



# FBA Memphis/MidSouth Chapter Newsletter

Volume 2, Issue 1

April 2012

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

## UPCOMING FBA EVENTS

May 18-19, 2012

### Immigration Law Seminar

Cecil C. Humphreys School of Law – Memphis, Tennessee

May 18, 5:45 p.m.

### Judicial Reception and Awards Ceremony (for local judges and immigration judges)

Cecil C. Humphreys School of Law – Memphis, Tennessee

June 28, 2012 (tentative date)

### Jackson Federal Practice Update

Federal Courthouse – Jackson, Tennessee

August (tentative date)

### Federal Trial Practice

Federal Courthouse – Memphis, Tennessee

September (tentative date)

### Ethics - Lunch & Learn

Memphis, Tennessee

October 17 or 24, 2012 (tentative date)

### Annual Federal Practice & Procedure Seminar

Cecil C. Humphreys School of Law – Memphis, Tennessee

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

## PRESIDENT'S MESSAGE

By J. Gregory Grisham

The Memphis-MidSouth Chapter of the Federal Bar Association concluded a very successful 2011 and it is looking forward to an equally eventful 2012. If you are not an FBA member, we hope that you will consider joining. The FBA represents the federal legal profession consisting of more than 15,000 federal practitioners, including over 1,300 Article III, Magistrate and Bankruptcy judges. The FBA also monitors and often advocates on federal issues that impact the practice of federal lawyers and the courts and keeps its members abreast of current federal issues.

In May, our chapter will co-host the 9<sup>th</sup> Annual Immigration Law Seminar with the Immigration Section of the FBA. This year's event will be held again at the University of Memphis School of Law and we are expecting attendees from all over the United States. The seminar will feature many of this country's leading Immigration Law practitioners and judges. In addition to the excellent educational opportunities, this year's Immigration Seminar will offer attendees the opportunity to take in many of the sights of Memphis, including a riverboat ride on Friday night.

The FBA is also planning to again host a Federal Practice Seminar this summer at the Federal Courthouse in Jackson, Tennessee. This program is always well attended and typically includes as featured speakers many of our Western District Judges and United States Magistrate Judges.

The Chapter is also planning a Summer Seminar for late July or August in Memphis which will focus on trial practice, including jury selection, voir dire, and opening and closing statements. We plan to invite a number of leading trial practitioners, as well as local judges, to participate in this program.

This year we are planning to add a second one hour ethics lunch time seminar, which will be free for FBA members in the fall.

As always, we are planning a Federal Practice and Procedure Seminar in October, which we plan to hold at the Law School. Last year's keynote speaker, Linda Greenhouse, captivated the audience with stories about her coverage of the Supreme Court arguments in the past several decades. This year we plan to have an equally renowned speaker, as well as a number of sessions we have had in the past, as well as some new sessions.

I am pleased to announce that this year the Federal Bar Association will be participating in the Memphis Area Legal Services Silent Auction and Gala that is being planned by a variety of legal organizations in Shelby County. Three members of our Board are actively involved in the planning process. We are also planning to participate in the Memphis Bar Association's Law week activities, as we are sponsoring a table for the kickoff program.

As President, I am very thankful to have a group of excellent Officers and Board Members working with me to help serve local FBA members, as well as the legal community. If you are interested in becoming more involved in the FBA, please feel free to give me a call. FBA membership is a great opportunity to network with local federal practitioners while receiving discounts on all FBA Seminars and two free one hour ethics CLEs. We look forward to seeing you at our programs.



## JUDICIAL PROFILE

### JUDGE J. DANIEL BREEN

By Brandon O. Gibson



United States District Court Judge J. Daniel Breen had a goal when he was young. That goal was to be a lawyer. No one in his family was a lawyer, and he doesn't even remember really knowing one, but he knew *he* wanted to be one.

Judge Breen, who is the United States District Judge for the Western District of Tennessee, Eastern Division, is a Jackson native. He attended St. Mary's in Jackson for eight years, which is one of the oldest parochial schools in Tennessee, before graduating from Jackson High School. From Jackson, he traveled south, to Spring Hill College in Mobile, Alabama. Spring Hill College, the oldest college in Alabama, was the alma mater of his father, and a logical choice for Breen. Knowing from an early age that he wanted to be a lawyer, he chose to major in history, graduating in 1972 as valedictorian. After college, he attended the University of Tennessee College of Law, where he was a research editor for the Tennessee Law Review.

During the summer before his 3L year, Breen clerked with the Jackson firm Waldrop, Hall, Tomlin & Farmer. While he was offered a job in Kingsport, he ultimately accepted a position in Jackson with Waldrop, Hall, Tomlin & Farmer and began work in 1975 after graduating from law school. At the time, the firm had six lawyers, including Breen, and he cut his teeth on criminal defense, divorce, and real estate work, along with a healthy amount of insurance defense work. Three years into his legal career, a partner in the firm had a major heart attack, was out of commission for a significant period of time, and Breen found himself assigned to significant cases and getting plenty of courtroom experience.

Waldrop & Hall, as the firm is now known, quickly became a pool for potential judges, as Hewitt Tomlin left in 1981 to become a judge on the Tennessee Court of Appeals, James Todd left in 1983 to sit on the Circuit Court bench (and, two years later, to the federal bench), and Judge David Farmer left the firm in 1986 to also sit on the Tennessee Court of Appeals. At age 36, Breen found himself the senior partner of Waldrop, Breen, Bryant, Crews, Taylor and McLeary, P.A.

In 1989, the Western District of Tennessee, Eastern Division, got a Magistrate judge position. That position was a part-time position, though, and Billy Jack Goodrich was appointed to the part-time Magistrate position. Soon after, the Administrative Office of the Courts decided Jackson needed a full time Magistrate judge, who most likely would serve in Jackson and Memphis. In 1990, the process began to select a full time Magistrate judge, and Breen applied for that position, along with 50-60 other individuals. Breen progressed through the committee selection process and was interviewed by the District Judges. One day, Judge Todd called Breen and asked if Chief Judge Odell Horton had called. As

soon as Breen responded with "no," Todd hung up. Breen was faced with the difficult task of trying to work the rest of the day, and finding that he was unable to concentrate, he decided to walk down the street, only to return to find that Chief Judge Horton had called while he was out. Breen did get a chance to talk with Chief Judge Horton later that day, and he discovered that he had been appointed as the first full-time Magistrate Judge for the Eastern Division.

Breen was sworn in as the Magistrate judge on July 1, 1991, when he was only 40 years old. While he was in the Magistrate position, he presided in Memphis two days a week. Breen describes the Magistrate job as the "best job I ever had." After twelve years as a Magistrate Judge, when Judge Julia Gibbons was elevated to the Sixth Circuit, Breen had the opportunity to move into a District Judge position. After interviewing with the Chiefs of Staff of both then-Senators Fred Thompson and Bill Frist, Breen received a call from Washington that he needed to appear in D.C., and with only four days' notice. There, he was interviewed by then-President George W. Bush's attorneys. Once his background check was clear, Breen was nominated to be a United States District Court judge. His nomination died in 2002, and he was re-nominated in 2003. Breen appeared before the Senate Judiciary Committee in February 2003, along with four other nominees. The hearing for five judges lasted a total of twenty minutes.

Judge Breen served in Memphis from 2003-2008, and when Judge James Todd moved to senior status, Breen's court responsibilities moved to Jackson. When reflecting on his move from practicing attorney to Magistrate Judge to District Court Judge, Breen notes that his moves were "another step in the progression of being a lawyer." Breen acknowledges that being a judge allows an individual to have a little more control of his life, but he still finds himself at the office late, most often working on jury instructions, which he likes to prepare himself.

On being a judge, Breen notes that it was difficult for him to step away from being an advocate,

since he spent well over fifteen years in that role. He finds his most difficult task is sentencing criminal defendants, and he is clearly burdened by the realization that the people in his court are real people with real problems. His decisions affect a variety of people – the defendant, the victim, and the families, and the gravity of his decisions is at the forefront of Breen's mind.

In his time away from the office, Breen enjoys bar association activities, traveling, and working with his church. Breen was President of the Tennessee Bar Association from 1996-1997, while he was a Magistrate Judge. He is active in the American Bar Association, the Judicial Division of the ABA, and is the Chair-Elect of the Executive Committee of the National Conference of Federal Trial Judges.

When asked to give advice to younger lawyers who are in the earlier stages of their careers, Breen offered "get into an area you like, and balance your practice with other interests. You have to work to give your life balance." Clearly, Breen has found that balance and thoroughly enjoys the challenges his job brings.

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*Brandon O. Gibson is an attorney at Pentecost & Glenn in Jackson, Tennessee, and a member of the FBA Memphis/MidSouth Chapter's Board of Directors.*



## SIXTH CIRCUIT CASE UPDATE

### Civil Law

*Bryson v. Middlefield Volunteer Fire Dep't, Inc.*, 2011 U.S. App. LEXIS 18447 (6th Cir. Sept. 2, 2011) (Moore\*, Gibbons (concur/dissent), Borman).

Bryson was an administrative employee at a volunteer fire department who brought a Title VII claim alleging discrimination based on sex. The defendant contended that because the volunteer firefighters were not “employees” but received “only de minimis benefits” for their services, the firefighters did not constitute “employees” for purposes of Title VII and thus the defendant did not have the requisite 15 employees to qualify as an “employer” for purposes of Title VII. The district court granted summary judgment for the defendant, holding that in determining whether an individual was an employee, “compensation analysis is an antecedent inquiry that must be examined prior to application of the economic realities or common law agency test,” and that the benefits provided to the firefighters were insufficient to create a jury issue as to whether the firefighters were employees. The majority reversed, holding that the district court had applied the wrong test. The Court found that although an employee for purposes of Title VII must be a “hired party,” that could be satisfied by showing the parties had a contractual relationship and that the purported employee received benefits. The trial court thus erred by considering remuneration as an independent antecedent inquiry when it should have just been weighed as one factor along with all of the other incidents of the relationship.

Judge Gibbons concurred/dissented in the decision. Judge Gibbons agreed with the district court that the precedents from the Second, Eighth, and Tenth Circuits correctly construed Title VII to

require an independent antecedent inquiry as to remuneration prior to employing the use of common law tests to determine if an individual is an “employee.” Remand was necessary, however, because there was sufficient evidence of benefits given to the firefighters that a jury could conclude that they constituted significant remuneration sufficient to make the firefighters employees for purposes of Title VII.

\* \* \*

*Donald v. Sybra, Inc.*, 667 F.3d 757 (6th Cir. Jan. 17, 2012) (Martin, Suhrheinrich, Cole\*)

Plaintiff assistant manager at Arby’s sued her employer for discrimination, FMLA interference, and FMLA retaliation. She maintained that she had been terminated as a result of extensive medical leave she had taken while the defendant maintained that Donald was improperly logging orders such that she was collecting more money than she was recording in the register and pocketing the difference. At the time the investigation concluding that Donald had engaged in this improper behavior was completed, she had gone out on another leave that may have been an FMLA medical leave. When she returned, she was terminated based on the findings of the investigation into the theft.

The district court, applying the *McDonnell Douglas* burden shifting framework, granted summary judgment on both FMLA claims. It concluded that regardless of whether there was a genuine issue of material fact as to Donald’s prima facie cases of FMLA retaliation and interference, Sybra successfully shifted the burden back to Donald by presenting sufficient evidence of a nondiscriminatory reason for its decision to terminate her. Because Donald provided insufficient evidence to show that Sybra’s stated reasons were pretextual, Sybra was entitled to summary judgment. The Sixth Circuit affirmed.

In doing so, it established what had previously been an unsettled issue in the Sixth Circuit, which was that the *McDonnell Douglas* framework applied to cases involving FMLA interference. The Sixth Circuit also affirmed summary judgment on Donald's ADA and PWDCRA claims.

\* \* \*

*Discount Tobacco City & Lottery, Inc. v. United States*, 2012 U.S. App. LEXIS 5614 (6th Cir. Mar. 19, 2012) (Clay\*, Stranch\*, Barrett).

Certain manufacturers and sellers of tobacco products brought this case as a First Amendment challenge to provisions of the Family Smoking Prevention and Tobacco Control Act (the "Act"). The Sixth Circuit's decision was the first considering a facial challenge to the Act. Judge Clay's opinion is the lead opinion, and the unanimous opinion as to the parts for which it was controlling. Judge Stranch's opinion, joined in full by Judge Barrett, is the controlling opinion in the respects from which it differs from Judge Clay's opinion.

The challenged provisions were as follows "(1) that tobacco manufacturers reserve a significant portion of tobacco packaging for the display of health warnings, including graphic images intended to illustrate the hazards of smoking; (2) restrictions on the commercial marketing of so-called modified risk tobacco products; (3) ban of statements that implicitly or explicitly convey the impression that tobacco products are approved by, or safer by virtue of being regulated by, the FDA; (4) restriction on the advertising of tobacco products to black text on a white background in most media; and (5) ban on the distribution of free samples of tobacco products in most locations, brand-name tobacco sponsorship of any athletic or social event, branded merchandising of any non-tobacco product, and distribution of free items in consideration of a tobacco purchase (i.e., 'continuity programs')."

Judge Clay applied two different standards depending on the nature of each challenged provision. As to those provisions that regulated

non-misleading commercial speech, Judge Clay applied the more rigorous test from *Central Hudson*, which requires that the governmental interest in the challenged provision to be "substantial" and that the Court determine that "the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest." With respect to those provisions of the Act that regulated misleading or potentially misleading commercial speech, Judge Clay applied the rational basis level of scrutiny articulated in the *Zauderer* case: that the "disclosure requirements are reasonably related to the State's interest in preventing deception of consumers and not unjustified or unduly burdensome."

Judge Stranch, writing for the majority, agreed with Judge Clay's articulation of the tests. The majority faulted Judge Clay, however, for the process in determining whether the speech was misleading. Specifically, Judge Stranch faulted Judge Clay for examining certain provisions on an "as applied basis rather than as a facial challenge." Because the majority held that the challenge was a facial challenge, a provision could only be struck down if the plaintiff can establish that "no set of circumstances exists under which the statute would be valid, or that the statute lacks any plainly legitimate sweep."

Despite the differences in approach, Judge Clay's analysis and holding was joined by the remainder of the panel on most of the provisions. Applying *Zauderer*, the panel upheld the increased size and placement requirement of the textual warnings as reasonably tailored to "overcoming the informational deficit regarding tobacco harms." The panel also unanimously held constitutional the provision that prohibited marketing of a tobacco product as "modified risk" absent FDA approval. In reaching this conclusion, the panel rejected the contention that this restriction applied to claims made outside the marketing context, and thus upheld it as an appropriately tailored restriction under *Central Hudson*.

The panel next examined the marketing bans on brand-name sponsorship and merchandise, sample tobacco products, and continuity programs. Although the panel upheld the marketing ban on brand-name sponsorship and merchandise and sample tobacco products as appropriately tailored to limit speech that materially impacted juvenile smoking decisions, the panel held that the ban on “continuity programs” was not narrowly tailored and thus was unconstitutional. Such continuity programs, which provided rewards tied to volume of cigarettes of a given type purchased, were not tailored to curbing juvenile smoking because the only evidence showing juvenile interest in such programs was twenty years old, and the fact that adults consume 98% of tobacco products “logically dictates that the overwhelming beneficiaries, both numerically and comparatively, of these continuity programs are adult smokers.”

The panel likewise struck down the restriction on use of color and imagery in tobacco advertising finding that restriction to be “vastly overbroad” in attempting to accomplish its goal of alleviating the effects of tobacco advertising on juvenile consumers.

The panel upheld the provision restricting speech that implied that tobacco products were less harmful due to their regulation by the FDA. In reaching this conclusion, the panel applied the constitutional avoidance doctrine to reject the claim by Plaintiffs that the restriction applied to those in the press and otherwise and not just to those in the tobacco industry. After so construing the provision, the panel found that “[i]n the context of tobacco products, any statement explicitly declaring, or even implying, that compliance with FDA procedures has ensured safety is inherently misleading and patently false. Therefore, this regulation survives under either *Zauderer*, as prevention of deceptive and untrue advertising, or *Central Hudson*, as a narrowly tailored regulation of commercial speech.”

Judge Clay and the majority differed in result on one key provision of the Act – the requirement that certain color graphic images depicting the possible effects of smoking, to be selected by the

FDA, be displayed on tobacco packaging. The majority held that this provision was constitutional because a picture can contain accurate factual information, and it can convey information in a manner that can be more effective than text alone. In reaching this conclusion, the majority rejected Judge Clay’s distinction between pictures and text, which was the distinction that led him to distinguish between the mandatory text warnings (which he held were constitutional) and the mandatory graphic picture warnings (which he held were not). The majority further found fault with Judge Clay’s decision on this issue to the extent it depended on the provocative nature of the photographs because the actual photographs to be used were not contained in the statute and thus considering the content of those images was inappropriate in the context of a facial challenge.

\* \* \*

*Coalition to Defend Affirmative Action, Integration and Immigrant Rights and Fight for Equality by Any Means Necessary v. Regents of the Univ. of Michigan*, 2011 U.S. App. LEXIS 13405 (6th Cir. July 1, 2011) (**NOTE: rehearing en banc granted on September 9, 2011**) (Daughtrey, Cole\*, Gibbons (dissenting)):

Plaintiff challenged the constitutionality of Proposal 2, a successful voter-initiated amendment to the Michigan Constitution. In relevant part, it prohibits Michigan’s public colleges and universities from granting “preferential treatment to[] any individual or group on the basis of race, sex, color, ethnicity, or national origin.” Mich. Const. art. I, § 26.

The Court was presented with two constitutional challenges to Proposal 2: (1) whether Proposal 2 violates the Equal Protection Clause by “impermissibly restructuring the political process along racial lines (the ‘political process’ argument)” and (2) whether Proposal 2 “violates the Equal Protection Clause also by impermissibly classifying individuals on the basis of race (the ‘traditional’ argument).” The political process equal protection analysis, exemplified in *Hunter v. Erickson*, 393 U.S. 385 (1969) and *Washington v.*

*Seattle School Dist. No. 1*, 458 U.S. 457 (1982) (“Seattle”) provides that under the Equal Protection Clause, “the State may no more disadvantage any particular group by making it more difficult to enact legislation in its behalf than it may dilute any person’s vote or give any group a smaller representation than another of comparable size.” According to the Court, the *Hunter/Seattle* test provides that: “an enactment deprives minority groups of equal protection of the laws when it: (1) has a racial focus, targeting a goal or program that “inures primarily to the benefit of the minority”; and (2) works a reallocation of political power or reordering of the decisionmaking process that places ‘special burdens’ on a minority group’s ability to achieve its goals through that process.

Applying the test, the Court first found that Proposal 2 had a “racial focus” because “the policy targeted by the law ‘at bottom inures primarily to the benefit of the minority, and is designed for that purpose.’” The Court then considered whether Proposal 2 “reordered a ‘political’ process.” The Court held first that the Michigan Admissions Committee was “political” because it “relates to the government” in that the committee is established by the Michigan Constitution and holds public meetings. It further found that Proposal 2 reordered the political process to impose a special burden on minority groups because instead of being able to seek a change to reinstitute affirmative action by lobbying for a change at the admissions committee level as would be the case absent Proposal 2, a person seeking such as change in light of Proposal 2 would need to get a constitutional amendment passed. Finally, the Court found that the *Hunter/Seattle* test was applicable notwithstanding the fact that Proposal 2 was a burden on obtaining preferential minority treatment rather than obtaining protection from discrimination. The Ninth Circuit has recognized a distinction between the two as dispositive in holding a similar measure in California to be constitutional. The Court rejected the Ninth Circuit’s approach, however, concluding that “[u]sing this rationale, the political process theory

would be superfluous, for an aggrieved citizen could sue to enjoin the unconstitutional law under the traditional equal protection analysis.” The Court thus concluded that Proposal 2 was unconstitutional under the “political process” theory and, therefore, decided not to “reach the question of whether it also violates the Equal Protection Clause when assessed under the traditional framework.”

Judge Gibbons dissented in part, disagreeing with the majority’s conclusion that Proposal 2 is unconstitutional under *Hunter/Seattle* or under traditional due process analysis. With respect to *Hunter/Seattle*, Judge Gibbons disagreed with the majority’s holding that the political restructuring theory applied because “Proposal 2 does not impermissibly restructure the political process in the state of Michigan to burden the ability of minorities to enact beneficial legislation.”

Judge Gibbons stated that the constitutional problem with the legislation at issue in *Hunter* and *Seattle* was that “[i]n both cases where the Court found an impermissible political restructuring, the relevant lawmaking authority was reallocated from a local legislative body to the ‘more complex government structure,’ of the city- or state-wide general electorate thereby placing a ‘comparative structural burden . . . on the political achievement of minority interests.” In *Hunter*, the charter amendment at issue created an additional process – popular referendum – for any ordinance regulating real property on the “basis of race, color, religion, national origin, or ancestry” that did not apply to other ordinances regulating real property generally (which could be modified a vote of the City Council). In *Seattle*, the voters removed decisions related to use of busing to desegregate schools from the local to the state level.

Judge Gibbons, upon an examination of the factual record, concluded that Proposal 2 did nothing to distort the state’s political processes because prior to the passage of Proposal 2, admissions policies were totally within the control of university faculty. These faculty members were not “politically accountable to the people of

Michigan.” Thus, by passing Proposal 2, “[t]he Michigan voters have therefore not restructured the political process in their state by amending their state constitution; they have merely employed it.” Turning then to the traditional equal protection analysis, Judge Gibbons concluded that Proposal 2 was constitutional under that analysis as well because Proposal 2 prohibited, rather than created, racial classifications.

### **Criminal Law**

*U.S. v. Hanna*, Nos. 09-1425/2086 (Keith, **McKeague**, Kethledge) (Aug. 12, 2011)

A jury convicted defendant of shipping telecommunications and navigation equipment to Iraq in violation of the U.S.’s embargo. The court affirmed. First, a search warrant for the defendant’s family business was not overbroad when it listed “records or documents, referencing or related to the purchase of computer, telecommunications or related equipment and materials.” Second, even though the district court erred by using the wrong subsection of the money laundering sentencing guideline, the error was “invited” because defendant herself urged the court to use that guideline instead of another (more lenient) one. Third, pursuant to the Classified Information Procedures Act (CIPA), the district court properly ordered (after an *ex parte* hearing) the non-disclosure of certain classified information related to the case.

Finally, after trial the defendant filed a declaration by a man who said that the CIA knew about and condoned some of the illegal shipments to Iraq being arranged by defendant’s company. There was no Brady violation, because it was neither exculpatory nor material. “[S]ince the shipments were illegal and Hanna did not even know of the alleged government involvement, these facts have no bearing on her guilt.”

\* \* \*

*U.S. v. Clariot et al.*, No. 09-5783 (**Sutton**, White (concurring), Stafford (N.D. Fla.)) (Aug. 25, 2011)

Defendants landed their airplane at an unstaffed airport in Jackson, Tennessee at 9:00 p.m. Officers talked to the men and asked for consent to search the plane. The men, who previously had been cooperative and “very nice,” refused, acting “nervously.” They got back in the plane and flew to Nashville, where officers later found 70 kilograms of cocaine in the plane. The government appealed an order suppressing evidence of the encounter in Jackson. The court assumed that the encounter in Jackson violated the Fourth Amendment and focused on the question “whether the court should have applied the exclusionary rule in this setting.”

The court reversed, on the basis that application of the exclusionary rule would serve no purpose. Judge Sutton cited cases from as far back as 1873 to explain that for evidence to be suppressed under the exclusionary rule, officers’ misconduct must have been the but-for cause of the evidentiary discovery, and benefits of deterrence have to outweigh the costs. Here, the defendants’ argument failed “on both fronts.” First, the men got nervous and flew away because they didn’t want the plane to be searched, not because of the illegal seizure. Second, the deterrent value of suppressing such evidence would be small, since the government gained no unfair advantage due to its conduct.

\* \* \*

*U.S. v. Sease*, No. 09-5790 (**Cole**, Rogers, Griffin) (Oct. 21, 2011)

The defendant police officer and other officers staged drug purchases and then robbed the drug dealers who participated in the deals for their own benefit. Sease was convicted on numerous civil rights, robbery, and firearms counts.

On appeal Sease argued that there was no violation of the civil rights of the participants in the drug deals, because Sease and the others in

fact had probable cause to arrest the drug dealers and seize their drugs and money. He relied on *Whren v. United States*, 517 U.S. 806 (1996), where the Supreme Court held that, “with rare exceptions,” it does not matter what police officers’ actual motivations are when stopping someone – the only question is whether there is probable cause for the stop. Because Sease and the others arranged the drug deals in the first place, he argued, they had probable cause to stop and arrest the drug dealers, and thus, even though other crimes may have been committed (e.g., theft), there was no violation of the drug dealers’ civil rights. The court rejected this argument and affirmed the convictions, on the basis that *Whren* “presumes that the officers are engaging in bona fide law enforcement activities when they make the stops.”

\* \* \*

*U.S. v. Richards*, Nos. 08-6465/6503 (Siler, Moore (concurring in judgment), **Griffin**) (Oct. 24, 2011)

Richards was a “sophisticated [child] pornography entrepreneur” who operated numerous child pornography-related websites. He kept several computers in his Nashville home and also utilized multiple commercial web servers in California. The FBI got warrants to search the entirety of two of these servers.

The court affirmed the denial of defendant’s motion to suppress. The court rejected the idea that warrants for computers should include specific search protocols, instead holding that “so long as the computer search is limited to a search for evidence explicitly authorized in the warrant, it is reasonable for the executing officers to open the various types of files in the...hard drive in order to determine whether they contain such evidence.” Then, the court specifically applied this principle to servers “under the facts of the present case” and approved the agents’ search of the entire servers, because the defendant had administrative access to the whole servers, and *investigators did not know* prior to the search whether the relevant content was limited to particular file directories.

\* \* \*

*U.S. v. Beauchamp*, No. 10-5102 (Moore, Kethledge (dissenting), **Marbley** (S.D. Ohio)) (Oct. 25, 2011)

Officers were on patrol at 2:30 a.m. in a Covington, Kentucky, housing project. They saw the defendant walk away hurriedly without making eye contact. The court stated that the officers “instructed” the defendant to stop and come towards them. Officers frisked the defendant, and during the frisk the defendant said they could search him. The officers found crack cocaine “between his butt cheeks.”

The court first held that the encounter was non-consensual and that the defendant was seized without reasonable suspicion. Second, the defendant did not consent to the subsequent search, because “a scared, defenseless man is not in a position to say no to a police officer whose hands are still on or just removed from his body while another officer is standing just a few feet away.”

\* \* \*

*U.S. v. Kernell*, No. 10-6450 (Moore, **Cole**, Beckwith (S.D. Ohio)) (Jan. 30, 2012)

David Kernell hacked into Sarah Palin’s Yahoo! email account. The court affirmed his conviction for obstructing justice by deleting certain information from his computer, in violation of 18 USC Section 1519. Kernell’s vagueness challenge to the statute failed. The court held that the statute has a specific intent element. And, the requirement that the obstruction occur “in contemplation of an investigation” was not vague, at least not as to Kernell, since Kernell had specifically referred to the possibility of an FBI investigation in an Internet post after he hacked into the account.

\* \* \*

*U.S. v. Tolbert*, No. 10-6467 (Martin, **Gibbons**, Steeh (E.D. Mich.)) (Feb. 10, 2012)

At the end of his trial on gun charges, Tolbert grabbed a plastic water pitcher from the defense table and hit a Deputy U.S. Marshal in the head with it. He was later prosecuted for assaulting a federal officer. The court held that under the circumstances, the pitcher was a “dangerous weapon” under USSG § 2A2.2(b)(2)(B). The court applied a “functional” analysis and relied in part on the government’s evidence that the pitcher was a very hard plastic material, it had a six-inch handle (giving it “increased leverage”), and it may have contained some water when it was used to strike the officer.



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## THE CLERK'S CORNER



### United States District Court Western District of Tennessee

Thomas M. Gould  
*Clerk of Court*

#### The New Visiting Judge Program

About a month ago approximately 30 local attorneys received an electronic notice indicating that some of their cases had been assigned to a district judge not based in this district. Understandably, this generated a number of hurried calls to the Clerk's office from those with upcoming trial dates. Following those calls, we placed the following notice on the District Court's external website:

#### VISITING JUDGE PROGRAM

The Judges of the U.S. District Court for the Western District of Tennessee have authorized the development a Visiting Judges Program to provide an opportunity for experienced federal judges to assist with resolving the Court's currently overburdened caseload. These temporary judicial assignments, designated and approved by the Sixth Circuit Court of Appeals, will affect civil and criminal cases. Chief Judge Gerald Rosen and the District Judges from the Eastern District of Michigan have been exceedingly generous in responding to the temporary needs of our Court. Three Judges from that district, the Honorable Robert H. Cleland, the Honorable Stephen J. Murphy, and the Honorable Arthur J. Tarnow, have agreed to accept cases. Case reassignments will be processed through the CM/ECF filing system to prepare case dockets for the visiting Judges. Counsel in cases under reassignment will be notified via CM/ECF. From the time of reassignment until final disposition each of those

cases will be presided over by the assigned visiting Judge.

We also transmitted a CM/ECF "blast" to all registered attorneys that the District Court had launched its Visiting Judge Program, and soon after the *Commercial Appeal* published an article about the Visiting Judge Program, all of which has prompted many inquiries and led me to provide the following background information.

#### What are "overly congested" federal district courts?

The federal judiciary recognizes that for a variety of reasons district courts might need additional judicial resources to stay on top of their caseloads. Courts often become overwhelmed by aging cases due to the death, disability or absence of a sitting judge. This is the current situation in our district because of the elevation of Judge Bernice B. Donald to the Sixth Circuit Court of Appeals and the unknown time it will take to confirm our next district judge. Sometimes it occurs because of protracted individual civil or criminal cases throwing a trial judge's schedule into turmoil. This too has been the situation in our court with the recent conclusion of a seven-week high-risk criminal trial. Case disposition backlogs also occur in our court because of lengthy and technically complex intellectual property litigation, such as those involving patent infringement. In other instances backlogs develop because courts are simply overrun with particular types of cases, such as those arising from asbestos

exposure, toxic torts, mass disasters or white-collar crimes affecting multiple victims. Yet another illustration would include the overwhelming number of immigration cases swamping the Border States, such as California, Arizona, New Mexico and Texas.

Another reason that a court cannot keep up with its caseload is the one that affects our own court the most. This involves the sheer number of case types that are unavoidably time-consuming to process. Our district is located in a financially distressed part of the country. Unemployment is high and many that do work are hourly employees. This generates a lot of employment-related litigation in the areas of civil rights, FLSA, EEOC, and the like. Many of these cases are filed *pro se* because the cost of representation is out of reach. We also have numerous penal and detention facilities in our district, and inmates are prone to filing endless appeals and civil complaints, all of which are initially *pro se*. If you want to clog up a court calendar, load it down with slow-moving cases involving self-represented litigants. We have a disproportionate percentage of these cases in our district.

Moreover, in terms of trying to maintain any sort of consistent schedule for hearings and trials in these *pro se* cases, due to the constitutional time constraints on criminal cases, criminal matters will always trump civil actions where there are

time conflicts. And, again, we have a disproportionate number of criminal cases for a court our size because firearms violations are filed in federal court in lieu of state court and because of the large number of drug interdiction cases generated along I-40 and I-55, which are major routes for illegal drugs moving north to Chicago or east and west across the Mississippi.

The federal judiciary uses various benchmarks to designate district courts as being “overly congested.” Being overly congested basically means that it takes too long to process cases; in terms of the technical benchmark, the so-called “median time” between the filing of a civil or criminal case and its ultimate disposition is much longer than the norm. The fact that a court is “congested” doesn’t mean that its judicial officers and court staff aren’t hard-working; it simply means that despite all reasonable efforts to move cases along, it just takes too much time to dispose of them. As listed above, there are many reasons for this sort of congestion, most of which apply to our own court.

So let’s look at the historical data reflecting the level of congestion in our court because the statistics paint a clear picture of the classic overworked court. First, consider how our court ranks in terms of the number of trials completed per judge per year:

<u>Trials Completed</u> <i>Per Judge per Year</i>	TNWD		TNWD		TNWD		TNWD		TNWD		TNWD	
	No.	Rank	No.	Rank	No.	Rank	No.	Rank	No.	Rank	No.	Rank
	<u>2006</u>	<u>2006</u>	<u>2007</u>	<u>2007</u>	<u>2008</u>	<u>2008</u>	<u>2009</u>	<u>2009</u>	<u>2010</u>	<u>2010</u>	<u>2011</u>	<u>2011</u>
Tennessee Western	31	--	49	--	42	--	39	--	42	--	39	--
6th Circuit (9 Districts)	18	#1	21	#1	17	#1	18	#1	19	#1	2-	#1
National (94 Districts)	19	#11	20	#3	20	#5	20	#6	20	#4	20	#4

As the above data indicates, our district court, on average, completes about twice the number of trials per judge per year as the average district court nationwide and has consistently ranked at the top of all district courts for at least the last six years. As positive as this might be, there is unsettling data regarding the length of time that it takes for us to dispose of cases. I’ve already explained the reasons for this protracted disposition rate, and the historical data supports this obvious “congestion.” Here is the profile for the length of time that it takes to dispose of civil cases:

<u>Civil Case Median Time</u> <i>(Months to Disposition)</i>	No. <u>2006</u>	Rank <u>2006</u>	No. <u>2007</u>	Rank <u>2007</u>	No. <u>2008</u>	Rank <u>2008</u>	No. <u>2009</u>	Rank <u>2009</u>	No. <u>2010</u>	Rank <u>2010</u>	No. <u>2011</u>	Rank <u>2011</u>
Tennessee Western	11.6	--	11.9	--	11.8	--	11.3	--	10.3	--	11.5	--
6th Circuit (9 Districts)	--	#5	--	#8	--	#9	--	#8	--	#8	9.5	#8
National (94 Districts)	19	#87	20	#85	20	#87	20	#83	20	#86	20	#90

Here is the profile for the length of time that it takes to dispose of criminal cases:

<u>Crim. Case Median Time</u> <i>(Months to Disposition)</i>	No. <u>2006</u>	Rank <u>2006</u>	No. <u>2007</u>	Rank <u>2007</u>	No. <u>2008</u>	Rank <u>2008</u>	No. <u>2009</u>	Rank <u>2009</u>	No. <u>2010</u>	Rank <u>2010</u>	No. <u>2011</u>	Rank <u>2011</u>
Tennessee Western	13.9	--	12.8	--	13.6	--	13.5	--	13	--	15	--
6th Circuit (9 Districts)	--	#9	--	#8	--	#9	--	#8	--	#8	9.8	#9
National (94 Districts)	7.8	#87	7.6	#85	7.3	#87	7.1	#83	--	#86	7.0	#90

Compounding the “congested” status of our court is the simple fact that our court-wide pending case count has also escalated. This increase reflects both the increase in the number of cases being filed as well as the protracted time it takes to dispose of filed cases. Here is a simple chart depicting the trend:

<u>Tennessee Western District</u>	<u>2007</u>	<u>2008</u>	<u>2009</u>	<u>2010</u>	<u>2011</u>
Total Filings	1816	1917	2048	2033	2099
Total Terminations	1999	1745*	1991	2028	1987
Total Pending Cases	2076	2269	2356	2366	2496

\*Short one district judge after Judge Todd took Senior Status and before Judge Anderson had been confirmed.

**What are some of the solutions for “overly congested” courts?**

One measure that the court took several years ago was to place Magistrate Judges on the civil case presiding judge assignment wheel. This process increased the number of cases for which a Magistrate Judge served as the presiding judge from the point of consent by all parties through final disposition of all matters.

A second procedural change was to move the processing of initial stages of pro se filings to the clerk’s office staff. This freed pro se staff attorneys to focus on the merits portion of those

cases. The result was to reduce completion of the earliest stages of *pro se* litigation from an average of 4-5 months to less than five days.

The third change, which is now in progress, was to adopt the concept of differentiated case management, which, in a nutshell, looks at individual case types in determining the recommended speed at which particular cases ought to move through the court. Cases are basically put on “tracks” with well-defined time-lines for completing different stages of litigation. The design and construction of these case tracks and their relative time-frames are being developed by the court’s local rules and federal practice committee.

Yet another approach to reducing case disposition times is the adoption of a Visiting Judge Program. The federal judiciary maintains a recall magistrate judge program, which provides the services of retired magistrate judges who are called back into service through assignment to a particular district. In our own court, prior to the creation of a fourth permanent magistrate judge position, we benefitted from the services of recall Magistrate Judges James Allen and Gerald Cohn, who rendered substantial service to the court for at least the first four years of my own tenure.

In addition to the use of recall magistrate judges, the judiciary maintains a program for the intra-circuit and inter-circuit designation of senior and active district judges who are assigned to district courts on a case-specific or standing basis. This is a completely voluntary undertaking for the visiting judges as there is no compulsion or requirement for them to go to another jurisdiction to help clear cases. We have used intra-circuit designations when we have needed district judges to hear matters because our own judges are unavailable due to absence or some form of case-related conflict. These temporary, short-term designations have been case-specific. Our new Visiting Judge Program, however, will now utilize long-term intra-circuit designations (up to one-year per visiting judge) and mid-term inter-circuit designations (generally not to exceed six months) to help move cases toward final disposition. Intra-circuit designations must be approved by the Chief Judge of the Circuit in which the requesting court resides whereas inter-circuit designations ultimately require the approval of the Chief Justice after completion of several procedural steps managed by the Administrative Office of the U.S. Courts. These visiting judges will be trying civil and criminal cases with pending trial dates and they will be using electronic case management techniques to work on cases that have not yet moved to the trial stage.

Our Visiting Judge Program will become a long-term critical component of addressing the need to more quickly dispose of back-logged civil and

criminal matters. As shown, our district judges already rank 4<sup>th</sup> of 94 district courts in terms of the number of completed trials they handle each year. They try, on average, twice the number of matters that district judges try nationwide, so there is not much more that they can do. It cannot be overstated that the willingness of visiting judges to voluntarily come to this district to help us dispose of pending cases will be the best solution to our current delays in processing civil and criminal matters. I wanted you to understand the context within which our district court has implemented this new program.

Tom Gould  
Clerk of Court



### **Writers Wanted**

The FBA Memphis/MidSouth Chapter Newsletter is seeking attorneys who would be interested in writing a judicial profile on one of our federal judges, recent case law updates, or other articles of interest to the federal practitioner. If you are interested in contributing to the newsletter, we would like to hear from you. Please send an e-mail to the editor, Michael Gabel, at [megabel@fedex.com](mailto:megabel@fedex.com).