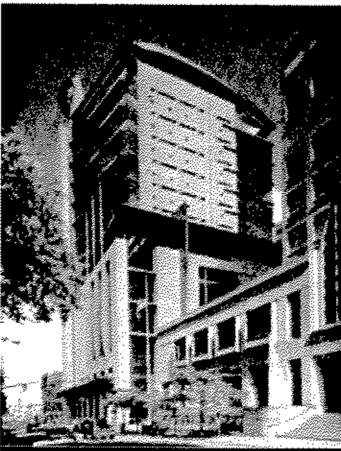

A Quarterly Newsletter of the Oregon Chapter of the Federal Bar Association

FOR THE DISTRICT OF OREGON

Volume XII, No. 1 *Spring 2007*

IN THIS ISSUE

The U.S. Department of Justice's "Revised" Principles of Federal Prosecution of Business Organizations: Real Change or Just More of the Same?
By David Angeli 1-5

In the District
By Courtney Angeli 5-6

Update to the District of Oregon Local Rules of Civil Practice Annotated
By Kathryn Mary Pratt 6-8

Announcements 8

Monthly FBA Luncheon 10

THE U.S. DEPARTMENT OF JUSTICE'S "REVISED" PRINCIPLES OF FEDERAL PROSECUTION OF BUSINESS ORGANIZATIONS: REAL CHANGE OR JUST MORE OF THE SAME?

By David Angeli, Hoffman Angeli LLP

On December 12, 2006, Deputy Attorney General Paul McNulty issued a memorandum updating the U.S. Department of Justice's Principles of Federal Prosecution of Business Organizations. The "McNulty Memorandum" was a response to growing criticism of what many view as the heavy-handed tactics employed recently by federal prosecutors in corporate investigations and plea negotiations. However, as discussed below, the revised policy may do little to protect either the sanctity of the corporate attorney-client privilege or the ability of corporations to advance legal fees to their executives and employees who find themselves enmeshed in federal criminal investigations.

I. BACKGROUND

On January 20, 2003, Mr. McNulty's predecessor, Larry Thompson, issued a memorandum entitled Principles of Federal Prosecution of Business Organizations, the main focus of which was to "increase[e] [the] emphasis on and scrutiny of the authenticity of a corporation's cooperation" with federal criminal investigations. The "Thompson Memorandum" encouraged corporations to waive the attorney-client privilege relating to their internal investigations of potential wrongdoing, and expressly permitted prosecutors, "[i]n determining whether to charge a corporation," to consider the corporation's willingness "to disclose the complete results of its internal investigation; and to waive attorney-client and work product protection." The Thompson Memorandum also provided that "a corporation's promise of support to culpable employees and agents, . . . through the advancing of attorneys fees . . . may be considered by the prosecutor in weighing the extent and value of a corporation's cooperation."

Those provisions set off a firestorm among business groups, civil libertarians, and the white-collar defense bar, resulting in several years of heated debate. In a survey published in March 2006 by the National Association of Criminal Defense Lawyers, almost 75 percent of in-house and outside counsel agreed that a "culture of waiver" now exists, pursuant to which the government expects broad waivers of corporate privilege.

That culture threatens a foundational element of our justice system. For hundreds of years, it has been understood that privilege encourages frank discussions between lawyers and clients, thereby increasing the likelihood that corporations will comply *voluntarily* with the law. Furthermore, it has long been accepted that when criminal proceedings are commenced, justice is best served when all of the targets/defendants—including individual employees—are represented by competent

FROM THE BOARD

By Helle Rode, Board President of
Federal Bar Association Oregon Chapter

Judicial pay is a key agenda item for the FBA this year. Recently, FBA Executive Director Jack Lockridge and Bruce Moyer, FBA Counsel for Government Relations, represented the FBA at a meeting in New York City of approximately 50 bar associations and other legal groups, federal judges, and the Administrative Office of the U.S. Courts. Those in attendance agreed that a broad-based coalition of groups should be organized, apart from the judicial conference, to carry a consistent unified message of support for a significant judicial pay increase to Capitol Hill. Jack Lockridge will serve as the principal point of contact for the FBA. We will keep you informed of developments on this important issue.

Please join us for the annual Judges Appreciation Dinner scheduled for May 8, 2007 at the Governor Hotel (note the new location). We will be honoring retiring Magistrate Judge John Cooney of Medford and welcoming his replacement, Mark Clarke, also of Medford. You should receive your invitation to the dinner during the first week of April. Please respond promptly. Thank you to Board members Susan Pitchford and Katherine Heekin for planning this important event.

Mark your calendar now for our monthly luncheon on April 19, 2007, featuring Judge Anna Brown. Judge Brown will speak on jury instructions in federal court. Also at this meeting, members will vote on proposed changes to the FBA Oregon Chapter Constitution and By-Laws. To review these changes before the meeting, please check our website www.vangelisti.com/fbaoregon.htm (scroll to the bottom of the page and open the document labeled "FBA CONST BYLAWS PROPOSED 2007 REDLINED.PDF."

At our luncheon meeting on May 17, 2007, Magistrate Judge Thomas Coffin will speak on mediation in federal court. Our annual meeting will be on June 21, 2007. Lunch at the annual meeting is on us. A speaker for the annual meeting will be announced via the listserv. Please note our new luncheon location, the University Club on SW Sixth Avenue, Portland. We hope this new venue is convenient for you.

As you probably know, most of our announcements regarding luncheons, meetings, CLEs, and new developments are sent via our listserv. If you are a member but are not receiving these announcements (about two to three per month), please contact Seth Row (seth.row@hklaw.com) or me (helle.rode@comcast.net).

THE U.S. DEPARTMENT OF JUSTICE'S "REVISED" PRINCIPLES OF FEDERAL PROSECUTION OF BUSINESS ORGANIZATIONS: REAL CHANGE OR JUST MORE OF THE SAME?

Continued from page 1

and experienced counsel. The Thompson Memorandum threatens to eviscerate those basic tenets of common-law tradition.

The debate took on a new dimension when, in March 2006, U.S. District Judge Lewis Kaplan ruled that prosecutors violated the constitutional rights of defendants in a tax shelter case by pressuring the accounting firm where they worked, KPMG, not to pay for their legal defense. Judge Kaplan's ruling received widespread attention in the popular press, resulting in increased scrutiny of the policies articulated in the Thompson Memorandum.

In August 2006, the American Bar Association's Task Force on the Attorney-Client Privilege sharply criticized the Thompson Memorandum in Resolution 302B, which was adopted unanimously. And on December 7, 2006, Senate Judiciary Committee Chair Arlen Specter introduced The Attorney-Client Privilege Protection Act of 2006 (the "Act"). The Act included nine "findings," including that "[w]aiver demands and other tactics of Government agencies are encroaching on the constitutional rights and other legal protections of employees." The stated purpose of the Act was "to place on each agency clear and practical limits designed to preserve the attorney-client privilege and work product protections available to an organization and preserve the constitutional rights and other legal protections available to employees of such an organization." Accordingly, the Act would explicitly prohibit the government from "demand[ing], request[ing], or condition[ing] treatment on the disclosure by an organization, or person affiliated with that organization, of any communication protected by the attorney-client privilege or any attorney work product." The Act would also prohibit government lawyers from forcing organizations into refusing to contribute to the legal defense of an employee, refusing to enter into a joint defense strategy with an employee, refusing to share relevant information with an employee, and terminating or disciplining an employee.

The Act was supported by an unusually broad coalition of organizations, including the American Bar Association, the U.S. Chamber of Commerce, the Association of Corporate Counsel, the National Association of Criminal Defense Lawyers, the American Civil Liberties Union, and other influential business and legal groups. In a press release, former Attorney General Edwin Meese III called for Congress to pass the Act, stating that "[t]he principles embodied in the [Act] strike the right balance between the needs of law enforcement and the fundamental civil rights embodied in the attorney-client privilege and related pro-

tections for individual employees."

On December 12, 2006, just five days after Senator Specter introduced the Act, the Department of Justice released the McNulty Memorandum, which purports to revise several of the Thompson Memorandum's more controversial policies. However, as discussed below, it remains to be seen whether those revisions will result in any practical changes in the Department's behavior.

II. PRIVILEGE WAIVERS

The McNulty Memorandum makes clear that "[w]aiver of attorney-client and work product protections is not a *prerequisite* to a finding that a company has cooperated in the government's investigation." However, it goes on to recognize that "a company's disclosure of privileged information may permit the government to expedite its investigation" and that "the disclosure of privileged information may be critical in enabling the government to evaluate the accuracy and completeness of the company's voluntary disclosure." In short, there appears to be little if any change in the Department's view of the potential importance of a privilege waiver.

The McNulty Memorandum purports to provide additional safeguards by limiting the circumstances under which prosecutors may request privilege waivers, and imposing a regime whereby line prosecutors, depending on the type of information being sought, must first obtain approval from senior Department officials. Although these "safeguards" may prove to be a step in the right direction, the devil, as they say, is in the details.

A. Establishing a "Legitimate Need" for Privileged Information

For example, the McNulty Memorandum provides that "[p]rosecutors may only request waiver of attorney-client or work product protections when there is a *legitimate need* for the privileged information to fulfill their law enforcement obligations" and that a "legitimate need for the information is not established by concluding it is merely desirable or convenient to obtain privileged information." So far, so good. However, examination of the "important policy considerations" that guide prosecutors in determining whether a legitimate need exists suggests that prosecutors might be able to articulate a "legitimate need" in virtually any and every case:

- The first factor is "the likelihood and degree to which the privileged information will benefit the government's investigation." It is hard to imagine any case involving the investigation of an organization and its employees in which the privileged information would not satisfy that low threshold. Certainly, the results of a company's internal investigation and records of its interviews of employees are "likely" to be of "benefit" to the government's investigation in virtually every case.
- The second factor is "whether the information sought can be obtained in a *timely and complete* fashion by using alternative means that do not require waiver." Prosecutors faced with the possibility of individuals asserting their Fifth Amendment rights, or even the possibility of having to retrace steps that corporate counsel may already have taken, may well conclude that this factor weighs in favor of a waiver, even in the ordinary case.
- The third factor is "the completeness of the voluntary disclosure already provided." However, a few paragraphs earlier, the McNulty Memorandum provides, in circular fashion, that "disclosure of privileged information may be critical in enabling the government to *evaluate* the accuracy and *completeness* of the company's voluntary disclosure." Taken together, those two provisions literally establish that a waiver may be necessary to determine whether a waiver is necessary.
- The fourth factor is that a prosecutor must consider "the collateral consequences to a corporation of waiver." But such consequences have not proven to be a deterrent to the Department in the past, and there is no reason to believe that they suddenly will act as one in the future.

B. Obtaining Necessary Approvals to Request Privilege Waivers

After setting prosecutors' "legitimate need" bar quite low, the McNulty Memorandum then divides requests into two categories for purposes of establishing the extent to which senior-level Departmental approval must be sought before a privilege waivers is requested.

1. "Category I" Information

"Category I" information is described as "purely factual information, which may or may not be privileged, relating to the underlying misconduct." "Examples of Category I information could include, without limitation, copies of key documents, *witness statements, or purely factual interview memoranda regarding the underlying misconduct*, organization charts created by company counsel, *factual chronologies, factual summaries, or reports (or portions thereof) containing investigative facts documented by counsel*." Of course, materials falling into each of the italicized categories fall squarely within what has traditionally been considered to be protected by the attorney-client privilege and the work product doctrine.

Before requesting Category I information, an Assistant U.S. Attorney must obtain written approval from his or her U.S. Attorney, who must provide a copy of the request and consult with the Assistant Attorney General or, in the case of prosecutors at Main Justice, get approval in the first instance from the Assistant Attorney General. As a practical matter, it is difficult to imagine either that U.S. Attorneys—who frequently press their Assistants to seek such materials—will deny many such requests or that the "review" process at the Assistant Attorney General level will be anything but perfunctory. It will almost certainly be no more rigorous than the review and approval by the Assistant Attorney General of requests by line prosecutors to provide statutory immunity to witnesses, which requests are routinely rubber-stamped.

Perhaps most troubling, the McNulty Memorandum continues to instruct prosecutors that "[a] corporation's re-

sponse to the government's request for waiver of privilege for Category I information *may* be considered in determining whether a corporation has cooperated in the government's investigation." Coupled with the separate dictate that "[f]ederal prosecutors are not required to obtain authorization if the company voluntarily offers privileged documents without a request by the government," it is difficult to discern any real policy revision at all. Recent experience has shown that, under those circumstances, prosecutors will not have to demand or even request waivers, and companies will feel they must offer waivers for fear of being deemed uncooperative absent such an offer.

2. "Category II" Information

The McNulty Memorandum goes on to outline circumstances in which prosecutors may request "Category II" information, defined to include "attorney-client communications or non-factual attorney work product," including "legal advice given to the corporation before, during, and *after* the underlying misconduct occurred." As a threshold matter, this appears to be an *expansion* on the Thompson Memorandum, which stated that waivers "should ordinarily be limited to the factual internal investigation and any *contemporaneous* advice given to the corporation concerning the conduct at issue" and that "[e]xcept in unusual circumstances, prosecutors should not seek a waiver with respect to communications and work product related to advice concerning the government's criminal investigation."

The McNulty Memorandum provides that Category II requests "should only be sought in rare circumstances" and require written authorization from the Deputy Attorney General. But the memorandum does not define what circumstances are "rare," apparently leaving that determination to the discretion of the individual prosecutor. Nor does the memorandum set out the factors that will be considered by the Deputy Attorney General in determining whether to authorize the request.

Moreover, although the McNulty Memorandum provides that "[i]f a corporation declines to provide a waiver for Category II information . . ., prosecutors must not consider this declination against the corporation in making a charging decision," that seeming limitation is rendered effectively meaningless by the memorandum's very next sentence, which expressly permits prosecutors to "*favorably consider a corporation's acquiescence to the government's waiver request in determining whether a corporation has cooperated in the government's investigation.*" The italicized language will undoubtedly perpetuate the existing culture of waiver, notwithstanding the "limitation" that immediately precedes it.

III. ADVANCEMENT OF ATTORNEYS' FEES TO EMPLOYEES

With regard to an organization's ability to pay the legal fees of its employees and agents, the McNulty Memorandum first provides that

> [p]rosecutors *generally* should not take into account whether a corporation is advancing attorneys' fees to employees or agents under investigation and indictment. Many state indemnification statutes grant corporations the power to advance the legal fees of officers under investigation prior to a formal determination of guilt. As a consequence, many corporations enter into *contractual obligations* to advance attorneys' fees through provisions contained in their corporate charters, bylaws or employment agreements. Therefore, a corporation's *compliance with governing state law and its contractual obligations* cannot be considered a failure to cooperate. This prohibition *is not meant to prevent a prosecutor from asking questions about an attorney's representation of a corporation or its employees.*

Taken together, that language seems to establish that an organization's payment of legal fees for individuals should "generally" not be taken into account, so long as the organization is *obligated* to do so by state law or a specific contractual agreement. But in most cases, an organization is permitted—but *not* obligated—to pay the legal fees and expenses of its employees and agents. Many organizations do so because their bylaws permit it, not because they have specific written contractual agreements with their employees. Perhaps even more troubling is a footnote in the McNulty Memorandum stating that "[r]outine questions regarding the representation status of a corporation and its employees, including how and by whom attorneys' fees are paid, frequently arise in the course of an investigation" and "[s]uch questions are appropriate and this guidance is not intended to prohibit such inquiry." The potential chilling effect of such inquiries is obvious. Indeed, just as with many of the McNulty Memorandum's provisions relating to privilege waivers, this exception threatens to swallow the purported rule.

IV. OTHER ISSUES

The McNulty Memorandum does not even address, much less rectify, many of the serious problems identified by the ABA in Resolution 302B regarding the Department's policies discouraging corporations from entering into or continuing to operate under joint defense and information-sharing agreements, sharing information with employees and agents relating to the matters under investigation by the government, or choosing to retain or declining to sanction an employee who exercises his or her Fifth Amendment rights in response to a government inquiry. To the contrary, the McNulty Memorandum expressly states:

> Another factor to be weighed by the prosecutor is whether the corporation appears to be protecting its culpable employees and agents. Thus, while cases will differ depending on the circumstances, a corporation's promise of support to culpable employees and agents, e.g., through retaining the employees without sanction for their misconduct or through providing information to the employees about the government's investigation pursuant to a joint defense agreement, *may be considered* by the prosecutor in weighing the extent and value of a corporation's cooperation.

The bottom line is that, although the McNulty Memorandum purports to "revise" Department policy, the revisions may prove to be largely superficial and may result in little, if any, real change. Moreover, by announcing with great fanfare a "revision" of its policy, the Department's real aim may have been to try to drive a wedge between members of the coalition that has opposed the Department's policies, and to convince Congress that curative legislation is not necessary. It may only be through that type of legislation that the Department's policies and practices will change in any meaningful respect.

IN THE DISTRICT

By Courtney Angeli, Stoel Rives LLP

The Ninth Circuit Court of Appeals recently provided some guidance in an issue that seems to arise with particular frequency in the context of lawsuits initiated by pro se litigants: How much discretion does Fed. R. Civ. P. 4(m) provide a district court faced with a motion for extension of time to effect service of summons and complaint?

Efaw v. Williams, 473 F.3d 1038 (9th Cir. 2007), appears to be the first decision by any court of appeal holding that a district court abused its discretion in granting an extension under Rule 4(m). Practitioners should heed its guidance and not tarry for a full seven years before serving a defendant in an action. The plaintiff in that case was an individual, Robert Efaw, who claimed that he was beaten severely by two guards, Teresa Williams and Jack Kerr, while imprisoned at a Navajo County, Arizona jail in 1995. Efaw sued a number of individuals, including Williams, and various institutional defendants. Although he later obtained counsel, the original complaint was filed pro se on July 29, 1996, and was subsequently amended in October 1996. By mid-January 1997, plaintiff had served process on all defendants except two individuals, one of whom was Williams. At the time, Williams no longer worked for the Navajo County Sheriff's Office.

On January 28, 1997, plaintiff sought an extension of time to complete service of process, and the district court granted him an additional 180 days, but he failed to serve Williams in that time.

In August 2003, the district court granted partial summary judgment to the other defendants, leaving only defendants Williams and Kerr in the action.

The recent Ninth Circuit decision gives no hint about what woke the proverbial sleeping dog of litigation, but on September 9, 2003—more than seven years after the original complaint was filed—Williams sought dismissal as a party pursuant to Fed. R. Civ. P. 4(m) based on plaintiff's failure to complete service of process. The district court denied the motion and granted plaintiff 30 days to serve defendant. Plaintiff completed service, and the case went to trial with Williams as the only remaining defendant because Kerr, the other security guard, had died several years earlier.

The trial resulted in a judgment for plaintiff of $10,000 in compensatory damages and $90,000 in punitive damages. At trial, on hearsay grounds, the district court refused to admit into evidence a report that Kerr had written on the day of the underlying incident. The report asserted that it was plaintiff who attacked the guards when they entered his cell.

Williams contended on appeal that the district court had abused its discretion when it allowed the extension for service of process, and also challenged admission of Kerr's report on hearsay grounds. In a 2-1 ruling, the Ninth Circuit vacated the judgment and remanded the case with instructions to dismiss the action against Williams.

The court noted that district courts have broad discretion to extend time for service under Rule 4(m). In 1996, the U.S. Supreme Court clarified in *Henderson v. United States*, 517 U.S. 654, 661 (1996), that Rule 4(m)'s 120-day period for service "operates not as an outer limit subject to reduction, but as an irreducible allowance." The *Efaw* court stated that although prior Ninth Circuit law explicitly permits a district court to grant an extension of time to serve the complaint after the 120-day period has expired, "no court has ruled that the discretion is limitless." 473 F.3d at 1041.

Efaw provides guidance as to the factors that a district court should evaluate when faced with an extension decision, and makes clear that the Ninth Circuit viewed the apparent lack of such evaluation as the central failing of the lower court's ruling. Looking to a decision from the Seventh Circuit, the *Efaw* court said that the trial court "may consider factors 'like a statute of limitations bar, prejudice to the defendant, actual notice of a lawsuit, and eventual service.'" *Id.* (*quoting Troxell v. Fedders of N. Am., Inc.*, 160 F.3d 381, 383 (7th Cir. 1998)).

In *Efaw*, the Ninth Circuit held that such factors weighed strongly against the district court's decision to allow an extension. It deemed the seven-year delay "extraordinary," and emphasized that plaintiff had no "reasonable explanation" for it. *Id.* The court suggested that justification for an extension might include a defendant's attempts to evade service, leaving the state, or other action seemingly calculated to impede service.

The court also noted that plaintiff had retained counsel at some point, implying that greater indulgence is warranted for litigants who are not represented and who may find compliance with procedural rules more challenging, particularly if plaintiff is in fact ignorant of the service requirement. The court found persuasive the lack of ev-

idence in the record of actual knowledge by defendant Williams about the action.

The final factor considered by the court, which it suggests was quite significant, is the prejudice that Williams suffered as a result of the delay: Kerr, the only other witness to the incident, had died without ever being deposed, and "the memories of all witnesses faded." *Id.* The court held that the evidentiary issue would be moot by virtue of the dismissal.

Judge William A. Fletcher dissented from what was admittedly a "close case." *Id.* at 1042 (Fletcher, J., dissenting). The dissent emphasized that Williams admitted at trial that Kerr had punched plaintiff and that plaintiff had been restrained in an abnormal position before paramedics were contacted to tend to his bloodied body. The dissenting opinion cites a Ninth Circuit decision from 2004 that states that courts have "'greater leeway to preserve meritorious lawsuits despite untimely service of process,'" *id.* (*quoting United States v. 2,164 Watches*, 366 F.3d 767, 772 (9th Cir. 2004)), and noted that the 1993 amendments to Rule 4(m) give courts discretion to enlarge the 120-day period "even if there is no good cause shown," *id.* (*quoting Henderson*, 517 U.S. at 663). The dissent also stated that the district court may have decided as it did because plaintiff's excessive force claim would be time-barred if it had been dismissed. Finally, the dissent minimized the significance of the seven-year delay based on the fact that the greatest prejudice was caused by the death of Kerr, which occurred only two years after the original filing.

Although most practitioners are unlikely to encounter (or pursue) a case with such extraordinary delay in service, this case underscores the importance of supporting a request for extension of the 180-day service period with a record of the reasons why an extension is warranted. The decision also describes factors that a court should view as relevant to such a request. Moreover, attorneys seeking to represent a potential client and who provide a defendant with a copy of a complaint as a means of initiating a dialogue about representation should bear in mind that knowledge of an unserved action is a factor that may later weigh in favor of extension of service deadlines.

UPDATE TO THE DISTRICT OF OREGON LOCAL RULES OF CIVIL PRACTICE ANNOTATED

By Kathryn Mary Platt

The ***2006 District of Oregon Local Rules of Civil Practice Annotated*** provides annotations for the published cases interpreting the District of Oregon Local Rules of Civil Practice between June 1, 1998 and August 2006. This quarterly column provides updates to that publication. This quarter's column includes annotations to published cases for the period from December 2006 through February 2007. A complete copy of the book ***2006 District of Oregon Local Rules of Civil Practice Annotated*** can be purchased by contacting Kathryn M. Pratt at prattkary@hotmail.com.

ANNOTATIONS TO LOCAL RULE 15.1

YOUNG v. WILLIAMS, CV 06-1511-ST, 2007 WL 614169 (D. Or. Feb. 20, 2007)

Plaintiff moved to amend his complaint, but failed to comply with LR 15.1(c)(1)'s requirement that a party moving to amend a pleading "reproduce the entire pleading and . . . not incorporate any part of the prior pleading by reference." Plaintiff instead supplied only the fifth page of his proposed amended complaint. The Court granted plaintiff's motion to amend, but ordered plaintiff to file a complete amended complaint within 30 days.

ANNOTATIONS TO LOCAL RULE 16

JACKSON & PERKINS WHOLESALE, INC. v. SMITH ROSE NURSERY, INC., CV 03-3091-CO, 2007 U.S. Dist. LEXIS 6326, 2007 WL 397103 (D. Or. Jan. 26, 2007)

In this decision, Judge Panner considered whether a demand for jury trial by a removed defendant was timely when made more than three years after removal. In ruling that the jury trial demand was timely, Judge Panner noted that in interpreting a previous version of LR 16.6(b)(1), the Court held that a party's failure to include a jury demand in the pretrial order waived the right to a jury trial, citing *Thomas v. Transamerica Occidental Life Insurance Co.*, CV 90-584-FR, 1991 U.S. Dist. LEXIS 3834, 1991 WL 47273, at *1 (D. Or. Mar. 27, 1991) (interpreting former LR 235-2(b)(1)). However, Judge Panner concluded that because the removed defendants had made their jury demand before the parties submitted proposed pretrial orders, the reasoning of *Thomas* did not apply to the facts before him.

STINE v. OR. FED'N OF NURSES & HEALTH PROF'LS, LOCAL 5017, CV 05-473 AS, 2007 U.S. Dist. LEXIS 7434, 2007 WL 316357 (D. Or. Jan. 30, 2007)

A pro se plaintiff argued that he should have been allowed to reopen discovery in order to pursue additional evidence relevant to defendant's statute of limitations defense. Approximately one month after his request for an extension of the discovery period was denied, plaintiff filed a "request" to compel response to interrogatories. The Court denied that request because plaintiff failed to confer with defense counsel in violation of LR 7.l, and because the request was untimely under Fed. R. Civ. P. 33(b)(3) and LR 16(d). In addition, the Court denied plaintiff's motion for summary judgment as untimely because he filed it three months after the deadline set by the Court and did not seek to have that deadline extended. However, because the plaintiff was pro se, the Court considered all of the arguments he raised in his summary judgment motion as arguments in opposition to defendants' motions for summary judgment.

ANNOTATIONS TO LOCAL RULE 38

JACKSON & PERKINS WHOLESALE, INC. v. SMITH ROSE NURSERY, INC., CV 03-3091-CO, 2007 U.S. Dist. LEXIS 6326, 2007 WL 397103 (D. Or. Jan. 26, 2007)

In this case, Judge Panner considered whether defendants in a removed action had waived the right to a jury trial by waiting more than three years after the removal to make a request for jury trial. Because Oregon law does not require a party to make an express demand for a jury trial in order to preserve the right to a jury trial, removed parties need only make such a demand if the "court directs that they do so within a specified time" under Fed. R. Civ. P. 81(c). Plaintiff argued that LR 38.1 and LR 38.2 were a "direction by the court to make a demand for jury trial." The Court concluded that LR 38 does not set express deadlines for making jury demands after an action is removed from state court. The Court further noted that, because the request for jury trial was made about three months before the scheduled trial date, plaintiff did not suffer any prejudice. The Court concluded that the demand for jury trial was timely.

ANNOTATIONS TO LOCAL RULE 54

PURE GRACE, INC. v. FURLONG, CV 04-01763-MO, 2006 U.S. Dist. LEXIS 88080 (D. Or. Dec. 4, 2006)

In this matter, Judge Mosman considered a motion for attorneys' fees and costs pursuant to Fed. R. Civ. P. 54(d)(2), LR 54.3, Fed. R. Civ. P. 54(d)(1), and LR 54.1. Plaintiff argued that a settlement agreement and stipulated final judgment that stated "Pure Grace's costs and fees will be determined by motion to Judge Mosman" entitled it to attorneys' fees. Defendant argued that this agreement entitled plaintiff to the right to have Judge Mosman decide whether attorneys' fees were appropriate. Judge Mosman concluded that the language was ambiguous and ordered a hearing on the narrow issue of the parties' intent. The Court denied plaintiff's request for attorneys' fees based on bad faith, noting that defendant's delay and lack of cooperation did not rise to the level of an "exceptional case" that would justify an award of fees on equitable grounds.

Judge Mosman held that an award of costs was appropriate because even though plaintiff had prevailed on only one claim, this claim afforded it a substantial portion of the relief sought. However, he noted that plaintiff failed to provide supporting receipts or an affidavit indicating how the costs it sought were tallied. In light of the fact that defendant did not specifically object, he allowed the requests for filing and services fees and the costs of a rescheduled deposition on the condition that plaintiff show documentation for these costs. However, he denied the request for copying costs for lack of documentation and pursuant to 28 U.S.C. §§ 1821 and 1920 denied the request for a $3,000 retainer paid to an expert who was not in "attendance at trial".

ACRADYNE CORP. v. EURO-HERRAMIENTAS, S.A.U., CV 04-1526-PK, 05-688-PK, 2007 U.S. Dist. LEXIS 2831, 2007 WL 128996 (D. Or. Jan. 12, 2007)

In this case, defendant requested costs in the amount of $69,920.95. Plaintiff argued that any award of costs was precluded because defendant failed to file a bill of costs as required by LR 54.1, and that, in any event, the costs defendant sought were not permitted by 28 U.S.C. § 1920. The Court did not address the timeliness question under LR 54.1 and evaluated the cost bill "by reference to the provisions of § 1920."

CLEMENTE v. OR. DEP'T OF CORR., CV 04-1417-BR, 2006 U.S. Dist. LEXIS 89454, at *13-*15 (D. Or. Dec. 7, 2006)

After defendant prevailed in a case filed by a pro se plaintiff against the Oregon Department of Corrections, defendant sought to recover costs for court reporter fees. The only supporting documentation was a list of court reporters, coupled with the amount for each reporter. Plaintiff objected to defendant's request on the ground that defendant had failed to submit receipts or documentation to verify the costs. Because there was no documentation describing when any of the court reporter fees were incurred, the rate the reporters charged, and the nature of the proceedings, the Court denied the petition for costs. The Court held that defendant's request did not conform with LR 54.1(a)(2), which requires verification of a bill of costs pursuant to the requirements of 28 U.S.C. § 1924. The Court concluded that on "this record, the Court is not able to determine with any certainty whether Defendant's costs were appropriate or necessary."

ANNOTATIONS TO LOCAL RULE 56.1

TUCKER v. OR. AERO, INC., CV 05-930-HU, 2007 U.S. Dist. LEXIS 7611, 2007 WL 405878 (D. Or. Feb. 1, 2007)

The Court noted that it had "reviewed the entire summary

judgment record carefully," even though LR 56.1(e) provides that it has no independent duty to do so.

KARBOAU v. LAWRENCE, 03-CV-82-BR, 2007 U.S. Dist. LEXIS 2060, 2007 WL 114022 (D. Or. Jan. 8, 2007)

In a case involving unreasonable search and seizure filed by a pro se plaintiff, the Court noted that any facts stated by defendant in his concise statement that were not denied or controverted by plaintiff were deemed admitted for purposes of defendant's motion pursuant to LR 56.1(f).

ANNOTATIONS TO LOCAL RULE 83.12

DELONG v. WASH. COUNTY BD. OF COMM'RS, CV 05-1822-TC, 2007 U.S. Dist. LEXIS 11015 (D. Or. Feb. 15, 2007), 2007 WL 539435

Pursuant to LR 83.12, the Court ordered the action dismissed for failure to prosecute when a pro se plaintiff had not contacted the Court in over seven months. Plaintiff had not updated the Court when he changed his mailing address and telephone number, as required by LR 83.10, and mail from the Court could not be delivered to him due to the lack of a current address.

ANNOUNCEMENTS

Annual Judges Appreciation Dinner

Please join the FBA Oregon Chapter for our Annual Judges Appreciation Dinner, which will be held May 8, 2007 at 5:30 p.m. at the Governor Hotel, Portland. This year's dinner will honor Magistrate Judge John Cooney and welcome Judge Mark Clarke. Invitations and RSVP instructions will follow.

FBA Board of Directors Accepting Nominations for Hon. James M. Burns Federal Practice Award

The FBA Oregon Chapter Board of Directors is now accepting nominations for the Honorable James M. Burns Federal Practice Award, which will be awarded at the Chapter's Annual Judges Appreciation Dinner on May 8, 2007. The award honors a person who has contributed to improve the quality of federal practice in Oregon. Please forward your nomination, along with a statement of support of one page or less, to Chapter President Helle Rode at helle.rode@comcast.net or PO Box 69083, Portland, OR 97239. Questions? Call Helle Rode at 503-504-4504.

Judge Thelton Henderson to Present His Documentary Film *Soul of Justice* in Portland

The Honorable Thelton Henderson, U.S. District Court Senior Judge, Northern District of California, will be in Portland on August 6, 2007 to speak and answer questions following the presentation of the documentary film, *Soul of Justice: Thelton Henderson's American Journey*. The film is free and will be shown during lunch in the jury assembly room of the Hatfield Courthouse, 1000 S.W. Third Avenue, Portland.

Judge Henderson is a graduate of Boalt Hall. He was the first black Justice Department lawyer in the South in the early 1960s, and he has had a distinguished career as a lawyer, an academic, and a judge. In the late 1960s, after directing a legal services office in East Palo Alto, California, Judge Henderson moved to Stanford Law School, where he created Stanford's minority admissions program. Judge Henderson spent several years in private practice as a civil rights lawyer before he was appointed to the federal District Court bench by President Carter in 1979.

In this inspiring film, Abby Ginzberg, a lawyer and award-winning producer of documentary films, has captured the highlights of Judge Henderson's life, from his humble beginnings in Watts to his still-active career on the bench. Anyone interested in meeting and talking with a frontline civil rights attorney should not miss this.

Revised Constitution and By-Laws for FBA Oregon Chapter

The FBA Oregon Chapter Board of Directors has prepared a draft revised Constitution and By-Laws of the Oregon Chapter (the most recent revision was in 1985). The revised Constitution and By-Laws will be submitted to our membership for a vote at the April 19, 2007 luncheon meeting. The Board requests your input on the revision; to review the proposed Constitution and By-Laws, visit our Chapter's website at www.vangelisti.com/fbaoregon.htm, scroll down to Organizational Documents of the FBA Oregon Chapter, and open "FBA CONST BYLAWS PROPOSED 2007 REDLINED.PDF." Please send comments and suggestions to Chapter President Helle Rode (helle.rode@comcast.net). The Board thanks you for your time and attention to the revised Constitution and By-Laws.

Helle Rode Opens Mediation and Arbitration Practice

Helle Rode, current President of the FBA Oregon Chapter, announces the opening of her practice focusing on mediation and arbitration. Helle is available to mediate litigated cases and workplace disputes and to serve as an arbitrator in contested matters. She can be reached at helle.rode@comcast.net or 503-504-4504.

FBA Seeking Nominations For Sarah T. Hughes Civil Rights Award

The FBA is seeking nominations for its Sarah T. Hughes Civil Rights Award. The Award was created to honor that man or woman who promotes the advancement of civil and human rights among us, and who exemplifies Judge Hughes' spirit and legacy of devoted service and leadership in the cause of equality. Judge Hughes was a pioneer in the fight for civil rights, due process, equal protection, and the rights of women. The Award will be presented at the President's Installation Banquet to an attorney or judge whose career achievements have made a difference in advancing the causes that were important to Judge Hughes. Such work may include either ground-breaking achievement or a body of sustained and dedicated work in the area of civil rights, due process, and equal protection. Nomination packets are due at FBA National Headquarters by May 31, 2007. For more information on qualifications and nomination packages, please contact Tim Snider at 503-294-9557, or by email at twsnider@stoel.com.

OREGON CHAPTER FBA OFFICERS AND DIRECTORS 2006-2007

President:
Helle Rode
helle.rode@comcast.net

President-Elect:
Katherine Heekin
katherine@heekinlawoffice.com

Vice President:
Courtney Angeli
cwangeli@stoel.com

Secretary:
Seth H. Row
seth.row@hklaw.com

Treasurer:
Jacqueline A. Tommas
503-631-2660

Past President:
Richard J. Vangelisti
richard@vangelisti.com

Directors 2004-2007:
Peter C. Richter
peter.richter@millernash.com

Seth H. Row
seth.row@hklaw.com

Edward T. Tylicki
etylicki@lindsayhart.com

Directors 2005-2008:
Benjamin M. Bloom
bmb@roguelaw.com

Honorable Anna J. Brown
Anna_J_Brown@ord.uscourts.gov

Julie Bolt
julie_bolt@ord.uscourts.gov

Don Cinnamond
donald_cinnamond@ord.uscourts.gov

Chelsea L. Grimmius
chelsea.grimmius@bullivant.com

Todd A. Hanchett
thanchett@barran.com

Timothy W. Snider
twsnider@stoel.com

Kelly Zusman
kelly.zusman@usdoj.gov

Directors 2006-2009
Clarence Belnavis
cbelnavis@laborlawyers.com

Jeff Bowersox
jeffrey@blfpc.com

Kathryn (Kate) Cottrell
kathryn.cottrell@state.or.us

Sivhwa (Hwa) Go
hwa.go@harrang.com

Susan D. Pitchford
sdp@chernofflaw.com

***For the District of Oregon** is a quarterly newsletter of the Oregon Chapter of the Federal Bar Association. Editor Timothy W. Snider, 900 SW Fifth Avenue, Suite 2600, Portland, Oregon 97204, 503-294-9557. It is intended only to convey information. The Oregon Chapter of the Federal Bar Association, editors, and contributors to this publication make no warranties, express or implied, regarding the use of any information derived from this publication. Users of this information shall be solely responsible for conducting their own independent research of original sources of authority and should not rely upon any representation in this newsletter. The views published herein do not necessarily imply approval by the Oregon Chapter of the Federal Bar Association or an organization with which the editors or contributors are associated. As a courtesy to the Oregon Chapter of the Federal Bar Association, Stoel Rives LLP provides publication assistance for For the District of Oregon but does not necessarily endorse the content therein.*

PAST PRESIDENTS

C.E. Luckey
Harry J. Hogan
Sidney I. Lezak
Clifford Comisky
John D. Picco
Arno Reifenberg
LaVorn A. Taylor
Ronald E. Sherk
George D. Dysart
George Van Hoomissen
Peter A. Plumridge
Robert R. Carney
Robert B. (Barry) Rutledge
Jack G. Collins
David E. Lofgren
Paul H. Schroy
Peter A. Plumridge
Chester E. McCarty
Larry O'Leary
John D. Picco
James F. Zotter
Elden Gish
Thomas C. Lee
Cecil Reinke
C. Richard Neely
Linda DeVries Grimms
Richard A. Van Hoomissen
Owen L. Schmidt
Jonathan M. Hoffman
Michael C. Dotten
Susan K. Driver
Robert S. Banks, Jr.
Paul R. Gary
Sarah J. Ryan
Robert E. Maloney, Jr.
Paul T. Fortino
David A. Ernst
David A. Bledsoe
James L. Hiller
Gilion Dumas
Gregory J. Miner
Robert E. Barton
Nancy J. Moriarty
Kathleen J. Hansa
Katherine S. Somervell

Missing Electronic Notices?

We have been sending the electronic notices via our listserv. While we have made every effort to obtain our members' email addresses, we need your help to keep our list accurate and current. For those members without email, we are providing the electronic notices by fax. If you have an email address or fax number and have *not* been receiving electronic notices, or if your email address changes, please contact our listmaster: **Seth Row, Holland & Knight**, 503-517-2931, seth.row@hklaw.com

Call for Submissions/Publication Schedule

***For the District of Oregon* welcomes submissions from everyone as well as our regular contributors. The deadlines are: June 15, 2007; September 15, 2007; and December 1, 2007. We ask only that you advise us in advance if you are preparing a submission. Please direct inquiries to Timothy Snider, 503-294-9557, twsnider@stoel.com.**

New FBA Members Welcome

Membership Eligibility. FBA membership is open to any person admitted to the practice of law before a federal court or a court of record in any of the several states, commonwealths, territories, or possessions of the United States or in the District of Columbia, provided you are or have been an officer or employee of the United States or the District of Columbia, or you have a substantial interest or participate in the area of federal law. Foreign Associate Status is open to any person admitted to practice law before a court or administrative tribunal of a country other than the United States. Law Student Associate Status is open to any law student enrolled at an accredited law school. If you wish to join, please visit www.fedbar.org and click on the "Join Now" link.

Monthly FBA Luncheon—New Location and Food Options!

Please join the FBA Oregon Chapter for our monthly luncheon on April 19, 2007, featuring U.S. District Judge Anna Brown. Judge Brown will speak about jury instructions in federal court.

The luncheon will be held at the University Club, 1225 SW Sixth Avenue, Portland, starting at noon. *Please note the new location and start time.*

Please RSVP to Ann Fallihee, afallihee@barran.com, or 503-276-2129. Make sure to indicate if the person attending will need a vegetarian lunch. It is *very important* that you RSVP to Ann for the luncheon by 5 p.m. on April 17 so that we can ensure that we have enough lunches. The luncheon cost is $18 for members and $20 for nonmembers. Please send your check, payable to the FBA Oregon Chapter, c/o Ann Fallihee, Barran Liebman, 601 SW Second Avenue, Portland, Oregon 97204, or pay at the door.

Upcoming FBA Monthly Luncheons:

May 17: Magistrate Judge Thomas Coffin—Mediation in Federal Courts

June 21: FBA Oregon Chapter Annual Meeting—speaker to be announced, free lunch

Oregon Chapter
Federal Bar Association
1001 SW 5th Avenue, Suite 1900
Portland, OR 97204

PRST STD
U.S. POSTAGE
PAID
PORTLAND, OR
PERMIT NO. 11