Sidebar

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Opening Statements

Message from the Chair

Michelle Hamilton-Burns

It has been a busy winter for the Federal Litigation Section. After soliciting volunteers for a new board of directors in the last issue of *Sidebar*, we now have a governing board comprised of 15 members from around the country, representing various fields of practice. The following committees were also formed: Appellate Law and Practice, Federal Rules of Procedure and Trial Practice, Federal Circuit, Admiralty-Maritime, Military Law, and Federal Tort Law. No doubt the chairs of those committees would appreciate volunteers to help them implement the goals of their committees. It is our hope that by expanding the leadership of our section, we can better serve our membership by endeavoring to do the following: keep apprised of issues that arise that could affect federal litigation practice, report these issues timely and accurately to the section membership, provide a forum for members to participate in FBA activities, publish a newsletter that informs and gives members an opportunity to publish articles, and provide an outlet for members to address issues that are perceived as important to the section.

In keeping with these goals, we recently examined two legislative issues that arose in congress that affect or potentially could affect litigation practice. A bill was proposed in the House of Representatives that would require federal or state courts to recognize any notarization made by a notary public licensed by a state other than the state where the court is located. Robert Kohn and John McCarthy of the Federal Rules and Trial Practice Committee reviewed and tracked the bill. We were also given the opportunity to provide input to the FBA Government Relations Committee on legislation introduced on the subject of cameras in the federal courtroom. We polled the membership for feedback and received numerous responses. The feedback we received and a preview of the legislation is addressed in an article in this newsletter. This is an issue that undoubtedly requires our strict attention.

Our section is also co-sponsoring with the Mecklenberg County Bar in Charlotte, N.C., the production of a DVD on the subject of the changes in the civil rules, that impact electronic discovery, taking effect in December of this year. The DVD was produced in April and updates the DVD and book on electronic discovery our section produced in year 2000 in conjunction with the Mecklenberg County Bar and the Federal Judicial Center. FBA chapters and other CLE providers can use it either as a half-day CLE or as a one-and-a-half hour CLE program that can be presented as a lunch program for bar associations or private firms. In the DVD, a hypothetical forms the basis for four courtroom oral arguments. Between the courtroom arguments, a computer forensics expert and a law professor focus the audience on the application of the new rules to the issues raised. Two of our section leaders, Jonathan Grammar and Matthew McConnell, have volunteered to act in the production. The DVD will be provided free of charge to FBA chapter presidents and will be otherwise for sale. Consider ordering a copy of this DVD for your office, as it is a timely, inexpensive, and user-friendly way to learn about the new rules.

I am excited about the change in the makeup of the section leadership and the increased enthusiasm for the mission of this association. Too often we tend to neglect the benefit of working with and sharing ideas with other attorneys on issues that are important to all of us, not just issues that may be important to the person represented by the file on our desk.

Ideas are like rabbits. You get a couple and learn how to handle them, and pretty soon you have a dozen. John Steinbeck (1902-968)

Here's to new associations and new ideas!

Inside

News and Notes

Electronic Discovery Update: Impact of the 2006 Federal Rules Changes

The Federal Litigation Section, in conjunction with the Mecklenberg County (North Carolina) Bar Association, is producing a video entitled "Electronic Discovery Update: Impact of the 2006 Federal Rules Changes." A copy will be distributed at no charge to each chapter. Section members should be sure to work with their chapter CLE coordinators to acquire their chapter's copy. It will be available in time to use in the fall — before the rules changes take effect. It will include two versions — a one-hour version that can be used at a luncheon CLE and a two-hour version that can be used with live speakers for a half-day CLE.

The Federal Rules of Civil Procedure will be amended Dec. 1, 2006 to include a variety of provisions targeted at making electronic discovery more manageable. The video, through following one hypothetical of a misappropriation of trade secrets, intersperses commentary by Joan Feldman, of Navigant Consulting, and Professor Alan Blakley, with scenes from the litigation — the Rule 16 meeting, a motion for protective order, a motion for sanctions, and a motion for production of electronic information in native format. The video highlights the changes in Rules 16, 26, 37 and 34.

The project is dedicated to the late Hon. H. Brent McKnight, former chief judge of the Western District of North Carolina, who participated in the previous video on electronic discovery produced by the section. Participating in this video are section board members Matt McConnell of Lafayette, La. and Jonathan Grammer of Oklahoma City, Okla. Also participating and directing the project is Alan Blakley, former section chair.

Presentation of a plaque to Beth McKnight dedicating the project to her late husband, Judge McKnight (l to r): Hon. David C. Keesler, U.S. magistrate judge, Western District of North Carolina; Nicole Gardner, Charlotte, N.C.; Joan Feldman, Navigant Consulting, Seattle, Wash.; Jonathan Grammer, Oklahoma City, Okla.; Alan Blakley; Beth McKnight; Matt McConnell, Lafayette, La.; Blas Arroyo, Charlotte, N.C.

Congress Considers Legislation Concerning Out-of-State Notarizations

A bill concerning the recognition of out-of-state notarizations is currently being considered by the House of Representatives. If enacted, H.R. 1458 would require both federal and state courts to accept out-of-state notarizations in cases affecting interstate commerce. The FBA has been asked for its comments on this proposed legislation. This piece is intended both to inform the section membership of this proposed legislation and to solicit comments on its necessity.

Rep. Robert Aderholt of Alabama introduced this bill in April 2005. Separate provisions applicable to state and federal court provide that courts "shall recognize any notarization made by a notary public licensed under the laws of a State other than the State where the court is located when such notarization occurs in or affects interstate commerce." The stated purpose of the bill is to make it easier for litigants to introduce out-of-state notarizations in court. A committee hearing was held on March 9, 2006. The committee took testimony, all of which supported enactment of the bill. Supporters of the bill encouraged passage to make everyday transactions easier for individuals and business. One supporter, the owner of a court reporting company, believed that "[t]he purpose of this bill is to enable notary publics to swear witnesses country-wide rather than just in their own states." The testimony of another supporter, president of the National Notary Association, seemed to focus more on concerns about the filing of real estate documents. All of the testimony can be found at http://judiciary.house.gov/hearings.aspx?ID=132.

When the Federal Litigation Section leadership discussed H.R. 1458 at one of its recent meetings, none of the participants had ever experienced a problem with the use of out-of-state notarizations in court. 28 U.S.C. § 1746, which allows for the use of documents signed under penalty of perjury in place of affidavits, seems to render this proposed legislation superfluous. Your comments, suggestions, or war stories are welcome. Please send them by e-mail or snail mail to John McCarthy, jmccarthy@baintonlaw.com, Bainton McCarthy LLC, 320 Carleton Avenue, Central Islip, NY 11722.

Sidebar is published by the Federal Litigation Section of the Federal Bar Association. The views expressed herein do not necessarily represent those of the FBA. Send all articles or other contributions you may have to: Robert E. Kohn, Kohn Law Group Inc., 2120 Colorado Avenue, Suite 160, Santa Monica, Calif. (310) 453-1323, rkohn@kohnlawgroup.com.

NEWS IN BRIEF

Supreme Court Votes to Allow Citation to Unpublished Opinions in Federal Courts

by Tony Mauro

The Supreme Court on Wednesday adopted a historic rule change that will allow lawyers to cite so-called unpublished opinions in federal courts starting next year. The new rule takes effect unless Congress countermands it before Dec. 1.

The justices' vote represents a major milestone in the long-running debate over unpublished opinions, the sometimes-cursory dispositions that resolve upward of 80 percent of cases in federal appeals courts nationwide. In some circuits these dispositions have no precedential value and cannot be cited.

"Unpublished" is a misnomer, since most of these opinions are available now on legal databases. But some federal judges have argued that if this category of opinions can be cited and used as precedent, they will take more time to decide and write, sharply increasing the backlog of cases. Many sentencing appeals, for example, are resolved by unpublished opinions. The U.S. Courts of Appeals for the 2nd, 7th, 9th, and federal circuits ban the citation of unpublished opinions outright, while six other circuits discourage it.

Under the new rule, circuits will still be able to give varying precedential weight to unpublished opinions, but they can no longer keep lawyers from citing them — in the same way lawyers cite rulings from other circuits or other authorities, such as law review articles.

"This change will facilitate lawyers' representation of their clients, and it will facilitate the courts' informed decision of future cases," said Mark Levy of Kilpatrick Stockton, a member of an advisory committee that recommended the change. "It will also bring national uniformity to the process."

At one point in the debate, 9th Circuit Judge Alex Kozinski, the leading opponent of the rule change, said unpublished opinions were so designated for a reason: They are drafted "entirely" by law clerks and staff attorneys. He added, "When the people making the sausage tell you it's not safe for human consumption, it seems strange indeed to have a committee in Washington tell people to go ahead and eat it anyway."

The committee Kozinski was referring to, the Advisory Committee on the Federal Rules of Appellate Procedure, was chaired at the time by then-3rd Circuit Judge Samuel Alito Jr., and one of its members was then-D.C. Circuit Judge John Roberts Jr. Both supported the change while on the committee, and now that both serve on the Supreme Court, Wednesday's vote may have been unsurprising. There was no indication in the Court's order whether any justices dissented or did not participate.

The advisory committee's original recommendation was to allow the citation of all unpublished opinions, past and future, but the Judicial Conference last September added an amendment to make the rule prospective, allowing the citation only of those rulings issued on or after next Jan. 1. The high court adopted that amendment in the rule change it promulgated Wednesday.

Unpublished opinions first came into vogue in the 1960s as a time-saving device for appellate judges. Though the propriety of an essentially secret judicial process has been debated for years, the catalyst for change came in 2000, when the late 8th Circuit Judge Richard Arnold ruled in a routine case that stripping unpublished opinions of precedential value was unconstitutional because it gave judges a power not authorized by Article III of the Constitution.

Sidebar

FOOD FOR THOUGHT

Cameras in the Courtroom: Public Sunshine or Media "Reign"

By René D. Harrod and Matthew D. McConnell

Even before Judge Wapner and *The People's Court* brought the courtroom into the American living room in 1981, television has had a love affair with the courtroom. Whether the federal courts love the television camera, however, is the question currently before Congress. The federal courts have debated the issue of allowing television cameras in the courtroom for more than 30 years and appear to be slowly changing their opinion from completely prohibiting all camera access to allowing certain televised access for federal appellate proceedings, and possibly for federal trial court proceedings.

Currently pending before Congress are three bills that would allow trial and/or appellate level federal civil proceedings to be televised, subject to certain requirements. H.R. 1751 (introduced by Rep. Louie Gohmert, Texas) would allow broadcast media coverage of federal court proceedings at both the appellate and trial court levels, at the discretion of the presiding judge.[1] The House of Representatives passed the bill on Nov. 9, 2005, in a vote of 375 to 45, and the bill moved on to be considered by the Senate Judiciary Committee.

Two other bills addressing cameras in federal courtrooms are also currently pending in the Senate: S. 829 (introduced by Sen. Charles E. Grassley), called the "Sunshine in the Courtroom Act of 2005," would allow the photographing, electronic recording, broadcasting, or televising to the public of court proceedings, at the discretion of the judge; and S. 1768 (introduced by Sen. Arlen Specter) would apply only to the Supreme Court, requiring the Court to permit television coverage of its sessions, unless the justices decide, by majority vote, that such coverage would violate the due process rights of one or more of the parties.[2] Both bills were placed on the Senate legislative calendar on March 20, 2006.

For its part, the White House has indicated that it opposes cameras in the courtroom. In a public statement on Nov. 9, 2005, the White House suggested that the applicable section of H.R. 1751 "has the potential to influence court proceedings unduly and to compromise the security of participants in the judicial process."

This debate is not a new one for the federal courts. As recited by Seth Berlin during the November 9, 2005 hearings before the Senate Judiciary Committee, the federal Judicial Conference has been debating this issue for more than 30 years. In 1972, the Judicial Conference prohibited "broadcasting, televising, recording, or taking photographs in the courtroom and areas immediately adjacent thereto," for both criminal and civil proceedings. The Judicial Conference subsequently appointed committees to reconsider the issue and even implemented a pilot program in six district courts and two courts of appeals. Although the staff of the pilot program concluded favorably on the project and recommended camera access to civil proceedings in district and circuit courts, the Judicial Conference rejected the recommendation. As recently as 1996, the Judicial Conference urged each circuit judicial council to adopt an order prohibiting broadcast coverage of proceedings in district courts. All but two courts of appeals subsequently adopted prohibitions, so that presently only the Second and Ninth Circuit Courts of Appeals permit camera coverage.[3]

Recently, during hearings before the Senate Judiciary Committee on Nov. 9, 2005, Senator Patrick Leahy, advocating in favor of cameras in the courtrooms, stated: "In 1994, the Judicial Conference concluded that the time was not ripe to permit cameras in the federal courts, and it rejected a recommendation of the Court Administration and Case Management Committee to authorize the photographing, recording, and broadcasting of civil proceedings in federal trial and appellate courts. Today the time is ripe."

Also during the Senate Judiciary Committee hearings, Ninth Circuit Judge Diarmuid O'Scannlain testified regarding his experience with the pilot project that allowed cameras in the Ninth Circuit. He reported that media requests for taping appellate arguments occurred in less than 1 percent of the cases, and the Ninth Circuit allowed the cameras in approximately 65 percent of those instances. (Judge O'Scannlain also noted that even after the pilot project ended, audio playback of argument is always available on the Ninth Circuit Web site the day after the hearing, and live audio feeds are available in certain cases.) Judge O'Scannlain testified in support of allowing cameras in the courtroom on the appellate level. However, he indicated "serious concerns" about allowing cameras in trial courts. *Id.*

Judge DuBois of the Eastern District of Pennsylvania also participated in the pilot program for cameras in the courtroom. He testified before the Senate Judiciary Committee that in his view, "the disadvantages of cameras in the courtroom far outweigh the advantages." He noted that the presence of cameras is likely to influence the substance of the proceeding, and noted various objections — *e.g.*, one defendant indicated he would settle the case before trial regardless of merits if the trial would have been televised; also, during one trial that was televised, the cameras would appear on one day and not the next, requiring the Court to instruct the jury that the presence or lack of cameras did not denote the significance of the testimony. *Id.*

The Federal Litigation Section conducted an informal poll of its members as to their positions on allowing television cameras in the courtroom. The poll inquired whether legislation allowing televised coverage of trial court and/or appellate proceedings is appropriate and desirable, and if so, what restrictions and level of judicial discretion would be appropriate to handle allowing cameras in the courtroom. The results of the poll reflected the existing conflict of opinion: almost two-thirds of those responding approved of televising Supreme Court pro-

Food for Thought continued on page 4

Food for Thought continued from page 3

ceedings, while the opinions on circuit and district level proceedings were split roughly evenly with slightly more approving of televising circuit court hearings and slightly more opposing the televising of trial court proceedings.

The concerns typically expressed by those in favor of allowing televised access included the principle of public justice — *i.e.*, access to the courts via television is a virtue of an open government as well as a healthy practice to quell criticism, or expose demerits, of the legal profession and the courts system.

The concerns typically expressed against allowing cameras in the courtroom included fear of distorting legal proceedings through grandstanding, or "playing to the cameras," and the concern that televised court proceedings would transform the justice system into a trial by media, rather than by the judge and jury. Other concerns included security concerns for the lawyers, witnesses, and judges involved in a televised proceeding, especially in trial courts; separation of powers (legislative authority versus court self-governance); and fear that regulation of cameras in the courtroom would spawn collateral litigation, adding more complexity and inefficiencies to the administration of justice.

The consensus among the members of the section appears to be that cameras in the courtroom would be more appropriate in appellate courts and, most desirably and appropriately, in the Supreme Court. Likewise, the consensus appears slightly to favor restricting camera access in district courts. Some helpful suggestions from respondents included allowing parties to veto televising their proceeding, and empowering judges to sanction lawyers and others for playing to, or taking advantage of, cameras in the courtroom.

The section's poll perhaps raised more questions than it answered. For example, because federal courts are typically already open to the pedestrian public, is there a compelling reason to broadcast in light of the potential adverse effects of the cameras? Should every litigant and lawyer have to accept the possibility of play-by-play televised coverage of their demand for justice by virtue of filing a complaint or an answer? Would the specter of broadcast television coverage have an adverse chilling effect on an injured plaintiff considering seeking redress in the courts, or would it be a positive limitation on frivolous litigation? Would unpopular aggrieved persons willing to go to "video trial" nevertheless have trouble finding lawyers willing to represent them on TV?

As Congress addresses these questions and more in connection with the pending bills, lawyers and litigants alike may be wise to seize the current opportunity to invest in that bit of cosmetic surgery they have been considering before the "darkness" of the federal courtroom gives way to televised sunshine.

Endnotes

[1]"Notwithstanding any other provision of law, the presiding judge of an appellate court of the United States may, in his or her discretion, permit the photographing, electronic recording, broadcasting, or televising to the public of court proceedings over which that judge presides." Secure Access to Justice and Court Protection Act of 2005, H.R. 1751, 109th Cong. § 22(b)(1) (2005).

"Notwithstanding other provision of law, any presiding judge of a district court of the United States may, in his or her discretion, permit the photographing, electronic recording, broadcasting, or televising to the public of court proceedings over which that judge presides. . . . Upon the request of any witness (other than a party) or a juror in a trial proceeding, the court shall order the face and voice of the witness or juror (as the case may be) to be disguised or otherwise obscured in such manner as to render the witness or juror unrecognizable to the broadcast audience of the trial proceeding." Secure Access to Justice and Court Protection Act of 2005, HR. 1751, 109th Cong. § 22(b)(2)(A), (B) (2005).

[2]"Notwithstanding any other provision of law, any presiding judge of a district court of the United States may, in the discretion of that judge, permit the photographing, electronic recording, broadcasting, or televising to the public of court proceedings over which that judge presides." (Sunshine in the Courtroom Act of 2005, S. 829, 109th Cong. § 3 (2006)); "The Supreme Court shall permit television coverage of all open sessions of the Court unless the Court decides, by a vote of the majority of justices, that allowing such coverage in a particular case would constitute a violation of the due process rights of 1 or more of the parties before the Court." (S. 1768(a), 109th Cong. (2006)).

[3]*See Cameras in the Courtroom: Hearing Before the Senate Judiciary Committee*, 109th Cong. (Nov. 9, 2005), *at* http://judiciary.senate.gov/hearing.cfm?id=1672.

Editor's Note

Future editions of *Sidebar* need your contributions. Please let us know if you or a colleague have written about a litigation topic, or even if you see a useful or interesting article that *Sidebar* readers might like to see reprinted here. And thank you for reading.

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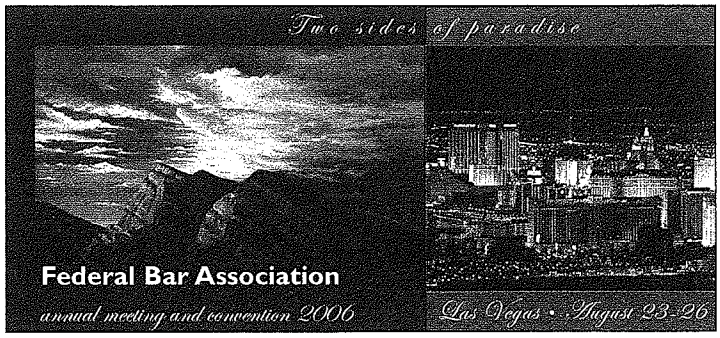

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