
Vol 27, No.1 February 2014

Table of Contents



# President's Letter

Ronald G. DeWaard, President
Federal Bar Association, W.D. Michigan

Greetings,

Thank you for the opportunity to serve as your President this year. It is an honor to serve in this position where so many other outstanding lawyers have served before and I particularly want to thank Jennifer McManus for the superb job she did during her tenure last year. Jennifer initiated our Young Lawyers Division, which has become a vital part of the organization and she also pioneered our FBA Book Club.

I was struck by the momentous changes our profession has experienced while listening to Judge Janet T. Neff interview Judge Bernice Bouie Donald at our annual meeting. The story of Judge Donald's rise from humble beginnings in Mississippi to her current station as a judge on the U.S. Court of Appeals for the Sixth Circuit was truly inspiring. I was also inspired at our Federal Bar Association's recently completed Hillman Advocacy Clinic, where another crop of newly minted lawyers earnestly participated and learned trial skills at the clinic in the federal court. In the Advanced Section, students deftly integrated electronic evidence into the presentations, which just a few years ago was not even possible. Now, students use technology second-hand and regularly end up teaching their instructors about the capabilities of their own computers. Both of these experiences lead me to believe that, while our profession clearly faces a number of challenges, the Federal Bar can play a very positive role in meeting those challenges. Consistent with that, this year the Federal Bar will continue to both celebrate the history of the profession and keep an eye toward the future.

In particular, we will continue with our Brown Bag series and we have already presented a program on the Bureau of Prisons sentencing classifications. On February 26, Chief Judge Maloney will present a

Continued on next page

next

President's Letter

Continued form page 1

State of the Court Address to the membership. And on March 27, we will again present our annual Supreme Court year-end review.

The FBA Book Club will also continue this year and, on April 30, will be discussing Justice Sotomayor's memoir, *My Beloved World*. Judges Neff, Carmody and Beckering have agreed to participate in the discussion. Later in the summer or early fall, we will discuss the *Autobiography of a Recovering Skinhead*, by Frank Meeink, as told to Jody Roy, Ph.D.

The Young Lawyers Division will also remain active, and has already presented a panel discussion on the transition from public to private practice. By the time you have received this newsletter, the Young Lawyers Division will also have held a "Speed Mentoring" event to help law students with questions about job interviews, choosing a practice area, and the profession as a whole.

Finally, on September 25, 26 and 27, we will hold a Bench/Bar Conference at Mission Point Resort on Mackinac Island. This should be an exciting conference which will include numerous useful programs, as well as the opportunity to meet and visit with practitioners and members of the judiciary. We also hope to use the conference as an opportunity to celebrate the 50th anniversary of the Civil Rights Act and the Criminal Justice Act.

I look forward to working with you and thank you, again, for the privilege of serving as your President this year.

*Ron DeWaard,* President

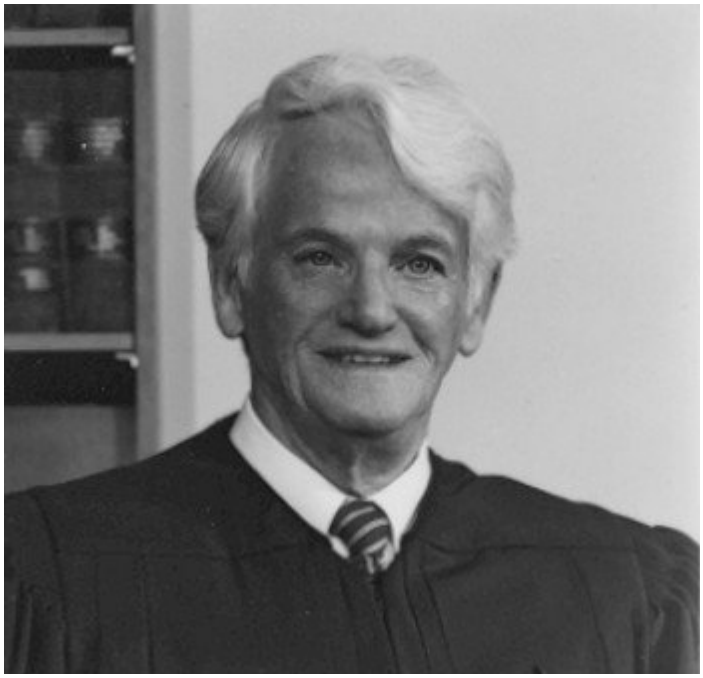



home back next

# Celebrating the Life and Career of the Late Judge Wendell A. Miles

The people of our state, nation, and city lost a dear friend and colleague with the death of retired Judge Wendell A. Miles on July 31, 2013. Judge Miles, who was 97, had an extraordinary and varied life, and devoted almost his entire career to public service of one kind or another, first as a soldier, then a prosecutor, and finally a state and federal judge. Two memorial services were held for Judge Miles, one for friends and family held at Porter Hills in Grand Rapids, and an official ceremony held in Judge Miles' courtroom at the Gerald R. Ford Federal Building.

In the eulogy reprinted below, Magistrate Judge Hugh Brenneman, one of Judge Miles' long-time friends and colleagues, gives a moving and inspiring tribute, offering a window into a few of the many facets of Judge Miles' amazing life.



U.S. District Judge Wendell A. Miles

## Remembering the Extraordinary Life of Wendell Alverson Miles, 1916 - 2013

*Memorial Service at Porter Hills, Grand Rapids, MI*
*August 12, 2013*
*Hon. Hugh W. Brenneman, Jr.*

My first memory of Wendell Miles was his shock of wavy white hair and piercing blue eyes. It was 1974. He was sitting behind his bench in his courtroom in the Grand Rapids Federal Courthouse. I had just come from Washington, D.C. to be an Assistant United States Attorney. I remember peering through the windows of the courtroom door. I felt like a boy sneaking a peek at the principal on the first day of school. Judge Miles was the very image of a federal judge. His demeanor told me it would be a good idea to have my act together when I entered his courtroom.

Judge Miles shared the 4th floor with the court's only other district judge. All five attorneys in the U.S. Attorney's Office were up one flight, and Steve Karr, the magistrate, was on the 6th floor. Those three floors pretty much comprised my legal universe for the next several years. Thus began my association with Judge Miles, first as a judge, later as my boss, and always as a colleague.

I want to thank Judge Miles' children, Lorraine, Michele and Tom, for the privilege of reminiscing about him for a few moments. I see a number of his law clerks and colleagues here tonight. I don't presume to know him as well as many of you who have gathered here to celebrate his life. Indeed, he had lived half his adult life before he and I ever met. Of course, many of his contemporaries who shared those earlier years are no longer with us. That is what happens when you live to be 97. But I am confident those who are not sitting with us this evening have already greeted Wendell in his new home, a place where he and Mariette are happily together again. At best, I can only hope that my remarks may stir some of your memories, and not your recent memories of a frail old man smiling at you as he struggled to walk to his office, but of a passionate younger man, a man of many parts, whose story has many chapters, any one of which we would be proud to call our own.

Continued on next page



home back next

In many ways, I feel like one of those "sidewalk superintendents," walking past a construction site and peering through a hole in the fence to see what is being built. You only catch a glimpse. There is so much you are not privy to. So it was with Judge Miles.

And that is because of the very full life that Wendell Miles chose to lead. He was, of course, nearly a 40-year member of the Grand Rapids Rotary Club; President of the Grand Rapids Torch Club; a 32nd Degree Mason; President of the Holland Board of Education; Chairman of the Republican party's statewide committee to push for Con-Con, the Constitutional Convention of 1963 which ultimately gave us our state Constitution; Vice Chairman of the Michigan Higher Education Commission for a decade; and the first honorary member of the Gerald R. Ford Chapter of the American Inns of Court. He had a B.A. from Hope College, a M.A. from the University of Wyoming, and a J.D. from the University of Michigan Law School, and two honorary law degrees. He received awards too numerous to mention, but one close to the hearts of us in the federal courthouse was the Service to the Profession Award from the Federal Bar Association. But even taken together, all these achievements are but a pale recognition of his real accomplishments.

For, while many of us enjoy reading history (and Wendell did, he was, after all, the Court Historian) and while some teach history (and Wendell did, serving as Distinguished Adjunct Professor of History at Hope College for many years), – while many of us do those things – Wendell Miles, a leader of that which we now call the Greatest Generation, lived much of that history that we have read about. He was a player, usually at the highest level of whatever venue he chose to enter, but regardless, seldom on the sidelines.

To begin, we all know Wendell Miles as a federal district judge. He held this position for over a third of a century. Some would say being a federal district judge is the capstone of a trial lawyer's career. While many attorneys have aspired at one time or another to become a district judge, Wendell Miles accomplished that. He received his lifetime appointment as a United States District Judge on his birthday, when he was 58 years old. He served from 1974 through 2008, 7 of those years as the Chief Judge.

But before he was a federal judge, he was an outstanding trial lawyer. He handled big cases on behalf of utilities like Michigan Consolidated Gas, Michigan-Wisconsin Pipeline; and Trans-Canada Pipeline. He handled a two-year trial involving a $63,000,000 gas storage field on the eastern side of the state (and 50 years ago, $63,000,000 was still real money), while flying across 20 to 30 Michigan counties and chunks of Canada from Alberta to Toronto, in a private plane, rushing to make court hearings in numerous pipeline condemnations disputes, as the natural gas industry began burgeoning throughout the Midwest and Canada.

At the same time, Wendell defended two major corporate officers in an 18-month trial before the 7th Circuit Court of Appeals involving a contempt order of the FTC. 16 men were convicted, but not the two defendants Wendell represented.

Wendell was the first General Counsel for Ferris State College, now Ferris State University, handling all of the litigation for that college for half a decade.

He was also special counsel for the City of Grand Rapids. As special counsel, Wendell Miles tried 5 major condemnation cases that were to change the 19th century face worn by sleepy downtown Grand Rapids. It was this period of urban renewal that cleared the space for our present federal, state, city and county buildings. In several of these trials he went head-to-head with another legendary Grand Rapids trial attorney, Hal Sawyer.

Very few attorneys ever have the opportunity to stand before the United States Supreme Court and argue a case. One is here tonight, Judge Joe Scoville. Wendell Miles was a member of this select fraternity. He argued a one man/one vote case before the U.S. Supreme Court in 1967, in *Sailors v Board of Education of Kent County*.[1]

And so, as one of the premier trial attorneys in the state, it is not surprising that before he was a federal judge, he was a name partner in the prominent law firm of Mika, Meyers, Beckett & Jones. He was there for

Continued on next page

nine years, and the firm was called "Miles, Mika, Meyers, Beckett & Jones."

But before he was a private practitioner, Wendell was a prosecutor; but not just a prosecutor; he was twice the prosecutor, elected three times as the prosecuting attorney of Ottawa County and then appointed by Eisenhower as the United States Attorney – the chief federal prosecutor for all of Western Michigan and the Upper Peninsula. He served 7 years in that position. He said this was the best job he ever had. It was a job designed for a trial lawyer, and Wendell Miles was a perfect fit.

Incidentally, ladies, he was a pioneer of sorts. One of his two assistants was Margaret Cook, only the second female attorney to be hired in the U.S. Attorney's Office. During this time, Wendell had a warm relationship with Federal District Judge Wally Kent, at least outside court. But Judge Kent, it was said, could be quite acerbic on the bench. One day Margaret Cook ran afoul of Judge Kent in court and following the dust-up, Miles did not hesitate to tell Kent off. It would not be the last time Miles would butt heads with a federal judge while defending a colleague or a client or a principle.

In 1960, he resigned as U.S. Attorney to run for Michigan Attorney General. He lost that election, but said it was a gamble he had been prepared to take. That was living life. He was not unemployed long. The very same day he lost, a trial attorney representing Michigan Consolidated Gas in a major civil case dropped dead, and Wendell had a new career.

I have not mentioned all of Judge Miles' courts. While many of us have wondered, perhaps with a touch of nostalgia, what it would be like to be that fixture of Americana, the judge of a rural county court, Judge Miles was that judge for 4 years in the combined Circuit Court for Ottawa and Allegan counties, taking the seat his father, Fred T. Miles, had left two decades earlier.

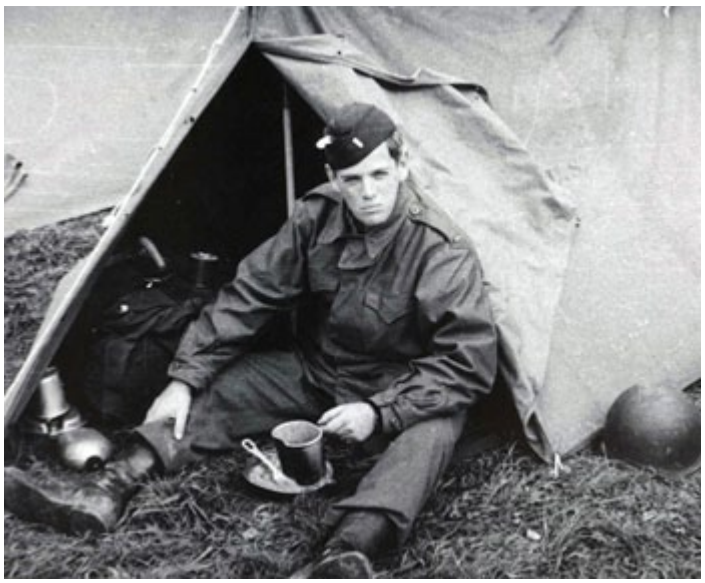
And I know you have recently heard much about America's spy court, a court once so secret that most people did not even know of its existence, fewer yet of its location. It is the Foreign Intelligence Surveillance Court.[2] Wendell was selected to serve on that court for 7 years by the Chief Justice of the United States.[3] He felt very honored by that appointment. The proceedings of that court were so secret that Judge Miles was not even allowed to carry papers in or out of the soundproof courtroom.

It is not that others haven't done some of these same things – we have many accomplished judges and lawyers in the audience – it is that Wendell did them all.

I believe it is self-evident that Judge Miles was a passionate actor in events of his day. But his role in the Greatest Generation does not end there.

Before he was a judge, and before he was a trial attorney, he was a soldier. While my generation has read about World War II, Wendell Miles fought that war, serving in the Army from 1942-1947. He entered a Private and came out a Captain. His first assignment was to interview German Afrika Korps prisoners-of-war at Camp Hood, Texas. He received this task because he had taken two years of German at Hope College. His job was to separate the ardent Nazis from German POWs with more moderate views, and to teach the latter about our political system. He said he was ultimately able to speak fluent German because of coaching he received from a German Wehrmacht sergeant, who had attended Columbia University before the war.

Continued on next page



Judge Miles in the European Theater during World War II

Continued form page 5

Two months after D-Day, Wendell landed in Normandy, as part of General Patton's Third Army. He continued his duties in the European Theater, where he interrogated German POWs immediately after capture, to learn of gun emplacements, the location of German troops, and similar intelligence necessary to save American lives. I have no doubt interrogating German soldiers enhanced his ability to cross-examine witnesses in the years to come. He performed this duty in France, Belgium and later Germany as the Third Army advanced into the Third Reich. Gen. George S. Patton, Capt. Wendell A. Miles – together – in the same army. It is somewhat surprising the Germans were able to resist as long as they did.

On the 20th day of July, 1944, I was in Glasgow, Scotland. It had just been announced that Hitler had been assassinated and there was great joy and celebration. I went into a photo shop and became a Scotsman. Everyone expected the war to be terminated in ten days.

(A note included with the photo.)

One of Wendell's duties was to transport German prisoners of war, many of them hardcore Nazi SS troops, to POW camps here in the States. He made three crossings of the Atlantic doing this. On one return trip to Europe, Wendell took 100 incorrigibles the other way – prisoners from Joliet Prison in Illinois to join the American ranks in Europe. Think: "The Dirty Dozen." Years later, when he stood before Eisenhower in the White House to accept his appointment as United States Attorney, and Ike asked him, "Were you one of my boys?" Wendell could answer yes, and know that because of his wartime experiences, he had already faced down worse criminals than he would find in West Michigan.

After VE Day, Judge Miles was assigned as a JAG officer to try black marketing cases in Marseille. He was later transferred to Strasbourg, Alsace, where he was liaison officer handling U.S. claims. His most successful liaison was winning the hand of the most beautiful French girl in Strasbourg, his beloved Mariette. He even learned French so his future mother-in-law could, and would, speak to him. After all, she had a son in the French Underground, and another with the Free French in North Africa. She was not an easy sell. Through his new family Wendell learned to appreciate the symphony and love the opera. And while Wendell was absorbing the culture of the Old World, Mariette's family was being exposed to the New. When her family saw American troops entering Alsace for the first time, they literally speculated on whether any of the soldiers might be those "Chicago gangsters" that America was so famous for. Ironically, since Wendell had earlier brought over prisoners from Joliet, Illinois, some of them probably were.

After their wedding, Wendell and Mariette moved to Heidelberg, Germany, where he became a law officer in the Third Army's General Court. The couple was provided a

Continued on next page

Continued form page 6

home, a car, a chauffeur and a gardener. Apparently there was no Sequester in those days. They hunted wild boar, rabbits and moose in the Black Forest. There were symphonies. Mariette became pregnant. The dashing young American officer. His beautiful French bride. The old Heidelberg Castle. The Opera. The Black Forest. It was a romance that needed only Sigmund Romberg, to set it to music. Wendell almost made Europe his home, before his father lured him back to West Michigan with the promise of setting up a private practice, Miles and Miles. It was a tough call.

I have been using the name Wendell – probably for the first time in his presence. Whenever we talked, he was always Judge Miles to me. As Sandy Shank, his devoted and long-time assistant who is with the family tonight can tell you, I could never bring myself to address him otherwise. I doubt she could either. After all, he was my father's contemporary. He was the personification of the Greatest Generation, that generation which raised us and protected us. He was the comfortable reminder that despite the passing years, ours was not yet the oldest generation.

Wendell Miles was who he was because he chose to be. This is the point. He was sometimes an observer – he enjoyed watching his Hope College football team beat my Alma College Scots when we would go to a game – but he was usually a doer who participated. Golf. Skiing in the mountains, or up north at the snow bowl on weekends; sailing on Lake Michigan, fishing trips with Wally Kent, or fishing on Lake Superior when he was in Marquette in the summertime. When he was on the bench up there, his clerk would often slip him a note shortly before 5:00 p.m., saying that Capt. Bruce, his fishing boat skipper, was casting off at 5:05 p.m. He would close court in a hurry and run down to the harbor, and they would fish until 10 p.m.

He loved Marquette, and Marquette loved him. Once when he was in Marquette, the Strategic Air Command let him fly in a big tanker that refueled American bombers. That day, the refueling took place over New Orleans, before they returned to Marquette. It reminded him of the times when he had been stationed in Marseille, and would fly to Rome for the weekend, lying in the bomb rack of a U.S. bomber.

Judge Miles in uniform touring Europe after VE Day.

But whether he was playing tennis at 6:30 a.m. with those of us half his age, or parking his car in the sub-basement of the Federal Building so he would have an extra flight of stairs to walk up each morning, he was determined to live life to the fullest, and to the end. He fought to stay healthy and to make the most of every day. He did go to the hospital unexpectedly in April two years ago, but he simply had a pacemaker put in and was back to the office the following Monday. When Dylan Thomas admonished, "Do not go gentle into that good night," he was preaching to the choir as far as Wendell Miles was concerned.

Wendell never lived his life timidly, but embraced it vigorously. His was a life marked by passion, whether it was for his children and grandchildren whom he loved so dearly, the wife he worshiped, or the father he idolized. When he worked, he worked hard, putting in long hours. When he played, he played hard. He was very competitive. When he had to fight, he fought hard and without apology.

And throughout it all, he exhibited a dry (one attorney called it an arid) sense of humor. I recall a sentencing conference in his chambers when I was a young prosecutor. Just as the defense counsel was sitting down – his fanny had not quite touched the seat –

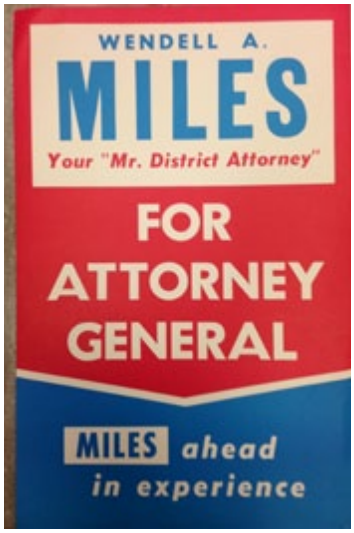

home back next

Judge Miles as U.S. Attorney
1953-1960

Judge Miles said, "Well, it looks like we are going to have to send your boy up the river for life." He said it with such a straight face that the defense attorney didn't even finish sitting, but stood up, rather dejectedly, to leave. Judge Miles was only kidding. Sometimes his conversation seemed circuitous as he would lead you around the barn, occasionally clearing his throat, but he always knew where he was and he always brought it home. He was this way at 58 and at 88. But he could fool you in court, too. If he asked your opponent a lot of tough questions, it was no time to relax. He was leaning in your opponent's favor and just wanted to make sure the other guy's arguments would hold water.

Nor was it a good idea to try to bluff him. Once, a defense attorney flew in from out of town for the day to demand of Judge Miles at a pretrial conference that his defendant receive an earlier trial date. He was trying to pressure the prosecutor, and he told Judge Miles, "My client has a right to a speedy trial." The judge looked him straight in the eye and said, "You're right – we'll start the trial tomorrow morning." The defense counsel quickly back-tracked and asked to withdraw his motion for a speedy trial. Judge Miles said, "Of course you can withdraw your motion. Now that that's done, we'll start the trial tomorrow morning."

Supreme Court Justice Oliver Wendell Holmes, Jr., after whom Wendell Miles was named, famously said in an 1884 speech,[4] "I think that, as life is action and passion, it is required of a man that he should share the passion and action of his time at peril of being judged not to have lived." Namesake Wendell, who thought that Holmes was perhaps the best judge who ever lived, unquestionably internalized that quotation, because he certainly personified it, didn't he?




Few people will accomplish in this life what Wendell Miles did. But duplicating his achievements is not our challenge. Rather, we should try to emulate his uncompromising spirit and zest for life that tells us to never give up, never give in, and take the most out of each day. And should we ever, in the autumn of our years, be tempted to coast "gently into that good night," remembering the life of Wendell Miles should divert us from that path and call to mind the voice of another poet, who said, "I have . . . miles to go before I sleep, . . . miles to go before I sleep."[5]

Judge Miles, thank you and God Bless. ▪

## Endnotes

1 387 U.S. 105 (1967).

2 Created to provide judicial oversight of government's covert surveillance activities of foreign entities.

3 He was appointed by then-Chief Justice William H. Rehnquist.

4 Memorial Day speech, 1884.

5 *Stopping by Woods on a Snowy Evening*, by Robert Frost.

# News from the Clerk

By Tracey Cordes

Greetings, all! As I finalize this missive, I notice that it is again snowing sideways outside my window. Sun lover that I am, it is shocking that "polar vortex" has become such a part of my vernacular. Who knows where we will end up in life!

Our divisional offices have experienced a few weather-related closures this winter but, overall, we are humming along very nicely. In the news:

## The Budget

We have, at last, received our final year appropriation from Congress, i.e. funding for the remainder of the fiscal year. All things considered, we are relieved at the outcome. The omnibus bill provides a 5.1 percent overall increase in discretionary appropriations for the Judiciary: a 4.9 percent increase from FY 2013 for salaries and expenses, a 5.9 percent increase for the Defender Services account, and a 5 percent increase for the Court Security account. While this is better news than expected, this funding, measured against sequestration cuts, really means that Judiciary funding has been relatively flat since FY 2010. Also, inflationary pressures and cost growth in areas such as rent and employee benefits means that our final funding will not represent a restoration of most FY 2013 cuts to salary and operating costs. Again, however, news has been, and could have been, much worse.

We will continue to assess cost-reduction measures this year. Specifically, our district is joining federal courts around the country in considering how we might reduce our physical foot print and thus reduce the considerable amount that the Judiciary pays in rent. This exercise, when balanced against the need to plan for future space needs, is proving challenging, but everyone in all corners of our system is rolling up their sleeves and contributing to the effort.

My final message on this topic is one of gratitude. Many practitioners and bar associations in our district and around the country have reached out to elected officials to offer a "front lines" view of the impact of sequestration on our courts. Your voices were clearly heard. Thank you.

## The Hillman Program

The Hillman Trial Skills Program for 2014 has just wrapped up and all agree that this collaborative effort has again been a resounding success. Sixty-two lawyers registered for the introductory and advanced sessions. As a bonus, 15 law students served as "jurors" thus enhancing their experience in learning the "ins and outs" of the profession.

## New Judicial Officers

The process of selecting two new Bankruptcy Judges is nearing a close. I expect an announcement at any time–perhaps even before this missive arrives at your door. The current judges and staff eagerly await word of who will share in the next leg of our Bankruptcy Court's journey.

The selection process is also underway to fill the seat being vacated by District Court Magistrate Judge Joseph Scoville. The application period closed on December 3, 2013, and initial interviews are scheduled for mid-February. The goal is to have a new magistrate judge named prior to Judge Scoville's departure on July 31, 2014.

## Let's Look at the Numbers

A total of 73,208 cases have been filed electronically in our district, 41,841 of which are civil cases (this includes *pro se* filings).

Over a million documents are stored in our CM/ECF system–1,099,832, to be precise. The majority–854,292–have been filed in civil cases. Imagine the storage space that would be required if we still dealt with paper!

The number of attorneys who are registered to use our CM/ECF system total 9,919, although only 6,712 have actually utilized their access by filing documents.

Best wishes, everyone! ▪

# Why "Other Things of Value" Matter: A Brief Discussion of *UNITE HERE v. Mulhall*

By Nicholas M. Ohanesian[1]

## Introduction

*UNITE HERE v. Mulhall*[2] is a case that was until recently pending before the United States Supreme Court on a petition for certiorari from the United States Court of Appeals for the 11th Circuit. The question presented is an obscure bit of statutory interpretation that may drastically expand criminal and civil liability for employers and labor unions in the field of labor relations. It also presents a case study in statutory interpretation. Oral arguments were held on November 13. While the cert petition was ultimately dismissed as improvidently granted on December 10, 2013, the issues underlying the case remain and may eventually find their way back before the Supreme Court.[3]

## Facts

On August 23, 2004, UNITE-HERE Local 355, a labor union, entered into an agreement with Mardi Gras Gaming located in South Florida whereby UNITE would spend $100,000 to support a casino gaming ballot initiative favored by Mardi Gras and in return Mardi Gras entered into a card check neutrality agreement with UNITE. A card check neutrality agreement typically requires an employer to recognize a union as the exclusive collective bargaining representative upon being presented with evidence that the union represents a majority of the employees of the employer. As part of this agreement the employer typically agrees to not campaign against the union and provide some form of access to their employees. This process bypasses the National Labor Relations Board, the federal agency responsible for regulating private sector labor relations and the traditional method by which a union would seek a secret ballot election to represent the employees of an employer.

Under the card check agreement in the instant case Mardi Gras agreed to provide UNITE with the addresses of its employees and access to the same in non-public locations on the premises of the employer. Mardi Gras also promised not to campaign against UNITE and agreed to grant recognition to UNITE if and when they presented evidence that they represented the majority of the employees of the employer. UNITE also agreed not to engage in picketing activity against Mardi Gras. A dispute between Mardi Gras and UNITE arose over the terms of the agreement and arbitration ultimately ensued.

## The Lawsuit

Robert Mulhall is an employee of Mardi Gras that UNITE is seeking to represent through the neutrality agreement. Mulhall filed suit in the Southern District of Florida against Mardi Gras and UNITE alleging that the agreement between Mardi Gras and UNITE violated Section 302 of the Labor Management Relations Act, commonly known as the Taft Hartley Act. The District Court originally dismissed the case on the basis of standing, only to be reversed on this point by the Eleventh Circuit. Upon remand the District Court found that the agreement between UNITE and Mardi Gras did not implicate Section 302. The Eleventh Circuit again reversed the District Court in a 2-1 decision finding the agreement in question could fall within the scope of Section 302 noting it was necessary to look at the intent of the parties. This conclusion is at odds with the two other Circuits that have addressed this question.[4] UNITE filed a petition for certiorari, which was ultimately granted on the following question:

> Whether an employer and union may violate § 302 by entering into an agreement under which the employer exercises its freedom of speech by promising to remain neutral to union organizing, its property rights by granting union representatives limited access to the employer's property and employees, and its freedom of contract by

Continued on next page



home back next

obtaining the union's promise to forego its rights to picket, boycott, or otherwise put pressure on the employer's business.

## Section 302

Section 302 of the Labor Management Relations Act was enacted in 1947 as part of the first major reforms of the National Labor Relations Act originally passed in 1935.[5] Section 302, along with its companion sections 301 and 303, marked a reversal by Congress of a trend towards excluding federal courts from the field of labor relations.[6]

Section 302 makes it a crime "for any employer * * * to pay, lend, or deliver, or agree to pay, lend, or deliver, any money or other thing of value * * * to any labor organization, or officer or employee of such an organization, that represents or seeks to represent the employer's employees."[7] The statute also makes it a crime for a labor union "to request, demand, receive, or accept, or agree to receive or accept, any payment, loan, or delivery of any money or other thing of value prohibited by subsection (a)."[8] There are several exceptions provided in Section 302, none of which are implicated here.

## The Arguments

### *Plain meaning*

Mulhall's argument comes down to the plain meaning of Section 302. He contends that UNITE spent $100,000 to campaign for a state ballot initiative on behalf of Mardi Gras. Mardi Gras was then required to tender the addresses of employees, permit union organizers access to their facilities, not campaign against UNITE, and finally recognize the union upon being presented with proof of majority status. The lynchpin in the eyes of Mulhall is that the benefits tendered to UNITE constitute an "other thing of value". To support this argument Mulhall notes that Congress has generally used this phrase to cover tangible as well as intangible assistance.[9] Also of significance is that the assistance provided to UNITE does not fall within any of the exceptions contained in Section 302.

### *Legislative Intent*

UNITE and the United States, as amicus, essentially argue that the legislative intent of Section 302 and the larger structure of federal labor law places the conduct at issue in the present case beyond the scope of Section 302. The Courts have construed Section 302 as an anti-corruption measure designed to prevent the corruption of and extortion by union officers.[10] In the eyes of UNITE and the United States, Mulhall has not plead any allegations to show the required corruption of UNITE or extortion by the same. It is also noted as an overarching goal of federal labor law is to promote the voluntary adjustment of disputes between labor organizations and employers. This goal would be thwarted by the construction of 302 urged by Mulhall. As support for this argument, it is noted that federal courts have asserted jurisdiction to enforce card check neutrality agreements under Section 301, which vests federal courts with jurisdiction over claims of breach of collective bargaining agreements.[11]

### *Structure*

To rebut Mulhall's argument concerning "other things of value" covering the card check and neutrality agreement at issue, UNITE and the United States draw upon the larger structure of federal labor relations. The strongest argument on this point is that voluntary recognition by an employer predates passage of the National Labor Relations Act in 1935 and every amendment passed thereafter including Section 302 as part of the Labor Management Relations Act. It then stands to reason that if Congress was interested in outlawing this practice it would have done so in a more explicit manner. It is also argued that if the construction of 302 sought by Mulhall were found, it would call into question many long accepted norms of collective bargaining agreements between employers and unions, such as providing unions with access to company bulletin boards or allowing union access to company email systems. It is also worth noting that the National Labor Relations Board requires employers to turn over lists of their employees to unions during the pendency of an NLRB supervised election. Adoption of Mulhall's construction would also render the NLRB's practice in this area unlawful.

Continued on next page

## Cert Dismissal

On December 10, 2013 the Court dismissed the cert grant in Mulhall on the basis it was improvidently granted. While the order did not reveal the reasons for the dismissal, the dissent authored by Justice Breyer and joined by Justices Sotomayor and Kagan offers some insight. The first reason is mootness as the agreement between UNITE HERE and Mardi Gras expired in 2011 prior to the Eleventh Circuit reaching its most recent decision. The second reason is that Mulhall, as the sole plaintiff in the case, may have lacked standing under Article III. This is because Florida is a right to work state and thus Mulhall could not be required to join the union or pay dues. These issues are compounded by the fact that the case was in an interlocutory posture and thus lacked a solid record to consider. Finally, Justice Breyer noted that there is a fundamental question whether Section 302 creates a private right of action in the first place. While the Court previously found this to be the case in 1962, more recent jurisprudence suggests the Court has drifted away from readily finding implied private rights of action, rendering its earlier determination suspect.[12]

## Predictions

While this case is now off of the Supreme Court's docket, the circuit split remains with an almost near guarantee that the issue of whether a private right of action exists under Section 302 will be added into the mixture going forward. Assuming the procedural hurdles posed in Justice Breyer's dissent are passed, the question facing the trial court on remand will be how to effectuate the Eleventh Circuit's command to examine the intent of the contracting parties in circumstances where the statute is silent on the issue. ▪

## Endnotes

1 Nicholas M. Ohanesian currently serves as an Administrative Law Judge with the Social Security Administration in the Grand Rapids hearing office. Prior to being named as an administrative law judge he served as an attorney for the National Labor Relations Board In Peoria, Illinois and later as the head of the Jacksonville, Florida office. The views expressed by author are his alone and do not reflect the views of the United States Government, the National Labor Relations Board, or the Social Security Administration.

2 *Mulhall v. UNITE HERE Local 355*, 667 F.3d 1211 (11th Cir. 2012), cert. granted 570 U.S. ____ (June 24, 2013)

3 *UNITE HERE Local 355 v. Mulhall*, 571 U.S. _____ (2013) (December 10, 2013)

4 *Hotel Employees & Restaurant Employees, Local 57 v. Sage Hospitality Resources, LLC*, 390 F.3d 206, 219 (3d Cir. 2004) cert. denied, 544 U.S. 1010 (2005); *Adcock v. Freightliner LLC*, 550 F.3d 369 (4th Cir. 2008)

5 29 U.S.C. 186

6 Cf. 15 U.S.C. Sec. 17 (Clayton Act) (exempting labor disputes from coverage under the Sherman Anti-Trust Act); 29 U.S.C. Sec. 101 (Norris LaGuardia Act) (restricting the availability of federal court injunctive relief in most labor disputes)

7 29 U.S.C. 186(a)(2)

8 29 U.S.C. 186(b)(1)

9 *United States v. Nilsen*, 967 F.2d 539, 542 (11th Cir. 1992)

10 *Arroyo v. United States*, 359 U.S. 419, 425-426 (1959)

11 *Hotel Emps., Rest. Emps. Union, Local 2 v. Marriott Corp.*, 961 F.2d 1464, 1467- 1470 (9th Cir. 1992)

12 Compare *Sinclair Refining Co. v. Atkinson*, 370 U. S. 195, 205 (1962) (finding an implied right of action in dicta), overruled in part on other grounds, *Boys Markets, Inc. v. Retail Clerks*, 398 U. S. 235, 237–238 (1970) with *Alexander v. Sandoval*, 532 U. S. 275, 286–287 (2001) (setting a high bar for finding an implied right of private action).

# The Power of Practicing the Fundamentals

By Ronald G. DeWaard[1]

Professional musicians still play the scales. Major league baseball players regularly hit baseballs off tees. Yet when trial lawyers think about "practice," we generally associate it with full rehearsals of opening and closing statements, or as scrimmages staged for mock juries and focus groups. While doing a full-blown dry run is obviously a useful exercise, there is a more elementary type of practice that is also effective—both for the novice and the seasoned trial lawyer—which involves practicing the fundamentals. Not unlike playing the scales or hitting off the tee, practicing basic phrases, techniques, and key portions of presentations will create the muscle memory that will not only polish your performance but also help you think more quickly under fire.

## Free Your Mind to Think

As Brian Johnson and Marsha Hunter explain in their book *The Articulate Advocate,* persuasive advocacy in trial is ultimately a motor skill.[2] Because of that, mere mental preparation for trial has its limitations. Some preparation should engage all the muscles and motor skills involved in active persuasion. By deliberately practicing concrete trial tasks, you can develop the muscle memory necessary to make them repeatable under pressure. However, the benefits do not end there.

Trial lawyers, like musicians and baseball players, are engaged in a complex endeavor that requires high-level thought and decision making while performing certain motor skills under pressure. Practicing fundamental tasks so they become rote allows the mind freedom to focus on more complex tasks under the stress of performance. In fact, it has been suggested that rote practice and conceptual thinking can feed synergistically on each other, leaving the brain capacity for tasks requiring the most creativity.[3] Being able to think on your feet in the cauldron of trial is a goal of every trial lawyer. Fortunately, there are "practice tees" and "scales" for trials that can move you toward that ideal.

## Develop and Practice Your Own Toolkit of Basic Trial Phrases

Every trial will predictably require the use of certain phrases and statements, such as those needed when introducing evidence and making objections. These moments can offer an opportunity for a show of confidence to the judge and jury. However, the opposite image is projected when these phrases are stumbled over or mumbled. If you have limited trial experience, it would be beneficial to plan how you will phrase these types of statements and then practice them in advance of trial. Practicing such statements forces you to choose the most persuasive wording, emphasis, and inflection and will keep you from being distracted by such details during the trial. For example, when introducing evidence, you may decide you will say, "Your Honor, Acme Corporation moves for the admission into evidence of Exhibit 1 for identification." If you say this phrase a number of times, your mind and body will remember how to place the emphasis so you are making a confident statement instead of one that sounds like you are begging the court to allow you to do something. Having practiced the phrase, you will also avoid interrupting your thought process during your examination to deliberate over the manner in which you will introduce evidence. You will look and feel confident. It will be a point scored.

It is not difficult to imagine the various stages of the trial to glean the phrases you will need for your toolkit. For instance, in the previous example, you could expand the practice exercise to include a request to approach the witness, the movement of showing the proposed exhibit to opposing counsel, and a request to the court to show the exhibit to the jury after it has been admitted. Other examples could include practicing how you intend to introduce yourself and your client to the jury, how you are going to call a witness to testify, how

Continued on next page



home back next

Continued from page 13

you will conclude your questioning of a witness, and how you will phrase basic objections in a confident and poised manner.

Practicing these could be as simple as writing or visualizing the particular phrase and then repeating it until you are comfortable with how it sounds and feels. The more phrases and steps you can anticipate and practice before trial, the better your presentation and flow will be when you are under pressure.

## Practice Basic Trial Techniques

Nearly every trial will present the opportunity to employ certain basic techniques that can be practiced in advance. An excellent example of this is impeachment, which even experienced trial lawyers can benefit from practicing. Impeachment with a prior inconsistent statement presents one of the greatest opportunities for advocacy and drama in a trial. However, that opportunity fades with a bungled impeachment, which can happen quickly with an uncooperative witness.

Impeachment requires proper technique to be truly effective. The clarity and gravity of the contradiction must be laid bare for the jury while not giving the witness any opportunity for escape or explanation.

The difficulty with preparing for a specific impeachment, though, is that it is not possible to know in advance with any certainty how witnesses might contradict themselves at trial. While mastery of the facts of your case—as well as making some educated guesses—is good preparation, it is not sufficient. What you can and should practice is the technique you will use to impeach so you have it ready to roll at trial.

While the art of cross-examination is a lengthy subject unto itself, the form of a basic impeachment can be practiced and mastered. A tried and true method employs the three Cs: *confirm* the statement made on direct, *credit* the circumstances of the previous inconsistent statement (e.g., it was made in a deposition or a report), and *confront* the witness with the inconsistency.

There are a number of outstanding articles and resources on different phrasing that can be used to set up those elements of the impeachment. However, once you settle on the words you want to use, the technique is nearly universal because most of the statements leading up to the drama—such as when you reinforce the reliability of the previous statement—do not change with the subject matter. You can have at the ready numerous short foundational questions on cross-examination to underscore testimony given at a deposition (e.g., "There was a court reporter there, you raised your right hand, you gave an oath, and you swore to tell the truth. . ."). Thus, once you decide how to proceed with your impeachments, you can practice them using simple hypothetical scenarios.

For instance, you can practice impeachment by creating a contradiction in the anticipated testimony in your own case or by using something as simple as a red light/green light contradiction. The substance of the practice session is not that relevant because the essential setup and phrasing remain fundamentally the same. Once again, practicing forces you to not only choose language for the form you want to use, but also trains the muscles of your mouth and voice for maximum persuasive effect. You will learn to create a dramatic moment before you are under fire. Moreover, just like the music scales and the practice tee, even experienced trial lawyers, who may not be in court every day, can benefit from a basic run-through of an impeachment before trial. It is a simple way to shake off the rust.

Another example of a technique that can be practiced in advance of trial is the cadence of cross-examination. One of the most difficult things to teach students in a trial practice seminar is not the substance of a leading question, but the manner in which a leading question must be asked. When done correctly, such a question is, in reality, not a question at all but a statement by the questioner to which the witness is compelled to assent. Apart from the substance, the phrasing of such statements is generally short. Emphasis must be placed on key words with the inflection at the end of the statement descending instead of ascending. When the inflection rises at the end of the statement, the unintended

Continued on next page

Continued from page 14

result is that it sounds like an invitation to the witness to testify—the death knell of a good cross-examination.

The proper cadence of truly leading cross-examination questions can be practiced quickly and effectively. Think of an irritated parent remonstrating the prodigal son: you don't *call*; you don't *write*; we *never* hear from you, do we? Those statements (minus the irritated tone, of course) demonstrate the proper cross-examination cadence because a parent would never say the statements in such a way that would invite an explanation. The parent allows no response other than agreement. The emphasis is on the italicized words, and the inflection descends rather than ascends at the end of the statement. This drill can be practiced with random phrases to get the feel for the rhythm and cadence of cross-examination. By practicing beforehand, that rhythm and cadence will come naturally at trial because your body and mind internalize it, helping you to focus on the substance of your cross-examination rather than the cadence of your delivery.

## Focus on Key Phrases and Transitions in Practicing Openings and Closings

It is, of course, worthwhile to practice your complete opening and closing in advance. Focus on the words you will use at the beginning, in key transitions, and at the end. Memorizing whole performances or attempting to read them does not make for effective public speaking. Again, the deliberate practice of key phrases and the structure of your presentation will free up your mind so you can think as you speak.

## You Have Time for Practice

Another advantage of most of the practice techniques suggested here is that you have time for them. While too much precious trial preparation time can be spent on written materials juries will never see, such as motions in limine, trial briefs, and detailed pretrial orders, the described techniques won't consume large chunks of your work day. The exercises can be effectively accomplished away from work—driving in your car, riding in the elevator, or as a replacement to singing in the shower. In fact, this type of practice can be a constructive alternative to some of the fretting you may be doing while trying to anticipate every strategy the opposition *might* come up with at trial. These things *will* come up at trial; practicing them can help free your mind to handle everything else that may. ▪

## Endnotes

1 Ronald G. DeWaard is a civil and white-collar criminal trial lawyer. He is a past chair of the Hillman Advocacy Program and serves as President of the Federal Bar Association for the Western District of Michigan for 2014. He has taught trial advocacy for the National Institute for Trial Advocacy, the Department of Justice, and the Hillman Advocacy Program. He was previously an assistant United States attorney in Miami and is currently a partner at Varnum.

2 Johnson & Hunter, *The Articulate Advocate* (Phoenix: Crown King Books, 2010), pp 136–170.

3 Lemov, *Practice Makes Perfect—And Not Just for Jocks and Musicians,* The Wall Street Journal, October 26, 2012; see also Lemov, Woolway & Yezzi, *Practice Perfect: 42 Rules for Getting Better at Getting Better* (San Francisco: Jossey-Bass, 2012).



home back next

# The Current Proposed Amendments to the Federal Rules – Much Ado About Nothing?

By Jonathan Moore[1]

## Introduction

The current package of proposed amendments[2] to the Federal Rules of Civil Procedure has elicited considerable criticism, especially among the plaintiffs' bar, which sees these amendments as disproportionately favoring the interests of large businesses and governments at the expense of individuals. Since the package's release last August, the overwhelming majority of the written comments submitted have opposed the amendments, largely from individuals and entities self-identified as predominately representing plaintiffs.[3] In a nutshell, these critics charge that by seeking to limit the scope (and costs) of discovery, the proposed amendments will make it even more difficult for the "Davids" of the world to take on corporate and governmental "Goliaths" in civil litigation.[4] This package of proposed amendments grew out of a discussion that began at a conference at Duke University in 2010 on the perceived need to reign in the excessive costs of electronic discovery.

From the controversy they have sparked, one might expect the proposed amendments to contain bold and sweeping pronouncements of fundamental changes. But careful examination reveals a fairly modest set of revisions that primarily clarify existing principles, tempered by imposition of exceptions and the retention of considerable judicial discretion. Nevertheless, although the proposed amendments may not substantially alter the playing field for federal litigants, they do indicate an increased desire to reduce the burdens and expense of discovery in civil cases.

## Summary of the Key Proposed Amendments

In addition to the mundane "mop up" revisions to Rules 16 and 26 regarding the meet-and-confer process, time for service, and issuance of scheduling orders, the key amendments in the August 2013 package include:

(1) changes to the scope of discovery in Rule 26; (2) the adoption of a new set of guidelines for imposition of certain "serious sanctions" in Rule 37; (3) the reduction of presumptive limits on the number of interrogatories and depositions, and introduction of a limit on the number of requests for admission in Rules 30, 31, 33, and 36; (4) a new requirement of greater specificity in responding parties' objections to requests for production; and (5) the application to parties of the obligation to seek the "just, speedy, and inexpensive determination" of every case in Rule 1.

### *Scope of Discovery (Rule 26)*

Although the proportionality language in the proposed amendment to Rule 26(b)[5] has attracted a lot of attention, the actual changes are more form than substance. The scope of discovery under the current Rule 26(b)(1) is already expressly subject to the proportionality requirements of Rule 26(b)(2)(C). Although that provision does not specifically refer to "proportionality," it nevertheless embodies the same principle as reflected in the proposed amendment, and even uses the same language. Thus, at most the proposed amendment merely converts proportionality from a condition subsequent to a condition precedent, with no difference in ultimate effect. Proponents concede that there is no substantive difference here but nevertheless maintain that moving the proportionality requirement up from where it is currently buried will encourage courts and litigants to apply it more often.

Similarly, the elimination of the "reasonably calculated" language from the current Rule only makes a difference for the subset of judges and litigants that were previously misinterpreting it. Properly understood, the existing rule does not permit discovery of nonrelevant information that is "reasonably calculated to lead to the discovery of admissible evidence." The sole purpose of

this language was to clarify that admissibility is not a prerequisite for discovery as long as what is sought is relevant. Although the proposed amendment certainly makes this distinction clearer than the current rule, it does not create a different standard.

The most significant apparent change in the proposed amendment to Rule 26 is the elimination of the opportunity to broaden the scope of discovery beyond the parties' claims and defenses to matters "relevant to the subject matter involved in the action." If adopted, the new rule would clearly limit the scope of relevance to the actual claims and defenses asserted in the litigation. In reality, however, this amendment is of little, if any, practical effect. This provision has had almost no impact on civil litigation and has rarely been litigated since it was added in the 2000 amendments. Given the prevailing broad construal of relevance, and the inherent difficulties of discerning what exactly could be relevant to the "subject matter" that is not made relevant by the parties' claims and defenses, the proposed amendment's removal of this second tier of relevance is of doubtful importance. Despite the urging of many commentators and contributors, the Rules Committee has so far declined to add a "materiality" requirement to Rule 26(b)(1), which would impose a much more substantial limit on the scope of discovery than the current proposed amendment . Nevertheless, this proposed change could provide some additional ammunition for responding parties to challenge broad discovery requests.

### *Guidelines for Spoliation Sanctions (Rule 37)*

Focusing on simply the text, the new proposed Rule 37(e) certainly marks a dramatic departure from the current rule.[6] In place of the seldom-applied "safe harbor" for routine, good-faith loss of electronically stored information, the new Rule 37(e) sets forth an elaborate set of guidelines for courts to apply in responding to spoliation motions. And it purports to impose a clear limit on the availability of "serious sanctions" for the loss of discoverable information. But the exceptions and certain aspects of its wording threaten to mitigate its effectiveness in accomplishing its stated objective, as recited in the committee note to the proposed amended rule, of "ensur[ing] that potential litigants who make reasonable efforts to satisfy their preservation responsibilities may do so with confidence that they will not be subjected to serious sanctions should information be lost despite those efforts."

On the one hand, the proposed rule's limiting of serious sanctions "only" to cases in which the court finds either (A) substantial prejudice plus willfulness or bad faith, or (B) irreparable deprivation of a meaningful opportunity to present or defend against claims would certainly limit the court's power considerably.[7] On the other hand, however, the effectiveness of the proposed rule is limited because the restrictions imposed in Rule 37(e)(1)(B) only apply to imposition, under the Rules, of a "sanction," narrowly defined, and do not restrict the court's power to order "curative measures," to permit additional discovery, or order a party to pay the other party's expenses, including attorney's fees – all of which may have the same practical bottom-line effect of a "sanction" award simply without that label. The court's considerable discretion and freedom to order broad remedies to counterbalance the effects of lost or destroyed evidence through "curative measures" thus mitigates against any incentive towards "sloppiness" in preservation that some critics of the proposed amendment have interposed.

Nevertheless, the language of the proposed amendment creates considerable uncertainty about how it will be applied. Several commenters have criticized the rule's inclusion of "willfulness" as an alternative to a finding of bad faith, noting the manifold definitions that have been used for that term, including nonmalicious inadvertent actions and omissions.[8] In particular, critics have noted that ordinary operation of an information system or following general document retention policies and procedures could be deemed "willful" despite there being no intention to destroy relevant information.[9] Additionally, although the committee notes indicate that the "irreparable deprivation" prong of proposed Rule 37(e)(1)(B)(ii) is designed only to apply in rare cases in which the information lost is the key evidence at the heart of the case,[10] the language of this provision could

Continued on next page

permit courts to apply it more broadly. The nonexclusive and nonbinding set of factors provided in proposed Rule 37(e)(2) have also been criticized as vague, incomplete, and ill-suited to guiding the court in making the determinations required under Rule 37(e)(1).

### *Presumptive Limits (Rules 30, 31, 33, and 36)*

The aspect of the proposed amendments that has received the most criticism, especially from plaintiff-leaning commenters, is the reduction in the presumptive limits on discovery devices provided in Rules 30, 31, 33, and 36. The current package, if adopted, would reduce the presumptive limits for each party with respect to (1) the number of oral depositions – from 10 to 5;[11] (2) the number of written depositions – from 10 to 5;[12] and (3) the number of interrogatories – from 25 to 15.[13] It would also add a new presumptive limit of 25 on the number of requests for admission by each party;[14] and would cut the presumptive time limit for oral depositions from 7 hours to 6 hours.[15] It is important to note, however, that these remain presumptive limits only, and the court retains discretion to permit additional discovery in appropriate cases.

### *Responses to Requests for Production (Rule 34)*

Included in the package of proposed amendments are provisions in Rule 34 requiring greater specificity with respect to objections.[16] Specifically, the proposed amendment would require the responding party (1) to state the grounds for objecting to the request with specificity; (2) to state a specific "reasonable" deadline for completing production of documents, if the responding party will be producing copies rather than permitting inspection; and (3) to "state whether any responsive materials are being withheld on the basis of that objection." The purposes of these provisions are to eliminate boilerplate objections, to clarify the timing of production, and to force responding parties to identify the practical effect of its objections on the set of documents they are producing. No longer will parties be able to rely on "black box" objections and then simply produce documents subject to their objections generally, leaving the requesting party guessing as to whether documents have been withheld. Note, however, that there is no requirement to quantify the number or volume of materials that have been withheld or to provide further identification of the nature of the documents not provided. As a practical matter, then, parties may simply tack onto the end of every objection a boilerplate statement that "documents have been withheld on the basis of this objection." In sum, while the proposed amendments to Rule 34 will certainly change some of the mechanics in how parties draft responses to discovery requests, it may simply result in a different "checklist" that one must follow in preparing discovery responses.[17]

### *Cooperation (Rule 1)*

Although known as the "cooperation" rule, the proposed amendment to Rule 1 notably does not use that word.[18] Earlier drafts of the proposed amendment included express reference to "cooperation" and featured a more robust requirement of cooperation among litigants, but ultimately the Rules Committee removed that language, leaving a more stripped-down, basic aspirational statement of the obligation of "the parties" to seek the "just, speedy, and inexpensive determination of every action and proceeding."

## What's Next?

Public comment period ends February 15, 2014. To the extent the Rules Committee makes modifications in response to public comments, a revised package will be presented to the Standing Committee, most likely at its June 2014 meeting, followed by review by the Judicial Conference in September 2014. If approved by the Supreme Court, then a final set will be transmitted to Congress no later than May 1, 2015.[19] The amendments will then become effective on December 1, 2015, unless Congress enacts legislation to reject, modify, or defer them – a step that Congress has rarely taken and that the current state of deadlock in Washington makes unlikely.

Continued on next page

## Conclusion

While certainly not "much ado about nothing," the current proposed amendments to the Federal Rules of Civil Procedure entail changes that are not nearly as dramatic as the controversy that they have engendered would suggest. They do, however, represent an important step in development of rules that will help guide litigants and courts to reduce the burdens and expense involved in civil discovery. ▪

## Endnotes

1 Jonathan Moore is a partner in the Grand Rapids office of Warner Norcross & Judd LLP, and specializes in securities and shareholder litigation, automotive and supply-chain litigation, and electronic discovery. Mr. Moore is a co-author of the chapter on e-discovery in ICLE's Michigan Civil Procedure treatise. He can be reached at jmoore@wnj.com or (616) 752-2126.

2 The full text of the package of proposed amendments may be found at http://www.uscourts.gov/RulesAndPolicies/rules/proposed-amendments.aspx.

3 The submitted written comments on the proposed package may be found at http://www.regulations.gov/#!docketDetail;D=USC-RULES-CV-2013-0002.

4 See 11/7/13 Hr'g Tr. at 25, available at http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/public-hearings/civil-hearing-transcript-2013-11-07.pdf.

5 The relevant text of the proposed amendment to Rule 26(b)(1) is as follows:

(1) Scope in General. Unless otherwise limited by court order, the scope of discovery is as follows: Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense **and proportional to the needs of the case, considering the amount in controversy, the importance of the issues at stake in the action, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit. Information within the scope of discovery need not be admissible in evidence to be discoverable.** ~~—including the existence, description, nature, custody, condition, and location of any documents or other tangible things and the identity and location of persons who know of any discoverable matter. For good cause, the court may order discovery of any matter relevant to the subject matter involved in the action. Relevant information need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence. All discovery is subject to the limitations imposed by Rule 26(b)(2)(C).~~

6 The relevant provisions of the proposed amendment to Rule 37(e) are as follows:

~~(e) Failure to Provide Electronically Stored Information. Absent exceptional circumstances, a court may not impose sanctions under these rules on a party for failing to provide electronically stored information lost as a result of the routine, good-faith operation of an electronic information system.~~

**(e) Failure to Preserve Discoverable Information.**

**(1) Curative measures; sanctions. If a party failed to preserve discoverable information that should have been preserved in the anticipation of or conduct of litigation, the court may:**

**(A) permit additional discovery, order curative measures, or order the party to pay the reasonable expenses, including attorney's fees, caused by the failure; and**

**(B) impose any sanction listed in Rule 37(b)(2)(A) or give an adverse-inference jury instruction, but only if the court finds that the party's actions:**

**(i) caused substantial prejudice in the litigation and were willful or in bad faith; or**

Continued on next page

**(ii) irreparably deprived a party of any meaningful opportunity to present or defend against the claims in the litigation.**

**(2) Factors to be considered in assessing a party's conduct. The court should consider all relevant factors in determining whether a party failed to preserve discoverable information that should have been preserved in the anticipation or conduct of litigation, and whether the failure was willful or in bad faith. The factors include:**

**(A) the extent to which the party was on notice that litigation was likely and that the information would be discoverable;**

**(B) the reasonableness of the party's efforts to preserve the information;**

**(C) whether the party received a request to preserve information, whether the request was clear and reasonable, and whether the person who made it and the party consulted in good faith about the scope of preservation;**

**(D) the proportionality of the preservation efforts to any anticipated or ongoing litigation; and**

**(E) whether the party timely sought the court's guidance on any unresolved disputes about preserving discoverable information.**

7 *E.g.*, *G. Heileman Brewing Co. v. Joseph Oat Corp.*, 871 F.2d 648, 652 (federal court "may not exercise its inherent authority in a manner inconsistent with rule or statute" and such power "should be exercised in a manner that is in harmony with the Federal Rules of Civil Procedure") (quotation omitted).

8 *See, e.g.*, Black's Law Dictionary 1737 (9th ed. 2009) (defining "willful" as "[v]oluntary and intentional, but not necessarily malicious").

9 *See, e.g.*, 11/7/13 Hr'g Tr., *supra*, at 38.

10 The prime illustration is *Silvestri v. GM*, 71 F.3d 583 (4th Cir. 2001), in which the vehicle that was the subject of the plaintiff's defects claims had been altered so that no inspection could be made regarding the defect.

11 Rule 30(a)(2)(A)(i).

12 Rule 31(a)(2)(A)(i).

13 Rule 33(a)(1).

14 Rule 36(a)(2).

15 Rule 30(d)(1).

16 The relevant text of the proposed amendment to Rule 34 is as follows:

(B) *Responding to Each Item*. For each item or category, the response must either state that inspection and related activities will be permitted as requested or state **an objection to the request the grounds for objecting to the request with specificity**, including the reasons. **The responding party may state that it will produce copies of documents or of electronically stored information instead of permitting inspection. The production must then be completed no later than the time for inspection stated in the request or a later reasonable time stated in the response.**

(C) *Objections.* **An objection must state whether any responsive materials are being withheld on the basis of that objection**. An objection to part of a request must specify the part and permit inspection of the rest.

17 The application of this requirement to the realities of our computer-based environment raises further questions, however. Although the committee note adds the clarification that a statement of the "limits that have controlled the search for responsive and relevant materials qualifies as a statement that the materials have been withheld," it does not provide any guidance on the degree of specificity necessary to effectively state the "limits that have controlled the search." Whereas this might be rather easy with respect to a straightforward traditional keyword search, it may be more complicated when dealing with application of proprietary predictive coding software. Past experience would suggest, however,

that litigants will quickly develop standard boilerplate summary statements to satisfy the minimum requirements of this rule.

18 The relevant text of the proposed amended Rule 1 is as follows:

**Rule 1. Scope and Purpose**. These rules govern the procedure in all civil actions and proceedings in the United States district courts, except as stated in Rule 81. They should be construed**, and** administered**, and employed by the court and the parties** to secure the just, speedy, and inexpensive determination of every action and proceeding.

19 *See* 28 U.S.C. § 2074(a).

# Senate Hearing Is Warned of Lasting Damage to Courts[1]

In a congressional hearing on sequestration and the courts, a U.S. judge, federal defender and a private lawyer warned Senators that continued budget cuts would devastate the nation's system of justice—threatening public safety, constitutional rights and economic well-being.

"Flat funding at sequestration levels would … irreparably damage the system that is a hallmark of our liberty around the world," Judge Julia S. Gibbons told the Senate Judiciary Subcommittee on Bankruptcy and the Courts. "We look to Congress to recognize our critical needs, and our function in government, our value to the democracy, by providing the funding we need to do our work."

Also testifying were Michael Nachmanoff, Federal Defender for the Eastern District of Virginia, and W. West Allen, Government Relations Committee chair for the Federal Bar Association. The witnesses got a largely sympathetic reception from senators.

"The sequester is slowing the pace, increasing the cost, and potentially eroding the quality of the delivery of justice," said Sen. Chris Coons (D-Del.), chair of the Judiciary subcommittee. "The irony is that cuts to the Judicial Branch … don't actually save taxpayers any money. The cases will still be adjudicated, just at a slower pace and at a higher cost."

Sen. Jeff Sessions (R-Ala.) expressed doubt that more money could be found for the courts, but he praised the federal Judiciary's success in containing costs. "You have been asked … to take reductions more rapidly than smart people would ask you to take," Sessions said. "The courts in many areas are being smart, they're working hard, they're finding ways to save money without impacting the quality of justice in America. And for that you should be saluted."

Judge Gibbons, chair of the Budget Committee for the Judicial Conference of the United States, noted that court staffing levels are at their lowest level since 1999. Court offices have lost 2,100 employees since July 2011, a process that has accelerated with sequestration, which in March cut $350 million from the courts' FY 2013 budget. A request from the courts for $72.9 million in supplemental funding has been submitted to Congress.

Throughout the July 23 hearing, the witnesses stressed that budget cuts already were being felt by the public, and were likely to get much worse in the next fiscal year. The impacts include delays in processing cases and diminished supervision of potentially dangerous offenders. Much of the hearing focused on cuts to defense representation for those who cannot afford attorneys.

Continued on next page

"We are cutting ourselves to the bone. ... We're on the verge of being crippled," Federal Defender Nachmanoff said. "If action is not taken immediately to save the program, the federal defender system will devastated."

Nachmanoff noted that his Virginia office had turned down five "intensive, serious cases" because of widespread furloughs in his office.

Noting that full-time Federal Defenders provide the most economical approach to the constitutional right to counsel, he added, "We are a model of quality and efficiency. By reducing the staffing of federal defenders, ultimately the government will be spending more money. Indigent defense costs will rise."

The support for defense funding was supported by two former prosecutors now in the Senate: Sheldon Whitehouse (D-R.I.), a former U.S. Attorney, and Amy Klobuchar (D-Minn.), a former county prosecutor. "We want a justice system that works," Whitehouse said. "And we want a viable, robust public defender on the other side. … It's good for the system."

Whitehouse read from a June 12 letter, in which Attorney General Eric Holder and Deputy Attorney General James M. Cole stated: "We recognize that the Court system operates effectively only when all of its functions are adequately funded and fully operational. This includes funding for court employees, probation pretrial services offices, and defender services (which provides defense counsel guaranteed under the Sixth Amendment). An effective court system is one of the foundations of our democratic society, and one of the Nation's bedrock institutions."

In her testimony, Judge Gibbons said that the court's probation and pretrial officers were struggling to provide adequate supervision and rehabilitation resources for defendants awaiting trial and criminal offenders serving probation in the community. Money for drug testing and mental health screening of offenders also has been cut.

Sen. Dick Durbin (D-Ill.) asked, "Am I right to be concerned that these reductions may lead to potentially violent individuals walking the streets of my city of Chicago without adequate supervision?"

"You're quite right to be concerned," Gibbons responded. "We have fewer officers to supervise an increasingly larger numbers. We have had to really seriously compromise some of the funds keeping folks we supervise out of further trouble. … Yes, this is a public safety risk throughout the country."

Allen, of the Federal Bar Association, said cuts in clerks' offices had increased delays in civil and bankruptcy cases, where litigants do not have a constitutional guarantee of a speedy trial. "Waiting for judicial rulings even on simple matters for up to six months is not uncommon," he said.

"Our current trajectory, of how the sequester is being implemented in the federal court system, is doing real harm," Sen. Coons said in conclusion. "I leave this hearing today deeply concerned. … It is my veritable hope that Congress will take to heart the unique role of the Judiciary, and within it the federal public defenders." ▪

## Endnote

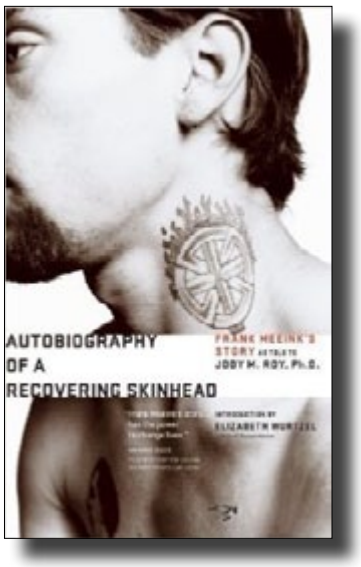
1 This article reprinted with permission from *The Third Branch News*, July 25, 2013.

**Don't forget to check the calendar portion of the wdfba website at http://www.westmichiganfederalbar.org/Federal_Bar_Calendar.php for upcoming seminars and other programs.**

# Book Notes

By Heather Abraham[1]

## *Autobiography of a Recovering Skinhead: The Frank Meeink Story*, as told to Jody M. Roy, Ph.D.




Cover photo from Amazon.com

### Overview

In this unsettling memoir, reformed neo-Nazi Frank Meeink reflects on his indoctrination into the skinhead movement at age 13. He painfully recalls the senseless violence he committed in the name of the movement, his resulting imprisonment, and his unrelenting drug addiction. At its core, the book is both a frightening tale of the ease with which a person can adopt blind hatred, and a remarkable story of overcoming weakness and prejudice.

Meeink is a Philadelphia native who grew up surrounded by violence and drug abuse. He learned about the neo-Nazi movement from a cousin whom he admired. For Meeink, being a skinhead meant safety in numbers and finally belonging to something bigger than himself. At an early age, he became the widely known leader of "Strike Force," a violent local chapter of the Aryan Nation. He also hosted a cable-access television show promoting neo-Nazi beliefs.

At age 17, Meeink was sentenced to prison for kidnapping and assault with a deadly weapon after mercilessly torturing a teenage boy for hours—an encounter that Meeink proudly captured on videotape. In prison, largely through playing football with inmates of other races, Meeink began to question his race-based assumptions. After his release from prison, Meeink tried to leave Strike Force but encountered harsh resistance from his former friends. Ultimately, Meeink's own gang brutally attacked him for turning on the cause. Meeink, however, rejoiced that he had made it out of Strike Force, alive.

Of particular interest to the FBA audience may be Meeink's candid thoughts on the criminal justice system, race relations in prison, and his struggle to overcome his heroin addiction.

### Praise

*"Powerful, absorbing, stunning, and sobering."*
- Barry Morrison, Regional Director, Anti-Defamation League

*"Frank Meeink's book is a candid and captivating story of upbeat transformation of a raw racist into a courageous citizen which has much to teach all of us. Don't miss it."*
-Cornell West, Princeton University

*"Frank Meeink's story is inspiring, compelling, and moving. It has the power to change lives."*
-Morris Dees, Founder & Chief Trial Counsel, Southern Poverty Law Center ▪

### Endnote

1 Law Clerk to the Honorable Robert J. Jonker, U.S. District Judge.