

# ON THE MERITS

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Vipal J. Patel  
President Dayton Chapter,  
Federal Bar Association

## **FIRST CHAIR: PRESIDENT'S MESSAGE**

BY: VIPAL J. PATEL

Dear FBA Dayton Chapter,

It was with great humility and honor that I assumed the role as Chapter President. As I stated after my swearing-in at the Annual Meeting this past October, this is the most respectful and cordial bar in which I have ever practiced. The aim of the Dayton Chapter of the Federal Bar Association is to keep it that way. We are fortunate to practice our profession in a relatively small community, where practitioners simply cannot afford to be anything less than civil towards each other. We work together, sometimes as advocates for opposing parties, but we also shop, dine, entertain, educate, worship, and raise our families together. Our profession may lead us to the same office buildings and courtrooms, but our profession *in this small and close-knit community* may also lead us to same grocery aisle, soccer field, and place of worship.

Civility for us is therefore a must, not only in the “avoiding mutually assured destruction” sense, but also because it is simply the right thing to do. Civility cannot be legislatively created, and as the Judges of our District expressed in their Introductory Statement on Civility to the local rules for the United States District Court for the Southern District of Ohio, the most appropriate manner in which to foster civility is through emphasis of the ideals behind it, such as common courtesy, respect for the profession, respect for the legal system, and alternate dispute resolution and legal reform, as outlined in the Judges’ Introductory Statement. The emphasis has paid off, as the Dayton-area federal bar embodies these ideals, and I am thankful for it. This is where the FBA Dayton Chapter comes in. We can continue to emphasize these ideals, encourage incorporating the ideals into everyday practice, and foster their development. We have served, and will continue to serve, as a vehicle to bring practitioners together, promote civility, and enhance the practice of federal law. Continuing with this tradition, look for even more opportunities – CLE and social alike – to come together as federal practitioners in the coming year.

As I said, how fortunate am I to practice in this community. And, how honored am I now to serve as this Chapter’s President. I look forward to the coming year! With warm regards, -- Vipal Patel\*

\*Vipal is the First Assistant United States Attorney for the U.S. Attorney’s Office for the Southern District of Ohio. His membership and service in the FBA is, however, in his personal capacity.

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**2018 DAYTON CHAPTER ANNUAL MEETING**

BY: TIFFANY R. AKERS

On October 24, 2018, the Dayton Chapter of the Federal Bar Association hosted its Annual Meeting and Luncheon at the Steam Plant in downtown Dayton. Mr. Vipal Patel served as the master of ceremonies and was sworn in as the new Chapter President. The event was well attended with many local practitioners and judges.

Honorable Edmund A. Sargus, Jr., Chief Judge of the United States District Court for the Southern District of Ohio was the Keynote Speaker for the event. Chief Judge Sargus spoke on accomplishments in the Southern District of Ohio over the past year and shared his encouragement for the upcoming year. Following his presentation, Chief Judge Sargus was presented with a plaque in appreciation for his service to the bench and bar, as well as his gracious leadership within the Federal Bar Association.



*Ms. Tiffany R. Akers,  
Air Force Materiel Command Law Office*

Following the Keynote Address, the Dayton Chapter recognized three outstanding members for their contributions to the Dayton Chapter of the FBA. First, Ms. Christine M. Haaker was presented with the *FBA Dayton Chapter Federal Service Award*, for her dedication and commitment to serving the Federal Government. Next, Mr. Richard W. Nagel was presented the *Mona Guerrier Public Service Award*, for his dedication and commitment to public service. Last, Mr Bill C. Wells was presented the *Dayton Chapter Outstanding Member Contribution Award*, for his dedication and commitment to the success and continued growth of the Dayton Chapter of the Federal Bar Association.



*Honorable Chief Justice Sargus administering Oath of Office to incoming Dayton Chapter Officers*

The Annual Meeting concluded with the Honorable Edmund Sargus administering the Oath of Office to incoming Chapter President, Mr. Vipal Patel, and the Dayton Chapter's Officers for the upcoming year. The meeting and luncheon adjourned with applause in celebration of another successful year.



*Honorable Chief Justice Sargus giving Keynote Address*



*Immediate Past President, Ms. Erin Rhinehart, passing the torch of Chapter President to Mr. Vipal Patel*



*Chapter President, Vipal Patel, presenting Mr. Richard Nagel with the Mona Guerrier Public Service Award*

***SWEET HOME ALABAMA AND THE ADVERSE INFERENCE***

BY: BILL C. WELLS, U.S. AIR FORCE



*Bill C. Wells,  
Air Force Materiel Command Law Office*

Mix together rock and roll history, money and electronic discovery and you get Ronnie Van Zant, Inc. v. Pyle, 270 F.Supp.3d 656, (S.D.N.Y, 2017). The case is from the Southern District of New York in 2017, but the events behind it began in Jacksonville Florida, in the 1960's when some friends from high school formed a rock and roll band. Eventually they settled on the name Lynyrd Skynyrd, a variation of the name of a gym teacher who had given them a hard time about having long hair in high school. Lynyrd Skynyrd became a wildly popular southern rock band, selling millions of albums and writing classic songs such as "Sweet Home Alabama" and "Free Bird." "Remembering Lynyrd Skynyrd's Deadly 1977 Plane Crash," Jordan Runtagh, Rolling Stone, Oct. 20, 2017.

The well-known hazards of life on the road for a rock and roll band included alcohol, drugs and STDs, but added to those should be travel itself, first in cars and overloaded vans and then if the band is successful, airplanes. By 1977, Lynyrd Skynyrd was traveling by chartered planes, but the aircrafts were a long way from first class. On October 20, 1977, the 30-year-old Convair 240 the band had chartered crashed near Gillsburg, Mississippi, killing 3 members of the band and 4 others including both pilots. Everyone else on board was badly injured.

In the aftermath of the crash, two of the surviving band members and Van Zant's widow, now Judy Van Zant Jenness ("Jenness"), entered into what has since been termed a "blood oath," under which the three of them decided that no one would ever perform as Lynyrd Skynyrd again. For ten years, the former band members performed with other bands and under other band names, but there was too much money at stake not to try and exploit the name of Lynyrd Skynyrd and in 1987, the band's surviving members reunited for a tribute tour. This of course resulted in a lawsuit, which was eventually settled with a consent order. Grondin et ano. v. Rossington et al., 690 F.Supp. 200, (S.D.N.Y, 1988). That consent order set forth, among many things, restrictions as to how the parties could use the name Lynyrd Skynyrd, the names, images and likeness of deceased band members or the history of Lynyrd Skynyrd.

In 2017 Artemis Pyle, one of the parties to the consent order signed a contract with Cleopatra Entertainment LLC to make a film about the 1977 airplane crash. Cleopatra then hired Jared Cohn, a director and screenwriter, to work on writing and directing the proposed film. Shortly after this, other parties to the consent order sued Pyle and Cleopatra alleging that the film was in violation of the order.

One of the issues in the case was whether the Plaintiffs were entitled to an adverse inference because the failure to preserve the text messages between Cohn and Pyle amounted to spoliation. These messages were lost when Cohn switched phones in May 2017. Spoliation is "the destruction or significant alteration of evidence, or the failure to preserve property for another's use as evidence in pending or reasonably foreseeable litigation." West v. Goodyear Tire & Rubber Co., 167 F.3d 776, 779 (2d Cir. 1999).

Federal Rule of Civil Procedure 37(e)(1) permits a court to sanction a party for spoliation "[i]f electronically stored information that should have been preserved in the anticipation or conduct of litigation is lost because a party failed to take reasonable steps to preserve it, and it cannot be restored or replaced through additional discovery." Where the party that failed to preserve the electronically stored information ("ESI") has "acted with the intent to deprive another party of the information's use in the litigation," the Court may "instruct the jury that it may or must presume the information was unfavorable to the party." Fed. R. Civ. P. 37(e)(2). In determining this, the court may consider whether a party acted willfully, negligently, or in bad faith; and the prejudice suffered by the party seeking the discovery. John Bo Hull, Inc. v. Waterbury Petroleum Prods., Inc., 845 F.2d 1172, 1176 (2d Cir. 1988). While the Pyle case was tried to a judge alone, the adverse inference had the effect of lessening the plaintiff's burden of proof.

*(continued on page 5)*



Ryan Boos  
Law Student, University of Dayton  
School of Law

### ***DRONE'T TREAD ON ME: HOBBY DRONE USE***

BY: RYAN BOOS, 3<sup>RD</sup> YEAR LAW STUDENT, UNIVERSITY OF DAYTON SCHOOL OF LAW

“Bzzzzzz”, stepping out of the shower you hear an annoying buzzing noise coming from somewhere outside your house. Interested in seeing whether your neighbor has chosen to weed-whack their lawn again at 7am, you peer out your un-curtained second story window. To your shock, hovering menacingly in the distance is a small drone. Noticing that you saw it, the drone flies off never to be seen again. So, what can you do to protect yourself from marauding drone hobbyists in search of “interesting” things to look at?

Unfortunately, as the access to hobby drones with video and picture capabilities become more ubiquitous, this type of scenario is occurring more often. The answer to what a private citizen can do against these drones involves a maze of legal battles and regulations.

On one hand, the Federal Aviation Administration (FAA) is supposed to regulate everything aeronautical. On the other hand, small misdemeanors, such as trespass, fall within State purview.

The first approach one could take is to bring the infraction up in Federal Court. In 2012, the FAA passed the “FAA Modernization and Reform Act” which was supposed to bring the FAA regulations and guidelines in line with modern innovations such as drones. The Act does set some limits on non-commercial drone use such as a 400 foot maximum flight height, flight only during daylight and in line-of-sight, and no operation within 5 miles of an airport.

While these regulations do set some important guidelines for drone flight, they are virtually silent on privacy matters concerning drone use. There is nothing in the Act restricting use of camera or video recording equipment or how close to residential housing drones are allowed to fly. This leaves a grey area where “legally” as long as you fly a drone under 400 feet during the day away from an airport, the operator is not violating federal law.

Due to the lack of federal guidance, States have adopted their own drone privacy provisions. Currently, over 41 States have enacted some sort of unmanned aircraft legislation. In California, it is a civil offense to use a drone to view someone on private property. Cal. Civ. Code § 1708.8. Additionally, in Texas, the use of an unmanned aircraft to capture an image of another over private property is a criminal misdemeanor. Tex. Gov't Code § 423.003. This has created a hodge-podge of different state regulations concerning how drone users are allowed to fly their devices.

The final approach, while not advisable, highlights the need for more federal legislation on the issue of drone privacy. The case revolves around William Merideth who shot a drone out of the sky with a shotgun when it was purportedly taking pictures of his daughters in the backyard. John Boggs sued Merideth for destruction of his drone in Federal Court under the FAA regulations. The judge dismissed the case without discussing the merits because he deemed it a state issue, not a federal one. While technically a win for the shotgun wielding vigilante, this case shows that the federal government is still reticent to handle these sorts of high-tech privacy cases.

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### ***SOLACE SUCCESS STORY***

On October 15, 2018, a SOLACE request was circulated on behalf of a fellow attorney concerning insurance coverage for his father who had significant hospitalization issues. Within 45 minutes of the request, the Regional VP from Humana reached out and completely resolved the attorney's issues. This is just one example of the power of the FBA SOLACE program. The FBA's SOLACE initiative is open to all FBA members and those related to them within the legal community—judges, lawyers, court personnel, paralegals, legal secretaries and their families—not just lawyers. If you would like to submit a SOLACE request, there is an electronic form on the FBA SOLACE website. No request is too big or too small.



***(SWEET HOME ALABAMA AND THE ADVERSE INFERENCE, CONTINUED FROM PAGE 3)***

In opposing the request for an adverse inference, Cleopatra argued that it could not be sanctioned for the actions of Cohn in failing to preserve the text messages because Cohn was not a party to the lawsuit and Cleopatra did not have control over him or his phone. However, the court found that the "concept of `control' has been construed broadly." The court cited In re NTL, Inc. Sec. Litig., 244 F.R.D. 179, 195 & n.19 (S.D.N.Y. 2007) (quoting Marc Rich & Co. v. United States, 707 F.2d 663, 667 (2d Cir. 1983) where the court had ruled that documents are considered to be under a party's control "if the party has the practical ability to obtain the documents from another, irrespective of his legal entitlement." Finding that Cleopatra had "the practical ability" to have preserved the messages on Cohn's phone, the court rejected Cleopatra's argument.

In arriving at this conclusion, the court considered that while Cohn is a non-party, his text messages were, practically speaking, under Cleopatra's control. It also found that Cohn was contracted by Cleopatra to work on the Film, and that he worked closely with Cleopatra for over a year. It also found that over the course of the litigation, Cohn had participated by providing documents and being deposed. Finally, and perhaps most importantly, the court found that Cohn also had a financial interest in the outcome of this litigation, since he would be entitled to a percentage of the film's net receipts, and these would be zero should the plaintiffs prevail in their request for an injunction.

As to the question of intent, the court put a great deal of significance on the fact that Cohn successfully transferred his pictures to the new phone but not the text messages. The opinion does not say if no explanation for this was offered, or if one was offered but found unconvincing. The court found this to be evidence of "the kind of deliberate behavior that sanctions are intended to prevent" and weighed it heavily in favor of an adverse inference. The court cited and quoted West v. Goodyear Tire & Rubber Co., 167 F.3d 776, 779 (2d Cir. 1999) where the 2<sup>nd</sup> Circuit had held that "sanction[s] should be designed to: (1) deter parties from engaging in spoliation; (2) place the risk of an erroneous judgment on the party who wrongfully created the risk; and (3) restore the prejudiced party to the same position he would have been in absent the wrongful destruction of evidence by the opposing party."

Cleopatra's defense to the plaintiff's request for an injunction was that they were not bound by the consent order, and if they were that they had not violated it because the film was based on publicly known information. The court found that Cleopatra was bound by the consent order because of its relationship with Pyle. It then found that the exact nature of the collaboration between Pyle and Cohn (who was hired by Cleopatra to write and produce the film) was important to the second question, and that the text messages between Cohn and Pyle were important to understanding that relationship. Having found that Cleopatra could have preserved these messages but had not, the court applied the adverse inference against Cleopatra and issued an injunction against public release of the film. While that injunction was later reversed on appeal, Van Zant v. Cleopatra Records, No. 17-2849, (2<sup>nd</sup> Cir., Oct 10, 2018) that holding did not deal with the matter of the adverse inference.

***THAT'S CONFIDENTIAL: SUPREME COURT TO CONSIDER FOIA EXEMPTION FOR CONFIDENTIAL BUSINESS INFORMATION***

BY: CHRISTOPHER C. HOLLON



*Christopher C. Hollon  
Faruki Ireland Cox Rhinehart &  
Dusing PLL*

The U.S. Supreme Court recently agreed to hear a case that could significantly affect access to business information provided to the federal government that is otherwise kept confidential: Food Mktg. Inst. v. Argus Leader Media, No. 18-481. It would mark the first time that the Court has interpreted Exemption 4 of the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552(b)(4), which shields from public disclosure "matters that are . . . trade secrets and commercial or financial information obtained from a person and privileged or confidential." 5 U.S.C. § 552(b)(4) (emphasis added).

**(continued on page 9)**



***JUNE 2018 CRIMINAL JUSTICE ACT eVOUCHER TRAINING***

BY: RICHARD W. NAGEL, CLERK OF COURT  
U.S. DISTRICT COURT FOR THE SOUTHERN DISTRICT OF OHIO

On the morning of Tuesday, June 19, 2018, the Clerk's Office of the U.S. District Court for the Southern District of Ohio held an Electronic Voucher (eVoucher) Criminal Justice Act (CJA) Training CLE for CJA panel attorneys and their respective staff. The CJA panel attorneys and their staff provide a valuable service by furnishing representation in federal court for any person financially unable to obtain adequate representation. The eVoucher system is an automated solution for the paper-based Criminal Justice Act (CJA) vouchering system to prepare, submit, review, and certify CJA vouchers for payment.

Judge Walter H. Rice, Judge Thomas M. Rose and Judge Sharon L. Ovington opened the training by thanking the CJA panel attorneys and their staff for the work that they perform in representing their clients and also for taking their time to attend the training.

Also attending were Judge Michael R. Merz and Judge Michael J. Newman. Following remarks by Clerk of Court Richard W. Nagel, Chief Deputy Clerk Julie A. Cobble, Financial Administrator Mike Socha and CJA Specialist Kristen Keppler discussed the eVoucher process, best practices for submitting vouchers and reimbursable and non-reimbursable expenses. A total of eight attorneys attended the training. They will be obtaining one hour of continuing legal education as approved by the Supreme Court of Ohio for their attendance at this training.

***WILLS FOR VETERANS***

BY: HON. MICHAEL J. NEWMAN, U.S. MAGISTRATE JUDGE,  
U.S. DISTRICT COURT FOR THE SOUTHERN DISTRICT OF OHIO

The Dayton Bar Association and Dayton Chapter of the Federal Bar Association teamed together in honor of Veterans Day 2018 at the Dayton Veterans Affairs Medical Center in a "Wills for Veterans" celebration. Wills and related power of attorney documents were written for 68 military veterans and their spouses in an all-day event on Saturday, November 10th. More than 30 attorneys, in-house counsel, and law students volunteered their time to give back to the veterans who have served our country with honor and sacrifice.



*Left to right are Chris Albrektson from the Dayton Bar Association; Judge Erik Blaine from the Montgomery County, Ohio Common Pleas Court; Dayton V.A. Medical Center Director Jill Dietrich, J.D., M.B.A.; Dayton V.A. Medical Center Deputy Chief of Police, Charles Barnes; and former national FBA president, the Hon. Michael Newman of the United States District Court for the Southern District of Ohio, at Dayton.*

**SAVE THE DATE**

***The Dayton Chapter of the FBA will be hosting a CLE on the First Step Act and Current Issues in Federal Sentencing on May 20, 2019, at the University of Dayton School of Law. This will be a one-day seminar, free to FBA members. More information to come.***

***DON'T GET BIT BY THE BITCOIN***

BY: BILL C. WELLS, U.S. AIR FORCE



*Bill C. Wells,  
Air Force Materiel Command Law Office*

Cybercurrencies, of which Bitcoin is the most well-known, have been in the news a lot of late, but what exactly are they? That question itself is really multiple questions. According to Google, Bitcoin is “a type of digital currency in which encryption techniques are used to regulate the generation of units of currency and verify the transfer of funds, operating independently of a central bank.” The definition goes on to add that “bitcoin has become a hot commodity among speculators” [

[https://www.google.com/search?source=hp&ei=CNYyXO6DHcPSjwTWs4OYAQ&q=what+is+bitcoin&oq=what+is+bitcop&gs\\_l=psy-ab.1.0.0i10l10.2013.5819..8755...1.0..1.188.1713.2j13.....0....1..gws-wiz.....6..0j35i39j0i131.Tisi5lDJQ\\_s](https://www.google.com/search?source=hp&ei=CNYyXO6DHcPSjwTWs4OYAQ&q=what+is+bitcoin&oq=what+is+bitcop&gs_l=psy-ab.1.0.0i10l10.2013.5819..8755...1.0..1.188.1713.2j13.....0....1..gws-wiz.....6..0j35i39j0i131.Tisi5lDJQ_s) , last visited Jan. 06 at 11:35 p.m.].

The last sentence about Bitcoin and other cyber currencies having become a “hot commodity among speculators,” besides potentially being out of date [See, e.g. “Bitcoin Price Suffers Worst Monthly Losing Streak in 7 Years,” Omkar Godbole, Jan 02, 2019, <https://www.coindesk.com/bitcoin-price-suffers-worst-monthly-losing-streak-in-7-years>, last visited Jan 06, 2019 at 11:45 p.m.], highlights a key question about what the function of cybercurrencies is. Are they “currency,” a means of exchange or are they an investment or speculative financial product? While it may have originally been intended as a medium of exchange, and may actually serve that role in the black economy of drug deals and money laundering [“The History of Bitcoin,” Matthew Cochrane, Apr. 02, 2018, <https://www.fool.com/investing/2018/04/02/the-history-of-bitcoin.aspx> , last visited Jan. 06, 2019 at 11:52 p.m.], cybercurrencies in general and Bitcoin in particular rapidly came to be perceived as a speculative asset.

This matters because the financial disclosure for conflict of interest screening purposes in both the private and governmental sectors assets held “for the purpose of investment or the production of income” must generally be reported, while bank deposits, if they are reportable at all, are reported differently.

In I.R.S. Notice 2014-21, I.R.B. 2014-16 (Apr. 14, 2014) the Service determined that virtual currency is “a digital representation of value that functions as a medium of exchange, a unit of account, and/or a store of value.” Please note that virtual currency is a term used synonymously with terms such as “cryptocurrency, cyber currency” and “digital currency.” As a result of this definition the IRS treats virtual currency as property (and not a real currency) for U.S. federal tax purposes.

Likewise, in a June 18, 2018 Legal Advisory [LA-18-06] the United States Office of Government Ethics (OGE) determined that virtual currency is “property held . . . for investment or the production of income” for purposes of public and confidential financial disclosure, pursuant to the Ethics in Government Act (EIGA). Though each situation will of course have to be determined individually, it is likely that state and local ethics bodies will adopt similar definitions. It is unknown what effect, if any, Ohio’s decision to become the first state to allow taxes to be paid with Bitcoin will have on this [“Ohio is the first state to accept Bitcoin tax payments,” Emily Bamforth, and Andrew J. Tobias, Cleveland.Com, <https://www.cleveland.com/news/2018/11/ohio-is-the-first-state-to-accept-bitcoin-tax-payments.html> , last visited Jan. 07, 12:15 a.m.].

**DAYTON CHAPTER BOARD MEETING**

*The Board of the Dayton Chapter of the FBA meets at noon on the second Monday of every month in Judge Newman’s Courtroom, unless otherwise indicated. All FBA members are invited and encouraged to attend!*

**FEDERAL COURT PRACTICE SEMINAR**

BY: TIFFANY R. AKERS, U.S. AIR FORCE

On December 11, 2018, the United States District Court, Southern District of Ohio, hosted its biannual Dayton Federal Court Practice Seminar. Attendance at this Seminar is a requirement for any attorney wishing to become admitted to the bar of the Southern District of Ohio.

The seminar kicked off with remarks by the President of the Dayton Chapter of the Federal Bar Association, Mr. Vipal Patel. Following his remarks, a judiciary panel provided, "A View from the Bench," a discussion of the practices and procedures relevant to cases litigated in federal court, with a particular emphasis on professionalism. The panel consisted of U.S. District Court Judges Walter H. Rice and Thomas M. Rose and U.S. Magistrate Judges Sharon L. Ovington, Michael J. Newman and Michael R. Merz. The Seminar was then turned over to U.S. Bankruptcy Judges Guy R. Humphries, and Beth A. Buchanan, to discuss jurisdiction, venue, rules, and procedures for practicing before the U.S. Bankruptcy Court for the Southern District of Ohio.

After a short break for refreshments and networking, Mr. Jeffrey T. Cox of Faruki Ireland Cox Rhinehart & Dusing, PLL, talked to participants about the details and procedural considerations involved in removing a case to federal court. The final presentation, "Practice in the Southern District of Ohio," was given by U.S. Magistrate Judge Newman and his clerk, Mr. Michael N. Rhinehart. The session highlighted the Southern District of Ohio Local Rules, Standing Orders and General Orders.

Following the Seminar, the twenty-nine attendees were sworn in to practice in the Southern District of Ohio. The next Federal Practice Seminar in Dayton will be hosted on the second Tuesday in May. Please visit, <https://www.ohsd.uscourts.gov/attorney-admission>, for an update on when the Court will begin accepting applications for the Seminar and admission.

**JUDICIARY CIVICS PROGRAM CONTINUES TO THRIVE**

On Friday, February 22, 2019, a group of approximately 100 Fairmont High School students visited the courthouse on a field trip, as part of the Judiciary's Civics program, which the FBA Dayton chapter supports. Judges of the Southern District of Ohio spoke to the students, providing them insight into the judicial system and the Judicial branch of government.

Additional speakers included representatives of the United States Attorney's Office and United States Marshals Service, including members of the FBA Dayton Chapter. Since the beginning of 2017, approximately 3,000 students have either visited the courthouse, or been visited by members of the Judiciary and FBA, as part of this nationally-recognized Civics program.



**DAYTON FBA  
COMMITTEE MEMBER SPOTLIGHT**

***Bridget Findley***

*Bridget Findley is the Chief Civil Counsel for the City of Dayton, Ohio. Her practice focuses on areas of municipal law including economic development, real estate, utility issues, contracts and other civil matters. She volunteers for multiple organizations in the Dayton area. She is the Vice President of the Dayton Federal Bar Association and the Chapter's Mentorship coordinator. She is active in the Military Spouse Juris Doctorate Network (MSJDN) advocating for bar admission and licensing accommodations on behalf of military spouse attorneys across the country. In 2014, Mrs. Findley was awarded the Mona Guerrier Public Service Award by the Dayton FBA. She was awarded Attorney of the Year for the City of Dayton Law Department in 2016 and the Joseph T. Cline Award for public and community service in 2017.*

***(THAT’S CONFIDENTIAL: SUPREME COURT TO CONSIDER FOIA EXEMPTION FOR CONFIDENTIAL BUSINESS INFORMATION, CONTINUED FROM PAGE 6)***

The underlying dispute arose when a South Dakota newspaper requested various data concerning the Supplemental Nutrition Assistance Program (“SNAP”), formerly known as the food stamp program, from the U.S. Department of Agriculture (“USDA”). While the USDA releases monthly SNAP usage data on national, state, and congressional-district bases, it refused to provide the newspaper with usage data on an individual-store basis under Exemption 4. The newspaper sued the agency under FOIA and prevailed at trial.

The Eighth Circuit affirmed, ruling that the USDA had failed to show that the data were “confidential” under Exemption 4. The court applied a test first articulated in Nat’l Parks & Conservation Ass’n v. Morton, 498 F.2d 765 (D.C. Cir. 1974), under which the agency had to show that “releasing the data was likely (1) to impair the Government’s ability to obtain necessary information in the future; or (2) to cause substantial harm to the competitive position of the person from whom the information was obtained.” Argus Leader Media v. U.S. Dep’t of Agric., 889 F.3d 914, 915 (8th Cir. 2018) (emphasis added) (internal quotation marks omitted). The court concluded that while store-level SNAP data is closely-guarded by retailers, the evidence did not satisfy National Parks:



“The trial evidence showed that the grocery industry is highly competitive, but is already rich with publically-available data that market participants (and prospective market entrants) use to model their competitors’ sales. The evidence shows that releasing the contested data is likely to make these statistical models marginally more accurate. But the evidence does not support a finding that this marginal improvement in accuracy is likely to cause substantial competitive harm. . . . A likelihood of commercial usefulness – without more – is not the same as a likelihood of substantial competitive harm.”

*Id.* at 916-917 (emphasis in original). The Eighth Circuit refused to follow the dictionary definition of “confidential” (i.e., “secret”), fearing that such a test “would swallow FOIA nearly whole,” and contradict the well-established rule that “FOIA exemptions must be narrowly construed.” *Id.* at 916 n. 4 (internal quotation marks omitted). Accord: Milner v. Dep’t of the Navy, 562 U.S. 562, 565 (2011).

This fight over the meaning of “confidential” in § 552(b)(4) has now reached the Supreme Court. In seeking review, the petitioner (an association of retail grocery stores) argued that the “substantial harm” test is “atextual,” and relies on a “selective reading of legislative history” instead of the plain meaning of “confidential.” Petition for a Writ of Certiorari, Food Mktg. Inst. v. Argus Leader Media, No. 18-481 (2018), pp. 3, 8. In response, the newspaper argued that the Court should not “blindly interpret statutes based on bare dictionary definitions divorced from context,” and that the petitioner’s interpretation of the term is “overly broad, unworkable, and inconsistent with the structure and purposes of FOIA.” Brief in Opposition, Food Mktg. Inst. v. Argus Leader Media, No. 18-481 (2018), pp. 12, 33.

The Supreme Court granted certiorari on January 11, 2019, and will hear the case in the coming months. If the Court rejects the “substantial harm” test of National Parks and instead applies a dictionary definition of “confidential,” then the scope of Exemption 4 could expand dramatically. Whatever the result, a decision should provide important insight into the Justices’ theories of statutory interpretation under FOIA, and how they balance the interests of companies who must provide sensitive information to federal agencies – by law or business necessity – against the public’s right to monitor the business of their government.

**ABOUT THE DAYTON CHAPTER**

*The mission of the Dayton Chapter of the FBA is to advance the profession and science of jurisprudence and to promote the welfare, interests, education, and professional growth and development of the members of the Federal legal profession.*

**EXECUTIVE COMMITTEE**

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