



# FBA Memphis/Mid-South Chapter Newsletter



Volume 7

October 2015

Chapter Website: [www.fedbar.org/Chapters/Memphis-Mid-South-Chapter](http://www.fedbar.org/Chapters/Memphis-Mid-South-Chapter)

## Upcoming FBA Event

### Annual Federal Practice Seminar

Friday, October 30, 2015

At the University of Memphis, Cecil C. Humphreys School of Law

Speakers and Topics Include:

#### Sixth Circuit Update: A Judicial Perspective

Judge Jane B. Stranch - U.S. Court of Appeals for the Sixth Circuit  
Judge Sheryl H. Lipman - U.S. District Court, W.D. of Tennessee  
Kevin G. Ritz - Asst. U.S. Attorney, W.D. of Tennessee (Moderator)

#### How MALS Changed the Law in Tennessee

Mayor A C Wharton, Jr., David Howard, and Donald Donati

#### Arguing Before the Supreme Court: It's No Tennessee Waltz

Carter G. Phillips

#### Leveraging Technology to Meet Your ESI Obligations

John Hartman, Michael McLaren, and Shea Oliver

#### CJA Break Out Session and Business Meeting

Thomas Gould – Clerk for US District Court for the Western District of TN

#### Upcoming Amendments to the Federal Rules of Civil Procedure

William B. Ryan, Amy M. Pepke, Jeana M. Littrell, and Frank L. Watson, III

#### Judges' Panel

District, Bankruptcy, and Magistrate Judges of the W.D. of Tennessee will discuss a wide range of topics related to federal practice.

*Complete Agenda and Registration Form on pages 15-17*

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## Memphis Mid-South Chapter Awarded Presidential Achievement Award

The Federal Bar Association awarded the Memphis Mid-South Chapter a distinguished award this year. The Chapter received the Chapter Activity Award for its work in advancing the goals of the Chapter. Congratulations to the Chapter and its Board for the continued good work on behalf of its members and the National Federal Bar Association!



*Mary Morris with Magistrate Judge Michael Newman, the President-Elect of FBA National, accepting the Chapter Activity Award on behalf of the Memphis Mid-South Chapter*

# President's Message

By: Mary H. Morris

This is yet another busy, interesting year for the Memphis/Mid-South Chapter of the FBA, and it wouldn't be possible without our energetic board and members. Thank you for being a part of this group!

Please mark your calendar and join us on Friday, October 30<sup>th</sup> at the law school for our Annual Seminar, which features keynote speaker Carter Phillips. Mr. Phillips has argued before the Supreme Court in eighty-one cases (yes, you read that right!), more than any other lawyer in private practice. The seminar also includes a retrospective on Memphis Area Legal Services, on the occasion of its 45th anniversary, as well as the ever-popular Judges' Panel. And we will be very pleased to welcome Judge Jane Stranch and Judge Sheryl Lipman, who will update us on recent Sixth Circuit rulings. At the close of the seminar, we'll cap off the day with a wine and cheese reception overlooking the river.

The registration materials are included here, and I encourage you to sign up today, as the event has sold out in recent years.

This event comes on the heels of other fantastic events this year, including the FBA's Immigration Seminar, which brought hundreds of lawyers and judges to Memphis from across the country for a top-notch educational event that coincided nicely with Memphis in May. Also, at our Supreme Court Seminar in June, Maureen Holland, who represented the Memphis plaintiffs in *Obergefell*, provided an insider's view of the case shortly before the ruling.

This year's Jackson Seminar in July was the best-attended yet, and we were excited to have Judge David Kennedy and Judge Jenny Latta of the U.S. Bankruptcy Court participate in the Judges' Panel, together with several district judges and magistrate judges from the Western District of Tennessee. We greatly appreciate all of these judges, who are so generous with their time. Thanks also to Judge Brandon Gibson, Jon York, and Pam Vawter for putting together an excellent event.

In August we hosted a Trial Practice Seminar at the federal building, where attendees enjoyed hearing from Judge Bernice Donald, Clint Saxton, Kevin Ritz, Amy Pepke, and Michael Russell. We also welcomed Corbin

Carpenter, this year's scholarship recipient. Last year, our FBA chapter began providing a \$1,000 award to the student with the highest grade in the Federal Courts class at the University of Memphis's law school. We had hoped that this would increase students' interest in the subject, and it has – enrollment in the class has doubled.

Our chapter, which has been going strong for more than forty years now, reached a new membership high of 134 members this year, around the same time that FBA National broke its record of more than 17,000 members. In addition to our chapter's diverse group of practicing attorneys, a student chapter of the FBA has recently launched at the University of Memphis. Professor Daniel Schaffzin and an enthusiastic group of students have organized two events so far – a presentation by Judge Fowlkes last fall, and a presentation on "Threats to Amateurism at the NCAA." Please keep an eye out for our new student members on October 30<sup>th</sup> and say hello to them at the seminar.

We recently received a Chapter Activity Award from FBA National, and it is a testament to the hard work of many dedicated board members and others. We would not be able to present these seminars without the generous support of the U.S. District Court, and we are extremely grateful for the judges' and court staff's willingness to give their time and effort to our events. The members of the federal bench support the FBA by speaking at seminars and participating in panel discussions, and both Magistrate Judge Tu Pham and Clerk Tom Gould provide invaluable contributions by serving on our chapter's Board of Directors.

Our chapter is run entirely by volunteers, and we are always eager for members to become more engaged. We welcome suggestions for enhancing the value of your FBA membership and attracting new members. If you have ideas about how we can improve this chapter, or if you would like to become more involved in chapter activities, please let me or one of the other board members know. A directory of officers and board members is included at the end of this newsletter.

Again, thank you for being a part of the FBA's Memphis Mid-South Chapter. We look forward to hearing from you!

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*Current and past FBA board members (left to right): Shea Oliver, Adam Cohen, Maureen Holland, Michael Gabel, Colleen Hitch Wilson, Chris Cornaghie, Jan Cornaghie, Craig Cowart and Mary Morris.*

## SIXTH CIRCUIT CRIMINAL LAW CASE UPDATE

*United States v. Walli*, 785 F.3d 1080 (6th Cir. May 8, 2015)

The defendants broke into the property containing the Y-12 National Security Complex in Oak Ridge, Tennessee, where they spray-painted antiwar slogans on a building, hung crime tape and banners with biblical phrases, splashed blood, and sang hymns. A jury convicted them of violating the Sabotage Act (18 U.S.C. § 2155(a)) and injuring government property (18 U.S.C. § 1361).

The court reversed the Sabotage Act conviction. The Sabotage Act makes it a crime to injure national-defense premises “with intent to interfere with the national defense.” The court held that to establish the intent element, the government must show “the defendant’s actions were either consciously meant or practically certain to impair the nation’s capacity to wage war or defend against attack.” Here, a mere diversion of resources (in the form of guards’ response to the intrusion) did not qualify as interfering with the national defense. And, especially considering the Oak Ridge facility neither houses nor manufactures weapons (only components of weapons), defendants’ actions “had zero effect, at the time of their actions or anytime afterwards, on the nation’s ability to wage war or defend against attack.” The defendants’ statements that they sought to “disarm” the United States via “direct action” showed only motive, not intent. In sum, no rational jury could have found the requisite intent when defendants cut the fences and engaged in protest activities: “[Defendants] did not cut [fences] to allow al Qaeda to slip in behind.”

*United States v. Harris*, 786 F.3d 443 (6th Cir. May 13, 2015)

Harris wrote a threatening letter to a Member of Congress. At trial, three lay witnesses identified Harris as the author based on their familiarity with his “distinctive” handwriting. The court affirmed the admission of this testimony because it satisfied both Rule 701 and Rule 901(b)(2). The witnesses had all become familiar with Harris’s handwriting based on letters he wrote, subscription cards he filled out, or envelopes he addressed, and the witnesses did not gain this familiarity for purposes of litigating the case.

*Martinez v. United States*, 793 F.3d 533 (6th Cir. July 10, 2015)

Martinez shot and killed two people in Mexico in 2005. Mexican authorities issued an arrest warrant for him. At the time, Martinez was a legal permanent resident of the United States, and he continued living and working in Lebanon, Tennessee. In 2012, Mexico requested Martinez’s

provisional arrest pursuant to the 1978 U.S.-Mexico extradition treaty. Agents in the United States arrested Martinez, and a federal magistrate judge certified him as extraditable. Martinez filed a petition for a writ of habeas corpus under 28 U.S.C. § 2241, and the district court denied it.

The court reversed. The 1978 treaty prohibits extradition where “the prosecution or the enforcement of the penalty for the offense” would be barred due to “lapse of time,” under the laws of either country. Creating a split with the Eleventh Circuit, the court held this language incorporated the Sixth Amendment’s Speedy Trial Clause. The court remanded for the district court to conduct the speedy trial analysis in the first instance.

*United States v. Bah*, 794 F.3d 617 (6th Cir. July 24, 2015)

Officers pulled over a car for speeding. During their search of the car, the officers found 72 credit, debit, and gift cards in the glove compartment and trunk. Without getting a warrant, the officers used a magnetic card reader to scan the cards and found that most of the cards had been re-encoded such that the information on the magnetic strips did not match the information printed on the cards. The court held that sliding the (lawfully seized) cards through a scanner was not a search. It did not constitute physical intrusion of a constitutionally-protected area, and neither defendant had a reasonable expectation of privacy in the magnetic strips. Also, “because the magnetic strip on a credit card does not contain the same quality or quantity of personal information that can be found on cell phones, computers, or cassette tapes, the reasoning underlying the Court’s recent opinion in *Riley v. California*, 134 S. Ct. 2473 (2014), does not apply.”

*Detroit Free Press, Inc. v. U.S. Dep’t of Justice*, 796 F.3d 649 (6th Cir. Aug. 12, 2015)

The court adhered to its 19-year-old precedent holding that the Freedom of Information Act requires government agencies to honor media requests for booking photographs. The Seventh and Tenth Circuits recently disagreed with this holding. Here, the Marshals Service denied a FOIA request for booking photos. The district court followed the 1996 precedent and ordered their release. On appeal, the panel recognized it was bound by the 1996 case but (at the Department of Justice’s urging) suggested that the en banc court revisit the issue.

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## SIXTH CIRCUIT CRIMINAL LAW CASE UPDATE, CONTINUED

*United States v. Ray*, -- F.3d --, 2015 WL 5573749 (6th Cir. Sept. 23, 2015)

Before trial, Ray moved to suppress his admissions to police. He alleged that, before he was given *Miranda* warnings at the scene of arrest, an officer coerced him to admit “off the record” that he sold drugs and owned a gun. Then, at the police station an hour and a half later, he was given *Miranda* warnings and made the same admissions. The district court denied the motion without a hearing and without conducting a “*Miranda-in-the-middle*” analysis under *Missouri v. Seibert*, 542 U.S. 600 (2004). Defendant went to trial and was convicted of gun and drug crimes.

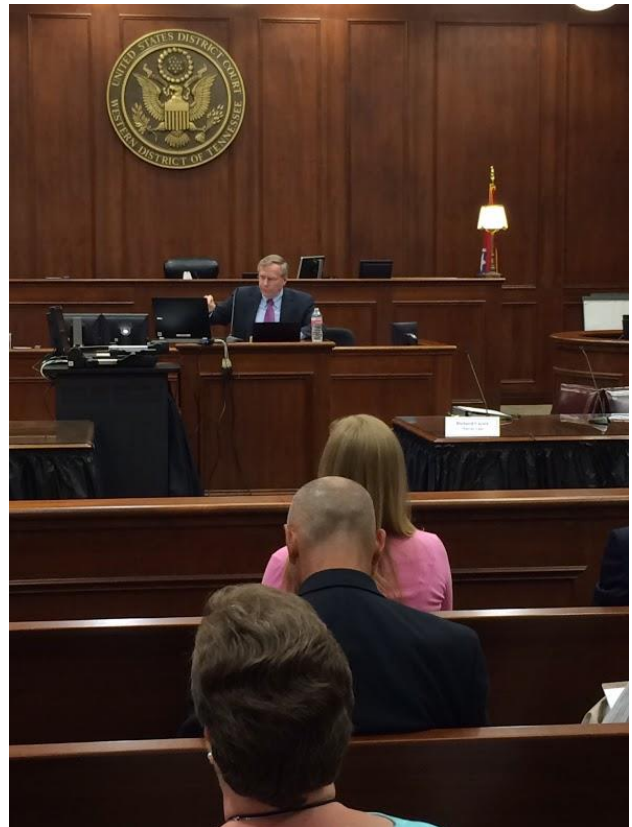
The court remanded for the district court to conduct a full evidentiary hearing on the voluntariness of Ray’s confession. And – resolving the question for the first time – the court held that the multi-factor test announced by the *Siebert* plurality is the proper governing standard for *Miranda-in-the-middle* situations. Under this “reasonable-person” test, courts consider: (1) the completeness and detail of the questions and answers in the first round of interrogation, (2) the overlapping content of the two statements, (3) the timing and setting of the first and the second, (4) the continuity of police personnel, and (5) the degree to which the interrogator’s questions treated the second round as continuous with the first. By adopting the plurality’s test, the court rejected the test from Justice Kennedy’s *Siebert* concurrence, which many other circuits have adopted and which focuses on the subjective intent of the interrogating officers.



*Amy Pepke presents to a crowded courtroom at the Trial Practice Seminar in August.*



*Colleen Hitch Wilson, Maureen Holland, and Harrison McIver at the Supreme Court Seminar in June.*



*Richard Carter updates lawyers at the Jackson Seminar about the upcoming amendments to the Federal Rules of Civil Procedure.*

## SIXTH CIRCUIT CIVIL LAW CASE SUMMARY

### ***Sutherland v. DCC Litigation Facility Inc. (In re Dow Corning Corp.), 778 F.3d 545 (6th Cir. 2015)***

In this case, the Sixth Circuit addressed a “narrow question of first impression for this circuit: Should a change of venue under 28 U.S.C. § 157(b)(5) alter which state’s law governs or, as in diversity, should a change of venue have no impact on which state law applies?” *Sutherland*, 778 F.3d. at 549. The three-judge panel split two-to-one in its determination.

The issue arose from Ms. Sutherland’s 1993 lawsuit for injuries allegedly caused from silicone breast implants. *Id.* at 547. She filed suit in the Middle District of North Carolina. *Id.* A multidistrict litigation panel transferred the case to the Northern District of Alabama. *Id.* at 547-48. Dow Corning filed for bankruptcy in the Eastern District of Michigan, and pursuant to § 157(b)(5), Ms. Sutherland’s lawsuit was transferred to the district where Dow Corning filed bankruptcy as “related to” the bankruptcy. *Id.* at 548. The District Court granted summary judgment on statute-of-limitations grounds under Michigan law. *Id.*

The Sixth Circuit stated that but for the bankruptcy statute of § 157(b)(5), the choice of law rules in North Carolina would apply. *Id.* at 549-50. Three reasons supported this general rule. *Id.* at 550. First, a change in venue should not eliminate “state-law advantages that exist absent diversity jurisdiction,” and second, a change in venue “should not create or multiply opportunities for forum shopping.” *Id.* Third, determining whether to transfer venue “should turn on considerations of convenience and the interest of justice,” not “possible prejudice resulting from a change of law.” *Id.* The Sixth Circuit held that these three reasons are “equally applicable to personal injury and wrongful death cases originally brought in diversity but transferred via § 157(b)(5).” *Id.* The Sixth Circuit’s holding was consistent with a 2012 ruling of the Second Circuit. *Id.* at 551 (citing *In re Coudert Brothers LLP*, 673 F.3d 180 (2d Cir. 2012)).

The Sixth Circuit reversed the dismissal based on Michigan law, and it stated that, under North Carolina law, a question of fact existed regarding whether Ms. Sutherland’s cause of action was barred. *Id.* at 552-54. The Sixth Circuit remanded for a determination of those facts. *Id.* at 554.

Judge Sutton dissented because Ms. Sutherland did not preserve the argument that Michigan law did not apply and because he observed no conflict in the result from applying Michigan or North Carolina law. *Id.* at 554-55.

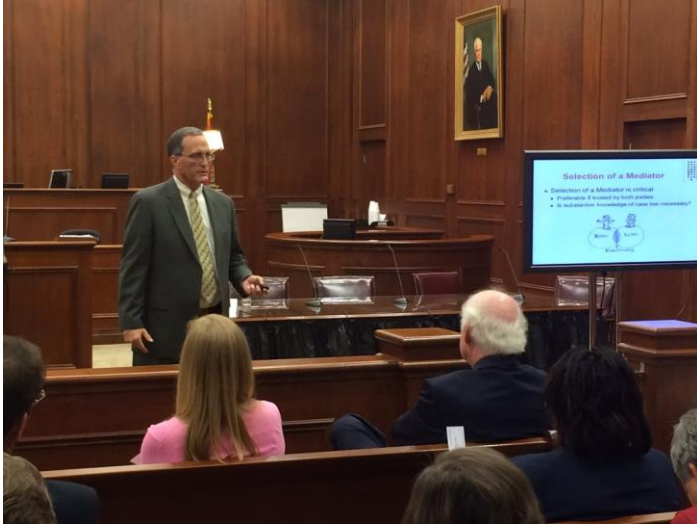
### ***Colosi v. Jones Lang LaSalle Americas, Inc., 781 F.3d 293 (6th Cir. 2015)***

*Colosi* is worthy of note because the Sixth Circuit decides whether the discovery costs associated with imaging hard drives that may be awarded under Fed. R. Civ. P. 54(d)(1) and 28 U.S.C. § 1920. Rule 54(d)(1) states in part that “costs—other than attorney’s fees—should be allowed to the prevailing party.” Fed. R. Civ. P. 54(d)(1). Section 1920(4) authorizes courts to tax costs “of making copies of any materials where copies are necessarily obtained for use in the case.” 28 U.S.C. § 1920(4). In determining whether the imaging of a hard drive constitutes a copy as that word is used in the statute, the Sixth Circuit considered the plain meaning of “making copies.” *Colosi*, 781 F.3d at 297. “[C]ourts have long understood that the phrase ‘making copies’ fairly includes the production of imitations in a medium or format different than the original.” *Id.* at 296. Therefore, “[i]maging a hard drive falls squarely within the definition of ‘copy’ . . .” *Id.* at 297.

The Sixth Circuit rejected the “overly restrictive” meaning of “making copies” used by the Third Circuit in *Race Tires America, Inc. v. Hoosier Racing Tire Corp.*, 674 F.3d 158 (3d Cir. 2012). There, the Third Circuit used a historical context of “making copies” to preclude a prevailing party from being awarded costs under § 1920(4) for imaging hard drives, deduplicating image files, populating a database, reviewing the files for discoverable information, and redacting privileged information. *Colosi*, 781 F.3d at 297. The Sixth Circuit held that, unlike the Third Circuit, “[w]e need not ask whether imaging is the ‘functional equivalent’ of making photocopies in the era before electronic discovery because—consistent with the 2008 amendments [to § 1920]—the procedure comes within the ordinary meaning of ‘making copies of any materials.’” *Id.* at 297-98.

In so holding, the Sixth Circuit declined to opine on “the disagreement between the Third and Federal Circuits on the question of whether § 1920 permits courts to tax the cost of imaging as it usually occurs in the electronic discovery process” because the facts of the case did not require it to address that question.

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John Burleson provides tips for success in mediation.



Historian Curtis Wilkie addresses the crowd in Jackson.

## SIXTH CIRCUIT CIVIL LAW CASE SUMMARY, CONTINUED

*Id.* at 298 n. 2 (comparing *CBT Flint Partners, LLC v. Return Path, Inc.*, 737 F.3d 1320, 1329-30 (Fed. Cir. 2013) (holding imaging costs taxable when the opposing party requests metadata be included in the production and imaging is the least expenses manner of obtaining it), with *Race Tires*, 674 F.3d at 169-71 (holding imaging an untaxable process regardless of the need for metadata)).

### ***PENN, LLC v. Prosper Business Development Corp.*, 773 F.3d 764 (6th Cir. 2014)**

Here, the Sixth Circuit “clarif[ied] the law” as to whether a party’s letter of intent to seek Fed. R. Civ. P. 11 sanctions satisfied the rule’s safe-harbor provision. *PENN, LLC*, 773 F.3d at 766. Plaintiff filed a complaint that defendants believed lacked any reasonable basis in law or fact. *Id.* at 765. A defendant served plaintiff with a letter stating that it would seek sanctions under Fed. R. Civ. P. 11 unless plaintiff dismissed the complaint before the first answer date. *Id.* Plaintiff refused to do so, and defendant filed a motion to dismiss all causes of action, which the district court granted. *Id.* After dismissal, defendant served plaintiff with a proposed motion for Rule 11 sanctions and threatened to file it if plaintiff did not reimburse the attorneys’ fees and costs for winning the motion to dismiss. *Id.* Plaintiff did not pay, and defendant filed the motion. *Id.* Plaintiff opposed the motion for sanctions on the merits and argued that “serving a copy of the motion post-dismissal failed to comply with Rule 11’s safe-harbor provision.” *Id.* at 766.

Did defendant’s letters of its intent to seek sanctions – the first served before the first answer was due and the second served twelve days after the dismissal – satisfy the safe-harbor provision in Rule 11? The safe harbor provision states:

A motion for sanctions must be made separately from any other motion and must describe the specific conduct that allegedly violates Rule 11(b). The motion must be served under Rule 5, but it must not be filed or be presented to the court if the challenged paper, claim, defense, contention, or denial is withdrawn or appropriately corrected within 21 days after service or within another time the court sets.

Fed. R. Civ. P. 11(c)(2). “[T]he rule specifically requires formal service of a motion” pursuant to Rule 5 at least twenty-one days before it is filed with the court. *Penn, LLC*, 773 F.3d at 767. The Sixth Circuit has “no doubt that the word ‘motion’ definitionally excludes warning letters.” *Id.* “Permitting litigants to substitute warning letters, or other types of informal notice, for a motion timely served pursuant to Rule 5 undermines” the goals of Rule 11 including a safe harbor provision, that is, “to reduce Rule 11’s volume, formalize appropriate due process considerations of sanctions litigation, and diminish the rule’s chilling effect.” *Id.*

Thus, defendant’s letters of intent did not satisfy Rule 11’s safe harbor provision. *Id.* The ruling joined the Sixth Circuit with the majority of its sister circuits, but it overruled three unpublished Sixth Circuit opinions that had held a warning letter could satisfy the safe harbor provision. *Id.* at 768.

# Clerk's Corner

## THE DISTRICT COURT'S NEW ADR PLAN

*By Venita Griffin, Manager/Court Operations*

### I. BACKGROUND

The U.S. District Court for the Western District of Tennessee ("the Court") had been designated a "congested court" by the Judiciary since at least 2005. The Court had always ranked in the top ten courts out of 94 district courts nationwide in the number of completed trials per judge per year. The Court had consistently averaged more than double the national average for the number of trials completed per judge per year. At the same time, the Court had consistently ranked in the bottom ten for the time it took to dispose of cases (referred to as the "median time from initial filing to final disposition"). The Court, therefore, was extremely productive in disposing of cases but regardless of this high disposition rate, the Court took too long to actually dispose of cases, which resulted in cases becoming backlogged.

The Court undertook a comprehensive examination of its "congested" status using internal staff and data as well as experts from the Judiciary's Administrative Office. After two years of study the Court determined that its congestion was principally due to the disproportionate number of pro se cases filed in this district. Those cases included both walk-in civil filings by unrepresented parties and cases filed pro se by inmates in the numerous penal institutions located within the district. The Court then launched an aggressive campaign to more quickly screen and dispose of these cases, which in turn involved more than 20 operational changes for the Court's pro se staff attorneys and supporting personnel.

One of these changes was the implementation of mandatory ADR for all civil case filings, including pro se filings by walk-in litigants and prisoners. Civil case parties are free to agree amongst themselves which sort of ADR they wish to engage in, and if they choose mediation they are free to mutually select the mediator. If, however, the parties are unable or unwilling to agree on the type of ADR or, if mediation is the selection process, a mediator the Court will appoint a mediator from the Court's Mediation Panel. This process applies to all civil cases, including cases where both parties are represented and those where one or more parties are proceeding pro se.

### II. THE NEW ADR PLAN

The Court adopted an alternative dispute resolution plan ("the ADR Plan") on March 1, 2014 with an effective date of September 1, 2014. Pursuant to the ADR Plan, all civil cases filed on or after September 1, 2014 are automatically referred for ADR resolution. Upon the filing of a new case, the Clerk of Court's office staff electronically sends a *Notice to Comply with Plan for Alternative Dispute Resolution* to the filer.

Using court-administered ADR techniques and processes to resolve legal disputes affords civil litigants the opportunity for quicker, less expensive and potentially more satisfying solutions than continuing with litigation, which is usually more protracted, more expensive and often more acrimonious. Properly conducted mediation generally goes beyond the typical settlement discussion process because it enhances communication among the parties and allows the participants to explore more creative outcomes to better meet the parties' needs and expectations. While mediation will be the primary ADR intervention used under the Court's ADR Plan, several other techniques can be employed; what is most important is that the parties mutually agree on the ADR process that they will use in their particular case.

The Clerk of Court's Office has developed a computer-based program that will randomly select mediators. The algorithm used in this program has been designed so as to balance the number of cases that are assigned to each mediator. The Mediation Panel is subdivided into an Eastern Division Panel (for Jackson cases) and a Western Division Panel (for Memphis cases) and the computer-based assignment system tracks them independently in terms of balancing out case appointments. The Court has made seventeen appointments to date using the computer-based program, other mediator appointments have been selected by the parties themselves using our Mediator Profile Directory, which can be found on the court's website (<http://www.tnwd.uscourts.gov>).

Attorneys and non-attorneys who have the required ADR discipline training (a minimum of 40 certified hours) and who can point to adequate relevant experience are eligible to serve as mediators. All mediators, other than Magistrate Judges, must have received this required training and must complete periodic retraining in order to continue serving as mediators. It should also be noted that non-attorneys are required to satisfactorily complete four hours of additional training in federal court civil practice and procedures.

A unique feature of this ADR Plan is that through the application process potential mediators will clearly indicate to the Court the types of cases and areas of law for which they feel unqualified or simply do not want to serve as mediators. Panel mediators will not be required to serve on cases or work in areas of law for which they have requested exemption.

Another feature of this ADR Plan is that the Court has set specific fees for mediators appointed by the Court from the Mediation Panel (although mediators jointly selected by the parties are free to establish their own mediation rates with the case parties). Moreover, if a litigant has been deemed an IFP pro se party or even if not IFP has upon motion has been relieved of the responsibility to pay his or her share of the mediator's charges, the Court will pay for that individual's mediation expense

At the present time, there are no openings on the Mediation Panel. If you have an interest in serving on the panel, we urge you to review the ADR Plan in its entirety before applying to serve as a mediator. The entire ADR Plan can be found on the Court's website to read online or print for future reference. Once your application has satisfied the requirements of the Plan for Alternative Dispute Resolution your name will be placed on a waiting list for any future openings as they occur. If you have specific questions about becoming a mediator or just want to know more about the ADR Plan feel free to contact the Court's Mediation Coordinator, Venita Griffin, at: [venita\\_griffin@tnwd.uscourts.gov](mailto:venita_griffin@tnwd.uscourts.gov).

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*Mary Morris and Colleen Hitch Wilson with members of the FBA's Puerto Rico Chapter, at the FBA's Annual Meeting in Salt Lake City.*

# Major Changes Coming to Federal Rules of Civil Procedure

By Jordan Maglich, Securities Law Attorney at Wiand Guerra King, Tampa, Florida

*This article originally appeared in The Federal Lawyer and is reprinted here with permission. Since the time of the original publication, the Supreme Court has approved the amendments, which will become effective December 1 if approved by Congress.*

A sweeping set of changes to the Federal Rules of Civil Procedure is scheduled to become effective later this year that could dramatically change current discovery, procedural, and trial practices. The amendments to Rules 1, 4, 6, 16, 26, 30, 31, 33, 34, 37, and 55 of the Federal Rules of Civil Procedure, as well as the abrogation of Rule 84 (collectively, the “**Amendments**”), represent the culmination of efforts beginning in 2010 to examine the state of civil litigation in federal courts and ensure the rules remained consistent with Rule 1’s goal of achieving a “just, speedy, and inexpensive determination of every action.” The Amendments were recently approved by a judicial committee, are currently under review by the U.S. Supreme Court, and if ultimately approved by Congress, will become effective December 1, 2015.

A May 2010 Conference on Civil Litigation at Duke University Law School, attended by 200 participants representing a diverse cross-section of the legal community, ultimately concluded that while the federal civil litigation process was not in need of a top-down reconfiguration, there were significant changes could be made to facilitate the disposition of civil actions, foster communication and cooperation between parties, and enable more efficient judicial case-management. As the Committee on Rules of Practice and Procedure (the “**Committee**”) stated in a report to Chief Justice John G. Roberts:

*“What is needed can be described in two words – cooperation and proportionality – and one phrase – sustained, active, hands-on judicial case management.”*

Over four years after the Duke Conference – during which over 2,300 comments were submitted by interested practitioners and academics – the Amendments now await approval by the U.S. Supreme Court and Congress before they are scheduled to take effect on December 1, 2015. As discussed below, the sweeping changes envisioned by the Amendments will likely have a profound impact on a large cross-section of practitioners.

## *Rule 1*

The Committee sought to amend Rule 1 to include clarifying language that the Federal Rules of Civil Procedure should be construed, administered, and employed by the court and the parties to secure the just, speedy, and inexpensive determination of every action and proceeding. While not creating any new set of sanctions, Rule 1 added specific language that the Rules were to be employed by the court and the parties.

## *Rule 4*

Currently, Rule 4(m) requires that the summons and complaint in an action must be served within 120 days. The Committee initially proposed to amend Rule 4 by halving this time period from 120 days to 60 days, but was eventually persuaded by the subsequent public comments to curb the decrease from 120 days to 90 days. Among these comments were concerns that compliance with Rule 4(m) could be difficult with defendants that were difficult to locate or serve, as well as the potential for difficulties should a defendant refuse a waiver of service and force service in the resulting shortened period.

### *Rule 16*

The first significant changes to the Federal Rules of Civil Procedure come in the form of amendments to Rule 16. The first change deals with encouraging direct communications at initial case management conferences by deleting reference to a conference occurring “by telephone, mail or other means” in Rule 16(b)(1)(B). While Rule 16(b)(1)(A) will continue to allow courts to craft the scheduling order based on the parties Rule 26(f) report, the amendment will also encourage direct communications where warranted between judges and parties.

The second and third amendments to Rule 16 attempt to speed up the issuance of the scheduling order as well as expand the list of topics that can be addressed. Rule 16(b)(2) reduces the time for issuance of the scheduling order from 120 days to 90 days after a defendant has been served, or from 90 days to 60 days after any defendant has appeared. Rule 16(b)(3)(B)(iii) and (iv) specifies that a court may address the preservation of electronically-stored information (“ESI”), as well as agreements reached under Rule 502 of the Federal Rules of Evidence pertaining to disclosure of attorney-client privilege or work-product protection.

Finally, the last amendment reflects the growing consensus favoring a discovery conference with the court before the filing of any discovery motion. Rule 16(b)(3)(B)(v) was created to specify that a scheduling order may “direct that before moving for an order relating to discovery, the movant must request a conference with the court.”

### *Rule 26*

The Committee also recommended significant changes to Rule 26. One of the primary amendments relates to the scope of discovery under Rule 26(b)(1) by replacing the requirement that discovery be “relevant to any party’s claims or defense” with a “proportionality” factor that incorporates the five factors currently set forth in Rule 26(b)(2)(C): the importance of the issues at stake, the amount in controversy, the parties’ relative access to information, the parties’ resources, the importance of the discovery in resolving the issue, and whether the burden or expense of the proposed discovery outweighs its likely benefit. Of note, the “amount in controversy” factor was moved to follow the “importance of the issues at stake” factor to emphasize that the amount in controversy was not the most important concern.

The Committee also recommended the deletion of the final sentence of Rule 26(b)(1), which provided that “Relevant information need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence.” The Committee noted that the scope of discovery was never meant to encapsulate a “reasonably calculated” standard, and instead proposed new language that would reiterate the principle that inadmissibility was not a ground to oppose discovery of relevant information. The Committee recommended replacing that sentence with this language: “Information within this scope of discovery need not be admissible in evidence to be discoverable.”

Currently, Rule 26(c)(1) allows the issuance of protective orders to protect a party or person from whom discovery is sought. However, the Committee proposed that Rule 26(c)(1) be amended to expressly acknowledge a court’s authority to allocate the expenses of discovery to the requesting party. Given that this authority has been recognized by the Supreme Court for several decades, the Committee recommended the amendment of Rule 26(c)(1)(B) to provide that a protective order may specify “the terms, including time and place or the allocation of expenses, for the disclosure of discovery.” (emphasis added).

Finally, the Committee proposed the addition of Rule 26(d)(2) to allow a party to serve a Rule 34 document production request prior to the Rule 26(f) meeting between the parties. While the requesting party is free to serve the Rule 34 request prior to the Rule 26(f) meeting, the date of service would be calculated as the date of the first 26(f) meeting.

### *Rules 30, 31, and 33*

Minor amendments were proposed for Rules 30, 31, and 33, which govern depositions by oral examination, depositions by written questions, and interrogatories, respectively. The parallel amendments were proposed to reflect the newly-added proportionality factor in Rule 26(b)(1).

### *Rule 34*

The Committee proposed several significant amendments to Rule 34, which governs the production of documents, ESI, and tangible things, or entering onto land for inspection or other purposes. These amendments seek to avoid common issues arising in discovery, including the use of boilerplate objections, whether or not documents are being withheld on the basis of objections, and the timing of production of responsive documents. The first amendment clarifies that any Rule 34 requests served prior to the parties' first Rule 26(f) conference are due within 30 days after that first 26(f) conference.

The second amendment addresses the use of boilerplate objections by proposing to amend Rule 34(b)(2)(B) to require that objections to Rule 34 document production requests be stated with specificity. Such broad and boilerplate objections have recently become commonplace in discovery disputes. Indeed, the Committee Note to Rule 34(b)(2)(B) indicates that while an objection may be raised to the broad nature of a request, the objection should state the scope that is not overbroad if a portion of the request is appropriate. Additional language is also proposed in Rule 34(b)(2)(B) to allow a responding party to state that it will produce copies of documents or ESI in lieu of permitting inspection, and requiring that the production must be completed no later than the time for inspection specified in the request or another reasonable time specified in the response.

Finally, the Committee also addresses the issue of withholding documents based on an asserted objection. Rule 34(b)(2)(C) currently provides that an objection to a request must specify the part and allow inspection of the remainder. The amendment proposes to add language to Rule 34(b)(2)(C) to require that an objection "must state whether any responsive materials are being withheld on the basis of that objection." In short, the proposed amendments to Rule 34 may have a significant (and encouraging) impact on minimizing discovery disputes.

### *Rule 37*

The Committee proposed significant amendments to Rule 37, and sought to rewrite the current rule with respect to preserving electronically stored information. Adopted in 2006, the current form of Rule 37 only cautioned the court against imposing sanctions for properly preserving ESI. Reflecting on the nearly ten years that have passed since Rule 37's passage, the Committee decided that a detailed revamping of the rule was in order. Driving these concerns were widely-held feelings that many individuals and entities went above and beyond the necessary preservation out of fear that anything less could result in a showing of negligence or even an adverse inference in jury instructions. The Committee also noted a circuit split among the requisite showing before an adverse inference could be included in jury instructions.

These concerns and accompanying research ultimately yielded a revised Rule 37 that, rather than attempt to delineate the precise circumstances triggering a preservation obligation, sought to provide an array of remedies a court may take when it determines that certain information that should have been preserved is lost. In other words, the amended Rule 37 does not create a duty to preserve; rather, the rule yields to the duty imposed by case law that a preservation obligation is created when litigation is reasonably anticipated.

The Committee's amendments essentially replace Rule 37(e)(1) and provide the court with a non-exhaustive list of "curative measures" and "sanctions" in the event that a party "failed to preserve discoverable information that should have been preserved in the anticipation or conduct of litigation." These "curative" factors include allowing additional discovery and ordering the offending party to pay reasonable expenses caused by the failure. While the court is also permitted to sanction the offending party, Rule 37(e)(1)(B) allows the imposition of limited sanctions provided in Rule 37(b)(2)(A) only where the party's actions either (i) caused substantial prejudice and were willful or in bad faith, or (ii) irreparably deprived a part of a meaningful opportunity to present or defend against the claims made in the litigation.

### *Rules 55 and 84*

The Committee proposes to amend Rule 55(c) by clarifying that a court may set aside a final default judgment under Rule 60(b). Given the relationship between Rules 54(b), 55(c), and 60(b), the Committee felt that specifying that Rule 60(b)'s heightened standards were applicable only when seeking relief from a final judgment.

Last but not least, the Committee addressed the Appendix of Forms provided for by Rule 84. Recognizing that Rule 84 was originally adopted in 1938 when the Civil Rules were established, the Committee observed that many of the forms were out of date, amendment of the forms would be time-consuming, and multiple alternative sources existed for forms. As the Committee characterized it, it was time to “get out of the forms business.”

*In Closing*

In connection with Rule 1’s goal of the “just, speedy, and inexpensive determination of every action and proceeding,” the Amendments proposed by the Committee contain a series of significant steps that seek to expedite early pre-trial stages, bring clarity to many facets of discovery, and redefine a party’s ESI obligations. If approved by the Supreme Court and subsequently Congress, the Amendments are scheduled to take effect December 1, 2015. Practitioners are recommended to proactively research how these changes may affect their practice areas.[1]

[1] Interested parties are encouraged to visit the U.S. Courts’ [website](http://www.uscourts.gov/rules-policies) [http://www.uscourts.gov/rules-policies], which contains extensive information on the changes to the FRCP, including Reports of the Judicial Conference Committee on Rules of Practice and Procedure.

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2015 MEMPHIS/MID-SOUTH CHAPTER OF THE  
FEDERAL BAR ASSOCIATION  
ANNUAL SEMINAR



**Friday, October 30, 2015**  
**University of Memphis**  
**Cecil C. Humphreys School of Law**  
**1 North Front Street, Memphis, TN 38103**

- 8:15 – 8:45 a.m.                    **Registration and Breakfast**
- 8:45 – 9:00 a.m.                   **Welcome and Opening Remarks**
- 9:00 – 10:00 a.m.                **Sixth Circuit Update: A Judicial Perspective**  
*Judge Jane B. Stranch - U.S. Court of Appeals for the Sixth Circuit – and Judge Sheryl H. Lipman - U.S. District Court, W.D. of Tennessee - will provide an overview of recent developments in Sixth Circuit law and practice, including highlights of significant decisions on both civil and criminal issues. Kevin G. Ritz - Asst. U.S. Attorney, W.D. of Tennessee – will moderate the panel discussion.*
- 10:00 – 11:00 a.m.               **How MALS Changed the Law in Tennessee**  
*MALS is celebrating its 45<sup>th</sup> anniversary this year, but most do not fully understand the tremendous impact that it had on the law in Tennessee. In its first ten years of existence, MALS changed the face of the law statewide. Mayor A C Wharton, Jr., David Howard, and Donald Donati will share those stories and explain how MALS was responsible for juvenile court reform, the landlord tenant act, the establishment of debtor’s rights, and much more.*
- 11:00 – 11:15 a.m.               **Break**

11:15 – 12:15 a.m.

**Arguing Before The Supreme Court: It's No Tennessee Waltz**

*Carter G. Phillips, is the Chair of the Executive Committee of Sidley Austin LLP, and is a member of the firm's Management Committee. He served as a law clerk to both Judge Robert Sprecher on the U.S. Court of Appeals for the Seventh Circuit and Chief Justice Warren E. Burger on the United States Supreme Court. Since joining Sidley, Carter has argued 72 cases in the Supreme Court; for a total of 81 arguments before that Court, the most of any lawyer currently in private practice.*

12:15 – 1:30 p.m.

**Lunch**

1:30 – 2:30 p.m.

**Leveraging Technology to Meet your ESI Obligations**

*John Hartman, principal of TERIS Texas, will join Michael McLaren (Butler Snow), and Shea Oliver (Burch Porter) in a panel discussion on E-discovery practices and the use of technology to meet your ESI obligations.*

**CJA Break Out Session and Business Meeting**

*In this year's annual meeting, Thomas Gould, Clerk for the U.S. District Court for the Western District of TN, will preview and discuss the implementation of the new electronic voucher system and other upcoming changes to the program for the coming year.*

2:30 – 3:30 p.m.

**Upcoming Amendments to the Federal Rules of Civil Procedure**

*Panelists William B. Ryan (Donati Law Firm), Amy M. Pepke (Butler Snow), Jeana M. Littrell (Federal Express), and Frank L. Watson, III (Watson Burns, PLLC) will discuss the upcoming changes to the Federal Rules of Civil Procedure and the impact that these amendments may have on federal practice.*

3:30 – 3:45 p.m.

**Break**

3:45 – 4:45 p.m.

**Judges' Panel**

*District, Bankruptcy, and Magistrate Judges of the W.D. of Tennessee will discuss a wide range of topics related to federal practice.*

5:00 - 6:00 p.m.

**Judicial Reception**

*The FBA will host a reception for our judges and attorneys immediately following the seminar. Join us for appetizers, wine, beer, and soft drinks.*

Price (includes breakfast, lunch & reception )  \$190 FBA Members

\$240 Non-Members

\$95 Government Attorneys

FREE for CJA Panel Members

FREE for Federal Judicial Law Clerks

REGISTRATION DEADLINE IS October 23, 2015 -Space is Limited

Pending approval from the Tennessee Commission on Continuing Legal Education, attendees will receive 5 hours of CLE (general) and 1.0 hour of CLE (dual) credit in Tennessee.

#### REGISTRATION FORM

Name:

BPR No.:

Address:

Email:

Phone:

Facsimile:

Please send registration with payment to:

Michael C. McLaren, Butler Snow

6075 Poplar Avenue, Suite  
500 Memphis, TN 38119

[Michael.mclaren@butlersnow.com](mailto:Michael.mclaren@butlersnow.com)

cc: [pamela.atkins@butlersnow.com](mailto:pamela.atkins@butlersnow.com)

Please make checks payable to "Federal Bar Association"

The FBA will submit CLE hours for Tennessee.