressed only a specific provision of the crack cocaine Guidelines, courts have since extended its reasoning to the child pornography Guidelines.[28] Thus, courts are permitted to deviate downward from the child pornography Guidelines based on policy disagreements.[29] While this provides judges with significant discretion, the court may not simply state its dissatisfaction with the Guidelines; the court must instead provide sound reasoning for its disagreement and "adopt some other well-reasoned basis for sentencing."[30]

Spears, by its terms, would permit courts to "reject and vary categorically" from the child pornography Guidelines, rather than determine whether to deviate on an individual basis.[31] Thus, courts may reject the

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Guidelines as a whole rather than merely as they apply to a particular defendant. For example, in *United States v. Beiermann,*[32] the district court rejected the child pornography Guidelines generally and in their entirety, without any reference to the defendant in that case.[33] However, some courts have declined to take a categorical stance or have argued that categorical rejection is inappropriate.[34] Those courts conduct an individual evaluation in light of the specific facts of the case, but give the child pornography Guideless less deference than the deference given to Guidelines for other offenses.[35]

V. Other Justifications for Policy-Based Deviations Besides Congressional Mandate

Unreasonable Sentences

Courts also have held that the Guidelines result in "unreasonable sentences"[36] because they fail to differentiate between the worst offenders and those with less culpability.[37] This is largely because many of the sentencing enhancements for child pornography offenses are "all but inherent to the crime of conviction."[38] In 2011, 97% of cases involved use of a computer, 95% involved a victim under age 12, 79% involved violent images, and 70% involved at least 600 images.[39] A defendant who qualifies for three of those four enhancements, as many do, will receive a scoring increase of at least eleven levels.[40]

In *United States v. Dorvee,*[41] the Second Circuit held that a Guideline range of 262 to 327 months was unreasonable for a defendant convicted of possessing numerous videos depicting minors engaging in sexually explicit conduct and for trading these videos on the Internet with approximately 20 other individuals.[42] The court observed that the defendant's Guideline range in this case could have been considerably lower if he had actually engaged in sexual conduct with a minor rather than merely possessed and distributed images.[43] "[A]dherence to the Guidelines results in virtually no distinction between [the defendant] and the sentences for the most dangerous offenders" and therefore the court rejected the Guideline range.[44]

Similarly, in *United States v. Munoz,*[45] the court rejected the Guideline range after noting the irony that, if the defendant had committed the charged pornography offense while engaging in a "pattern of activity involving sexual abuse or exploitation of a minor," or had distributed child pornography for pecuniary gain, he would have received the same sentence recommendation under the Guidelines as he received for the charged offense alone.[46]

Sentencing Disparities

The increasing rate of downward deviations from the child pornography Guidelines has in fact given courts yet another reason to deviate: avoidance of sentencing disparities.[47] The Guidelines are intended to reduce sentencing disparities by providing a national sentencing standard. However, because of the prevalence of below-Guideline sentences, within-Guideline sentences are quickly becoming the exception rather than the rule. In *United States v. Munoz,*[48] the court noted "[t]he sentencing practices of other courts in similar cases demonstrate that a Guidelines sentence in this case would create disparities."[49] In *United States v. McElheney,*[50] the court found that applying the child pornography Guidelines created sentencing disparities in two ways. First, as in *Munoz,* the court noted that the significant number of sentences below the Guidelines create a situation in which a within-Guideline sentence treats a defendant differently than similarly-situated defendants.[51] Additionally, because the Guidelines fail to differentiate between particularly egregious conduct and less serious conduct, adherence to the Guidelines treats differently situated defendants similarly, which also contributes to impermissible sentencing disparities.[52]

VI. Policy-Based Deviations Permitted But Not Required

A sentencing court commits "*Kimbrough* error" when it fails to recognize its discretion to vary from a Guideline range based on policy disagreements.[53] While it is error for a court to fail to recognize the discretion, it is not error for a court to refuse to exercise it.[54] Now, *Bistline* requires more of district court judges who do choose to exercise that discretion, at least in this circuit,

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all while it appears that courts nationwide who refuse to exercise this discretion as to child pornography sentences are becoming more and more rare.

Endnotes

1 Sarah Riley Howard heads the White Collar Criminal Defense practice group at Warner Norcross & Judd LLP, which represents clients in a range of matters involving corporate legal compliance, federal litigation counseling, and criminal defense. Emily Bakeman is a junior associate in Warner's Grand Rapids office.

2 The Guidelines for trafficking and possession of child pornography are found in found in section 2G2.2 of the 2012 Guidelines Manual. United States Sentencing Commission, *Guidelines Manual, § 2G2.2 (Nov. 2012)* ("Trafficking in Material Involving the Sexual Exploitation of a Minor; Receiving, Transporting, Shipping, Soliciting, or Advertising Material Involving the Sexual Exploitation of a Minor; Possessing Material Involving the Sexual Exploitation of a Minor with Intent to Traffic; Possessing Material Involving the Sexual Exploitation of a Minor").

3 United States Sentencing Commission, *Results of Survey of United States District Judges January 2010 through March 2010* (June 2010), *available* at http://www.ussc.gov/Research/Research_Projects/Surveys/20100608_Judge_Survey.pdf .

4 For the purposes of this article, "below-Guideline sentences" and "downward deviations" refer specifically to below-Guideline sentences that are non-government sponsored.

5 United States Sentencing Commission, *2011 Sourcebook of Federal Sentencing Statistics,* Table 27A, *available* at http://www.ussc.gov/Data_and_Statistics/Annual_Reports_and_Sourcebooks/2011/Table27a.pdf ; United States Sentencing Commission, 2011 Annual Report, Ch. 5, available at http://www.ussc.gov/Data_and_Statistics/Annual_Reports_and_Sourcebooks/2011/2011_Annual_Report_Chap5.pdf .

6 *See United States v. Booker,* 543 U.S. 220, 246-58 (2005) (holding that sentencing guidelines are advisory rather than mandatory).

7 *E.g., United States v. Zauner,* 688 F.3d 426, 431 (8th Cir. 2012); *United States v. Dorvee,* 616 F.3d 174 (3d Cir. 2010) (holding that the deference given to the Guidelines will depend on the thoroughness evident in the Commission's consideration of those Guidelines, which was lacking in light of Congress's involvement); *United States v. Grober*, 624 F.3d 592 (3d Cir. 2010) (finding grounds to deviate from the child pornography Guidelines based on the fact those Guidelines are unlikely to "reflect a rough approximation of [appropriate] sentences" due to Congress's involvement).

8 665 F.3d 758 (6th Cir. 2012), cert. den., 133 S. Ct. 423 (Oct. 9, 2012).

9 *See Id.*

10 *Id. at 760.*

11 *Id.* at 761.

12 *Id.* at 762 (internal citations omitted).

13 *Id.* at 764.

14 *Id.*

15 *Id.*

16 *Id.*

17 *See United States v. Rothwell,* 847 F. Supp. 2d 1048, 1054 (E.D. Tenn. 2012) (citing *Bistline* with approval for the proposition that Congress's role is not a grounds for rejecting the Guidelines); compare with *Zauner*, 688 F.3d at 431; Dorvee, 616 F.3d at 184.

18 *United States v. Dorvee,* 616 F.3d 174, 184 (2nd Cir. 2010).

19 *Id.* at 184.

20 *See Dorvee,* 616 F.3d at 185-86; United States Sentencing Commission, *The History of the Child Pornography Guidelines* (Oct. 2009), *available at* http://www.ussc.gov/Research/Research_Projects/Sex_Offenses/20091030_History_Child_Pornography_Guidelines.pdf .

21 *See* Sentencing Commission, *History of Child Pornography Guidelines.*

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22 *See* United States Sentencing Commission, *2011 Sourcebook of Federal Sentencing Statistics,* Table 13, *available at* http://www.ussc.gov/Data_and_Statistics/Annual_Reports_and_Sourcebooks/2011/Table13.pdf .

23 *See Sentencing Commission, 2011 Annual Report, Ch. 5*

24 552 U.S. 85 (2007).

25 *Id.* at 575.

26 555 U.S. 261 (2009).

27 *Id.* at 268 (citing *Kimbrough,* 552 U.S. 85).

28 *See United States v. Beiermann,* 599 F. Supp. 2d 1087, 1096 (N.D. Iowa 2009) ("[T]he powerful implication of Spears is that, in other "mine-run" situations, the sentencing court may also reject guidelines provisions on categorical policy grounds[.]").

29 *See Id.; Dorvee,* 616 F.3d at 188.

30 *Beiermann*, 599 F. Supp. 2d at 1096.

31 *Spears,* 555 U.S. at 266.

32 599 F. Supp. 2d 1087.

33 *Id.* at 1104-06.

34 *See, e.g., United States v. McElheney,* 630 F. Supp. 2d 886, 895 (E.D. Tenn. 2009) (" The Court agrees with those courts that have concluded the child pornography Guidelines are due less weight than empirically based Guidelines. However, the Court parts company with those courts that categorically reject the child pornography Guidelines."); *United States v. Cruikshank,* 667 F. Supp. 2d 697, 702 (S.D. W.Va. 2009).

35 *See McElheney,* 630 F. Supp. 2d at 895 ("The Court agrees with those courts that have concluded the child pornography Guidelines are due less weight than empirically based Guidelines.").

36 *Dorvee,* 616 F.3d at 184.

37 *See, e.g., Zauner,* 688 F.3d at 431 (holding that the defendant's offense conduct alone did not place him among the worst offenders and therefore it would have been unreasonable to sentence him within the Guidelines).

38 *See Id.* at 186.

39 *See* United States Sentencing Commission, *Use of Guidelines and Specific Offense Characteristics, Fiscal Year 2011,* 41-42, *available at* http://www.ussc.gov/Data_and_Statistics/Federal_Sentencing_Statistics/Guideline_Application_Frequencies/2011/Use_of_Guidelines_and_Specific_Offense_Characteristics.pdf .

40 Sentencing Commission, *Guidelines Manual, § 2G2.2(b).*

41 616 F.3d 174.

42 *Id.* at 186-87.

43 *Id.* at 187.

44 *Id.*

45 2012 WL 5351750

46 *Id.* at *4.

47 *See Munoz,* 2012 WL 5351750 (citing numerous cases in which district courts have imposed sentences far below the child pornography Guideline range as evidence that a harsh sentence would create sentencing disparities); Rothwell, 847 F. Supp. 2d at 1054 ("The reality, however, that so many courts are imposing sentences of defendants convicted of child pornography offenses outside of USSG § 2G2.2, coupled with the multiple criticisms of it must give any court pause when sentencing a defendant under USSG § 2G2.2.").

48 2012 WL 5351750.

49 *Id. at *5.*

50 630 F. Supp. 2d 886

51 *Id. at 895.*

52 *Id.*

53 *See United States v. Stone, 575 F.3d 83, 89 (1st Cir. 2009); United States v. Henderson, 649 F.3d 955 (9th Cir. 2009); United States v. Boykin, 2012 WL 5625853, *2 (11th Cir. Nov. 15, 2012). See also United States v. Clogston, 662 F.3d 588 (1st Cir. 2011).*

54 *See Stone, 575 F.3d at 92-93.*

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What Federal Court Practitioners Need to Know about the N.L.R.B. Decision in *D.R. Horton* and How it Impacts Class Action Waivers Contained in Arbitration Agreements

By Nicholas M. Ohanesian[1]

I. Introduction

With the Supreme Court's recent decision in *AT&T Wireless LLC v. Concepcion,*[2] the approval of arbitration agreements containing joinder and class action waivers now appears settled. However, the National Labor Relations Board (NLRB) has issued a decision in a case called *D.R. Horton*[3] that is poised to upset the apple cart. The purpose of this article is first to examine the major arguments for and against the application of decision to federal court litigation and second to discuss how reviewing Courts have to this point treated this argument.

II. The cases

A. Federal doctrine on class action waivers

Any discussion of the judicial treatment of arbitration contracts starts with the Federal Arbitration Act (FAA), which declares:

> [a] written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.[4]

The FAA was written to reverse a judicial hostility to arbitration agreements that had developed in the early twentieth century and manifests a, "liberal federal policy in favor of arbitration."[5] Over time arbitration agreements have expanded into the area of employment claims. In *Gilmer v. Interstate/Johnson Corporation*[6], the Supreme Court found an employment contract that provided for arbitration of "[a]ny controversy between a registered representative and any member or member organization arising out of the employment or termination of employment…" was fully enforceable against an employee's claim under the Age Discrimination in Employment Act (ADEA).

Building on the success of the decision in *Gilmer*, employers have sought to utilize arbitration as a way to curb costly class action employment litigation by including language requiring arbitration claims to be litigated individually and thus barring class action. In *Stolt-Nielsen v. Animalfeeds Intl. Corp*[7], the Supreme Court held that parties could not be forced into class action arbitrations without their consent. In *AT&T Mobility LLC v. Concepcion*, the Supreme Court concluded that California law governing unconscionability of contracts as it pertains to contractual bars against class actions was preempted by the FAA. The trajectory of the Court's jurisprudence in this area is unmistakable.

B. D.R. Horton

The National Labor Relations Board was created by Congress as part of the National Labor Relations Act.[8] The powers of the NLRB are divided between an adjudicative five member board (the Board) and a prosecutorial arm (the General Counsel). At the core of the NLRA is Section 7, which provides:

> Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or *other mutual aid or protection*, and shall also have the right to refrain from any or all such activities…[9]

In a charge filed against *D.R. Horton* by Michael Cuda, an Individual, and prosecuted by the General Counsel, the Board was confronted for the first time with whether an arbitration agreement barring joinder of claims and class action claims violated Section 7 of the NLRA. In addition to protecting the rights of employees to engage in collective bargaining, the

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NLRA has also been construed to protect the rights of employees to engage in other activities for "mutual aid and protection" which has included resorting to processes outside of the immediate employer – employee relationship. For example the Board has previously found in a case that was upheld on appeal by the Sixth Circuit that a class-action lawsuit alleging that employer failed to provide rest periods required by state statute was protected concerted activity.[10]

The Board started its analysis in *D.R. Horton* by noting that early on the life of the NLRA that the Supreme Court had found, in agreement with the Board, that private contracts between an employer and employee could not be used to circumvent the rights guaranteed under the Act.[11] Even more to the point the Board with Court approval held that individual agreements that required employees to attempt to resolve employment disputes individually with the employer and then provided for arbitration violated the NLRA.[12]

The Board also addressed whether there was a conflict between the FAA and NLRA on this issue. At the outset the Board noted that where there is a possible statutory conflict between the NLRA and other statutes, the Board is required to undertake a "careful accommodation" of the two statutes.[13] In this instance the Board noted that the right to proceed collectively under the NLRA was a substantive right and not a procedural one. This distinction is a critical one given the language in *Gilmer* that an arbitration agreement cannot require a party to forgo a substantive right as opposed to a procedural right.[14] It was also noted that the Board's conclusion did not turn on the requirement to arbitrate a claim, but instead applied to any agreement that required an employee to forgo joinder or class action claims with fellow employees. Accordingly, the Board decision did not rest on "defenses that apply only to arbitration or that derive their meaning from the fact that an agreement to arbitrate is at issue."[15] In response to the Court's decision in *Stolt-Nielsen*, the Board noted none of the prior cases involved waivers of rights under the NLRA and that further the Board was not compelling class action arbitration, it was prohibiting the waiver of rights in judicial and arbitral venues.

D.R. Horton has sought review of the Board's order in the Fifth Circuit.

III. The Arguments

A. Is the Horton *decision contrary to* Concepcion*?*

1. *Concepcion* declares that class actions can be waived in arbitration contracts. The most obvious argument that needs to be considered is that the Supreme Court has granted its imprimatur to class action waivers in mandatory employment arbitration agreements. As noted above, the Court has premised its analysis on a procedural versus substantive rights analysis. As long as an arbitration agreement is addressing procedural issues then the Court will permit restrictions. Taken in a larger sense, this is why arbitration agreements are entered into in the first place. Parties opt for arbitration because it dispenses with full blown Court litigation. Arbitration allows for the quick and efficient resolution of claims.

2. NLRA creates a substantive right that differs from *Concepcion*. The Board in *Horton* went to great lengths in its decision to explain that the issue before it is analytically distinct from the claims brought in *Concepcion*. The Board's argument is that acting in concert with other employees is a core right protected under Section 7 of the National Labor Relations Act. Viewed through this lens, a class action waiver is not permitted because the arbitration agreement is waiving a substantive right and not a procedural right.

B. Does the Horton *decision run afoul of the FAA?*

1. FAA trumps the NLRA (Hoffman and Southern Steamship) and no deference is owed to NLRB interpretation of FAA. The Supreme Court has traditionally been tough on the Board when it has attempted to resolve conflicts with other statutes. The principal reason for this is that while the Board is entitled to substantial deference in interpreting the NLRA, it receives no such deference

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when interpreting other statutes. For example in *Southern Steamship v. N.L.R.B.* the Board tried to reconcile the right to strike guaranteed by the NLRA with the mutiny provisions of federal admiralty law.[16] The Supreme Court ended up disagreeing with the Board. In *Hoffman Plastics v. N.L.R.B*[17]., the Supreme Court rejected the Board's attempt to reconcile the make whole remedial provisions of the NLRA with the Immigration Reform and Control Act of 1986.

2. NLRA can be accommodated here. The Board in *Horton* went out of their way to first say there was not conflict with the FAA and then to argue if there is, the FAA must yield. The Board has not construed the NLRA to bar arbitrations, rather it has barred waivers of substantive rights under the NLRA. An employer is free to seek to compel arbitration of statutory claims under the *Horton* decision, but it cannot require a waiver of rights under the NLRA any more than it could require a waiver to a statutory claim. Moreover, the Board's decision is not contingent on the fact that the claim is being subject to arbitration. As noted previously, the Board has found that an employer cannot discriminate against an employee because they are engaging in a lawsuit against their employer in conjunction with other employees. In this way, the Board is not announcing a new law with its decision in *Horton*; rather it is simply declaring that class action restrictions in arbitration will be treated the same as class actions in federal court litigation.

3. Private contracts yield to the NLRA (*J.I. Case*). To the extent it is decided that *Horton* conflicts with the FAA, the strongest argument that can be made is that the Supreme Court has previously held that where a private contract conflicts with the NLRA, the private contract must yield. If it is assumed that the NLRA protects the rights of employees to engage in concerted litigation, a private contract cannot be used to abrogate those rights. It should be noted that the Supreme Court's decision in *Nat'l Licorice,* did not involve the FAA, but the same logic may apply if the FAA can be used to abrogate rights under the NLRA. One might ask why not utilize the same procedure to waive all rights guaranteed under Section 7. To allow this would frustrate the objectives of Congress in passing the NLRA.

C. No union activity

From time to time an argument will be made that the NLRA does not apply because there is no union involved. The rights guaranteed under Section 7 are not limited to supporting or not supporting a labor union. Section 7 explicitly includes the right to engage in concerted activities. This right exists regardless of whether a labor organization is involved.[18]

D. Two member board

A final argument that needs to be addressed is whether the Board had the authority to issue its decision at all. By way of history, in 2010 the Board composition fell to only two members. The Board took the position that it could still issue decisions with only two members sitting. The Supreme Court eventually disagreed in *New Process Steel v. N.L.R.B.*[19] In *Horton* there were three Board members serving, however Board Member Brian Hayes recused himself. This left Chairman Pearce and Acting Board Member Craig Becker to decide this case. While this situation facially resembles the situation in *New Process*, there is a critical difference. The issue in *New Process* came down to whether there a sufficient number of sitting Board members to hear the case. In the present case, there was a sufficient number of Board members to hear the case, but one was recused because of a conflict. The Court in *New Process* explicitly upheld the Board's actions in the later situation.

IV. Limitations by the NLRA on the application of the NLRB's decision in *Horton*

Even assuming the Board's decision in *Horton* is found to bar class action waivers in arbitration agreements there are still several limitations to this agreement. The first is that the NLRA by its terms only applies to employers who fall within its jurisdiction.[20] The NLRA's jurisdiction is tied to employers who have a substantial impact on interstate commerce.[21] While an in depth discussion of the NLRB's jurisdiction is beyond the scope of this article, the NLRA

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generally covers all private sector employers in the United States with the major exceptions of airlines and railroads.[22] It also does not exercise jurisdiction over federal, state, or municipal employees.[23] The NLRA also limits who is an employee and thus who is protected by the NLRA. The major exclusions here are independent contractors[24], supervisors,[25] and managerial employees.[26]

V. Court applications of *Horton*

As of the date of this article, no Courts in the Sixth Circuit have addressed the application of *Horton* to class action waivers. Further, no Circuit Courts have ruled on this issue, either. However, there have been thirteen decisions from District Courts following Board's decision in *Horton* around the country that have reached the merits of the issue. Of these thirteen, eleven Courts have issued decisions granting motions to compel arbitration and rejecting the application of *Horton*. Of these eleven cases, three Courts have declined to provide a rationale.[27] The remaining eight Courts have found with varying degrees of analysis that the FAA trumps the NLRA in this circumstance.[28] Of these decisions, the *Delock* Court provides the most comprehensive analysis to date. This Court in this particular case also granted the plaintiff's request for an interlocutory appeal.

There have been two Courts that have embraced the Board's decision in *Horton*.[29] In both cases, the Courts rely upon the Board's conclusion that the right to engage in concerted activity under the Act converts the class action waiver from a procedural one that is allowed under *Gilmer* to a substantive one that is not allowed.

While no Circuit Courts have ruled on the application of the Board's decision, there are now cases pending before the Fifth and Eight Circuits. The Eighth Circuit case involves the *Delock* case discussed above and of additional note there is an intra-circuit split with the *Owen* decision. The Fifth Circuit is hearing an appeal of the Board's ruling brought by *D.R. Horton*.

VI. Conclusion

The issue of whether *Horton* bars class action waivers in arbitration remains an open question with District Court decisions in differing Circuits going in different directions. The author predicts this issue will end up being decided ultimately by the Supreme Court either because of an eventual Circuit split or because of the Court's continued interest in the arbitration arena. ▪

Endnotes

1 Nicholas Ohanesian is an Administrative Law Judge for the Social Security Administration. The views expressed in this article are solely those of the author and do not reflect those of the Social Security Administration or the United States Government.

2 563 U.S. ___ (2010), 131 S.Ct. 1740 (2011)

3 357 N.L.R.B. No. 184 (2011)

4 9 U.S.C. 2.

5 *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*, 460 U.S. 1, 24 (1983).

6 500 U.S. 24 (1991).

7 559 U.S. ____ (2010), 130 S.Ct. 1758 (2010).

8 29 U.S.C. 151 et. seq.

9 29 U.S.C. 157 (emphasis supplied)

10 *United Parcel Service*, 252 NLRB 1015, 1018, 1022 fn. 26 (1980), enfd. 677 F.2d 421 (6th Cir. 1982).

11 *See National Licorice Co. v. N.L.R.B.*, 309 U.S. 350, 360 (1940); *J. I. Case Co. v. N.L.R.B.*, 321 U.S. 332 (1944).

12 *J. H. Stone & Sons*, 33 NLRB 1014 (1941), enfd. in relevant part, 125 F.2d 752 (7th Cir. 1942).

13 *Southern Steamship Co. v. N.L.R.B.*, 316 U.S. 31, 47 (1942).

14 *Gilmer*, supra at 26.

15 *AT&T*, supra at 1746.

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16 316 U.S. 31 (1942)

17 535 U.S. 137 (2002)

18 *See Eastex Inc. V. N.L.R.B.*, 437 U.S. 556, 565-66 (1978)

19 130 S.Ct. 2635 (2010)

20 29 U.S.C. §152(2)

21 29 U.S.C. §152(6-7)

22 29 U.S.C. §152(3)

23 *Id.*

24 29 U.S.C. §152(2)

25 29 U.S.C. §152(11)

26 *N.L.R.B. v. Yeshiva University*, 444 U.S. 672 (1980)

27 *LaVoice v. UBS Fin. Servs.*, 2012 U.S. Dist. LEXIS 5277 (S.D.N.Y. Jan. 13, 2012); *Collier v. Real Time Staffing Servs.*, 2012 U.S. Dist. LEXIS 50548 (N.D. Ill. Apr. 11, 2012); *Palmer v. Convergys Corp.*, 2012 U.S. Dist. LEXIS 16200 (M.D. Ga. Feb. 9, 2012).

28 *Andrus v. D.R. Horton*, 2012 U.S. Dist. LEXIS 169687 (D. Nev. Nov. 5, 2012); *Tenet Healthsystem Phila.v. Rooney*, 2012 U.S. Dist. LEXIS 116280 (E.D. Pa. Aug. 14, 2012); *Jones v. JGC Dallas LLC*, 2012 U.S. Dist. LEXIS 133056 (N.D. Tex. Aug. 17, 2012); *Delock v. Securitas Sec. Servs. USA*, 2012 U.S. Dist. LEXIS 107117 (E.D. Ark. Aug 1, 2012); *Morvant v. P.F. Chang's China Bistro, Inc.* 2012 U.S. Dist. LEXIS 63985 (N.D. Cal. May 7, 2012); *Jasso v. Money Mart Express, Inc.*, 2012 U.S. Dist. LEXIS 52538 (N.D. Cal. Apr. 13, 2012); *Spears v. Mid-America Waffles, Inc.*, 2012 U.S. Dist. LEXIS 90902 (D. Kan. July 2, 2012); *Luciana De Oliveira v. Citigroup N. Am., Inc.*, 2012 U.S. Dist. LEXIS 69573 (M.D. Fla. May 18, 2012).

29 *Herrington v. Waterstone Mortg. Corp.*, 2012 U.S. Dist. LEXIS 36220 (W.D. Wis. Mar. 16, 2012); *Owen v. Bristol Care, Inc.* 2012 U.S. Dist. LEXIS 43325 (E.D. Ark. Mar 29, 2012).

Various Amendments to the Federal Criminal Rules and Bankruptcy Rules Took Effect December 1, 2012

Last spring, the Supreme Court approved various amendments to the Federal Rules of Bankruptcy and Criminal Procedure. The amendments automatically took effect December 1, 2012.

The following rules have been amended:

- Bankruptcy Rules 1007, 2015, 3001, 7054 and 7056; and
- Criminal Rules 5 and 15, and new Rule 37.

The amendments will govern all proceedings commenced on or after December 1, 2012, and all proceedings then pending "insofar as just and practicable."

The text of the amended rules and supporting documentation can be found at: *http://www.uscourts.gov/RulesAndPolicies/rules.aspx*

Numerous amendments to the local bankruptcy rules also took effect August 1, 2012. Most notably, new local rule 9016-1 states the Bankruptcy Court favors ADR and adopts all of the ADR methods provided by W.D. Mich. L. Civ. R. 16.3 – 16.8. *See* LBR 9016-1.

The text of the new local rules, with redlined amendments, can be found here: *http://www.miwb.uscourts.gov/cms/index.php/rules-and-forms/rules/local/* ▪

Don't forget to check the calendar portion of the wdfba website at

http://www.westmichiganfederalbar.org/Federal_Bar_Calendar.php

for upcoming seminars and other programs.

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News from the Clerk

By Tracey Cordes, Clerk of Court, U.S. District Court, Western District of Michigan

Greetings! It is safe to assume that the last of the holidays will have passed by the time you read this. I hope you are all managing to catch your breath as we ease into the new calendar year.

Budget

While I hate to begin this report on a sour note, the budget picture really is dominating our thoughts. We are operating on funding from a continuing resolution. This allows us to operate through March 31 and, while this is at a level that is reduced from last year, we are currently able to operate without cutting more deeply into muscle. However, while we still lack details, the impacts of either sequestration or just "ordinary" cuts in response to the difficult fiscal environment are predicted to be deep. We are told that even if we avoid the dramatic cuts attributable to sequestration, the judiciary is expected to be cut to sequestration levels within three years.

We are approaching this as any other management challenge: we are closely guarding any discretionary expenses; we accomplished large, relatively costly objectives prior to this fiscal year in anticipation of these cuts; and, until facts are known, we are holding open vacant positions. We also have advantages that others might not: we have judges who are deeply invested in the quality and integrity of this court, and we have mature staff who are willing to make individual sacrifices in order to preserve the whole.

I will continue to offer reports as information is provided by our Administrative Office.

Good Works

In spite of the thickening clouds on the fiscal front, our judges and staff go well beyond merely processing cases and give of themselves in our communities. Staff and Judicial Officers in the Grand Rapids and Marquette divisional offices made individual contributions totaling $22,000 to the Combined Federal Campaign this year. In addition, folks in the Grand Rapids office gathered approximately 100 gifts for our adopted extended family with whom we were connected by D.A. Blodgett. This is an amazing place.

CM/ECF Filing Errors

We will soon be implementing changes in our response to errors in filing documents in the CM/ECF system. Historically our staff have made courtesy telephone calls to the filers in attorneys' offices to discuss the error and to talk through corrections. Although these attempts at making telephone contact is sometimes quite time-consuming, our approach for many years has been to treat errors as teaching moments. We are no longer convinced, at this point, that the time spent by staff is yielding additional benefit. Therefore, instead of a telephone call, in late January filers will receive an electronic notice of filing (ENF) that an error has occurred, along with an instruction for correcting the error. Stay tuned for additional information about this adjustment in our procedures.

Facilities Issues

The new Clerk's office space is now open in the Kalamazoo Courthouse. This project moved staff from their crowded, dingy basement office to a clean, bright space on the first floor. They are more easily accessible to the public, have more adequate working space, and are enjoying actual daylight! I welcome you to stop by and say hello to Barb and Martha.

And now for the numbers...

CM/ECF trivia -

Number of Registered Attorneys:	9, 152
Number of Documents Available Electronically:	992,234
Total Number of Cases in CM/ECF:	69,653
Number of criminal cases	16,085
Number of civil cases	39,925
(Balance comprised of misc. case categories)	

See you next time! - Tracey ▪