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Raising the Bar to New Heights

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In This Issue:

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Message from the Chapter President

Chartered in 1945, the Massachusetts Chapter of the Federal Bar Association serves the entire state of Massachusetts. Its 200 members include private practitioners, federal prosecutors, counsel for federal, state and local governments and governmental agencies, academics and judges.

I am pleased to report that the Chapter is rededicating itself to meeting the needs of the federal practitioners in our area by sponsoring CLE programs, creating a newsletter and holding social events. Most exciting is the emergence of a group of Young Lawyers who are spearheading activities designed for those new to federal practice. If you have not already done so, I invite you to become part of the resurgence of this organization by renewing your membership and participating in our activities.

On March 10, the Massachusetts Chapter, along with The Center for Advanced Legal Studies, The Macaronis Institute for Trial & Appellate Advocacy, Suffolk University Law School and Flaschner Judicial Institute, sponsored a continuing legal education program entitled "Federal Sentencing: What Now?" A distinguished panel comprised of the Honorable Paul Barbadoro, Chief Judge of the United States District Court for the District of New Hampshire; the Honorable Nancy Gertner of the United States District Court for the District of Massachusetts; and the Honorable William G. Young, Chief Judge of the United States District Court for the District of Massachusetts, moderated by Professor Diane Juliar of Suffolk University Law School, provided their interpretations of *United States v. Booker* and recommended changes for lawyers to make to their practices as a result of that decision.

Also in March the Chapter hosted a well-attended reception honoring Magistrate Judge Lawrence P. Cohen, who had retired from the bench after nearly 30 years of service to the District of Massa-

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New Standing Order for Inexperienced Attorneys

On May 10, 2005, Judge F. Dennis Saylor and Chief Magistrate Judge Charles B. Swartwood issued a new Standing Order regarding courtroom opportunities for relatively inexperienced attorneys, particularly those who practice at large firms. The intent of the Standing Order is to counter the trend of requiring the appearance of "lead" counsel in many court proceedings. In the order, the judges "strongly encourage the participation of relatively inexperienced attorneys in all court proceedings." For more information, go to http://www.mad.uscourts.gov/Orders/StandOrd_CrtrmOpps.pdf

A Message from the Chapter President - *Continued from page 1*

chusetts. Chief Magistrate Judge Charles B. Swartwood, III was the master of ceremonies. The speakers and presenters included William F. Norman, Cape Cod Canal Park Manager, representing the U.S. Army Corps of Engineers; Paul F. Ware of Goodwin Procter LLP, who unveiled the official portrait of Magistrate Judge Cohen that will hang in the Courthouse; Chief Judge William G. Young; Magistrate Judge Cohen and me, representing our Chapter.

The Chapter is currently planning a reception at the John Joseph Moakley United States Courthouse in Boston to recognize the service of Chief Judge William G. Young who will be stepping down as Chief Judge of the District of Massachusetts at the end of the year. Save the date: November 16, 2005, from 5:30 p.m. to 7:30 p.m. Please check the Chapter's website at http://www.fedbar.org/massachusetts.html for more information as it becomes available.

On July 11, Younger Lawyers Daryl Andrews, Helen Litsas, Gina McCreadie and Matt Moschella initiated, organized and hosted a highly successful First Annual Summer Kick-Off Event for about 100 young lawyers and summer associates on Goulston & Storr's beautiful outdoor patio overlooking Boston Harbor and, most appropriately, the John Joseph Moakley United States Courthouse. The Honorable Patti B. Saris of the U.S. District Court for the District of Massachusetts was a huge hit when she addressed the enthusiastic group of

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Younger Lawyers Reception from left: Daryl Andrews, Matt Moschella, Neil McKittrick, Judge Patti B. Saris, Gina McCreadie and Helen Litsas.

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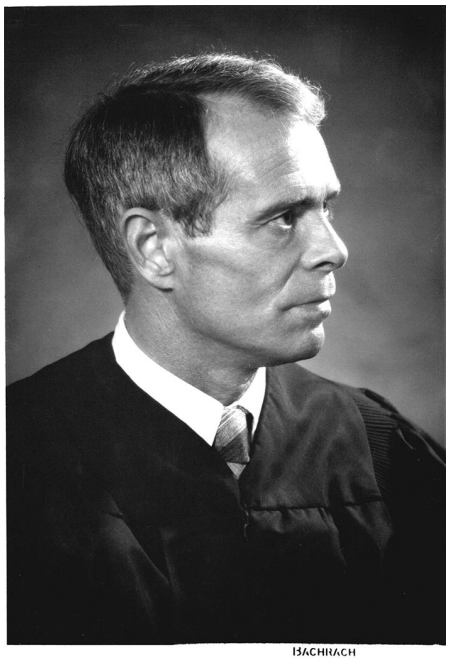
attendees. We thank Goulston & Storrs, Nixon Peabody LLP and Sherin and Lodgen LLP for their generosity in sponsoring this event. We extend special thanks to Sherin and Lodgen for donating a pair of highly coveted tickets to a game of the World Champion Boston Red Sox! Kudos to Daryl, Helen, Gina and Matt for their initiative and hard work. They are instilling new life into the Massachusetts Chapter. Anyone 36 years of age and under or anyone who has been admitted to practice for 3 years or less who would like to become involved in the activities of the new Younger Lawyers Division of the Massachusetts Chapter should contact Matt Moschella at (617) 646-2000 or mcmoschella@sherin.com.

Let's keep the momentum going!

Holly M. Polglase
President
Massachusetts Chapter

Magistrate Judge Lawrence P. Cohen



At a reception on March 3, 2005, the Massachusetts Chapter of the Federal Bar Association honored Magistrate Judge Lawrence P. Cohen, who had recently retired from the Bench of the United States District Court for the District of Massachusetts.

Born on December 12, 1939, in Schenectady, New York, Lawrence P. Cohen graduated from the University of Vermont in 1963 and received his law degree from the Albany Law School in 1966.

Judge Cohen began his legal career in Washington, D.C., where he worked as a trial lawyer at the United States Department of Justice from 1966 to 1969. Later in 1969, he became an Assistant Attorney General of the Commonwealth of Massachusetts under the Honorable Robert H. Quinn. From 1970 to 1976, Judge Cohen served as an Assistant United States Attorney and Chief of the Criminal Division under the following United States Attorneys: The Honorable Herbert F. Travers, Jr., The Honorable Joseph L. Tauro and The Honorable James Gabriel.

On June 14, 1976, the judges of the United States District Court for the District of Massachusetts appointed Judge Cohen a United States Magistrate. In 1990 he became a United States Magistrate Judge. From 1993 to 1995, Judge Cohen served as the Chief United States Magistrate Judge for the District of Massachusetts.

The *Zubulake* Decisions

by Sabrina DeFabritiis

A series of opinions by Judge Shira A. Scheindlin of the United States District Court for the Southern District of New York have significantly influenced the discovery of information held in electronic format. In its simplest form, *Zubulake v. UBS Warburg LLC* is a gender discrimination action. Laura Zubulake, an equities trader, sued her employer UBS Warburg LLC, UBS Warburg, and UBS AG (collectively, "UBS") under federal, state and city law for gender discrimination and illegal retaliation.[1] *Zubulake v. UBS Warburg LLC*, 217 F.R.D. 309, 311 (S.D.N.Y. 2003) (*Zubulake I*). It led to five opinions, commonly known as *Zubulake I* through *V*, regarding the discovery of electronic data, the obligations of the parties to the litigation, and the duty of counsel to communicate with clients regarding discovery.

Zubulake I and *III* focus on the scope and cost of discovery of electronic data. *Zubulake IV* focuses on the question "*when* does the duty to preserve attach, and *what* evidence must be preserved." *Zubulake V* identifies the roles of counsel and client in the preservation and production of electronically stored information.[2]

Zubulake I

In *Zubulake I*, the issues before the court were the extent to which inaccessible electronic data is discoverable, and who should pay for its production. *Zubulake v. UBS Warburg LLC*, 217 F.R.D. 309 (S.D.N.Y. 2003) (*Zubulake I*). When Zubulake served UBS with her first document request, the defense objected to a substantial portion of the requests, including "[a]ll documents concerning any communication by or between UBS employees concerning Plaintiff." *Zubulake I*, 217 F.R.D. at 312. The term "document" specifically "include[ed], without limitation, electronic or computerized data compilations." *Zubulake I*, 217 F.R.D. at 312.

With this factual context as its backdrop, the *Zubulake I* court analyzed the existing Federal Rules 26 through 37 which governed discovery in all civil actions. Under Federal Rule 34, a party may request discovery of any document, "including writings, drawings, graphs, charts, photographs, phone records, and other data compilations. . . ." Fed.R.Civ.P. 34(a). The "inclusive description" of the term "document" "accord[s] with changing technology." *Id.* at 316-17, citing Advisory Committee Note to Fed.R.Civ.P. 34. "It makes clear that Federal Rule 34 applies to electronics [sic] data compilations." Thus, "[e]lectronic documents are no less subject to disclosure than paper records." *Id.* at 317, citing *Rowe Entertainment, Inc. v. William Morris Agency, Inc.*, 205 F.R.D. 421, 428 (2002). "This is true not only of electronic documents that are currently in use, but also of documents that may have been deleted and now reside only on backup disks." *Id.* at 317 (internal citation omitted).

In accordance with its interpretation of the Federal Rules, the *Zubulake I* court held that "Zubulake is entitled to discovery of the requested e-mails so long as they are relevant to her claims, which they clearly are." *Id.* at 316. Faced with this situation, Judge Scheindlin found that most courts would engage in a cost shifting analysis. *Id.* at 317 (internal citation omitted). "[C]ost-shifting should be considered only when electronic discovery imposes an 'undue burden or expense' on the responding party." *Zubulake I*, 217 F.R.D. at 317 citing Fed. R. Civ. P. 26(c).

Judge Scheidlin found that "[b]y far, the most influential response to the problem of cost-shifting relating to the discovery of electronic data was given by United States Magistrate Judge James C. Francis IV of this district in *Rowe Entertainment, Inc. v. William Morris Agency, Inc.,* 205 F.R.D. 421 (2002). Judge Francis utilized an eight-factor test to determine whether discovery costs should be shifted. *Zubulake I*, 217 F.R.D. at 317, citing *Rowe,* 205 F.R.D. at 429. However, Judge Scheidlin reasoned that the "*Rowe* factors will generally favor cost shifting, [therefore, the] 8 Factor test was not enough." *Zubulake I*, 217 F.R.D. at 320. Accordingly, the *Zubulake I* court proposed a new seven-factor test based on modifications to the *Rowe* test. These factors include: (1) The extent to which the request is specifically tailored to discover relevant information; (2) The availability of such information from other sources; (3) The total cost of production, compared to the amount in controversy; (4) The total cost of production, compared to the resources available to each party; (5) The relative ability of each party to control costs and its incentive to do so; (6) The importance of the issues at stake in the litigation; and (7) The relative benefits to the parties of obtaining the information. *Id.* at 322. The *Zubulake I* court was very clear that the purpose of the test is not to add up the factors, rather

The *Zubulake* Decisions - *continued*

"[w]hen evaluating cost-shifting, the central question must be, does the request impose an 'undue burden or expense' on the responding party?" *Id.*

Further the court concluded that by simply "[r]equiring the responding party to restore and produce responsive documents from a small sample of backup tapes will [help in determining] the cost-shifting . . . When based on an actual sample, the marginal utility test will not be an exercise in speculation – there will be tangible evidence of what the backup tapes may have to offer." *Id.* at 323. Therefore, by requiring a sample restoration of backup tapes, the entire cost-shifting analysis can be grounded in fact rather than guesswork. *Id.*

Ultimately, the court reasoned that UBS was required "to produce *all* responsive e-mails that exist on its optical disks or on its active servers . . . at its own expense." *Id.* at 324.

Zubulake III

Approximately one year later, having had an opportunity to review the results of the sample restoration, Laura Zubulake moved for an order compelling UBS to produce all remaining backup e-mails at UBS's expense. *Zubulake v. UBS Warburg LLC*, 216 F.R.D. 280, 281 (S.D.N.Y. 2003) (*Zubulake III).* The question presented in *Zubulake III* is which party should pay for the costs incurred in restoring and producing these backup tapes. *Zubulake III*, 216 F.R.D. at 282.

In applying the seven factor analysis, the court found that factors 1 and 2 tip slightly against cost-shifting. *Id.* at 287. The court reasoned that "while the subject matter of some of those e-mails was addressed in other documents, these particular e-mails are only available from the backup tapes." *Id.* "The best that can be said is that Zubulake has demonstrated that the marginal utility is *potentially* high. All-in-all, because UBS bears the burden of proving that cost-shifting is warranted, the marginal utility test tips slightly against cost-shifting." *Id.* As to factor 3, the court found that, "[i]n an ordinary case, a responding party should not be required to pay for the restoration of inaccessible data if the cost of that restoration is significantly disproportionate to the value of the case. Assuming this to be a multi-million dollar case, the cost of restoration is surely not 'significantly disproportionate' to the projected value of this case. This factor weighs against cost-shifting." *Id.* at 288. Factor 4, similarly weighed against cost shifting, but it does not rule it out. *Id.* Factor 6 is neutral. *Id.* at 289. Finally, the court held that factor 7 weighed in favor of cost-shifting because "there can be no question that Zubulake stands to gain far more than does UBS out of this litigation." *Id.*

Ultimately the *Zubulake III* court concluded that "[b]ecause some of the factors cut against cost shifting, but only *slightly so* – in particular, the possibility that the continued production will produce valuable new information--some cost-shifting is appropriate in this case, although UBS should pay the majority of the costs." *Id.*[3]

Zubulake IV

Just a few months after the *Zubulake III* decision the parties again returned to court to "determine an appropriate penalty for the party that caused the loss and--the flip side--how to determine an appropriate remedy for the party injured by the loss." *Zubulake v. UBS Warburg LLC*, 220 F.R.D. 212, 214 (S.D.N.Y. 2003)(*Zubulake IV*). Pursuant to the court's July 24, 2003 order the parties began to restore relevant e-mails, "[i]n the restoration effort, the parties discovered that certain backup tapes [were] missing." *Zubulake IV*, 220 F.R.D. at 215. Accordingly, Zubulake sought "sanctions against UBS for its failure to preserve the missing backup tapes and deleted e-mails." *Id.* The *Zubulake IV* court was faced with the question, "*when* does the duty to preserve attach, and *what* evidence must be preserved?" *Id.* at 216. For the instant action, the court found that the "trigger date," the duty to preserve evidence arose, at the latest, on August 16, 2001, when Zubulake filed her EEOC charge. *Id.*[4]

"The next question is: What is the scope of the duty to preserve? Must a corporation, upon recognizing the threat of litigation, preserve every shred of paper, every e-mail or electronic document, and every backup tape? The answer is clearly, 'no'. Such a rule would cripple large corporations, like UBS, that are almost always involved in litigation. As a general rule, then, a party need not preserve all backup tapes even when it reasonably anticipates litigation." *Id.* at 217.

"The scope of a party's preservation obligation can be described as follows: Once a party reasonably an-

The *Zubulake* Decisions - *continued*

ticipates litigation, it must suspend its routine document retention/destruction policy and put in place a 'litigation hold' to ensure the preservation of relevant documents." *Id.* at 218. However, "if backup tapes are accessible (*i.e.,* actively used for information retrieval), then such tapes *would* likely be subject to the litigation hold."[5] *Id.* Of factual importance in this action is that "[i]n August 2001, UBS employees were instructed to maintain *active* electronic documents pertaining to Zubulake in separate files. UBS employees did not comply with these directives. Three backup tapes containing the e-mail files of [key employees] created after April 2001 were lost, despite the August 2002 directive to maintain those tapes." *Id.* at 218-219. UBS offered no explanation for why these tapes are missing. *Id.* at 219. Accordingly, the *Zubulake IV* court concluded that UBS had breached its duty to preserve the backup tapes at issue. *Id.* at 220.

Ultimately, the court concluded that "although UBS had a duty to preserve all of the backup tapes at issue, and destroyed them with the requisite culpability, Zubulake [could not] demonstrate that the lost evidence would have supported her claims. Under the circumstances, it would be inappropriate to give an adverse inference instruction to the jury." *Id.*

Zubulake V

In the fifth Zubulake decision Laura Zubulake again moved to sanction UBS for its failure to produce relevant information and for its tardy production of such material. *Zubulake v. UBS Warburg LLC*, 2004 WL 1620866, #1 (S.D.N.Y. July 20, 2004) (*Zubulake V*). Accordingly, the question presented in *Zubulake V* is "[d]id UBS fail to preserve and timely produce relevant information and, if so, did it act negligently, recklessly, or willfully?" *Zubulake V* at #1. The *Zubulake V* decision is focused on client and counsel's continuing obligation to preserve and produce relevant evidence.

Counsel's Duty to Monitor Compliance

The *Zubulake V* court found that "[a] party's discovery obligations do not end with the implementation of a 'litigation hold' – to the contrary, that's only the beginning. Counsel must oversee compliance with the litigation hold, monitoring the party's efforts to retain and produce the relevant documents." *Zubulake V* at #7. To accomplish these goals, "counsel must become fully familiar with her client's document retention policies, as well as the client's data retention architecture."[6] *Zubulake V* at #8. "To the extent that it may not be feasible for counsel to speak with every key player, given the size of a company or the scope of the lawsuit, counsel must be more creative." *Id.* "[I]t is *not* sufficient to notify all employees of a litigation hold and expect that the party will then retain and produce all relevant information. Counsel must take affirmative steps to monitor compliance so that all sources of discoverable information are identified and searched." *Id.*

Counsel's Continuing Duty to Ensure Preservation

"Once a party and counsel have identified all of the sources of potentially relevant information, they are under a duty to retain that information (as per *Zubulake IV*) and to produce information responsive to the opposing party's requests." *Id.*, citing Fed. R. Civ. P. 26. "In practice, therefore, the lawyer under a continuing burden must periodically recheck all interrogatories and canvass all new information." *Id.* at #9. "The *continuing* duty to supplement disclosures strongly suggests that parties also have a duty to make sure that discoverable information is not lost." *Id.*

In accordance with *Zubulake V* "counsel must issue a 'litigation hold' at the outset of litigation or whenever litigation is reasonably anticipated. The litigation hold should be periodically re-issued so that new employees are aware of it, and so that it is fresh in the minds of all employees." *Id.* Also, counsel should communicate directly with the 'key players' in the litigation and periodically reminded that the preservation duty is still in place. *Id.* "*Finally,* counsel should instruct all employees to produce electronic copies of their relevant active files" and counsel might be advised to take physical possession of backup tapes. *Id.* at #10.

Counsel's Failings

"In this case, counsel failed to properly oversee UBS in a number of important ways, both in terms of its duty to locate relevant information and its duty to preserve and timely produce that information." *Id.* at #11. "[W]hile UBS personnel deleted e-mails, copies of many

The *Zubulake* Decisions - *continued*

of these e-mails were lost or belatedly produced as a result of counsel's failures. *Id.* at #12. However, despite the court's critical review of counsels' performance it held that, "[a]t the end of the day . . . the duty to preserve and produce documents rests on the party.[7] *Id.*

Therefore, the *Zubulake V* court "conclude[d] that UBS acted willfully in destroying potentially relevant information, which resulted either in the absence of such information or its tardy production. *Id.* Accordingly, the court imposed sanctions against UBS including an "adverse inference instruction with respect to e-mails deleted after August 2001, and in particular, with respect to e-mails that were irretrievably lost when UBS's backup tapes were recycled." *Id.* at #13. Moreover, the court ordered UBS "to pay the costs of any depositions or re-depositions required by the late production." *Id.*

Endnotes

[1] Zubulake filed "a Charge of (gender) Discrimination with the EEOC on August 16, 2001. On October 9, 2001, Zubulake was fired with two weeks' notice. On February 15, 2002, Zubulake [brought suit], suing for sex discrimination and retaliation under Title VII, the New York State Human Rights Law, and the Administrative Code of the City of New York." *Zubulake I*, 217 F.R.D. at 312.

[2] In addition to her request for the production of certain e-mails and the deposition of key employees, Laura Zubulake moved for an order permitting her to release the transcript of Behny's deposition to securities regulators. *Zubulake II*, *Zubulake v. UBS Warburg LLC,* 2003 WL 21087136, 1590 (S.D.N.Y. May 13, 2003), decided on the same day as *Zubulake I*, focuses on the release of the deposition and thus is not relevant to the issue of electronic discovery.

[3] "It is beyond cavil that the precise allocation is a matter of judgment and fairness rather than a mathematical consequence of the seven factors discussed above. Because the seven factor test requires that UBS pay the lion's share, the percentage assigned to Zubulake must be less than fifty percent. A share that is too costly may chill the rights of litigants to pursue meritorious claims. A twenty-five percent assignment to Zubulake meets these goals." *Zubulake III*, 216 F.R.D. at 289. "[T]he costs of restoring any backup tapes are allocated between UBS and Zubulake seventy-five percent and twenty-five percent, respectively. All other costs are to be borne exclusively by UBS. Notwithstanding this ruling, UBS can potentially impose a shift of all of its costs, attorney's fees included, by making an offer to the plaintiff under [Federal] Rule 68." *Id.* at 291.

[4] "Merely because one or two employees contemplate the possibility that a fellow employee might sue does not generally impose a firm-wide duty to preserve. But in this case, it appears that almost everyone associated with Zubulake recognized the possibility that she might sue." *Zubulake IV*, 220 F.R.D. at 217.

[5] "If a company can identify where particular employee documents are stored on backup tapes, then the tapes storing the documents of 'key players' to the existing or threatened litigation should be preserved if the information contained on those tapes is not otherwise available." *Zubulake IV*, 220 F.R.D. at 218.

[6] "This will invariably involve speaking with information technology personnel, who can explain system-wide backup procedures and the actual (as opposed to theoretical) implementation of the firm's recycling policy. It will also involve communicating with the 'key players' in the litigation, in order to understand how they stored information." *Zubulake V* at #8.

[7] "[C]ounsel has a duty to effectively communicate to her client its discovery obligations so that all relevant information is discovered, retained, and produced." *Zubulake V* at #14. "If a party acts contrary to counsel's instructions or to a court's order, it acts at its own peril." *Zubulake V* at #15.

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U.S. Supreme Court Recognizes Employer Liability for Unintentional Age Discrimination

By Matthew C. Moschella

On March 30, 2005, in an opinion delivered by Justice John Paul Stevens, the U.S. Supreme Court held in *Smith v. City of Jackson, Mississippi*, 544 U.S. —, 125 S.Ct. 1536, 161 L.Ed.2d 410, 73 USLW 4251 (2005), that an employer may be liable under the Age Discrimination in Employment Act of 1967 ("ADEA") for age discrimination when it implements a policy or takes some other action that adversely effects older employees — even when there is no evidence that the employer intended such an effect. This type of discrimination claim, commonly referred to as a "disparate impact" theory, imposes liability for employment practices that appear neutral in their treatment of different groups, but in effect "fall more harshly" on one group (*e.g.*, older employees) than another.

In *Jackson*, a group of older police and public safety officers employed by the city of Jackson, Mississippi, filed suit, alleging that pay increases that were more generous to officers with less than five years' tenure violated the ADEA because the policy tended to result in larger pay raises to younger officers. The Court recognized that such a practice could constitute unlawful age discrimination under the ADEA.

Although the *City of Jackson* holding could dramatically expand employer liability for practices that tend to impact older employees more harshly, regardless of the employer's intentions, the Supreme Court's decision also places some limits on these claims. First, it held that plaintiffs must offer evidence of a very specific practice that results in unfavorable treatment to older employees (and held that the *Jackson* officers failed to do so). Second, the Court held that under the ADEA (unlike other discrimination claims brought under Title VII of the Civil Rights Act of 1964), an employer may successfully defend against an age discrimination claim arising under a disparate impact theory by showing that its action "is based on reasonable factors other than age." Thus, the *Jackson* officers' claim was found lacking because the City showed that it had based its pay increases on a reasonable factor other than age: the city's desire to remain competitive with other police departments in the region.

In light of *Jackson*, employers should review any policies and/or practices that may adversely impact employees over 40, such as reductions in force, geographic parity plans and retirement plans, to ensure that such polices and/or practices are based on reasonable factors other than age.

Matthew C. Moschella is an associate in the Litigation Department of Sherin and Lodgen LLP.

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New Cases of Interest

Eric R. Crete v *City of Lowell*

– F.3d – , 2005 WL 1907271 (1st Cir. 2005)

In a case decided on August 11, 2005, Justice Sandra Lynch of the First Circuit Court of Appeals held that a hiring decision made by a municipality is immune from negligence pursuant to M.G.L.A. c. 258, section 10 (b) or the "discretionary function exception."

The decision arose from a lawsuit filed by the plaintiff, Eric R. Crete, against Police Officer Steve Ciavola and the City of Lowell under federal and state law. The plaintiff alleged that Officer Ciavola used excessive force on the plaintiff in March of 1999 and that the City of Lowell had wrongfully and negligently hired Officer Steve Ciavola in 1995 despite the officer's recent criminal history. The City had hired Officer Ciavola just months after he had been convicted of assault and battery and sentenced to probation for a period of one year.

At the summary judgment stage, the trial judge dismissed the federal claim of wrongful hiring against the City, but allowed the claim of negligent hiring to proceed to trial. At the time of trial, the plaintiff voluntarily dismissed the claims against the officer after the officer had declared bankruptcy. The jury returned a verdict of $143,000 which was subsequently reduced to the cap of $100,000, pursuant to c. 258, section 2.

On appeal, the First Circuit not only affirmed the grant of summary judgment on the federal civil rights claims against the City, but also held that the negligence claims against the City should also have been dismissed. The First Circuit reasoned that where the City had lawfully hired the officer pursuant to Civil Service rules and regulations and had decided not to by-pass him, such decisions constituted discretionary acts by a government official immune from third party scrutiny. While the First Circuit acknowledged that the Supreme Judicial Court of Massachusetts had not directly addressed this precise issue, the First Circuit explained that the SJC would likely adopt a similar analysis of the issue given the SJC's history of utilizing the federal court's analysis of cases under the Federal Tort Claims Act for its decisions under the MTCA.

—Helen G. Litsas

In re Administrative Subpoena Blue Cross Blue Shield of Massachusetts, Inc.

2005 WL 1801694 (D.Mass. 2005)

The issue presented in *In re Administrative Subpoena Blue Cross Blue Shield of Massachusetts, Inc.* was whether Blue Cross Blue Shield of Massachusetts, Inc. (Blue Cross) may decline to produce documents in response to an administrative subpoena upon the assertion of a peer review privilege. 2005 WL 1801694 (D.Mass. 2005).

In underlying discovery, the United States found reason to believe that a physician had been diagnosing patients with a rare disease when those patients either did not have the disease or had not been subjected to enough tests to determine whether or not they had the disease. The United States then believed that the physician then billed Medicaid and/or Medicare fraudulently for an expensive specialized treatment which is used to treat patients with the disease. The Government engaged in an ongoing investigation to determine whether this conduct amounted to health care fraud. Pursuant to the investigation, the United States subpoenaed several documents from Blue Cross**.** Blue Cross complied with the subpoena with one exception: it declined to produce documents relating to its Medical Peer Review Committee that was in the process of conducting an internal investigation of the physician, but had not yet completed its work.

"The peer review privilege, which is recognized by the majority of states, including Massachusetts**,** insures that all medical peer review committee documents and proceedings are not subject to discovery or being introduced into evidence." *In re Administrative Subpoena Blue Cross*, *citing* M.G.L., c. 111, § 204(a). The purpose of the privilege is to foster openness and honesty in proceedings *Id.* (internal citation omitted).

As this action was pending in the District Court, Blue Cross acknowledged that there was no extant federal peer review privilege and that most federal courts, including the Supreme Court, have declined to recognize a state peer review privilege in a federal case. *In re Administrative Subpoena Blue Cross*. Accordingly, the District Court sitting in the First Circuit, found itself bound by First Circuit law and applied a balancing test in order to render its

New Cases of Interest - *continued*

decision. *In re Hampers*, 651 F.2d 19, 22-23 (1st Cir. 1981). The First Circuit's test is that a state privilege should be recognized in a federal case if (a) the forum state recognizes the privilege, and (b) the privilege is "intrinsically meritorious." *In re: Administrative Subpoena Blue Cross*, *citing In re Hampers*, 651 F.2d at 22. There was no question that the forum state recognized the privilege. Whether the privilege is "intrinsically meritorious" is determined by applying Wigmore's formulation which requires a four-part analysis: (i) whether the communications "originate in a confidence that they will not be disclosed"; (ii) whether this element of confidentiality is "essential to the full and satisfactory maintenance of the relations between the parties"; (iii) whether the relationship is a vital one that "ought to be sedulously fostered"; or (iv) whether "the injury that would inure to the relation by the disclosure of the communications [would be] greater than the benefit thereby gained for the correct disposal of litigation." *In re:Administrative Subpoena Blue Cross*, *citing In re Hampers*, 651 F.2d at 22-23 (internal citation omitted).

The Court found that the United States was conducting a criminal investigation into the activities of a physician. Accordingly, the court phrased the issue as such: "whether the injury that would inure to the relation by the disclosure of the communications [would or would not be] greater than the benefit thereby gained for the correct disposal of litigation." Applying the fourth inquiry as required by the holding in the *Hampers* case, the court found that Blue Cross had demonstrated that "injury would inure" to the peer review process if disclosure were ordered. Accordingly, the Court ruled that the Government had failed to demonstrate, in the particular circumstances of this case, that the benefit gained from disclosure of the peer review records would be greater than that injury. *See In re: Administrative Subpoena Blue Cross.*

—*Sabrina DeFabritiis*

U.S. v. Councilman
418 F.3d 67 (1st Cir. 2005)

The First Circuit Court in *U.S. v. Councilman* was faced with an important question of statutory construction. The Court had to decide whether interception of an e-mail message in temporary, transient electronic storage states an offense under the Wiretap Act, as amended by the Electronic Communications Privacy Act of 1986, 18 U.S.C. §§ 2510-2522. *U.S. v. Councilman*, 418 F.3d 67, 69 (1st Cir. 2005).

Mr. Councilman was Vice President of Interloc, Inc., which ran an online rare and out-of-print book listing service. As part of its service, Interloc gave book dealer customers an e-mail address at the domain "interloc.com" and acted as the e-mail provider. *Id.* at 69. According to the indictment, in January 1998, Councilman directed Interloc employees to intercept and copy all incoming communications to subscriber dealers from Amazon.com. Interloc's systems administrator modified the server's procmail recipe so that, before delivering any message from Amazon.com to the recipient's mailbox, procmail would copy the message and place the copy in a separate mailbox that Councilman could access. *Id.* at 70. The Court found that Councilman and other Interloc employees routinely read the e-mail messages sent to Interloc subscribers in the hope of gaining a commercial advantage. *Id.* at 70-71.

On July 11, 2001, the grand jury indicted Councilman, charging him under 18 U.S.C. § 371, the general federal criminal conspiracy statute, for conspiracy to violate the Wiretap Act, 18 U.S.C. § 2511, by intercepting electronic communications, disclosing their contents, using their contents, and causing a person providing an electronic communications service to divulge the communications' contents to persons other than the addressees. *Id.* at 71. Councilman moved to dismiss the indictment for failure to state an offense under the Wiretap Act, arguing that the intercepted e-mail messages were in "electronic storage," as defined in 18 U.S.C. § 2510(17), and, therefore, were not, as a matter of law, subject to the prohibition on "intercept[ing] ... electronic communication[s]," 18 U.S.C. § 2511(1)(a). The district court ultimately granted Councilman's motion to dismiss the charge, ruling that the messages were not, at the moment of interception, "electronic communications" under the Wiretap Act. *Id.* at 71.

As amended by the Electronic Communications Privacy Act of 1986, Pub.L. No. 99-508, 100 Stat. 1848 ("ECPA"), the Act makes it an offense to "intentionally intercept[ ], endeavor[ ] to intercept, or procure[ ] any

New Cases of Interest - *continued*

other person to intercept or endeavor to intercept, any wire, oral, or electronic communication." *Id.*, citing 18 U.S.C. § 2511(1).

Councilman argued that Congress intended to exclude any communication that is in (even momentary) electronic storage. In his view, "electronic communication[s]" under the Wiretap Act are limited to communications traveling through wires between computers. Councilman took the position that once a message enters a computer, the message ceases to be an electronic communication protected by the Wiretap Act. *Councilman*, 418 F.3d at 72.

After a thorough review of the statute, the court found that the ECPA's plain text did not clearly state whether a communication is still an "electronic communication" within the scope of the Wiretap Act when it is in electronic storage during transmission. Applying canons of construction did not resolve the question. Given this continuing ambiguity, the Court turned to the legislative history. *Id.* at 76. Ultimately, the Court concluded that the term "electronic communication" included transient electronic storage that is intrinsic to the communication process for such communications. Consequently, in this context it rejected Councilman's proposed distinction between "in transit" and "in storage." *Id.* at 79.

Even though the Court concluded that the temporarily stored e-mail messages at issue constituted electronic communications within the scope of the Wiretap Act, the statute also required the conduct alleged in the indictment to be an "intercept[ion]." *Id.* at 79, *citing* 18 U.S.C. § 2511(1). The term "intercept" is defined broadly as "the aural or other acquisition of the contents of any wire, electronic, or oral communication through the use of any electronic, mechanical, or other device." *Id.* (internal citation omitted).

Councilman's argument was that because the messages at issue, when acquired, were in transient electronic storage, they were not "electronic communication [s]" and, therefore, section 2511(1)'s prohibition on "intercept[ion]" of any "electronic communication" did not apply. That is the argument that the reviewing Court has now rejected in holding that an e-mail message does not cease to be an "electronic communication" during the momentary intervals, intrinsic to the communication process, at which the message resides in transient electronic storage. *Id.*

Additionally, Councilman argued that acquisition of electronic communications in temporary electronic storage is regulated by the Stored Communications Act. Accordingly, he inferred that such acquisition was not regulated by the Wiretap Act, or that, at minimum, the potential overlap implicates the rule of lenity or other doctrines of "fair warning." Consequently, the reviewing Court delved into the "complex, often convoluted" intersection of the Wiretap Act and Stored Communications Act. *Id.* at 81 (internal citation omitted).

The *Councilman* Court found that Congress added Title II to the ECPA to halt these potential intrusions on individual privacy. Commonly referred to as the Stored Communications Act, it established new punishments for accessing, without (or in excess of) authorization, an electronic communications service facility and thereby obtaining access to a wire or electronic communication in electronic storage. *Id.*, *citing* 18 U.S.C. § 2701(a). In the alternative, Councilman argued that the two titles were sufficiently confusing that principles of fair warning require dismissal of the indictment. Those principles are expressed in the law through three related doctrines: the rule of lenity, the vagueness doctrine, and the prohibition against unforeseeably expansive judicial constructions. *Id.* at 82-83 (internal citation omitted).

The *Councilman* Court concluded that although the text of the statute did not specify whether the term "electronic communication" includes communications in electronic storage, the legislative history of the ECPA indicates that Congress intended the term to be defined broadly. Also, that history confirmed that Congress did not intend, by including electronic storage within the definition of wire communications, to exclude electronic storage from the definition of electronic communications. The Court, therefore, ruled that the term "electronic communication" includes transient electronic storage that is intrinsic to the communication process and that interception of an e-mail message in such storage is an offense under the Wiretap Act. Accordingly, the ruling of the district court was reversed. *Id.* at 85.

—*Sabrina DeFabritiis*

New Cases of Interest - *continued*

MacInnis v. Cigna Group Ins. Co. of America

379 F.Supp.2d 89 (D.Mass. 2005)

The underlying action in *MacInnis v. Cigna Group Ins. Co. of America* concerned an ERISA dispute wherein the plaintiff sought leave to proceed under a pseudonym and for an order sealing this case. 379 F.Supp.2d 89, 90 (D.Mass. 2005). The plaintiff alleged that she suffered from "major depression and anxiety". *MacInnis*, 379 F.Supp.2d at 90. As a result, she believed that public disclosure of her name "would have a severely damaging impact on the lives of [her] and her daughter" in two ways: (1) it would create a danger of discrimination or stigmatization and (2) it would increase her emotional distress. *Id.*

The Court articulated the determinative issue as "whether the plaintiff has a substantial privacy right which outweighs the customary and constitutionally-embedded presumption of openness in judicial proceedings". *Id.* (internal citation omitted). The Court found that cases challenging a denial of ERISA health benefits routinely involve disclosure of mental and physical illnesses. Likewise, the medical histories of tort victims are a common subject of negligence and medical malpractice cases. The Court found it difficult to perceive disclosure of a depressive/anxiety disorder as presenting the "exceptional" case for which anonymity was intended. *Id.*

The Court found that the plaintiff had not overcome the constitutional preference for openness in judicial proceedings. She offered only a one-sentence, conclusory assertion that disclosure of her depressive/anxiety disorder could generate social stigma and discrimination unsupported by evidence or explanation. The burden was on the plaintiff and it could not be carried in such a cursory manner. *Id.* However, the court did note that, to the extent that the plaintiff has legitimate privacy concerns with respect to particular matters, they are best addressed on a document-by-document basis. *Id.*

—*Sabrina DeFabritiis*

Gouin v. Gouin

— F.R.D. —, 2005 WL 1802257 (D.Mass. 2005)

On June 27, 2005, the lower Court allowed two motions which the plaintiff had filed to compel the defendant to serve answers to interrogatories and to produce documents. The motions were allowed because no opposition had been filed. In the subsequent action of *Gouin v. Gouin*, — F.R.D. —, 2005 WL 1802257 (D.Mass. 2005), the plaintiff then sought an award of reasonable costs, including attorney's fees, in the amount of $1,809.50 incurred in obtaining the orders allowing the motions. The defendant opposed costs on the grounds that plaintiff's counsel failed to comply with Local Rule 37.1. The court held that while it was indeed true that plaintiff's counsel failed to comply with Local Rule 37.1, that point should have been made in an opposition to the motions to compel. The *Gouin* Court expressly held that a defendant cannot choose to ignore motions which she deems are without merit; an opposition must be filed.

The Court also found frivolous the defendant's further contention that she did not oppose the motion to compel because she thought that the court would automatically deny. That being said, the Court found that plaintiff's claim for fees must be denied for other reasons. Federal Rule 37 requires that a fee award be denied when "...the motion is filed without the moving party first making a good faith effort to obtain the disclosure or discovery without court action." *Gouin v. Gouin*, *citing* Fed. R. Civ. P. 37. In rendering its decision the Court found that there was nothing in the record which would indicate that prior to filing those motions, plaintiff's counsel made any effort, much less a good faith one, to obtain the discovery without filing a motion to compel. Accordingly, the plaintiff's motion was denied.

—*Sabrina DeFabritiis*

Bleau v. Greater Lynn Mental Health & Retardation Ass'n

371 F.Supp.2d 1 (D.Mass. 2005)

In *Bleau v. Greater Lynn Mental Health & Retardation Ass'n*, 371 F.Supp.2d 1 (D.Mass. 2005), Judge Ketton ruled that the prior decision in *Dorn v. Astra USA*, 975 F.Supp. 388, (D.Mass. 1997) and his own decision in

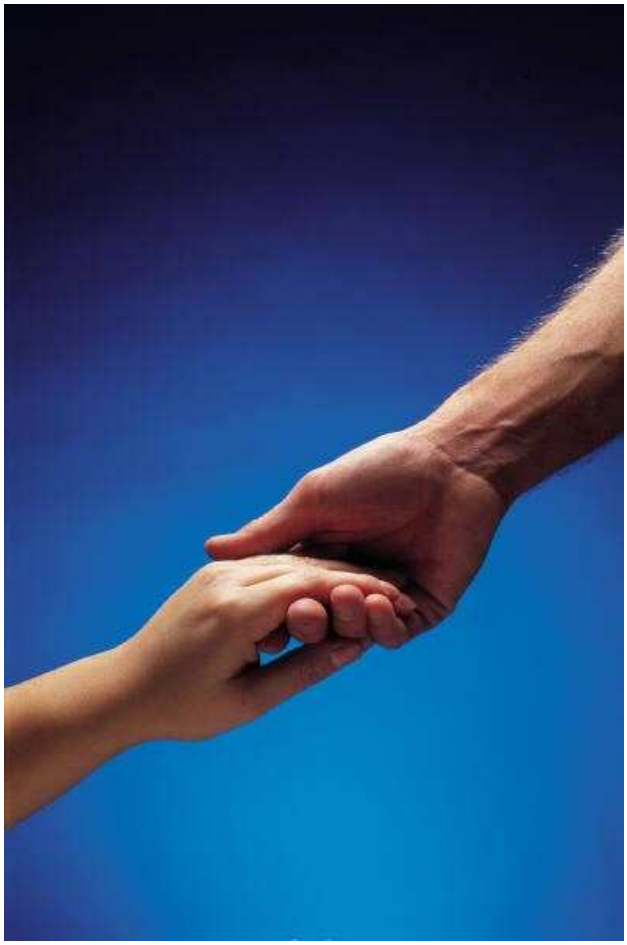
New Cases of Interest - *continued*

Chiara v. Dizoglio, 81 F.Supp.2d 242 (D.Mass. 2000) had been overturned in effect by *Andresen v. Diorio*, 349 F.3d 8 (1st Cir. 2003) and found that subsequent First Circuit case law supports this belief.

In *Bleau*, defendant Greater Lynn Mental Health & Retardation Association ("GLMHRA") sought summary judgment based on a heightened pleading requirement for defamation claims in Massachusetts. *Bleau*, 371 F.Supp.2d at 1. GLMHRA claimed that Bleau's defamation claim was not specific enough in that it did not specify the statements at issue or the time or times they were made. *Id.* at 2. GLMHRA cited to one of Judge Ketton's previous decisions in *Chiara v. Dizoglio*, 81 F.Supp.2d 242, (D.Mass.2000), in support of its motion. That case held that defamation claims are subject to a heightened pleading standard. *Id.*

In his decision in *Bleau*, Judge Ketton expressly ruled that *Andresen v. Diorio*, 349 F.3d 8 (1st Cir. 2003) overruled *Dorn v. Astra USA*, 975 F.Supp. 388, (D.Mass. 1997) explicitly on the ground that it applied state pleading requirements in federal court and that federal courts generally look to the Federal Rules for the proper pleading requirements. *Bleau*, 371 F.Supp.2d at 2. He further stated, "[i]n order to clear up any confusion in the future, I explicitly declare that *Andresen v. Diorio*, particularly when viewed in the context of other First Circuit pleading cases, in effect overrules the holding of *Dorn v. Astra USA* adopted by *Chiara v. Dizoglio*), that a heightened pleading standard applies to defamation claims brought in federal court. Accordingly, the *Bleau* court rules that there was no heightened pleading requirement for state law defamation claims brought in federal court.

—*Sabrina DeFabritiis*



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The Hurricane Katrina Disaster Relief Fund will provide money to support legal assistance and/or professional support for those affected by this tragedy.

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SAVE THE DATE

November 16, 2005

5:30 p.m. - 7:30 p.m.

At its Twenty-Seventh Annual Judicial Reception, the Massachusetts Chapter will honor

Chief Judge William G. Young

at the John Joseph Moakley United States Courthouse.

Tickets:

$ 40 for members
$ 50 for non-members
$ 500 for sponsors
Each sponsor will receive 11 tickets, as well as a listing in the program and on the Welcoming Board at the Courthouse on the day of the event.

KEEP AN EYE OUT!

"Breakfast with the Judges"

The popular "Breakfast with the Judges" series will be back this fall. Speakers at the breakfasts will address issues facing federal litigators. Likely topics include the 2005 Bankruptcy Abuse Prevention & Consumer Protection Act and admiralty law.

Please check the Chapter's website at http://www.fedbar.org/massachusetts.html for more information as it becomes available.

To suggest topics, contact:
Patricia M. Connolly
(617) 748-3278
patricia.connolly@usdoj.gov

From the DISTRICT COURT

Proposed Amendments to Local Rules

The Judges of the United States District Court for the District of Massachusetts are considering certain amendments to the court's Local Rules. These amendments involve adoption of a new **Local Rule 5.4** and rewriting of **Local Rule 67.2.**

New Local Rule 5.4 is designed to reflect the court's determination that unless exempt or otherwise ordered by the court, all pleadings or other papers submitted to the court must be filed, signed, verified and served by electronic means.

The rewriting of Local Rule 67.2 is designed to detail the procedure for deposit of funds in the registry of the court in civil actions.

Copies of the proposed rules are available for inspection in the offices of the Clerk, Suite 2300, United States Courthouse, 1 Courthouse Way, Boston, Massachusetts; on the 5th floor of the Federal Building and Courthouse, 1550 Main Street, Springfield, Massachusetts; or the 5th floor of the Donohue Federal Building, 595 Main Street, Worcester, Massachusetts. They may also be found on the court's web site at www.mad.uscourts.gov.

Those wishing to comment on these proposed amendments to the Local Rules for the District of Massachusetts may do so in writing. All comments must be received on or before September 2, 2005 and should be addressed to:

Honorable Douglas P. Woodlock
Chairman, Rules Committee
c/o Helen M. Costello, Projects Manager
United States District Court
United States Courthouse - Suite 2-300
Boston, MA 02210

We invite submissions of articles for publication in future newsletters. Please send copy to:

Susan M. Weise
City of Boston Law Department
susan.weise@cityofboston.gov

or

Helen G. Litsas
City of Boston Law Department
helen.litsas@cityofboston. gov

Information Sheet for Electronic Filing

The Office of the Clerk for the United States District Court for the District of Massachusetts has created an extremely helpful information sheet to assist attorneys with electronic filing. The document addresses issues covering a wide range of topics, from registering for filing to trouble-shooting various problems. We have attached it here for ease of reference.

United States District Court
District of Massachusetts
Office of the Clerk

ELECTRONIC CASE FILES
INFORMATION SHEET FOR ATTORNEYS

What if....

I haven't yet applied for an account?

If you are receiving e-mail notices from the Court, you already have an ECF account (see next question). Otherwise, use the application on our web page at http://www.mad.uscourts.gov/AttyInfo/Attyrereginfo.htm. A login and password will be issued to you approximately 7 business days after receipt of your application.

I think I have an ECF account, but don't know my login and password?

You may check to see if you have an ECF account by going to our web page www.mad.uscourts.gov and clicking on the 'MA-Federal Bar Search' link under 'What's New'. Search for your name there, and if found, contact the ECF Help Desk at 866-239-6233 or by e-mail at ecfhelp@mad.uscourts.gov - we will arrange to have the login and password reissued to you.

I don't know how to use the system?

Check out our training opportunities at http: / /www.mad.uscourts.gov/train/TrainAnnounce.htm

I have filed a notice of appearance but I'm not receiving notices?

If you have filed your notice of appearance using your own ECF login and password, did you check the appropriate box to link yourself to your client on the docket (and leave the box for 'Notice' checked)? If you did, contact the ECF Help Desk. If you failed to check the association box, or unchecked the notice box, contact the docket or courtroom clerk for the assigned Judicial Officer.

If the notice was filed on your behalf using another attorney's login and password, contact the docket or courtroom clerk for the assigned Judicial Officer and then file the notice again using your own ECF login and password.

I've moved my office or changed my e-mail address?

Log into the ECF system to update your account, using the 'Maintain Your Account' feature under the Utilities menu. Instructions are available in the ECF User Guide (Training Manual), available on our web page under 'Training Information.' If you encounter a problem updating your street address, refer to the FAQ page on our web page for more information or contact the ECF Help Desk.

Answers to other Frequently Asked Questions are available on our web site, at
https: / /pacer.mad.uscourts.gov/dc/cgi-bin/faq.html

United States District Court
District of Massachusetts
Office of the Clerk

ELECTRONIC CASE FILES
INFORMATION SHEET FOR ATTORNEYS

What if....

I'm no longer involved in a case but I'm still receiving e-mails?

You should file a notice of withdrawal of appearance. If you have filed the notice of withdrawal and are still receiving e-mails, contact the ECF Help Desk.

I receive e-mails from the Court, but I just can't read the body of the message?

Check the settings on your ECF account. Be sure that you have selected the proper format ('html format' or 'text format'). Contact your Internet service provider for advice on what choice is best for you.

I open the document, but all I see is a blank screen?

Try refreshing your screen - that normally solves the problem. You may also want to clean out your temporary Internet files if the problem persists.

There is no hyperlink to a document number in the body of the e-mail message?

In the past the Clerk's Office would copy the margin order and mail it to counsel. The Clerk's Office has established a practice of entering those orders onto the docket as 'Electronic Orders,' including any and all text from the Judicial Officer, and since there is no entry attached to the document, there is no hyperlink. Attorneys not yet receiving e-mail notice from the Court will receive a copy of the receipt generated by the CM/ECF system. (NOTE: the same is true of certain other Court generated documents, such as notices and clerk's notes of court proceedings.)

I'm the attorney of record in a Social Security case, but I still can't view the documents?

You must first login to the ECF system using the Court-issued login and password, and then when you see a second login screen, enter your PACER login and password.

I want to file a responsive document, but the document in question is not yet on the docket?

All documents received over the counter (or by other traditional means) should be entered into the ECF system within 48 hours of receipt by Clerk's Office staff. If more than that time has elapsed, or if the document in question is an emergency, contact the docket or courtroom clerk for the assigned Judicial Officer.