WEST MICHIGAN CHAPTER OF THE FEDERAL BAR ASSOCIATION
BAR & BENCH NEWSLETTER
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President's Letter—Provide Input

Britt Cobb, President
Federal Bar Association, W.D. Michigan

Your FBA tries to keep you up to date on important events, programs, legal issues, and milestones in our district. We also want to make sure that our members know that they can have input with the Court on proposed amendments to its local rules of practice. In June 2023, the Court approved proposed amendments to the Local Civil Rules and the Local Criminal Rules that affect attempts to obtain motion concurrence. The proposed amendments to Local Criminal Rule 12.4 and Local Civil Rule 7.1(d) add requirements to the efforts to obtain concurrence and add requirements to the certificate to be filed if concurrence is not obtained. For those who practice regularly in the Court, you should take a look and provide any input by **July 31, 2023**. The proposed amendments are here and the process for comment can be found here.

The FBA has a lot of great events planned for the fall, including the POWER Act program on September 20, 2023; a mixer with the Eastern District of Michigan Chapter of the FBA tentatively planned for October 2, 2023; and our annual meeting on October 12, 2023, with the Honorable Joan Larsen of the U.S. Court of Appeals for the Sixth Circuit as our special guest speaker. Please keep your eye out for emails so you do not miss any of these events.

***Britt Cobb** is the 2023 president of the West Michigan Chapter of the FBA. She is a partner at Willey & Chamberlain LLP in Grand Rapids, a criminal defense law firm.*

WEST MICHIGAN CHAPTER OF THE FEDERAL BAR ASSOCIATION
www.westmichiganfederalbar.org

Lessons I Learned About the Practice of Law from Across the Dinner Table

By Erin Lane and Madelaine Lane

Having a sibling comes with certain advantages. For us, the advantage of having a sibling—and one practicing in the same legal community—comes with yet another benefit. It has helped us to better understand what counsel on the other side of the aisle faces when representing his or her client.

Madelaine (the oldest) practices in white collar criminal defense and Erin (the second oldest) is a federal prosecutor. MRPC 1.8(i) will likely prevent us from ever facing each other in the courtroom. However, what we have learned from each other about the practice of law is more valuable than whatever trophy comes from besting your sister in trial.

As lawyers, we often look at the other side of a dispute as an adversary. Indeed, the term "opposing counsel" suggests that this is a zero-sum game. This is especially true in criminal cases, where the prosecution has likely indicted Madelaine's client before she first meets him or her. The rules of professional conduct require lawyers to treat everyone involved in the legal process with courtesy and respect, but this proves difficult when both sides are guarded from day one. (MRPC 6.5(a).)

Trust. When both sides begin a matter ready for battle, trust is the first thing to go. What we learned from each other, however, is the importance of understanding each party's position and obligations.

The defense counsel has an important role in our judicial system. A strong defense is critical to balancing the strength of the prosecutor's office. But we often forget in the defense that we are not the only ones with a client, and we are not the only ones seeking to do our constitutional duties. Prosecutors also have a client to answer to, whether it is the Department of Justice's priorities or agency dictates—line Assistant U.S. Attorneys are not creating policy anymore than

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Lessons I Learned ...

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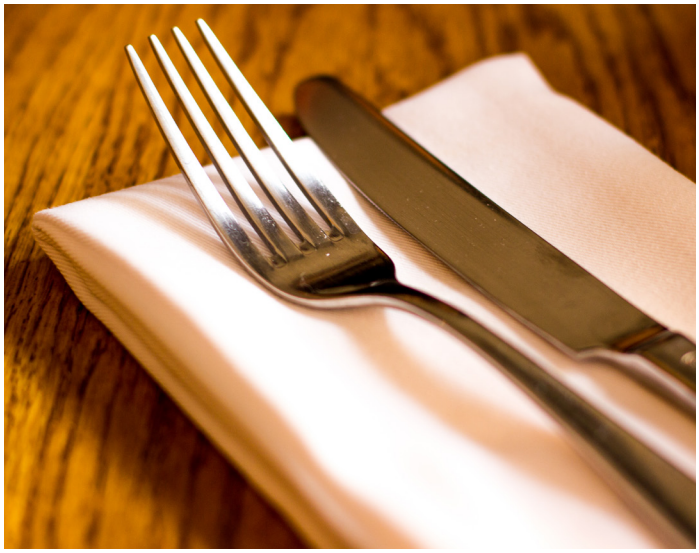
defense counsel are setting the latest CJA reimbursement rates. They are often working long hours with fewer resources. That large grand jury subpoena you just responded to? It is being reviewed in spare time between trial, witness preparation, warrant review, and other tasks—without the newest technological programs or associate assistance.

Defense counsel also have their own burdens. They are on this journey with a client who may be facing a long sentence and is going through the process of grieving the loss of their life as they knew it. Perhaps the client has mental health or substance use concerns or is looking at deportation. The process of representing a criminal defendant is a long one. Criminal defense counsel must gain the trust of the client and, often, deliver bad news. It is in these situations that the term "counselor" is perhaps the most appropriate job title.

One of the difficulties of being a lawyer is that we are always trying to guess our opponent's next move. If we are not careful, this can lead us to assume the worst in our colleague and spend too long questioning the strategy behind our opponent's plea offer or position, rather than working collaboratively to reach the best result. While you need to vigorously advocate for your client, you can do so without demonizing the other side.

Every one of us has a wish list that would make our client's outcome better. Maybe we would like more binding plea agreements, fewer electronic documents to review, easier access to witnesses and/or pre-trial detainees, or just a fresh set of magazines in the Grand Jury waiting room. But, we also must recognize that we are lucky to work in a wonderful bar with counsel that we know and trust.



Erin Lane *is an Assistant United States Attorney in the Western District of Michigan and prosecutes narcotics trafficking matters and violent crimes. Before joining the United States Attorney's Office, Erin was a program officer with the United States Department of State where she worked to combat transnational crime and narcotics trafficking.*

Madelaine Lane *is a partner at Warner Norcross + Judd LLP where she specializes in white collar criminal defense and ediscovery matters.*

Sixth Circuit Appellate Advocacy from the Judges and the Pros

By Gaëtan Gerville-Réache

Appellate practice is a different animal from other litigation, as any seasoned appellate practitioner will tell you. But you don't have to take it from me. Just read below what Judges David McKeague and Joan Larsen from the United States Court of Appeals for the Sixth Circuit had to say about it at the recent West Michigan Chapter's presentation on "Sixth Circuit Appellate Advocacy from the Judges and the Pros." While I was honored to serve on the panel, it was an even greater privilege to hear the viewpoint of these two Sixth Circuit judges. Below are the takeaways that I found most insightful, supplemented with some of my additional commentary.

Draft your brief to a reader one or two years out of law school, especially in diversity cases applying state law.

If you ever thought you might insult the appellate court's intelligence by putting basic principles of law in your brief, think again. Appellate judges are generalists, not specialists. Even when you think the area of law may be routine, the issues likely will not be. It's always a good idea to start from the basics to orient the readers (who include clerks fresh out of law school) before delving into the issues. This rule of thumb is frequently overlooked by specialists who do not regularly practice in the appellate courts. If you don't have an appellate practitioner handling the appeal, it's beneficial to at least have one not too familiar with the issues review and comment on the brief prior to filing and help prepare you for oral argument.

Pick your one or two best arguments to focus on at oral argument; that is all you have time for.

One of the hardest things to do as the original litigator is divorce yourself from the hard-fought issues lost below. One becomes invested. I know from experience. But appellate courts are busy and the more issues you throw at them, the less time they have to spend on any one issue. The judges first observed that raising more than two or three issues in a brief is usually a mistake. The more issues raised, the more it appears there are no reversible errors. This has almost become conventional wisdom among practitioners at this point. But

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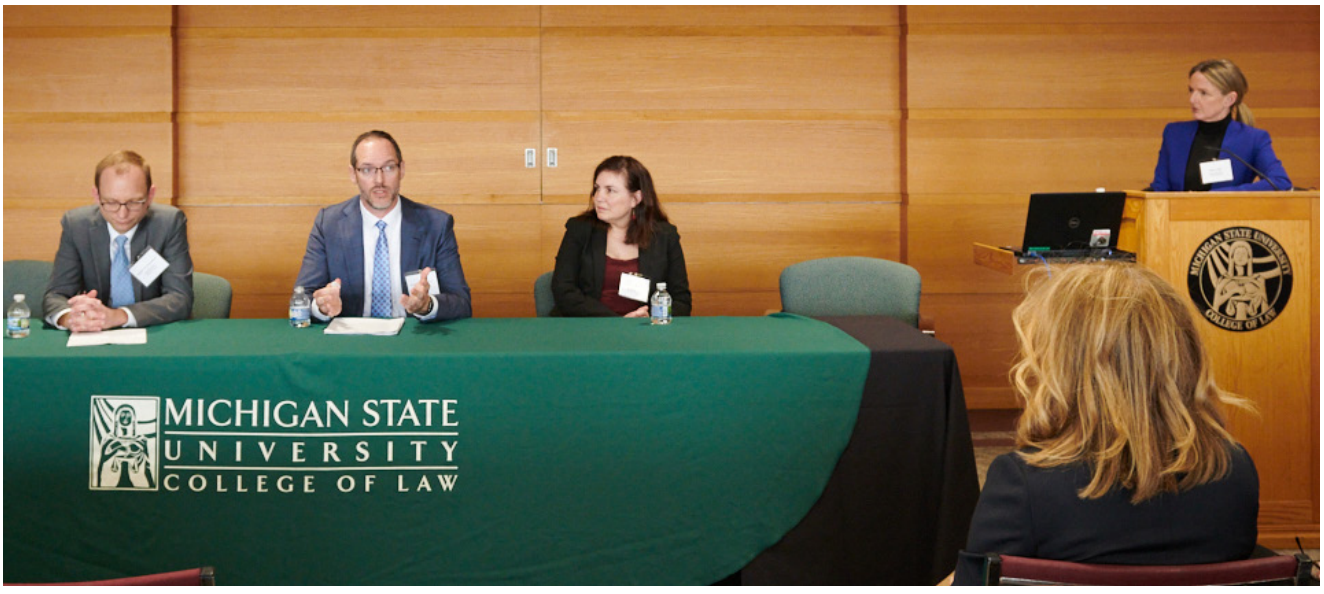

Steve van Stempvoort, Gaëtan Gerville-Réache, Mary Chartier & Britt Cobb (L-R) (Credit: @2023Thomas R Gennara)

Sixth Circuit Appellate Advocacy ...

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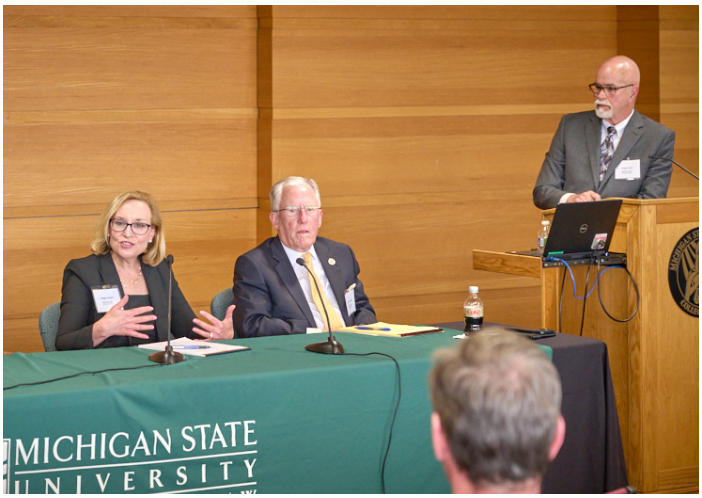
far fewer realize that this narrowing continues at oral argument. The judges emphasized that, with only 15 minutes of oral argument time, there simply is not time to focus on more than one, maybe two issues. Choosing which arguments and which issues can be tricky. Sometimes it depends on the other side's arguments, and sometimes on the composition of your panel. And sometimes you discover at oral argument the best argument is not what you expected. This is one of many instances where having a solid grasp of appellate strategy, the proclivities of the panel, and skill at oral argument become highly valuable.

Video argument can be requested in exigent circumstances, and the court itself may request it if questions arise in screened cases.

The Sixth Circuit is doing video arguments (reluctantly) when there are exigent circumstances for counsel or judges. If you fall ill immediately before oral argument, or your travel arrangements fail you due to unforeseen circumstances, contact the court and request to attend by video. It can be done.

While the bulk of Sixth Circuit appeals are decided without oral argument, sometimes a screened case surprises the panel, and the judges discover they had questions they did not anticipate. The solution sometimes may be to request a video hearing with counsel.



Sixth Circuit Judge Joan Larsen, Sixth Circuit Judge David McKeague & Magistrate Judge Ray Kent (L-R) (Credit: @2023 Thomas R Gennara)

When on video, using interesting backgrounds and gazing off screen (instead of at the judges) are annoying and distracting.

This is good advice for any video argument in any court. Take note. Use good lighting, background, and a properly positioned camera.

Additional time for oral argument may be granted if multiple parties are involved or if amici wish to argue, but it's usually best not to divide up the argument among multiple counsel.

Managing the oral argument can be particularly difficult in consolidated appeals or in appeals involving multiple defendants or plaintiffs where the issues among

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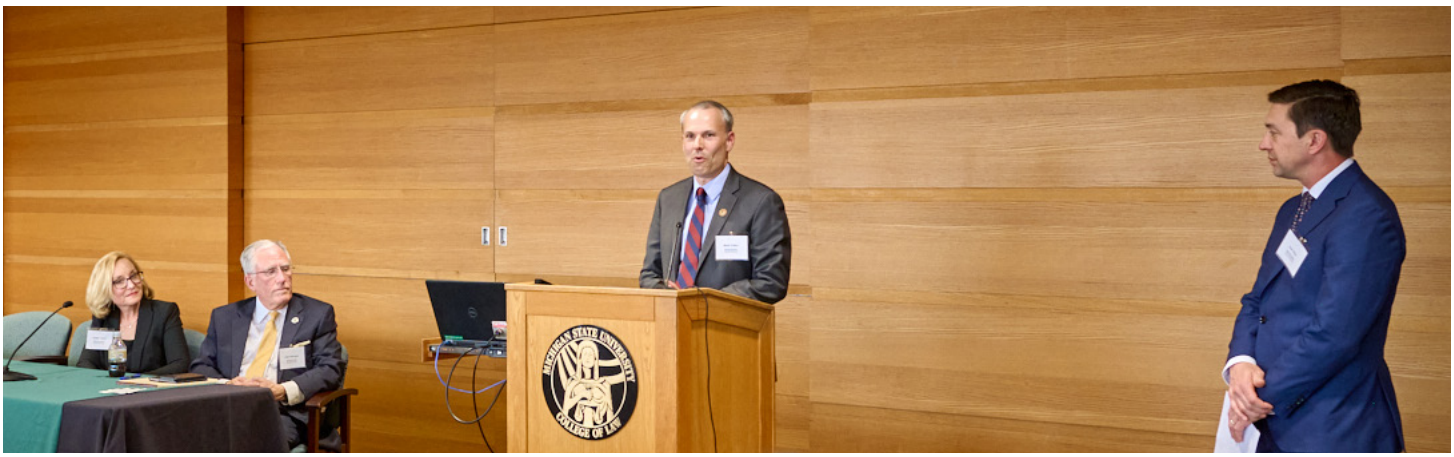

Sixth Circuit Judge Joan Larsen, Sixth Circuit Judge David McKeague, U.S. Attorney Mark Totten & Sean Tilton (L-R) (Credit: @2023 Thomas R Gennara)

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them individually diverge. Judge McKeague opines that dividing up argument between multiple counsel is a terrible idea. I take this to heart, but not as a universal rule. Sometimes, reserving some time for co-counsel to answer questions on issues not common to other parties may be advisable. In that case, requesting additional time may be advisable, and it is sometimes granted. That said, be mindful that if oral argument is productive, you will be allowed additional time during oral argument, even if it is not granted ahead of time.

As appellee, it is usually best to avoid raising issues in the oral argument that were not argued by the appellant or raised by the judges.

After you prepare your killer arguments for the oral argument, it can be tempting to press forward as planned at oral argument. This could be a mistake if it means diving into issues the appellant did not discuss and the judges did not ask about. As the judges put it, if the panel does not question the appellant about a particular issue, it typically means the judges are not interested. And if the judges are not interested, it probably would not help you to bring it up. In fact, it might hurt your position, as you might say something that catches the panel's attention and causes them to give greater consideration to the allegation of error you are addressing than they otherwise would have.

Gaëtan Gerville-Réache *is a partner at Warner Norcross + Judd LLP in Grand Rapids, where he focuses on appellate matters and real property, zoning, and environmental litigation.*

Call for Articles

Interested in contributing to *Bar & Bench*? We invite you to draft an article on a subject of interest to federal practitioners in the Western District of Michigan. Please contact our editor, Charlie Quigg, at cquigg@wnj.com for more information.

District Court Roundup

By C.J. Schneider and Richard Perez

Williams v. City of Grand Rapids et. al
21-cv-1011, 5/9/2023

Plaintiff Dominic Williams brought a civil rights action asserting claims under 42 U.S.C § 1983 against the City of Grand Rapids and its officers. Plaintiff alleged that Defendants Ryan Johnston and Makentorch Seide violated his Fourth Amendment rights to be free from excessive force, unreasonable search and seizure, and arrest without probable cause. During a traffic stop for failing to use his left turn signal, Plaintiff was asked to completely roll down his window and to end his phone call, but refused. Plaintiff was removed from the car and subsequently arrested. During the arrest, Defendants used a "straight arm-bar" maneuver to bring Plaintiff to the ground and placed their knees on Plaintiff's back while he was on the ground. Once detained, Plaintiff's cell phone was searched and a video of the incident was allegedly deleted. Defendants moved for summary judgment on all counts, contending that there was no genuine issue of fact and that the officers were entitled to qualified immunity. The Court granted the motion in part and denied in part.

The Court concluded that Defendants were entitled to summary judgment on the excessive force claim as it relates to the knee on Plaintiff's back. However, the Court denied summary judgment as to the straight arm-bar claim, reasoning a genuine dispute of material fact existed as to whether the totality of the circumstances justified use of a straight-arm bar takedown. Further, a genuine dispute existed as to whether search of Plaintiff's phone violated the Fourth Amendment under *United States v. Jones*, 556 U.S. 400 (2012), reasoning that *Jones* applied because a physical intrusion occurred. Additionally, the Court held that the Defendants did not act with malice, and Defendants were entitled to governmental immunity as to the state law claims. Lastly, the Court concluded that Plaintiff did not present sufficient evidence to create a genuine dispute of fact on his failure-to-train claim.

Shawn Cabot of Christopher Trainor & Associates represented the plaintiff. Grand Rapids City Attorneys Elizabeth Fossel, Sarah Hartman, and Tobijah Koenig represented the defendants.

C.J. Schneider *is a member at Miller Johnson in Grand Rapids. He practices in commercial crisis counseling and litigation, helping businesses and nonprofit organizations successfully navigate high-profile matters, including mass tort claims, high-stakes contract disputes, global supply chain emergencies, and corporate governance reform.*

Richard Perez *is an associate at Miller Johnson in Grand Rapids. His litigation practice primarily focuses on commercial, governmental, and criminal litigation in all phases of disputes and investigations.*

Appellate Roundup—Summer 2023

Noteworthy Cases from the Sixth Circuit

By Ashley Yuill

Levine v. DeJoy, 64 F.4th 789 (6th Cir. 2023)

After being passed over for a promotion in favor of her white colleague with 20 years' less experience, plaintiff—a Black woman—filed a Title VII action against her employer, the United States Postal Service. Judge Maloney dismissed the case, finding that the plaintiff failed to demonstrate that the Postal Service's proffered justification for its hiring decision was pretext for racial discrimination. On appeal, the Sixth Circuit reversed in a split, published opinion.

The majority focused on the summary judgment standard, reaffirming that "the Court's function is not to weigh the evidence and determine the truth of the matter, but to determine whether there is a genuine issue for trial." According to the majority, the district court erred in failing to afford any weight to the facts plaintiff relied on as evidence of her arguably superior qualifications. Judge Maloney had dismissed these facts outright, concluding that they related only to the plaintiff's *opinion* about her qualifications. But in the majority's view, these facts—many of which were empirically verifiable—created a genuine issue as to whether plaintiff was significantly better qualified for the job, a question for the jury to resolve.

Judge Thapar dissented, accusing the majority of ignoring decades of precedent to impose "a rule requiring employers to favor credentials over relevant work experience in hiring." The majority likewise charged its dissenting colleague of "attempt[ing] to rewrite binding precedent" in insisting that the Court take an employer at its word when it claims—even in the face of evidence to the contrary—that it chose not to hire a candidate because another applicant was better qualified.

Glenn L. Smith and John M. Roels of Wheeler Upham, P.C. represented the employee. AUSA Carolyn A. Almassian represented the Postal Service.

MacIntosh v. Clous, 69 F.4th 309 (6th Cir. 2023)

Common sense carried the day in this § 1983 action when the Sixth Circuit held that a government official should have known that brandishing a high-powered firearm during a public hearing could have deterred participants from speaking. During a Zoom meeting of the Grand Traverse County Commission, a citizen asked the Commission to publicly condemn a known hate group. In response, a Commissioner retrieved an assault-style rifle and displayed it to the camera with a smirk. The citizen sued, alleging the Commissioner unconstitutionally retaliated against her for exercising her First Amendment rights. The Commissioner moved to dismiss the action, asserting a qualified immunity defense. Magistrate Judge Green denied the motion, and the Sixth Circuit affirmed in a split, published opinion.

"A threat to shoot a person because of her protected speech is an adverse action sufficient to support a First Amendment retaliation claim," the majority explained. The Sixth Circuit's decision in *Zilich v. Longo*, 34 F.3d 359 (6th Cir. 1994), put the Commissioner on notice that he could not brandish a firearm in response to a citizen's request to condemn violence. Rejecting the Commissioner's argument that wielding the rifle was itself protected speech, the majority reasoned that retaliation for the exercise of a constitutionally protected right is actionable under § 1983 even if the action could be proper in a different context. Accordingly, the majority affirmed the denial of the Commissioner's motion to dismiss. Chief Judge Sutton dissented; in his view, the plaintiff had not shown it was "beyond debate" that the Commissioner's conduct was unconstitutional given the lack of caselaw supporting this kind of claim in this precise context.

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Marcelyn A. Stepanski of Rosati Schultz Joppich & Amtsbuechler, PC represented the Commissioner. Blake K. Ringsmuth of Ringsmuth Wuori, PLLC represented the citizen.

Clark v. A&L Homecare & Training Ctr., LLC, 68 F.4th 1003 (6th Cir. 2023)

For decades, district courts across the country—including in the Sixth Circuit—have used a fairly lenient standard for facilitating notice of a Fair Labor Standards Act ("FLSA") action to potential plaintiffs. Not anymore, said the Sixth Circuit in *Clark*.

The FLSA allows employees to sue for alleged labor violations on behalf of themselves and other "similarly situated" employees. But neither the Act nor U.S. Supreme Court precedent has clarified the showing of similarity that FLSA plaintiffs must make for the district court to send notice of the action to other employees as potential plaintiffs. Most courts have adopted a two-step approach, under which the court may facilitate notice to other employees upon a "modest factual showing" that they are similarly situated to the original plaintiffs. The Sixth Circuit, weighing in for the first time in this putative collective wage action, rejected this approach in a split, published opinion.

The majority held that, for a district court to facilitate notice of an FLSA suit to other employees, the plaintiffs must show a "strong likelihood" that those employees are similarly situated to the plaintiffs themselves. In doing so, the majority drew from the preliminary injunction standard, noting that a district court's determination to facilitate notice in an FLSA suit is analogous to a court's decision whether to grant a preliminary injunction. The 'strong likelihood' standard strikes the appropriate balance and is familiar to district courts, the majority reasoned. Recognizing the FLSA's two-year limitations period, the *Clark* majority cautioned that if plaintiffs move for court-approved notice to other employees, "the court should waste no time in adjudicating the motion." Judge White dissented from the majority's new standard because it could potentially undercut the FLSA's broad remedial goals and the district courts' roles as case managers.

M. Scott McIntyre and Gregory V. Mersol of Baker & Hostetler LLP represented the employers. Gregory R. Mansell, Carrie J. Dyer, and Rhiannon M. Herbert of Mansell Law represented the employees.

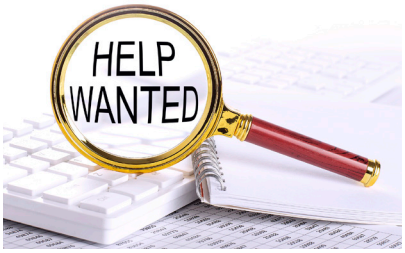
Honorable mention for most interesting opening line of an opinion:

"Consumed by a toxic mixture of mental illness and drug addiction, Hunter Loos stabbed his mother to death, drove her body to a nearby trail, doused it with gasoline, and set her body on fire." *United States v. Loos*, 66 F.4th 620, 621 (6th Cir. 2023).

(Runner up [if you don't like *Loos*]: "Plaintiffs are adherents to Christian Identity, a religion that is 'explicitly racist.'" *Fox v. Washington*, No. 21-1694, 2023 WL 4175228, at *1 (6th Cir. June 26, 2023).)

***Ashley Yuill** focuses on litigation and dispute resolution, including appeals, at Warner Norcross + Judd LLP.*

Help Wanted—Pro Bono Trial Attorneys for Prisoner Civil Rights Cases



Each year, members of our chapter represent prison inmates whose civil rights claims have survived summary judgment and are headed to trial. The district court is again looking for attorneys to accept pro bono appointments in this worthwhile program. The Western District's prisoner civil rights pro bono program presents an excellent opportunity for trial work, without lengthy discovery. We encourage our members—and especially our young lawyers, for whom trial experience can be hard to find—to participate. The link to the Court's Pro Bono Plan is: https://www.miwd.uscourts.gov/sites/miwd/files/Pro%20Bono%20Guidelines.pdf.

If you would like to learn more or volunteer, please email stephanie_carpenter@miwd.uscourts.gov, and either Stephanie Carpenter or Judge Ray Kent can tell you about the process.

Upcoming Events

September 6-8	Sixth Circuit Judicial Conference in Cleveland, Ohio
September 20	POWER Act Program
October 2 (tentative)	Mixer with E.D. Mich. FBA chapter
October 12	Annual Meeting with Sixth Circuit Judge Joan Larsen