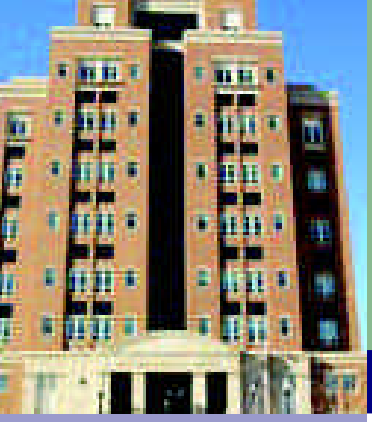

THE ROCKET DOCKET NEWS

The Newsletter of the Northern Virginia Chapter of the Federal Bar Association

JUNE 2010

The President's Report

by Attison L. Barnes, III, Esq.

Litigation is the basic legal right that guarantees every corporation its decade in court.

- Rear Admiral David Porter, US Navy (1813-1891)

Perhaps we have all experienced the frustration underlying this famous quote while representing a party in litigation that just . . . would . . . not . . . end. Across the country, lengthy lawsuits distract multiple iterations of corporate management and span not only economic boom and bust, but boom again. Most parties and lawyers crave a level of certainty -- preferably a decision on the merits -- within a reasonable period of time. For those of us who "grew up" in the Eastern District of Virginia, it is always nice to come home after litigating in some far off (and painfully slow) jurisdiction.

The success of the Rocket Docket is, of course, directly attributable to the quality of the judges, to the talented law clerks, and to the dedication of the Clerk's Office and courtroom personnel. Over the last few months, we at the Federal Bar Association's Northern Virginia Chapter have seen first hand why this is a special Court and why it is a privilege to practice there. By the end of next month, we will have been fortunate to sponsor eight (8) events in 2010 featuring four (4) district judges, four (4) magistrate judges, one (1) bankruptcy judge, one (1) Fairfax County Circuit Court judge, as well as a reception for the newest Fourth Circuit Judge, Hon. Barbara Milano Keenan, with more than a dozen federal and state judges in attendance to congratulate Judge Keenan. The judges seem to care deeply about the health of the bench and the bar, and they are willing to devote their valuable time to serve on seminar panels for our association and others.

On behalf of the Board, I express our special thanks to those who worked diligently to develop and present the following CLE programs and events, all of which surpassed our attendance expectations:

- Federal and state injunction standards in light of the Fourth Circuit's recent departure from Blackwelder, featuring the Hon. Anthony J. Trenga and the Hon. Jane Marum Roush of the Fairfax Circuit Court. The program, ably moderated by Board Member Sean F. Murphy, was so well-received, it was repeated by request at the Advanced Business Litigation Institute in Charlottesville last month.

- Litigation Ethics: Witnesses, presented by the always-entertaining Thomas E. Spahn of McGuire Woods. Tom is a national expert on ethics and professional responsibility, and his interactive seminars never disappoint.

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Members of the Northern Virginia Chapter are encouraged to submit articles or news information of interest to other members of the Northern Virginia Chapter for possible publication in the Rocket Docket News. Please submit any proposed articles or news information to the Editors at the telephone numbers and e-mail addresses listed above. The Editors reserve the right to decide on publication, and any articles accepted for publication are subject to editing.

The President's Report (cont'd)

- The Annual Introduction to Courthouse Program (co-chaired by Board Members Sean Murphy and Caitlin Lhommedieu) serves the dual purpose of moving the admission of new lawyers to the Alexandria Division and introducing those lawyers to key members of the courthouse family. Approximately 50 new attorneys were sworn into the Bar of the Eastern District of Virginia before a panel of district judges, bankruptcy judges, and magistrate judges. Special thanks to the Hon. Leonie M. Brinkema for her tireless efforts on this program year-after-year, and to the Hon. Stephen S. Mitchell and the Hon. Ivan D. Davis for speaking at the event along with Past President and Federal Public Defender Michael Nachmanoff, and representatives of the Clerk's Office, the Probation Office, the Marshal's Service, and the U.S. Attorney's Office. The event concluded with inspirational remarks from experienced practitioner William D. Dolan, III about the importance of integrity, preparation, and respect in the Alexandria federal courthouse.

- The Federal Law of Sanctions: Discovery & Pretrial, featuring the Hon. Ivan D. Davis and moderated by Board Member Craig C. Reilly unraveled the mysteries of the myriad sanctions available to parties aggrieved during the litigation process. Craig Reilly's written materials are a must-have primer for sanctions in this district.

- The late May weather cooperated throughout the reception on the courthouse patio in honor of Judge Barbara Milano Keenan for her recent commission to the United States Court of Appeals for the Fourth Circuit.

Federal and state judges gather on the courthouse patio in late May to honor Judge Barbara Milano Keenan for her recent commission to the United States Court of Appeals for the Fourth Circuit.

The President's Report (cont'd)

Judge Barbara Milano Keenan pauses with her husband and daughter.

From left to right: Bill Cummings, Dana Boente of the US Attorney's Office, and Bill Dolan were among those in attendance for the festitivies.

- Last month, a spirited group gathered for a Bench/Bar Dialogue on Protective Orders and Motions to Seal featuring the Hon. T. Rawles Jones, Jr., the Hon. Theresa C. Buchanan, the Hon. John F. Anderson, and the Hon. Ivan D. Davis and moderated by Board Member Craig C. Reilly. Special thanks to Judge Buchanan who kept a list of important issues from her courtroom since the last Bench/Bar Dialogue. [Note to members: everyone should attend the annual Bench/Bar Dialogue so that your next case is not on the agenda for next year's event!]

In conjunction with our Annual Meeting, we held a seminar on June 22, 2010 entitled Patent Infringement Litigation in the Alexandria Division, featuring the Hon. Gerald Bruce Lee, the Hon. Liam O'Grady, the Hon. T. Rawles Jones, Jr., and the Hon. John F. Anderson, and moderated by patent litigators Charles B. Molster, III and Caitlin Lhommedieu. The spirited discussion among the judges, the panelists, and the attendees resulted in one of our best intellectual property seminars in years. Prior to the start of the CLE, we also voted on next year's officers and directors. Please join me in congratulating the following members who were unanimously elected officers and directors for the coming year:

- Chas McAleer (as President-Elect, Chas automatically ascends to the office of President)
- Sean Murphy -- President-Elect
- Scott Caulkins -- Vice-President
- Damon Wright -- Secretary
- Anne Devens -- Treasurer
- Caitlin Lhommedieu -- National Delegate
- The Honorable Ivan D. Davis -- Director at Large
- Craig Reilly -- Director at Large
- George Kostel -- Director at Large

I thank them all for their willingness to serve.

The Federal Bar Association's Mission Statement:

"The mission of the Association is to advance the science of jurisprudence and to promote the welfare, interests, education, and professional growth and development of the members of the Federal legal profession."

For more information regarding the Federal Bar Association and its activities, please contact the Federal Bar Association at its national offices:

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The President's Report (cont'd)

Finally, please also mark your calendars for three additional events:

- On July 26, 2010 at 3:00 p.m., we will welcome the Hon. Leonie M. Brinkema as she participates in a seminar on Motions Practice After *Iqbal* and *Twombly*, moderated by Jonathan Frieden and Stephen Cobb at Odin Feldman Pittleman, PC.

- On September 22, 2010 at 5:00 p.m., you will not want to miss the annual Torrey Armstrong Lecture, where the judges will introduce their new law clerks and William D. Dolan, III of the Venable law firm will deliver a keynote speech. The event will once again be held at the Masonic Temple in Alexandria, and will include a reception where we can meet the new law clerks. You will receive more information on this special event as the date approaches.

- On September 29, 2010 at 1:00 p.m., our Chapter will hold its annual golf outing at Army Navy Country Club. Unlike a court appearance in the Rocket Docket, no skills are required to join this group on the links.

Thank all of you for making this year's programs so successful, and I look forward to seeing you at our upcoming Chapter events and seminars. As always, please feel free to contact me at 202-719-7385 or at abarnes@wileyrein.com if you would like to get involved in our Chapter. If you are not currently a member of our Chapter but would like to be, please visit www.fedbar.org/nvirginia and remember to select the Northern Virginia Chapter.

Case Update: The Standard for Preliminary Injunctions in the Fourth Circuit

Scott Caulkins, Esq. Capsalis, Bruce, Reaser & Caulkins, PLC

Last year, in the much talked about case of *The Real Truth About Obama, Inc. v. Federal Election Commission*, 575 F.3d 342 (4th Cir. 2009), the Fourth Circuit cast aside the standard long used by the Fourth Circuit for determining whether to grant or deny preliminary injunctive relief articulated in *Blackwelder Furniture Co. v. Seilig Mfg. Co.*, 550 F.2d 189 (4th Cir. 1977). In doing so, the Court shifted the focus of the analysis from the "balance-of-hardship test" that had long been used in the Fourth Circuit to the requirement that a plaintiff make a clear showing of a likelihood of success on the merits. *The Real Truth* decision harmonized the preliminary injunction standard applied in the Fourth Circuit with the standard articulated by the U.S. Supreme Court in *Winter v. Natural Resources Defense Council, Inc.*, 129 S. Ct. 365, 374-76, 172 L. Ed. 2d 249 (2008).

The Real Truth was appealed to the U.S. Supreme Court. Recently, the Supreme Court vacated the judgment on other grounds, and remanded the case to the Fourth Circuit for further consideration in

PRACTICE TIPS
Bill Cummings, William B. Cummings P.C.

A recent civil case from the Eastern District (VAED) provides helpful guidance to attorneys when seeking or defending a post-trial request for costs.

In a memorandum opinion issued on March 25, 2010, in the discrimination case of *Ford v. Zalco Realty, Inc., et.al.* (1:10cv1318), U.S. District Judge Liam O'Grady drastically reduced prevailing defendant's request for costs. A request for assessment of costs is governed by Rule 54(d) of the FRCP, and 28 USC § 1920. In *Ford*, the defendant sought to recover, *inter alia*, costs for the service of subpoenas on witnesses both for trial appearances and for appearances for depositions. This component represented $5,285.00 of the defendant's Bill of Costs, which totaled $27,916.57. The difficulty with the claim was that the defendant utilized a private process server to serve the subpoenas. Judge O'Grady referred to the Code (28 USC § 1920) and ruled that service fees are only allowable if service was effected or attempted by the U.S. Marshal. Private process server fees are not allowable. NB: For all practical purposes, at least in the Eastern District, the U.S. Marshal is not available for serving witness subpoenas in civil cases. The opinion is a helpful primer on the general subject of reimbursable costs.

(con't page 5)

PRACTICE TIPS CON'T

Fortunately, Judge O'Grady did not impose sanctions on Ford's counsel. Pursuant to Local Rule 54 (E), "Any party applying for costs **which are not recoverable** or which are excessive shall be subject to sanction under Fed. R. Civ. P. 11" (emphasis added). Since, as Judge O'Grady correctly pointed out in his memorandum opinion, there is no Fourth Circuit case on point, one could contend that he or she was not aware that private process server costs are not recoverable. However, this "Practice Tip" is meant as "a word to the wise."

Case Update (cont'd)

light of the Supreme Court's much politicized decision in *Citizens United v. Federal Election Commission*, 130 S. Ct. 876, 175 L. Ed. 2d 753 (2010)(holding that the Federal statute prohibiting corporations and unions from spending for electioneering communications violated the *First Amendment*), and based upon the Solicitor General's suggestion of mootness. Although the Fourth Circuit remanded the case to the district court for further consideration in accordance with the Supreme Court's decision, it reissued the portion of its earlier opinion regarding the standards to be applied for granting or denying preliminary injunctions. *The Real Truth About Obama, Inc. v. Federal Election Commission*, 2010 U.S. App. LEXIS 11627 (4th Cir. June 8, 2010). Accordingly, the new preliminary injunction analysis articulated in *The Real Truth* was not affected by the appeal and the long standing *Blackwelder* standard so familiar to Fourth Circuit practitioners apparently will become a relic of the past.

For those who are interested in a review of the new Fourth Circuit standard for the grant or denial of preliminary injunctive relief, *see* Rocket Docket News, December 2009 Issue, "Bye, Bye, Blackwelder," by Damon W.D. Wright and May Steinbach.

From the Bench: What You Always Wanted to Know About: The Honorable Ivan D. Davis

U.S. Magistrate Judge Eastern District of Virginia

1. Best advice you received prior to taking the Bench about how to be an effective judge?

Answer: I was advised by a most astute United States District Judge, EDVA, Alexandria Division, who will remain nameless for obvious reasons, that I should always be polite, courteous, and professional to all those who enter my courtroom - counsel and clients alike. He said in order to be an effective judge, I needed to remember that I used to be standing exactly where counsel stand now. And to remember, how much better the courtroom experience was when the judge was polite, courteous, and professional. Finally, he advised that I was selected as a judge because it was decided that I could do the job and do it well. Therefore, I should not hesitate in deciding cases the way I believed most appropriate because even if I made a mistake, mistakes can always be corrected.

From the Bench (cont'd)

2. Advice you would give to a young lawyer starting a legal career?
Answer: I would give a young lawyer starting a legal career the same advice the Chief Judge of the U.S. Air Force gave me when I first joined the Air Force Judge Advocate General Corps years ago. He told me that too many officers concern themselves too much with making the next rank rather than getting things done right now. He told me that if I wanted to be a successful officer or successful in any career, I should do the best I can at the job I have right now. He said if I did that and carried that attitude and philosophy with me to each subsequent job, things would work out just fine. So, that's the advice I'd give a new lawyer.

3. Favorite book, movie, or quote and why?
Answer: My favorite quote hails from slain civil rights leader Martin Luther King, Jr.: "Injustice anywhere is a threat to justice everywhere." It holds a lot of significance to me having grown up in the sixties and early seventies and having witnessed many injustices. But, more importantly, it reminds me that we all should at some point in time consider and address the problems and issues of the less fortunate. Because as history proves, today s fortunate may easily become tomorrow's less fortunate.

4. Mentor/friend who was biggest influence on you and why?
Answer: My mother has always been the biggest influence on me. For those of you who know her or who witnessed her remarks at my investiture, you know why. For those of you who don't or didn't, this is surely not enough space to explain. So, you'll have to ask me next time you see me. But, one example of her motivating influence was her insistence throughout the early years of her children that education is key to living the life you desire. She always impressed upon us that life without a good education would be very difficult. She did so not only by her words but also by her actions in returning to school and obtaining her Bachelors Degree in nursing. We both graduated from college the same year - one of the proudest moments of my life.

5. Constructive comments to assist lawyers practicing before you?
Answer: Always be as prepared as you can when you step into the courtroom to argue a position, including when you've simply accepted a file at the last minute from counsel who could not be present. Also, don't forget to refer to the EDVA's local rules as well as the federal rules. And, always remember, even in our adversarial system there is no such thing as being too professional to opposing counsel.

6. Fondest memory of childhood?
Answer: I'm sure this will probably sound like a man thing, although it is certainly not meant to be. But, I believe my fondest childhood memory was when I was approximately nine years old and was awarded my first Most Valuable Player trophy for my participation in peewee football.

ECF TIP -- Don't Forget!

An electronically filed document must include a nine-element signature block that contains the following typed information about the filing user:

- √ "/s/" types in the space where the signature would otherwise appear,
- √ Name,
- √ Virginia bar number
- √ Attorney for [party name]
- √ Firm name
- √ Firm address,
- √ Telephone number,
- √ Fax number, and
- √ E-mail address.

From the Bench (cont'd)

7. Are civility and professionalism as strong today as they were 10 years ago?
Answer: Since I've been in the Eastern District of Virginia for only approximately eight years, my experience with the strength of civility and professionalism in EDVA practice is somewhat limited. However, as a federal magistrate judge in the EDVA for the past approximately 1 ½ years, I have seen and have voiced concerns about counsel making what appear to be unsupported accusations of what could be interpreted as unethical conduct against opposing counsel. In fact, I have had to remind counsel on more occasions than I would have liked about their ethical obligation to respect the decorum of the courtroom as well as to treat opposing counsel professionally.

8. Best part about being a judge?
Answer: I thoroughly enjoy almost every aspect of being a judge. In fact, when I first became a federal magistrate judge, many of my colleagues throughout the country said it's the best job to have. After having served for approximately 1 ½ years, I would tend to agree. At least, it's the best job I've had so far in my life. I think the reason for that is that as a lawyer, I always strove to achieve what I believed were the best and most fair results for my clients. Sometimes I left the courtroom feeling I had accomplished that goal, but unfortunately, other times I left the courtroom feeling that I had not. As a judge, I know the ultimate result in any given case is what I perceive as the most fair result based upon the totality of circumstances in that particular case. I know that because I am the individual who has rendered that result. And, that provides me a true sense of accomplishment and satisfaction.

9. One memory or event from your early years that motivated you to study law?
Answer: One memory that motivated me to study law from my early years, if you can refer to teenage years as early years, was a plaque that hung in the employee break room at the McDonald s at which I worked when I was 16. It read "Don't find fault, find a remedy. Anybody can complain." It made me realize that if you wanted to fight injustices you had to do more than talk the talk, you had to walk the walk. And, that's what I thought lawyers did. I have tried to live by those words ever since, both personally and professionally.

10. Most unusual/humorous moment in your courtroom?
Answer: Too many to count and/or recall. Or, maybe I'm just saving them all to include in the book I intend to write or the reality t.v. show I intend to pursue upon retirement.
Isn't that wishful thinking?

"And, always remember, even in our adversarial system there is no such thing as being too professional to opposing counsel."

Ashcraft v. Conoco, Inc. and Local Civil Rule 5c Ten Years Later

Craig C. Reilly, Law Offices of Craig C. Reilly

On May 27, 2010, the Chapter held its annual Bench-Bar seminar with the United States Magistrate Judges for the Alexandria Division of the Eastern District of Virginia. As a follow up to that seminar, this article examines some of the important issues discussed at the seminar concerning sealed filings.

In the Eastern District of Virginia, complex civil cases - most notably patent infringement cases - often involve discovery of confidential and competitively sensitive information. Can you and your opponent stipulate to a protective order that provides prospectively that the parties may make sealed filings of confidential documents? Yes - ***if*** you do it right.

To be sure, sealing judicial records is the exception, not the rule. It has long been held that court files are presumptively public, and a common law right of public access attaches to all judicial records. *See Nixon v. Warner Comm., Inc.*, 435 U.S. 589, 597 (1978). In modern complex litigation, however, it has become routine to enter "blanket" or "umbrella" protective orders, which allow the parties to make unilateral designations of confidentiality and sealed filings without a particularized showing for each document. *See* MANUAL FOR COMPLEX LITIGATION, § 11.432 (FJC/West 4th ed. 2004). The practice of using umbrella protective orders streamlines discovery and relieves the district court from making time-consuming, document-by-document reviews. Indeed, umbrella protective orders often are entered by stipulation with little judicial scrutiny.

In 2000, the Fourth Circuit sent a shockwave through the civil litigation bar, when it re-affirmed the necessary steps for sealing federal judicial records. *See Ashcraft v. Conoco, Inc.*, 218 F.3d 288 (4th Cir. 2000). If the proper steps were not followed, the panel ruled that the sealing order would not be a "valid decree," and the judicial records could be made public. *Id.* at 302-03. That ruling was a sea-change. In cases prior to *Ashcraft*, the Fourth Circuit had routinely remanded the matter for reconsideration of the sealing issue, rather than invalidating the improper sealing order and allowing public access. *E.g.*, *In re Time, Inc.*, 182 F.3d 270 (4th Cir. 1999) (issuing mandamus requiring district court to undertake sealing analysis notwithstanding the prior entry of an umbrella protective order). The *Ashcraft* opinion forced district courts to reexamine the practice of entering stipulated umbrella protective orders.

". . . sealing judicial records is the exception, not the rule."

After *Ashcraft*, the Eastern District of Virginia enacted Local Civil Rule 5, which sets forth the general parameters for sealing judicial records, and also sets forth specific procedures for obtaining umbrella protective orders with sealing provisions. In the ten years since this issuance of *Ashcraft*, some problems remain in the implementation of sealing practices under Local Civil Rule 5. This article briefly addresses those problems and suggests some solutions.

Ashcraft v. Conoco, Inc. and Local Civil Rule 5c Ten Years Later (cont'd)

Local Rule 5: Rule 5 has several important components. First, it prohibits filings under seal except by Court order. E.D.Va.Civ.R. 5(A). Second, if you do not have a sealing order already in place, that rule provides that you may seek one together with a proposed sealed filing, which will remain under seal until the motion is ruled upon. *Id*. (D). Third, the rule explains the mechanics of filing under seal - how the document should be marked, and how it will be identified on the docket. *Id*. (B) & (E). Fourth, the rule allows the parties to stipulate to a protective order restricting access to discovery materials that are not filed with the district court. *Id*. (G); *see also Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 33-35 (1984) (discovery materials may be kept private pursuant to a protective order and are not part of the public judicial record of the case unless and until filed). Fifth, the rule explains how a party may obtain an umbrella protective order "providing prospectively for filing documents under seal." *Id*. (C). Those are the major provisions of the rule, but other provisions will be discussed in context below.

Local Rule 5(C): Subsection 5(C) was drafted in an effort to balance the efficient judicial management of cases through use of umbrella protective orders, on the one hand, with the competing interest of the public's right of access, on the other. It has worked well, but not perfectly. Parties sometimes mishandle the process of applying for an umbrella protective order with a sealing provision, and sometimes overwork the sealing provision they have obtained.

Under current Fourth Circuit law, the district court must do the following prior to sealing any court records:

> (1) give public notice of the request to seal and allow interested parties a reasonable opportunity to object, (2) consider less drastic alternatives to sealing the documents, and (3) provide specific reasons and factual findings supporting its decision to seal the documents and for rejecting the alternatives.

Ashcraft, 218 F.3d at 302. Local Civil Rule 5(C) states the manner in which those procedures must be followed in this Court. Here is how Rule 5(C) is intended to work:

First, the Court must give public notice of a request for sealing which will provide interested persons with "a reasonable opportunity to object." *Id*. Individual notice is not required, however, and the Court may give adequate notice either by "notifying the persons present in the courtroom of the request to seal at the time of the hearing, or by "docketing [the sealing request] in advance of deciding the issue." *In re Knight Pub. Co.*, 743 F.2d 231, 235 (4th Cir. 1984). In the Alexandria Division, the parties notice their own motions for hearing. E.D.Va.Civ.R. 7(E). If you are moving for entry of an umbrella protective order "providing prospectively for filing documents under seal," your notice of hearing must state that a sealing order is sought. E.D.Va.Civ.R. 5(C). Filing such a notice in the publicly accessible docket will satisfy the notice requirement under *Ashcraft* and *Knight*. Failing to give such notice will be grounds to deny relief, or if relief is granted, will be grounds to invalidate the sealing order if it is later challenged.

". . your notice of hearing must state that a sealing order is sought."

Ashcraft v. Conoco, Inc. and Local Civil Rule 5c Ten Years Later (cont'd)

Second, you must submit a memorandum of law justifying the use of an umbrella protective order that provides for prospective sealing. This memorandum should describe the type of materials likely to be exchanged during discovery that later might be filed under seal, and present legal argument and case law support for the protective order and sealing provision. E.D.VA.CIV.R. 5(C)(1) &(3). Although public access to judicial records is presumed, the Supreme Court has recognized that each district court has discretionary "supervisory power over its own records and files, and access has been denied where the court files might have become a vehicle for improper purposes," such as injury to a litigant's "competitive standing." *See Nixon v. Warner Communications*, 435 U.S. at 597-98. Thus, a litigant's interest in protecting its "competitive standing" may overcome the common law right of access and justify sealing a judicial record. Your memorandum should show why such injury may occur unless sealing is permitted, address why less drastic alternatives will not suffice, and explain how long the sealing order should remain in place. E.D.VA.CIV.R. 5(C)(2) & (4). Failure to address each of these points simply invites the district court to deny your motion.

Third, specific findings must be included in a proposed order. Do not overstate your position with exaggerated proposed findings or propose merely perfunctory findings. If the Court disagrees with your proposed findings, or believes them inadequate, it may deny relief. For example, the Court will look at the definition of "confidential materials" that the parties propose for sealed filings. If the parties have defined "confidential materials" too broadly, the Court may strike the sealing provision, and require the parties to file for sealing on a document-by-document basis. Moreover, if the order containing only exaggerated or perfunctory findings is approved, but later challenged by a third party or reconsidered by the Court itself, the exaggerated or perfunctory findings might not carry the burden of justifying the continued sealing of those materials.

Follow these steps properly and your order should be entered, and thereafter you may file confidential documents under seal - up to a point. As explained next, there are practical and legal limits on the parties' right to make sealed filings under an umbrella order.

TRIAL EXHIBITS: Even if an umbrella protective order has been entered, the district court must reexamine the issue of sealing when the parties file their trial exhibits: "Trial exhibits, including documents previously filed under seal, and trial transcripts will not be filed under seal except upon a showing of necessity demonstrated to the trial judge." E.D.VA.CIV.R. 5(H). A civil trial is "a public event," and the press and public have the right to attend. *Craig v. Harney*, 331 U.S. 367, 374 (1947). The right of access to civil trial proceedings and records mirrors the right of access to criminal cases, which right arises under the First Amendment. *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 580 n.17 (1980). Thus, there is a First Amendment right to attend a civil trial, as well as to read and obtain copies of the trial exhibits. To justify sealing the trial record, a party must show a "compelling government interest." *Press-Enterprise Co. v. Superior Court*, 464 U.S. 501, 510 (1984) ("*Press-Enterprise I*"). This is a more substantial showing than that necessary to overcome the common law right of access in the pretrial stages of the case.

"To justify sealing the trial record, a party must show a compelling government interest. . . . Accordingly, the entry of an umbrella protective order allowing for sealing is not enough to justify sealing of trial exhibits."

Ashcraft v. Conoco, Inc. and Local Civil Rule 5c Ten Years Later (cont'd)

Accordingly, the entry of an umbrella protective order allowing for sealing is not enough to justify sealing of trial exhibits. A separate sealing order must be obtained. Under local practice, the parties exchange Rule 26(a)(3) exhibit disclosures at the final pretrial conference, but the trial exhibits themselves are not filed until the day before trial. E.D.Va.Civ.R. 79(A). Thus, there is time to obtain a sealing order before you actually file your trial exhibits. The sealing justification must be made on a document-by-document basis. *See Level 3 Communications, LLC v. Limelight Networks, Inc.*, 611 F. Supp. 2d 572 (E.D. Va. 2009) (denying motion to seal trial exhibits). The necessary inquiry for sealing trial exhibits is exhaustive (and exhausting!).

Summary Judgment Motions: A motion for summary judgment in a civil case "serves as a substitute for a trial," and so the First Amendment right of access applies to the judicial filings made in support of, and opposition to, the motion. *Rushford v. The New Yorker Magazine, Inc.*, 846 F.2d 249, 252-54 (4th Cir. 1988). Even if an umbrella protective order is already in place, *Rushford* requires the district court to reexamine the pertinent "confidential" documents to determine if the First Amendment sealing standards would have been satisfied.

Electronic Filings: Before electronic filing, parties filed sealed paper documents in an appropriately marked envelope together with the public versions of the remainder of the filing (also in paper form). Now that the Eastern District of Virginia has electronic filing, the procedure for filing sealed materials has changed. To be sure, "Sealed documents are exempt from electronic filing and therefore must be filed on paper in a sealed envelope marked 'Under Seal' in accordance with Local Civil Rule 5 . . . ." E.D. Va. ECF Policies and Procedures Manual at 17 (revised Mar. 6, 2010). This does not mean, however, that no electronic filing is made. Here is an example of how sealed filings are now made:

If a confidential document is used as an exhibit to a brief, the brief would be filed electronically and an electronic "place-holder" slip-sheet would be attached, which says something to the effect of, "Exhibit A: FILED UNDER SEAL." Then, a paper copy of the exhibit would be delivered to the Clerk in a sealed envelope, marked "Under Seal," which identifies the case and filing with which it is associated, and includes a "non-confidential descriptive title of the document." E.D.Va.Civ.R. 5(E). If the brief contains a discussion of the contents of the exhibit and such discussion reveals confidential information, then a redacted version of the brief would be filed electronically with the place-holder exhibit sheet, and a sealed paper copy of both the brief and exhibit would be delivered to the Clerk in a sealed envelope that is appropriately marked. The redactions from the brief should be only those sections which, if made public, would compromise confidentiality. Sealing the entire brief would rarely be appropriate.

Over-designation of Confidentiality: Despite the streamlining virtues of an umbrella protective order, there is a counterveiling vice -- the over-use of unilateral confidentiality designations, which in turn leads to the over-use of sealed filings. This often triggers the Court's wrath and

"If your opponent has been heavy-handed with the confidentiality stamp, you should meet-and-confer or bring an early motion to de-classify documents, which may head-off later disputes about sealed filings."

From the Bench (cont'd)

Clerk's impatience - which may be aimed at both parties. If your opponent has been heavy-handed with the "confidentiality" stamp, you should meet-and-confer or bring an early motion to de-classify documents, which may head-off later disputes about sealed filings.

Sealing the Entire Record: Sealing the entire record of a case is a drastic measure. The press and public have a right of access to each aspect of a case - the party names, the pleadings, the motions, the hearings, the transcripts, the orders, the trial, the exhibits, and the judgment. To seal the entire record will require a very substantial showing under the requirements set forth in Local Civil Rule 5(C). *See* E.D.Va.Civ.R. 5(F). The district court must conduct a proper inquiry under both standards - common law and First Amendment - and must consider alternatives to the blanket sealing of the entire record. *See Stone*, 855 F.2d at 180-83 (remanding sealed case for reconsideration and narrowing of sealing order). Suffice it to say that sealing the entire record is rarely warranted and rarely will it be approved.

Changes Regarding the Rules Governing Expert Witness Disclosure & Discovery

The Supreme Court recently approved amendments to the Federal Rules of Civil Procedure relating to the disclosure and discovery of expert witness information. The amendments will take effect December 1, 2010, provided Congress does not intervene. The amendments extend work product protection to expert witness draft reports and, with certain specified exceptions, to communications between attorneys and experts retained or specially employed to provide testimony. The text of the amendments can be found at http://www.supremecourt.gov/orders/courtorders/frcv10.pdf.

Regarding expert reports, the amended rule first makes clear that not every expert is required to submit an extensive report describing the basis for the expert's opinions. Those who are required to submit reports (*i.e.,* those who are retained or specially employed to provide testimony) will be required to report, *inter alia*, "facts or data considered by the witness in forming" opinions. This requirement is intended to be narrower than the previous requirement, which called for disclosure of "data or other information" considered in forming opinions. Regarding those who are not required to submit reports (*e.g.,* physicians in many cases), the new rule imposes a more limited disclosure requirement. Namely, the subject matter and a summary of facts and opinions on which the witness is expected to testify must be disclosed.

The amended rule provides that drafts of such reports or disclosures -- regardless of form -- are protected by the work product doctrine. Further the new rule generally extends work product protection to communications between attorneys and those experts who are required to submit reports. There are, however, three exceptions to this work product protection, for communications that:

(i) relate to compensation for the expert's study or testimony;
(ii) identify facts or data that the party s attorney provided and that the expert considered in forming the opinions to be expressed; or
(iii) identify assumptions that the party s attorney provided and that the expert relied upon in forming the opinions to be expressed.

Member Spotlight: Sarah Elizabeth McElveen

Sarah Elizabeth McElveen began her informal legal education at an early age, attending OSHA meetings, partners meetings and at least one Dioxin Conference with her father, an attorney in Washington, D.C. Surprisingly, meeting organizers did not seek out the ten- or twelve-year-old Sarah's substantive contributions at that time, but her experiences at least minimally shaped her inclination to pursue a legal career later in life.

Sarah is a lifelong Virginian, growing up in Burke Centre and Fairfax Station. She obtained a B.A. jointly in music and anthropology from the College of William and Mary in Williamsburg, Virginia, and directly after graduation, moved to Alexandria and was employed as a paralegal at Sullivan & Cromwell. Her three years working there confirmed her desire to apply to law school. Sarah attended the American University, Washington College of Law, where she participated in the Glushko-Samuelson Intellectual Property Law Clinic as a student attorney, and in a study abroad program in Santiago, Chile where she learned about the complexities of economics and investment in Latin America, as well as Chilean legal history.

Sarah's legal interests were broad, and remain so. During law school Sarah took classes in food and drug law, law in the visual arts, and oil and gas law. She also interned at the Federal Communications Commission, the Department of Justice, Organized Crime and Racketeering section, and for a private debt collections practice. Upon graduation Sarah joined the firm of Richards, McGettigan, Reilly and West, P.C., in Old Town Alexandria, where she learned to navigate the oft-treacherous waters of discovery and motions practice in the Eastern District of Virginia under the expert guidance of, among others, Craig C. Reilly and Kathleen J.L. Holmes. When the opportunity arose to clerk for the Honorable John F. Anderson, United States Magistrate Judge, in the Alexandria Division of the Eastern District of Virginia, Sarah jumped at the opportunity. After spending approximately eighteen months learning the ins and outs of the court from the inside and at the expert hand of Judge Anderson, Sarah is now an associate at Wade, Friedman & Sutter, P.C., on North Washington Street in Old Town, where she handles landlord-tenant, real estate, wills and estates, business law, and other civil matters. She has also been active in the Alexandria Bar Association, where she has served on the Board of Directors since 2007.

Outside of work, Sarah enjoys reading the classics as well as history and biographies of the jazz greats. Sarah is an avid Redskins fan and enjoys watching, and from time to time attending, sporting events of any description.

Did You Know?

The current location of the Albert V. Bryan Courthouse was opened for business nearly 15 years ago, in January, 1996.

Why Every Member Should Attend the Upcoming July 26 CLE: Changes in the Pleading Landscape: A Roadmap to Proper Pleading After Twombly and Iqbal

Jonathan D. Frieden and Stephen A. Cobb, Odin Feldman Pittleman P.C.

According to many commentators, the United States Supreme Court's decisions in *Bell Atlantic v. Twombly*, 550 U.S. 554 (2007) and *Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009), have effectively killed the notice pleading standard. Before *Twombly* and *Iqbal*, it was sufficient merely to place a defendant on notice of a claim and a complaint would not be dismissed unless it appeared "beyond doubt" that the plaintiff could prove no set of supporting facts which would entitle him to relief. Now, a complaint must allege sufficient facts, as opposed to unwarranted, unreasonable conclusions, or arguments, to state a claim for relief that is plausible on its face; otherwise, it will be dismissed.

In the July 26 seminar, the presenters will consider how this new pleading standard affects the pre-filing investigation of claims and interacts with Fed. R. Civ. P. 11. The CLE will review specific guidance given by the Fourth Circuit and other courts as to how certain claims must be plead and whether the new pleading standard requires a plaintiff to "plead around" certain affirmative defenses. The presenters will also discuss the possibility that the new pleading standard applies, as at least one court has held, to the pleading of affirmative defenses.

The pleading landscape has changed. This seminar is intended to provide a roadmap that will permit practitioners in the Eastern District to successfully navigate those changes, whether one seeks to survive a motion to dismiss or to obtain dismissal.

"Now, a complaint must allege sufficient facts, as opposed to unwarranted, unreasonable conclusions, or arguments, to state a claim for relief that is plausible on its face; otherwise, it will be dismissed."