



FBA Memphis/MidSouth Chapter Newsletter

Volume 1, Issue 1

April 2011

Chapter Website: www.fedbar.org/Chapters/Memphis-Mid-South-Chapter

UPCOMING FBA EVENTS

May 13-14, 2011

Immigration Law Seminar (full brochure available online)
Cecil C. Humphreys School of Law – Memphis, Tennessee

May 13, 5:45 p.m.

Judicial Reception and Awards Ceremony (for local judges and immigration judges)
Cecil C. Humphreys School of Law – Memphis, Tennessee

July 19, 2011

Jackson Federal Practice Update
Federal Courthouse – Jackson, Tennessee

July 28, 2011 (afternoon)

Federal Discovery Strategy, Tips & Techniques
Federal Courthouse – Memphis, Tennessee

October 26, 2011

Annual Federal Practice & Procedure Seminar
Cecil C. Humphreys School of Law – Memphis, Tennessee

INSIDE THIS ISSUE

- 1** Upcoming Events
- 2** President's Message
- 3** Judicial Profile – Chief Judge Jon P. McCalla
- 6** Sixth Circuit Case Update
 - employment law
 - general civil
 - criminal law
- 14** The Clerk's Corner

The Federal Bar Association's membership application is available online at <http://www.fedbar.org>.

PRESIDENT'S MESSAGE

By Michael E. Gabel

Welcome to the inaugural issue of the Federal Bar Association's Memphis - MidSouth Chapter Newsletter. We plan to periodically offer this publication to update you on the activities of the Memphis/Mid-South Chapter of the FBA, while also offering interesting and relevant content that will benefit the federal practitioner. In this issue, you will find a judicial profile on Chief Judge McCalla, as well as summaries of significant recent decisions by the Sixth Circuit, and an interesting article regarding the Clerk's offices' efforts at disaster preparedness.

We have been busy planning this year's events, and I hope you will mark your calendar and plan to attend. One date you will want to save is October 26, the date of our Annual Federal Practice and Procedure Seminar. Linda Greenhouse, the Pulitzer prize winning journalist who covered the Supreme Court for the New York Times for nearly three decades, has recently agreed to speak at this year's seminar.

Below you will see a picture of last year's chapter president, Amy Pepke, accepting the Presidential Excellence Award on behalf of the Memphis/Mid-South Chapter at the National FBA Convention. Over the past several years, our chapter's programs have won numerous national awards, and we are proud of our accomplishments.

We would not be able to put on these programs without the generous support of our federal judges, and we are deeply grateful for their willingness to give their time and effort to our events. The members of the federal bench support the programs of the FBA by acting as speakers and participating in panel discussions, and Magistrate Judge Tu Pham serves on our chapter's Board of Directors.

Unlike some larger bar associations, the local FBA chapter is run entirely by volunteers. I am

grateful to the officers and members of the board of directors, who put in countless hours planning and organizing events. In addition, I would like to thank Board member Kevin Ritz and FBA members John Marshall Jones and Tyler Brooks for their work on this newsletter.

As a result of our volunteer nature, we are always eager to have additional help. If you have ideas about ways that we can improve this chapter and further enhance the value of your FBA membership, 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 on page 13).

One opportunity for involvement is in the publication of this newsletter. I would welcome ideas for future issues, and aspiring writers are encouraged to contact us. Finally, if you have an idea for a catchier or more captivating name than "The FBA Memphis/Mid-South Chapter Newsletter," let me know. The person who submits the best name will receive recognition in a future newsletter, and potentially a more tangible prize. *MEG*

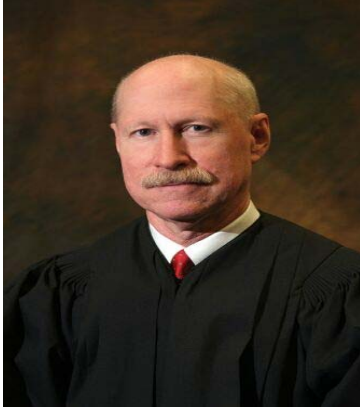


2010 Chapter President Amy Pepke accepts the Presidential Excellence Award on behalf of the Memphis/Mid-South Chapter at the FBA National Meeting.

JUDICIAL PROFILE

CHIEF JUDGE JON P. McCALLA

By Michael W. Higginbotham



Judge Jon Phipps McCalla is the Chief Judge for the Western District of Tennessee, sitting in Memphis. Nominated by President George H. W. Bush in 1991 to a newly created seat, he was confirmed in 1992. He has been Chief Judge since January 1, 2008.

Judge McCalla was born on February 16, 1947 in Memphis, Tennessee and grew up on a farm just east of the small town of Rosemark, Tennessee. Rosemark is about 15 miles north of Memphis. He is one of four children of A.K. and Mary Catheryne McCalla. He has a twin sister, Molly McCalla, an older brother, Frank, and a younger brother, Tom. The boys on the farm grew up working with livestock, both cattle and hogs. Working on the farm taught him lessons of responsibility. "You learn early on what you have to do – everyday – and the consequences of not doing it."

Judge McCalla attended Rosemark Elementary School - a small public school - in rural Northeast Shelby County. His entire eighth grade consisted of ten boys and four girls, two of the girls being his twin sister and one of his first cousins. Almost every boy in the elementary school played on the school's sports teams, so Judge McCalla played basketball and baseball and was very active in 4-H throughout elementary school. Despite the

school's small size, Rosemark was particularly competitive in basketball, usually finishing close to the top in its division.

Judge McCalla attended Millington Central High School, where he developed an interest in journalism and was editor of the school newspaper. He also continued his involvement in 4-H, was a class officer his sophomore year, and was salutatorian of his graduating class. Because he was one of four siblings and had two first cousins (his uncle farmed with his dad), his parents encouraged the children to prepare for another career.

In 1965, Judge McCalla enrolled at the University of Tennessee in Knoxville, where he majored in Agricultural Economics. He served as president of his fraternity, Pi Kappa Alpha, and was inducted into Omicron Delta Kappa, the national leadership honor society. He also served in the ROTC and was a Distinguished Military Graduate in 1969. During the latter years of his college tenure, the Vietnam war was at its peak, and there was little doubt that he would be serving upon graduation. He recalled that he and his contemporaries in college did not plan too far beyond graduation.

Judge McCalla received his orders from the Army in December of 1968, and reported to Fort Sill, Oklahoma at the end of the summer in 1969. He and other Distinguished Military Graduates (from non-military institutions) trained alongside recent West Point graduates and enjoyed a degree of competition as they trained to become artillery officers. He recalls that, in marked contrast to his next destination, the winter in Fort Sill was quite cold, but as a student of history, he enjoyed the history the fort had to offer.

At the conclusion of his training, First Lieutenant McCalla was assigned to the Military Assistance Command Vietnam, supporting the South Vietnamese troops, including both better-trained Regional Forces and small local units - Popular Forces. In that role, he served on a five-man MAT team (Military Assistance Team) which consisted of a first lieutenant, second lieutenant, medic, and two sergeants. The sergeants were usually small arms and heavy weapons specialists. They lived and fought with their Vietnamese units, providing tactical and combat support, including calling in American air support or Vietnamese artillery support. They also provided critical medical support to the Vietnamese. While his team engaged in active combat from fortified positions, they were also charged with expanding the area of influence for the South Vietnamese forces. The latter meant more perilous night activities and similar tactics, and Judge McCalla was ultimately awarded the Bronze Star and Combat Infantryman's Badge.

MAT teams were also tasked with the broader mission of establishing relationships with the local village governments and citizens in his area. The mission manifested itself in different ways. His team taught the villagers English. They sought out and met with village chiefs, where the basic training in Vietnamese that Judge McCalla received proved its worth. They provided security so that roads and medical facilities could be constructed. Perhaps most importantly, they were able to provide medical care or access to medical care, which would have otherwise been unavailable to the villagers. For that reason, according to Judge McCalla, the medic was the most popular and important guy on the team. In the end, the Judge believes they were able to change the way those Vietnamese viewed Americans. "As Americans, we wanted to change people's lives for the better."

Reflecting on his service, Judge McCalla first cautions that combat is not "like a movie," and he counts himself as "one of the lucky ones." He learned important lessons during his time in Vietnam. He learned that as different as the Vietnamese were from him, they wanted the same basic thing that he now recognizes most people

want. They wanted to provide for and protect their families, to have reasonable order and basic material goods. He also learned to recognize the really important things in life. Both of these lessons now shape his perspective as a judge.

After his one year tour in Vietnam, Judge McCalla was posted to the Special Processing Battalion at Fort Dix, New Jersey, which was charged with processing personnel out of Army service. Having mentioned his desire to attend law school to a superior, he was assigned to organize the prosecutions of courts martial there. He was even allowed as a non-lawyer to prosecute one of the cases - and won.

Judge McCalla received his discharge from active duty in early 1971 and took the LSAT in April. While the deadline for law school applications had already passed, he decided to apply to several law schools anyway and plead his case for extensions due to his service commitment. He was accepted to Florida State University Law School and initially intended to enroll there, but decided to seek a meeting with Vanderbilt Law School Assistant Dean Thomas R. McCoy first. That proved to be a successful encounter, and he was accepted to the first year class at Vanderbilt ten days before the start of school. At Vanderbilt, he served as an Articles Editor for the Vanderbilt Law Review, as well as on the Legal Aid Society and the Public Defender Program.

While he was a law student, Judge McCalla was a summer clerk for the Memphis firm then known as Farris, Hancock & Gilman, but was advised by Vanderbilt to pursue a clerkship with one of the District Court Judges in Memphis after graduation. He interviewed with Judges Bailey Brown, Robert McRae and Harry Wellford, and was offered a clerkship with then-Chief Judge Brown. He has high praise for Judge Brown, describing him as bright and collaborative and the clerkship as fun and enjoyable.

Following his clerkship, Judge McCalla joined the Memphis firm of Armstrong, Allen, Braden, Goodman, McBride & Prewitt, and was named a partner there in 1980. In 1987, he became a partner in the Memphis firm then known as

Heiskell, Donelson, Bearman, Adams, Williams & Kirsch (now known as Baker, Donelson, Bearman, Caldwell & Berkowitz), where he practiced until taking the bench. Judge McCalla's private practice focused primarily on intellectual property and First Amendment litigation, and his interest in journalism came full circle in his long-time representation of Memphis' daily newspaper, The Commercial Appeal.

The Western District of Tennessee tries more cases than almost any other federal court in the country on a per-judge basis. With that in mind, it is not surprising that Judge McCalla is a strong advocate for the effective selection of unbiased, properly instructed juries. He has a standard set of questions he delivers in each trial, which are designed to highlight and eliminate bias. He also favors juror questionnaires, primarily in significant or otherwise lengthy trials, and notes that, rather than lengthen the selection process, questionnaires can actually streamline and shorten it. Judge McCalla also has great faith in jurors on average. He cites examples of those who admit to illiteracy or embarrassing personal experiences which might affect their bias as validations of our jury system.

Regarding lawyers, Judge McCalla has high praise for the members of the criminal bar, both prosecutors and defense attorneys. He says that, because they are so frequently in Court, they more readily recognize the appropriate way to behave there than other lawyers who are perhaps not so regularly in court. He has seen an increase over the years in "the decibel level" and the personalization of issues in cases, and finds neither helpful. He says the best lawyers know that they are bound by the law and the facts presented to them and do the best they can with those things. If they lose under those circumstances, they know it is not necessarily a reflection of their skills as a lawyer, nor an indication of how they are thought of by the court. "A lawyer who says he never lost a case never had a client with a losing case."

Judge McCalla's involvement in both the legal and non-legal communities is well-known. He is a master member of the Leo Bearman, Sr.

American Inn of Court and served as Counsel/President of the Executive Committee of that body from 2006-2010. He is currently a member of the Board of Trustees for the American Inns of Court Foundation. He is an Advisory Board member of the Memphis Chapter of the Federalist Society, and served on the Site Selection Committee for the Cecil C. Humphreys School of Law, University of Memphis. He is an active member of the Rotary and has served on a number of Rotary committees.

Judge McCalla is a strong advocate for education and literacy, noting that illiteracy is a frequent issue in his court and with criminal defendants. He was a volunteer with the Memphis Grizzlies Academy, a non-profit partnership with the Memphis City Schools focused on the mission of helping students who were behind academically. He also served from 2003 to 2007 on the Rotary Reader Committee. He is active in his church, Grace St. Luke's Episcopal Church, and serves on the Board of Episcopal Churchmen of Tennessee.

Judge McCalla and his wife, Dr. Mary McCalla, an otolaryngologist, enjoy traveling and the arts together. She enjoys gardening. They are the proud parents of two daughters, one of whom is an English teacher in Korea and the other of whom is completing a PhD in clinical psychology.

Michael W. Higginbotham is Lead Counsel in the Litigation Department at Federal Express Corporation and a member of the FBA Memphis/MidSouth Chapter's Board of Directors.

SIXTH CIRCUIT CASE UPDATE

Employment Law

Franklin v. Kellogg Co., 619 F.3d 604 (6th Cir. 2010), *reh'g and reh'g en banc denied* (Oct. 25, 2010) (**Siler** and Graham (S.D. Ohio), JJ.; Clay, J., dissenting):

Plaintiff, an employee at Defendant's plant in Rossville, Tennessee, filed this action on behalf of herself and all other similarly situated employees under the Fair Labor Standards Act to recover compensation for time spent donning and doffing a safety uniform and equipment and for time spent walking between the plant's designated changing area and the employee time clock. Defendant required hourly production and maintenance employees to wear company-provided uniforms as well as hair nets and other equipment. Defendant never compensated its employees for the time spent donning and doffing the uniforms and equipment, and there was no written agreement as to this time in the collective bargaining agreement (CBA) with the company union. The district court granted summary judgment to Defendant, and Plaintiff appealed.

Section 203(o) excludes from an employee's compensable hours the time spent changing clothes at the beginning and end of a working day if such time was "excluded from measured working time during the week involved by the express terms of or by custom or practice under a bona fide collective-bargaining agreement applicable to the particular employee." Joining the majority of circuits that have addressed this issue, the Court of Appeals first held that § 203(o) is an exclusion from the definition of work, not an exemption and affirmative defense. Therefore, the plaintiff bears the burden of proving that the time spent changing clothes should not be excluded under § 203(o). The Court further concluded that the uniforms and equipment at issue constituted "clothes" within the meaning of § 203(o). In so doing, the Court rejected an opinion letter from the Department of Labor to the contrary, in part

because the DOL had taken inconsistent positions over the past twelve years. Finally, the Court concluded that there was a custom or practice of not paying for time spent donning and doffing prior to the first CBA between Defendant and the union and that nothing in the CBA spoke to or prohibited Defendant's practice of not paying for this time. Because it found that this created a custom or practice under a bona fide CBA, the Court concluded that donning and doffing time was excluded from the employee's "hours worked" and affirmed the district court's summary judgment on this claim. The Court, however, found that Plaintiff may be entitled to payment for post-donning and pre-doffing walking time because the uniform and equipment were integral and indispensable and the act of donning these items constituted a principal activity. Therefore, the Court partially reversed the trial court's summary judgment and remanded for further proceedings on this issue.

Judge Clay dissented. He argued that there were material questions of fact as to whether the union knew there was a right to payment for donning and doffing these items and thereby knowingly acquiesced in Defendant's decision to exclude it from its employees' compensable time.

* * *

Bates v. Dura Auto. Sys., Inc., 625 F.3d 283 (6th Cir. 2010) (**Martin**, McKeague, and Ludington (E.D. Mich.), JJ.):

Plaintiffs, seven former employees of Defendant, sued under the Americans with Disabilities Act (ADA) after Defendant instituted a policy prohibiting employees from using certain legal prescription drugs (including Xanax, Lortab, and Oxycodone). Plaintiffs each tested positive for the prohibited drugs and were terminated when they declined to transition to alternative medications. Defendant refused to consider letters from Plaintiffs' physicians opining that the drugs would not affect their work. The district court found that

there was an issue of fact as to whether one of the plaintiffs was disabled because she potentially possessed a “record of disability.” Otherwise, Plaintiffs did not qualify as disabled under the ADA.

On cross motions for summary judgment, the district court held that an ADA plaintiff need not be disabled to sue under 42 U.S.C. § 12112(b). An interlocutory appeal followed. Section 12112(a) prohibits discrimination by a covered entity “against a qualified individual with a disability,” and § 12112(b) includes in the definition of discrimination “using qualification standards, employment tests or other selection criteria that screen out or tend to screen out an individual with a disability or a class of individuals with disabilities” unless “job-related for the position” and “consistent with business necessity.” The Court of Appeals held that the plain language of the ADA limited claims under § 12112(b) to employees who are disabled and that this reading is not “demonstrably at odds” with Congress’s intent. Thus, since Plaintiffs were not disabled, they could not pursue claims under § 12112(b)(6), and the ruling of the district court was reversed.

* * *

DeLuca v. BlueCross BlueShield of Michigan, 628 F.3d 743 (6th Cir. 2010), *reh’g and reh’g en banc denied* (Feb. 17, 2011) (**Daughtrey** and Rogers, JJ.; Kethledge, J., dissenting):

Since 1996, Defendant BlueCross BlueShield of Michigan (BCBSM) has performed claims-processing and other administrative services for the self-insured employee health benefit plan maintained by Flagstar Bank. In 2003, Flagstar Bank executed an addendum under which BCBSM agreed to establish and maintain provider networks. The next year, BCBSM began negotiating amendments to its existing rate agreements with providers and in the process agreed to increase the rates allowed for PPO plans in exchange for lowering HMO rates. Plaintiff, a beneficiary of the Flagstar Bank plan, filed a putative class action against BCBSM, arguing that these actions, which resulted in higher provider charges to participants in the Flagstar Bank plan,

violated BCBSM’s fiduciary duties under ERISA. The district court granted summary judgment in favor of BCBSM. Plaintiff appealed.

The Court of Appeals held that BCBSM was not acting as a fiduciary when it negotiated the revised provider rate agreements. Following Supreme Court precedent, the Court emphasized that an ERISA fiduciary is only liable for a breach of fiduciary duty when it is performing a fiduciary function with respect to the specific actions at issue. Thus, although BCBSM was an ERISA fiduciary for claims processing and administrative purposes, the negotiation of rates was separate from these roles and could not give rise to a breach of fiduciary claim given that the rates affected a broad range of consumers. Further, the Court held that BCBSM could not be liable in its role as a developer and maintainer of provider networks because these dealings were not directly related to the Flagstar benefits plan, but instead simply constituted a business decision that affected a broad range of health care consumers. Accordingly, the Court affirmed the award of summary judgment to BCBSM.

Judge Kethledge dissented, arguing that, based on the record, a jury could find that BCBSM’s agreement regarding provider networks made BCBSM a fiduciary for purposes of negotiating provider agreements. Thus, he contended BCBSM could be liable under either of the Plaintiff’s two theories.

* * *

Jakubowski v. The Christ Hospital, Inc., 627 F.3d 195 (6th Cir. 2010) (**Martin** and Clay, JJ.; Cole, J., concurring in the judgment):

Plaintiff suffers from Asperger’s Disorder—a condition that impairs social interaction. Defendant Christ Hospital employed Plaintiff as a family practice medical resident. After the hospital terminated his employment, Plaintiff sued the hospital and the residency program director under the American’s with Disabilities Act (ADA), the Rehabilitation Act, and Ohio antidiscrimination law. The district court granted summary judgment, and Plaintiff appealed.

Plaintiff contended that the trial court erred in concluding that he was not “otherwise qualified” under the ADA. The hospital argued that Plaintiff could not perform the essential job function of communicating with colleagues and patients in ways that guaranteed patient safety. The Court of Appeals explained that this question turned on whether Plaintiff had proposed a reasonable accommodation for his disability. Plaintiff proposed making hospital physicians and staff aware of his condition and its symptoms. Because Plaintiff’s proposal to Christ Hospital did not meaningfully address his limitation in effectively communicating with patients, the Court held that Plaintiff had not established that he was otherwise qualified. Plaintiff also asserted that the hospital acted in bad faith by not offering him the option of a remediation program similar to one offered another resident. The Court held, however, that by considering Plaintiff’s proposal, explaining how it was unreasonable, offering help in securing a residency in pathology (which would involve less interaction with patients), and not otherwise hindering the process, the hospital participated in the accommodation process in good faith, even without offering a remediation program. Thus, the Court affirmed the district court’s grant of summary judgment.

In his concurrence, Judge Cole stated that the Court’s analysis incorrectly placed the burden on Plaintiff to produce a comprehensive, trial-ready proposal for accommodation in his first request for accommodation. He concurred in the judgment, however, because he found that the testimony from Plaintiff’s proffered expert was insufficient for a jury to conclude that Plaintiff’s proposed accommodations would actually remedy his disability-related impairments.

* * *

Bledsoe v. Emery Worldwide Airlines, __ F.3d __, No. 09-4346 (Feb. 16, 2011) (**Guy**, Boggs, and Gibbons, JJ.):

Defendant Emery Worldwide Airlines (EWA) is a former commercial air freight carrier. In August 2001, the FAA grounded EWA’s flights. As a result, EWA temporarily laid off 575 employees, retaining a smaller number of employees for

limited purposes. Between August 13 and 15, 2001, EWA mailed letters to the laid-off employees stating that, provided it could resolve issues with the FAA, their layoffs would last no more than six months. In September 2001, the FAA imposed additional requirements on EWA. EWA then sent letters in early October and early November 2001 notifying the laid-off employees of the new developments. The November 5 letter stated that EWA now did not know if the layoffs would be temporary or permanent and that the resumption of operations was contingent on several factors. On December 4, 2001, EWA’s parent company decided that the challenges presented by the FAA’s requirements were too onerous and decided to close EWA. The next day EWA notified the laid-off employees that their layoffs were permanent without any advance notice or pay in lieu of notice.

Plaintiffs filed a class action on behalf of themselves and the other laid-off employees against EWA and its parent company under the WARN Act. The WARN Act generally requires an employer of 100 or more full-time employees to provide 60-days written notice prior to a plant closing or mass layoff. Plaintiffs premised their claims on the December 2001 notice, not the initial lay off in August. After a bench trial, the district court found in favor of Defendants, and Plaintiffs appealed.

The Court of Appeals first held that the district court correctly ruled that Plaintiffs were not entitled to a jury trial under either the WARN Act or the Seventh Amendment. The Court also upheld the trial court’s finding that Plaintiffs were not “affected employees,” a term of art under the Act that the Sixth Circuit has interpreted to include laid-off employees who have an objectively “reasonable expectation of recall” at the time they lose their employment. After considering the letters EWA sent to the laid-off employees, the Court agreed with the district court that, given the obstacles that developed after the initial layoffs, a reasonable employee would not have expected to be recalled to work by December 2001. Accordingly, the Court affirmed the district court’s judgment for Defendants.

Criminal Law

U.S. v. Grant, No. 07-3831 (Jan. 11, 2011) (en banc)

Majority: **Gibbons**, Batchelder, Martin, Boggs, Gilman, Rogers, Sutton, Cook, McKeague, Griffin, Kethledge

Concurring: **Merritt**

Dissenting in part: **White**

Dissent: **Clay**, Keith, Moore, Cole

The government made a Rule 35 substantial assistance motion on behalf of the defendant, who had previously received a 25-year mandatory minimum sentence. The district court adopted the government's recommendation to reduce the sentence to 16 years and also stated on the record that it would not consider other factors (guideline issues, 3553 factors) in re-sentencing the defendant.

The initial Sixth Circuit panel reversed in June 2009, holding that "once the grip of the mandatory minimum sentence is broken" by the Rule 35 motion, the district court can consider other 3553 factors in re-sentencing the defendant. The *en banc* court vacated that decision and affirmed the sentence, holding that 3553(a) factors have no role in Rule 35 hearings, which are not "*Booker*-type proceedings." "The value of the substantial assistance is the governing principle in this exercise of discretion, and the reduction may not exceed the value of the assistance." Judge Gibbons wrote extensively about the discretion that district courts nonetheless may exercise in a Rule 35 proceeding, acknowledging some "overlap between some of the factors we view as appropriate aspects of valuing the assistance given and the Section 3553(a) factors."

* * *

U.S. v. Henderson, No. 08-3439 (Martin, **McKeague**, Ludington (E.D. Mich.)) (Nov. 19, 2010)

In 1981, Henderson robbed a bank. His friend Robert Bass provided information about the robbery to the FBI, leading to Henderson's arrest.

At trial the getaway driver Coy Washington testified against Henderson. Henderson was convicted and sentenced to 25 years. He got out in April 1996. In November 1996, Bass was killed. In November 1998, Washington was killed. A jury convicted Henderson of these retaliatory murders. The court affirmed.

At trial, the district court allowed evidence of statements made in 1981 by the murder victims. The question was whether this was error under *Crawford v. Washington*, 541 U.S. 36 (2004). Admission of Bass's statements to the FBI was proper. Since it was admissible not for the truth of the matter asserted, but rather to show only that Bass had made an offer to help authorities, it was not testimonial.

Washington's statement that Henderson said "he would do something to me if I was to do something to him" should not have been admitted, because it was testimonial hearsay. However, admission of the statement was harmless error, because it was cumulative of other more direct evidence establishing Henderson's retaliatory animus.

* * *

U.S. v. Warshak et al., Nos. 08-3997/4085/4087/4212/4429; 09-3176 (Keith (concurring in result), **Boggs**, McKeague) (Dec. 14, 2010)

The court affirmed most of the convictions of two individuals and a corporation for fraud and money laundering. The scheme related to the sale of Enzyte, a drug that "purported to increase the size of a man's erection."

The court held that the defendant enjoyed a reasonable expectation of privacy in his emails, which receive Fourth Amendment protection just like letters or phone calls. "The government may not compel a commercial ISP to turn over the contents of a subscriber's emails without first obtaining a warrant based on probable cause....[T]o the extent that the Stored Communications Act [18 USC 2703(b) & (d)] purports to permit the government to obtain such

emails warrantlessly, the SCA is is unconstitutional.” Because the agents have relied on the SCA in good faith, the exclusionary rule did not apply. After this decision, though, “the good-faith” calculus has changed, and a reasonable officer may no longer assume that the Constitution permits warrantless searches of private emails.”

* * *

U.S. v. Ashraf, No. 09-4002 (**Gilman**, Griffin, Collier (E.D. Tenn.)) (Jan. 12, 2011)

Defendant was convicted for willfully failing to sign travel documents necessary for his departure from the country, after a final order of removal had been entered. The government moved to dismiss the appeal, because Ashraf had already served his sentence and been deported to Pakistan. The court denied the motion, relying on a presumption that the defendant continues to suffer collateral consequences from the conviction (e.g., his future ability to return to the U.S. would be affected). Then, interpreting 8 U.S.C. Sections 1252 and 1253, the court affirmed, holding that Ashraf’s “attempts to have his removal reversed do not excuse him from his statutory obligation to make a good-faith effort to obtain travel documents.”

* * *

U.S. v. Locklear, No. 08-1180 (**Gibbons**, **Kethledge**, Sargus (S.D. Ohio)) (Jan. 28, 2011)

Defendant robbed a bank on Christmas Eve 2003. Agents caught up with him three weeks later, in a car with four firearms (one of which was used in the robbery). He was charged in a two-count indictment with bank robbery (on Christmas Eve) and being a felon in possession of firearms (on or about January 11-13).

The joinder of these offenses was erroneous under Rule 8(a). But the error was harmless, because the “extra” information known to the jury (that defendant was a felon and that he later possessed three guns in addition to the one used in the robbery) did not have a substantial effect on the jury’s verdict on the bank robbery, due to the other “overwhelming” evidence.

General Civil Law

Westfield v. Federal Republic of Germany, No. 09-6010, ___ F.3d ___, 2011 WL 309637 (6th Cir. February 2, 2011) (Judges **Martin**, Siler, Bell (W.D. Mich.)).

The heirs of Walter Westfield, a German art dealer in the 1930s, sued the Federal Republic of Germany to recover the value of Westfield’s art collection. The heirs claimed that while under Nazi control, Germany seized and sold Westfield’s collection, which he had unsuccessfully attempted to protect and bring to the United States. The heirs alleged that Westfield intended to send his collection to his brother in Nashville, that Germany’s action had a direct effect in the United States because it prevented valuable assets from reaching this country, deprived Westfield’s family of property intended for them and that would have passed to his heirs, and deprived the United States art market of access to the collection. Westfield’s heirs filed suit in Tennessee state court. Germany removed the case to federal court and moved to dismiss for lack of subject-matter jurisdiction under the Foreign Sovereign Immunities Act. The district court granted the motion to dismiss.

The Foreign Sovereign Immunities Act, 28 U.S.C. §§ 1602 *et seq.*, is the sole available avenue by which an American court may exercise jurisdiction over a foreign nation; jurisdiction under the Act is strictly limited. In this case, Westfield’s heirs asserted that the district court should have exercised jurisdiction under the “commercial activities” exception to foreign sovereign immunity. Westfield’s heirs argued that Germany’s actions occurred “outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act cause[d] a direct effect in the United States[,]”, and that Germany therefore was subject to jurisdiction under 28 U.S.C. § 1605(a)(2) (defining the three categories of the “commercial activities” exception to foreign sovereign immunity).

The Sixth Circuit affirmed the district court's dismissal of the case, although on different grounds, holding that even if Germany's actions were undertaken in connection with commercial activity (the district court found they were not), Westfield's heirs had not established that the foreign sovereign's alleged actions caused a "direct effect" in the United States. The Sixth Circuit examined cases in which jurisdiction had been exercised over foreign nations. The Court noted that the required "direct effect" is established, for example, where a foreign sovereign has issued bonds, promised to make payment at a location in the United States, and then has failed or refused to make payment. In such an instance, there is direct effect in the United States, and the commercial activities exception to foreign sovereign immunity applies.

The Sixth Circuit found that "Germany's actions did not extend beyond its borders. The only connection to the United States is through Westfield and derivative of Germany's action. As appalling as the Nazis' actions were, the reverberations from them in Nashville were derivative of Germany's seizure and not direct effects". Affirming the district court's dismissal, the Sixth Circuit concluded: "We are deeply sympathetic to the loss the Heirs suffered as a result of Germany's unspeakable acts. However, our jurisdiction is limited by both Article III of the Constitution and the statutes Congress enacts. We must operate within those restrictions...."

Doe v. Boland, No. 09-4281, 630 F.3d 491 (6th Cir. January 19, 2011) (Judges **Sutton**, Griffin, Bertlesman (E.D. Ky.)).

Defendant Boland, in connection with preparing testimony and exhibits as an expert witness for clients facing criminal charges for child pornography, downloaded images of children from a stock photo website and then digitally morphed the images into pornographic ones. The parents/guardians of the children learned about the exhibits, and sued Boland under the civil remedy provisions of the federal child pornography statute. The district court ruled in favor of Boland, holding that, as a matter of law, Congress

did not intend for the statute to apply to expert witnesses.

18 U.S.C. § 2252A(a)(5)(B) makes it unlawful for any person to knowingly possess or access with intent to view a computer disk or other material that contains child pornography, which disk or material was produced using materials affecting interstate commerce. The children and their parents/guardians sued Boland under 18 U.S.C. §§ 2252A(f) and 2255, which provide for civil damages to "any person aggrieved" by and minors who suffer "personal injury" as a result of a violation of § 2252A(a).

The Sixth Circuit reversed the district court's order granting summary judgment in Boland's favor, holding that § 2252A applied to his actions, and that, even though he had acted in his capacity as an expert witness, there was no exception to possible civil liability under the statute. In at least one of the underlying cases in which Boland testified as an expert, he had obtained the court's permission to present testimony and images demonstrating the difficulty in determining whether an image depicts an actual child (which would violate the statute) or a virtual image of a child (which would not). Boland argued that the trial judge therefore had permitted him to create and possess the otherwise unlawful images. The Sixth Circuit rejected this argument, stating that "[n]one of this authorized or required the creation or possession of new child pornography." Similarly, the Court rejected the argument that Boland was immune from liability because his actions were taken in his capacity as a witness in a judicial proceeding.

Fabian v. Fulmer Helmets, Inc., No. 10-5009, 628 F.3d 278 (6th Cir. December 23, 2010) (Judges **Sutton**, Moore, Friedman (Fed. Cir.)).

Plaintiff Robert Fabian sued Fulmer Helmets in Tennessee state court in April 2009, claiming that he had purchased two large Fulmer AF-50 motorcycle helmets in reliance on Fulmer Helmets' misrepresentation that the helmets had been tested and approved by the United States Department of Transportation. Fabian sold one of

the two helmets to a friend, who died from severe brain trauma suffered in a motorcycle accident that occurred while he was wearing the Fulmer Helmets' AF-50 helmet. Fulmer Helmets removed the case to federal court on diversity grounds.

In 2002, the National Highway Traffic Safety Administration, on behalf of the DOT, tested Fulmer Helmets' small AF-50 helmet. The helmet failed two components of the NHTSA's testing, including the test concerning the required absorption of impact. As relevant to the case on appeal, Fabian sued Fulmer Helmets for fraudulent misrepresentation, negligent misrepresentation, and unjust enrichment under Tennessee state law. Fabian also sought to represent the class of persons who had purchased Fulmer Helmets' AF-50 helmet since it failed the 2002 NHTSA testing.

Fulmer Helmets moved to dismiss the case for failure to state a claim upon which relief could be granted. The district court granted the motion to dismiss on the basis that Fabian had purchased two large Fulmer AF-50 helmets, but only Fulmer Helmets' small AF-50 helmets had failed the 2002 testing. However, the district court rejected Fulmer Helmets' alternative argument that the National Traffic and Motor Vehicle Safety Act of 1966, 49 U.S.C. §§ 30101 *et seq.*, preempted Fabian's state law claims.

The Sixth Circuit reversed the district court's dismissal of the case. The Court found that although the inference relied on by the district court - that Fabian's claims regarding the small AF-50 helmet were implausible because the helmets he purchased were large AF-50's - was a possible inference from the pleadings, it was not a necessary inference. The other reasonable inference to be drawn from Fabian's complaint was "that helmets of the same model, even if sized differently, perform the same." At the 12(b)(6) motion stage, a plaintiff's claim must survive dismissal if the district court can draw any reasonable inference that the defendant is liable under the allegations pled.

In addition, the Sixth Circuit rejected Fulmer Helmets' argument that Fabian's claims were preempted by federal statutory law. First, the savings clause of the National Traffic and Motor Vehicle Safety Act provides that the Act does not expressly preempt state tort claims. In addition, Fabian's claims turned on Fulmer Helmets' representation that the helmets had been approved by the DOT. Fabian's claims did not conflict with the safety requirements and applicable standards under the Act; therefore, the Act did not impliedly preempt Fabian's state law claims. The Sixth Circuit reversed the district court and remanded the case for further proceedings.

Scott v. Kamtech, Inc., No. 08-6342, 2011 WL 635903 (6th Cir. February 23, 2011) (Batchelder, Daugherty, Van Tatenhove (E.D. Ky.), JJ.) (per curiam).

Plaintiff Scott, a Tennessee resident, was employed with Valley Mechanical, a Tennessee corporation, as a millwright. Defendant Kamtech subcontracted with Valley to assist on a demolition project in Texas. The subcontract between Kamtech and Valley was formed in Tennessee, was governed by Tennessee law, and provided that Valley was responsible for workers' compensation coverage for the employees it sent to work on the project in Texas.

On the job, Scott was involved in removing the facing on the outside of the structure being demolished. When performing the work, Scott (and others) were lifted in a "man-basket," a metal cage attached to a crane operated by Kamtech. One evening, Scott and a co-worker were in a man-basket and signaled to the crane operator to lower them to the ground. The basket malfunctioned and, instead of lowering the workers slowly and steadily, went into a free fall of approximately 60 feet. Kamtech's crane operator stopped the free fall before the basket hit the ground; however, Scott was seriously injured by the force of the sudden stop. He sustained injuries to his left ankle, left knee, spine, and right shoulder. Subsequently, Scott developed post-traumatic stress syndrome and anxiety attacks.

Scott filed for and received Tennessee workers' compensation benefits though Valley's insurer. In addition, however, Scott filed suit against Kamtech and two of its employees ("Kamtech"), alleging that their negligence had caused his injuries. Kamtech removed the case to federal court on diversity grounds. The district court granted summary judgment in favor of Kamtech, having "engaged" in what the Sixth Circuit termed "a rather sophisticated choice-of-law analysis and ultimately determin[ing] that Tennessee's statute should prevail@ and that workers' compensation benefits were Scott's exclusive remedy.

The Sixth Circuit affirmed, noting that the district court's conflicts of law analysis was unnecessary, given the plain language of the Tennessee workers' compensation statute. TENN. CODE ANN. § 50-6-115 governs "extraterritorial application" of the statute. An on-the-job injury that occurs outside Tennessee is covered by, and benefits are available under, the statute (assuming the same injury would be covered had it occurred in-state) "[i]f at the time of the injury the injured worker was a Tennessee resident and there existed a substantial connection between this state and the particular employer and employee relationship." TENN. CODE ANN. § 50-6-115(3). Valley hired Scott, a Tennessee resident, in Tennessee, and the work in Texas was only temporary; therefore, the Tennessee statute applied and Scott clearly was entitled to workers' compensation benefits under Tennessee law.

The Sixth Circuit held that under the Tennessee workers' compensation statute, Kamtech, as the principal contractor, was immune from liability for Scott's claim. A principal contractor is immune from tort liability to the same extent as the injured employee's immediate employer (subcontractor) where the subcontractor's employee is injured while "on, in, or about the premises on which the principal contractor has undertaken to execute work or that are otherwise under the principal contractor's control or management." TENN. CODE ANN. § 50-6-113(a) and (d). Therefore, under TENN. CODE ANN. § 50-6-108(a), Scott's claim for workers' compensation benefits was his exclusive remedy for his injuries.

Memphis/MidSouth Chapter Board of Directors

Officers

President

Michael E. Gabel
Federal Express
(901) 434-0016

President-Elect

J. Gregory Grisham
Leitner, Williams
(901) 527-0214

Vice President

Eric Hudson
Butler, Snow
(901) 680-7309

Treasurer

Craig A. Cowart
Kieswetter Wise
(901) 795-6695

Secretary

Mary Hale Morris
Burch Porter & Johnson
(901) 524-5144

National Delegate

Brandon Gibson
Pentecost & Glenn
(731) 668-5995

Past President

Amy Pepke
Butler, Snow
(901) 680-7324

Directors

Bryce Ashby
Donati Law Firm
(901) 278-1004

Barry Frager
The Frager Law Firm
(901) 763-3188, Ext. 221

Jonathan Hancock
Baker, Donelson
(901) 577-8202

Michael Higginbotham
Federal Express
(901) 434-8570

Earl W. Houston, II
Martin Tate
(901) 522-9000

Honorable Tu M. Pham
United States District Court
Western District of TN
(901) 495-1200

Kevin Ritz
Assistant U.S. Attorney
(901) 544-4231

Justin M. Ross
Morgan & Morgan
(901) 333-1844

Federal Court Liaison

Tom Gould
United States District Court
Western District of TN
(901) 495-1200

THE CLERK'S CORNER

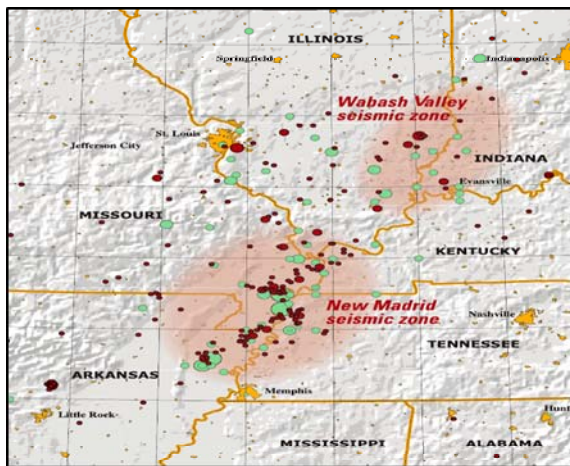


Tom Gould
Clerk of Court
U.S. District Court

Disaster Preparedness: Part I FEMA's May 16, 2011 NLE-11 (2011 National Level Exercise)

The Scenario

It's early morning on Monday, May 16, 2011 and the U.S. Geological Survey ("USGS") has just confirmed that at approximately 2:00 AM C.S.T. a catastrophic earthquake with a magnitude of 7.7 occurred along the southwest segment of the New Madrid Seismic Zone ("NMSZ"). The epicenter was near Marked Tree, Arkansas, about 150 miles northwest of Memphis. A second major quake with a magnitude of 6.0 occurred shortly thereafter within the Wabash River Seismic Zone near Mt. Carmel, Indiana.



Ironically, these seismic events, which are actually ruptures within the tectonic plates on which the central U.S. is located as opposed to the collision of separately moving plates, have occurred within days of the 200th anniversary of the worst series of

earthquakes ever recorded within the United States. They (being three major quakes in excess of intensity 8M plus thousands of aftershocks) also took place within the NMSZ over several months during 1811 and 1812. The sheer force of those earlier quakes was so great that they were felt along the East Coast and actually rang church bells in Boston and throughout New England, while the Mississippi River actually changed course and ran upstream.

Overall Impact

The reported May 16, 2011 quakes affect eight states sitting within or along the New Madrid and Wabash River Seismic Zones, an area encompassing 25,000 square miles and home to over 7,000,000 people. The short-term impact of these quakes includes 190,000 fatalities plus another 265,000 people seriously injured, the loss of over 700,000 structures, the loss of power to more than 2,600,000 and the immediate need to shelter and feed just almost 2,000,000 people (providing over 15,000,000 meals and 23,000,000 liters of water in just the first three days). These numbers would sound exaggerated were it not for the recent natural disasters in Japan.

Localized Impact

Closer to home is the impact that this 7.7M quake has on Western Tennessee. The information flowing into FEMA's emergency operations center located between Memphis and Jackson indicates devastating conditions. In the Memphis area alone, 265,000 buildings have been damaged beyond use or completely destroyed and 1,030 bridges, overpasses, highway ramps and elevated roadbeds have collapsed or been rendered too unsafe to cross. Transportation by car, cab, bus, train or plane is basically unavailable. Over 710,000 homes and businesses are without electric power, running water or sewage services. All

telephone land-lines would be down and cell tower service would be intermittent at best, making communication services nonexistent for those not using emergency or short-wave radios.

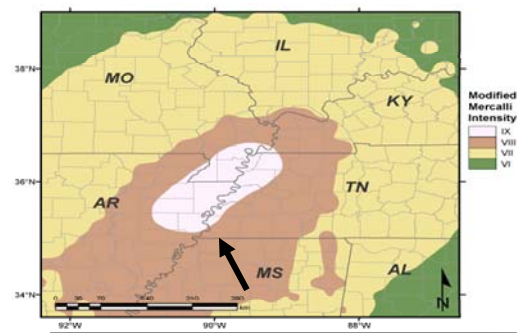
More than 33,000 people are severely injured and require immediate medical treatment and at least 1,300 have been killed. The missing people number in the thousands and the stricken areas are in need of almost 13,000 search and rescue personnel. On Day 1, 91,100 people will need shelter and by Day 3, an estimated 562,500 will need shelter. To get through the first three days, western Tennessee alone will require 4,510,300 food rations (meals) and 6,765,400 liters of drinking water.

Basic Seismic Background

As the above data demonstrates, Western Tennessee will suffer one-third of the combined 8-state physical destruction, deaths, injuries and ongoing survival needs flowing from the May 16, 2011 earthquakes. The above statistics are derived from detailed seismic studies and predictive modeling that takes into account several aspects of Western Tennessee's below-grade soil composition, above-ground buildings and road construction and the region's close proximity to significant bodies of water.

In terms of severity, earthquakes are evaluated in many ways. One measurement is that which assesses the below-ground release of energy incident to a quake. These are the "Richter Scale" figures with which we're most familiar. Another measurement, which is of more concern to us as residents living alongside the NMSZ, is the "Modified Mercalli Index", which measures the intensity of a quake with regard to its impact at the surface, such as fissures, collapsed structures, buckled roadways and flooding. Other, more scientific and academic measurements exist, such as the speed with which energy is released and travels through a quake zone, but I'm inclined to leave that level of work to the real seismologists.

Shown below is the Mercalli intensity mapping of the May 16, 2011 earthquake and you can see that Memphis sits at the southern border of the highest intensity zone.



I was intrigued by the repeated references to the fact that Shelby County would suffer so much destruction given its distance from the Marked Tree epicenter. Well, it turns out that this is a function at least in part attributable to the nature of Western Tennessee's soil structure. In a nutshell, the bedrock under Memphis is so far below the surface on which we've placed our buildings, we've literally built our city on sand; you know that the Bible warns us against that and it doesn't work any better in the world of earth science. Sitting atop the silt, sand and clay soil deposited by the Mississippi over thousands of years, we are prime candidates for an ugly process called "liquefaction". This is a condition where sub-surface ground water is released due to the disruption of the subsoil caused by a quake and as the water percolates up through the subsoil it mixes with the silt, sand, and clay and forms plastic-like goo that cannot support much of anything. Structures sitting on a liquefaction zone basically sink from their own weight, and this was clearly shown during the last San Francisco quake when the bayside townhouses sank three floors into the soil more-or-less intact. They didn't pancake; they just slipped down below grade.

There are detailed liquefaction hazard maps covering Shelby County that show the probable extent of liquefaction, but suffice it to say that downtown Memphis up to several miles east is not where you want to be when a significant quake occurs. This is one way that our bedrock structure

and soil composition aggravate the impact of earthquakes.

Aside from the dangers of liquefaction there is the destruction caused by “shaking”, by which I mean the rolling, undulating and vibratory surface movement incident to an earthquake. Our region is particularly prone to damage due to shaking, and there are shake hazard maps for Shelby County and beyond showing the likely destruction of surface structures attributable to shaking. Shaking damage is particularly excessive in this region because our soil structure is conducive to extending the shake zone much further from the epicenter than typically found.

In fact, you can see from the Mercalli Intensity Map attached, projected significant damage from the 7.7 quake’s Marked Tree epicenter extends southeast all the way to Alabama. As another example of the way our region promotes shake damage, the so-called “Building Loss Ratio” for Madison County flowing from a seismic event occurring in the actual New Madrid area of Missouri (not our Marked Tree May 16th scenario) indicates the loss of 20-30% of the ‘built environment’ (calculated on a dollar-value basis) compared to a building loss ratio of only 5-10% for the Shelby County area which is the same distance from the epicenter. It is interesting to note that in terms of sustainability a community is generally considered to be at risk when the building loss ration exceeds 10%.

The final factors affecting shake damage are, first, the fact that it was not until 1990 that our highways were constructed to comply with seismic safety standards. For this reason, the 7.7M quake in Marked Tree would destroy virtually all of our surface transportation routes making travel within the quake zone extremely difficult and evacuation by vehicle even worse. Aside from our roadways failing, many of our buildings would also fail because of their structural design and building materials. FEMA has detailed analyses of the ability of different building infrastructure designs and construction materials to withstand the rigors of an earthquake,

and, in general, the area’s abundance of brick-façade structures doesn’t bode well for structural sustainability.

The May 16, 2011 FEMA NLE

On May 16, 2011, the U.S. District Court will take part in FEMA’s first-ever multistate no-notice COOP mobilization exercise based on a natural disaster. It is also the first time that the federal courts have participated in any sort of FEMA-based disaster recovery drill. The Court’s COOP preparation has taken over four years and preparation for the May 16th exercise has taken over six months. Whereas the other participating federal courts and the other governmental agencies are generally conducting table-top exercises, our Court is implementing a full-scale COOP mobilization response. The Intake Counter of both divisional offices will be open that day, but no court proceedings will be scheduled. Some of the judicial officers and virtually all of the court staff will be participating in the May 16th exercise.

The overall objective is to respond to the Marked Tree earthquake scenario described above by moving the entire court operation to an alternative site, recreating a fully functional electronic courtroom and back-office operations center, conducting several hearings on-site and via videoconference back to the Jackson courtrooms and working through all critical stages of both criminal and civil cases. We will be testing our disaster recovery I.T. operation by taking down the Memphis servers and replicating all I.T. functions through the Jackson recovery center and we will be blocked from using any land-line Internet access, which will force the systems staff to reestablish Internet access and secure operations using four separate mobile access technologies. Telephone service will be tested by taking down all land-line access and forcing the telecommunications staff to maintain constant broadband/Wi-Fi access throughout a series of fail-overs of our cell phone services. In the actual FEMA scenario all cell phones are inoperable but that would preclude the technical testing that we need to complete.

The entire recovery process will depend on our success in mobilizing our mobile courtroom vehicles and reassembling our electronics, which are stored throughout Shelby County for safe-keeping. (See, “Federal courts to go mobile during disasters so system can remain intact”, by Daniel Connolly, The Commercial Appeal, March 19, 2011.)



Participating court-related agencies will include: the District Court; the U.S. Bankruptcy Court; the U.S. Probation Unit, the U.S. Pretrial Services Unit; the Federal Public Defender; the U.S. Attorney; the Federal Protective Service, the U.S. Marshal Service; the Court Security Officers Group; the General Services Administration; Homeland Security/FEMA; the Midsouth Naval Air Station EOC Operations Group; the Shelby County Sheriff; the Memphis Police Department; the Millington and Germantown Police Departments; the Shelby Office of Disaster Preparedness; and the Madison County Sheriff. U.S. Judiciary observers from Washington, New York City and New Orleans will be monitoring the exercise in Memphis and Jackson, and the Public Affairs Group of the AOUSC will be filming the entire day's activities for future court training.

We have also recruited a number of law firms to participate by filing “dummy case” documents through the mobile CM/ECF system and by sending and receiving emails from the recovery court site as well as several teleworkers groups processing cases from remote locations within

Shelby County and at points along the routes to our divisional offices.

As you can see, this complex “real-world” exercise has been extremely complicated to prepare for and will be difficult to execute, but it has to be done in order to identify weaknesses in our COOP planning, staff training, asset preparation and execution management. We’ll start at 4:30 AM with our three emergency notification systems and wrap things up by early evening, followed by a so-called “hot wash” assessment from our evaluators and observers.

Despite all the planning and preparation, we might encounter several points of failure or, preferably, we’ll come away from this looking like heroes. Whatever the outcome, we have all agreed that it is better to find our weaknesses during a test exercise than during the stress of an actual disaster.

Part II of this series of articles will move to the process of identifying and assessing risks and the best way to get started in preparing a truly functional disaster response plan because just copying one from the Internet and putting it up on an office shelf won’t work when the need becomes real.

