Vol 25, No.2 July 2012

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President's Letter

Scott Brinkmeyer, President, Federal Bar Association, W.D. Michigan

Although I have mentioned this before, good news bears repetition. A special WDM Federal Bar Association planning committee is already preparing for the annual meeting, which will feature U.S. Supreme Court Clerk General William Suter as our keynote speaker. The event will offer members and non-members alike the opportunity to be sworn in to the Supreme Court. It will be held at the Amway Grand Plaza Ambassador Ballroom on Wednesday, October 17, with a luncheon commencing at noon, followed by the swearing-in ceremony.

We are tentatively planning a morning seminar, which we anticipate will include one or more District Court and 6th Circuit Judges, together with other speakers to be announced, discussing different topics connected with Federal Appellate Practice. We have reserved courtroom space in the Federal Building for the morning sessions. Chief Judge Paul Maloney is involved with the planning and he is encouraging the support and participation of the District and Magistrate Judges.

The Executive Committee hopes that this event will also provide the opportunity to expand interest in membership in our bar. Invitations will be extended to numerous bar associations throughout the state, and to Judges and lawyers in the Eastern District. There will be discounts offered to new members who decide to join our association as they sign up for the meeting. All invitees will have the opportunity to participate meaningfully in the event. Consequently, we urge you to alert your partners, associates and colleagues about this exceptional occasion and to encourage any who are not yet members of the WDMFBA to consider joining. It would be a great introduction to our organization.

I know that the Executive Committee and Cabinet members share my excitement about General Suter's visit and getting sworn in by him to the U.S. Supreme Court. I will follow up with more details later, but I wanted you to have this in mind for your own planning for the fall. In the meantime, have a safe and enjoyable summer. ▪

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Accelerated Community Entry Program: Continuing to Confront Prisoner Reentry Challenges

By Sharon Turek[1]

Despite recent budget cuts resulting in a downsizing of the program, this district's reentry program called Accelerated Community Entry (ACE) continues to work at reducing the recidivism rate of high-risk offenders as they return from prison and re-enter the community. When the ACE program began in October of 2005, it was one of the first of its kind in the federal system with the goal of impacting the recidivism rate of high-risk offenders. Six years later, ACE is a model for many of the now 60 or more programs across the country.

ACE came about in the wake of a realization throughout the corrections community that traditional supervision methods were just not working. A study that tracked two-thirds of the inmates released from United States prisons in 1994 for three years after their release found that 29.9% of the released inmates had been rearrested within the first 6 months and 59.2% were rearrested within the first year.[2] In 2002, the Department of Justice's Office of Justice Programs implemented the Serious and Violent Offender Reentry Initiative (SVORI). This initiative used a collaborative approach involving several agencies, as it recognized that a comprehensive approach would be more effective, as individuals returning from prison have multiple needs.

One early success using a collaborative approach was the Allen County Reentry Court program in Ft. Wayne, Indiana. That program showed promising results. Participants in the program had a recidivism rate of approximately half that of inmates released with no supervision. The Allen County Program was designed to closely monitor the progress of its participants and included monthly court hearings. In addition, participants received job training, housing assistance and other services, if necessary.

This program caught the attention of Valerie Martin, Chief of the Western District of Michigan's Office of Probation and Pretrial Services. She took the idea of starting a reentry program to the district judges and she requested approval to start a federal reentry program for high-risk offenders here in the Western District. The judges approved the plan in 2004 and in April of 2005 a planning committee was assembled by Chief Martin. In addition to Sr. Judge Richard A. Enslen and later Magistrate Judge Ellen S. Carmody and members from their chambers, the initial group consisted of members of probation, the Federal Public Defender's Office, the United States Attorney's Office, and the Bureau of Prisons. As needed, other entities were also included such as service providers,

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halfway house staff, and the United States Marshals. At each planning meeting, issues ranging from legal concerns to logistics were tackled and the policies and procedures of the new program were created. The group constructed a program that was meant to address recidivism among those who were identified as being a high risk to reoffend. At the time, a tool called the risk prediction index (RPI) was used to determine an offender's risk of recidivism by taking into account factors such as criminal history, history of substance abuse, employment history, and family support.

From the start, a collaborative approach was encouraged so that those involved in creating the program worked as a team. It was understood that the participants of the program would face many obstacles and would require a variety of services and help. The intense supervision applied to participants in the program made it more likely that any special need or issue would be known early on and could be dealt with before escalating into a violation. The additional supervision also made it possible to address any violations closer to the actual misconduct and apply a tailored sanction. When warranted, graduated sanctions were imposed to provide punishment and incentive to comply, and to avoid incarceration.

The ACE team was introduced to the concept of Evidence Based Practices (EBP) which is the term used to describe the use of interventions and practices that are based on research. One such practice was the use of a cognitive behavioral therapy (CBT). CBT helps people to be able to recognize, identify, and change any of their dysfunctional beliefs, thoughts, or patterns of behavior. The CBT program used in ACE is called Moral Reconation Therapy (MRT) and is a key element of the program. By utilizing both the use of evidence based principles as well as incorporating a cognitive behavioral component, the ACE Program helps to keep participants focused on things they need to do in order to remain law abiding and successfully complete supervision, whether that means finding employment or involving themselves in pro-social activities and relationships.

The ACE program is designed to allow participants to complete their term of supervision in two years instead of the three to eight year term of supervision that may have originally been imposed. To complete the program, participants must complete two phases. The first phase requires participants to attend monthly status hearings where their progress for the month is reviewed with them and their goals for the following month are assigned. If a participant meets his or her goals for the month, they receive a verbal reward. After receiving twelve rewards, participants graduate from the first phase of the program and move on to phase two, which entails another year of supervision without having to attend the monthly hearings. If a participant completes the second phase, he or she is discharged from supervised release.

Once the structure of the program was in place, plans were made to begin the pilot program in Benton Harbor, a community within Berrien County. Permission to hold the monthly status hearings at the Berrien County Court House was given by then Berrien County Circuit Chief Judge Paul L. Maloney, who became a strong supporter of the ACE program after becoming one of this district's judges. The Benton Harbor location was selected for a number of reasons. It was known that many offenders were on schedule to be released to the Benton Harbor area and that many of them would be a high risk to recidivate. It was also known that offenders returning to the Benton Harbor community would face a number of challenges. Benton Harbor was in the throes of racial unrest, high unemployment, high crime rates, and a staggering percentage of households living below the poverty level. The thought was that if a reentry program could be successful there, it could be successful in other areas throughout the district.

The intense supervision applied to participants in the program made it more likely that any special need or issue would be known early on and could be dealt with before escalating into a violation.

The initial pilot program was eventually replicated and brought to Grand Rapids and also to Kalamazoo. The program, however, is resource intensive. In addition to staff time expended to maintain the program, team members have completed additional training and have taken on added responsibilities to

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help participants access services they need to help manage their lives. Probation officers spend an considerable amount of time with participants assessing their needs and helping them work through day-to-day challenges. On occasion, the Federal Public Defender's Office has provided help with legal issues, such as child support and paternity claims. More recently, the Federal Public Defender's Office and the Probation Office joined together with the Grand Rapids halfway house provider to hold a job fair at Grand Rapids Community College.

For ACE team members, participation in the reentry program has been a collaborative effort. That in part explains why last fall, when it was learned that the program was in jeopardy because of budget cuts, the parties again worked together to try to maintain the program. After some discussion, it was decided to continue with the Kalamazoo program, but to modify the Grand Rapids and Benton Harbor programs by not having a monthly court hearing, and eventually suspending both programs indefinitely. The decision to downsize the program was not easy to make, albeit necessary. Nevertheless, the Court, as well as other members of the ACE team, remain very supportive of the program.

In 2010, an evaluation of the ACE program was conducted by Christopher T. Lowenkamp and Kristin A. Bechtel in which they were able to compare a small sample of ACE participants with a sample of other offenders who were not participating in the ACE program. While acknowledging the small sample size of ACE participants, the results indicated that the ACE group appeared to have a lower recidivism rate.[3] Yet, even if the success rate of participants is not yet fully known, the program has had an effect. Chief of Probation Valerie Martin stated that the "biggest success is the education of the court community. Anyone involved with the ACE programs now has a much better understanding of the challenges faced by offenders re-entering the community." In the past the Court's involvement would usually start after a violation had occurred. "The court never saw A to Z, they just saw Z," according to Martin. The program has also reminded everyone of how important it is for participants to have pro-social relationships and pro-social activities in their lives. ACE has taught this district a multitude of lessons that could be applied to the entire supervision population. ▪

Endnotes

1 Sharon Turek serves as First Assistant Federal Public Defender in the Western District of Michigan's Federal Public Defender Office. She is an ACE team member and served on the original planning committee for the program.

2 *See* Langan and Levin, 2002.

3 *See* Christopher T. Lowenkamp and Kristin A. Bechtel, *An Evaluation of the Accelerated Community Entry (ACE) Program–Preliminary Report* (2010).

Annual Meeting

The WD FBA Annual Meeting will be held at the Amway Grand Plaza on October 17, 2012, at noon, featuring Keynote speaker Gen. William Suter, U.S. Supreme Court Clerk

News from the Clerk

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

Greetings! As the winter season became summer and then spring and soon will be summer again (it has been that kind of a year), the work of your federal District Court continues.

Clerk's Year in Review

The Clerk's Office 2011 Year in Review is now posted on the Court's website. Did you know:

- In 2011, our judges presided over 32 naturalization ceremonies, during which 1,949 new citizens from 127 countries were represented?
- Our very busy Finance Unit performed 10,845 disbursements and made 17,739 collections–an increase in volume in both categories from the previous year?
- Ninety-nine percent of the 4,273 grand and petit jurors present in our district in 2011 expressed high satisfaction with staff service and courtesy?

To learn more, I welcome you to access the report at: *http://www.miwd.uscourts.gov/GENERAL/2011_Year_in_Review.pdf*

Court Programs

Because of the very low number of case referrals to arbitration, the judges have decided to eliminate this as a form of court-sponsored alternative dispute resolution. Parties are encouraged to utilize arbitration where appropriate, but the court will not maintain lists of court-approved arbitrators or directly refer cases.

Facilities Issues

The south entryway to the Grand Rapids facility has re-opened to the public and the improvements are obvious. Other phases of this project are ongoing but, hopefully, ingress and egress will not be disrupted.

Work is fully underway on new Clerk's office space in our Kalamazoo courthouse. This project will move staff from their crowded basement space to the first floor. They will be more easily accessible to the public, will have more adequate working space, and will surely enjoy actual daylight.

The Budget

We received our budget, at last, on February 2. The good news is that our reductions were slightly less than had been feared which, among other things, allowed us to discontinue the staff furloughs (no work-no pay, one day each month) as of February 1. It will be quite some time before we have solid numbers for FY 2013 but, as previously reported, we expect to be in a reduction environment for the foreseeable future.

Upcoming Events

By way of reminder:

- The Court is partnering with the Federal Bar Association to bring U.S. Supreme Court Clerk and General William K. Suter to Grand Rapids in October. It is expected that he will participate in the FBA Annual meeting and luncheon and the Amway Grand Hotel on October 17 and then will swear in new admittees to the US Supreme Court.
- A portrait hanging ceremony for Judge Gordon Quist is scheduled here in Grand Rapids for Tuesday, August 28. You can safely assume it will be an afternoon function, but details have not yet been ironed out.

And now for the numbers...

CM/ECF trivia -

Number of Registered Attorneys	8,660
Number of motions seeking reduction of sentence under Amendment 750 (crack cocaine):	311
Number of Attorney Civil E-filings	176,033
Number of Attorney Criminal E-filings	45,347
Total Number of Documents Available Electronically	922,881
Total Number of Cases in CM/ECF	67,369

Waiving the Right to Appeal

By Sarah Riley Howard, Madelaine C. Lane and Jennifer Tello[1]

It comes as no surprise to anyone practicing federal criminal law that a growing number of plea agreements contain appeal waivers.[2] Even from the defense bar's perspective, it certainly seems reasonable that federal prosecutors would want to try to curb appeals of limited or arguably no merit from defendants who have nothing to lose by filing. On the other hand, it is concerning that the trend could result in meritorious issues not being litigated in the appellate courts. At some level, of course, plea agreements in general probably result in fewer meritorious issues being litigated in appeals courts, but waivers of appellate rights expand that reality.

With the significant length of many federal sentences, defendants can be understandably influenced to take a plea deal by the tremendous risk that they bear by going to trial, or even by filing pretrial motions where doing so could result in a less favorable plea offer or no plea offer at all. Appeals are now another right that defendants will be tempted to, or feel pressure to, bargain away, which may not always be the most just outcome – from an individual-defendant perspective, or a system-wide view. By the very nature of appeal waivers, these questions may not receive careful review or scrutiny unless the institutional participants, particularly defense counsel and trial court judges, remain cognizant of these concerns.

Constitutionality and Validity of Appeal Waivers

Presentence waivers of appellate rights have been enforced by all of the circuit courts of appeal.[3] To assess whether a waiver of appeal is valid, as with other waivers, courts use the United States Supreme Court's *Brady v. United States* test to ascertain whether the defendant's decision to waive was voluntary and a "knowing, intelligent act[] done with sufficient awareness of the relevant circumstances and likely consequences."[4] Many circuits have been persuaded by the reasoning that if a defendant can waive her right to a trial without knowing the outcome, and all of the trial rights that a plea bargain necessarily entails, they can surely waive the right to an appeal even if the sentence is unknown.

The D.C. Circuit was the last federal court of appeal, in 2009, to agree that appeal waivers were generally enforceable. However, prior to that, the U.S. District Court for the District of Columbia had cases refusing to enforce appeal waivers. The court argued that its acceptance of a waiver of the right to appeal "would vitiate the requirements of Rule 11 [of the Federal Rules of Criminal Procedure]" because appeal waivers are "inherently uninformed and unintelligent."[5] In essence, those courts argued that the difference between waiving the right to a trial and waiving all rights to appeal was that while the possible outcomes are generally known at a trial, any number of sentencing controversies that are unforeseen can sway a sentence outcome in all kinds of unanticipated directions.[6] The D.C. District Court was also unwilling to enforce a defendant's waiver of appellate rights because the government's right to appeal was not similarly restricted and because of the disparity of bargaining power that the court saw as favoring the Government.[7]

Nonetheless, this reasoning did not pick up steam. Instead, because criminal defendants may validly waive Constitutional rights, the circuits have reasoned that they may surely waive statutory rights, like the right to direct appeal.[8] Courts have further justified enforcement of appeal waivers under the law of contracts. In *Brady*, the Court held that it was constitutional "for the State to extend a benefit to a defendant who in turn extends a substantial benefit to the State…"[9] The Sixth Circuit has also used this reasoning, explaining how "plea agreements always entail risks for the parties," but that the plea agreements allocate that risk between the parties: "If courts disturb the parties' allocation of risk in an agreement, they threaten to damage the parties' ability to ascertain their legal rights when they sit down at the bargaining table…"[10]

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However, this argument for predictability in bargaining ignores the various exceptions to enforceability of appeal waivers that courts have recognized, albeit rarely. Moreover, in our view, these exceptions are needed to ensure Constitutional compliance with due process, even if appeal waivers are otherwise generally enforceable. Arguably, then, plea bargaining would be more predictable if appeal waivers were never enforced, so it is not a particularly forceful justification.

Potential Areas of Invalidity of Appeal Waivers

Those rare cases where appeal waivers have been held invalid deserve some discussion. For example, at least two circuits have held that waivers are reviewable or invalid where there would otherwise be a "miscarriage of justice."[11] This is obviously not a bright-line, easy-to-apply standard that enhances "the parties' ability to ascertain their legal rights when they sit down at the bargaining table[.]" And while some uncertainty for parties is unfortunate, it is unavoidable if extraordinary draconian results are to be sidestepped. As the First Circuit put it:

> We have endeavored to provide general guidance to the district courts and the bar concerning plea-agreement waivers of appellate rights. We caution, however, that because such waivers are made before any manifestation of sentencing error emerges, **appellate courts must remain free to grant relief from them in egregious cases**. When all is said and done, such waivers are meant to bring finality to proceedings conducted in the ordinary course, not to leave acquiescent defendants totally exposed to future vagaries (however harsh, unfair, or unforeseeable).[12]

In the Sixth Circuit, a waiver will not bar presentation of an ineffective assistance of counsel claim, since that claim goes to the very validity of the overall plea and the waiver of appeal rights.[13] The Seventh Circuit, among others, have explicitly carved out this exception as well.[14] Other common examples of possible reasons to invalidate a waiver of appeal rights: a sentence imposed in excess of the statutory maximum, or based on a constitutionally impermissible factor like race.[15] Presumably, meritorious examples of these particular issues are not encountered with much regularity, although it is worth noting that the Sixth Circuit among others has held that this is not an exclusive list of examples that might invalidate an appeal waiver.

Finally, and as with many other circuits, the Sixth Circuit has also held that any ambiguity in an appeal waiver is construed against the Government.[16] This is also an area where the parties have litigated about the application – if not enforcement – of the waiver, and there is at least one reported case of the Government losing an argument in the Sixth Circuit (arising out of the Eastern District of Michigan) that its appeal waiver covered the challenged issue.[17]

Ethical Implications

Despite the fact that all of the Circuits find waivers of appellate rights to be constitutional in theory, the ethical obligations of judges, prosecutors and defense attorneys may preclude the use of such waivers in at least some situations. Courts should carefully contemplate what if any safeguards need to be used before accepting pleas with appeal waivers, and whether certain waivers, as applied, violate Due Process or other Constitutional rights, even if waivers are generally enforceable.

It is arguably unethical for prosecutors to attempt to obtain, or for defense attorneys to recommend that clients accept, an appeal waiver unless it is given in exchange for a sufficient benefit above and beyond what would have been offered simply in exchange for pleading guilty. It is true that every fact situation is different, and unfortunately there is no way to create a bright-line rule regarding when appeal waivers are or are not consistent with ethical duties of attorneys. But on the other hand, giving up an appeal – particularly relating to a sentence for a period of incarceration that is unknown at the time of the plea – should not be recommended without at least some reservation, and without some assurance that the defendant is receiving something of value in exchange for the waiver.

Missouri's governing ethics body has responded to these questions by declaring waivers of ineffective assistance of counsel claims invalid: "It is not permissible for defense counsel to advise the defendant regarding waiver of claims of ineffective assistance of counsel by defense counsel…. Therefore… this conflict is not

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waivable."[18] Governing ethics bodies of several other states have imposed similar ethical restrictions on post-conviction waivers, finding it impermissible for defense counsel to advise defendants on such waivers.[19] Several ethics bodies have further stated that it is not permissible for prosecutors to require or suggest waivers of ineffective assistance of counsel or prosecutorial misconduct claims.[20] Missouri's governing ethics body is among those to limit the power of the prosecutors: "We believe that it is inconsistent with the prosecutor's duties as a minister of justice… to seek a waiver of post-conviction rights based on ineffective assistance of counsel or prosecutorial misconduct."[21]

But those ethics opinions seems relatively obvious. In fact, it seems unlikely that appeals courts would enforce an appeal waiver applied to an ineffective assistance or prosecutorial misconduct claim in any event. The real question concerns when it is ethical to offer or recommend acceptance of an appeal waiver that does not contain one of these common exceptions to enforceability, but instead is quite likely to be enforced.

Courts have a significant role to play because of their ability to accept or reject a plea agreement. Beyond a specific inquiry of defendants to ascertain whether acceptance of the waiver provision itself is "knowing, intelligent, and voluntary," at least as we define those terms in the criminal justice system, questioning counsel about how the waiver came to be part of the deal, and inquiring as to the value the defendant expects to receive in exchange for the waiver, seems appropriate in at least some cases, if not all. But a district court is in a difficult position, since it is well-established under Rule 11 that the court may not participate in the negotiation of the plea agreement.[22] It is not hard to imagine how inquiring about the wisdom of the bargain could appear to be, or actually become, "participation" in a plea negotiation.

It goes without saying that it is the duty of everyone involved in the criminal justice system to uphold and promote its integrity and effectiveness. When the right to appeal is bargained away, it is possible that the defendant lost a crucial procedural safeguard without sufficient benefit in return. That outcome has to be scrupulously avoided.

Conclusion

Appeal waivers are generally enforceable, but it is good for practitioners and courts to keep in mind the list of standard issues on which appeal waivers have been held invalid. Further, practitioners and courts remain responsible for case-by-case consideration of appellate waivers in individual plea agreements to ensure that the appeal issue does not still rise to the level of invalidity, even if it is not one of the commonly-enumerated examples. What form that individualized consideration should take is still yet to develop. ▪

Endnotes

1 Sarah Riley Howard heads the White Collar Criminal Defense practice group at Warner Norcross & Judd LLP, representing clients in a range of matters involving corporate legal compliance, federal litigation counseling, and criminal defense. Madelaine Lane is a senior associate with extensive defense experience, and is a member of the Western District's Criminal Justice Act panel appointment attorneys. Jennifer Tello is a summer associate in Warner's Grand Rapids office.

2 J. Vincent Aprile II, *Waiving the integrity of the criminal justice system*, 24:4 Crim. Just. (2010).

3 *United States v. Guillen*, 561 F.3d 527, 529 (D.C. Cir. 2009); *United States v. Teeter*, 257 F.3d 14, 18 (1st Cir. 2001); *United States v. Hernandez*, 242 F.3d 110, 113 (2d Cir. 2001); *United States v. Khattak*, 273 F.3d 557, 562 (3d Cir. 2001); *United States v. Fleming*, 239 F.3d 761, 763-64 (6th Cir. 2001); *United States v. Jemison*, 237 F.3d 911, 917 (7th Cir. 2001); *United States v. Nguyen*, 235 F.3d 1179, 1182 (9th Cir. 2000); *United States v. Cuevas-Andrade*, 232 F.3d 440, 446 (5th Cir. 2000); *United States v. Brown*, 232 F.3d 399, 403 (4th Cir. 2000); *United States v. Black*, 201 F.3d 1296, 1300 (10th Cir. 2000); *United States v. Howle*, 166 F.3d 1166, 1168 (11th Cir. 1999); *United States v. Michelsen*, 141 F.3d 867, 871 (8th Cir. 1998).

4 *Brady v. United States*, 397 U.S. 742, 748 (1970).

5 *United States v. Johnson*, No. 97–0305, found at 992 F. Supp. 437, 438 (D.D.C. Aug. 8, 1997); *see also United States v. Raynor*, 989 F. Supp. 43, 44 (D.D.C. 1997) ("A plea that requires such a waiver of unknown rights cannot comport with Rule 11 or the Constitution.").

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6 *Johnson*, 992 F. Supp. at 439.

7 *Johnson*, 992 F. Supp. at 439-40.

8 *E.g., United States v. Teeter*, 257 F.3d 14, 22 (1st Cir. 2001); *United States v. Khattak*, 273 F.3d 557, 561 (3d Cir. 2001). The right to an appeal is merely statutory. *Jones v. Barnes*, 463 U.S. 745, 751 (1983); 18 U.S.C. § 3742.

9 *Brady*, 397 U.S. at 753.

10 *United States v. Bradley*, 400 F.3d 459, 464 (6th Cir. 2005).

11 *Teeter*, 257 F.3d 14, 25-26 (1st Cir. 2001); *accord Khattak*, 273 F.3d at 562.

12 *Teeter*, 257 F.3d at 25 (emphasis added).

13 *United States v. Taylor*, 281 Fed. Appx. 467, 468-69 (6th Cir. 2008); *In re Acosta*, 480 F.3d 421, 422 (6th Cir. 2007).

14 *United States v. Joiner*, 183 F.3d 635, 645 (7th Cir. 1999).

15 *United States v. Ferguson*, 669 F.3d 756, 763 (6th Cir. 2012); *United States v. Caruthers*, 458 F.3d 459, 471 (6th Cir. 2006) (collecting cases in agreement from every circuit who has reviewed it).

16 *United States v. Smith*, 344 F.3d 479, 483 (6th Cir. 2003) (rejecting argument that appeal waiver covered restitution calculation where defendant waived any challenge based on "any right he may have to appeal any sentence which is within the parameters of this agreement," finding it to be ambiguous whether appeal of restitution was included, and thus construing it against the Government).

17 See footnote 16, *supra*.

18 Alan Ellis & Todd Bussert, *Stemming the tide of postconviction waivers*, 25:1 Crim. Just. (2010) (quoting Advisory Comm. of the Sup. Ct. of Mo., Formal Op. 126 (May 19, 2009)).

19 *See* Vt. Bar Ass'n Advisory Ethics Op. 95-04 ("an attorney should not recommend to a defendant in a criminal case that the defendant enter into a plea agreement that contains a provision limiting the client's right to assert a claim of ineffective of counsel in a postconviction proceeding"); *see also* N.C. State Bar Ethics Comm'n, Formal Op. RPC 129 (2d Rev.) (approved Jan. 15 1993).

20 *See* Ohio Bd. of Comm'rs on Grievance & Discipline, Op. 2001-6 (Dec. 7, 2001); see also Tenn. Bd. Prof'l Resp. Advisory, Op. 94-A-549 (1994).

21 Ellis & Bussert, *supra* (quoting Advisory Comm. of the Sup. Ct. of Mo., Formal Op. 126 (May 19, 2009)).

22 Fed. R. Crim. P. 11(e)(1); *United States v. Fleming*, 239 F.3d 761, 764 (6th Cir. 2001).

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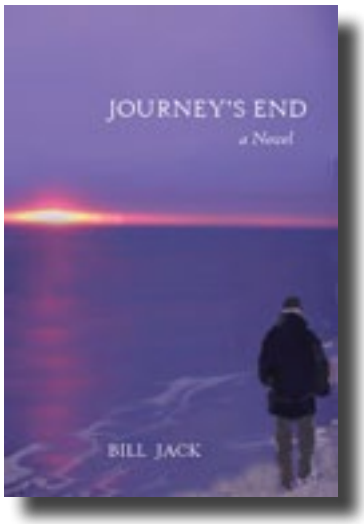
Book Notes *Journey's End*, by Bill Jack

by Molly E. McManus[1]



Smith, Haughey, Rice & Roegge partner and FBA member Bill Jack makes his fiction debut with the fast-moving murder mystery, *Journey's End*. The main character, Will Bennet, is an experienced trial lawyer who has relocated to New Mexico from the Midwest. When the wife of his best friend and law school classmate, Sam Greenberg, is found murdered and Greenberg is nowhere to be found, Bennet launches a desperate investigation. Bennet is sure that his friend cannot be responsible, but all of the evidence – from the scene found by police, to the couple's missing money, to tales of marital problems – says otherwise.

Although it is written as tightly as a good closing argument, the story focuses not on Bennet's trial skills, but instead on his personal relationships: his longtime friendship with Greenberg, his passionate marriage, and his unlikely new friendship with the Virginia detective investigating the case. *Journey's End* is a lively, entertaining read. It is published by Chapbook Press and is available at *www.schulerbooks.com/new-titles-chapbook-press*.

Quotes from the Book Jacket:

"It's a spell binding page turner. A remarkable first novel. I couldn't put it down."
—*The Author's Spouse*

"I haven't read it yet, but my dad tells me it's really good."
—*The Author's Daughter*

"Well, it's a start."
—*The Author's Sister*

"Please, please buy it."
—*The Author*

Endnote

1 Molly E. McManus, a member of the Western District FBA, is a litigation partner practicing in the Grand Rapids office of Warner Norcross & Judd LLP.

A Quick Tip from the State Bar of Michigan
Practice Management Resource Center

Zoom Zoom . . .

If you find yourself looking for the toolbar icon that lets you zoom in and out, STOP! Instead, hold down the control key and use the scroll button on your mouse. Using this shortcut, it is very easy to change the view to multiple pages by continuing to "scroll smaller." Take a minute to try this tip—it is easy to remember and intuitive to use with just a couple of practice runs. Control + Scroll works in Office, Adobe, and on web pages.

For more tips visit http://www.michbar.org/pmrc/tips.cfm

AO, Justice Department Jointly Recommend ESI Discovery Practices[1]

The digital revolution is producing increasingly complex litigation and discovery issues in federal criminal cases. Most challenging for federal court practitioners are cases involving electronic discovery, also known as "electronically stored information" (ESI).

After 18 months of negotiation, the Administrative Office (AO) and the Department of Justice jointly have developed a set of recommendations aimed at making the production or exchange of ESI discovery between prosecutors and defense counsel more efficient and cost-effective.

"An expansion in the amount of digital data, the number of devices on which it can be created and stored, and the declining cost of storing such information have resulted in the increased presence of ESI in federal criminal litigation," said Theodore Lidz, the AO's Assistant Director for the Office of Defender Services. "Often the amount of information ranges from tens of thousands to millions of pages. While difficult to quantify, the expectation is that use of the recommendations will limit overall criminal justice discovery costs, reduce the number of discovery disputes, and shorten the time for processing complex cases."

Recently, the Recommendations for Electronically Stored Information Discovery Production were sent by the deputy attorney general to all U.S. attorney offices, and by the AO to all federal defenders and Criminal Justice Act (CJA) panel attorneys. Training also has begun for defender and prosecutorial personnel.

"It was anticipated that the recommendations would be used as soon after their February release as possible in appropriate cases, and we are aware that parties in some cases have already discussed the protocols and implemented some of the recommendations," Lidz said.

Andrew Goldsmith, the National Criminal Discovery Coordinator for the Department of Justice, served as the working group's co-chair. He called the recommendations "a pragmatic approach to the increasing challenges presented by ESI in criminal cases."

"They are the product of a unique level of collaboration among representatives from the Department of Justice, federal public defenders, and private attorneys who accept appointments under the Criminal Justice Act," Goldsmith said. "The recommendations provide meaningful, how-to guidance in dealing with ESI in a way that minimizes unnecessary costs and motion practice."

He added that all federal prosecutors will receive training on the recommendations this year "to ensure that they are on the same page as their counterparts in the federal defenders' offices and CJA counsel."

The recommendations are built on 10 principles:

- Lawyers have a responsibility to have an adequate understanding of electronic discovery.
- In the process of planning, producing, and resolving disputes about ESI discovery, the parties should include individuals with sufficient technical knowledge and experience regarding ESI.
- At the outset of a case, the parties should meet and confer about the nature, volume, and mechanics of producing ESI discovery. Where the ESI discovery is particularly complex or produced on a rolling basis, an ongoing dialogue may be helpful.
- The parties should discuss what formats of production are possible and appropriate, and what formats can be generated. Any format selected for producing discovery should maintain the ESI's integrity, allow for reasonable usability, reasonably limit costs, and, if possible, conform to industry format standards.
- When producing ESI discovery, a party should not be required to take on substantial additional processing or format conversion costs and burdens beyond what the party has already done or would do for its own case preparation or discovery production.

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- Following the "meet and confer," the parties should notify the court of ESI discovery production issues or problems that they reasonably anticipate will significantly affect the handling of the case.
- The parties should discuss ESI discovery transmission methods and media that promote efficiency, security, and reduced costs. The producing party should provide a general description and maintain a record of what was transmitted.
- In multi-defendant cases, the defendants should authorize one or more counsel to act as the discovery coordinator(s) or seek appointment of a coordinating discovery attorney.
- The parties should make good-faith efforts to discuss and resolve disputes over ESI discovery, involving those with the requisite technical knowledge when necessary, and they should consult with a supervisor, or obtain supervisory authorization, before seeking judicial resolution of an ESI discovery dispute or alleging misconduct, abuse, or neglect concerning the production of ESI.
- All parties should limit dissemination of ESI discovery to members of their litigation team who need and are approved for access, and they should also take reasonable and appropriate measures to secure ESI discovery against unauthorized access or disclosure.

"For years, ESI has often been produced or exchanged in electronic formats or on a media that the receiving party is unable to open, search, or otherwise use effectively, or those processes have been unnecessarily inefficient. Often, either prosecutors or defense counsel have had to reprocess the electronic information, wasting both time and money," Lidz said.

"The recommendations, by calling for the parties to 'meet and confer' to discuss and resolve discovery issues and to use industry or reasonably useable electronic formats, provide a framework for eliminating or minimizing duplicative processes. The protocols also include provisions that will allow federal judges to manage discovery issues more effectively," he said.

The recommendations were created by Department of Justice/ Administrative Office Joint Electronic Technology Working Group, which met about a half dozen times between May, 2010, and the fall of 2011. Its members included Federal Public Defender Donna Elm (Middle District of Florida) and Doug Mitchell, the CJA panel attorney district representative in Nevada. Other members included Sean Broderick, the national litigation support administrator in the AO's Office of Defender Services.

The working group obtained input from attorneys, paralegals, and technology staff, and coordinated its efforts with various Judiciary liaisons, including Magistrate Judge Jonathan Feldman (Western District of New York), who serves on the Judicial Conference's Committee on Defender Services. The recommendations can be found here: *http://www.fd.org/navigation/litigation-support/subsections/esi-protocol-jetwg-recommendations-for-esi*

Endnotes

1 This article is reprinted with permission from *The Third Branch News*, April 23, 2012.

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.

Western District Leads Sixth Circuit in Key Case Management Statistics

The United States District Court for the Western District of Michigan fared very well in some recent statistics published by the United States Courts. In the Federal Court Management Statistics, published in September 2011, the Western District led all other districts in the Sixth Circuit in some key stats, including:

- Highest in the Circuit in total filings per Judgeship with 630. The next highest District was the Northern District of Ohio with 544.
- Most civil and criminal-felony filings per Judgeship, with 482 and 105 respectively.
- Highest in the Circuit in weighted filings per Judgeship.
- Highest number of terminations per Judgeship in the Sixth Circuit, at 594. The next highest was the Middle District of Tennessee with 473.
- Shortest median time in the Circuit from filing to disposition of cases, at 6 months for criminal-felony cases and 6.2 months for civil cases.
- Lowest percentage of civil cases over 3 years old, with only 3.1 %.

Here is a chart summarizing the statistics:

Comparison of Districts Within the Sixth Circuit -- 12-Month Period Ending September 30, 2011

				KY,E	KY,W	MI,E	MI,W	OH,N	OH,S	TN,E	TN,M	TN,W
Overall Caseload Statistics	Filings			2,102	1,565	6,543	2,519	5,977	3,342	1,996	1,900	2,099
	Terminations			2,164	1,709	6,194	2,375	4,480	3,471	1,940	1,890	1,987
	Pending			1,914	1,642	5,876	1,763	6,386	3,277	2,250	2,168	2,496
	Percent Change in Total Filings Current Year Over		Last Year	3.9	-8.8	11.2	14.2	37.1	-1.5	1.5	1.5	3.2
			2006	-17.0	-10.2	2.3	25.9	14.5	9.0	12.5	2.1	10.4
	Number of Judgeships			6	5	15	4	11	8	5	4	5
	Vacant Judgeship Months*			0.0	0.0	24.0	0.0	14.7	0.0	0.0	7.0	0.8
Actions per Judgeship	Filings	Total		382	348	436	630	544	418	399	475	419
		Civil		288	287	377	482	473	330	281	394	300
		Criminal Felony		66	49	42	105	47	60	89	57	70
		Supervised Release Hearings		28	12	17	43	24	28	29	24	49
	Pending Cases			348	365	392	441	581	410	450	542	499
	Weighted Filings*			355	371	423	599	453	465	504	538	429
	Terminations			393	380	413	594	407	434	388	473	397
	Trials Completed			13	16	13	21	15	26	18	38	39
Median Time (Months)	From Filing to Disposition	Criminal Felony		7.3	13.3	10.9	6.0	7.3	8.7	10.8	14.5	15.0
		Civil*		8.9	10.0	8.4	6.2	10.5	10.3	12.2	9.7	11.5
	From Filing to Trial (Civil Only)*			23.6	25.3	23.4	28.6	20.1	26.4	24.1	22.7	22.6
Other	Number (and %) of Civil Cases Over 3 Years Old*			76	75	398	48	453	163	57	374	71
				5.2	5.5	7.8	3.1	7.6	6.1	3.3	20.2	4.1
	Average Number of Felony Defendants Filed per Case			1.8	1.5	1.6	1.3	1.7	1.5	2.0	2.0	1.4
	Jurors	Average Present for Jury Selection		53.6	39.9	49.0	50.5	38.8	43.2	39.3	35.8	48.6
		Percent Not Selected or Challenged		50.6	29.7	47.9	40.7	30.7	39.8	32.8	24.4	55.6

* See "Explanation of Selected Terms."

For more information, interested persons can access the Federal Court Management Statistics here: http://www.uscourts.gov/Statistics/FederalCourtManagementStatistics/DistrictCourtsSep2011.aspx

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