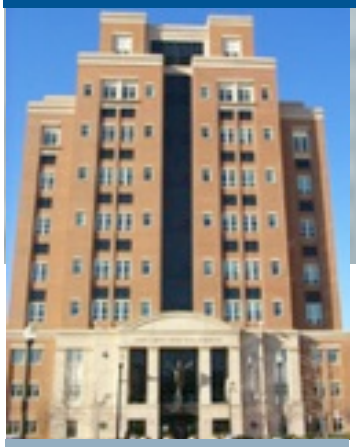
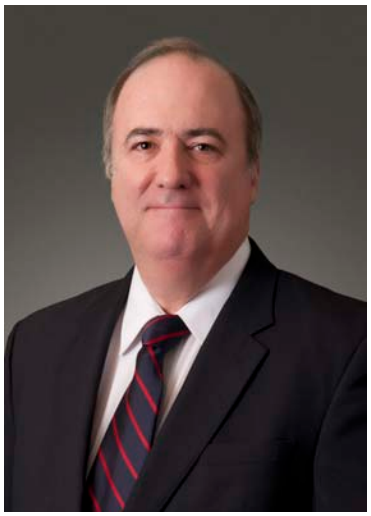


The Rocket Docket News

The Newsletter of the Northern Virginia Chapter of the Federal Bar Association

PRESIDENT'S COLUMN



By Sean F. Murphy
McGuireWoods LLP

I had no subject for this column until I looked at the calendar and realized that next month is my 30th law school reunion at William & Mary. Like most of us, I am startled by the seemingly quick passage of time – have I really been practicing law that long? That thought led to another memory – that shortly after my law school graduation, I entered for the first time the federal courthouse on South Washington Street that was the Alexandria Division of the Eastern District of Virginia.

In September 1982, I began a clerkship for Judge Albert V. Bryan, Jr. during which I learned first hand from Judge Bryan about life in the "Rocket Docket." It was a marvelous experience that has shaped and guided my career as a trial lawyer. It is only fitting then that I find myself in this 30th year serving as President of this Chapter – the Federal Bar organization that itself focuses on the practice of law in the Rocket Docket. Given this backdrop, I thought I would share a few thoughts about my Rocket Docket perspective.

My clerkship was an invaluable start to my legal career. Rotating cases with my co-clerk I still nonetheless averaged close to one trial a week with Judge Bryan – and I ended each week in court with him for Friday Motions Day. I learned how to present and structure a case whether on my feet in the courtroom or through the pleadings I submitted to the Court. My experiences as a law clerk still heavily influence how I write a brief.

Some things, of course, have changed in the Rocket Docket since my early days as a young lawyer appearing in the Alexandria Division. The discovery period then was little more than two months. And you could still file a discovery motion on a Wednesday and have it heard on a Friday – writing an effective opposition brief in that timeframe was particularly challenging. Of course then the Court used a master calendar and did not utilize individual case assignments to the magistrate judges and district judges as the Court does now. The latter change has not yet caused a significant reduction in the amount of time from date of filing to date of trial, but it will be interesting to look at that particular statistic in another ten years.

In comparing then and now, I cannot ever remember encountering a patent infringement case during my clerkship. Nowadays patent cases are such a constant feature of practice in this Court that patent cases are the only type of cases randomly assigned to the judges throughout the entire District. The growth in patent litigation and the creation and discovery of electronic documents have been the two most significant changes I have seen in my Rocket Docket practice over the last 30 years.

Some things, of course, have remained the same in the Rocket Docket. As best I can tell, Judge Bryan pioneered the one page Scheduling Order that all of the judges still use in Alexandria. In fact, several of Judge Bryan's key sentences and directives remain unchanged to this day. And while the two month increase in the discovery period was a significant boon, nowhere else would practitioners think a 4 1/2 month discovery period was a positive development. Litigation in this Court is still the Rocket Docket by any standard. Disputes are resolved quickly – no other courthouse moves as quickly either through trial or settlement to decide or end a case. The judges come prepared and are available every Friday to resolve any type of pretrial disagreement or issue. Yet, despite the demands that this fast-paced schedule imposes on both our clients and ourselves, I prefer no other forum.

My experiences in other courts have only reinforced this conclusion. Several years ago, I had a commercial contract dispute in the state court for Queens, New York. There, in commercial cases, the lawyers typically opted for arbitration to resolve their cases because, otherwise, it would take roughly four years to get to trial. Getting a motion heard took forever – and that problem let lawyers indulge in numerous discovery games without restriction

continued on page 5

BLOWING THE WHISTLE IN 2012: NEW DEVELOPMENTS IN QUI TAM LITIGATION

BY
R. SCOTT OSWALD
MICHAEL L. VOGELSANG, JR.

March 7, 2012
Lunch Seminar
12:00-2:30 p.m.
Westin – Alexandria
(across from the Courthouse)

TWO HOURS OF VA. CLE CREDIT PENDING

How do the recent 2009 and 2010 amendments to the False Claims Act ("FCA") affect litigating *qui tam* suits today? What should relators' counsel and Government attorneys know in order to navigate the differing judicial application of the implied false certification theory? When can defense counsel raise public disclosure and proper pleading defenses? What factors does the Government consider when deciding whether to intervene, and when? On March 7, 2012, from 12:00 p.m. to 2:30 p.m. at the Westin Alexandria, the Northern Virginia Chapter of the Federal Bar Association will be hosting a presentation and discussion panel to address these, and other, hot topics related to the current environment of *qui tam* litigation.

On May 20, 2009, Congress passed the Fraud Enforcement and Recovery Act of 2009 ("FERA"). The impetus was to clarify the provisions of the FCA so that they would reflect the original intent of the law and correct court misinterpretations of Congress intent in passing the FCA, in decision such as *United States ex rel. Totten v. Bombardier Corp.,* 380 F.3d 488 (D.C. Cir. 2004) and *Allison Engine v. United States ex rel. Sanders,* 128 S. Ct. 2123 (2008). FERA clarifies that, contrary to the decision in *Totten*, a relator need not show that a claim is presented directly to an officer or employee of the Government in order to meet the FCA's presentment requirement. FERA defines a "claim" as any request to Government contractors and grantees. In Allison Engine, the Supreme Court held that FCA liability is predicated on the fact that a government contractor intends that the Government pay a claim, rather than on a false statement resulting in the use of Government funds to pay a false or fraudulent claim. FERA defines the terms "knowing" and "knowingly" under the FCA to include a person who acts in deliberate ignorance of the truth or in reckless disregard of the truth. Thus, FERA's 2009 amendments explain that no proof of specific intent to defraud is necessary to establish FCA liability.

On March 23, 2010, President Barack Obama signed the Patient Protection and Affordable Care Act ("PPACA"). PPACA amends both the FCA and the Anti-Kickback Statute ("AKS"). Specifically, PPACA changes the language of the AKS to provide that claims submitted in violation of the statute automatically constitute false claims under the FCA and that a person need not have actual knowledge or specific intent to commit a violation of the AKS. PPACA expands the definition of "original source" under the FCA to include anyone who has "knowledge that is independent of and materially adds to the publicly disclosed allegations or transactions." Finally, it gives the Government the final word on whether a court may dismiss a case based on the public disclosure bar.

The jurisprudence regarding the implied false certification theory of FCA liability has evolved and changed grounded in the notion that the act of submitting a claim for reimbursement itself implies compliance with governing federal rules and regulations that are a precondition to payment. A majority of federal Courts of Appeals, including those in the First, Second, Third, Sixth, Ninth, Tenth, Eleventh, and District of Columbia Circuits, have recognized that there can be implied false certification liability under the FCA. The Fifth Circuit has not officially recognized the theory, and recent district courts have held that this silence means it is unavailable. Neither the Seventh nor the Eighth Circuits have addressed implied false certification liability under the FCA.

The Fourth Circuit, too, has raised concerns with the implied false certification theory. In 1997, the Fourth Circuit held that there can be no FCA liability for an omission without an obligation to disclose, thus questioning the viability of implied certification claims. See *U.S. ex rel. Berge v. Bd. of Trustees of the Univ. of Alabama*, 104 F.3d 1453, 1461 (4th Cir. 1997). Since then, the Fourth Circuit and the Eastern District of Virginia have continued invalidating it. PPACA made AKS violations per se false claims, so the Government and *qui tam* relators need not rely upon the implied false certification theory when prosecuting such claims. However, implied false certification remains an important, and controversial, tool in *qui tam* litigation for all other types of FCA claims.

In 2011, the public disclosure bar to FCA liability took center stage before the Supreme Court. In *Schindler Elevator Corp. v. U.S. ex rel. Kirk*, 131 S. Ct. 1885, 1893 (2011), the Court held that Government responses to Freedom of Information Act ("FOIA") requests constitute public disclosures and bar *qui tam* suits. However, in *U.S. ex rel. Davis v. Prince*, 753 F. Supp. 2d 569 (E.D. Va. 2011), the Eastern District of Virginia clarified that to constitute public disclosure, information must either reveal a fraud itself, or both a false statement and true statement of facts from which fraud could be inferred. When deciding whether to file a FOIA request in order to gather support for a *qui tam* suit, a relator should determine whether the request will provide only peripheral information or uncover evidence of additional fraud.

During the upcoming March 7, 2012, presentation and discussion panel, Blowing the Whistle in 2012: New Developments in Qui Tam Litigation, relators' counsel R. Scott Oswald of The Employment Law Group, PC; defense counsel Jonathan L. Diesenhaus of Hogan Lovells US LLP; Assistant U.S. Attorney Gerard J. Mene; and moderator N. Thomas Connally from Hogan Lovells US LLP will discuss these and more topics central to litigating *qui tam* actions in this ever-changing environment.

EDVA CLERK'S CORNER:

PRO HAC VICE MOTIONS ARE NOW REQUIRED TO BE ELECTRONICALLY FILED AND THE FILING USER IS REQUIRED TO PAY THE FEE ON-LINE USING PAY.GOV DURING THE FILING OF THE MOTION. FILING USERS ARE ALSO REQUIRED TO PAY THE APPEAL FEE ONLINE DURING THE FILING OF NOTICES OF APPEAL, NOTICES OF CROSS APPEAL, NOTICES OF INTERLOCUTORY APPEAL, AND SUBSEQUENT NOTICES OF APPEAL. FOR MORE INFORMATION, PLEASE VISIT OUR WEBSITE AT HTTP://WWW.VAED.USCOURTS.GOV/ECF/INDEX.HTML

RECENT NOTEWORTHY CASES FROM THE EASTERN DISTRICT OF VIRGINIA

By Charles B. Molster, III & Andrew Smith
Winston & Strawn LLP

PREJUDGMENT INTEREST

Wells Fargo Equipment Finance, Inc. v. State Farm Fire and Cas. Co., 1:10–CV–1246, 2011 WL 4738595 (E.D. Va. Oct. 6, 2011)

Background: After two trucks were destroyed by fire, the plaintiff paid the trucks' owner's claims, becoming the loss payee. The plaintiff subsequently sought payment from the defendant insurer. When the insurer refused payment, the plaintiff filed suit in the Eastern District for breach of contract. After the Court granted the plaintiff's motion for judgment on the pleadings, holding the insurer liable for payment on the claims, the plaintiff sought prejudgment interest on an amount stipulated by the parties.

Summary of Holding: The Court confronted two related questions: 1) first, whether to award prejudgment interest at all; and 2) if so, how to set the appropriate date from which interest began to run. The Court noted that the question of whether to award prejudgment interest in a diversity action is governed by Virginia law, which commits the decision to the discretion of the Court in exercising its equitable powers. Accordingly, the Court set out to balance the equities presented by an imposition of prejudgment interest. While recognizing the countervailing concern that prejudgment interest might punish litigants who pursue perfectly valid, but unsuccessful, legal arguments, the Court concluded that the equities favored an award of prejudgment interest under the facts of the case. The Court was particularly concerned by the length of time that had passed since the destruction of the trucks. Namely, weighing against the insurer was that its investigation lasted a full year before denying payment, which deprived the loss payee of rightful payment for a significant amount of time. Namely weighing against the insurer was that its investigation lasted a full year before denying payment, which deprived the loss payee of rightful payment for a significant amount of time. Finding that a prejudgment interest award was proper, the Court then confronted the issue of when the interest should begin to run. The insurer argued that interest should not run until the Court granted the plaintiff's motion on the pleadings. The plaintiff countered that interest should start from the date it submitted its insurance claim to the defendant. Finding a middle road, the Court determined that interest would run starting on the date the insurer denied coverage after more than a year-long investigation, noting that it was "appropriate for State Farm to bear the consequences of its conclusion" beginning on the date of denial. *Wells Fargo Equipment Finance*, 2011 WL 4738595 at *3. Accordingly, the Court awarded prejudgment interest at the rate of 6% per anum, per Va. Code Ann. § 6.2–302.

Lesson for Practitioners: In diversity actions in the Eastern District, Virginia law governs prejudgment interest inquiries and gives the court discretion to decide whether to award interest. Prevailing parties should consider the potential for an award of prejudgment interest, particularly if an opposing party was dilatory in their pre-litigation conduct or defended the claim on a particularly questionable legal argument. When practitioners find themselves on the losing end, it is likely good practice to stress to the court that an award of prejudgment interest is by no means required, and should emphasize the diligence and good faith in the parties' pre-litigation dealings and the merits of the legal argument presented in opposing the prevailing party's claims.

JOINDER/ ANTICYBERSQUATTING ACT

Coach, Inc. v. 1941 Coachoutletstore.com, No. 1:11-cv-1211, 2012 WL 27918 (E.D. Va. Jan. 5, 2012)

Background: A plaintiff corporation instituted an in rem suit against hundreds of internet domain names pursuant to the Anticybersquatting Consumer Protection Act ("ACPA"), 15 U.S.C. § 1125(d). After the plaintiff amended its complaint and attempted to name all of the defendants in a single action, the Magistrate Judge expressed concern about the propriety of joinder under the provisions of Fed. R. Civ. P. 20. The plaintiff whittled down the list of named defendants to 356 names and submitted additional briefing in support of its motion for entry of default judgment after no entity responded to the published notice of the action. The Magistrate Judge concluded, however, that joinder of the 356 domain names did not satisfy the requirements of Rule 20, and subsequently entered a Report and Recommendation ("R & R"), recommending joinder of eleven of the domain names, but concluding that the others should be severed from the action. The plaintiff filed its objection to the Magistrate Judge's R&R

continued on page 4

RECENT NOTEWORTHY CASES

continued from page 3

pursuant to Fed. R. Civ. P. 72(b), arguing, in part, that Rule 20 did not apply to the action in the face of the ACPA.

Summary of Holding: The Court began its analysis by rejecting the plaintiff's argument that the ACPA trumped or displaced the requirements of the Rule 20. The court noted that although the ACPA clearly permits a single *in rem* proceeding against multiple defendants, no case law or legislative history indicated that the ACPA eviscerated the requirements of Rule 20. The Court then weighed whether joinder of the numerous defendants met the requirements of Rule 20. The Magistrate Judge had concluded that although the claims against all named defendants implicated a common question of law, they failed on the second prong of the joinder analysis – the "same transaction or occurrence" requirement. The Court did not dispute that conclusion, but looked instead to the combined provisions of Fed. R. Civ. P. 61 and 21, seeking a pragmatic resolution. The Court held that because the Federal Rules, including the joinder provisions of Rule 20, "only apply to the extent that they 'affect any party's substantial rights,'" citing Rule 61, and because the Court possessed the authority under Rule 21 that allows the Court to add or drop parties *sua sponte* "on just terms," the Court concluded it could join all defendants in a single action. This was so, according to the Court, because each of the named domain name defendants was individually subject to default, meaning no prejudice would ensue. Thus, while the Court did not disagree with the Magistrate Judge's reasoning, it granted the plaintiff's objections to the R&R and permitted plaintiff to join all 356 domain names in the single action.

Lesson for Practitioners: Even when confronted with a potentially unwieldy number of opposing parties in an ACPA proceeding, the joinder provisions of Rule 20 still apply. But in the circumstances in which a large number of defendants might collectively present a challenge in meeting the "same transaction or occurrence" requirement under Rule 20, the pragmatic solution offered by the Court in Coach may offer practitioners a loophole to avoid the expense of filing numerous suits.

ATTORNEYS' FEES

Automotive Finance Corp. v. EEE Auto Sales, Inc., 2011 WL 3422648 (E.D. Va. Aug. 3, 2011)

Background: A financing company ("AFC") brought suit against several used car dealerships and their guarantors for breach of contract. After securing summary judgment, AFC moved for its attorneys' fees and costs. AFC based the amount of the fees sought on a provision in the parties' promissory notes and security agreements that provided for the recovery of attorneys fees of "not less than 15% of the outstanding Obligations where not prohibited by law." *EEE Auto Sales*, 2011 WL 3422648 at * 2. Thus, AFC argued, it was entitled to fees in the amount of 15% of the total judgment entered against the defendants, regardless of the amount of fees it actually paid in prosecuting the action.

Summary of Holding: As with any attorneys' fees petition, the Court began its discussion by noting that the Eastern District analyzes a fee request by first looking to the "lodestar" amount – the number of hours reasonably expended multiplied by a reasonable hourly rate – and applies the all-too-familiar twelve *Johnson/Kimbrell* factors in weighing the reasonableness of the fees. Before proceeding to this "reasonableness" inquiry, however, the Court confronted AFC's contention that it was entitled to an award of fees equal to 15% of the judgment amount under the terms of the parties' agreements, regardless of the substantive reasonableness of that amount. The Court noted that although parties can contract around the so-called "American rule," which dictates that each party bears the burden for its own fees, the ability to do so is not unfettered. Applying Indiana law pursuant to the choice of law clause in the parties' agreements, the Court dispatched the plaintiff's argument that the 15% calculation could supplant the party's burden to properly document and support the fees petition. A contrary conclusion, according to the Court, "would confer an unreasonable windfall on that party and would be fundamentally at odds with the basic principle that the party requesting fees bears the burden of proving that such fees are reasonable." *Id.* at * 5 (citing *Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983)). Fortunately for AFC, counsel also sought in the alternative the actual amount of fees incurred. And after culling fees that were tied to an associated bankruptcy proceeding (which were not recoverable in the present action), the Court found the rate charged by prevailing counsel to be reasonable. The Court, however, then applied a 10% reduction to the amount sought because the Court found the submitted billing records indicated duplicative and potentially unnecessary work among fourteen separate attorneys.

Lesson for Practitioners: The overriding concern in a fees petition should always be to establish, with proper documentation, the actual amount of work expended and that the rates charged were reasonable. Though applying Indiana law, EEE Auto Sales serves an important reminder to all practitioners seeking to recover attorneys' fees regardless of the applicable law: Courts may be wary of contractual provisions that would relieve a party of its their burden to properly document and demonstrate the reasonableness of the fees it seeks. Some states' laws may look upon these provisions more favorably than others, so practitioners should take care to analyze the applicable law closely before presenting a fees petition. Virginia practitioners should note that the plaintiff in EEE Auto Sales also cited two Virginia cases, *NationsBank of Va., N.A. v. Jordache Venture Assoc.*, No. 2:92494, 1993 WL 724806 (E.D. Va. Aug. 4, 1993) and *In re Bowden*, 326 B.R. 62 (Bankr. E.D. Va. 2005), to support its argument that percentage-based attorneys' fees provisions are valid and enforceable. Noting that those cases were of no moment because Indiana, not Virginia law applied, the Court went on to express its skepticism that those cases would compel a different outcome, because neither case "directly holds that contractual attorneys' fees provisions should be mechanically enforced without regard to whether the resulting fee award is reasonable." *EEE Auto Sales*, 2011 WL 3422648 at * 5, n.1.

Venue Change to EDVa for Certain Patent Suits

By Caitlin Lhommedieu

Under the America Invents Act, certain suits relating to administration of the Patent & Trademark Office (PTO) will be heard in the Eastern District of Virginia (E.D. Va.), whereas they had previously been heard in the District of Columbia. This change is effective immediately, and applies to any civil action commenced on or after Sep. 16, 2011.

The subjects of such suits include the following:

- Suits reviewing the **suspension or exclusion from practice** before the PTO will be heard in the E.D. Va. 35 USC § 32.
- An applicant -- whether a **patent applican**t, a patentee under **re-examination**, or a third-party requester in an ***inter partes* review** – who is dissatisfied with the decision of the Board of Patent Appeals and Interferences (BPAI) may, unless appeal has been taken to the Federal Circuit, have remedy by civil action against the Director (of the PTO) in the E.D. Va. 35 USC § 145. The court may adjudge that such applicant is entitled to receive a patent for his invention, as specified in any of his claims involved in the decision of the BPAI, as the facts in the case may appear, and such adjudication shall authorize the Director to issue such patent in compliance with the requirements of law.
- Any party to an **interference or derivation** proceeding dissatisfied with the decision of the BPAI may have remedy by civil action in the E.D. Va, unless he has appealed to the Federal Circuit. 35 USC § 146.
- In a civil action for patent infringement, if **adverse parties reside in a plurality of districts not embraced within the same state, or an adverse party resides in a foreign country**, the E.D. Va. shall have jurisdiction and may issue summons against the adverse parties directed to the Marshal of any district in which any adverse party resides. 35 USC § 146.
- If issuance of an original patent is delayed due to the actions or inactions of the PTO, then the Director may correspondingly adjust the term of the patent. An applicant dissatisfied with such a **Patent Term Adjustment determination** shall have remedy by a civil action against the Director filed in the E.D. Va. within 180 days after the grant of the patent. 35 USC § 154(b)(4)(A). The Director shall thereafter alter the term of the patent to reflect the Court's decision. The determination of a patent term adjustment under this subsection shall not be subject to appeal, or challenge by a third party, prior to the grant of the patent.
- A **patentee not residing in the United States** may file in the Patent & Trademark Office a written designation stating the name and address of a person residing within the US on whom may be served process or notice of proceedings affecting the patent or rights thereunder. If the person designated cannot be found at the address given in the last designation, or if no person has been designated, the E.D. Va. shall have jurisdiction, and summons shall be served by publication or otherwise as the court directs. 35 USC § 293. The court shall have the same jurisdiction to take any action respecting the patent or rights thereunder that it would have if the patentee were personally within the jurisdiction of the court.

The number of such suits filed in recent years is as follows:

- In 2009 - 56 cases filed;
- In 2010 - 78 cases filed; and
- In 2011 - 28 cases filed.

Plaintiffs may sometimes file such suits simply to toll the statute of limitations; frequently these matters are later resolved at the PTO without the Court's intervention. For example, of the 28 cases filed in 2011, eight were voluntarily terminated.

Although we all hope that such suits are few and far between, when it is necessary to do so, we look forward to bringing these cases in the E.D. Va.

President's Column

Continued from Page 1

or sanction. An even more interesting contrast came through my management of a complex commercial dispute for a client in the courts of Cyprus.

The Cypriot legal system is very similar to the English system. That means no depositions and virtually no document discovery – and yet it takes at least 3 to 4 years for a commercial case in Cyprus to get to trial. Such results under either court system are simply not justified. Delay results in unnecessary legal expenses and, more importantly, gravely undermine confidence in the efficiency and effectiveness of our legal system. Justice delayed is indeed in many respects justice denied.

Of course, no system is so perfect it cannot be improved. In that regard, the growth in the cost and volume of document discovery, particularly electronic discovery, is one area that warrants further reform beyond the restraints that might flow from a Friday motions ruling. It is certainly a subject area in the Federal Rules ripe for further consideration – and for discussion at our Chapter's Annual Bench/Bar Dialogue in May.

For me, after 30 years, practicing in the Rocket Docket is the place to be, both for myself and my clients. I worry at times about deadlines too rigidly applied as part of the effort to make sure the trains continue to run on time, but on balance, it is the most effective courthouse I know. I plan to keep on appearing in the Rocket Docket as long as my "engines" hold up!

MEMBER SPOTLIGHT:

Andrew Smith

Andy Smith is currently an associate in Winston & Strawn, LLP's Washington, D.C. office.

As the son of an Air Force JAG, Andy moved frequently throughout his childhood, living in England, Alabama, Arkansas, and Iowa along the way. His family eventually settled in North Carolina, where he attended high school. Athletics played a large part in Andy's life and he accepted a track scholarship to attend the College of William and Mary. There, Andy received his B.A. in Government, and also met his wife, Amy. Andy then moved to Nashville, TN, where he earned his J.D. from Vanderbilt University. After his first year of law school, Andy split his summer between an internship with a federal magistrate in the Middle District of Tennessee and a small plaintiff's firm in Brentwood, TN. He spent the summer after his second year as a summer associate in Winston & Strawn's Washington office. During law school, Andy was an editor of the law review and also participated in several moot court and mock trial competitions, developing a particular interest in trial advocacy and criminal practice and procedure. He also participated in the school's criminal practice clinic, assisting on a death penalty appeal and representing several clients facing felony charges.

After graduation, Andy had the good fortune to serve as a clerk to Hon. Liam O'Grady here in the Eastern District of Virginia. His clerkship was an influential experience, giving Andy the opportunity to work on numerous criminal and civil matters, including a number of jury trials, while learning the virtue first-hand of the Rocket Docket's approach to case management.

After his clerkship, Andy joined Winston & Strawn's litigation department in Washington, D.C., where he spends most of his time in commercial litigation, with a current focus on antitrust litigation. He also recently represented an asylum applicant *pro bono*.

Outside of work, Andy is a huge Kansas City Royals and Chiefs fan and tries to stave off old age by lifting weights, golfing, and playing rec league basketball and softball. He also plays mediocre guitar, cooks above-average barbeque, and otherwise enjoys spending time with his wife.

UPCOMING PROGRAM ON ADMISSIBILITY OF ELECTRONIC EVIDENCE

We hope you will join us on Monday, April 23 for an all star program on the Admissibility of Internet and Electronic Evidence. Together with the D.C. Chapter of the Federal Bar Association, the Northern Virginia Chapter is fortunate to host a panel of experts including the Honorable John M. Facciola, the Honorable Anthony J. Trenga, the Honorable John F. Anderson and practitioner and E-discovery guru James S. Kurz as they discuss important issues surrounding the admissibility of electronic evidence. Our Chapter Immediate Past-President Chas McAleer will moderate what is sure to be a lively and informative discussion. The specific time and place is still being determined at the time of publication, but mark your calendars! You won't want to miss this program!

A LIVELY CLE ON LITIGATION ETHICS

By R. Scott Caulkins
Caulkins & Bruce, PC

On October 17, 2011, our Chapter sponsored a two-hour CLE on Litigation Ethics. Over 30 people attended the luncheon program, held at the Westin in Alexandria. The speaker was the always popular Thomas Spahn of McGuireWoods, LLP. Mr. Spahn's engaging if not Socratic style created a lively discussion during which no cat napping was possible, despite the gourmet luncheon! He addressed issues such as the type of information on which an attorney can rely in asserting claims and defenses, ghostwriting pleadings, waiver of attorney-client privileges, and the appropriateness of commonly used settlement tactics. Although Mr. Spahn focused on how these issues are addressed under the rules of ethics, he compared how courts have addressed the same issues applying the rules of civil and criminal procedure. Sometimes bars and courts take differing positions on a lawyer's duties to the court, opposing counsel, and the client. A lawyer should not assume that conduct during litigation that is appropriate under the rules of ethics will also be appropriate under the applicable rules of procedure.

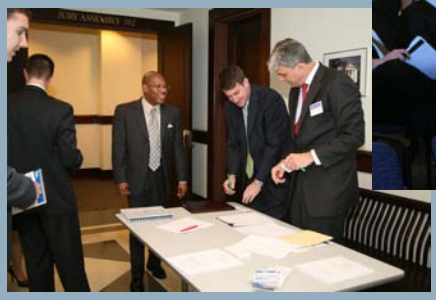
Upcoming National FBA Events

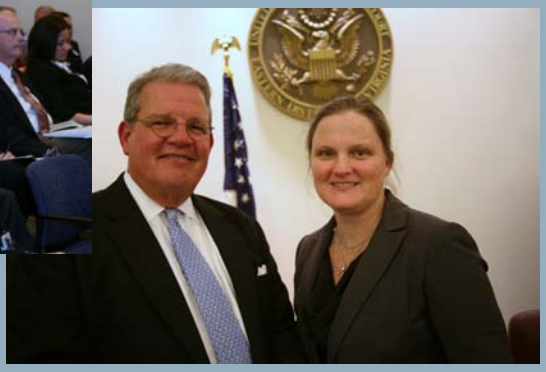
Upcoming events sponsored by the National Federal Bar Association can be found at www.fedbar.org Here are some highlights:

May 29, 2012
Federal Bar Association Younger Lawyers Division Supreme Court Admissions Ceremony. This is an opportunity to be admitted to the Supreme Court of the United States. Check the FBA website for forthcoming information and deadlines

May 31- June 1, 2012
24th Annual Insurance Tax Seminar. Held at the JW Marriot in DC. Reservation Deadline is May 9.

September 20-22, 2012
Federal Bar Association Annual Meeting and Convention in San Diego.





At the December 14, 2011 Patent CLE, from left to right: David Kappos, the Under Secretary of Commerce for Intellectual Property and the Director of the United States Patent and Trademark Office, speaking at the CLE; George Kostel and Damon Wright welcome CLE attendees; Attendees listening intently; Moderators Chip Molster and Caitlin Lhommedieu at the CLE.

PATENT CLE HELD AT ALEXANDRIA COURTHOUSE

By Charles W. Molster, III
Winston & Strawn LLP

On December 14, 2011, the Chapter sponsored a CLE program at the Alexandria Federal Courthouse entitled "Patent Litigation under America Invents Act and Other Recent Developments." The panelists included Judge Gerald Bruce Lee and United States Magistrate Judges T. Rawls Jones, Jr. and John F. Anderson, and also included David Kappos, Under Secretary of Commerce and Director of the United States Patent and Trademark Office ("PTO"), and Kenneth Hairston, retired Administrative Patent Judge at the PTO's Board of Patent Appeals and Interferences. The program was moderated by Chapter members Caitlin Lhommedieu and Chip Molster.

More than 40 people attended this popular event, made even more so by the addition of Under Secretary Kappos to the panel. The program began with opening remarks by Kappos regarding the newly-passed America Invents Act ("AIA"), and an overview of the PTO's progress and procedures in implementing the Act. Kappos noted the importance of innovation as a driver of the U.S. economy (and U.S. jobs), and informed attendees that the PTO was in the process of designing the most forward-looking patent system in the world. Kappos noted the historical significance of this opportunity, and welcomed input from all facets of the Intellectual Property Community.

Thereafter, the panel discussed a number of new issues raised by the AIA, including the shift from a "first to invent" rule to a "first to file" rule, which brings the U.S. more in line with the patent systems of other countries. Also discussed were new considerations and procedures regarding prior art, limitations on joinder of parties, inequitable conduct, expansion of the defense of "prior commercial use," and third party challenges to pending patent applications or granted patents. The panel also discussed the ways in which these new PTO procedures would likely impact patent infringement cases in federal district courts, including its potential to stay cases pending the new third party challenge processes.

Next in the program, Caitlin Lhommedieu provided a very informative overview regarding the evolving standards of patentable subject matter, including a discussion of the U.S. Supreme Court's decision in *Bilski*.

Thereafter, Chip Molster provided an overview of other recent developments in patent law, including damages-related issues (*Uniloc*, etc.); Judge Rader's new Model E-Discovery Order; divided infringement (*Akamai* and *McKesson*); inequitable conduct (*Therasense*); and the new patent pilot programs in 14 district courts around the country.

The program then concluded with an interactive question and answer period. Written materials were provided, including an appendix with Judge Rader's Model E-Discovery Order, and Judge Rader's remarks regarding the State of Patent Litigation, delivered at the E.D. Texas Judicial Conference on September 27, 2011.

Did You Know?

- The Northern Virginia Chapter of the Federal Bar Association has 208 members and represents almost 1.5% of total FBA members.
- The NoVa Chapter is the fourth largest chapter among thirteen chapters within the 4th Circuit and D.C. Circuit.
- The Federal Bar Association has over 15,000 members divided into 99 chapters.
- Divided by Circuit, the 9th Circuit has the most members, with 2,700, followed by the 5th (New Orleans), 6th, 11th and 4th.
- There are FBA chapters in Puerto Rico and the Virgin Islands.
- The largest chapter (as noted) is New Orleans with 1,120 members (which could suggest that people like to visit New Orleans for chapter meetings, wherever they may actually practice).
- 40% of FBA members have been in practice for 11 or more years.
- 10% of the members work in the public sector.

Our Chapter's Membership Chair is **George Kostel** and can be reached at **George.Kostel@nelsonmullins.com**. Please contact George with any membership questions!

COURTESY AMONG COUNSEL

By David W. Goewey & Meredith Boylan
Venable LLP

"All doors open to courtesy." – Thomas Fuller "Rudeness is the weak man's imitation of strength." –

Regrettably, most advocates reading this article likely have experienced (more than once) an "adversarial process" in which opposing counsel refuses to concede anything, be it reasonable limits on discovery, facts that are truly not controverted, the color of the sky, etc. The attendant terse letters/e-mails, contentious calls, and acerbic motions may make such counsel feel that they have zealously advocated on behalf of their clients, but such advocacy tends to significantly increase fees and costs and very few of the related motions are well-received. For the more temperate advocates, cost-conscious clients, and despairing jurists, there is hope.

The judges of the Eastern District of Virginia have endorsed the American College of Trial Lawyers' Code of Pretrial and Trial Conduct (2009) (the "Code"), stating that the Code "reflects the standards of professionalism that are expected in the Eastern District of Virginia." See http://www.vaed.uscourts.gov/CodeProbTrial.html. The Code calls for trial lawyers to be "role models of skill, honesty, respect, courtesy, and fairness consistent with their obligations to the client and the court." Code, Preamble. The Code emphasizes that "[t]he dignity, decorum and courtesy that have traditionally characterized the courts are not empty formalities." *Id.* A central theme, perhaps the central theme, throughout the Code is civility among counsel.

The Code instructs that:

> A lawyer must be courteous and honest when dealing with opposing counsel.
>
> When practicable and consistent with the client's legitimate interests and local custom, lawyers should agree to reasonable requests to waive procedural formalities.
>
> A lawyer has an obligation to cooperate with opposing counsel as a colleague in the preparation of the case for trial. Zealous representation of the client is not inconsistent with a collegial relationship with opposing counsel in service to the court.
>
> In written submissions and oral presentations, a lawyer should neither engage in ridicule nor sarcasm. Neither should a lawyer ever disparage the integrity, intelligence, morals, ethics, or personal behavior of an opposing party or counsel unless such matters are directly relevant under controlling law.
>
> Discourtesy, obfuscation, and gamesmanship have no proper place in [the discovery] process.

Code at 4, 7, 8.

CONTINUED ON PAGE 9

SAVE THE DATES

APRIL 23, 2012

Admissibility of Internet and Electronic Evidence Program

See description on Page 6. Time and Place to be Announced. Virginia CLE credit pending

APRIL 27, 2012 1-4 PM

Introduction to the Courthouse

Reception for participants and non-participants to begin at approximately 3 pm at the Courthouse

COURTESY

Continued from page 8

The American College of Trial Lawyers comments that applying the Code's standards is not "inconsistent with effective advocacy in an adversary system of justice." Code, Forward. So, how do you serve as an effective advocate while still cultivating a collegial relationship with opposing counsel?

In a word: Communication. For example, whenever feasible, respond to emails and voicemails within a reasonable time, ideally on the day of receipt. If you are not prepared to provide a substantive response, due, for example, to your trial or travel schedule or the need to confer with others before responding, consider advising opposing counsel that you expect to more fully respond to the message by a certain date.

In a few words: Do not rise to the bait. If you receive an obnoxious email from opposing counsel, resist the urge to respond in kind; push away from your keyboard (or put down your smartphone) and stare intently at the 4x6 framed portrait of your spaniel or other loved one before replying. You should assume that your emails and possibly a transcript of your voicemails will one day find their way before the court in an affidavit or as exhibits to a motion; a judge is more likely to be favorably disposed toward you (and, perhaps, your client) if you have been uniformly courteous, rational, and professional in your communications.

With respect to extensions of time, the Code instructs that lawyers should agree to reasonable requests for additional time to respond to motions and discovery requests. Code at 6-8. Notably, the Code specifies that "[t]he lawyer, and not the client, has the discretion to determine the customary accommodations to be granted opposing counsel in all matters not directly affecting the merits of the cause or prejudicing the client's rights." Code at 4 (emphasis added). The Code further states that "[a] lawyer should not use the client's decision on scheduling as justification for the lawyer's position unless the client's legitimate interests are affected." Code at 6. Admittedly, extending professional courtesies to one's adversary may strike some clients as weak (e.g., those clients who believe that belligerence is tantamount to effectiveness). In these instances, the Code recommends that the lawyer "counsel the client that cooperation among lawyers on scheduling is an important part of the pretrial process and expected by the court." *Id.* You might also remind your client that collegiality will likely reduce legal fees by decreasing, if not eliminating, exchanges between counsel (and motions) on non-merits matters.

Of course, courtesy toward opposing counsel need not require that you shy away from forcefully arguing the merits of your client's case or aggressively defending or prosecuting an action. But, by not getting bogged down in sidebars on discovery disputes and the like, the parties and the court can focus on timely and efficient resolution of substantive issues.

In short, as far as the American College of Trial Lawyers and the judges of the Eastern District of Virginia are concerned, you can and should be courteous toward opposing counsel and parties while still being a strong and effective advocate. To paraphrase Winston Churchill (in a somewhat different context): When you are going to thrash the other side, it costs nothing to be polite.

CO-EDITORS

Anne M. Devens
Federal Deposit Insurance Corp.
adevens@fdic.gov
(703) 562-2204

Laurie Hand
laurie_hand@verizon.net

The Rocket Docket News is a regular publication of the Northern Virginia Chapter of the Federal Bar Association. Opinions or views published in the Rocket Docket News do not necessarily imply approval by the FBA, the Northern Virginia Chapter or any agency or firm with which the editors or authors are associated. All copyrights are held by the Northern Virginia Chapter of the FBA unless otherwise noted by the author.

Members of the Northern Virginia Chapter are encouraged to submit articles or news information of interest to other members of the Northern Virginia Chapter for possible publication in the Rocket Docket News. Please submit any proposed articles or news information to the Editors at the telephone numbers and e-mail addresses listed above. The Editors reserve the right to decide on publication, and any articles accepted for publication are subject to editing.

REGISTRATION FORM

Blowing the Whistle in 2012: New Developments in Qui Tam Litigation

March 7, 2012 Lunch Seminar 12:00-2:30 p.m.

Westin – Alexandria (across from the Courthouse)

Name: _____

Business Address: _____

_____

_____

_____

Phone: _____

Fax: _____

E-mail: _____

Please make check payable to "Federal Bar Association, Northern Virginia Chapter," and mail with your registration form to the Chapter's Treasurer:

Caitlin Lhommedieu
8311 Knights Forest Drive
Clifton VA 20124
703-851-3366
clhommedieu@cox.net

Cost:

Members: (FBA Members) ($55) (FBA Member - Government Attorney) ($35)

Non-Members: (Non-Members) ($70) (Non-Member - Government Attorney) ($60)

TO JOIN THE FBA NORTHERN VIRGINIA CHAPTER, PLEASE VISIT: www.fedbar.org