



Corporate Representative Depositions: Notice Provision of Rule 30 (b)(6)[©]

by Carter E. Strang and Arun J. Kottba

Federal Rule 30(b)(6) is the vehicle for taking depositions of corporate representatives in civil cases. Such depositions are unique in many respects and contain traps for the unwary. A lack of familiarity with the Rule's provisions can be disastrous for the noticed corporation and a bonanza for the noticing party.

This is the first of a series that will be published in *Inter Alia* regarding corporate representative depositions under Rule 30(b)(6). It will focus on the Rule's notice provision.

Notice Provision

Rule 30(b)(6)'s notice provision states:

In its notice or subpoena a party may name as the deponent a public or private corporation, a partnership, an association, a governmental agency, or other entity and must describe with reasonable particularity the matters for examination.¹

Following the truism that "you cannot understand the present if you do not understand the past," we will begin discussion of the Rule's notice provision by looking at the history that gave rise to it.

Pre-rule practice placed the burden on the party taking the deposition to designate a specific corporate representative that possessed knowledge about the areas at issue and was an officer, director or managing agent whose testimony would be binding on the corporation.²

Denial of knowledge was common by the corporate representatives so designated, leading to successive depositions to find someone with knowledge who could provide testimony binding on the corporation, causing one commentator to note: "[t]



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Arun J. Kottba is an Associate in the Cleveland office of Tucker Ellis & West LLP. He is a trial attorney who focuses on mass tort and product liability.

his dance of the ignorant witnesses became so common it earned a nickname: 'bandying.'³

Rule 30(b)(6), adopted in 1970, shifted the burden to the corporation to produce a representative whose testimony is responsive to the notice, which testimony is then binding on the corporation, no matter the representative's corporate status. This burden is one familiar to litigators, and one more fairly placed on the noticed corporation:

This burden is not essentially different from that of answering interrogatories under Rule 33, and is in any case lighter than that of any examining party ignorant of who in the corporation has knowledge.⁴

The Notice

The noticing party still retains an initial burden of providing a notice that describes "with reasonable particularity" the matters on which examination is requested.⁵ This means that a notice must be specific and not over broad or unduly burdensome. Thus, a challenge to a notice as being "too specific" was denied because—the court held—the more precise the request, the easier it should be for the noticed party to produce a witness to testify.⁶ Providing a "specific" notice is what, in fact, the Rule envisioned.⁷

Judge Gwin of our Northern District of Ohio Court held that a notice was both over broad and unduly burdensome where it 1) sought information relating to a vast array of strategic, financial, and contractual information from a non-party corporation; 2) provided little time for a response; 3) included areas of questioning beyond the issues in the underlying litigation; 4) would require a costly review/analysis of thousands of documents and witness preparation in order to respond; 5) requested information already available from other sources; and 6) sought potentially privileged information.⁸

Also held improper was a request—deemed "too broad and burdensome" given its "almost limitless" scope—for the deposition of corporate representatives to address some 143 categories of questions, many with questions within questions, that sought information about every fact, conception, intention, understanding, belief and sense impression regarding the disputed topic (patents) covering a 20-year period.⁹

Where a notice properly identified the areas of inquiry but ended each with "including but not limited to" language, the notice was rendered improper because one responding cannot properly identify the outer limits the areas of inquiry noticed, subjecting it to an impossible task in attempting to comply.¹⁰

A notice that simply requested information from those "with knowledge of the facts" was similarly improper.¹¹

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The President's Podium

by Ellen Toth

In Memoriam: Honoring Our Mentors and Professional Heroes

Each year, Chief Judge James G. Carr presides over a Memorial Program to honor lawyers and judges in Cleveland and Cuyahoga County who passed away during the prior year. This year's program was held on April 6th at 12 p.m. in the Atrium of the Howard M. Metzbaum U.S. Courthouse. To those of you who have never attended, I strongly encourage you to attend next year to pay your respects to the honored members of the bench and bar and their families. To those of you who have attended, I am sure you will attend each year and encourage your colleagues to support this wonderful program.

You may know some of the honorees or may have read about them in the headlines but, whether you knew them or not, each of them made a unique contribution to our

legal community. It is important for us to show the honorees' families that their family member was important to his or her colleagues and appreciated by his or her fellow members of the bar.

Many of our families support the fact that we are lawyers and might even turn to us for free legal advice on occasion, but few of them have actually seen us "in action" as an attorney or a judge. Most family members have never read a motion for summary judgment we wrote, read the transcript of a deposition we took, witnessed an effective cross-examination or heard us make a closing argument. But judges, colleagues

The families of the honorees may not fully appreciate what their loved ones did as judges or lawyers—but they relish hearing stories from colleagues about our professional contributions and accomplishments. For many families, this may be the best, and last, opportunity of this kind.

and co-workers have seen and heard us practicing law and can share stories about our victories and contributions. The families of the honorees may not fully appreciate what their loved ones did as judges or lawyers—but they relish hearing stories from colleagues about our professional contributions and accomplishments. For many families, this may be the best, and last, opportunity of this kind.

Please join us in honoring our deceased colleagues and showing our gratitude to their families.



Ellen Toth is an attorney with Ogletree Deakins Nash Smoak & Stewart PC in Cleveland. Ms. Toth is President of the Northern District of Ohio Chapter of the FBA.

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Chapter Marks Passing of David B. Webster



David B. Webster

The Cleveland legal community lost a dear colleague and friend, David B. Webster, who passed away on March 13, 2009, from cancer. Webster, 46, was a member of the FBA Northern District of Ohio Chapter's Board of Directors from 2002 to 2007, and served as the first Chair of the Chapter's Government Relations Committee.

Webster was a founding member of the Cleveland law firm Webster & Dubyak. He also founded the nonprofit Clean Air Conservancy (CAC), which pioneered the "retirement" of pollution rights as a means of improving our environment. The CAC purchases, and then "retires," sulfur dioxide (SO₂) allowances

that otherwise would have been used to release SO₂ into the atmosphere. To date, the CAC has retired more than 7 billion tons of pollution credits and allowances.

Webster was a native of Cuyahoga Falls. He graduated *summa cum laude* from Ohio University in 1983 and *magna cum laude* from Case Western Reserve University School of Law. Webster was serving as president-elect of the Cleveland Metropolitan Bar Association (CMBA), and was to assume the presidency this June. His efforts were instrumental in the historic unification of the Cleveland Bar Association and Cuyahoga County Bar Association, forming the CMBA in 2008.

Webster is survived by his wife and law partner, Beth Brandon Webster, and their four children, Olivia, Caroline, Juliet and John, as well as his parents, two brothers and a sister. To each of them, the FBA Northern District of Ohio Chapter sends its heartfelt condolences.

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Write an Article!

Members of the Northern District of Ohio Chapter of the Federal Bar Association are invited to submit an article for an upcoming issue.

If you are interested in writing an article, please contact me at (216) 706-3874 or sjett@taftlaw.com. **The deadline to receive articles for the Summer 2009 issue is May 29, 2009.**



Stephen H. Jett
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 2008-09 Newsletter Editor

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Clerk's Corner

by Geri M. Smith

New Crosswalk on Huron Avenue at Carl B. Stokes U.S. Court House

After several long years we finally have a crosswalk on Huron Rd. The crosswalk has a traffic light that is activated when you press the button to cross. This light is only (at least presently) to stop traffic for pedestrians to cross Huron Road. A special thanks goes to Judge Polster who was pivotal in working with the city of Cleveland to make this happen.

Please continue to use caution, however, when crossing, because the traffic is still not accustomed to looking for a traffic signal and has been driving through red lights.

Court Authorizes Filing Sealed Documents in CM/ECF with Approval of Court

Please note the change to Local Civil Rule 5.2 and Local Criminal Rule 49.4 re: Filing Documents under Seal, that went into effect Feb. 2, 2009. In accordance with the local rule changes allowing sealed documents to be filed electronically in CM/ECF, training documentation is available on our Web page at www.ohnd.uscourts.gov/Electronic_Filing/electronic_filing.html. The modules include:

- Filing Sealed Documents Demo
- Local Civil Rule 5.2
- Local Criminal Rule 49.4
- Advisory for Limiting Personal Information in Transcripts
- Policies and Procedures
- Q&A Regarding Electronic Transcripts

Classroom training in electronic filing at our courthouse locations continues to be available to interested attorneys and law firm staff and at other court locations by prior arrangement. For more information, please call:

Cleveland: (216) 357-7007
Akron: (330) 252-6015
Toledo: (419) 213-5500
Youngstown: (330) 884-7419

Court Adopts Model Protective Order as Appendix L to Local Rules

The court approved a standard Stipulated Protective Order recommended by the court's attorney advisory group to be used in civil cases in which the parties seek to protect confidential information. Although

there is a presumption that most records will be open to the public, the standard protective order was adopted in recognition that under some circumstances particular information must be kept private. The standard protective order is provided as a template for a potential order. The determination of whether such an order will be issued remains with the individual judicial officer assigned to the case. The template is provided as a guide to the parties in helping them draft a proposed agreement.

The model stipulated protective order form has been added to the Local Rules as Appendix L. Local Rule 16.3(b)(2) was also modified to add the determination of whether an order is necessary to protect confidential information to the agenda for the Case Management Conference. Highlights:

- There is a presumption in favor of public disclosure and that the order will be strictly construed in favor of public disclosure.
- The definition of "confidential information" is limited as follows, "confidential personal information, medical or psychiatric information, trade secrets, personnel records, or other such sensitive commercial information that is not publicly available."
- The order prohibits the electronic filing of redacted briefs or the filing of briefs under seal. Counsel are directed to refer the court to the confidential exhibit filed under seal, rather than to re-publish the contents of the confidential exhibit in the brief.
- The ability to now file sealed documents in CM/ECF with the court's approval will enhance the Rule's implementation.
- The order emphasizes that trials are open to the public and that no confidential information can be protected during trial absent order of the court. The order preserves the obligation of the parties to provide advance notice to the other party if he or she intends to use confidential information at trial. It further provides that the court may issue any orders, if necessary, to protect the use of confidential information at trial.

Filing Transcripts in Social Security Appeals Electronically

A technical modification was made to Section 5 of the Electronic Filing Policies and Procedures Manual

to indicate to parties that Social Security transcripts should be filed electronically in those instances in which the Social Security Administration provides the transcript in electronic format. The modification permits those documents to exceed the five-megabyte limitation placed on the size of other documents filed electronically to take advantage of the index and internal hyperlinks that are available when the transcript is filed as a single document.

Requests for Refunds

Requests for refunds should be filed electronically in CM/ECF. The procedures are posted on our Web site at www.ohnd.uscourts.gov/Electronic_Filing/Refund_requests.pdf.

Any questions may be directed to the finance department of the Clerk's Office, (216) 357-7022. If you have difficulty filing the request, please call (216) 357-7081.

Amendments to 6th Circuit

Rules Effective Jan. 12, 2009

- Circuit Rules 10, 27, 28, 30, and 101
- Internal Operating Procedures 10 and 11
- Guide to Electronic Filing

The 6th Circuit Court of Appeals has adopted amendments to several of its Local Rules, Internal Operating Procedures and the Guide to Electronic Filing. These amendments are all effective as of Jan. 12, 2009. The text of the Rules, the procedures, and the Guide reflecting these amendments are available on the circuit's Web site.

The amendments to the rules were adopted without prior public notice or opportunity to comment on the court's determination that an immediate need existed therefore; 6 Cir. R. 47(a). Pursuant to that rule the court will welcome comment from any interested persons no later than April 13, 2009. Comments may be addressed to ca06-rules_comments@ca6.uscourts.gov.

Court Closings

If inclement weather or other emergency conditions cause the court to close or delay opening at any of its courthouses, the Clerk's Office will post a notice at the top of the court's Web site (www.ohnd.uscourts.gov). The public may also call individual courthouses at their main numbers: Akron, (330) 252-6000; Cleveland, (216) 357-7000; Youngstown, (330) 884-7400; and Toledo, (419-) 213-5500. Please be advised, however, that the determination to conduct, cancel or delay court proceedings resides with the presiding judicial officer, so if you have any questions about particular proceedings, it would be best to call chambers directly.

Information on the dates of other closings is posted on the web site under "Holiday Closing."

"In the News"

Please visit the U.S. Court's Web site to see:

- An interesting article, "On Being Chief Judge," was recently published in the federal judiciary publication *The Third Branch*. and may be found at: www.uscourts.gov/ttb/2009-02/article03.cfm?WT.cg_n=TTB_Feb09_article03_WhatsNew_homepage.
- A recently released video on careers in the court at www.uscourts.gov/careersPromo Loader.swf.
- An article entitled, "A Study: Class Action Plaintiffs Most Often Did Not Seek to Certify Class" at www.uscourts.gov/ttb/2009-02/article05.cfm?WT.cg_n=TTB_Feb09_article05_newsroom. You may see the interim report at [www.fjc.gov/public/pdf.nsf/lookup/cafa1108.pdf/\\$file/cafa1108.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/cafa1108.pdf/$file/cafa1108.pdf).
- The U.S. Sentencing Commission released two reports in January 2009, one that looked at federal criminal sentencing since 1991 and a second that provides an overview of federal criminal cases in 2007. An article highlighting the studies may be found at www.uscourts.gov/ttb/2009-02/article06.cfm?WT.cg_n=TTB_Feb09_article06_newsroom. The reports themselves may be found at: www.uscourts.gov/general/20081230_Changing_Face_Fed_Sent.pdf and www.uscourts.gov/general/20081222_Data_Overview.pdf.

Upcoming Events

The Ohio State Bar Association 2009 Annual Convention is scheduled for May 13-15 at the Renaissance Cleveland Hotel.

Please set aside the dates Oct. 22 and 23, 2009, so that you can attend the bi-annual Federal Bench-Bar Conference of the Northern and Southern Districts of Ohio to be held in Columbus, Ohio.



Geri M. Smith was appointed the Clerk of Court for the U.S. District Court Northern District of Ohio on July 1, 1991, having joined the court in 1982. She serves as the chief administrative officer of the court as well as the administrative assistant to the Chief Judge. Smith is a member of the FBA-NDOC Board of Directors.



Chapter Partners with Legal Aid Society

By Diana Thimmig

On Feb. 21, 2009, members of the Federal Bar Association, Northern District of Ohio Chapter, partnered with the Cleveland Legal Aid Society to staff a Brief Advice and Referral Clinic held at the West Side Catholic Center in Cleveland. The Brief Advice and Referral Clinic is a monthly neighborhood clinic, in which volunteer attorneys with expertise in relevant substantive law provide area residents, many of whom are living below the poverty line, with much needed legal assistance.

Following a brief orientation conducted by the staff of the Legal Aid Society, area law students began the intake process. The law students gained real-world experience by meeting with a resident and completing an intake sheet for use by the volunteer attorney. With the assistance of the background prepared by the law student, the volunteer attorneys would assess the issues, review supporting materials and, if necessary, seek input from a mentor attorney. Following this preparation, the volunteer attorney would meet with the resident, conduct an interview to make sure that he or she had all the relevant facts and provide advice as to a recommended course of action.

Issues addressed by the volunteer attorneys included expunging criminal records, employment-related issues, insurance claims, personal injury claims, landlord-tenant disputes, debtor-creditor issues, bankruptcy, immigration, Social Security and

general civil litigation. Domestic law issues related to divorce, child custody and spousal or child support were, however, handled by attorneys from Legal Aid.



Volunteer attorneys meet with local residents during the Clinic, providing advice on a wide variety of legal issues.

Chapter members who volunteered and staffed the clinic included Steve Paffilas, U.S. Attorney's Office; Dennis Terez, Office of the Federal Public Defender; Ellen Toth, Ogletree Deakins; Mike Mumford, Baker & Hostetler; Jim Satola, Squire Sanders & Dempsey; Kerri Keller, Brouse McDowell; Gregory

Feldcamp, Tucker Ellis & West; Natalia Steele, Vorys Sater Seymour & Pease; and Diana Thimmig, Roetzel & Andress.

Participating chapter members unanimously agreed (a rarity among lawyers) that the Brief Advice and Referral Clinic was a meaningful experience that they would like to repeat. Feldcamp stated "[I]t was educational learning how different cases are handled by the clinic. I could learn a lot more by participating in future clinics." Keller added, "I enjoyed participating in the clinic and appreciated the experience."

Given the success of the clinic and the overwhelming membership response, the chapter will sponsor another Brief Advice and Referral Clinic Nov. 14 in Cleveland.

Look for additional details in upcoming editions of *Inter Alia*.



Legal Aid Attorney Susan Stauffer, addressing FBA members Gregory Feldcamp, Jim Satola, Steve Paffilas and volunteer law students during the brief orientation session.



Diana M. Thimmig is Partner-in-Charge, Cleveland Office, Roetzel & Andress. Ms. Thimmig focuses her practice on complex business and commercial litigation, bankruptcy cases, and insolvency proceedings. She is FBA-NDOC Membership Chair and a member of the FBA-NDOC Board of Directors.

First Annual Capital Habeas in Ohio Seminar

By *Dennis Terez*

On Feb. 5 and 6, 2009, the newly formed capital habeas unit of the Office of Federal Public Defender for the Northern District of Ohio held its first annual seminar, Capital Habeas in Ohio. The Northern District of Ohio Chapter of the Federal Bar Association, and the Habeas Assistance and Training Office of the Office of Defender Services in Washington, D.C., co-sponsored the seminar. Program organizers were Alan Rossman and Vicki Werneke, both assistant federal public defenders working in the capital habeas unit in Cleveland.

This year's seminar included discussions on critical habeas concepts, including fact development and litigation strategies in federal court. Among the presenters were nationally recognized habeas assistance and training counsel, including John Blume, Mark Olive and Denise Young. Presenters also included prominent local practitioners, such as Jeffrey Gamso of the American Civil Liberties Union and Michael Benza who leads the death penalty clinic at Case Western Reserve University School of Law. Seminar organizers look to bring in talent from the Southern District of Ohio's FPD Office as well in future programs. This year, David Stebbins and Richard Vickers, an assistant federal public defender and investigator in that office, respectively, were presenters on the topics of investigative techniques and the funding, pleading and preservation of issues in the capital habeas arena.

Unique to this program—and something program sponsors aim to expand next year—was a presentation made by the court's capital habeas law clerk, Lori Riga, and a special presentation by John Blume and Mark Olive to judges and their staffs. The sponsors also intend to include in future programs presentations by lawyers who have argued leading capital habeas cases in the Supreme Court of the United States. This year's program included Dana Hansen Chavis who argued on Jan. 12, 2009, on behalf of the petitioner in *Harbison v. Bell*, Case No. 07-8521. That case presents the court with the issue of whether indigent death row inmates seeking clemency have a right to federal taxpayer-funded lawyers. Ohio's Governor Ted Strickland and others filed an amicus brief in support of the petitioner in that case. A decision in *Harbison* is expected later this term.



Dennis G. Terez is the Federal Public Defender for the Northern District of Ohio and serves as an adjunct faculty member at the Case Western Reserve University School of Law. He is also a member of the FBA-NDOC Board of Directors.

CJA Lawyer Appreciation Luncheon

On Jan. 30, 2009, the first annual CJA Lawyer Appreciation Luncheon was held at the Renaissance Hotel in Cleveland. The guest speaker was Brendan V. Sullivan Jr., a senior partner at the Washington, D.C., law firm of Williams & Connolly LLP. Sullivan's long and distinguished career has included the representation of Lt. Col. Oliver North during the late 1980s; a number of high-profile public officials from both the executive and legislative branches in Washington; and most recently former Sen. Ted Stevens from Alaska. Senator Stevens was convicted last fall and subsequently lost his bid for re-election. His case is currently in the throes of postconviction motion litigation. Sullivan spoke

of the unique obligations that form a special bond among defense attorneys, and the difficult challenges they face both in the courtroom and in the public's eye. He illustrated his talk with examples from his own cases where a particular defense attorney's diligence in providing the client with zealous advocacy resulted in a dramatic turn around in the case. Also speaking at the luncheon were Chief Judge James G. Carr, who welcomed the guests, Judge Peter C. Economus, who serves as the chair of the court's CJA Selection Committee, and Federal Public Defender Dennis G. Terez, who introduced Sullivan. Program organizers intend to make this an annual event.



Welcome New Board Members



Catherine ("Cathy") Garcia-Feehan

As part of its efforts to represent all parts of the Northern District of Ohio Chapter, the FBA welcomes two new members to its Board of Directors: Catherine "Cathy" Garcia-Feehan from Toledo and John P. "J.P." Daliman from Youngstown.

"Our Chapter offers many exciting programs and seminars and we want to offer our Chapter activities to federal practitioners throughout the Northern District of Ohio," said Ellen Toth, FBA-NDOC Chapter President. "By having Cathy join Jason Hill from Toledo on our Board and adding J.P. from Youngstown, we will increase our ability to reach out to federal practitioners throughout the Northern District."

Cathy Garcia-Feehan is a native of northwest Ohio. She obtained her undergraduate degree from Bowling Green State University and her law degree from the University of Toledo College of Law. She is a career law clerk to the Honorable David A. Katz. Prior to her tenure with Judge Katz, Catherine served as a career law clerk to the Hon. Nicholas J. Walinski and then clerked for the Hon. David D. Dowd.

Cathy is a member of the Ohio State Bar Association, Federal Bar Association, Toledo Bar Association,

Toledo Women's Bar Association, Ohio Women's Bar Association, the Lucas County Bar Association and is an Ohio State Bar Foundation Fellow. She serves on the Board of the Toledo Bar Association, is a past-president of the Toledo Women's Bar Association, and a past-president of the University of Toledo College of Law Alumni Association.



John P. ("J.P.") Daliman

J.P. Daliman is general counsel, controller and licensed administrator of Windsor House, Inc. in Youngstown and its nursing homes and related companies. He received a Bachelor of Arts degree in mathematics from Youngstown State University and obtained his law degree from the University of Akron College of Law. He is active in various civic and community activities including the Youngstown United Way Campaign Fund, Youngstown YMCA, Assumption Nursing Home Board, Foundation Fighting Blindness, the Ice Castle Scholarship Fund, Inc. and St. Michael's Church.

Please join us in welcoming Cathy and J.P. to the board and thanking them for their willingness to serve.

Welcome New Chapter Members

Heather Allred, Attorney at Law
Michael Austin, Benesch Friedlander Coplan & Aronoff LLP

Kenneth Blech, Kenneth A Blech & Co, LPA
Matthew Bruce, Oberholtzer Filous & Lesiak
Christopher Carino, Brouse McDowell, LPA

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Jennifer Young, Attorney at Law

Eric Zell, Calfee Halter & Griswold LLP

Brown Bag Luncheon with U.S. District Judge Sara Lioi

By Stephen Funk



Judge Sara Lioi

On Dec. 19, 2008, the Northern District of Ohio Chapter of the Federal Bar Association and the Federal Court Committee for the Akron Bar Association jointly hosted a brown bag luncheon for U.S. District Judge Sara Lioi. More than 35 attorneys attended the luncheon, which lasted for more than an hour.

Judge Lioi has been a member of the federal judiciary for almost two years since her appointment to the bench by President George W. Bush in 2007. Prior to her appointment, she was a trial judge on the Stark County Court of Common Pleas for almost 10 years, where she was elected to serve two six-year terms. Before her service as a common pleas judge, Judge Lioi was an attorney at the law firm of Day, Ketterer, Raley, Wright & Rybolt, Ltd., where she began her legal career in the fall of 1987 and was promoted to partner in December 1993. She graduated in 1983 from Bowling Green State University with a Bachelor of Arts degree and continued her education at The Ohio State University, receiving her Juris Doctor degree in 1987.

During the brown bag luncheon, Judge Lioi introduced her staff: Jacqueline Porter, courtroom deputy clerk; Sharon K. Derivan, law clerk; Brodie Butland, law clerk; and David DeVito, law clerk. She also engaged in a lengthy discussion of her chambers' general procedures and preferences with questions from counsel. Among other things, Judge Lioi emphasized the importance of the case management conference (CMC). She generally expects that counsel should be

prepared to discuss the factual predicate of the case and to discuss settlement. For these reasons, she requires that clients be present for the CMC.

In this regard, Judge Lioi advised that she is willing to tailor the case management plan to the needs of each particular case and to take into account the cost of litigation and the amount of discovery necessary for settlement, dispositive motions, and/or trial in determining the appropriate case management schedule. Judge Lioi also discussed her general preferences and practices during trial. Among other things, she allows counsel to engage in jury voir dire. She also will allow jurors to take notes during trial and to submit questions for the court to ask of witnesses. Such juror questions are reviewed and approved by the judge before they are asked, and counsel are then permitted to ask additional follow-up questions, if necessary.

For more information about U.S. District Judge Sara Lioi, please consult her Web site at www.ohnd.uscourts.gov/Judges/District/Lioi__Sara/lioi__sara.html.



Stephen W. Funk is a partner with the law firm of Roetzel & Andress in Cleveland and Akron. Mr. Funk's practice focuses on business and public law litigation, where he has been involved in representing a large number of private and public sector clients, prosecuting and defending complex claims for breach of contract, constitutional violations, antitrust and securities violations, fraud, professional malpractice, defamation, and director and officer liability. He is a graduate of the Harvard Law School, a former law clerk to U.S. District Judge Ann Aldrich, and a former Senior Litigation Counsel with the U.S. Department of Justice.

Visit the FBA-NDOC online at
www.fba-ndohio.org



The Lilly Ledbetter Fair Pay Act of 2009 and its Impact on Employers

By Christopher J. Carney and Christopher F. Carino

The Lilly Ledbetter Fair Pay Act of 2009 was signed into law by President Obama on Jan. 29, 2009.¹ In all likelihood, the Act should increase the litigation of pay discrimination claims because it resets the statute of limitations for filing wage claims based on alleged discrimination each time an employee receives a paycheck, benefits, or “other compensation.”² Now, previously stale pay discrimination claims may work their way into the courtroom. Congress conceived the Act in response to some outspoken backlash to the Supreme Court’s decision in *Ledbetter v. Goodyear Tire & Rubber Co.*, 127 S.Ct. 2162 (2007). To put the Act into its proper context and understand its implications it is necessary to understand the Supreme Court’s decision.

The *Ledbetter* Decision

Lilly Ledbetter worked in a management position at Goodyear’s Gadsden, Alabama plant from 1979 to 1998 when she accepted an early retirement package.³ Once she retired, Ledbetter filed a charge of discrimination with the EEOC alleging that throughout her employment she received smaller annual increases in pay as compared to similarly situated males in violation of Title VII of the Civil Rights Act of 1964.⁴ A jury ruled in Ledbetter’s favor awarding her, among other things, \$223,766.00 in back pay and over \$3.2 million in punitive damages.⁵ The district court reduced the award to \$360,000.00 plus attorneys’ fees and costs and Goodyear appealed from that judgment.⁶ The 11th Circuit Court of Appeals reversed and entered judgment in favor of Goodyear, holding that Ledbetter’s pay at the time she filed her charge of discrimination resulted from

decisions well outside of the 180-day charge filing time period.⁷

In a 5-4 decision, the Supreme Court held that the EEOC charge period is triggered when a discrete unlawful practice takes place and that a new violation does not occur, and a new charging period does not commence, on the occurrence of subsequent non-discriminatory pay decisions that entail adverse effects resulting from the past discrimination (in this case, continuing to pay Ledbetter less than her male counter-

parts based on decisions made years before she filed her charge).⁸ In so holding, the Court rejected Ledbetter’s argument that Goodyear’s nondiscriminatory conduct of paying Ledbetter during the charging period gave present effect to Goodyear’s discriminatory conduct outside of that period because Ledbetter was unable to prove discriminatory intent within the charge period—a necessary element of any disparate treatment claim.⁹

The Act and its Implications

The Act overturns the *Ledbetter* decision and amends Title VII, the Americans with Disabilities Act of 1990, the Rehabilitation Act of 1973, and the Age Discrimination in Employment Act of 1967 so that the period for filing a charge of discrimination begins when: 1) a discriminatory compensation decision or other practice is adopted; 2) an individual becomes subject to the compensation decision or practice; or 3) an individual is affected by an application of a discriminatory compensation decision or practice.¹⁰ As a result, the statute of limitations starts over each time an employee receives a check based on a discriminatory compensation decision. Putting



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this into context, under the new law an employee can now challenge compensation decisions that are five, 10 or even 20 years old, on the theory that their current paycheck is tainted by the prior discriminatory decision or practice. In addition, while *Ledbetter* involved pay discrimination based upon sex, the Act applies not only to gender discrimination, but also to race, national origin, religion, disability or age discrimination.¹¹ Finally, the Act also prohibits "other practices" that affect compensation, which will likely encompass hiring, firing, promotion and demotion decisions.¹²

The law is retroactive to May 28, 2007, the day before the Supreme Court's decision in *Ledbetter*, and applies to all pay discrimination claims pending on or after that date.¹³ Presumably this was done to provide individuals who did not file pay discrimination claims in light of the *Ledbetter* decision the ability to do so, and to revive those claims that were dismissed on statute of limitations grounds after the *Ledbetter* decision so that they can be re-issued.

Going Forward

From the employer's perspective, the good news is that the Act does not increase the limit on recovery of back pay—it is still limited to a maximum of two years preceding the filing of a charge of discrimination.¹⁴ Additionally, affirmative defenses such as waiver, estoppel and laches will likely become more important when arguing that an employee's wage claim for past alleged discrimination should be time-barred.

On the prevention side, it is critical that employers have written procedures in place for documenting the reasons for their pay decisions as well as data supporting the pay decisions that are made. In light of the Act's open-ended limitations period for bringing wage claims based upon unlawful discrimination, it will be important for employer's to evaluate and likely extend their recordkeeping policies as they relate to pay decisions. The expanded limitations period also should prompt employers to conduct self-audits of

starting pay and promotion and merit increases from years passed.

It is now more important than ever for employers to implement objective criteria for starting salaries, and promotional and merit increases. The last thing employers (and their counsel) want to defend are decisions from another time, that potentially predate their current decision makers and their current practices. In other words, the Act opens the door for the past to resurface and haunt employers.

Endnotes

¹The Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2 (2003).

²*Id.*

³*Ledbetter v. Goodyear Tire and Rubber Co., Inc.*, 127 S.Ct. 2162, 2165 (2007).

⁴*Id.*

⁵*Ledbetter v. Goodyear Tire and Rubber Co., Inc.*, 421 F.3d 1169, 1176 (11th Cir. 2005).

⁶*Id.*

⁷*Id.* at 1189.

⁸*Ledbetter*, 127 S.Ct. at 2169-72.

⁹*Id.* at 2169.

¹⁰The Lilly Ledbetter Fair Pay Act of 2009 §§3-5.

¹¹*Id.*

¹²*Id.*

¹³*Id.* at §6.

¹⁴*Id.* at §3.



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FBA Intellectual Property Seminar

by *Annette G. Butler*

On Thursday, Feb. 5, 2009, board members Kip Bollin of Thompson Hine and Virginia Davidson of Calfee, Halter and Griswold co-chaired and conducted our chapter's first Intellectual Property Crimes Seminar. The 3.75 hour seminar was held in Judge Lesley Brooks Wells' 19th floor courtroom. The 65 attendees, most of whom were private sector attorneys from both firms and corporations, examined issues, answers and some trial strategy from both criminal and civil practitioners.

United States Attorney Bill Edwards opened with a brief introduction followed by Assistant U.S. Attorney Bob Kern, who gave an overview of intellectual property enforcement efforts in the Northern District of Ohio.

Kern's presentation was followed by Raymond J. Dowd of the New York firm of Dunnington, Bartholow & Miller. Dowd discussed cases that he handled involving claims of art that was stolen during World War II. Dowd represents collectors and dealers of fine art and has litigated disputes involving authenticity, forgery, ownership and provenance. He focused the majority of his presentation on his legal efforts to recover artwork stolen by the Nazis from Fritz Grunbaum incidental to Grunbaum's arrest and deportation to Dachau Concentration Camp in 1941.

Christian Stickan, chief of the Economic Crimes Unit in the U.S. Attorney's Office posed the ques-

tion "Who really owns research?" by sharing his experiences handling the unsuccessful extradition of Japanese researcher Takashi Okamoto. In May, 2001, Dr. Okamoto was indicted for economic espionage by the Federal Grand jury here for stealing genetic materials related to Alzheimer's Disease Research conducted at the Cleveland Clinic Foundation.

Richard Klein of Fay, Sharpe, Philip Kushner of Kushner & Hamed and James Robenalt of Thompson Hine shared their collective knowledge, experience and challenges involving the complex representation of clients in counterfeiting cases and the pitfalls that could arise when relying on criminal prosecution for a remedy.

Judge Kathleen O'Malley wrapped up the seminar by raising special concerns that she has identified in discovery, trial and sentencing in intellectual property cases.

This seminar was taped in its entirety through the generous services provided by the Rennillo Court Reporting Service.



Annette G. Butler is a member of the FBA-NDOC Board of Directors.

Joint Bench-Bar Memorial Program Honors 38 Attorneys

On April 6, 2009, 38 attorneys who died during the preceding year were memorialized during a noon program held in the atrium of the Howard M. Metzenbaum U.S. Courthouse, in Cleveland. Our Chapter assisted in planning the event through its Joint Bench-Bar Memorial Committee representatives, President Ellen Toth and President-Elect Carter Strang.

Numerous federal, state and local judges attended the event, along with family members and colleagues of the attorneys who died. The name of each attorney was read and each had a biography

printed in the memorial event booklet provided to all who attended. The Hon. James G. Carr, Chief Judge, U.S. District Court, Northern District of Ohio, presided over the event and coordinated the committee's activities. FBA Chapter Board member Geri Smith, Clerk of the U.S. District Court, Northern District of Ohio, introduced all the judges in attendance as they entered the atrium single file and took seating in the front rows. Rabbi Richard Block, Senior Rabbi with The Temple-Tifereth Israel, provided a moving tribute to those memorialized. A reception followed the event.

Everything You Need To Know About Avoiding Prison You Learned In Kindergarten

by Virginia A. Davidson



Most of us learn these important lessons early in life. Never tell one story to Mom and another to Dad.

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Most of us learn these important lessons early in life. Never tell one story to Mom and another to Dad. Never put something in writing that you would not want the world to see. And if all else fails, at least get your story straight.

A former drug company senior vice president learned those lessons the hard way. Andrew Bodnar pleaded guilty on April 6 in Washington, D.C. to making a false statement to the Federal Trade Commission. He will be sentenced in June and faces possible imprisonment and fines. His crime? He said

one thing to a competitor in settlement negotiations, and another when describing those negotiations to the FTC.

Bristol-Meyers Squibb (BMS) and Apotex were in settlement negotiations over the validity of a patent for the brand name drug Plavix. At the time, BMS was subject to an unrelated consent decree requiring FTC review and approval of patent litigation settlements.

The FTC had previously rejected a proposed settlement in which BMS had promised Apotex it would not launch its own generic version of Plavix, which would compete with an Apotex drug. The FTC warned outside counsel for BMS that it would not approve any such term. In later settlement talks, Bodnar nevertheless verbally promised Apotex counsel that if the parties settled, BMS would not sell the competing drug. When the parties submitted a second written settlement agreement for FTC approval, Apotex included the oral representation in a letter to the FTC. BMS submitted a separate FTC certification—signed by Bodnar—that did not disclose the oral representation.

It is noteworthy that the Department of Justice prosecuted Bodnar individually, even though the crime was his employer's certification to FTC, executed by Bodnar arguably within the scope of his employment. The company was prosecuted, admitted to the crime and agreed to a \$1 million fine, the largest allowable by law, in 2007. It also is remarkable that the government made a criminal case of the matter, instead of merely punishing BMS and/or Bodnar with civil contempt of the FTC consent decree.



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(*Corporate Representative Depositions, continued from page 1*)

And, where a notice sought the “evolution” and meaning of certain insurance contract language but did not state a time period, it was “unbounded” and thus improper.¹²

Objecting to the Notice

On receipt and review of a 30(b)(6) notice, counsel for the noticed corporation should carefully review it for any potential objections and should object where appropriate. A failure to object prior to the deposition can result in an award of sanctions against the noticed party.¹³

A motion to compel was granted against a company that provided no written objections to the 30(b)(6) notice prior to the deposition of its representative; rather, it waited to assert them at the deposition of its representative, who knew little or nothing about the items contained in the notice.¹⁴ The court characterized such conduct as an improper “self-help” measure and held that the failure to provide written objections prior to the deposition was in violation of the “spirit” of the Civil Rules.¹⁵

How to properly raise a 30(b)(6) notice dispute with the court is dependent on many factors, including the applicable Federal Civil Rules as well as any local rules and/or standing orders.¹⁶ For example, Local Rule 37.1 for the U.S. District Court for the Northern District of Ohio places the burden on the “party seeking the disputed discovery” to make a “good faith” effort to resolve the dispute prior to seeing court intervention.¹⁷ Thus, under the local rule, once counsel for the noticed corporation provides written objections to the 30(b)(6) notice, the party that noticed the deposition (the “party seeking the disputed discovery”) is required to take the initiative to resolve any dispute arising from it prior to the deposition, and failing that, to bring it to the attention of the Court. The U.S. District Court for the Southern District has a similar local rule.¹⁸

Conclusion

Rule 30(b)(6) provides the mechanism for taking depositions of corporate representatives. The party seeking the deposition is obligated to provide a 30(b)(6) notice that describes “with reasonable particularity” the matters on which examination is sought. Upon receipt of a notice, the noticed corporation must properly assert its objections prior to the start of the representative’s deposition.

Endnotes

¹Federal Rules of Civil Procedure, Rule 30(b)(6).

²Bradley M. Elbein, *How Rule 30(b)(6) Became a Trojan Horse: A Proposal for a Change*, FICC Quarterly 365, 366-367 (Spring, 1996).

³*Id.*

⁴Notes of Advisory Committee on Rules (1970), Rule 30(b)(6).

⁵Black’s Law Dictionary, 5th Ed., defines “reasonable” as “not immoderate or excessive,” and “particular,” while defining “particularity” as “partial in extent,” “not universal,” “Individual,” and “specific.” The authors will use the term “notice” to include both a notice provided to parties as well as a subpoena provided to non-parties.

⁶*E.E.O.C. v. Goodyear Tire and Rubber Co.*, 1979 WL 86, at *2 (N.D. Ohio) (the 30(b)(6) request was in the form of an administrative subpoena); *see also Marker v. Union Fidelity Life Ins. Co.*, 125 F.R.D. 121, 125-126 (M.D.N.C. 1989) (notice is “sufficiently specific” and understandable that requested person knowledgeable about claims processing, claims records and general file keeping, storage, and retrieval systems utilized by the noticed corporation could be identified).

⁷*See E.E.O.C. at *2.*

⁸*Recycled Paper Greetings, Inc. v. Davis*, 2008 WL 440458, at *4 (N.D. Ohio) (the 30(b)(6) request—in the form of a subpoena—sought information about “all similar product lines” not just the one at issue), compare with *Scovill Mfg. Co. v. Sunbeam Corp.*, 62 F.R.D. 598, 603 (D. Del. 1973) (court held notice was proper seeking drawing, manufacturing data and other information about the steam iron patent at issue but the request for information about all small appliances was over broad because other small appliances were not at issue). The issue surrounding privileged information will be addressed in a subsequent *Inter Alia* article in this series. It is, of course, an important objection to timely and properly assert in response to the notice.

⁹*General Foods Corp. v. Computer Election Systems, Inc.*, 211 U.S.P.Q. 49, 50 (S.D.N.Y. 1980) (the 30(b)(6) request was in the form of a subpoena directed to non-party IBM, which had previously produced thousands of responsive documents).

¹⁰*Reed v. Gennett*, 193 F.R.D. 689, 692 (D. Kan. 2005); *Tri-State Hospital Supply Corp. v. U.S.*, 226 F.R.D. 118, 125 (D.C. 2005); *Innomed Labs, LLC v. Alza Corp.*, 211 F.R.D. 237, 240 (S.D. N.Y. 2000).

¹¹*Budget Dress Corp. f. Joint Bd. Of Dress & Waist-makers’ Union of Greater New York*, 24 F.R.D. 506, 507 (S.D.N.Y. 1959) (construing Rule 30 of the Federal Rules of Civil Procedure).

¹²*Falcone v. Provident Life & Accident Ins. Co.*, 2008 WL 2323528, at **6-7 (S.D. Ohio) (court also refused to enforce the notice because it was presented no authority showing that insurance contracts other than the one at issue were relevant under ERISA); *see also Comstock v. Conros Corp.*, 1996 WL 194268, at *4-6 (N.D. Ohio) (notice—issued via subpoena—was improper that sought information not pertinent to the issue litigated).

¹³See *Artic Cat, Inc. v. Injection Research Specialist, Inc.*, 210 F.R.D. 680, 681 (D. Minn. 2002) (failure to respond to an allegedly vague notice).

¹⁴*Prosonic Corp. v. Stafford*, 2008 WL 2323628, at *4-5 (S.D. Ohio).

¹⁵*Id.*

¹⁶See Federal Civil Rules 26(c) and 37(a)(1) (both require the party seeking a motion to include with such motion a certification of a “good faith” effort on the movant’s part to confer or attempt to confer with the party from whom discovery is sought).

¹⁷Local Rule 37.1(a)(1) states: “[d]iscovery disputes shall be referred to a Judicial Officer only after counsel for the party seeking the disputed discovery has made, and certified to the Court the making of, sincere, good faith efforts to resolve such disputes.” See *Comstock v. Conros Corp.*, 1996 WL 194268 (N.D. Ohio) (parties brought dispute to court’s attention before motions to quash and for protective order were filed).

¹⁸Local Rule 37.1 for the U.S. District Court for the Southern District of Ohio states: “[o]bjections, motions, applications, and requests relating to discovery shall not be filed in this Court . . . unless counsel have first exhausted among themselves all extrajudicial means for resolving the differences. After extrajudicial means for the resolution of differences about discovery have been exhausted, then in lieu of immediately filing a motion . . . any party may first seek an informal telephone conference with the judicial officer assigned to supervise discovery in the case”; see *Passa v. City of Columbus*, 2006 WL 1071866 (S.D. Ohio) (held local rule must be followed and includes a discussion of what constitutes compliance); *Star Lock Systems, Inc. v. Dixie-Narco, Inc.* 2006 WL 2265886 (S.D. Ohio) (“good faith” effort discussed and held that a cryptic e-mail response—that the noticed party provided all it was “willing” to provide—satisfied movants’ obligation under the local rule to attempt to resolve dispute).

CLE Welcomes New Lawyers

by Robert B. Port

When I wanted to get admitted to practice in the Northern District of Ohio, I had to sit in a small conference room and sit through a half-day video of talking heads discussing the federal rules and practice in the district. No longer. On Jan. 9, 2009, the Northern District of Ohio Chapter of the Federal Bar Association and the U.S. District Court for the Northern District of Ohio sponsored the “Introduction to Federal Practice” CLE. In place of the video, a packed court room of newly-minted lawyers were treated to presentations by federal judges and the clerk of court, all in the lavish surroundings of the ceremonial court room at the federal court house, and culminating in the administration of the oath for admission to practice in the northern district.

Judge Donald Nugent opened the proceedings with a warm welcome. Magistrate Judge Kenneth McHargh followed with an insightful discussion on the role of the magistrate judge in the federal court system. Some of the topics covered by Judge MacHargh included the process of the assignment of cases to judges and magistrates and, generally, the issues that a magistrate may typically handle.

Next on the docket, Geri M. Smith, the Clerk of Courts of the Northern District of Ohio, gave a detailed presentation on the information available on the court’s Web site, the courthouse amenities for attorneys, and practical pointers and information on electronic filing and the role of the clerk’s office. Chris Malumphy, the

Chief Deputy Clerk of Court, followed with a discussion of the most pertinent local rules covering topics including differentiated case management, discovery motion practice, and alternative dispute resolution. Both Malumphy and Smith’s presentations were loaded with practical tips for practicing in the northern district. The attendees were then treated to a demonstration of all the electronic courtroom technology by John Bianco and David Zendlo—including a game of tic-tac-toe demonstrating the telestration technology. At the end of the seminar, Geri Smith administered the oath, swearing in all the new attorneys to practice in the Northern District of Ohio. Finally, Toni Paoletta, provided the newly admitted attorneys with a tour of the courthouse.

The courtroom was packed, the presentations were informative and interesting and, in the end, a courtroom-full of new attorneys joined our thriving bar.



Robert B. Port is an associate with the firm *Hahn Loeser & Parks* where he focuses his practice in litigation and tort litigation.



Calendar of Events

Please visit our Web site at www.fba-ndohio.org for additional information pertaining to any of the events listed below.

May 8

New Lawyer Training Curriculum Seminar, Professionalism, Law Office Management and Client Funds Management, Cleveland

June 4

Members-Only Networking Breakfast, Collins & Scanlon LLP, Cleveland

June 5

Advanced Federal Practice Seminar, Toledo

July 10

New Lawyer Training Curriculum Seminar, Standing Up—A Practical Guide to On Your Feet Experiences in Court, Cleveland

July 22

Summer Associate Reception, Cleveland

September 10-12

National FBA Event—Annual Meeting and Convention, Oklahoma City

September 14

State of the Court Luncheon, Cleveland

September 18

New Lawyer Training Curriculum Seminar, A Whole Trial in 3 Hours, Cleveland

November 6

Advanced Federal Practice Seminar, Cleveland

November 13

New Lawyer Training Curriculum Seminar, What You Need to Know About . . . , Cleveland

November 14

Brief Advice and Referral Clinic, Cleveland

December 1

Federal Employment Litigation Seminar, Cleveland

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