Minnesota Chapter of the Federal Bar Association

Bar Talk

Volume IV, Issue II

December 15, 2010

www.fedbar.org/Chapters/Minnesota-Chapter.aspx

Chief Judge Davis Recognizes Volunteers, Firms and Court Personnel for Contributions to *Pro Se* Project

Since July, the *Pro Se* Project has experienced exciting changes and been involved in many noteworthy events. In the first of what will be the *Pro Se* Project's regular columns, the following highlights the Project's momentous changes and significant events.

CLE Credit for Working on *Pro Se* Project Cases

Most notable of the recent changes, the Minnesota Board of Continuing Legal Education (CLE) designated the *Pro Se* Project as an Approved Legal Services Provider. Now, all volunteer attorneys who work on *Pro Se* Project cases are eligible to receive free CLE credit. As a result of the designation, many attorneys have expressed interest in participating in the *Pro Se* Project and several of those have volunteered to accept referrals from the Court.

***Pro Se* Project Awards**

During his State of the District address at the November monthly luncheon, The Honorable Michael J. Davis spotlighted the *Pro Se* Project and described the Project's importance to the Court. Chief Judge Davis recognized several individuals as well as law firms for outstanding service, commitment, and contribution to the *Pro Se* Project and presented them with special awards. The recipients of Chief Judge Davis' first annual *Pro Se* Project awards are:

(L to R) James Long, Chief Judge Michael J. Davis, Catherine Smith, David Allgeyer, Melanie Morgan, Dan Gustafson, Steve Rau, Michael Wilhem, Charles Zimmerman, Alan Maclin, Brian O'Neill.

Mike Wilhelm, Margaret Savage, and Mark Schroeder, Briggs and Morgan, P.A., for their acceptance of a difficult and hard-to-place case, years of aggressive litigation on behalf of the *pro se* litigant, and for an outstanding outcome in a jury trial before Judge Rosenbaum.

Catherine Smith, Gustafson Gluek, P.L.L.C., for her advocacy on behalf of a mentally ill *pro se* plaintiff and successful resolution of his case, including a change in Hennepin County's policies for detaining inmates with mental health issues and a significant monetary award.

Brian O'Neill, Faegre and Benson, L.L.P., for his willingness to accept an extremely difficult *Pro Se* Project case that no other lawyers would accept, and for his tireless advocacy on behalf of the *pro se* litigants in the ongoing and contentious matter.

Continued on page 2

Inside This Issue

Pro Se Project

Continued from cover page

David Allgeyer, Lindquist and Vennum, P.L.L.P., for agreeing to serve as mediator in an unpopular case where a *Pro Se* Project litigant sued a major law firm. Allgeyer's service as mediator enabled the *Pro Se* Project to find an attorney to represent Plaintiff for settlement purposes. Allgeyer also accepted a *Pro Se* Project case involving a difficult student loan issue and provided excellent legal representation.

Melanie Morgan, Gustafson Gluek, P.L.L.C., for running the *Pro Se* Project for more than a year while fulfilling her busy paralegal billable hourly work. As Chief Judge Davis stated, the *Pro Se* Project would not have continued without Morgan and her excellent work. Morgan's spreadsheets, templates, and files were passed on to the *Pro Se* Coordinator, and her organizational system were impeccable. Morgan made the transition a great deal easier.

The "Pack of Four": Steve Rau, Flynn, Gaskins & Bennett, L.L.P.; Lora Friedemann, Fredrikson & Byron, P.A.; Dan Gustafson, Gustafson Gluek, P.L.L.C.; and Jeffer Ali, Carlson, Caspers, Vandenburgh & Lindquist, for rising to the Court's challenge of bringing the idea of the *Pro Se* Project to fruition and nurturing the Project into its current form. Their vision, dedication, perseverance, and tireless effort made the *Pro Se* Project—the first of its kind in Federal Courts across the Nation—what it is today. It is because of Rau, Friedemann, Gustafson, and Ali that our FBA Chapter is able to provide *pro se* litigants the innovative service the Project strives to provide—the opportunity to consult with counsel.

Briggs and Morgan, P.A., for its generous $50,000 contribution to the *Pro Se* Project and $25,000 contribution to the Volunteer Lawyers Network ("VLN"). Alan Maclin, Briggs and Morgan President, explained that Briggs and Morgan wanted to give back to the *Pro Se* Project and VLN after the success its attorneys achieved in the *Pro Se* Project case they tried. Briggs took the case at the request of the federal bench through VLN—before implementation of the current FBA *Pro Se* Project. The donation stemmed from Judge Rosenbaum's August 17, 2010, order which awarded the firm statutory attorneys' fees for its representation of a committed sexual offender in a civil rights action against the state. *See Holly v. Anderson*, No. 04-1489 (JMR/FLN). Maclin accepted the award on behalf of the firm.

(L to R) Amy Leonetti, Clerk of Court Rich Sletten, Chief Probation Officer Kevin Lowry, Tricia Pepin, and Chief Judge Michael J. Davis.

Gustafson Gluek, P.L.L.C. and Zimmerman Reed, together contributed a munificent $50,000 to the *Pro Se* Project. Dan Gustafson and Charles ("Bucky") Zimmerman made the donation to help deflect costs incurred in assisting *Pro Se* Project individuals. Gustafson and Zimmerman accepted the awards for their firms.

Tricia Pepin, Legal Advisor to the Clerk of Court, and **Amy Leonetti, *Pro Se* Law Clerk**, for the excellent work they have done on the District Court's website to provide forms and information to federal *pro se* litigants, and for all of the great work they do assisting *pro se* individuals and the *Pro Se* Project.

The District of Minnesota is the third busiest District in the Country. With such large dockets, *pro se* litigants present additional challenges because of the extra time and attention they require. As a result, all of the attorneys, paralegals, law clerks, and legal assistants who spend time reviewing requests to accept Project referrals, meeting with *pro se* litigants, evaluating their claims, providing advice, and representing *pro se* litigants deserve the Court's thanks. Chief Judge Davis commended volunteers for making a tremendous difference in the efficiency of our Federal justice system and in making justice more accessible to those with limited means.

Pro Se Project Milestones

The Project reached two important milestones. In September, the Project received its 100th referral from District Court Judges. To date, the Project has received 121 referrals. The

Continued on page 15

Monthly Luncheon Speaker Profile: Bill White, *Minnesota Law & Politics*

Last year, law and politics became boring again in Minnesota.. In February, after twenty years of covers featuring bungee-jumping lawyers, *SuperLawyers* and *Rising Stars*, and publisher Bill White's back-page column, "All Seriousness Aside," *Minnesota Law & Politics* announced its final issue. Its slogan, "Only our name is boring," defined a publication that described itself as a blend of *Mad*, the *Harvard Law Review*, and the *New Yorker*. White credits the magazine's success to its approach to content: it sought to lead readers to discover something new rather than give readers material designed to meet focus-group recommendations.

White did not intend to become a publisher. He majored in communications at the University of Minnesota and received his law degree from William Mitchell College of Law. Following law school, White served as a law clerk to U.S. Magistrate Judge J. Earl Cudd in Minneapolis, where he was a founding member of the still-active Society for Veneration of Magistrate Judges. After practicing for a few years, White missed having a creative outlet. His brother convinced White to join him at a mission in Venezuela. White agreed, and a year later, he returned to Minnesota where he met a friend who had recently assumed the debt of the *Minnesota Law Journal*.

White was living a "low-overhead" life at the time, and he agreed to help. He suggested that the magazine expand and refocus to become *Minnesota Law & Politics*. Editor Steve Kaplan joined the magazine when he pitched a story about frequent presidential candidate Harold Stassen. White's creative urge found expression. He envisioned a future where Stassen actually wins the White House and created a "Dewey Defeats Truman"-inspired cover. From that issue forward, White realized that he and the staff were "unsupervised children" and decided to have fun with the covers.

The parody covers extended to *Super Lawyers*, which provided the magazine's revenue. White developed *Super Lawyers* after recognizing the importance of referrals and the reluctance of lawyers to advertise their practices. The cover of the first issue featured Joe Friedberg as a flying super-hero. When Vance Opperman purchased *Minnesota Law & Politics*, he and White included *Super Lawyers* in *Minneapolis-St. Paul Magazine* and *Twin Cities Business Monthly*. Its success provided a model for expansion, and when Thompson Reuters acquired *Super Lawyers* and *Rising Stars* last year, they were being published in every state and the District of Columbia.

If the covers set the tone and *Super Lawyers* paid the bills, White's back-page observations about the humor, absurdity, and profound humanity of everyday events reminded readers that ultimately, the profession is about people. As Allen Saeks says in *All Seriousness Aside: Stories from the Back Page*, "When my non-lawyer wife insists each month on reading a column in a law-related magazine before I do, and then either laughs or cries, it's clear these columns are extraordinary."

The apparent effortless style of the final product, however, disguised the struggle to get there. White recalls his bimonthly denial, the terror of a blank screen, and his frequent attempts to convince Kaplan that they had enough good material to skip White's column. Invariably, fear of the deadline overcame avoidance, and White began the process that he likens to dumping a bin of wood blocks on the floor and building a structure. The single-page limit helped White develop his descriptive, concise style. When the magazine ended last February, however, White finally gave himself the relief from deadlines that Kaplan long refused.

Today, White works from his home office, the pace of downtown equaled by the energy of his 2½ year old son. He is still considering his next endeavor. Whatever it is, it won't be boring.

Todd Winter *is a law clerk for The Honorable David S. Doty.*

Mag. Judge Leo I. Brisbois: Public Service Personified

As a young man, Magistrate Judge Leo I. Brisbois thought he would become a teacher, just like his father and grandmother. Although life ultimately took him on a different path, Minnesota's newest Magistrate Judge hasn't strayed far from his desire to serve the public.

Born in 1961 in the small town of Aurora, Minnesota, on the edge of the Superior National Forest, Brisbois was raised nearby in Hibbing, close to his Ojibwe roots. His parents instilled a hearty work ethic at a young age and made public service a priority in his life and those of his two siblings. In addition to being a teacher, Brisbois's father, Gabe, campaigned door-to-door on the Iron Range for the Democratic-Farmer-Laborer party and later served as campaign secretary for the lieutenant-gubernatorial bid of Hibbing's erstwhile town dentist, Rudy Perpich. Brisbois was often at his father's side during those door-to-door sojourns.

After graduating from Hibbing High School in 1980, Brisbois enrolled at Hamline University, fully intent on a career in education. He spent a semester as a student teacher in Brazil and earned his teaching degree and license, but slowly his aspirations changed, with law replacing education. While the two occupations might seem vastly different, in Brisbois's mind they shared an important key characteristic: advancing the public good. As he told the *Bench & Bar of Minnesota* in July 2009, law was a "natural next area" to teaching because "[e]ven in private practice, you're representing individual clients but in doing so, you're advancing the pubic good, by maintaining respect and confidence in the rule of law and the system that we live under. And by how you conduct yourself, and your integrity and ethics."

Brisbois graduated *cum laude* from Hamline University School of Law in 1987 and then took the first of many steps in his legal career aimed at serving the needs of the public: he entered the U.S. Army Judge Advocate General's Corps. He served for two years as a military prosecutor in Germany, then spent an additional year managing a legal-assistance office serving a military community of nearly 10,000 service members and their families. He returned to Minnesota in 1990 to clerk for the Minnesota Court of Appeals, and in 1991 he joined the Minneapolis firm now known as Stich, Angell, Kreidler, Dodge & Unke, focusing equally on litigation and appellate work.

Magistrate Judge Brisbois holds an eagle feather from a 2009 Ojibwe ceremony while being sworn in by Chief Judge Davis.

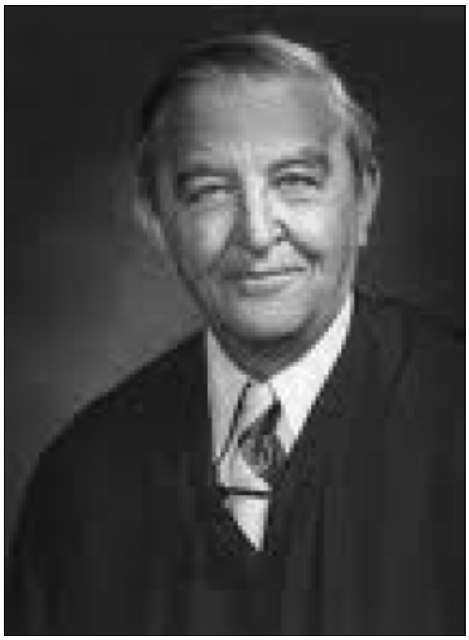
Although he represented private clients at Stich Angell, public service was never far from Brisbois's mind. He continued to serve in the JAG Corps in the Army Reserve for eight years after his active-duty tour ended; he volunteered as a Conciliation Court Judge in Hennepin County for several years; he served as an adjunct professor at Hamline University School of Law; and he was a member of several bar and community-service boards, with a particular emphasis on those serving Native-American communities. In his last year in private practice, he was elected President of the Minnesota State Bar Association, and during his one-year tenure he helped the MSBA accomplish several important goals, including limiting proposed budget cuts to the state judiciary. Brisbois's strong call to serve even led him to run for public office—he lost a race for a seat in the Minnesota House of Representatives to Tim Pawlenty in 1998. Undeterred, he later sought appointment to an open judgeship in Minnesota's First Judicial District under then-Governor Jesse Ventura and received the recommendation of the Minnesota Commission on Judicial Selection, but he did not obtain the position before Ventura's term ended.

Given his commitment to public service, it is not surprising that Brisbois threw his hat into the ring when Chief Magistrate Judge Raymond Erickson announced his retirement in early 2010 after 18 years on the federal bench in Duluth. Relocation to the North Shore was a natural fit, given his roots on the Iron Range and the time he spent in Duluth growing up. Moreover, the position provided Brisbois with the "greatest personal and professional opportunity" of his career and an excellent forum through which to provide direct service to the public. A Merit Selection Panel recommended him to the District Judges, with the Panel recognizing that Brisbois "has a long-standing reputation for fairness

Continued on page 14

Eighth Circuit Holds Special Session to Honor Late Judge Gerald W. Heaney

On October 19, 2010, the United States Court of Appeals for the Eighth Circuit held a special session to honor the life and times of the late Gerald W. Heaney, one of the longest serving judges in the circuit's history. Judge Heaney's colleagues, law clerks, friends, and family shared their humorous and often touching memories of Judge Heaney's contributions to the country in both law and politics. Though many experiences were shared and compliments paid, one theme emerged: Judge Heaney's work in the military and later as lawyer and judge was focused on securing what Heaney viewed as "best for our country in the long run."



The session's speakers began by highlighting some of the more memorable experiences of Heaney's life before he became a judge. Many speakers noted Judge Heaney's heroic accomplishments in the military. Robert Hennessy, one of Judge Heaney's former law clerks, explained that though Heaney was color blind and was not permitted to join the Marines, he instead joined the Army Rangers. Judge Diana Murphy recounted Heaney's accomplishments in World War II, when Judge Heaney assumed leadership of his unit after the captain was killed before exiting his boat at Normandy. Judge Heaney received a silver star for bravery on D-Day, as well as a bronze star and five battle stars, accomplishments for which Chief Judge William Riley labeled Heaney a "military hero."

After returning from the War, Judge Heaney's commitment to country continued when he moved to Duluth and joined a number of civic associations including the University of Minnesota Board of Regents. Judge Heaney also grew active in politics, becoming friends with, among others, Orville Freeman, Hubert Humphrey, and Walter Mondale. According to Judge Murphy, Heaney was a "shrewd observer of the political process" and a "sage advisor about any of the paths a lawyer might take in life." Judge Loken confirmed that this interest was life-long, explaining that after Judge Heaney retired in 2006, Loken asked Heaney whether he returned to pounding in lawn signs in Duluth. Heaney replied, "Oh no, I'm too old for that. But I was driving the car."

All speakers agreed that Judge Heaney's legal decisions were geared toward making the country a more equal place. Judge Myron Bright, one of Heaney's colleagues for more than three decades, explained that at a dinner in 1968 after Bright joined the court, Heaney told him, "Myron, I do not believe that this country can exist in domestic peace segregated as we are. All men and women must be treated equally under the law." Former University of Minnesota Law School Dean Robert Stein cited studies showing that students participating in Judge Heaney-approved programs were two to four times more likely to graduate from high school. Other speakers agreed that a central motif in Heaney's jurisprudence was "defending liberty, pursuing justice." Even those with whom Heaney did not always agree lauded Heaney's tireless work ethic and collegial spirit.

Perhaps the most poignant moment of the session occurred at its closing, when those in attendance were reminded of Judge Heaney's words themselves. Judge Heaney often explained that his "strong belief has been that the Constitution of the United States gives everybody equal opportunity for a job, education, and a home. That's where in my political work and work on the court that I really tried to have the greatest influence." On this point, all speakers agreed: Judge Heaney's nearly forty years of service on the Eighth Circuit did help increase liberty and justice for all.

Judge Heaney served as a Judge on the Eighth Circuit from October 1966 to August 2006. After he retired from the court, he remained active in local civic and political affairs in Duluth. He died on June 22, 2010 in Duluth at the age of 92. He is survived by his wife Eleanor and many other family members, colleagues and friends.

Jeff Justman *is a law clerk for The Honorable Diana E. Murphy.*

Minor Changes Making Major Impact:
New Amendments to Fed. R. Civ. P. 26 and 56

On December 1, 2010, Federal Rules of Civil Procedure 26 and 56 underwent a face lift in an effort to ease communications with expert witnesses and bring the rules in line with current practice before district courts. The amendments are designed to streamline litigation and provide support for procedures that numerous courts across the country have already implemented.

Federal Rule of Civil Procedure 26

The new amendment to Rule 26 relates to the discovery of information from expert witnesses who have been retained to testify at trial. The previous rules regarding expert discovery contained numerous hazards to which even the best attorneys could fall victim. The biggest trap was that the opposing party could obtain broad discovery of all communications between the attorney and his or her expert witness, as well as all drafts of the expert's opinion. These discovery rules caused significant pain and expense to both plaintiffs and defendants, and attorneys frequently employed interesting tactics in order to avoid this discovery. The Committee on Rules of Practice and Procedure (the "Committee") recognized that a change was needed because most attorneys work closely with experts, and may need to have frank discussions about potentially damaging facts with the expert in preparation of the expert's report.

The new change is in Rule 26(b)(4). Specifically, Rule 26(b)(4)(B) provides work-product protection under Rule 26(b)(3)(A) and (B) for drafts of expert reports for all testifying experts disclosed under Rule 26. This protection applies regardless of the form of the draft, be it electronic or written. Hereafter, attorneys and testifying expert witnesses may exchange drafts of the expert report without fear that such drafts will later be discovered. All parties will benefit from this open exchange of drafts and there should be a significant drop in the expense of preparing expert reports as attorneys and experts will no longer have to employ creative means to avoid discovery of drafts.

Likewise, certain communications between testifying expert witnesses and attorneys will be covered under the work-product doctrine. Rule 26(b)(4)(C) provides work-product protection for communications between attorneys and the testifying expert, regardless of form, except for three categories of communications that:

(i) relate to compensation for the expert's study or testimony;

(ii) identify facts or data provided by the party's attorney that the expert considered in forming opinions to be expressed; or

(iii) identify assumptions that the party's attorney provided and that the expert relied on in forming the opinions to be expressed.

Fed. R. Civ. P. 26(b)(4)(C)(i)-(iii).

The category that likely will need further clarification from the courts will be FRCP 26(b)(4)(C)(ii). The Notes for the amendment state that only "communications 'identifying' the facts or data provided by counsel" are included in the exception and that communications "about the potential relevance of the facts or data are protected." As such, good practice may be to only include the identification of facts or data in communications to the expert witness and have a separate discussion on the relevance of such facts or data in other communications.

The consequence of this rule change should not affect the ability of litigants to obtain information sufficient to learn about and potentially attack the opposing expert's opinions because the parties remain free to explore what the expert considered, adopted, rejected, or failed to consider in forming the opinions to be expressed at trial. Moreover, because the work product doctrine is not an absolute privilege, a party may be able to make a showing of need and hardship that would overcome the protection.

Federal Rule of Civil Procedure 56

DO NOT PANIC! The changes to Rule 56 do not change the standard or burdens for summary judgments. Rather, the changes are related to procedural aspects of summary judgment motions that have been in practice in courts across the nation. These changes are an attempt to bring uniformity to how summary judgment is handled in district courts.

The amendments to Rule 56 include:

✦ Requiring that a party asserting a fact that can or cannot be genuinely disputed provide a "pinpoint citation" to the record supporting the party's fact position;

✦ Recognizing that a party may submit an unsworn written declaration under penalty of perjury as a substitute for an affidavit to support or oppose a summary judgment motion;

✦ Setting out the court's options when a party fails to assert a fact properly or fails to respond to an asserted fact, including affording the party an opportunity to amend the motion, considering the fact undisputed for purposes of the motion ("deemed admitted"), or granting summary judgment;

Continued on page 7

✦ Setting a time deadline, subject to local rule or court order in a case, only for the filing of a summary judgment motion;

✦ Explicitly recognizing that "partial summary judgment" may be entered; and

✦ Clarifying the procedure for challenging the admissibility of summary judgment evidence.

The two major changes to be aware of are that all facts must be supported by specific citations to the record and the procedures available to the district court if a party fails to properly support or address a fact. First, every fact relied on by a party in demonstrating that there is or is not a genuine dispute of material fact must have a corresponding citation to the record, be it deposition testimony, documents, interrogatories, etc. Attorneys should keep this requirement in mind when conducting discovery to make sure that all necessary discovery has been conducted if the party anticipates filing or responding to a summary judgment motion.

Second, district courts now have four options for handling the situation where a party fails to properly support or address an assertion of fact. One option is for the court to provide the failing party another opportunity to dispute or support the assertion. In such situation, the non-failing party cannot just assume that the court will treat the fact as denied or admitted and should provide reasons why the court should not allow the failing party another opportunity to respond to the assertion. Further, the reply should provide argument to the court why summary judgment is either appropriate or inappropriate regardless of the particular assertion. These arguments should at least preserve the issue on appeal to allow the party to assert that the district court abused its discretion in allowing a second chance to the failing party to dispute or support a fact.

Again, the changes to Rule 26 and 56 have already been adopted in many local rules and now bring more uniformity to practicing before the federal district courts. In addition, the changes should provide a more streamlined process for pretrial matters that should benefit the clients and attorneys.

Ryan Schultz *is an attorney at Robins, Kaplan, Miller & Ciresi L.L.P.*

Hamline Forms Student Chapter

This past summer, Hamline 3L Katie Uline, working with graduating student Malika Kanodia, started the Hamline University School of Law Student Federal Bar Association. The mission is to strengthen the federal legal system and administration of justice by serving the interests and the needs of the federal practitioner, both public and private, the federal judiciary and the public they serve.

The officers are Katie Uline (President), Kelly Rodgers (Vice President), and Dmitriy Bondarenko (Treasurer). The student chapter's goal is to create and promote educational, networking and social opportunities for our fellow students and members to engage in the area of federal law and meet with the attorneys and judges in this practicing area.

Ms. Uline applied to law school after taking a position in the U.S. District Court's Clerk's Office in Minneapolis. Working in the Clerk's Office for more than four years has given her the opportunity to work on a wide variety of projects and make multiple connections throughout the legal community. After attending a student FBA event hosted by the University of Minnesota Law School during her first year, Katie saw the need to start a chapter at Hamline.

Mr. Bondarenko had his first exposure to federal law as a paralegal in New York City through his participation in litigation involving clients and their representatives all over the world. Dmitriy then realized that becoming involved with the federal court system would open many doors to a greater variety of opportunities for his future career. Ms. Rodgers attended the University of St. Thomas panel in November regarding the Petters Ponzi Scheme. This sparked her interest in federal law, and encouraged her to get involved in the FBA at Hamline so she could be a part of making similar federal law opportunities available to Hamline students. Kelly is excited to help this group grow and gain a dominant presence amongst the Hamline student body.

In November, the Hamline FBA co-hosted a Judicial Clerkship panel for students. This panel, moderated by current FBA President and Hamline University School of Law alumnus, The Honorable Donovan W. Frank, seated five current and former law clerks including Harleigh Brown, Jake Campion, Karin Ciano, Jamal Faleel, and Veena Iyer. Students were given the opportunity to ask questions about their clerking experiences, the application process, and what skills they had taken away from working in chambers. Many thanks to all who participated in this event.

As the fall semester comes to a close, the chapter has begun to plan for spring events and is currently planning a how-to networking event at Hamline University School of Law. Hamline FBA also hopes to work with the other FBA student chapters from the local law schools to create a federal law event open to all members of the legal community. For updates and additional information about our chapter, please see our website at http://fba.hamlinesba.com.

Katie Uline *is President of the Hamline University School of Law Student Chapter.*

Unweaving a Tangled Web: Petters Ponzi Scheme

(L to R) Faculty Advisor Hank Shea, UST FBA Activities Committee Chair Kali Gardner, Katie Ephgrave, Amelia Selvig, panelist John Marti, panelist Doug Kelley, panelist Joe Friedberg, panelist Allan Caplan, moderator Joe Dixon, Aaron Knoll, UST FBA President Sarah Broughton, and UST FBA Vice President Kate Lowe.

Over more than a decade and a half, Minnesota businessman Tom Petters built an empire of dozens of companies, including Polaroid and Sun Country Airlines, employing thousands of people in Minnesota and elsewhere. For a long time those who invested with him earned consistent, above-market returns; those who lent him money were repaid with interest. All the while, Petters and a few insiders operated a massive, complex Ponzi scheme that would eventually be valued at $3.65 billion—at the time, the largest in the U.S.

Petters executive Deanna Coleman decided to blow the whistle. She contacted defense lawyer Allan Caplan. With Caplan's encouragement, she approached the government on September 8, 2008. The investigation that followed led Coleman and several colleagues to plead guilty to crimes associated with the Ponzi scheme. Tom Petters went to trial, and in December 2009, was convicted of 20 counts of mail and wire fraud. Judge Richard H. Kyle sentenced Petters to 50 years in prison. The Petters companies remain in consolidated bankruptcy proceedings.

Five key players in the Petters criminal and bankruptcy cases—defense attorneys **Allan Caplan** and **Joe Friedberg**, bankruptcy trustee and receiver **Doug Kelley**, and federal prosecutors **John Marti** and **Joe Dixon**—met on November 10, 2010 at the University of St. Thomas ("UST") School of Law to share their stories and reflections and take questions from an audience of more than 400. Dixon, an adjunct professor at UST, moderated the forum. The event was co-sponsored by the Holloran Center for Ethical Leadership in the Professions and other organizations, including the UST student chapter of the FBA.

Prosecutor John Marti recalled Coleman's "spectacular, mind-blowing" allegations against Petters, then a respected member of the Minnesota business community. The fraud was "not even on the government's radar," according to Caplan. Marti described the tension between the desire to act immediately, and the need to gather corroborating evidence to support criminal charges. He encouraged Coleman to return to work wearing a wire. Coleman agreed.

Over the next two weeks Coleman recorded conversations with Petters and others, conversations which corroborated her allegations. On the morning of September 24, 2008, the investigation went "from covert to overt," in Marti's words, as more than one hundred federal agents searched Petters' corporate headquarters and the homes and offices of Petters and his associates.

Joe Friedberg described receiving a call that morning from Robert White, who had falsified documents for Petters. White turned over the documents in his desk to federal agents and signed a confession; he too wanted to cooperate with the government. In the days following the search, White surreptitiously recorded conversations with Petters and others, in which Petters suggested they flee the country. Based on the recordings, Petters and Larry Reynolds were charged in a felony complaint and taken into custody.

On October 8, 2008, thirty days after Coleman first told the government about the fraud, Coleman, Robert White and Michael Catain pleaded guilty to crimes associated with the Ponzi scheme.

Continued on page 9

Doug Kelley recalled that on the afternoon of September 24, he was with Senator Norm Coleman as the senator prepared for a debate. One of Coleman's aides announced that the Petters companies had been raided. Two days later, Kelley was appointed receiver and trustee.

As receiver, Kelley's immediate concern was to "stop the hemorrhaging." He noted the government could have required Petters to forfeit his interest in the companies—a move that would have shut down Sun Country Airlines. Petters relinquished his interests, the government agreed not to exercise its right to forfeiture, and Kelley was able to put Sun Country and other Petters companies directly into bankruptcy. Kelley described trying to "get [his] hands around the complexity" of the Petters organization, which owned, among other things, part of the Jamaican lottery and some of the intellectual property rights of Charlie Chaplin's estate. Because Tom Petters went to trial, Kelley did not have access to Petters' witnesses, which made gathering information more challenging. Kelley also discussed the numerous recently filed clawback lawsuits in bankruptcy court as further effort to recover "false profits" received by investors that were allegedly proceeds of fraud.

Dixon focused the panel on questions of ethics. How, for example, did essentially "normal" people like Coleman and White become involved in the fraud? In White's case, Friedberg answered, "very gradually." White had done business with Petters. Petters later approached him saying that he was overleveraged on a deal, and needed help putting together a false bank statement. Petters promised that no one would lose anything. White made one false document; a week later, Petters visited him at home to report that the problem had been "taken care of," and to offer him a gift of $15,000.

Then it happened again. And again. White continued to "help" Petters, believing that the majority of Petters' business was legitimate. Eventually Petters asked White to put together a schedule to pay investors, and White sought Coleman's help, telling her he couldn't tell the "good" documents from the "bad."

"They're all bad," Coleman replied.

Coleman, for her part, was a "simple farm girl" when she began working for Petters, according to Caplan. Petters led her to believe there was "an exit strategy" that would make investors whole, but eventually she came to realize that would never happen. When she contacted Caplan, she owned a million-dollar home, a million-dollar condominium, and had millions more in investments. Caplan let her know she stood to lose all of it. Marti observed that the defendants who pleaded guilty turned over all of their assets to Kelley as part of restitution to the victims.

Dixon focused the panel on sentences for the whistleblowers. Caplan recalled arguing that Coleman should receive no jail time at all. Marti agreed that whistleblowers like Coleman served an "invaluable public interest" because they allowed the government "to pursue justice quickly and deliberately," reducing investigation costs and freeing up resources that the government can use to investigate other crimes. Marti acknowledged that sentencing considerations for whistleblowers were "imprecise," and that his goal had been to encourage Coleman to keep cooperating, and to fully inform the Court of her efforts. Judge Kyle ultimately sentenced Coleman to a year and a day, the shortest possible prison sentence under the Sentencing Guidelines. White received a sentence of five years.

How, Dixon inquired of the panel, could a multibillion-dollar fraud happen with professionals, such as auditors, involved?

Kelley noted that Petters was "allergic to accountants" and as a result there were very few certified financial statements. He surmised that, when everyone was making money, the professionals were not asking the questions they normally might have asked.

Friedberg described a memorable call he received in 2002. A client had invested in Petters Worldwide and described getting returns of 18% a year. Friedberg described his response: "You're in a Ponzi scheme. That's the only way you get 18%." Later the client called back. According to Friedberg, the client had received his principal and interest, and Petters "want [ed him] to double up." Friedberg told the client if he doubled up, he was on his own. "People do it out of greed." At Dixon's prompting, Friedberg considered why he did not do anything more. "I had a client, I gave advice, and when he took it, the case was over." The fraud turned out to be "a much more serious question than I credited it with being."

Video of the event is available on the UST website; please visit http://www.stthomas.edu/ethicalleadership/conferences/Petters.html and follow the video link.

Karin Ciano *is the Chapter's Law School Liaison.*

Nov. Monthly Luncheon: State of the District

Mag. Judge Janie S. Mayeron and Judge Ann D. Montgomery.

Chief Judge Michael J. Davis delivers his address at the sold-out monthly luncheon at the Minneapolis Club.

Robert Bennett and David Schooler.

Erin Knapp Darda, Bankruptcy Judge Robert J. Kressel, and Shaun Parks.

Nick Thelemaque, Allan Williams, and Daniel Allen.

David Wallace-Jackson and Bethany Krueger.

Right from L to R:

Kali Gardner, Sarah Broughton, Karin Ciano, Katie Uline, and Kelly Rodgers.

Above from L to R:

Karl Cambronne, Tom Nelson, and David Hashmall.

Right from L to R:

Blake Lindevig, Nicole Moen, Michael Stokes, and Sybil Dunlop.

Above from L to R:

Lora Friedemann, Tara Norgard, and Becky Thorson.

Below from L to R:

Patrick Martin and Leah Janus.

Lori Simpson and Clare Priest.

District of Minnesota Hosts Ukrainian Judges

From September 25 through October 2, 2010, the District of Minnesota hosted a delegation of Ukrainian judges through the Open World Leadership Program. The mission of the Open World program is "[t]o enhance understanding and capabilities for cooperation between the United States and the countries of Eurasia and the Baltic States by developing a network of leaders in the region who have gained significant, firsthand exposure to America's democratic, accountable government and its free-market system."

Judges in the District of Minnesota have a distinguished tradition of assisting in the development of the rule of law throughout the world, including U.S. District Judge Paul A. Magnuson's work in Russia, Kazakhstan, Kyrgyzstan, Romania, Bulgaria, Albania and Rwanda, and U.S. District Judge John R. Tunheim's work in Kosovo, Uzbekistan, Georgia, Russia, Montenegro, Jordan, Hungary, Kazakhstan, Kyrgyzstan, Moldova, and Lithuania.

Ukrainian Appellate Judges Hon. Olha Serhiyivna Malko, Hon. Yuriy Serhiyovych Medvedenko, Hon. Oksana Vasylivna Pnivchuk, Hon. Oleksandr Vasylovych Shevchenko and Hon. Andriy Volodymyrovych Yaresko travelled to Minnesota in order to learn about the best practices in the U.S. federal and state court systems in the hope that they can someday be implemented by the Ukrainian judiciary. Chief Judge Michael J. Davis, Judge Donovan W. Frank, Judge Magnuson, Magistrate Judge Jeanne J. Graham, and Magistrate Judge Jeffrey J. Keyes, as well as members of the Clerk's Office, assisted in ensuring a successful visit by the Ukrainian delegation.

The Ukrainian judicial delegation with Chief Judge Michael J. Davis, Magistrate Judge Jeanne J. Graham, Judge Ann D. Montgomery, Magistrate Judge Jeffrey J. Keyes, Magistrate Judge Susan Richard Nelson, and Magistrate Judge Leo I. Brisbois.

While visiting the District of Minnesota, the Ukrainian judges received an introduction to the jury system used by the federal courts, had an opportunity to observe and try out the technology available in the courtrooms (including the ELMO), and learned about the ECF Case Management System. The judges also had the opportunity to meet with members of the U.S Attorney's Office, the Federal Public Defender's Office, Probation and Pretrial Services, the Clerk's Office, and the local press (regarding the freedom of the press in the United States). Mag. Judge Graham stated that what impressed the Ukrainian judges the most in their observations of the U.S federal judiciary system was the technology available to the court and attorneys, including ECF. In addition, the Ukrainian judges were struck by how calm criminal proceedings are in the United States and the fact that criminal defendants in the U.S. system are not separated from their defense counsel, by a cage or other barrier, during judicial proceedings.

The Ukrainian judges made a presentation at the St. Paul Warren E. Burger Federal Building and United States Courthouse to court staff and guests regarding the Ukrainian judiciary. According to the judges, the greatest obstacle facing the Ukrainian judiciary is the lack of a sufficient monetary budget to properly pay staff, obtain necessary technology, or to even conduct lengthy jury trials. Further, the judges noted that the Ukrainian judiciary was struggling to maintain independence and to gain the public's trust.

Part of the Open World program is devoted to exposing foreign officials to various social aspects of the United States. While in the Twin Cities, the Ukrainian judges stayed with host families and visited with the

Continued on page 13

Courts Split on Whether "Plausibility" Standard in *Twombly* Applies to Affirmative Defenses

The Supreme Court's decisions in *Bell Atlantic Corp. v. Twombly* and *Iqbal v. Ashcroft* imposed a new standard to survive a motion to dismiss under Rule 12 of the Federal Rules of Civil Procedure. *See Twombly*, 550 U.S. 544, 570 (2007); *Iqbal*, 556 U.S. ___, 129 S. Ct. 1937 (2009). But courts are split on whether the "plausibility" standard announced in *Twombly* and clarified in *Iqbal* applies to affirmative defenses. *See Wells Fargo v. U.S., No. 09-CV-2764, 2010 WL 4530158 (D. Minn. Oct. 27, 2010).*

In *Twombly*, the Supreme Court held that a complaint must be "plausible on its face" to survive a motion to dismiss. 550 U.S. at 570. Under *Twombly*, the plaintiff must plead factual content sufficient to "nudg[e] their claims across the line from conceivable to plausible." *Id*. This standard requires more than "threadbare recitals of the elements of a cause of action, supported by mere conclusory statements." *Iqbal*, 129 S. Ct. at 1949. The district court must engage in a "context-specific" analysis, "draw[ing] on its judicial experience and common sense" to evaluate whether a complaint meets the plausibility standard. *Id*. at 1950.

Although *Twombly* and *Iqbal* articulated a new standard for complaints, most courts have taken the view that the plausibility standard applies to affirmative defenses as well. *See Ahle v. Veracity Research Co., Civil No. 09-0042, 2010 WL 3463513, *24-25 (D.Minn. Aug. 25, 2010) (noting the weight of authority); Racick v. Dominion Law Associates, No. 5:10-CV-66-F, 2010 WL 3928702. *4-5 (E.D.N.C. Oct. 6, 2010).* These courts reason that "the considerations of fairness, common sense and litigation efficiency underlying *Twombly* and *Iqbal* mandate that the same pleading requirements apply equally to complaints and affirmative defenses." *Racick*, 2010 WL 3928702, at *4. Courts also reason that "[b]oilerplate defenses clutter the docket and . . . create unnecessary work and extended discovery." *Id.* (internal quotations omitted).

In *Ahle*, District Judge Ann D. Montgomery noted that "the arguments in favor of extending *Twombly* and *Iqbal* to affirmative defenses are compelling." 2010 WL 3463513, at *25. *See also E.E.O.C. v. Hibbing Taconite Co.*, 266 F.R.D. 260, 268 (D. Minn. 2009) (applying the *Twombly* standard to affirmative defenses).

Some courts, however, including two in the District of Minnesota, have reached the opposite conclusion. In denying a motion to strike, Judge Patrick J. Schiltz recently outlined three reasons not to apply the *Twombly/Iqbal* standard to affirmative defenses. *Wells Fargo*, 2010 WL 4530158. First, *Iqbal* and *Twombly* are rooted in the language of Rule 8(a)(2), which requires "a short and plain statement of the claim *showing* that the pleader is entitled to relief" (emphasis added). Rule 8(b), which governs defenses, contains no such requirement. Second, it is unfair to apply the plausibility standard to affirmative defenses because plaintiffs typically have more time for pre-filing investigation than defendants, who have only 21 days to file an answer. Third, applying the *Twombly/Iqbal* standard to affirmative defenses would add another round of motion practice to many cases because defendants would plead fewer affirmative defenses at the outset, and later move the court for permission to amend their answers after taking discovery. *See also Merchant & Gould v. Premiere Global Services, Inc.*, Civ. No. 09-3144 JRT/JSM (D.Minn. Dec. 30, 2009) (rejecting heightened pleading standard for affirmative defenses)

Twombly and *Iqbal* have significantly impacted federal civil litigation. As the discussion above illustrates, the ultimate scope of this impact is a subject of continuing debate.

Michael Goodwin *is a member of the Communications Committee.*

Ukranian Judges

continued from page 12

local Ukrainian-American community. In addition, the judges attended a Twins game, went on a Mississippi riverboat cruise, and, of course, visited the Mall of America. The judges also had lunch at Twin Cities law firms Frederikson & Byron and Briggs & Morgan. The visit culminated with an October 1 farewell reception at the Minneapolis Federal Courthouse, sponsored by the FBA, held in the honor of the Ukrainian judges. During the reception, the Ukrainian judges presented a gift to the Court— Ukrainian plate painted by a noted Ukrainian artist. Sister court agreements were also signed, in which the courts pledged to exchange information and assistance when needed.

Steve Katras *is a law clerk to The Honorable Janie S. Mayeron.*

IP Practice Group Volunteers for Habitat for Humanity

On November 6, the Chapter's Intellectual Property Practice Group held its second annual Habitat for Humanity volunteer event, allowing members the opportunity to get out from behind their desks for a worthwhile cause. The IP Practice Group actively brings together judges and practitioners for any number of events, such as CLEs, training sessions, formal receptions, and casual get-togethers—but volunteering for its Habitat for Humanity event offers participants a hands-on chance to, quite literally, build connections with the greater, non-legal community. For the second year, the Habitat event was a success, highlighting the nexus between "intellectual" and "real" property, and drawing participants from the University of Minnesota and William Mitchell College of Law as well as federal IP practitioners. Patrick Arenz, Chair of the IP Practice Group, noted that his goals for next year include increasing involvement, with the aim of fielding enough members to work on two homes.

The website for Habitat for Humanity of Minnesota describes its mission to "pursue the creation of decent, safe, affordable housing for those in need." Originally founded in 1976 by Millard and Linda Fuller, Habitat for Humanity now operates

worldwide through independently-run local affiliates in nearly 90 countries and all 50 U.S. states, the District of Columbia, Guam and Puerto Rico. Former president Jimmy Carter and former first lady Rosalyn Carter are perhaps the best-known spokespersons for the international umbrella organization, which seeks to use sustainable, "green" building methods, and requires homes to meet Energy Star and healthy indoor air quality standards. Habitat relies heavily on groups of volunteer laborers, such as the IP Practice Group, to build new homes and refurbish existing ones.

While Habitat for Humanity often builds new houses from the ground up, the November 6 project involved an existing home in the Hawthorne neighborhood of Minneapolis. The shell of the 1910 home was kept intact to maintain neighborhood character, while the interior was gutted and rebuilt to modern standards. The home is nearing completion, and the push is on to finish in time for the family to move in before Minnesota winter weather halts construction. The November 6th team spent its time on interior painting and exterior landscaping projects.

Arenz, an attorney at Robins, Kaplan, Miller & Ciresi L.L.P., describes Habitat for Humanity as an "impressive organization," effectively strengthening neighborhoods and increasing home ownership, especially in areas of the city struggling to attract and retain owners. Future owners of Habitat homes must meet specific selection criteria, make a down payment, and put in at least 500 hours of "sweat equity" before they move in. In return, they receive affordable loans, which they are required to pay back to the organization to fund future home construction.

The Third Annual IP Habitat project will be scheduled for Fall 2011. Please contact Patrick Arenz for more information.

Kerri Nelson *is an attorney at Holstein Law Group.*

Mag. Judge Brisbois

continued from page 4

and commitment to equal justice under law." Chief Judge Michael J. Davis echoed those sentiments when announcing Brisbois's appointment on August 25, 2010, noting that he "enjoys an outstanding reputation for maintaining the highest ethical standards and a commitment to public service." Brisbois was sworn in on August 30, honoring his heritage while taking the oath of office by holding an Eagle feather he received in a 2009 Ojibwe ceremony.

Although the workload has been heavy thus far and his responsibilities have differed greatly from those in private practice, the biggest adjustment for Brisbois has been the respect his newly held office commands from those appearing before him. While he understands and appreciates that lawyers pay him deference because of the position he occupies, he does not yet believe he has earned his stripes. "I feel like I've still got a lot more work to do to prove myself so as to earn in my own right that level of respect," Brisbois recently said. Given his history and reputation at the bar, that respect likely will be well-earned in short order.

Marc Betinsky *is a law clerk for The Honorable Richard H. Kyle.*

Pro Se Project

Continued from page 2

Project also expanded its geographic scope to Duluth. Magistrate Judge Brisbois has referred numerous Duluth cases to the Project, and in November, the law firms of Thibodeau, Johnson & Feriancek, P.L.L.P., and Maki & Overom, Chartered, were the first to accept referrals.

Social Security Disability CLE

Thanks to Becky Thorson of Robins, Kaplan, Miller & Ciresi L.L.P., the *Pro Se* Project participated in a CLE entitled "Basic Tips for Handling Social Security Disability Claims Cases" on October 29, 2010. Judge Donovan W. Frank and Steve Rau were also presenters on this panel. Social Security disability appeals comprise about one-fourth of the cases the judges refer to the Project. The well-attended CLE not only brought awareness of the *Pro Se* Project's need for volunteer attorneys to accept these types of referrals, but also provided a great opportunity to introduce the Project to the large group of lawyers and the media in attendance. Many lawyers expressed interest in accepting *Pro Se* Project Social Security disability cases. Also in attendance was Colleen Wieck, Executive Director of the Minnesota Governor's Council on Developmental Disabilities. Wieck has already provided the Project with tremendous help and resources for assisting *pro se* litigants with developmental disabilities.

***Pro Se* Project Publicity**

The *Pro Se* Project received excellent publicity from the November 1, 2010 issue of *Minnesota Lawyer*. The author of the piece, Michelle Lore, explained how the *Pro Se* Project works, the Project's goal to provide each Federal *pro se* litigant with the opportunity to consult with counsel, and the benefits of receiving CLE credit for helping *pro se* litigants. The attention from the article resulted in additional attorneys expressing interest in the Project.

Chief Judge Davis, Judge Frank, and Magistrate Judge Noel, who is the Court liaison to the *Pro Se* Project, are kind enough to meet regularly with Steve Rau, Tricia Pepin, and Tiffany Sanders to discuss the *Pro Se* Project, its initiatives, and how we can work together to better serve *pro se* litigants, the Court, and the Federal Bar. There are many exciting developments in the works, including the District Court and FBA-sponsored *Pro Se/Pro Bono* Bar Summit taking place on March 17, 2011. The Summit will bring together all of the local, county, state, and federal *pro se* and *pro bono* groups.

Tiffany Sanders *is the Pro Se Project Coordinator. She can be reached at:* ***proseproject@q.com*** *or* ***(612) 965-3711***.

Molly Borg Thornton *also contributed to this article. She is an attorney at Briggs and Morgan, P.A.*

This issue of *Bar Talk* was printed free of charge on recycled paper by Night Owl.

Spoliation Sanctions and Concerns Over the Lack of Uniform Standards

A recent must-read opinion for federal litigators is the case of *Victor Stanley, Inc. v. Creative Pipe, Inc.*, 269 F.R.D. 497 (D. Md. 2010). The opinion is authored by United States Magistrate Judge Paul Grimm and provides a valuable overview on the standards for sanctioning a party's discovery misconduct. Indeed, *Victor Stanley* includes a 12-page chart that outlines the various standards applied by the federal circuits. But more importantly, it offers a detailed analysis regarding the lack of uniform standards governing the imposition of spoliation sanctions. This article will tell you what you need to know about *Victor Stanley* and the current state of preservation and spoliation standards in the Eighth Circuit.

Summary of *Victor Stanley*

According to Magistrate Judge Grimm, he was confronted with the "single most egregious example of spoliation that [he has] encountered in any case that [he has] handled or in any case described in the legion of spoliation cases [he has] read in nearly fourteen years on the bench." *Victor Stanley,* 269 F.R.D. at 515. He wasn't exaggerating. Mark Pappas, the president of the corporate defendant, made a regular practice of delaying, deleting, destroying, and failing to preserve the defendant's electronically stored information ("ESI"); misrepresenting the completeness of the defendant's ESI production; and violating court orders. *Id.* at 502-15. As a result of the defendant's repeated and willful misconduct, Judge Grimm granted plaintiff's motion for sanctions and entered default judgment against defendant as to the primary claim in the case—copyright infringement on furniture designs. *Id.* at 538. Judge Grimm also found Pappas in civil contempt of court and ordered that he "be imprisoned for a period not to exceed two years, unless and until he pays to Plaintiff the attorney's fees and costs." *Id.* at 541-42.

Lack of Uniform Standards For Spoliation Sanctions

While the obvious misconduct at issue in *Victor Stanley* would ordinarily make for a relatively open-and-shut decision, Judge Grimm took the opportunity to provide detailed guidance on a problem that lawyers and clients across the country are very concerned about:

> the lack of a uniform national standard governing when the duty to preserve potentially relevant evidence commences, the level of culpability required to justify sanctions, the nature and severity of appropriate sanctions, and the scope of the duty to preserve evidence and whether it is tempered by the same principles of proportionality that Fed. R. Civ. P. 26(b)(2)(C) applies to all discovery in civil cases.

Id. at 516.

Judge Grimm used the following framework to evaluate the appropriateness and level of sanctions:

1. Duty to Preserve Evidence.

It is well established that the duty to preserve evidence arises not only during litigation, but "from the moment that litigation is reasonably anticipated." *Id.* at 521 (citation omitted). Of course, whether a party should have anticipated litigation is a subjective and fact-specific inquiry. *See, e.g., Rimkus Consulting Group, Inc. v. Cammarata*, 688 F. Supp. 2d 598, 613 (S.D. Tex. 2010).

Despite these general guidelines, Judge Grimm noted that the standards relating to the scope of the duty to preserve are not consistent across the circuits, or even within individual districts. *Victor Stanley,* 269 F.R.D. at 523. For example, the definition of "control" varies by circuit. *Id.* In the Eighth Circuit, a party must preserve potentially relevant documents in their possession. *Dillon v. Nissan Motor Co.*, 986 F.2d 263, 267 (8th Cir. 1993). Similarly, district courts in the Third, Fifth, and Ninth Circuits have held that the preservation duty exists only when the party controls the evidence. *Victor Stanley*, 269 F.R.D. at 523. But in the First, Fourth, and Sixth Circuits, the duty to preserve extends to evidence controlled by third parties. *Id.*

2. Degree of Culpability.

A party seeking spoliation sanctions must establish some level of fault. But the degree of culpability—bad faith, willfulness, gross negligence or ordinary negligence—also varies by circuit. For example, in the Fourth Circuit, "to impose an adverse jury instruction, the court must only find that the spoliator acted willfully in the destruction of evidence." *Id.* at 536 (internal quotations and citations omitted). However, in the Second Circuit, an adverse jury instruction may be warranted based on negligence or gross negligence. *See Residential Funding Corp. v. DeGeroge Fin. Corp.*, 306 F.3d 99, 108 (2d Cir. 2002); *see also Pension Comm. of Univ. of Montreal Pension Plan v. Banc of Am. Sec.*, 685 F. Supp. 2d 456, 465 (S.D.N.Y. 2010) (stating that adverse jury instruction was warranted for grossly negligent, but unintentional, conduct).

In the Eighth Circuit, if spoliation occurs before litigation commences, there must be evidence of bad faith for the court to impose an adverse inference instruction, but if spoliation occurs during litigation, the

Continued on page 17

Diversity Committee Plans Diversity Summit, CLE with MABL

In the coming months, the Chapter's Diversity Committee in conjunction with Leonard, Street and Deinard, P.A., is planning a special summit and reception entitled, "**Minnesota Diversity: Waves of the Future,**" to take place on **February 25, 2011** from **3:00-5:00 p.m.** at Leonard, Street and Deinard. The purpose of the summit is to bring together diverse organizations to share resource information in hopes of creating a website that will be a single point of contact for information about programs, activities, and other information related to diversity.

The Committee is also in the process of working with the Minnesota Association of Black Lawyers ("MABL") to put together a special CLE program to take place at Robins, Kaplan, Miller & Ciresi L.L.P. in March 2011. Please be on the look out for additional information.

For more information about either event , please contact Diversity Committee Co-Chairs, Magistrate Judge Jeanne J. Graham (jjgraham@mnd.uscourts.gov) or Ann Anaya (ann.anaya@usdoj.gov).

continued from page 16

court may impose an adverse inference instruction "even absent an explicit bad faith finding." *Stevenson v. Union Pac. R.R.*, 354 F.3d 739, 745, 747 (8th Cir. 2004).

Furthermore, various courts "differ in the fault they assign when a party fails to implement a litigation hold." *Victor Stanley*, 269 F.R.D. at 524. For example, in a case from the Southern District of New York, the court concluded that the failure to implement a written litigation hold constitutes gross negligence *per se*. *Pension Comm.*, 685 F. Supp. 2d at 466. However, in a case from the Northern District of Illinois, the court held that while the failure to institute a litigation hold was a relevant consideration, it was not *per se* evidence of sanctionable conduct. *Haynes v. Dart*, 2010 WL 140387, at *4 (N.D. Ill. Jan. 11, 2010). And, under some circumstances, a formal litigation hold may not be necessary at all. *Victor Stanley*, 269 F.R.D. at 524.

The Eighth Circuit has not addressed the implications of a party's failure to issue a litigation hold.

3. Relevance of Lost Evidence and Resulting Prejudice.

A party seeking spoliation sanctions must also show that the lost evidence is relevant and that the resulting loss of evidence is prejudicial. Evidence is relevant if "a reasonable trier of fact could conclude that the lost evidence would have supported the claims or defenses of the party that sought it." *Victor Stanley*, 269 F.R.D. at 531 (citations omitted). Prejudice exists when "the party claiming spoliation cannot present evidence essential to its underlying claim." *Id.* at 532 (internal quotations and citation omitted).

Nevertheless, inconsistent standards exist among the circuits as to whether relevance may be presumed depending on the spoliator's level of culpability. In the Fourth Circuit, negligent or even grossly negligent conduct is not sufficient to raise a presumption of relevance regarding lost evidence; instead, relevance of the lost evidence is presumed only when a party willfully fails to preserve it. *Id.* (citations omitted). Similarly, in the Seventh Circuit, unintentional conduct is insufficient to raise a presumption of relevance when spoliation sanctions are sought. *Id.* (citation omitted).

This issue has not been addressed by the Eighth Circuit, but the court has stated that there is no presumption of irrelevance for intentionally destroyed documents. *Alexander v. Nat'l Farmers Org.*, 687 F.2d 1173, 1205 (8th Cir. 1982). By contrast, in the Second Circuit, both "[r]elevance and prejudice may be presumed when the spoliating party acted in bad faith *or in a grossly negligent manner*." *Victor Stanley*, 269 F.R.D. at 532 (emphasis added) (quoting *Pension Comm.*, 685 F. Supp. 2d at 467.) Thus, a party in the Second Circuit that fails to issue a litigation hold may be found to have acted in a grossly negligent manner and be vulnerable to sanctions even absent a showing that the lost evidence was relevant and prejudicial. *Victor Stanley*, 269 F.R.D. at 532, n. 34.

As Judge Grimm aptly pointed out by, "the lack of a uniform standard regarding the level of culpability required to warrant spoliation sanctions has created uncertainty and added to the concern that institutional and organizational entities have expressed regarding how to conduct themselves in a way that will comply with multiple, inconsistent standards." *Id.* at 532. Under these circumstances, corporations should strongly consider developing preservation policies that comply "with the most demanding requirements of the toughest court to have spoken on the issue, despite the fact that the highest standard may impose burdens and expenses that are far greater than what is required in most other jurisdictions in which they do business or conduct activities." *Id.* at 523.

Conclusion

While the ultimate impact of the *Victor Stanley* decision remains to be seen, there is no doubt that Judge Grimm has provided the federal bar with a valuable framework for analyzing spoliation sanctions and has advanced the discussion regarding the problems that are created because of the lack of uniform federal standards.

Timothy M. O'Shea *is a litigation attorney at Fredrikson & Bryon, P.A., in Minneapolis. Prior to joining Fredrikson & Bryon, Tim served as a law clerk for The Honorable Richard H. Kyle and The Honorable Arthur J. Boylan of the United States District Court for the District of Minnesota.*

FBA National President Ashley Belleau Hopes to Increase the FBA's Value, Relevance and Visibility

The Minnesota Chapter sent two representatives to the 2010 FBA Annual Meeting and Convention in New Orleans: Eric Rucker, a shareholder at Briggs and Morgan, P.A., and the the Chapter's National Council Delegate, and Anh Le Kremer, a shareholder at Leonard, Street and Deinard, P.A., and Co-Vice President of the Eighth Circuit. Aside from meeting national delegates and judges, Kremer recalls that one of the highlights at the convention was witnessing her longtime friend, Ashley Belleau, being installed as the 2010-2011 National President of the FBA. Belleau, a partner at Montgomery, Barnett, Brown, Read, Hammond & Mintz, LLP, was born in Pensacola, Florida, but grew up in Mobile, Alabama. When Belleau was seventeen, she moved to New Orleans, Louisiana to attend Newcomb College of Tulane University.

With Belleau's background, it is no surprise that she would eventually be elected to such an honorable position within the FBA. Belleau began her bar association involvement at the state level in Louisiana. After graduating from Newcomb College, *cum laude*, and Tulane University Law School, and clerking for The late Honorable Henry A. Mentz, Jr., U.S. District Court Judge for the Eastern District of Louisiana, Belleau worked at a large law firm in Louisiana. While at the firm, one of the partners, who was involved with the Louisiana State Bar Association ("LSBA"), encouraged Belleau to become involved with the LSBA Young Lawyers Section. Belleau joined the Section, where she was later elected to the Board of the LSBA Young Lawyers Section and eventually became Chair of the Section. While being involved with the LSBA, Belleau met attorneys from all over Louisiana, and traveled throughout the state. According to Belleau, being on the Board gave her "the opportunity to get to know [her] peers in a more professional, but personal, level and many of them became [her] friends." For more than a decade, Belleau continued to hold leadership positions in various LSBA sections and committees, including serving as a member of the LSBA House of Delegates. Belleau credits her experiences with the LSBA for igniting her love and passion for bar association involvement.

Belleau accepts flowers after being installed as the 2010-2011 FBA National President at the Annual Meeting and Convention in New Orleans.

This bar association involvement would ultimately lead to Belleau's involvement with the FBA, which started in 1992 when Robert Kutcher, then-President of the New Orleans Chapter of the FBA and Belleau's then-partner, nominated her to the FBA's Board of Directors. After serving on the Board, Belleau was a member of the New Orleans Chapter Membership Committee and later became President of the New Orleans Chapter in 1999. From 2000 to 2005, Belleau served as Co-Vice President of the Fifth Circuit, a position that would ultimately earn her the FBA Award for Outstanding Service. Belleau subsequently served as Chair of the Circuit Vice Presidents from 2003 to 2005, Deputy Secretary from 2005 to 2006, General Counsel of the FBA from 2006 to 2008, and the FBA's Treasurer from 2008 to 2009. Belleau has found that the relationships she has made while serving on various bar association committees and positions has continued to serve her in her day-to-day practice, as these collegial relationships have made practicing law more enjoyable to her.

Now, as the third FBA National President to come from the New Orleans Chapter, Belleau continues to build these relationships as she furthers the FBA's mission for 2011 and beyond. In spring 2010, Belleau and several present and future FBA officers gathered at the Presidential Summit to strategize as to how to increase the FBA's value, relevance, and visibility, otherwise known as "VRV."

In regard to increasing the FBA's value, the goal speaks for itself. The FBA offers many networking opportunities, substantive sections, and national CLE programs, and takes the

Continued on page 19

lead on a number of different issues. For example, in 2009, the FBA filed an amicus brief in the Fifth Circuit defending the sanctity of the attorney-client privilege. "[I]t's exciting to be involved in a national organization that actually takes stands on legal issues that are facing our federal practitioners and the bench," Belleau said.

If FBA members and prospective members are aware of the numerous networking opportunities, substantive sections, and national CLE programs that the FBA offers, they will become excited about being a member of a national organization, which, according to Belleau, "brings the value." In regard to increasing the FBA's relevance, Belleau noted, "[I]t is very important when you are a member of any organization, and particularly the FBA, that people want to be in an organization that is relevant and provides them value for their membership—whether it's networking opportunities among local colleagues or networking within the context of meeting attorneys and federal judges across the country."

Going to the last "V" for visibility, the FBA wants to improve, on a national level, how it "lets people know what it does," whether that involves increasing its visibility on the internet, increasing its CLE offerings and charitable community opportunities, or issuing more press releases.

The FBA also wants the individual Chapters to follow in the same direction by engaging in programs and offerings that increase their visibility. The Minnesota Chapter has been a leader at doing this for many years. Being part of the Minnesota Chapter is indeed something to be very proud of. According to Belleau, the Minnesota Chapter is "one of our most vibrant Chapters in the country." In fact, when it came to the 2010 Chapter Challenge Membership Campaign, the Minnesota Chapter was recognized at the FBA Annual Meeting for being the second largest FBA Chapter in the nation.

The New Orleans Chapter also has a reputation for being highly recognized. Thus, it should be no surprise that the Minnesota and New Orleans Chapters tend to compete and compete they did in the Membership Campaign, with the New Orleans Chapter edging out the Minnesota Chapter by a close margin. "The Minnesota Chapter is a model for a number of Chapters throughout the country," Belleau said. "You've got a great board, Judge Frank is terrific, and you've got two great Vice Presidents of the Eighth Circuit. You have one of the largest Chapters in the country and you are constantly doing fantastic programs." Belleau also applauded the Minnesota Chapter's efforts in its various initiatives, such as the Diversity Committee and Federal Transportation Program, to name a few.

"The Minnesota Chapter is a model for a number of Chapters throughout the country. You've got a great board, Judge Frank is terrific, and you've got two great Vice Presidents of the Eighth Circuit. You have one of the largest Chapters in the country and you are constantly doing fantastic programs."

There is no doubt that calling the work of Belleau and the FBA leadership "ambitious" is an understatement. Together, Belleau and the FBA leadership team have created and, more importantly, started to implement goals and strategies for 2010-2011. Some key goals include the following:

✦ The FBA will undertake a comprehensive review and assessment of all Chapters to determine each Chapter's strengths, weaknesses, and needs.

✦ The FBA will study how to make the Young Lawyers Division ("YLD") more of a national body within the Bar. The YLD board structure should include representation from across the country and at least one person from each Circuit.

✦ The FBA will continue to improve and expand the content and capability of www.fedbar.org as the center point of communication to all members and potential members of the FBA.

Given Belleau's background, successful legal practice, and promising future as the new FBA National President, one has to ask, "How is she able to balance it all?" Equally related, for attorneys who might find FBA involvement daunting and perhaps overwhelming, how can they keep things in perspective? Belleau's response: "It does take up time, and it requires a lot of organization. I know some of my young associates have gotten very involved in the FBA as well as the Convention that was here. They are trying to juggle it all and sometimes it works, and sometimes it does not. But, these are the things you are going to want to do because they translate into benefits down the road—maybe not today, but down the road. . . . It is all a circle of life kind of thing, but you have to be invested in it and take the time."

Adine S. Momoh *is an attorney at Leonard, Street and Deinard, PA. Her practice consists of complex business and commercial litigation, securities litigation and banking and financial services representation, with a focus on bankruptcy litigation and creditors' rights.*

Calendar of Upcoming Events

January 13, 2011 | 12:00 p.m.
Newer Lawyer Lunch: Pre-Trial Submissions
The Honorable Donovan W. Frank
St. Paul Courthouse, Courtroom 724

January 19, 2011 | 12:00 p.m.
Monthly Luncheon: The Honorable Leo I. Brisbois
New Magistrate Judge's Transition to the Bench
Minneapolis Club

February 16, 2011 | 12:00 p.m.
Monthly Luncheon
Minneapolis Club

February 17, 2011 | 12:00 p.m.
Newer Lawyer Lunch: White Collar Crime
The Honorable John R. Tunheim
Minneapolis Courthouse, Courtroom 13E

February 24, 2011 | 6:00 p.m.
FBA Law Student Reception
Leonard, Street and Deinard, P.A.

February 25, 2011 | 3:00 - 5:00 p.m.
Minnesota Diversity: Waves of the Future Reception
Leonard, Street and Deinard, P.A.

March 8, 2011 | 6:00 p.m.
Spring Board of Directors Meeting
Woman's Club, Minneapolis

March 16, 2011 | 12:00 p.m.
Monthly Luncheon
Minneapolis Club

March 17, 2011 | 12:00 p.m.
Newer Lawyer Lunch: Appellate Issues
to Consider During Trial
The Honorable Diana E. Murphy
Minneapolis Courthouse, Courtroom 11E

To sign up for **Monthly Luncheons**, please contact **Tara Norgard** (tnorgard@ccvl.com) or **Leah Janus** (ljanus@fredlaw.com).

To sign up for **Newer Lawyer Lunches**, please contact **Brent Snyder** (brent.snyder@snyderattorneys.com) or **Kirstin Kanski** (kkanski@lindquist.com).

Communications Committee

Marc Betinsky
Law Clerk to The Honorable Richard H. Kyle

Karin Ciano
FBA Law School Liaison

Erin Knapp Darda
Law Clerk to The Honorable Robert J. Kressel

Michael Goodwin
Attorney

Wesley Graham
Henson & Efron, P.A.

Kari Hainey
Nilan Johnson Lewis, P.A.

William Hittler (Committee Co-Chair)
Nilan Johnson Lewis, P.A.

Annie Huang (Committee Co-Chair)
Robins, Kaplan, Miller & Ciresi L.L.P.

Jeff Justman
Law Clerk to The Honorable Diana E. Murphy

Steve Katras
Law Clerk to The Honorable Janie S. Mayeron

Adine S. Momoh
Leonard, Street and Deinard, P.A.

Kerri Nelson
Holstein Law Group

Erin Oglesbay
Winthrop & Weinstine, P.A.

Timothy O'Shea
Fredrikson & Byron, P.A.

Ryan Schultz
Robins, Kaplan, Miller & Ciresi L.L.P.

Bryan Symes
Seaton, Beck & Peters, P.A.

Anita L. Terry
Law Clerk to The Honorable Paul A. Magnuson

Vildan Teske
Crowder Teske, PLLP

Molly Borg Thornton
Briggs and Morgan, P.A.

Todd Winter
Law Clerk to The Honorable David S. Doty

A special thank you to **Rebecca Baerstch**, *Judicial Assistant to The Honorable Donovan W. Frank, and* **Patricia May** *of Robins, Kaplan, Miller & Ciresi for their proofreading expertise.*

Bar Talk is the official newsletter of the Minnesota Chapter of the FBA. It is published quarterly by the Communications Committee. For any inquiries or article suggestions, please contact:

Bill Hittler (whittler@nilanjohnson.com)
or
Annie Huang (ahuang@rkmc.com).