FBA Memphis/MidSouth Chapter Newsletter

Volume 4 July 2013

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

Upcoming FBA Events

Summer Seminar – Using Courtroom Technology
on Wednesday, August 28, 2013
at the Clifford Davis/Odell Horton Federal Building

Annual Federal Practice Seminar
On Friday, October 4, 2013
at the University of Memphis, Cecil C. Humphreys School of Law

Inside This Issue

PRESIDENT'S MESSAGE

By Eric E. Hudson

Welcome to the first 2013 issue of the Federal Bar Association's Memphis Mid-South Chapter Newsletter. The Chapter has been busy this year and is excited about the remainder of the year. This Spring we co-hosted the Federal Bar Association's Immigration Law Seminar. The Immigration Seminar drew practitioners from across the country and they were warmly received during Memphis in May. In addition to outstanding programming at the University of Memphis Law School, participants enjoyed a riverboat cruise, Barbeque Fest, and an exceptionally pleasant early summer weekend. We offer our thanks to chapter member Barry Frager for his tremendous effort in organizing this seminar and to the many members of the local judiciary who attended.

The Chapter also hosted a Federal Practice Seminar in Jackson, Tennessee on May 30. The seminar featured presentations by Phillip Hampton, Bill Ramsey, Deb Ireland, Todd Photopulos, Billy Ryan, Jon York, and Daria Watt, and it included an excellent judicial panel consisting of the District, Magistrate and Bankruptcy Judges from the Western District of Tennessee. For the keynote presentation, Judge Breen interviewed Judge Alberto Gonzales. Judge Gonzales shared his experiences as the former United States Attorney, Chief White House Counsel and Texas Supreme Court Justice. We greatly appreciate the participation by the bar, our speakers and the judiciary in this event, and we offer our special thanks to Brandon Gibson for her efforts in organizing this seminar.

This fall we will be hosting our annual Federal Practice and Procedure Seminar on Friday, October 4 at the University of Memphis Law School. We are pleased to report that Professor Thomas Mauet from the University of Arizona College of Law will be offering a full morning seminar on trial evidence. If Professor Mauet's name sounds familiar, it is likely you own, have read, or have at least heard about his award winning books on trial practice. We are excited about hosting Professor Mauet for the seminar and hope you can attend.

The work of our Chapter is done exclusively by members of the federal bar as volunteers, and special thanks are deserving for Greg Grisham, Mary Morris, Michael McLaren, Kevin Ritz, and Adam Cohen for their hard work in assembling this newsletter on behalf of the Chapter. Finally, on behalf of myself and this year's board, I would like to extend our gratitude to our federal judges for their support of the Chapter. Without their interest and involvement, we could not offer the seminars and other opportunities for which our Chapter is known. Over the remainder of the year I encourage members of the Chapter to contact me if they are interested in becoming more involved with the Chapter. There are numerous opportunities for involvement, and we welcome any interest or suggestions.

Memphis Mid-South Chapter Recognized at FBA 2012 Annual Conference

The Memphis Mid-South Chapter received special recognition at the 2012 FBA Annual Conference in San Diego in September 2012. The Chapter received a Meritorious Newsletter Award and a Chapter Activity Presidential Citation Award in recognition of the Annual Fall Practice Seminar. The Chapter was also recognized for Best Practices in Membership Development. 2012 Chapter President Greg Grisham accepted the awards on behalf of the Chapter.

Jackson May 30th Seminar

Pictured left to right District Judge J. Daniel Breen and former United States Attorney General Alberto R. Gonzales

Pictured left to right District Judge John T. Fowlkes, Jr., District Judge S. Thomas Anderson; District Judge Samuel H. Mays, Jr.; District Judge J. Daniel Breen; and Chief District Judge Jon Phipps McCalla

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JUDICIAL PROFILE
JUDGE SAMUEL H. MAYS, JR.

By Mary Hale Morris and Colleen D. Hitch

Judge Samuel H. Mays, Jr., known to his many friends as Hardy, will decline to name a favorite book if asked. That may be because there are simply too many for him to choose from – he reads sixty to eighty books a year, covering history, political science, philosophy, fiction, and whatever else catches his interest, including, recently, *The Origins of Reasonable Doubt* by James Q. Whitman and *The Mystery of Edwin Drood* by Charles Dickens.

His chambers' shelves are well-stocked, too. They house an impressive array of dictionaries, including a twenty-volume set of the Oxford English Dictionary that shows signs of frequent use. There is no shortage of biographies of great lawyers and judges. And one can find compilations of laws passed by the Tennessee General Assembly during each year that Mays worked in state government. In addition to all the reading he does on his own, Mays also enjoys taking classes through Rhodes College's Meeman Center, including recent courses on the Anti-Federalists, the Enlightenment, and Shakespeare's *As You Like It*.

A native Memphian whose family has been in Memphis as long as anyone can remember, Judge Mays was born on New Year's Day in 1948 to Samuel Hardwicke Mays and Eloise Mays. He attended White Station High School, where he was president of the Future Lawyers Club and was named Outstanding Senior, among other honors. He was a member of the class of 1966, along with actress Kathy Bates and writer Alan Lightman. Another classmate, Rendezvous owner John Vergos, recalls that Mays as a teenager was smart, friendly, and motivated. "I wasn't surprised to learn that Hardy had become a federal judge. It was always obvious he would go far – we thought he would be president one day."

Mays earned a bachelor's degree *cum laude* from Amherst College in Amherst, Massachusetts, in 1970, then matriculated at Yale Law School, where he became an editor of the Yale Law Journal. His law school colleagues included Bill and Hillary Clinton (also of the class of 1973) and Clarence Thomas (a member of the class of 1972).

Following his graduation from law school, Mays joined the firm now known as Baker, Donelson, Bearman, Caldwell & Berkowitz P.C. His practice began with a focus on tax and banking, and grew to include litigation and later health care. As a litigator, he tried more than 25 cases to judgment, many of them in federal court. He also served as a member of the board of directors of the Memphis Bar Association. When asked to identify a judge he admires, Mays is quick to mention Judge Bailey Brown, who presided over Mays' first civil jury trial and who was "as good a judge as I could have hoped to appear before."

Buck Lewis of the Baker Donelson firm, who was recruited to the firm by Mays, recalls that "Hardy was called upon to handle the most difficult cases, so he had an eclectic practice that I am sure has benefitted him greatly on the bench." Beginning

in 1987, Mays served as managing partner of the firm, "so he was in the cat herding business as well," Lewis said.

In addition to his busy law practice, Mays found time to be involved in more than fifty political campaigns. In the late 80s, Mays was co-chair of the state Republican party while Lewis was the chair of the state Democratic party. At the firm, their offices were close together and they shared the same assistant. "We were accused of treason on a regular basis," joked Lewis, and the two enjoyed debating and talking politics together. "We learned that the inner workings of the political parties were not as different as people might imagine."

In 1995, Mays became Legal Counsel to Governor Don Sundquist and was promoted to Deputy to the Governor and then Chief of Staff. In that capacity, he acted as the chief operating officer for the state (and its $19 billion budget), as well as being responsible for overseeing the Governor's cabinet and entire staff. In 2000, he returned to the private sector and rejoined Baker Donelson, until he was nominated in January 2002 by President George W. Bush to fill the seat vacated by Judge Jerome Turner.

April 25, 2002 was the date of the Senate confirmation hearing for Mays as well as for Judge Julia Gibbons, who was moving from the district court to the Sixth Circuit. At the hearing, Senator Bill Frist described Mays as "a Memphis institution." "No one lives life more to the fullest than Hardy, whose passion for the arts, a good book, the law, and public service is known to all."

Senator Fred Thompson also praised his community service, which has included director positions for the Memphis Orchestra, the Memphis Botanic Garden, Opera Memphis, Ballet Memphis, the Playhouse on the Square, the Decorative Arts Trust, and the Memphis Brooks Museum of Art. "[T]he arts in Memphis would be far poorer without his contribution," Thompson said, adding that "Mr. Mays is highly regarded by the bar for his intellect, his legal ability, his fairness, and his unfailing good humor. I am confident he has the ideal temperament to serve in the stressful position of a trial judge."

U.S. Representative Harold Ford, Jr. was one of many Democrats who supported Mays' nomination, describing him as "a person of integrity and strong moral character."

Along with his quick intellect, Judge Mays' sense of humor and belief in hard work are two of his hallmarks. He uses wit to ease the tension in the courtroom, often interspersed with words from Moe Udall or other quotable figures, but he does not allow it to detract from the seriousness of the matters at hand. Regarding work ethic, he has said, "There is no substitute for hard work on the part of the judge….It is a non-delegable duty." He spends a great deal of time reviewing the filings related to criminal sentencing proceedings in particular, which he describes as his least favorite aspect of being a district judge. "I think most district judges would identify that as the most difficult part of our work," he added.

Judge Mays enjoys the give-and-take of oral argument but rarely schedules it on civil motions, because he finds that the briefs ordinarily provide him with everything he needs to know. When asked for writing advice, he quoted Shakespeare approvingly: "Brevity is the soul of wit." Lawyers should "eliminate the non-essentials," he said.

Comparing his work in the executive branch and the judiciary, Mays said that, when working in Nashville, "you could be much more pro-active and set your priorities. Judges are passive – we must wait for parties to invoke the powers of the court. And there is no policy-making in this role; you must follow the facts and the law, regardless of policy."

When asked at his confirmation hearing about the qualities that make a good judge, Mays said, "[A]n ideal judge for me would approach every matter intelligently and analytically, would treat every human being who appeared before him or her with dignity and respect, and would be intellectually honest. By intellectual honesty, I

mean a judge who is willing to follow the laws where they lead and reach a conclusion based on the facts and the law, and who does not reason backward and find the facts and the law based on a pre-conceived conclusion."

Memphians praise Judge Mays for being just that sort of judge. Lawyers appreciate his judicial temperament and wisdom in resolving even the thorniest cases, of which he seems to have more than his share. In 2011, the Memphis Flyer wrote that Hardy was "the appropriate sobriquet" for Mays because, "as an adjective, the word suggests durability, endurance, and strength, and we think the judge is loaded with all the above qualities."

Away from the bench, Judge Mays stays busy with travel, an interest that started early in life when his parents allowed him to choose the destination and plan the itinerary for an upcoming family trip. Since then, Mays has become an avid globetrotter, having visited more than 100 countries. "I kept track until 100, then I lost count," he reports.

Recent journeys include jaunts to Easter Island and Southern Africa. On a trip to the Bahamas, he observed a lively group toasting one another and having a good time during a long midday meal. He soon learned that they were the justices of the Supreme Court of the Bahamas, who were celebrating the addition of a new justice.

Future destinations on his wish list include Burma and Laos, and he will soon travel to Armenia with Sixth Circuit Judge Bernice Donald to meet with a group of judges there. He also enjoys domestic travel, particularly to Chicago and New York for the opera.

Even after having visited so many places, Mays identifies Memphis as his favorite city. He praises its restaurants and its interesting people, and he appreciates that Memphis is home to many members of his close-knit family, including five grand-nephews and one grand-niece.

Proposed Changes to Local Rules and Patent Rules

On May 31, 2013, proposed revisions to the United States District Court for the Western District of Tennessee Local Rules and Local Patent Rules were published for review and public comment for a thirty day period of June 1-30, 2013.

A copy of the proposed Rule changes are available on the District Court's website at the link below. http://www.tnwd.uscourts.gov/pdf/content/2013LocalRuleRevisions.pdf

SIXTH CIRCUIT CASE UPDATE

Civil Law

Fulgenzi v. PLIVA, Inc., ___ F.3d ___, No. 12-3504 (6th Cir. March 13, 2013) (Judges Boggs, White, and McCalla (W.D. Tenn.))

The plaintiff brought a tort action against the defendant, a generic-drug manufacturer. In the lawsuit, she claimed that the defendant had failed to adequately warn of the risks of developing tardive dyskinesia from extended treatment with the drug metoclopramide. The plaintiff was prescribed this drug over a period of time and alleges that taking metoclopramide caused her to develop tardive dyskinesia.

Metoclopramide, originally sold under the brand name Reglan, is a drug approved for short-term treatment of patients suffering from gastroesophageal reflux disease. Over time, evidence has mounted that long-term use of the drug poses a substantial risk of causing tardive dyskinesia. Initially, on the labeling of Reglan, there was a disclaimer that therapy lasting longer than 12 weeks had not been evaluated and could not be recommended. In July 2004, the FDA approved a labeling change proposed by the manufacturer of Reglan. This change contained the following warning in bold type: "**Therapy should not exceed 12 weeks in duration.**" The plaintiff was prescribed generic metoclopramide some months thereafter, and the labeling did not contain the July 2004 warning, nor did the defendant ever communicate this change to any physicians. The plaintiff brought suit in the United States District Court for the Northern District of Ohio. The defendant filed a motion to dismiss, which the district court granted. This appeal followed.

The issue in this case was whether the Food, Drug, and Cosmetic Act preempted the lawsuit, and the focus was upon two U.S. Supreme Court cases that had generally dealt with this issue. In *Wyeth v. Levine*, 555 U.S. 555 (2009), the Supreme Court held that with respect to **branded** drug manufacturers, state failure-to-warn suits were not preempted by federal law. However, subsequently in *PLIVA, Inc. v. Mensing*, 131 S. Ct. 2567 (2011), the Supreme Court held that such suits could not go forward against **generic** drug manufacturers, as it is impossible for them to comply simultaneously with their state duty to adequately warn and their federal duty to be the same as their branded counterpart. In granting the defendant's motion to dismiss, the district court found preemption under *Mensing*.

On appeal, the plaintiff argued that her case was distinguishable from *Mensing*, given the defendant's failure to update the metoclopramide label in violation of the federal principle of sameness. Although generic-drug manufacturers cannot make unilateral label changes, the FDA requires that they follow changes made by branded-drug manufacturers. Thus, the plaintiff argued that the defendant's violation rendered compliance with both federal and state duties no longer impossible.

The United States Court of Appeals for the Sixth Circuit agreed. In this question of first impression, the Court determined that the U.S. Supreme Court never found that all failure-to-warn suits against generic-drug manufacturers would be preempted. Rather, it was the impossibility of simultaneous compliance with state and federal law, which would necessitate preemption. The Court held that as the defendant had a clear federal duty to update its label, compliance with federal and state duties was not just possible; it was required. Further, the Court decided that permitting a state tort suit under these circumstances would not frustrate the purposes and objective of Congress.

As a final matter, the Court addressed the secondary question of whether the plaintiff was simply attempting to enforce a federal law violation through state litigation. Such actions are typically preempted by *Buckman Co. v. Plaintiffs' Legal Comm.*, 531 U.S. 341 (2001), because they deprive the federal agency of the ability to use its enforcement authority as it sees fit. The Court noted that the plaintiff's suit was not premised on a federal law violation, but rather on a state failure-to-warn claim. Thus, the Court reversed the district court's dismissal and remanded for further proceedings.

* * *

Rudisill v. Ford Motor Company, ___ F.3d ___, No. 12-3486 (6th Cir. March 11, 2013) (Judges Gilman, Clay, and McKeague)

The plaintiff filed suit against his employer, Ford Motor Company, asserting that the defendant had committed an intentional tort against him. His wife additionally asserted a derivative claim of loss of consortium. The incident in question involved an injury the plaintiff sustained at one of the mold lines of the Cleveland Casting Plant. A mold line is the location where engine blocks are cast in molten metal.

The mold line process uses a system of hooks, pulleys and rails suspended over an open pit. Along the rail system, there is a chain of carts called "cartops." On top of each cartop sits a heavy iron fixture called a "drag flask." The drag flask is part of the mold into which molten metal is poured. Sometimes, there is an over-pour of molten steel, which needs to be "raked-off" into the open pit. On other occasions, the over-pour cools onto the rim of the drag flask before it can be raked off.

Should this later situation occur, two guard rails from the mold line must be removed, hoist clamps must be applied to the drag flask, and the drag flask must be removed from the line. Just such a situation led to the plaintiff's injury. While the plaintiff and his co-workers were attempting to remove a drag flask from the mold line, one of the hoist clamps slipped off and hit the plaintiff, causing him to tumble into the exposed pit below. Since this incident, Ford has modified the drag flask removal process, requiring employees to slide metal grates over the pit before removing the guard rails.

The plaintiff and his wife first brought their complaint in Ohio state court. Ford removed the case to the United States District Court for the Northern District of Ohio. Finding no genuine dispute of material fact, the court granted summary judgment for Ford on the intentional tort claim and dismissed the loss of consortium claim as derivative. This appeal followed.

Initially, the United States Court of Appeals for the Sixth Circuit provided the historical framework for the worker's compensation system and Ohio law concerning intentional torts. As with other states, Ohio has a worker's compensation system, which represents a public-policy tradeoff. Employees receive guaranteed, no-fault, compensation for injuries arising out of their employment. Indeed, the plaintiff had been the recipient of such compensation. In return, employees waive the right to bring tort actions (with their greater monetary recovery potential) against their employers for workplace injuries. The exclusivity of the worker's compensation avenue is only subject to the intentional torts exception. Thus, the plaintiff could pursue no other negligence-based litigation.

The Ohio common law provided remedies where the tortfeasor acted with deliberate intent to injure, as well as where he or she believed that the act was "substantially certain" to result in an injury. However, the common law was greatly narrowed with Ohio Revised Code section 2745.01, which essentially did away with the "substantially certain" type of intentional tort. The statute did, however, contain a rebuttable presumption provision where there was, inter alia, deliberate removal by an employer of an equipment safety guard.

The Court reviewed de novo the district court's decision with particular consideration of the following issues:

1. Whether Ford rebutted the intent-to-injure presumption

2. Whether, in the absence of a presumption, there existed a triable issue of fact

With respect to the first issue, the Court disputed the plaintiff's proposition that the question of whether a presumption has been rebutted must always go to the jury. The Court was not persuaded by dicta contained within *Zuniga v. Norplas Indus., Inc.*, 974 N.E.2d 1252, 1258 (Ohio Ct. App. 2012), which suggested that rebuttal of the presumption "necessarily involves some weighing of evidence." The Court disagreed, citing some examples where the evidence would be "clear as a matter of law."

Apart from the legal issue, the Court agreed with the district court that Ford has submitted ample evidence to rebut the presumption of intent to injure. For example, there was a lack of any prior substantially similar incidents despite hundreds of millions of man hours worked at the plant; there was a lack of any prior citations or complaints involving substantially similar conditions; several Ford employees, including the plaintiff himself, admitted they did not previously believe the drag flask removal process was dangerous; and the plaintiff, as a Team Leader, acknowledged that he would have reported the situation if he had thought this process was dangerous, but he never did so.

With respect to the second issue, the Court mentioned the above facts and noted that there was at most evidence of negligence. However, the evidence was not sufficient to enable a reasonable jury to find a deliberate intent to injure. Thus, the Court affirmed the judgment of the district court.

* * *

Bailey v. Callaghan, ___ F.3d ___, No. 12-1803 (6th Cir. May 9, 2013) (Judges Kethledge, Gibbons, and Stranch)

The plaintiffs, labor unions, filed a lawsuit, alleging that Michigan's Public Act 53 violates their rights under the First Amendment and the Equal Protection clause. Under the Public Act, a public school employer's use of public school resources cannot include assisting a labor organization in collecting dues. Thus, public school unions must collect their own membership dues from public school employees, rather than have the schools collect those dues via payroll deductions. The lawsuit was brought before the United States District Court for the Eastern District of Michigan, and the district court entered a preliminary injunction barring enforcement of the Public Act. The defendants, representatives of the state of Michigan, appealed.

On appeal, the United States Court of Appeals for the Sixth Circuit characterized the issue as "whether the federal Constitution compels Michigan's public schools to collect membership dues for unions that represent public-school employees." In reflecting upon the plaintiffs' likelihood of success on the merits, the Court found that the plaintiffs' First Amendment claim had already been rejected by the United States Supreme Court in *Ysursa v. Pocatello Educ. Ass'n*, 555 U.S. 353 (2009), because as stated by the Court in that case, the First Amendment "does not confer an affirmative right to use government payroll mechanisms for the purpose of obtaining funds for expression." In response to the plaintiffs' argument that they are being excluded from a nonpublic forum, the Court determined that the administrative process by which the payroll deduction occurs is neither speech nor a forum of any kind, as no form of "communicative activity" is present.

Likewise, the Court dismissed any argument of viewpoint discrimination, finding Public Act 53 to be facially neutral as to viewpoint. Moreover, as the Public Act bars public school employers from using resources to collect union dues, the particular union and its viewpoint was viewed to be irrelevant to the prohibition on collection; rather, it is the employer's identity that matters. Due to the Public Act's neutrality of viewpoint and union identity, as well as the lack of speech or a forum, the Court felt it was not appropriate to look past the text of the Public Act "to infer some invidious legislative intention." Thus, the Court

found the First Amendment claim to be without merit.

Further, the Court held the plaintiffs' Equal Protection claim to be invalid, as there was a conceivable legitimate interest in support of the Public Act. Thus, the Court reversed the district court's order granting the plaintiffs' motion for a preliminary injunction, and it remanded the case for further proceedings.

In Judge Stranch's dissent, she declared that *Ysursa v. Pocatello Educ. Ass'n* did not, in fact, control for two reasons. First, the law in question in that case applied to all payroll deductions for political activities, "not just a disfavored few" (i.e. those for school union dues). Judge Stranch noted that Michigan had chosen to "exclude just one subset of unions from the speech-facilitating mechanism of payroll deduction." Second, there was no suggestion in *Ysursa* that the law in that case was aimed "at the suppression of dangerous ideas." According to Judge Stranch, Public Act 53, while facially neutral, conceals a bias against the viewpoint advanced by the school unions. The dissent chastised the majority, because the majority "refuses to 'look past the Act's facial neutrality.'" Judge Stranch ultimately found that Public Act 53 discriminates on the basis of viewpoint, rejecting the defendants' allegedly neutral justifications for the Public Act (i.e. saving money, promoting union accountability, and providing a "check on union power").

* * *

Expert Opinions Based Solely on Prior Litigation Work

It is well established under Sixth Circuit law that a qualified expert is one that bases his or her opinions on their "knowledge, skill, experience, training, or education" in a particular field. Indeed, because an expert has presumably acquired a unique knowledge of a specified subject through independent research or experience, they *should* be able to assist the trier of fact by providing reliable opinions. However, what if an expert's proffered opinion on a particular subject is based solely on his or her experience as a consultant in prior cases? Stated differently, does an expert opinion that is based solely on prior litigation experience trigger a more comprehensive *Daubert* analysis?

In the recent case of *Lawrence v. Raymond Corporation*, the Sixth Circuit addressed this question and opined that a more rigorous analysis is proper when an expert opinion is based solely on one's prior consulting experience in other litigation. *See Lawrence v. Raymond Corporation*, Nos. 11-3935 and 11-4267, 2012 U.S. App. LEXIS 20860, at *1 (6th Cir. Sept. 17, 2012). In *Lawrence*, the plaintiff sued the manufacturer of a forklift after she suffered extensive injuries to her left foot when she was operating the forklift. *See id*. at *3. To prove that the forklift was defectively designed, the plaintiff offered the expert testimony of a mechanical engineer to opine as to an alternative design for the forklift. *See id*. Importantly, the expert admitted that "almost all of" his knowledge of and experience with forklift operation and design resulted from his work as a consultant in previous forklift accident cases. *See id*. at *5. The expert also could not point to any independent research in the field of forklift design. *See id*. Accordingly, after finding that the expert's opinions were based solely on his litigation work on other cases, the district court excluded his proffered testimony. *See id*.

On appeal, the Sixth Circuit affirmed the district court's exclusion of the expert's proposed testimony because it was not sufficiently reliable to survive a *Daubert* challenge. In its analysis, the court first recognized the long standing Sixth Circuit precedent that expert testimony prepared solely for litigation, as opposed to testimony that arises from one's independent knowledge and research in a specified field, should be viewed with more caution. *See id*. Recognizing the inherent unreliability of opinions offered by a "quintessential expert for hire," the court emphasized its role as a gate-keeper by demanding some indicia of reliability in the form of independent knowledge obtained outside of litigation. *See id*. Plaintiff's proffered expert could not satisfy this standard because there was

no indication that his opinions as to forklift design were based on any independent research that he had performed in that field. Accordingly, because the expert was not "testifying about matters growing naturally and directly out of research he has conducted independent of litigation," the court held that his opinions were insufficient under *Daubert. See id.*

The *Lawrence* opinion is consistent with the Sixth Circuit's recent emphasis on the gate-keeping role of the district courts in the context of *Daubert* challenges. Citing prior cases addressing the importance of the "solely for litigation" factor, *Lawrence* highlights the Sixth Circuit's seemingly renewed concern for the admission of unreliable expert testimony. The opinion is a clear encouragement to the district courts to more closely scrutinize the opinions of a "quintessential expert for hire" that cannot identify any independent research or experience in his supposed area of expertise. However, the opinion does not discuss the extent to which such an opinion should be scrutinized and does not delineate what factors, if any, would favor admission of an expert opinion that was based solely on one's experience in prior litigation. If, for example, an expert's opinions were generally accepted by the relevant scientific community that had performed independent research, would his opinion still be excluded because he lacked the requisite independent experience? These questions are left unanswered by *Lawrence*, but, given the court's emphasis on the necessity of independent research and knowledge, it is likely that the issue will be raised in future district court cases.

Criminal Law

U.S. v. Coss/Sippola, Nos. 10-2330/2331 (Moore, Sutton, Donald) (Apr. 16, 2012)

In 2004, defendant Allison Coss (who was 17 at the time) met the actor John Stamos at Disney World. She went to a party in Stamos's hotel room, where cocaine, ecstasy and alcohol were used/consumed. Photos were taken. Four years later, Coss started dating her co-defendant Sippola. Sippola saw the photos of Stamos and suggested they try to obtain money from Stamos in exchange for the photos. Coss and Sippola concocted a scheme to extort Stamos and were eventually arrested by the FBI on their way to a meeting to sell the photos to one of Stamos's associates.

Coss and Sippola were charged with: conspiracy to extort money by use of interstate communications, in violation of 18 USC Sections 371 and 875(d); and transmission of interstate communications of a threat to injure the reputation of another with intent to extort money, in violation of 18 USC Section 875(d). The court affirmed the denial of defendants' motions to dismiss the indictment. The court held that Section 875(d) should be interpreted to criminalize only threats that are "wrongful." (Defendants argued that the threats must be not merely "wrongful" but "unlawful.") And the indictment here alleged sufficient facts under this definition.

* * *

U.S. v. Aleo, Nos. 10-1569/1570/1833 (Boggs, Rogers, Sutton (concurring)) (May 15, 2012)

Defendant's guideline range for producing, possessing, and transporting child pornography was 235 to 293 months. The district court imposed a statutory maximum 720-month sentence (running all counts consecutive). The Sixth Circuit found this to be a substantively unreasonable variance. First, the court took issue with the district court's belief that the guidelines could not have envisioned a crime like defendant's. Second, the sentence "threatens to cause disparities in sentencing, because it provides a top-of-the-range sentence for what is not a top-of-the-range offense." In particular, the district court failed to "reasonably distinguish Aleo from other sex offenders who molested young relatives." The court vacated the sentence and remanded, although it rejected the defendant's request to re-assign the case to a different judge.

* * *

U.S. v. Greeno, No. *10*-6279 (Moore, Gibbons, Alarcon (9th Cir.)) (May 21, 2012)

The court affirmed the application of a two-level enhancement for possession of a firearm in connection with a drug crime. The court also rejected defendant's argument, based on *District of Columbia v. Heller*, *554* U.S. 570 (2008), that application of the two-level enhancement restricted defendant's Second Amendment right to bear arms. For the first time, the court joined other circuits in adopting a two-prong test to resolving *Heller* issues: first, "the court asks whether the challenged law burdens conduct that falls within the scope of the Second Amendment right, as historically understood." Second, if so, then the court examines the strength of the government's justification for burdening such a right. Here, the first prong was not met, because the right to keep and bear arms is a right to do so for lawful purposes only.

* * *

U.S. v. Erpenbeck, No. 11-3530 (Sutton, McKeague, Ripple (7th Cir.)) (June 21, 2012)

The first paragraph of the opinion is as good a summary as any: "In a fact pattern befitting a John Grisham novel, FBI agents found a cooler filled with more than $250,000 in cash buried at a private golf course outside Cincinnati. The money belonged to A. William Erpenbeck, Jr., a convicted fraudster then serving a 300-month sentence in federal prison. What came next is a tug-of-war over who gets the money: the government, which wants a criminal forfeiture of the cash, or the trustee of Erpenbeck's bankruptcy estate, who wants to distribute the cash to Erpenbeck's creditors. The district court sided with the government, but because the government did not provide the trustee with sufficient notice of the forfeiture proceeding, depriving him of the chance to assert his claim, we vacate the final order of forfeiture and remand."

* * *

U.S. v. Sypher, Nos. 11-5233/5411 (Martin, Daughtrey, Maloney (W.D. Mich.)) (July 5, 2012)

Defendant was convicted at trial on various charges relating to her attempt to extort basketball coach Rick Pitino. As the court put it: "The media attention surrounding this case was substantial because of the celebrity of Pitino and the local passions surrounding college basketball." The court affirmed defendant's convictions and the denial of her motions for a new trial and a change of venue. Also, the district court did not err when it created a website allowing public access to the district court's docket during trial, due to the public interest in the case.

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U.S. v. Skinner, No. 09-6497 (Clay, Rogers, Donald (concurring in part)) (Aug. 14, 2012)

DEA agents obtained orders from a magistrate judge authorizing the phone company to release subscriber info, cell site info, GPS real-time location, and "ping" data for phones belonging to the defendant and others. The agents tracked the phones and used the GPS data to locate the defendant at a rest stop with a motorhome filled with over 1100 pounds of marijuana. The defendant moved to suppress the evidence from the motorhome, arguing that the use of GPS location information was an unconstitutional warrantless search.

The district court denied the motion, and the court affirmed. Judge Rogers, writing for himself and Judge Clay, wrote: "Skinner did not have a reasonable expectation of privacy in the data given off by his *voluntarily* procured pay-as-you-go cell phone. If a tool used to transport contraband gives off a signal that can be tracked for location, certainly the police can track the signal. The law cannot be that a criminal is entitled to rely on the expected untrackability of his tools. Otherwise, dogs could not be used to track a fugitive if the fugitive did not know that the dog hounds had his scent. A getaway car could not be identified and followed based on the license plate number if the driver reasonably thought he had gotten away unseen. The recent nature of cell

phone location technology does not change this. If it did, then technology would help criminals but not the police. It follows that Skinner had no expectation of privacy in the context of this case, just as the driver of a getaway car has no expectation of privacy in the particular combination of colors of the car's paint."

It did not matter here that the agents had never established visual surveillance of defendant's movements, did not *know* his identity, and did not know what kind of car he was driving. "We determine whether a defendant's reasonable expectation of privacy has been violated by looking at what the defendant is disclosing to the public, and not what information is known to the police." The court distinguished *United States v. Jones*, 132 S. Ct. 945 (2012), as involving the physical intrusion of private property to place a tracking device. And, the case did not implicate the concerns of Justice Alito's concurrence in *Jones*, because there was no "extreme comprehensive tracking."

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U.S. v. Jeffries, No. 11-5722 (Sutton (dubitante), Griffin, Dowd (N.D. Ohio)) (Aug. 27, 2012)

Jeffries was in a custody battle for his daughter. He wrote a song about it called "Daughter's Love" and *recorded* a video of himself playing it on a guitar painted with an American flag. Then he put the video on YouTube and Facebook, five days before the next custody hearing in front of a Knox County Chancellor. In Facebook messages, Jeffries encouraged others to send or show the video to the Chancellor.

The video starts with Jeffries saying, "This song's for you, judge." Judge Sutton's opinion for the court includes all the lyrics, including these:

> And when I come to court this better be the last time.
> I'm not kidding at all, I'm making this video public.
> Cause if I have to kill a judge or a lawyer or a woman I don't care…….
> Cause you don't deserve to be a judge and you don't deserve to live.
> You don't deserve to live in my book.
> And you're gonna get some crazy guy like me after your ***.
> And I hope I encourage other dads to go out there and put bombs in their ***damn cars.
> Blow 'em up.

The government charged Jeffries with violating 18 U.S.C. Section 875(c): transmitting "any communication containing any threat to…injury the person of another." The district court declined Jeffries' request to instruct the jury that it could convict him only if he subjectively meant to threaten the judge. The court affirmed, noting that it did not matter what the defendant meant, "as opposed to how a reasonable observer would construe it." In so holding, the court joined all circuits except for the Ninth Circuit, which has held that *Virginia v. Black*, 538 U.S. 343 (2003) (the cross-burning case), requires the addition of a "subjective gloss" into "all threat statutes that criminalize speech."

Also, the court held that Jeffries's Facebook messages asking others to send the video to the judge constituted relevant *contextual* evidence, so there was no error in showing them to the jury. Finally, the district court properly rejected the defendant's request to introduce some of his other YouTube creations (*including* the videos "Coors Beer Sucks" or "Fastest Pin in Wrestling History") as trial exhibits, because their content was unrelated to the content of the video at issue.

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