



SideBAR

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OPENING STATEMENTS

Message from the Chair

Hon. Michelle Hamilton Burns

This will be my last message in *SideBAR* as the chair of the Litigation Section. My term expires in September, and the current vice-chair, Richard Pocker, will then assume the leadership position. During my involvement with the litigation section, I have undergone some transitions in my professional life. In 2003, after over ten years in private practice, primarily representing criminal defendants, I joined the U.S. Attorney's Office to become a white collar/public corruption prosecutor. This year, I joined the U.S. District Court as the newest magistrate judge in Phoenix. Admittedly, I have not researched whether it is unique to our profession to have served in all three capacities: defense counsel, prosecutor, and judge. At the "baby judges school" I attended recently, I made a passing mental note that most new judges had practiced at only one side of the table, whether in a civil or criminal practice.



In any case, I have been asked to share some lessons learned, or anecdotes from my experience, so my "park-hopping" must be of interest to some.

When I gave up my defense practice to become a prosecutor, I had two main concerns: (1) that I would have trouble advocating against my former professional mentors and peers, and (2) that I would have trouble advocating a prosecution or sentence that I did not necessarily personally agree with. It turned out that, for the most part, my concerns were justified. It was difficult, but not so difficult that I couldn't get through it by swallowing hard and proceeding forward with the conviction that the law I was sworn to uphold would guide me. I ultimately felt comfortable in my role, recognizing the importance of honorable prosecutors.

When I became a magistrate judge, I also had two main con-

cerns: (1) that I would miss the challenge and excitement of advocacy, and (2) that I would miss the freedom to choose who I met with and what I talked openly about. It turned out that, for the most part, my concerns were justified. It is difficult, but not so difficult that I can't get through it by focusing on the challenge and satisfaction of making fair and meaningful decisions and committing myself to representing the federal court in such a way that its dignity and impartiality are upheld. I am still new here, and getting more comfortable every day. It's clear that everyone recognizes the importance of honorable judges in the scheme of things.

I have a friend from high school who is a taxidermist. Sometimes I imagine what it must be like to go about that business on a daily basis. Comparing it to what I do at work is like comparing, well, ... taxidermists and judges. At the risk of sounding platitudinous, I am compelled to give the following advice: if you've given thought to, and have the opportunity professionally to change the nature of your practice, do it before it's time for the last toast at your retirement party. In sum, here's my view: having the experience of wearing different hats in the courtroom also advances the causes of justice, professionalism, and personal growth. Of course, to be fair to the counter-point of this general sentiment, I leave you with this quote from painter Vincent van Gogh (1853-1890): "If one is master of one thing and understands one thing well, one has at the same time, insight into and understanding of many things".

Editor's Notes

Robert E. Kohn



In this issue of *SideBAR* we consider the Supreme Court's intervention in patent law matters, the scope of admiralty jurisdiction, and the uses and limits of protective orders to keep discovery information confidential.

Hon. Michelle Burns also shares her views of wearing many hats—though not all at the same time—in the courtroom. We will miss her leadership of the section, and we welcome Richard Pocker to the chair position. Voting is now open to fill the position of secretary/treasurer. Please see the ballot on page seven.

Future editions of *SideBAR* need your contributions. 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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SUPREME COURT SPOTLIGHT

The Supreme Court Takes On Patent Law

by Irfan A. Lateef and Joshua Stowell

Recent decisions suggest that the Supreme Court is acting to replace the Federal Circuit as the final word on matters of patent law. In 1982, the U.S. Court of Appeals for the Federal Circuit was created to hear all patent cases and thus provide direction and uniformity to the patent system. For the next 25 years, the court enjoyed relatively unfettered control over U.S. patent law, with little intervention by the Supreme Court. This historical "hands-off" approach can be tracked numerically: depending on how a "patent case" is defined, in the last 25 years, the Supreme Court has granted certiorari in roughly 16 patent cases, or less than one per year. During this time period, the Federal Circuit developed a host of standards and tests to guide patent practice in the United States. In many cases, these standards and tests deviated from the traditional tests applied in other areas of the law and became peculiarities of patent law. Commentators often justified such specialized tests based on the unique nature of patent law.

However, the Supreme Court is now re-engaging in patent law, granting certiorari in four patent cases in just over a year. The Supreme Court has reversed the Federal Circuit in each case, overturning long-standing legal tests and doctrines in the process. Many commentators support the Supreme Court's new approach of reigning in the Federal Circuit because they believe that Circuit had gone too far in deviating from established general legal principles with its peculiarities of patent law. Some less-supportive commentators suggest, however, that in taking more patent cases, the Supreme Court is merely reacting to public opinion of recent high-profile cases, such as the BlackBerry case. In that case, infringement of allegedly "weak" patents led to a potential injunction that threatened to disrupt the BlackBerry service network.

eBay v. MercExchange, 126 S.Ct. 1837 (May 15, 2006)

In *eBay*, the Supreme Court rejected what had been the Federal Circuit's "general rule" (unique to patent law) that a permanent injunction prohibiting the sale of infringing products should automatically result from a finding of patent infringement, absent exceptional circumstances. In rejecting this rule, the Supreme Court instructed the Federal Circuit to adopt the traditional four-factor test for assessing requests for an injunction in other areas of the law. The Court noted in its

opinion that the traditional principles of equity apply to patent cases just as they would to any other area of the law.

MedImmune, Inc. v. Genentech, Inc., 127 S.Ct. 764 (Jan. 9, 2007)

In *MedImmune*, the Supreme Court rejected what had been the Federal Circuit's standard for declaratory judgment jurisdiction. The Federal Circuit's test had required potential infringers to demonstrate a "reasonable apprehension of suit" in order to maintain a declaratory judgment action. Under this standard, patent holders had been free to aggressively police their intellectual property in the marketplace—short of threatening an infringement suit—without fear of a pre-emptive declaratory suit.

Many commentators support the Supreme Court's new approach of reigning in the Federal Circuit because they believe that Circuit had gone too far in deviating from established general legal principles with its peculiarities of patent law. Some less-supportive commentators suggest, however, that in taking more patent cases, the Supreme Court is merely reacting to public opinion of recent high-profile cases, such as the BlackBerry case.

In rejecting the Federal Circuit's "reasonable apprehension of suit" test, the Supreme Court criticized it as inconsistent with the declaratory judgment standard applied in other areas of the law. The Court held that a more flexible test should apply. Commentators suggest that this change in the law will have a drastic effect on license negotiations, exposing patent holders to declaratory judgment jurisdiction more often from potential licensees. Consequently, law suits will increase because patent holders have fewer non-litigation options when notifying competitors or potential licensees of their patents.

KSR International Co. v. Teleflex Inc., 127 S.Ct. 1727 (April 30, 2007)

In *KSR*, the Supreme Court addressed the Federal Circuit's test for patent nonobviousness, a statutory requirement for obtaining a patent. In deciding that an invention is patentable, the U.S. Patent and Trademark Office must be satisfied that the invention has not already been made or described. The office looks at references that exist already—the "prior art"—to determine novelty and nonobviousness. Not only must no *single* reference describe the invention (novelty), but the invention must not be an obvious *combination* of existing references (non-obviousness).

In *KSR*, the Supreme Court rejected strict application of the TSM test as overly formulaic. The Court recognized that intelligent inventors would know to combine certain prior art references even without an explicit teaching or motivation. The Court encouraged a more flexible obviousness test in an attempt to better incorporate the general knowledge and common sense of a "person of ordinary skill in the art."

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COURTROOM PROCEDURE

Beware—Your Protective Order May Not Be As Protective As You Think

by **Carla B. Higginbotham**

"I'm not giving you anything in discovery until a protective order is in place." This is a direct quote from opposing counsel in a recent case that I was working on. This quote is not unlike many that I have encountered in my practice or that I have insisted on myself, particularly in complex litigation. As you are undoubtedly aware, blanket or umbrella protective orders are used to designate particular documents as confidential and subject to protection under Federal Rule of Civil Procedure 26(c)(7) for ease of exchange during discovery.¹ The use of these orders has become commonplace in federal courts.² Thus, one of the first things that often will occur before discovery proceeds is the negotiation and the stipulation between the parties requesting that the court adopt a blanket protective order.

There are great benefits to the utilization of these types of orders. First, such orders greatly improve the flow of discovery materials while at the same time affording protection to the party concerned with an improper disclosure of confidential information.³ This prevents the courts from having to make a document by document determination of whether or not a particular document should be protected.⁴ As such, the blanket approach is less time-consuming and burdensome to the parties and the court.⁵ Moreover, the use of such orders saves litigation costs as the parties will not be required to make repeated discovery motions to the court seeking protection of confidential information.⁶ This encourages the parties to meet and confer and work out their discovery differences before bringing these issues to the court, saving judicial resources, promoting the purposes of the Federal Rules of Civil Procedure, and helping to relieve some of the burden on already overcrowded dockets.⁷

As noted by one court:

The interest of preserving the efficient and effective functioning of the discovery process weighs substantially in favor of a protective order and there is no question that this interest would be significantly impaired were there no protective order in this case.⁸

For the above reasons, several courts and commentators have endorsed the use of such orders.⁹

However, there are certain pitfalls and limitations with these orders that should be kept in mind. Particularly if you and/or

your client are relying heavily upon a protective order to protect the confidentiality of certain information from others—especially those outside the litigation.

There is an emerging trend in the federal courts away from adopting these blanket orders,¹⁰ which is primarily based on the rationale that they prohibit the open access to information in the courts. Therefore, courts are becoming more and more distrustful of these orders. As a result, collateral attacks to modify these orders by third party intervenors are becoming increasingly successful.¹¹

The right of access to civil trials is recognized as both a constitutional and common law right.¹² This right is based on the

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policy that openness of judicial proceedings is a "fundamental feature of the American judicial system"¹³ and public access to the courts provides an important check on the system.¹⁴ Accordingly, there is a presumption of access to courts and courts that may only be overcome by a showing of compelling reasons. This right extends to court records, documents, and docket sheets.¹⁵

The use of protective orders can infringe upon the right of access because such orders may include provisions that require or permit the filing of documents under seal that are designated as confidential under the terms of the protective order.¹⁶

Accordingly, if you file documents under seal, pursuant to the terms of a protective order, these documents may not be safe from disclosure. For example, if these documents are attached to a dispositive motion and a third party intervenor seeks to "unseal" these documents, you will be required to establish that there is a "compelling reason" to rebut the presumption of access.¹⁷ If you are unable to establish a "compelling reason," the presumption of access will not be rebutted and the documents will be made public.

Generally, compelling reasons sufficient to justify the continued secrecy of documents exist where the documents, if made public, would be used for an "improper purpose" such as "the use of records to gratify private spite, promote public scandal, circulate libelous statements or release trade secrets."¹⁸ However, reliance upon a blanket protective order alone is insufficient as a "compelling reason" for a court to refuse to lift a seal or modify the protective order.¹⁹ In addition, mere embarrassment or exposure to additional litigation is also insufficient to meet the compelling reason standard.²⁰ Finally, even where protected documents contain third-party privacy records (such as social security numbers or medical records), these documents may eas-

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ily be redacted in such a way that the protected information remains under seal, while the remaining information is available for the collateral litigant.²¹ Therefore, maintaining third party privacy alone also will not constitute a "compelling reason." *Id.*

In addition, documents filed under seal that are attached to non-dispositive motions are also at risk of disclosure. Specifically, the party seeking to maintain the secrecy of sealed documents attached to a non-dispositive motion must meet the "good cause" standard required by Federal Rule of Civil Procedure 26(c). This generally requires that the party seeking to maintain the protective order must establish: (1) that the documents at issue contain either trade secrets or some other confidential information within the scope of Rule 26(c); and (2) that disclosure would cause some identifiable and significant harm.²² Although this standard is lower than the "compelling reason" standard above, it shows that any document filed with the court may be vulnerable to disclosure in spite of the existence of a blanket protective order. It should also be kept in mind that both the "good cause" and the "compelling reason" standards must be met for each and every document that is filed under seal.

The most concerning issue to bear in mind, however, is that documents that are never filed with the court, but are merely exchanged by the parties pursuant to a protective order during discovery, may also be released to third parties unrelated to the litigation. For example, the Ninth Circuit strongly favors access to discovery materials to advance the interest of judicial economy in the expense and burdens of duplicative discovery. *Foltz* 331 F.3d at 1131. Therefore, where a collateral litigant can demonstrate the relevancy of protected discovery to that collateral action, the request for the modification of the order will generally be granted.²³ This is based upon the belief that "allowing the fruits of one litigation to facilitate preparation in other cases advances the interests of judicial economy by avoiding the wasteful duplication of discovery."²⁴

In sum, although protective orders are very useful and help to facilitate discovery in many cases, these orders are not iron-clad. Even where the parties have stipulated to the terms of the order, collateral litigants can attack the use of the orders. As a result, these collateral parties may be successful in obtaining disclosure of materials that all of the parties to the litigation intended to remain secret. As a practitioner, it is important to beware of these pitfalls. This may require being more selective in the documents that are designated as confidential and being prepared to provide the required "compelling reasons" or "good cause" arguments necessary to keep these documents protected.

Carla B. Higginbotham is an associate at McDonald Carano Wilson LLP in Reno, Nevada. She primarily practices in appellate and complex business and civil litigation. Prior to joining the firm, Carla was a judicial law clerk to Hon. Proctor R. Hug, the former chief judge of the 9th Circuit Court of Appeals, and Hon. Peter I. Breen of the Second Judicial District Court for Washoe County, Nevada.



She would like to give a special thanks to Marla DaVee, a third year law student from the University Of Nevada Boyd School Of Law, for her contributions to this piece.

Endnotes

¹*Id.*

²*Chicago Tribune Co. v. Bridgestone/Firestone, Inc.*, 263 F.3d 1304, 1307 (11th Cir. 2001).

³*Cippolone v. Liggett Group, Inc.*, 785 F.2d 1108, 1123, n. 18 (3d Cir. 1986).

⁴*In re Alexander Grant & Co., Litig.*, 820 F.2d 352, 356-57 (11th Cir. 1987) (per curiam)

⁵*Cippolone*, 785 F.2d at 1123 n.18.

⁶*Id.*

⁷Fed. R. Civ. Pro. 1 (purpose of the rules is "to secure the just, speedy, and inexpensive determination of every action."); Fed. R. Civ. Pro. 26-37 (meet and confer requirement of parties concerning discovery and discovery disputes).

⁸*In re "Agent Orange" Prod. Liab. Litig.*, 96 F.R.D. 582, 585 (E.D.N.Y. 1983).

⁹*Cippolone*, 785 F.2d at 1123; *Alexander*, 820 F.2d at 356-57; *Agent Orange*, 96 F.R.D. at 585; *Anderson v. Cryovac*, 805 F.2d 1, 13 (1st Cir. 1986); *In Re Reporters Committee For Freedom of the Press*, 773 F.2d 1325, 1326 (D.C.Cir. 1985); Richard L. Marcus, *The Discovery of Confidentiality Controversy*, 1991 U. ILL. L.REV. 457 (1983); Marcus, *Myth and Reality in Protective Order Litigation*, 69 CORNELL L.REV. 1 (1983).

¹⁰*See William E. Dietrick & Audrey Fired-Grushcow, Confidentiality: 7th Circuits Challenge*, THE NAT'L L. J., April 28, 2003 at 1-2.

¹¹*Kamakana v. City and County of Honolulu*, 447 F.3d 1172 (9th Cir. 2006).

¹²*Westmoreland v. Columbia Broadcasting Sys., Inc.*, 752 F.2d 16, 22-23 (2d Cir. 1984); *Publicker v. Cohen*, 733 F.3d 1059, 1067-71 (3d Cir. 1984); *Rushford v. New Yorker Magazine, Inc.*, 846 F.2d 249 (1988); *Brown & Williamson Tobacco Corp. v. FTC*, 710 F.2d 1165, 1177-79 (6th Cir. 1983); *In Re Cont'l Ill. Litig.*, 732 F.2d 1302, 1308-09 (7th Cir. 1984); *Cf. Journal Pub. Co. v. Meechen*, 801 F.2d 1233 (10th Cir. 1986); *Wilson v. Am. Motors Corp.*, 759 F.2d 1568 (11th Cir. 1985); *In Re Reporters Comm. for Freedom of the Press*, 773 F.2d 1325 (D.C. Cir. 1985); *Foltz v. State Farm Mutual Auto Ins. Co.*, 331 F.3d 1122, 1135 (9th Cir. 2003).

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FEDERALLY SPEAKING

Admiralty Jurisdiction—Getting it “Hooked”

By Ron Anania

Let's imagine there are two boaters on Lake Okeechobee. John is fishing for bass in his 10-foot Jon boat and Bill is operating his 24-foot, super-sleek cruiser, pulling a water skier. The water skier falls, distracting Bill's attention. Bill starts a turn to pickup the skier, doesn't see John's small boat ahead of him, and they collide. The collision throws John in the water and causes damage to his boat. Although not injured, the collision also causes John to lose a giant bass he had hooked (or so he claims).

John yells at Bill, “You've damaged my boat, I lost the biggest bass I've ever seen, and this is all \$10,000 worth of damage!” (Obviously John places a high value on the lost bass.)

“You're nuts!” yells Bill, “Your boat's only worth \$700 and you would never have landed that bass!”

“What do you want to do, make a federal case out of this?” Well, in fact, John can do just that.

If John can establish that his case falls under admiralty jurisdiction, it can be brought into federal court. The U.S. Constitution gives the federal courts control over “all cases of admiralty and maritime jurisdiction.”

Does John have a federal case? Over 25 years ago, the Supreme Court developed a test to determine whether an accident on the water falls under admiralty jurisdiction. The first prong of the test is that the parties were engaged in a “traditional maritime activity,” and the second prong is whether the incident occurred on “navigable waters.”

“Traditional maritime activity” basically encompasses anything having to do with boats or travel over the water. Airplanes flying over the high seas have also sometimes been included.

Lake Okeechobee has a canal system that gives boats access to both the Atlantic Ocean and the Gulf of Mexico. Ocean access allows vessels to travel to other states; therefore, Lake Okeechobee is a “navigable water.”

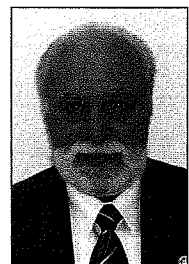
Since the two intrepid mariners were engaged in a traditional maritime activity and they were on the navigable waters of Lake Okeechobee, they may have a federal case on their hands, should they want one. John could take Bill to federal court. He also has the option of filing in state court under the Savings to Suits Clause, which allows state courts to hear many maritime cases. This decision should be made with the advice of legal counsel. The state alternative could possibly save money and time; it may also avoid the confusion it may cause a federal judge, who may wonder why he or she is hearing a dispute over a rowboat and lost fish.

The parties could also face reality and come to an agreement. John may realize his boat was only worth \$700; what he actually paid for it. On his way home, John could stop at the local fish market

and buy a large bass and claim he caught it. Bill could agree to pay for John's boat and the bass.

Determining the appropriate jurisdiction can be a lot like fishing. It requires time and patience, and it's a great feeling when you have it “hooked.”

Ron Anania has offices in Davie, Fla. He includes this note with his article: “It is difficult to write an article on this subject and be totally unique. Therefore, I would like to mention that a colleague and friend Mark Ercolin, wrote a similar article in 1997.”



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, CA 90404. (310) 453-1323, rkohn@kohnlawgroup.com.

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Microsoft Corp. v. AT&T Corp., 127 S.Ct. 1746 (April 30, 2007)

On the same day the Supreme Court decided *KSR*, the Court also decided *Microsoft*. The *Microsoft* case dealt with Section 271(f) of the Patent Act, which generally prohibits the sale of unpatented individual components from the United States for the purpose of combining the components overseas into an infringing product. The issue was whether supplying software from the United States to be installed overseas violated Section 271(f). In yet another example of Supreme Court intervention in patent law, the Court once again rejected the Federal Circuit's analysis. In reversing the Federal Circuit, the Supreme Court seemed to reject the notion that software should be treated any differently from inventions based on mechanical parts. The Supreme Court also relied on a general principle that U.S. law, including patent law, is limited to the territory of the United

States unless otherwise indicated by statute.

As these cases demonstrate, the Supreme Court is in the process of replacing the Federal Circuit as the final word on matters of patent law. Commentators believe patent litigators will now aggressively seek more writs of certiorari, particularly in cases where a Federal Circuit opinion relies on a specialized patent rule, where the Federal Circuit panel is divided, or where a Federal Circuit decision contradicts decisions rendered prior to the Supreme Court's formation in 1982. Legal areas that may be ripe for Supreme Court involvement include the waiver of attorney-client privilege in willful infringement proceedings, the magnitude and scope of patent damages, and the deference given to district courts in construing patent claims.

Irfan A. Lateef is a partner in Knobbe Martens Olson & Bear's Orange County office, and Joshua Stowell is an associate there. Both specialize in patent litigation.

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¹³*Brown & Williamson*, 710 F.2d at 1177.

¹⁴*Richmond*, 448 U.S. at 569-73.

¹⁵*In Re Providence Journal Co.*, 293 F.3d 1, 10-13 (1st Cir. 2002) (court's blanket policy of refusing to file memoranda at law required to be filed by counsel violated First Amendment); *Publicker*, 733 F.2d at 1069 (First Amendment right of access extends to public records and documents, including judicial records and documents); *Grove Fresh Distrib., Inc. v. Everfresh Juice Co.*, 24 F.3d 893, 897 (7th Cir. 1994) (First Amendment presumes a right of access to both proceeding and documents filed with the court); *Hartford Courant Co. v. Pellegrino*, 380 F.3d 83, 93 (2d Cir. 2004) (First Amendment right of access applies to

court docket sheets).

¹⁶*Kamakana v. City and County of Honolulu*, 447 F.3d 1172 (9th Cir. 2006).

¹⁷*Foltz*, 331 F.3d at 1135.

¹⁸*Kamakana*, 447 F.3d at 1179.

¹⁹*Foltz*, 331 F.3d at 1133.

²⁰*Kamakana*, 447 F.3d at 1179.

²¹*Foltz*, 331 F.3d at 1137.

²²*Id.* at 1131 (citing *Deford v. Schmid Prods. Co.*, 120 F.R.D. 648, 653 (D.Md. 1987).

²³*Id.* at 1132.

²⁴*Id.*

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SPECIAL NOTICE

Pursuant to Article III, Section 4, of the Bylaws, the Nominating Committee of the Federal Litigation Section has made the following nomination for the position of Secretary/Treasurer:

William Frank Carroll

Carroll is a shareholder in Winstead P.C. in Dallas, Tx., where he is a member of the Commercial Litigation, Government Enforcement and Regulated Industries and Appellate Practice Groups. He is double board certified by the Texas Board of Legal Specialization in Civil Trial Law and Civil Appellate Law. He is also a commissioner for the Civil Trial Law Exam Commission of the Texas Board of Legal Specialization. Carroll has been an arbitrator for the American Arbitration Association Complex Case Panel for a number of years, and he is also an adjunct professor of law at Southern Methodist University Dedman School of Law, where he has taught antitrust law, complex federal litigation, and trial advocacy. He is a regular instructor at the NITA trial and deposition courses and a frequent speaker at CLE programs. Carroll has also been the co-author of the appellate law and securities arbitration chapters of the American Bar Association's *Developments in Business and Corporate Litigation* for 2003-2007. Carroll is a graduate of the SMU Dedman School of Law and the University of North Texas. He is a member of the Antitrust and Trade Regulation Section (since 1975), the Financial Institutions and the Economy Section (since 2000) and is co-chair of the Federal Litigation Section's Appellate Practice and Law Committee. Carroll has spoken at the FBA Dallas Chapter Federal Practice Seminar for the past 10 years on the topic, "The Local Rules and the 'Local' Local Rules." FBA Member: 32 years.

BALLOT

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