Bar & Bench
Your Western Michigan Chapter Federal Bar Association Newsletter

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President's Letter

Take Time to Make Time

Katherine Smith Kennedy, President, Federal Bar Association, W.D. Michigan

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The stress of all of the components that go into practicing law and zealously representing one's clients can be onerous, as we all know and experience. Enter into the equation parenting, maintaining a household, maintaining relationships with family and friends, exercise, travel time – and the demands of our schedules make our heads spin. (I often feel my morning routine of getting me and my kids ready and out the door to our various destinations should be accompanied by banjo music.) A poor economy requiring us to work harder to bring home the bacon only intensifies the problem. Time is invaluable. Time is so precious that adding in any "extras" seems overwhelming, if not foolish.

Before I promote our upcoming FBA events, I'd like to sell you on why these programs and events, and those of other similar groups, are in fact not a foolish expenditure of time. Quite the contrary, an attorney who makes time for such extracurricular activities actually makes strides to reduce one's stress. Here's how. We "lawyer" by communicating with clients, partners, associates and opposing counsel, researching law, investigating facts, interviewing witnesses, briefing, motion practice and representing clients in court, arbitrations and negotiations. Take lawyer Smith who holes-up in her office, diligently working to bill every possible hour, working through lunch, concentrating only on the case or task at hand day-in and day-out, year-in and year-out, and compare her with lawyer Jones who attends educational programs, gets involved with projects in the legal community and general community, and joins committees involving members of her local bar and bench. What benefits does attorney Jones enjoy that attorney Smith does not?

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When attorney Jones receives a response to a demand letter from an opposing counsel, it's very likely attorney Jones knows that opposing counsel, or at least has met him at an 'extra curricular' function. Often-times, attorney Jones has a solid professional relationship, one of trust, with that opposing counsel and the two attorneys are able to resolve the case sooner rather than later. Even if unable to resolve the matter, attorney Jones and opposing counsel have minimal issues in document exchange, stipulations to motions and the like, and have an amiable relationship in the courtroom while trying a case.

When attorney Jones has a motion hearing, she has usually met or listened to the judge present at a program, and has some familiarity with the judge's perspective and personality. This conversance helps attorney Jones be better prepared for and focused on the issues in which the judge is likely to be more interested. When attorney Jones receives a new case, she will have fresh ideas on how to approach the matter, knows the trends in the industry involved, and knows how courts have recently treated the legal issues.

Attorney Jones actually has an easier go of her day-to-day practice than attorney Smith does. Taking part in bar programs and events actually makes attorney Jones' work much easier and less stressful than that of attorney Smith, who saves her time for billable hours. Lawyering is a more pleasant experience for attorney Jones than attorney Smith.

In addition to the benefits received by the individual lawyer in participating in bar programs, our legal community benefits by the collegiality, respect and professionalism of our bench and bar. Our Western District of Michigan's greatest commodity is, indeed, the level of professionalism we share with one another. This level of professionalism, I believe, is directly related to our collective willingness to be active in our legal community.

Attend one of our FBA brown bag lunch programs. Not only will you leave knowing more than you did when you walked in, you will have shared conversations with colleagues, met attorneys you haven't met before, maybe listened to or sat next to and conversed with a judge that you have not been before or whose name will be stamped on a complaint in your file in the future.

Go to our Bench/Bar conference at Shanty Creek in October and I'll bet you dollars to donuts that in addition to coming back home with more knowledge and information in your legal field and beyond, you will come back with closer friendships with colleagues, more familiarity with members of our bench, and new acquaintanceships with dozens of attorneys from our community. Sharing food and drink, and maybe a round of golf, with your colleagues over a fall weekend in northern Michigan has a lasting effect.

The above examples are the reasons I'm very passionate about our organization, and why my involvement in various FBA programs and committees has been invaluable to my practice. Thank you for allowing me to be your FBA chapter's President this year. I hope you are able to take advantage of the opportunities we offer. You won't be sorry. ▪

Note From Editor: As a new feature, *Bar & Bench* will periodically offer *News from the Clerk*, with the latest court news and developments from our very own Western District Clerk of Court, Tracey Cordes.

News from the Clerk

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

I appreciate the opportunity to contribute news to this edition of the Federal Bar Association newsletter. Our judges and staff labor quietly, but continue to hit very high benchmarks for quality case disposition, customer service and innovation.

Budget Outlook: I lead with this item because, as of this writing, this issue is at the forefront of our minds. We continue to get speculative reports from media outlets and to receive guidance from our colleagues in the Administrative Office in Washington, DC. We can say with absolute certainty that, for quite some time, we have seen darker days ahead and our administrative decisions for the past year or so have factored this in. We have not heard anything recently that has come as a surprise or that has caused us to deviate from the course we have been on.

Identification of Records of Historical Significance: Judge Brenneman and I are asking for your help in identifying records of historical significance for permanent retention. The story is this: The Federal Judiciary periodically reviews its records management system to consider where records are to be stored and for how long. Certain records have historically been designated as "permanent", meaning that they are never to be destroyed. These have included documents in cases that went to trial, cases filed prior to 1970, records in cases that went up on appeal, and cases that were identified by the National Archives and Records Administration (NARA) to be of historical value.

As of this Spring, either the NARA or individual courts may identify records as being of historical significance. The good news is that we might identify records the NARA would overlook. The bad news is that it is enormous task to consider records dating back as far as 1970 for this special designation. Therefore, we are asking for your help. As we go forward, we will appreciate your input on any case that should be retained as a permanent record that might not otherwise be so designated. Looking back, we are asking you to consider any cases that you believe should receive "permanent" status for its historical significance.

You may utilize the following criteria in making your recommendation:

1. Did the case involve a judge, lawyer, litigant or witness of historical interest or importance (e.g. the lawyer, unknown at the time, became a prominent regional or national figure);
2. Did the case involve an issue of historical legal interest (e.g. a petition for writ of habeas corpus from a prisoner being held at Guantanamo Bay);
3. Did the case involve a matter of historical interest separate from the legal issues in the litigation (e.g. an issue about the ownership of a painting by da Vinci); or
4. Did the case receive substantial media attention at the time?

When you identify such a case or case document, please contact Judge Brenneman or your Clerk of Court. Thanks, in advance, for your assistance.

CM/ECF: We are continuing to focus on improving system functionality for our users. As of January 2nd sealed documents can and must be filed electronically. This is a huge convenience for both practitioners and court staff. In addition, as of February 11, civil cases may be filed electronically rather than in paper form. Like most other documents, electronic filing of these documents will become mandatory once we are confident that all bugs have been worked out. Stay tuned for an announcement of this date. Finally, we are meeting our very ambitious goals in implementing updates to our electronic case management and case filing system as they become available.

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Trivia: In the trivia department, did you know that, as of this date:

- 809, 899 documents are available electronically;
- 63,401 cases are stored in the Western Michigan District Court's CM/ECF system;
- 7731 attorneys are registered to e-file here; and
- 5055 attorneys have actually utilized our system to e-file?

Staffing News: Judge Neff has welcomed Rick Wolters to her chambers group to serve as her new Case Manager. Rick proved himself to be a superstar in the Clerk's office where he served as a generalist clerk from 2008 until his appointment by Judge Neff in February. Also, Lauren Packard has transitioned from her position as a generalist clerk in the Clerk's office to our newly created Court Programs/Trainer position. In addition to serving as the primary coordinator and contact for our ADR options, Lauren will coordinate and oversee training for court staff.

Space and Facilities: Two projects that were funded in past fiscal years are well underway. First, we are expanding Judge Carmody's chambers and courtroom, largely to address security concerns. All phases of the work are due to be completed by October 30, 2011. In Kalamazoo, plans are being finalized for moving the Clerk's staff from the basement to the first floor area. The first floor location will add convenience for members of the public needing to do business with the Clerk's office, but will also place our staff in closer proximity to security personnel. The very preliminary time line has our staff occupying their new space in 2012.

That's all for now. Do not hesitate to contact me directly, or to reach out to any court staff person if we can provide information or offer assistance. ▪

Recent Amendments to Federal Rules of Civil Procedure 26 and 56

By Michael G. Brady

As many federal court practitioners are aware, Federal Rules of Civil Procedure 8, 26, 56 and Illustrative Form 52 were amended as of December 1, 2010. These amendments govern all proceedings filed on or after December 1, and will also govern all previously pending proceedings "insofar as just and practicable." 4/28/10 Supreme Court Order; 28 U.S.C. 2074(a). This article will focus on Rules 26 and 56, which contain the most significant changes.

Rule 26

Rule 26 was amended to apply work-product protection to testifying expert draft reports and, with three important exceptions, communications between certain expert witnesses and counsel. The rule also makes clear that attorneys relying on experts who are not specifically required to provide a Rule 26(a)(2)(B) report must provide a more limited disclosure.

Rules 26(a)(2)(B) and (C) clarify that non-Rule 26(a)(2)(B) testifying experts must only provide an abbreviated disclosure.

Rule 26(a)(2)(B) had previously provided that a written report must be provided by any witness "retained or specially employed to provide expert testimony in the case or one whose duties as the party's employee regularly involve giving expert testimony." This language, which has remained unchanged, did not expressly require written reports from experts who fall outside the foregoing definition, such as treating physicians or in-house experts who do not regularly provide expert testimony, but Rule 26 was silent as to what type of disclosure was required of these types of experts. As a result, some courts required that written reports be submitted by experts who fall outside the definition in Rule 26(a)(2)(B).

To resolve this issue, new Rule 26(a)(2)(C) provides the disclosure requirements of those expert witnesses who are

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not expressly obligated to submit a report under Rule 26(a)(2)(B). Under this new subrule, a party must only provide a written disclosure of the subject matter on which the witness will testify, and a summary of the facts and opinions to which the witness is expected to testify. This less burdensome reporting obligation should foster disclosure and discovery while taking into consideration the fact that these non-retained experts may not be as willing as retained experts to prepare a detailed report. The Rule 26(a)(2)(C) disclosure may be prepared by counsel.

Rules 26(a)(2)(B)(ii) and 26(b)(4) expand the scope of the work product protection for certain communications between an attorney and testifying expert.

Rule 26 was also amended to address the inefficient and costly discovery practices that have evolved with respect to attorney communications with their experts. The Advisory Committee on Civil Rules recognized that lawyers have been forced to take elaborate steps to avoid creating a discoverable record of their communications with their experts, while other attorneys also spend a great deal of time in discovery attempting to unearth information about the interaction between the opposing counsel and her expert. Rule 26 has been amended to allow attorneys to more freely collaborate with their experts without fear that certain communications will be exposed in discovery. The Advisory Committee also made clear that these rules should be applied pragmatically, to allow for proper protections while also permitting legitimate discovery of the expert's opinions:

- **Only facts/data in expert reports**: Rule 26(a)(2)(B)(ii) has been amended to require that an expert report include "the facts and data" that the expert considered in forming her opinion. The rule previously required that the report include "the data or other information" to be disclosed; however, this reference to "other information" opened the door to the disclosure of attorney-expert communications and draft reports. The change is meant to focus the report on the factual ingredients considered or relied upon by the expert, and not the mental impressions of counsel.
- **Protection of draft reports/disclosures**: Under amended Rule 26(b)(4)(B), draft reports or disclosures are now deemed to be attorney work product under Rule 26(b)(3)(A) and thus generally not discoverable. This subrule applies to retained experts and employees who regularly testify *as well as* experts who are not required to provide an expert report.
- **Protection of communications with retained experts**: Under amended Rule 26(b)(4)(C), any form of communication between a party's attorney and any witness required to prepare an expert report is deemed to be attorney work product under Rule 26(b)(3)(A) and generally not discoverable, with three important exceptions. This new protection does not apply to communications that:
  1. relate to the expert's compensation;
  2. identify facts or data that the party's attorney provided *and* that the expert considered in forming her opinions;
  3. identify assumptions that the party's attorney provided *and* that the expert relied on in forming her opinions.

It should be recognized that this protection under Rule 26(b)(4)(C) does not apply to experts who are not required to prepare a report under Rule 26(a)(2)(B). In addition to the three categories identified, discovery of communications or draft reports will be permitted under Rule 26(b)(3)(A) on a showing of substantial need for the discovery and an inability, without undue hardship, to obtain the substantial equivalent by other means.

Rule 56

Rule 56 has been extensively rewritten and reorganized, although the changes are procedural in nature. They are meant to improve the way Rule 56 motions are presented and decided, and to harmonize the rule with the procedures in many courts. The substantive standards for granting summary judgment have not changed. Among others, these amendments include:

- **Pinpoint citations to the record**: Rule 56(c)(1) now provides that a party asserting that a fact cannot be or is genuinely disputed "must" support the assertion by "citing to particular parts of materials in the record …" or by "showing that

the materials cited do not establish the absence or presence of a genuine dispute …" This "pinpoint citation" requirement is based on the required practice in many district courts. Its purpose is to allow the parties and the court to efficiently and effectively address the facts at issue. The new subrule does not address the form for providing the required record support, and practitioners should consult each district court judge's practice guidelines for further instruction.

- **A court "shall" grant summary judgment**: Rule 56(a) now sets forth the standard for granting summary judgment (previously found in Rule 56(c)). The new subrule states that the court "shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact …" The use of "shall" in the new version – instead of "should" in the prior version, or the word "must" – is meant to express the direction to grant summary judgment while also recognizing that a judge maintains discretion in handling summary judgment motions.
- **Failure to support fact or address issue**: Under new Rule 56(e), when a party fails to properly support or respond to a factual assertion, the court may: (1) provide an opportunity to rectify the deficiency, (2) consider the fact undisputed, (3) grant summary judgment if the material submitted shows the movant is entitled to it, or (4) issue any other appropriate order. This new rule is consistent with Supreme Court authority that a party should not obtain summary judgment by default if the opposing party provides an inadequate response. Likewise, a motion should not be denied by default if the movant fails to reply to the nonmovant's response.

For more information regarding the amended rules, you may consult the Advisory Committee Notes to each rule as well as an excerpt of the Judicial Conference Report at *http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Supreme%20Court%202009/Excerpt-ST-CV.pdf*. ▪

About the Author

Michael G. Brady is a business litigation partner with Warner Norcross & Judd LLP in Southfield, Michigan.

Recent Sixth Circuit Opinion Begins to Address Emerging Massive-Documents Issue in Federal Criminal Discovery and Other Electronic Evidence Problems

By Sarah Riley Howard and R. Michael Azzi

As federal criminal prosecutions become increasingly complex, courts and practitioners alike are faced with new challenges associated with the discovery process. In particular, e-discovery in the criminal context continues to emerge as an important component of the process, but the law remains relatively undeveloped on the subject. Courts have largely declined to impose civil discovery requirements in criminal cases, but large-document cases increasingly call for more guidance to district courts and practitioners than Federal Rules of Criminal Procedure 16 and 26.2 (plus the trifecta of the Jencks Act, *Giglio*, and *Brady*) provide. In addition, new national DOJ directives have attempted to clearly define the prosecutor's duties in a number of discovery contexts, and to push local U.S. Attorney's offices to develop and/or refine individual policies on discovery. Despite these efforts, much uncertainty remains. It may be worth exploring whether new local Court rules are appropriate.

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On March 7, 2011, the Sixth Circuit denied the defendants' petition for rehearing en banc in one of the first cases to address the so-called "document dump" in this Circuit. *See* 3/7/11 Order, Case No. 09-3176, among others; United *States v. Warshak*, 631 F.3d 266 (2010). The appellate court's opinion still leaves many questions unanswered. The panel held that where the Government's document production contained materials originally in defendants' possession, the U.S. Attorney in the Southern District of Ohio discharged the duty to disclose when producing "prodigious" numbers of documents without first reviewing them in detail. *Id.* at 295-97. In reaching its holding, the Court noted that most of the documents produced were originally in the defendants' possession, the documents were searchable, and the Government provided "something of a guide" that offered "some aid in identifying and marshaling the documents." *Id.* at 297.

To ensure a fair and efficient handling of discovery, prosecutors will likely need to use document management software that is commonplace in the civil arena, but relatively new to the criminal process.

But the Sixth Circuit took care to note that in some instances, providing vast amounts of documents would not always necessarily satisfy the Government's disclosure obligations under *Brady*. The Sixth Circuit implicitly acknowledged that requiring the prosecution to review millions of potentially relevant documents would be impracticable, but that an "open file" approach might violate *Brady* in another case. Absent some indication of what is relevant to a particular matter, a defendant may essentially be deprived of due process if he or she is unable to effectively pick out "materially relevant" documents in the deluge provided by the United States. *See* 631 F.3d at 297 (quoting *United States v. Skilling*, 554 F.3d 529, 577 (5th Cir. 2009), *vacated in part on other grounds*, 130 S. Ct. 2896 (2010)). In addition, it would likely violate due process requirements if the Government intentionally "padded" a document production with superfluous material. *See id.*

It is reasonable to extrapolate from the panel's opinion that a case involving documents within the initial exclusive control of the government—such as documents maintained or authored by the SEC or FDIC, for example—might result in different Government obligations. Also, with documents that could not be as easily searched as these apparently were, courts may very well find that *Brady* requires more than "open file" discovery.

The Ogden Memo

On January 4, 2010, Deputy Attorney General David Ogden issued a memo titled *Guidance for Prosecutors Regarding Criminal Procedures* ("Ogden Memo" or "Memo"). Ogden's memo stated that it wanted to give further guidance to U.S. attorneys as to their discovery obligations in criminal matters, and establish a methodical, systematic approach to the criminal discovery process. The Ogden Memo seeks to achieve this goal by providing prosecutors with a definition of the prosecution team (i.e., who to collect information from) and considerations regarding what information to review. The Ogden Memo also emphasizes that although prosecutors may delegate responsibility for reviewing information, they are ultimately the final decision makers on what information to disclose. The Ogden Memo does not mandate more specific solutions to increasingly common discovery challenges in large-document and/or electronic evidence cases that the Government and defense must tackle.

"The prosecution team" issue is another emerging question in federal criminal discovery. At least the Ogden memo seems to find that the "team" includes all members of law enforcement participating in the investigation and prosecution of the criminal case against the defendant, in addition to the agencies supporting the prosecution through manpower, documents, or a combination of the two. But courts are currently divided regarding whether the prosecution team is comprised of only those agencies and individuals that are directly involved in the prosecution and investigation of the case, or whether it also includes agencies that do not participate in the prosecution investigation, but may nonetheless have information relevant to the subject matter underlying the criminal case. This is clearly critical for purposes of under what rocks the Government must look for potential exculpatory evidence. *Compare United States v. Morris*, 80 F.3d 1151, 1169 (7th Cir. 1996), *and*

United States v. Pelullo, 399 F.3d 197, 217-18 (3d Cir. 2005), *cert. denied*, 126 S. Ct. 1141 (2006), *with United States v. Santiago*, 46 F.3d 885, 894 (9th Cir. 1995); *see also Kyles v. Whitley*, 514 U.S. 419, 437 (1995) (holding that the prosecutor has an affirmative duty to seek out and disclose favorable evidence, including evidence that is outside of the prosecutor's own office).

In any event, many complex criminal prosecutions involve numerous state and federal agencies, and it remains the prosecutor's responsibility to not only determine what agencies are part of the team, but also how to gather, review, and disclose relevant information to the defense. For example, many white collar prosecutions involve coordinated efforts between prosecutors, the SEC, the FDIC, the EPA, and numerous other agencies. Implicitly recognizing the realities of e-discovery and the complex nature of the criminal discovery process more generally, the Ogden Memo also authorizes prosecutors to delegate document review responsibilities to other members of the prosecution team, although the prosecutor is ultimately responsible for the final review and satisfaction of its discovery obligations.

E-Discovery, Litigation Holds and the Criminal Discovery Process

Using civil litigation as a persuasive analogy, it is possible that district courts will institute their own local rules, if no amendments are made to the Federal Rules themselves. Also taking a cue from the civil context, the Government may start asking for a "litigation hold" when investigating a corporate defendant, which does not enjoy a Fifth Amendment privilege like individuals do. As a consequence, defense counsel will be required to develop and implement policies establishing how the corporate defendant will properly maintain documents relevant to trial. In most cases, this requires counsel to help their corporate client identify what documents need to be maintained, what employees or third-party service providers maintain the documents, and what steps need to be taken to ensure such documents are not inadvertently destroyed. Conversely, the Government will be under the same burden – ensuring agency documents, individual notes, and electronic records are maintained throughout the prosecution.

How courts will handle failures to properly comply with litigation holds by both Government and defense has yet to be determined. As made famous in the civil context by *Zubulake*, spoliation of electronic data can result in serious consequences. *Zubulake v. UBS Warburg LLC*, 217 F.R.D. 309 (S.D.N.Y. 2003). Courts are likely to rely on these types of decisions for guidance in criminal discovery matters, given that the case law in the civil context is somewhat developed. To ensure a fair and efficient handling of discovery, prosecutors will likely need to use document management software that is commonplace in the civil arena, but relatively new to the criminal process. Failure by either party to adhere to litigation holds, or failure by the prosecution to satisfy its disclosure obligations, may result in a spoliation argument being made before a jury or at sentencing – or worse, obstruction charges for defendants and potentially government actors alike. Indeed, depending on the nature of the error, a criminal case may need to be dismissed if due process concerns that are the foundation of the criminal justice system are not observed. ▪

About the Authors

Sarah Riley Howard is Chair of Warner Norcross & Judd LLP's White Collar Criminal Defense Practice Group, and **R. Michael Azzi** is a Warner Norcross & Judd litigation associate.

Save the Date

The Bench Bar Conference is scheduled for September 30 - October 2, 2011 at Shanty Creek Resort. Stay tuned for more information.

Book Notes

Picking Cotton: Our Memoir of Injustice and Redemption, by Jennifer Thompson-Cannino and Ronald Cotton, with Erin Torneo

Overview

Picking Cotton is a harrowing and tragic true story co-written by two people who were on opposite sides of a terrible injustice. Jennifer Thomspon-Cannino, then a college student, was raped in her apartment in 1984, and picked Ronald Cotton from a police lineup. She had studied the features of the rapist very carefully, and was certain that Ronald was the man who had attacked her. But she was wrong. Based on her misidentification, Ronald was convicted and sentenced to life in prison. He spent 11 years behind bars before winning his exoneration based on DNA evidence through the pro bono efforts of a team of lawyers who believed in his cause.

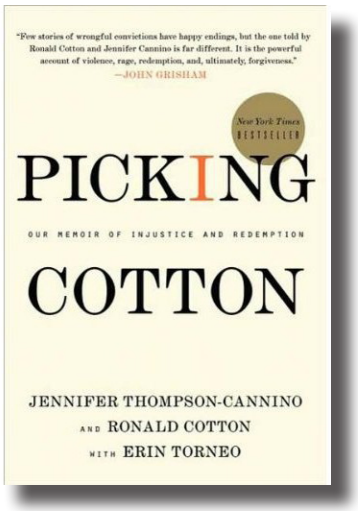
The book features alternating chapters written by Jennifer and Ronald, sharing their unique viewpoints from the night of the rape to Ronald's years in prison, and ultimately his exoneration.

In the journal-like entries, Jennifer describes her absolute certainty that Ronald was her attacker. After the trial, she took great comfort in the fact that he would be locked up for life and, she hoped, suffer great violence of his own in prison.

For his part, Ronald describes the pain and helplessness of being an innocent man, snatched up by the police and brought in for a lineup that would change his life forever. He talks about the trial and the pain he felt at being portrayed as a vicious rapist who had attacked a young woman in her home. He describes his 11 agonizing years in prison, away from his family and alongside some of the most dangerous men around. Throughout all of these events, the reader witnesses the seemingly irrepressible strength that kept Ronald alive and allowed him to continue to fight for his exoneration.

Picking Cotton is also a story of grace and redemption. Following his release from prison, Ronald and Jennifer arranged for a meeting through the unlikely efforts of the police detective who had helped put Ronald behind bars. As a result of that meeting, they took the first steps toward healing their wounds and putting their collective tragedy behind them. In the most amazing twist of all, Jennifer and Ronald are now close friends who spend time with each other's families. They have spent the last 15 years working together to raise awareness about misidentifications and advocate for judicial reform.

You can view a trailer for the book at *http://www.youtube.com/watch?v=nLGXrviy5Iw*



Praise

"The story of Jennifer Thompson-Cannino and Ronald Cotton, as told in first-person voices in this gripping, well-written book, is exceptional."

—*St. Petersburg Times*

"Even the most cynical reader will be impressed with Cotton's resilience and grace."

—*The Washington Post*

"*Picking Cotton* is the nonfiction title you must not overlook this year. It is as compelling as any fiction, yet the truth at its core will move you to tears."

—*The Louisville Courier-Journal*

"For all its trauma, *Picking Cotton* is ultimately an uplifting story of hope."

—*The Charlotte Observer*

Bios

Jennifer Thompson-Cannino lives with her family in North Carolina. She is an advocate for judicial reform and a member of the North Carolina Actual Innocence Commission, the advisory committee for Active Voices, and the Constitution Project.

Ronald Cotton lives with his wife and daughter in North Carolina. Along with Jennifer, he speaks about their case at events around the country. ▪

Meet Your President

Katherine Smith Kennedy became this Chapter's first female president in October 2010. Her law practice is concentrated in plaintiffs' employment litigation and labor relations, with specialties in FLSA wage-and-hour and discrimination claims. She received a B.A. from the University of Michigan in 1989, and received her law degree from Southern Illinois University in 1995. She is a member of several labor and employment organizations and the Women Lawyers Association of Michigan. She is also a member of the State Bar of Michigan Standing Committee on Character and Fitness; Chair of the Grand Rapids Bar Association Labor and Employment Section in 2007-2008; a member of the District Committee for the State Bar's Labor and Employment Section Council; and a former member of American Inns of Court.

Kathy has served on the FBA Executive Committee for six years. She will be co-chairing the Bench-Bar Conference at Shanty Creek for the second time this fall, and is involved on the Pro-Bono Committee, New Member Committee, and Program Committee. She is also on the annual Hillman Advocacy Program's Executive Committee, and serves as a faculty member for the program.

Kathy has been married to her husband Brady for nine years. They have two children, Meggie, who turns seven on March 15 (and is making sure everyone knows it), and Owen, who will be five in April. They live in Forest Hills with their beloved pets and enjoy spending time in the outdoors together -- especially in winter. She remains involved with a music, dance, and art organization and library that serves the Grandville Avenue neighborhood and the local Hispanic community. She was a board member for the Grandville Avenue Academy of Arts and Humanities for six years, and is a former officer on the Academy's Executive Committee. Kathy is an avid sports fan (especially football) and participant, and volunteers regularly in her children's classrooms and at school events. ▪

Judiciary Approves Pilot Project for Cameras in District Courts*

The Judicial Conference, at its biannual meeting in September, approved a pilot project to evaluate the effect of cameras in federal district courtrooms and the public release of digital video recordings of some civil proceedings.

The pilot, which will be national in scope, will last up to three years. It will evaluate the effect of cameras in district court courtrooms, video recordings of proceedings, and publication of such video recordings. Details of the development and implementation of the pilot will be determined by the Conference's Committee on Court Administration and Case Management (CACM).

The pilot will evaluate the effect of cameras in district court courtrooms, video recordings of proceedings, and publication of such video recordings. Courts that participate in the pilot will, if necessary, amend their local rules (providing adequate public notice and opportunity to comment) to provide an exception for judges participating in the pilot project. Participation will be at the trial judge's discretion.

Under the pilot, participating courts will record proceedings. Recordings by other entities or persons will not be allowed. Recording of members of a jury will not be permitted, and parties in a trial must consent to participating in the pilot.

The Federal Judicial Center will conduct a study of the pilot, and produce interim reports at the end of its first and second years. The Administrative Office will provide funding for equipment and training as needed by a participating court.

Electronic media coverage of criminal proceedings in federal courts has been expressly prohibited under Federal Rule of Criminal Procedure 53 since the criminal rules were adopted in 1946, and by the Judicial Conference since 1972. In 1996 the Conference rescinded its camera coverage prohibition for courts of appeals, and allowed each appellate court discretion to permit broadcasting of oral arguments. To date, two

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courts of appeals—the Second and the Ninth—allow such coverage. In the early 1990s the Judicial Conference conducted a pilot program permitting electronic media coverage of civil proceeding in six district courts and two courts of appeals. ▪

Endnote

* Reprinted from *The Third Branch: Newsletter of the Federal Courts* (Sept. 2010)

Death Penalty: A Post Script

By Ray Kent, W.D. FBA President Emeritus

In the last issue, I recounted the story of Rolando Cruz. Three times Mr. Cruz was tried and twice convicted and sentenced to death by the State of Illinois for a crime he did not commit. In 1995, after nearly ten years on death row, Mr. Cruz was finally exonerated and released.

On March 9, 2011, Governor Pat Quinn signed legislation repealing the death penalty in Illinois. Governor Quinn called the Illinois death penalty law "seriously broken" and remarked, "[w]e cannot have a death penalty system in our state that kills innocent people . . . ." Governor Quinn acknowledged that at least twenty innocent people had been wrongfully convicted and sentenced to death under the system. For Governor Quinn, the issue came down to this: "[i]f the system can't be guaranteed 100 percent error-free, then we shouldn't have the system. It cannot stand. It just is not right in our democracy and system of justice."

I am proud to say that Michigan was the first state to abolish the death penalty. 165 years later, Illinois became the sixteenth, a far less admirable figure when compared to the rest of the developed world. For example, 48 of 50 European nations, including Russia, no longer practice capital punishment. Of the 35 nations in the Western Hemisphere, the United States is one of only three that continue executing people. In 2009, the most recent year for which Amnesty International has compiled a comparative analysis, the United States ranked fifth world-wide in the number of executions with 52, behind China, Iran, Iraq and Saudi Arabia, but ahead of Yemen, North Korea and Libya. Only one other predominantly Christian country, Botswana, executed anyone that year.

In conjunction with signing the legislation to abolish the death penalty, Governor Quinn commuted the sentences of fifteen men remaining on death row to life in prison without parole. Included among them was Brian Dugan, the man who confessed to committing the crime for which Mr. Cruz was twice convicted and sentenced to death.

I congratulate Governor Quinn and the State of Illinois for making the right decision. As for the 34 states that still have the death penalty and our country as a whole, I only hope my mother was wrong many years ago when she told me "Raymond, you will be judged by the company you keep." ▪