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President's Letter

Scott Brinkmeyer, President, Federal Bar Association, W.D. Michigan

Happy New Year!

By the time that you read this, I expect that the holidays will be a fading memory and you'll be struggling with trying to fulfill your resolutions. One of mine is a commitment to the continued success of our Bar as your president during the forthcoming year.

To that end, I want to share what I hope you will agree is some exciting news. During the annual meeting at Shanty Creek, I had the pleasure of speaking with Ray Dowd, who not only gave a fascinating presentation as one of our key speakers, but turned out to be the Vice President for the Second Circuit, and the Chair of the V.P.'s of all the Circuits. He happened to mention that some of the Circuits had hosted swearing in ceremonies for the U.S. Supreme Court and asked if that was something we might also wish to do. Since we've long been wanting such an opportunity, I jumped in with questions about just how to make that happen.

Making a long story short, we've since been able to schedule the U.S. Supreme Court Clerk, General William K. Suter [No, not the Justice], to travel to Grand Rapids next October to conduct the swearing in to the Court of all qualified applicants in conjunction with our annual meeting. We expect to open the ceremony to lawyers from around the state, and would envision a large turnout. I will keep you posted on the associated events as we get closer to the date.

I would be remiss if I did not thank our immediate Past President, Katherine Smith Kennedy, for her leadership and hard work throughout the past year. She was a dedicated and "hands on" representative of our organization, and was truly a great example to all of us on the Board. The annual meeting was a great success due in no small measure to Kathy's relentless efforts. She's a hard act to follow.

I look forward to working with you and thank you for the privilege you've allowed me as your President. ▪

next

"Relentless Upward Ratcheting": New Rules on Loss Enhancement in Health Care Fraud Cases

By Sarah Riley Howard, Madelaine C. Lane and Ryan Grondzik[1]

As of November 1, over widespread opposition, there is a new Sentencing Guideline establishing the aggregate value of all fraudulent bills submitted as prima facie evidence of a defendant's intended loss, which is critical in determining recommended length of sentence. One thing that has not changed: District courts across the country continue to express displeasure over Guidelines sentences already viewed as draconian in this area.

Under the United States Sentencing Guidelines, the "intended loss" that a defendant meant to inflict in a fraud offense becomes a key component in determining the length of his sentence. Additionally, certain exacerbating factors – "loss enhancements" – can increase a defendant's offense variable, and in turn his advisory guideline range. A "sophisticated means" loss enhancement, for example, adds two levels to a defendant's total offense level if the defendant used sophisticated means (as defined by the Guidelines) to commit his crime. For years, calculating the loss caused by health care fraud has plagued judges, prosecutors and defense attorneys alike.

Generally speaking, the Guidelines governing fraud crimes are incredibly complex, with 18 specific offense characteristics and 19 application notes to consider when calculating a defendant's total offense level. In particular, health care fraud posed a unique challenge because of the difficulty in evaluating the exact amount of loss inflicted by most given acts of fraud. For example, the face value of a medical bill rarely reflects the true loss inflicted. Insurers rarely pay out the full face value of any given bill, and usually pay only a fraction to the health care provider. If a defendant was familiar enough with the health care system to know that any bill submitted was not likely to be paid in full, it became more difficult to argue that the face value of a bill represented the true loss that the defendant intended to inflict.

Additionally, the varying methods by which a defendant can defraud the health care system made it difficult to place an exact value on the loss inflicted. For example, if a health care professional bills for diagnostic tests that were never performed, then the loss calculation is fairly straightforward. But when a health care professional "upcodes" an otherwise legitimate bill by billing for a more complicated and expensive test than was actually performed, or simply falsely submits an anti-kickback certification alongside otherwise valid medical tests, then the loss calculations become more complex. Numerous appellate decisions attempted to clarify how to calculate "intended" loss in the face of some of these issues, with varying degrees of success. Different circuits came to different conclusions on the issue.

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In 2010, Congress stepped in and passed new federal legislation calling for a change to the intended loss guidelines. The new legislation proposed to make the penalties for health care fraud even stiffer. It established a new three-tiered system for loss enhancements and a new guideline establishing the aggregate value of all fraudulent bills submitted as the basis for a defendant's intended loss. The new provisions became part of the Guidelines as of November 1, 2011, despite widespread opposition.

Background: Struggling with Intended Loss

Several courts were using the "net gain" approach, only attributing what might actually be collected on bills as the intended loss, and not the total of the face amount. In *United States v. Singh*,[2] the defendant was a health care provider who testified at trial about his intimate familiarity with Medicare billing practices. The Second Circuit found it appropriate for the health care provider to be able to demonstrate that he knew he would receive less than the full amount of the bills as a Medicare payment. The Second Circuit reversed the sentence imposed by the district court, finding that the defendant should have an opportunity on remand to show that the total amount he expected to receive from Medicare was less than the face value of the bills submitted.

In *United States v. Jones*,[3] the Fifth Circuit also held that net gain to the defendant was an appropriate metric for calculating loss in a Medicare fraud case. The Fourth Circuit came to a similar conclusion in *United States v. Adam*,[4] finding that the loss that the defendant intended to cause should be based on the amount he actually received through his fraudulent actions.

However, in *United States v. Culberson*,[5] the Sixth Circuit came to a different conclusion. The district court calculated the defendant's advisory sentencing guideline range based on the face value of the fraudulent bills submitted to the insurer. The Sixth Circuit upheld the district court's loss calculation, finding that the defendant failed to show he expected to receive less than the full amount of the fraudulent bills.

The Patient Protection Act: A New Rule

President Obama signed the Patient Protection and Affordable Care Act ("the Act") into law on March 23, 2010. Among its many changes to the American health care system, the Act called for a revision of health care fraud enforcement. Specifically, Section 10606(a)(2) of the Act called for the United States Sentencing Commission to amend the relevant sentencing guidelines and policy statements to provide that the aggregate dollar amount of fraudulent bills submitted to a government health care program would constitute prima facie evidence of the amount of the defendant's intended loss.

The Act further directed the Sentencing Commission to amend the Guidelines to provide a tiered loss enhancement system dealing with federal health care offenses. The Act calls for certain additional increases based on amounts when a defendant defrauds a government health care program. Namely, the Act requires a two-level increase in the offense level if a defendant's intended loss is $1 million or more, but less than $7 million; a three-level increase if the intended loss is $7 million or more, but less than $20 million; and a four-level increase for an offense involving $20 million or more.

In response to the Act, the Sentencing Commission drafted a new set of proposed amendments. The proposed amendment dealing with health care fraud offenses incorporated the new tiered point enhancements required by the Act as specific offense characteristics under §2B1.1(b) of the Guidelines. The Sentencing Commission also incorporated the required language establishing the aggregate dollar amount of fraudulent bills submitted as rebuttable prima facie evidence of intended loss in an application note in the guidelines.[6]

The new Guidelines treat most instances of health-care fraud – such as failure to provide any services whatsoever, upcoding, or a false kickback certification – as essentially the same offense: a total failure to provide services. Regardless of the nature of the offense, a defendant's intended loss under the guidelines is to be set at the face value of the bills submitted to the government health care program.

Strong Opposition to the New Language

Debate regarding the new provisions was intense. Most comments offered regarding the new rules were negative, with one notable exception. The Department of Justice offered testimony supporting the new rules, and urged the Sentencing Commission to go further. The DOJ proposed expanding the application of the

new tiered enhancement structure to apply to fraudulent activity relating to privately-funded health care benefit programs, in addition to federally funded programs. According to the DOJ, this expanded language would cause the sentencing guidelines on fraud to mirror the criminal statutes referenced by the same section.[7] The DOJ also urged an expansion of the scope of the rules regarding health care offenses to explicitly apply to the sentencing of kickback cases, even where actual fraud is absent.[8]

Meanwhile, private sector attorneys offered testimony calling for a more moderate implementation of the new requirements. One attorney offered testimony urging the Sentencing Commission to adopt language in the application notes that clearly indicates that, pursuant to *Booker*, the Guidelines are only advisory and should not become a bright-line decision rule.[9] Expressing concerns that the new aggregate loss guideline would be understood by the courts to represent "something more than was intended," the attorney urged the Sentencing Commission to adopt extensive language in the application notes that thoroughly expressed to the court the meaning of the aggregate loss guideline, as well as an application note indicating that the burden of proof remained on the government to present substantial evidence supporting the aggregate loss.[10]

The chairman of the Practitioners Advisory Group offered similar testimony, noting that aggregate loss as stated on a fraudulent bill submitted to a health care program rarely gives an accurate picture of the loss that was truly intended.[11] Because of the complexities of health care billing and payment, and the fact that health care programs often do not pay the fraudulent bill in full as submitted, he advanced the argument that the Sentencing Commission should do the bare minimum in modifying the guidelines to satisfy Congress's mandate.

The ABA also opposed the new guidelines as written, describing the sentencing of high-loss economic crimes generally as a "relentless upward ratcheting."[12] While recognizing that the Sentencing Commission had no choice but to follow its Congressional mandate, the ABA urged the adoption of a narrow definition of a "government health care program," which would limit the scope of the new rules.[13] The ABA also suggested that the Sentencing Commission should adopt an application note offering courts some guidance in cases where the new guidelines overstate the seriousness of the offense in health care fraud cases.[14]

Despite the debate over the provisions, the Sentencing Commission adopted the proposed amendments without any substantial changes. At a public meeting held on April 16, 2011, the Sentencing Commission had only brief discussion regarding the new health care fraud rules. The Sentencing Commission did not enact either of the expansions of the language of the rule as requested by the Department of Justice. Nor did the Commission temper the guidelines as requested by private sector attorneys, the Practitioners Advisory Group and the ABA. Instead, the Sentencing Commission enacted the rules largely as they existed prior to receiving any testimony or public comments.

Calculating Loss Under the New Guidelines[15]

A sample hypothetical offered by a commenter objecting to the new Guidelines illustrates their potential impact. Assume that Dr. Smith, a hospital administrator with no previous criminal history, approved the submission of $20 million of bills for services that were actually rendered, but obtained via the payment of unlawful kickbacks. Dr. Smith would face a base offense level of 7, with a 22-level enhancement for the $20 million loss, a four-level enhancement under the new three-tiered guidelines, a two-level enhancement for sophisticated means, and a four-level enhancement for his role in the offense.

Dr. Smith's total offense level would be 39. With a criminal history category I, Dr. Smith's advisory sentencing guideline range would be 262 to 327 months imprisonment. Given that, in this hypothetical, the medical services in question were actually rendered and the fraudulent activity was confined to the kickback certification, it seems at least arguable that this penalty is disproportionate to the harm inflicted, and perhaps even disproportionate to other types of fraud.[16]

Under the old guidelines, Dr. Smith might have faced substantially less jail time. Without the new intended loss guidelines, Dr. Smith's intended loss could be calculated at the court's discretion. It seems likely that a discretionary calculation would lead to a far more lenient loss enhancement than the 39-point loss

enhancement called for by the combination of the new intended loss guideline and the new three-tiered system.

"Relentless Upward Ratcheting": A New Direction in Health Care Fraud Sentencing

The health care fraud provisions of the Patient Protection and Affordable Care Act have already been noted by courts. In *United States v. Mateos*,[17] decided over a year before the Sentencing Commission implemented the provisions called for by the Act, the Eleventh Circuit took note of the upcoming Congressional amendments to the Guidelines. In upholding the defendant's sentence for health care fraud, the court found that "if [the defendant] committed her crime today, the district court's 30 year sentence would fall within the upper limit of her guidelines range, and we would fully expect that it was reasonable."[18] Although the Eleventh Circuit acknowledged that it could not retroactively apply the amendment in the Guidelines to Alvarez, the court found that "it can still inform our consideration of whether thirty years is a reasonable sentence for her crime."[19]

The result in *Mateos* was an appellate affirmation of a then-unprecedented 30-year sentence in a health care fraud case. In the year since the *Mateos* decision, that sentence has already been surpassed twice. A federal district court in Florida handed down two sentences, one of 50 years and one of 35 years, in the same case. Given the direction in which the sentencing guidelines appear to be headed, these record-setting sentences will almost certainly be eclipsed before long. ▪

Endnotes

1 Sarah Riley Howard heads the White Collar Criminal Defense practice group at Warner Norcross & Judd LLP, which represents clients in a range of matters involving corporate legal compliance, federal litigation counseling, and criminal defense. Madelaine Lane is a senior associate with extensive defense experience, and is a member of the Western District's Criminal Justice Act panel appointment attorneys. Ryan Grondzik is a junior associate in Warner's Grand Rapids office.

2 390 F 3d 168, 193-94 (2d Cir. 2004).

3 475 F.3d 701 (5th Cir. 2007).

4 70 F.3d 776 (1995).

5 Nos. 07-2390, 07-2425, 2009 WL 776106 (6th Cir. Mar. 24, 2009).

6 U.S. Sentencing Guidelines Manual §2B1.1(b)(1) cmt. n. 3(F)(viii).

7 Ortiz, Carmen M. Statement to the United States Sentencing Commission at 4. Hearing on Proposed Amendments to the Federal Sentencing Guidelines, Feb. 26, 2011. Available at: http://www.ussc.gov/Legislative_and_Public_ Affairs/Public_Hearings_and_Meetings/20110216/Testimony_DOJ_Ortiz.pdf.

8 *Id.* at 8.

9 Crane, Thomas S. Statement to the United States Sentencing Commission at 18. Hearing on Proposed Amendments to the Federal Sentencing Guidelines, Feb. 26, 2011. Available at:

10 *Id.* at 18-19.

11 Tirschwell, Eric A. Statement to the United States Sentencing Commission at 5. Hearing on Proposed Amendments to the Federal Sentencing Guidelines, Feb. 26, 2011. Available at: http://www.ussc.gov/ Legislative_and_Public_Affairs/Public_Hearings_and_Meetings/20110216/Testimony_PAG_Tirschwell.pdf

12 Felman, James E. Statement to the United States Sentencing Commission at 2. Hearing on Proposed Amendments to the Federal Sentencing Guidelines, Feb. 26, 2011. Available at: http://www.ussc.gov/ Legislative_and_Public_Affairs/Public_Hearings_and_Meetings/20110216/Testimony_ABA_%20Felman.pdf.

13 *Id.* at 10.

14 *Id.*

15 The hypothetical in this section was taken from Felman, *supra*, p. 9.

16 The ABA made this argument in its testimony before the Sentencing Commission, noting that "[i]t is not evident why Congress believed health care frauds are any more serious than any other frauds, or why it believed the existing penalties for health care frauds were insufficient." Felman, *supra*, p. 10.

17 623 F.3d 1350 (D.C. Cir. 2010).

18 *Id.* at 1368.

19 *Id.* at 1368-69.

Ode to Toni Stevenson (and others like her)

By Katherine Smith Kennedy, Immediate Past-President, Western District of Michigan Federal Bar Association

As a lawyer, I feel privileged to be able to practice law and represent clients here in west Michigan. As a female lawyer, I feel very lucky and appreciative that the pioneering women who came decades before us (Rosemary Scott and Jean McKee come to mind) paved the way for us to have an (almost) equal role in representing clients in private practice, representing the government, and to even be jurists on the bench. We all reap the benefits of the courage and persistence of these women in our ability to practice law, and for that they are heroes.

There is another contingent of women that I feel we owe unending gratitude for our success as attorneys, yet who seem to go relatively unnoticed, unsung heroes if you will. Our children's care givers. In order for attorneys that have families to practice law, we have to entrust our most precious commodities to others. Especially initially it is a daunting idea to those who are pregnant for the first time and have to face the issue of "who will take care of my child when I'm working." I think all of us mothers that work outside the home have a gut-wrenching memory of leaving their child with someone else for the first time after maternity leave. I've heard many similar stories to my own.

I recall when I dropped off Meggie, my first born, at the day-care center for the first time. When I had to say good-bye, I handed off my 3 month-old to a woman I had only met a few times with a smile on my face, kissed Meggie's forehead and left. I walked to the car without looking back, got in the car and promptly dropped my head and sobbed for 20 minutes, drooling on my cell phone as I emoted to my poor husband on the other end. *"I just abandoned my baby"* is a common thought among us. It is a difficult thing for any parent to relinquish control of our children's well-being to another. But we must do so in order to practice law in some way, shape or form.

Whether it be daycare, a nanny, or relatives, these care givers of our children enable us to meet with clients, prepare for hearings, take depositions, write briefs, try cases, and be active in various organizations related to our careers. Having trustworthy, caring, compassionate, safe, reliable and disciplined care givers is the penultimate achievement as a working parent. Dumb luck can also play a role in the equation.

I think all of us mothers that work outside the home have a gut-wrenching memory of leaving their child with someone else for the first time after maternity leave.

Enter Toni. Toni Stevenson came to us in August of 2005. My husband and I were forced to think about changing from a daycare center to in-home care after a year of sicknesses spread from child to child at the daycare center and there were very few weeks where my daughter didn't have either a severe cold or the stomach flu. We decided to try a nanny even though this was unfamiliar territory. I was told by someone I trusted about a website that listed everything from part-time babysitters to live-in Au Pairs was a good place to start, so I did.

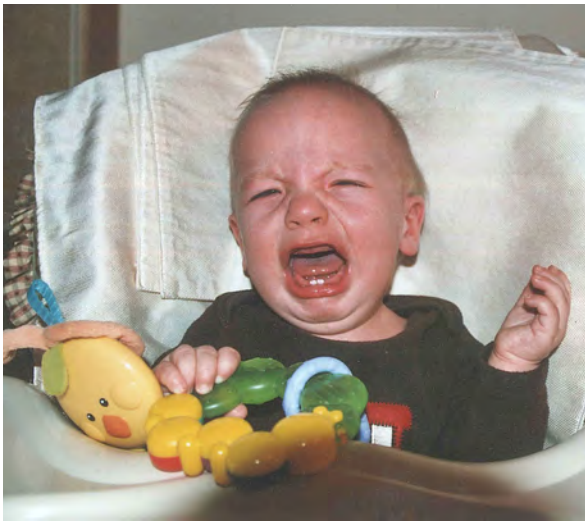
Toni was 19 years old, she didn't have much experience but had good references and was obviously very articulate and personable. She ended up being the only person I interviewed, as I had a good gut feeling when I met her for the first time. Six-years later, I can tell you that going with my gut in that situation worked out well.

Toni agreed to read two different child care books that I was following for my child. Starting off, we discussed my approach to discipline, which soon became our approach to discipline, our approach to sleep scheduling, nutrition, TV rules, etc. so that we were on the same page in raising my child. I still have notebooks from the early years when Toni would give us reports about nap times, formula/food times, poops, pees, to disposition and behavior, so that when I came home work after being away from her for 9 hours, I would know everything about my baby's day. Toni loved Meggie and Meggie loved Toni. Knowing

Meggie with Toni

Meggie was in her affectionate and excellent care made it easier to concentrate at work— so I too loved Toni.

Enter Owen. A month into Toni's tenure at the Kennedy household, we learned that the stork would be visiting our home for a second, and last, time. Toni was there for Meg and for our family during the whole pregnancy, through the morning sickness, sciatica, false labors and, ultimately, the birth, of the *Worst Baby Ever*. I love Owen more than the sweet air I breathe, and he is a wonderful, sweet, funny, smart little boy. But, he was the baby you wished only upon your worst enemy. Colick and reflux and gas. (Oh my). This kid screamed wildly and didn't sleep for eight months.



Baby Owen

I remember sitting at an FBA annual meeting eating lunch with a table full of distinguished attorneys. I recall sitting there in my disheveled, sleepless, haze forking chicken into my mouth as I listened to the table conversation. One of the distinguished attorneys began to complain that he was tired as he "only had five hours of sleep" the night before. My table mates continued to look down at their plates as they ate and nodded in sympathy for his plight. I dropped my silverware, and, (probably way too sternly) asked, "Five hours? Together? *Five hours of sleep all in a row*?" As I felt the questioning eyes of my table-mates suddenly upon me, I stifled the urge to fling my exhausted body across the table and throttle this very nice man. (I had about 2 ½ hours of sleep – in 20 minute increments– and had a brief due that day, so cut me some slack, please).

How was I able to continue to accomplish my work without committing malpractice during these dark days of Owen Kennedy? Toni Marcellino Stevenson. Toni understood as she was going through it with me. Toni was there 3 or 4 days a week to take the abuse and harassment that Owen doled out. Toni's care of my son helped – *a lot.* My husband, who is as helpful and hands-on as a father can be, unilaterally removed himself from the care of Owen at about the one-month mark. He basically became solely in charge of Meggie for the year. It was bittersweet to see Daddy and Meggie eating, learning and happily playing together, while Toni and I were left to wrestle with *Rosemary's Baby.* We tried to figure out together how to best nap Owen, what formula would relieve his reflux pain, and the best ways to soothe him. We would share our exasperation after repeatedly failing at one or more of these efforts every day. Thanks to Toni, I, and more importantly, Owen, survived his infancy.

Over the next several years of our children's lives, Toni didn't just "baby sit" for our kids, but helped them learn how to walk and talk. She had the pleasure of going through potty training with both of them and helped to raise them with discipline. She helped educate them, cultivate their imaginations with activity, dropped them off and picked them up from school, swim lessons, dance lessons and more. "Toni, my settlement conference is going well, can you work late tonight?" Yep. "Toni, I have a trial at the

Continued on next page

home back next

end of the month, can you double your work hours?" Sure. "Toni, I have to be in Kalamazoo for an early deposition, can you come an hour early on Thursday?" Done.

My children do not know life without Toni. I dread the day we have to completely "wean off" of Toni – we're in the process now and its not easy. She is a loved and respected family member to all of us and we couldn't ask for more from her in helping us raise our children.

That's just one story of the woman behind the woman-attorney. Here's another. Court of Appeals Judge Jane Beckering comments the following:

> *It's true that we are only as good as our childcare. I've always had the philosophy that if I ever felt the kids weren't being well cared for in my absence, and I couldn't fix it, I would quit. At my investiture, my nannies were as on the list of thank you's as my mentors and family members.*
>
> *Our nannies have ended up enhancing our lives and the lives or our children, rather than being "substitutes" for us. Our first nanny, Tami, fostered Marlee's gift for singing, as Ray and I are not good singers. Our second nanny, Sarah, let Katie explore her world while also managing to keep her out of the emergency room, as she was curious to the point of once trying to lick an electrical outlet. And Jessica, our nanny who just moved to Minneapolis after four years with us, is like a big sister to my kids. Marlee and Katie were bridesmaids in her wedding this past December, and little Ray was a groomsman.*
>
> *I consider myself extremely lucky to have enjoyed the rewards of being a lawyer and now a judge, and I know, without a doubt, I owe it to great childcare.*

So many of us have had to tweak our childcare arrangement if it is not working out. We've had to transition between places or people due to schedules and moves and other circumstances foreseeable and otherwise. But when we find that care that "feels right" for our children, we are able to be comfortable in leaving home, and to work without the stress of worrying about our children's well-being. It allows us not only to participate in our jobs in the justice system, but to excel in our legal careers.

Owen recently

Jennifer Jordan, Esq., Chief Administrative Officer of Goodwill Industries, shares her experience:

> *This is an issue that is near and dear to my heart. I would never have been able to have a career if I hadn't had childcare providers that I trusted without question. I have been fortunate to have had access to a couple different child development centers for my kids that allowed me to develop to my potential without the distraction of worrying whether my children were getting the same kind of care they would have had at home with me (or my husband). As it is, I'm quite certain my children got **better** care in daycare than they ever would have gotten at home with me. Even if it had occurred to me to provide my children with the variety of experiences they got in daycare, I wouldn't have done it, because they would have messed up my house and exhausted my (limited) patience.*

As our careers as working mothers carry on, and our children continue to learn and grow and hopefully succeed in life, we know that it is our child care givers who are the ones who make this possible. So, thank you to all of the Toni Stevenson's out there. Thank you, Thank you. We could not do what we do without you. ▪

2011 Bench Bar Conference – A Success

By Andrew D. Portinga

From September 30, 2011 to October 2, 2011, 105 members of the Western District of Michigan's Federal Bar Association gathered at Shanty Creek Resort in Bellaire, Michigan for the tri-annual Bench Bar Conference. Judges Paul Maloney, Robert Jonker, and Janet Neff, as well as Magistrate Judges Ellen Carmody, Joseph Scoville, Hugh Brenneman, and Timothy Greeley represented the bench at the conference.

The keynote address was presented by Professor David Moran of the University of Michigan's Innocence Project. The Innocence Project is a non-DNA based project which represents a select number of inmates, where there is compelling evidence that the inmate has been wrongfully convicted. In several cases, the Project has successfully proven the innocence of inmates.

The lunch presentation was provided by attorney Ray Dowd, an attorney from New York who specializes in litigation aimed at the recovery of art stolen during the Holocaust. Mr. Dowd discussed both the successes and the challenges presented in such litigation.

Dinner entertainment was provided by a troupe of amateur actors, consisting of several local lawyers and judges, including Kent Circuit Judge Donald Johnston and United States Magistrate Judge Hugh Brenneman. These lawyers presented a one-act play, entitled, "The Travails of Henry VIII."

Nine breakout sessions were conducted during the conference. The topics of the breakouts included the Asian carp litigation, social media, immigration issues and their effect on federal criminal law, criminal discovery issues, ADR, healthcare fraud litigation, real estate litigation, and class actions.

On Sunday, the conference concluded with an "Ask the Judges" panel, in which the participants presented the judges and magistrates with questions about practice in the Western District of Michigan.

The members of the planning committee for the Bench Bar Conference would like to thank the bench and the bar for their support of this conference. The committee would particularly like to thank the sponsors of the program, without whom the conference would not be possible. ▪

Devin Schindler as Pope Clement

Judge Brenneman as the Bailiff

The cast of "The Travails of Henry VIII"

Thank you to the sponsors of the 2011 FBA Bench-Bar Conference!

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News from the Clerk

By Tracey Cordes, Clerk of Court, U.S. District Court, Western District of Michigan

Greetings. How is it possible that we are already knee-deep in the holiday season! And, by the time you read this, it will be over! As the pages of the calendar are flying by, your court staff are working through many priority projects.

Developments with CM/ECF

Some of the more recent CM/ECF projects will likely not be noticed by many of you. Nonetheless, some new features will significantly improve our efficiencies in work flow. For example:

- The judges recently approved implementation of an electronic warrants process. Rather than performing nearly a dozen steps that include copying, scanning and walking paper around the building, warrants can now be prepared, filed and electronically served on the Marshal all in one step.
- In January, training will be offered to staff in the Probation and Pretrial Services office, as well as affected Bar members, on how to electronically file and access presentence reports and related documents. This, too, is a paper process currently.
- Once these projects are fully implemented, our CM/ECF Administrator will fully apply herself to the work of implementing the latest upgrade to the electronic case management system. This is expected to be a significant upgrade and will therefore require extensive work by staff. Information about if and how this will be noticed by users will be disseminated as work progresses.

Violations

At the request of the National Park Service, our judges recently approved changes to the Collateral Forfeiture Schedule for petty offenses. Last updated six years ago, the new schedule reflects certain changes to CFR Title 36; reflects increased efforts to protect against the introduction of exotic species into the Great Lakes; factors in inflation; and also seeks to balance assessment of fines as a deterrent to unlawful behavior while also not raising them so high as to discourage payment. The Schedule may be viewed on the court's website at *www.miwd.uscourts.gov* Refer to General Information and then Forfeiture of Collateral Schedules.

Resentencing Motions

We expected to receive many Motions for Resentencing in light of the Sentencing Commission's approval of retroactive changes to the guidelines for sentencing crack cocaine offenses. Since the effective date of the changes on November 1, our court has received 265 motions. Our volume will continue to rise in coming weeks.

Facilities Issues

Those of you who regularly enter the Grand Rapids Court facility have noticed that the south door has been closed off for some time and that access is gained through the north door. Although not a court project, we have been closely monitoring progress of the work of the General Services Administration (GSA) contractors because of the obvious impact on building ingress and egress. The project involves a redesign of the building lobby. The north entrance will be eliminated and a new entry vestibule on the south side of the building is being added. The project includes a reconfigured security station, glazed partitions, new signage, and new ceiling and lighting. GSA continues to report that the project will be completed by February.

The Budget

The federal judiciary continues to run on a continuing resolution. This means that we have been given partial year funding in order to sustain operations, but we do not yet have a final budget. We do know that we will ultimately face significant cuts this year and, in order to spread the effect out over as much of the fiscal year as possible, we have implemented employee

furloughs. This means that affected staff are taking one day each month of no work and no pay. In addition, all step increases have been eliminated. This has been discouraging to our hard-working staff, as you can imagine. If our budget allotment proves to be better than predicted, we will of course discontinue the furloughs.

For the numbers junkies...

CM/ECF trivia:

Number of Registered Attorneys: 8,380
Number of Attorney Civil E-filings: 166,369
Number of Attorney Criminal E-filings:..... 4,2785
Total Number of Documents Available Electronically: 889,173
Total Number of Cases in CM/ECF..... 6,6217

Jurors - Calendar year 2011

Number of citizens who appeared to serve as petit jurors: 1,169
Number of citizens selected to serve as petit jurors: 353
Number who served on grand juries: 92

Case statistics - Through November 2011

1,729 civil cases were commenced (up from 1,511 through November 2010)
392 criminal cases commenced (down from 398 through November 2010)
2,121 total cases commenced (up from 1,909 through November 2010)
2,031 total cases terminated (up from 1928 through November 2010)

I wish you all peace and prosperity in the new year. ▪

Sentencing Commission Asks Congress For New Legislation[1]

The U.S. Sentencing Commission has asked Congress to enact legislation that would enhance the role of the federal sentencing guidelines in response to a 2005 Supreme Court decision that made them advisory, not mandatory.

Judge Patti Saris (D. Mass.), the Commission's chair, testified before the House Judiciary Subcommittee on Crime, Terrorism, and Homeland Security on October 12 about the use of the guidelines in sentencing since the Supreme Court's ruling in *United States v. Booker* six years ago.

"While sentencing data and case law demonstrate that the federal sentencing guidelines continue to provide gravitational pull in federal sentencing, the Commission has observed an increase in the numbers of variances from the guidelines," Saris said.

Saris said the Commission suggested Congress take specific steps, including these:

- Require that sentencing courts give "substantial weight" to the guidelines at sentencing.
- Require that judges offer greater justification the

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greater they vary from a guideline.

- Enact a more robust appellate review standard that requires appellate courts to apply a presumption of reasonableness to sentences within the properly calculated guidelines range.
- Create a heightened standard of review for sentences imposed as a result of a "policy disagreement" with the guidelines.
- Clarify statutory directives to the sentencing courts and Commission that are currently in tension.

In her testimony, Saris said the Commission soon would issue two additional reports, one on sentences in child pornography cases and one on mandatory minimum sentences (now available on the Commission's website). She noted the long-standing opposition to mandatory sentencing by the Judicial Conference, the federal Judiciary's policy-making entity.

Saris's prepared testimony, submitted in 89 written pages, is posted on the Commission's website, at *www.ussc.gov/Testimony/20111012_Saris_Testimony.pdf*. The October 12 testimony before the House subcommittee by three other witnesses is on the House of Representatives website, at *http://judiciary.house.gov/hearings/hear_10122011.html*. ▪

Endnote

1 This article is reprinted with permission from *The Third Branch, Newsletter of the Federal Courts*, Nov. 2011.

FBA Bestows Two National Awards on Western District Chapter

The Western District FBA was the recipient of two national Federal Bar Association awards in 2011. The awards were bestowed at the Federal Bar Association's national meeting in Chicago this past September.

The first was the Chapter Activity Presidential Achievement Award, given to recognize then-President Katherine Smith Kennedy for "accomplished Chapter activities" in the areas of administration, membership outreach, and programming.

The second honor was the Outstanding Newsletter Award, given to recognize this WD FBA publication, *Bar & Bench*, for the quality of its articles, features, and other content. ▪

Past issue of *Bar & Bench* can be found at https://www.westmichiganfederalbar.org/newsletters.php

Don't forget to check the calendarportion of the wdfba website

at http://www.westmichiganfederalbar.org/Federal_Bar_Calendar.php

for upcoming seminars and other programs.

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Book Notes

***Judging in West-Michigan: Celebrating the Community Impact of Effective Judges and Courts*, edited by Nelson P. Miller, Kara Zech Thelen, Christopher G. Hastings, and Devin Schindler**

Judging in West-Michigan: Celebrating the Community Impact of Effective Judges and Courts was produced in commemoration of Law Day 2011. The book was a joint project between the editors, all professors at Thomas M. Cooley Law School's Grand Rapids campus, and the Grand Rapids Bar Association.

The book begins with an interesting chapter entitled "A Brief History of West Michigan Jurisprudence," which traces the development of West Michigan courts from the days of early French and British colonial rule, through the American Revolution, the creation of the Michigan Territory in 1805 and the election of the first territorial judges, Michigan statehood in 1837, Michigan's first federal judges, the division of the state into two federal judicial districts in 1863, to the present day state and federal courts.

Following this opening chapter, the book features 18 submissions from current and former state and federal judges and magistrates from the West Michigan area. Each of the submissions offers insights into the court system, the art of judging, and its impact on the community and the citizens who appear before the courts. The topics of the judges submissions are varied and include the following:

- *The Compassion of Supervised Release*, by the Honorable Robert Holmes Bell
- *Consistency as the Hallmark of Sound Judging*, by the Honorable Robert A. Benson
- *Solving the World's Problems One Case at a Time*, by the Honorable Calvin L. Bosman
- *The Clues to Successful Judging: The 17th Circuit Court Bench of 1972*, by the Honorable Patrick C. Bowler
- *Discreet Persons Learned in the Law*, by the Honorable Hugh W. Brenneman, Jr.
- *Annie Sullivan Meets Perry Mason*, by the Honorable Ellen S. Carmody
- *Standing on the Shoulders of Others*, by the Honorable Pablo Cortes
- *A Precious Midwestern Sensibility*, by the Honorable Scott W. Dales
- *A Long-Retired Judge's Timeless Oath*, by the Honorable Albert J. Engel
- *Providing the Glue for the Community*, by the Honorable William G. Kelly
- *A Satisfying Remembrance*, by the Honorable Dennis C. Kolenda
- *The Sound Workings of a Reformer's Heart*, by the Honorable Jeffrey Martlew
- *The Medical Mile - A Health Care Revolution in Grand Rapids*, by the Honorable David W. McKeague
- *Unweaving One More Tangled Web*, by the Honorable William B. Murphy
- *The Capacity of Law and Judging*, by the Honorable William Schma
- *Judging in Faith, Family, and Humor*, by the Honorable Sara Smolenski
- *Choosing Judges in West Michigan -- For Better, For Worse, For Real*, by the Honorable Paul J. Sullivan
- *Letting it Sit for a Night for Forbears to Measure*, by the Honorable Christopher Yates

Interested persons can purchase the book from Amazon at *http://www.amazon.com/Judging-West-Michigan-Celebrating-Community/dp/1600421350* or Vandeplas Publishing, at *http://vandeplaspublishing.com/store/product.php?productid=125&cat=4&page=1* ▪