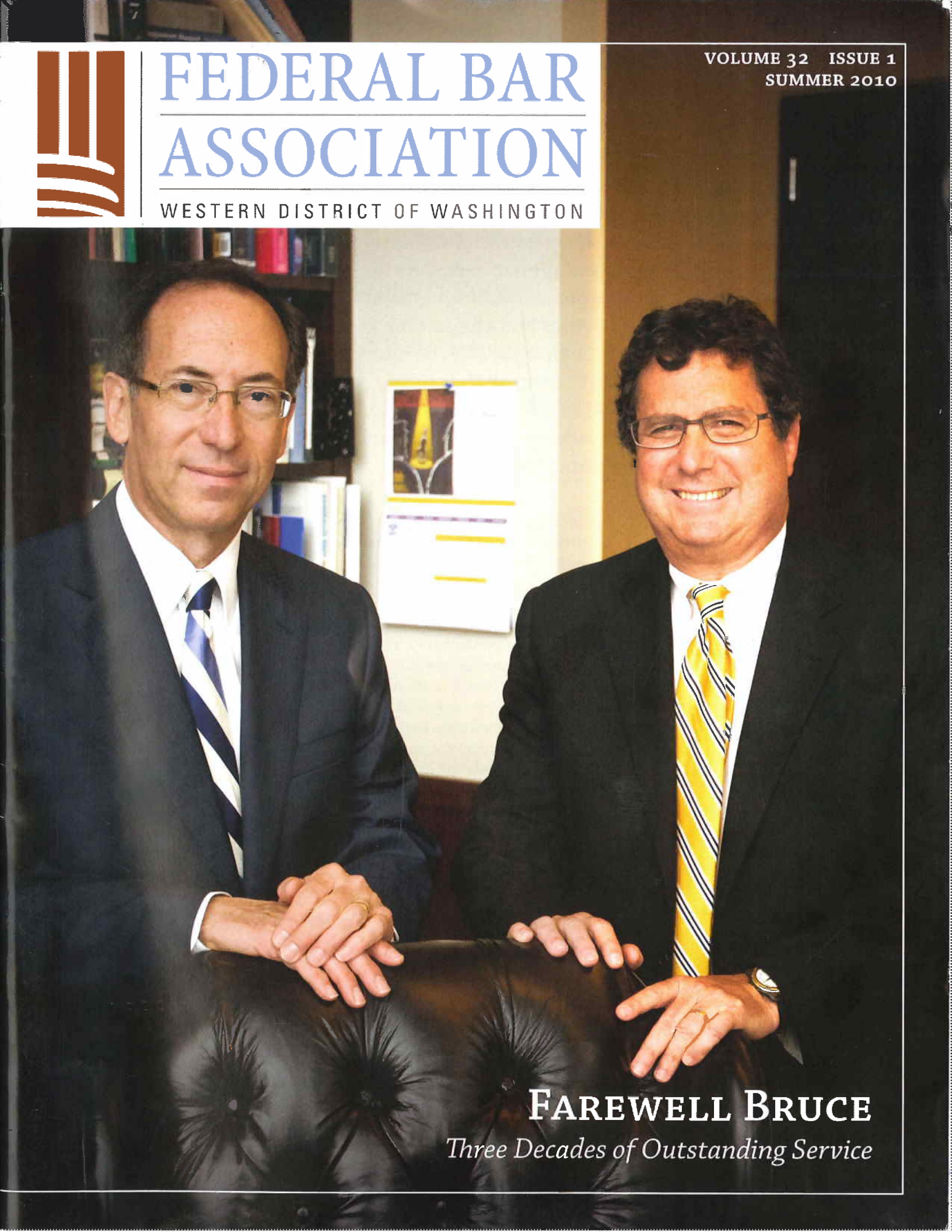
VOLUME 32 ISSUE 1
SUMMER 2010

FEDERAL BAR ASSOCIATION

WESTERN DISTRICT OF WASHINGTON



FAREWELL BRUCE

Three Decades of Outstanding Service

President's Message

By Kirk Johns

The goal of the Federal Bar Association of the Western District of Washington (FBA–WDWA) is to serve its membership. It aims to do this by providing members with unique, high-value programs and activities. This year, your leadership is making an effort to increase membership benefits by expanding the representation of members in leadership roles and by creating opportunities for greater member involvement in FBA activities and affairs. Our hope and expectation is that, through these efforts, our members will derive further benefit from all that the FBA offers. Specifically, we are (1) broadening leadership opportunities, (2) starting a "President's Dinner Program" and (3) representing you at the Annual Ninth Circuit Judicial Conferences.

I. Broadening Committee Leadership and Harvesting the Experience and Perspectives of Our Members

Committee Leadership

An effort has been made this year to appoint co-chairs to all FBA committees. Our committees have had co-chairs from time to time in the past, but this has never been a standing FBA goal. This year, it is.

The goal of the Federal Bar Association of the Western District of Washington is to serve its membership.

The appointment of current committee co-chairs reflects an effort to pair members with different practice backgrounds and perspectives (e.g., private practice, government practice, in-house practice) and different levels of experience in the leadership of each committee. We foresee a variety of benefits stemming from this approach: a broader perspective brought to bear in managing the affairs of each committee (benefiting both the co-chairs and committee members); mentoring opportunities; the ability to reach out to and involve a broader spectrum of the FBA in committee activities; greater continuity in committee leadership from year to year; and the preparation of co-chairs for greater responsibilities and further appointments in FBA leadership. Our overall rationale for these appointments is twofold: to reinvigorate committee activities and to involve more members, with more diverse backgrounds and levels of experience, in committee activities.

Committee Activities

Each committee with a practice area focus has been asked to conduct some type of CLE program *at least* once a year. These will range from short brown-bag lunches to formal CLE programs.

These committees are encouraged to organize CLE programs aimed at actively involving our most experienced members and exploiting their knowledge and views. Our members' depth of experience, knowledge and perspective is an enormous resource for the FBA. By actively enlisting and drawing upon that experience, our committees have the ability to present programs which are more in the nature of a colloquium than a typical speaker-oriented CLE program – a gathering of members to jointly consider, discuss and report on issues, challenges, or subjects of interest. Programs of this nature present an ideal opportunity to develop practice tips, or "best practices" guidelines, for our members. Depending on the subject matter (*e.g.*, discovery of ESI, or effective practices for the presentation of certain types of cases or evidence), such colloquia could also involve our district judges as participants, further enriching the experience and increasing the potential for the development of sound, practical and useful guidelines for our members and the Court.

II. Something New – The "President's Dinner" Program

This year we will be starting a new program for our members and our Western District and resident Ninth Circuit judges – the President's Dinner Program. The goal of the program is to nurture the professionalism and collegial bench-bar relations that we enjoy in the Western District by providing members and judges with an opportunity to gather on an informal and predominantly social basis for an

Continued on page 12

On the Cover:

Chief Judge Robert Lasnik and retiring Court Clerk and Executive Bruce Rifkin.

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Bruce Rifkin: Bidding Farewell After Three Decades of Service

By the Hon. John L. Weinberg, U.S. Magistrate Judge

It was just one of those random events. Just a visiting speaker, addressing a law school class. Not an event that Bruce Rifkin ever expected would give direction to his entire career. But it did.

When Bruce retires on September 3 of this year, he will complete 30 years as Clerk of our Court, with the added title of District Court Executive.

But back on that day in 1970, he was a 23-year-old student at the University of Denver Law School. As the speaker stepped to the rostrum, Bruce had no clear plans as to how he would apply his legal education, or where his career might lead him, his new bride Jo Ann, and their future family.

The guest speaker that day was a judge from the juvenile division of the state trial court in Denver. He was part of a pioneering group that was doing some of the earliest studies of the optimal ways to organize and administer courts.

The issues fascinated Bruce; and he took ambitious and effective action. To the normal burdens of a J.D. candidate, he added a simultaneous evening program leading to a master's degree in Judicial Administration. And as if that were not enough, he also worked part-time in the juvenile court in Denver. His career in judicial administration was launched. Meanwhile, Jo Ann pursued her own profession and helped support the family by teaching in the Denver school system.

Early Career Path

In Denver, Bruce and Jo Ann were 1,500 miles from home. They were born and raised in Harrisburg, Pennsylvania, and have known each other for their entire lives. Bruce's father was a dentist; Jo Ann's was an orthodontist.

As an undergraduate at New York University, Bruce majored in Fine Arts and History. Upon Bruce's graduation in 1970, he responded to "the call of the West," and selected Denver as the place for his legal education. He and Jo Ann were married in 1970.

His first job after law school was as a trial court administrator in Dade County (Miami) Florida. Then, as now, this was a very busy urban court, and its problems presented stimulating challenges to a bright and eager new court administrator. Bruce's prime responsibility was to administer a diversion program for first-time drug offenders. He worked every day with defendants, their families, prosecutors, defense attorneys, judges, counselors and others. Janet Reno, who would later become Attorney General of the United States, was one of his mentors. Bruce loved the experience. Meanwhile, in his "spare time," he studied for and passed the Bar in Florida and in Pennsylvania.

As Bruce puts it, our courts deal with many far-reaching issues; their impact on society as a whole is far greater; and they have greater resources available to achieve their mission.

But Bruce quickly learned that the federal courts were "*the* place" for a court administrator to work. As Bruce puts it, our courts deal with many more far-reaching issues; their impact on society as a whole is far greater; and they have greater resources available to achieve their mission.

So in 1976, Bruce and Jo Ann moved to Washington D.C., where he worked in the Administrative Office of the U.S. Courts. His Division of Management Review and Auditing assisted the courts with issues such as case management, jury administration, personnel matters, and all aspects of running a busy court.

Bruce rafting in the Grand Canyon, circa 1990.

Judge Coughenour says most administrators in Washington D.C. regard that city as, "the center of the universe." But Bruce did not see it that way, and was anxious to get out into the courts. In 1978, he learned the Chief Deputy Clerk in Seattle, Marion Miller, was about to retire. Bruce applied; and after a 20-minute telephone interview, Clerk of Court Joe Romane hired him. Bruce says his selection reflected, in part, a decision by Chief Judge Wally McGovern that the court would benefit from including professionally trained court administrators as part of the district team. After serving as Chief Deputy for two years, Bruce was selected as Clerk of Court upon Joe's retirement in 1980. Since then, our district has been one of those in the country which has changed the title of our "Clerk of Court" to that of "District Court Executive." This reflects the substantially expanded duties which our district associates with the position.

Continued on page 16

Justice for All, Not Just For Those Who Can Afford It

By Lynne Wilson

In September 2008, Terry Releford successfully convinced Federal Magistrate Judge Mary Alice Theiler that his civil rights claims against two Tukwila police officers deserved to be decided by a jury.[1] This was no small feat. When he filed his initial "Civil Rights Complaint by a Prisoner Under 42 U.S.C. §1983" on a form provided by the federal court in December 2007, Terry was serving a 45 month sentence for unlawful possession of a firearm in a Washington state prison. Terry, a high school graduate, handled all discovery and summary judgment motions pro se with virtually no outside help beyond the prison law library. Although his excessive force claims against the officers eventually survived summary judgment, none of the civil rights attorneys that Terry contacted would risk representing him. He was simply unable to overcome the hurdle of being a 40-year-old African American man with a felony record that included drug convictions, a background that was light years away from that of the average federal court juror and one that held little promise of eliciting their empathy.

In February 2009, I decided to represent Terry as part of the Federal Bar Association of the Western District of Washington (FBA-WDWA) Pro Bono Program and was subsequently appointed as plaintiff's counsel by Judge Ricardo Martinez. The Pro Bono Panel, from which attorneys are appointed in select cases to represent *pro se* litigants, is jointly administered by the District Court Judges and Magistrate Judges, the FBA-WDWA, and the Clerk of the Court. Because the need for appointed counsel has increased over the past few years, the Panel is currently seeking attorneys as well as law firms to join its ranks.

Altruism was only one motive for my decision to represent Terry. Another was that although the program is labeled "pro bono," a certain amount of attorney's fees (although modest) are available under the civil rights statutes if a settlement or judgment is obtained. In addition, the District Court has a special fund available to panel attorneys to off set most litigation expenses such as depositions, research, travel expenses, copies and experts.[2] Further, taking on one of these cases seemed to me to be a great way to sharpen my federal court litigation skills.

Terry, a high school graduate, handled all discovery and summary judgment motions pro se with virtually no outside help beyond the prison law library. Although his excessive force claims against the officers eventually survived summary judgment, none of the civil rights attorneys that Terry contacted would risk representing him.

Finally, the facts involved in Terry's case seemed both intriguing and worthy of an effort to push for justice on his behalf: Terry, who stands at 6'5" and weighs nearly 300 pounds, was subjected to simultaneous tasering by two Tukwila officers for allegedly failing to comply with orders to turn around. It was 1:00 in the morning in early June 2006 and the homeless Terry was walking through a 7-11 parking lot. One of the officers had recognized him and knew that he had an outstanding warrant for shoplifting. Before Terry could respond to their commands, each officer (one on the front and one on the back) tasered him simultaneously. The total 100,000 volt jolt knocked him to the ground.

Although Terry's damages were not substantial, these facts clearly constituted an "unreasonable seizure" under the Fourth Amendment. Marshalling his case through to settlement or a judgment was something he could not do without an attorney, so I chose to represent him. Ultimately, Terry's case was settled at a CR 39.1 mediation with Magistrate Judge James Donohue acting as mediator.[3] Terry received enough money from the settlement (which included attorney's fees) to have a basis for starting life over when he is released from prison.

The Pro Bono Plan

The vast majority of *pro se* litigants in the Western District are not as successful as Terry. Very few qualify for appointed counsel from the Pro Bono Panel. But between ten and fifteen civil rights cases per year do qualify. They qualify based on the litigant's lack of

Continued on page 18

Remembering Judge Franklin D. Burgess

By Brett A. Purtzer

Balance, compassion, humility. These words describe individuals who possess enduring qualities. Judge Franklin D. Burgess possessed these qualities and more, and his recent passing is felt by those within the legal community and beyond.

Judge Burgess was born March 9, 1935 in Eudora, Arkansas. He was one of eight children. While growing up, he was an outstanding athlete, particularly excelling in basketball. Life in Arkansas, however, was not all about sports. Rather, it was a life of meager means where hard work was expected simply to survive. After graduating from Eudora High School, he enlisted in the United States Air Force. While in the Air Force, Judge Burgess's athletic prowess in basketball continued, and he was picked as one of the 10 best Air Force players in the world and named to the All-Air Force Team.

He was the second African-American to be appointed to the Tacoma federal bench, following his long-time friend and law partner, Jack Tanner, who was appointed District Court Judge in 1978.

After his discharge from the Air Force in 1958, Judge Burgess enrolled at Gonzaga University. The draw to Gonzaga was simple. He would play basketball, but education would be the focal point. During Judge Burgess' playing days at Gonzaga, he set several records that still stand, and he led the NCAA in scoring for the 1960-1961 season and was named to multiple All-American teams. Equally, if not more importantly, however, he completed his degree in Education.

Unlike today, where financial rewards often follow special athletes, Judge Burgess' professional career was short. He was drafted by the Los Angeles Lakers, but opted for the newly formed American Basketball League (ABL). His ABL career, however, was short-lived as the ABL disbanded after two years. After the league disbanded, Judge Burgess, who was married and raising a family, returned to Spokane and enrolled at Gonzaga Law School. After graduating near the top of his class, he briefly worked with the Atomic Energy Commission in the Tri-Cities and then moved to Tacoma where he began practicing with the Tacoma City Attorney's Office. He would later became a partner in the Tacoma law firm of Tanner, McGavick and Burgess.

Just as there was more than basketball for Judge Burgess, there was also more to the practice of law. Throughout his time in Tacoma, he was active, as evidenced by his memberships in numerous organizations, including the Pierce County, state and Loren Miller Bar Associations; Tacoma Boys Club; Board of Directors of the Boy Scouts; Tacoma Urban League; past president of the local chapter of the NAACP: the Board of Regents of Gonzaga University and Shiloh Baptist Church. He also participated in many building projects with Habitat for Humanity.

Judge Burgess was appointed Magistrate Judge to the Federal Bench in 1981 for the Western District of Washington at Tacoma. He was the second African-American to be appointed to the Tacoma federal bench, following his long-time friend

and law partner, Jack Tanner, who was appointed District Court Judge in 1978. Judge Burgess dutifully filled his responsibilities as a Magistrate Judge, and was recognized as such when he was appointed as District Court Judge in 1994. He went senior status in 2005.

Judge Burgess was a caring individual, not only for his family and friends, and his staff – but the lawyers, parties, witnesses and jurors who came into his courtroom. He particularly cared for the most unfortunate among us, who are regular visitors to our courts. Frank Burgess wanted to, and tried his best to, help those who came before him. He cared.

- Judge Robert Bryan

Once Judge Burgess was appointed to the federal bench, his community involvement continued, as well as his involvement with Gonzaga University.

Continued on page 15

Upcoming changes to the Federal Rules

By Scott A. W. Johnson and Miles A. Yanick

On April 28, 2010, the United States Supreme Court approved changes to the following federal rules:

Civil Rules 8, 26, and 56

Criminal Rules 12.3, 21, and 32.1

Evidence Rule 804

Appellate Rules 1, 4, and 29

The Supreme Court has transmitted these rule changes to Congress in accordance with the Rules Enabling Act, and they become effective on December 1, 2010, unless Congress enacts legislation to the contrary.[1] Following is a summary of the changes and their purpose and intended effect.

Changes to Civil Rules

Rule 8: The change to Civil Rule 8(c) deletes the reference to "discharge in bankruptcy" from the list of affirmative defenses. Under the United States Bankruptcy Code, a discharge automatically voids any judgment to the extent that it determines the debtor's personal liability for the discharged debt. This statutory provision vitiates the affirmative-pleading requirement of Rule 8(c); meanwhile, according to the Judicial Conference Committee on Rules of Practice and Procedure (Rules Committee), the continuing reference to discharge as an affirmative defense has generated confusion, led to incorrect decisions, and caused unnecessary litigation.

Rule 26: The changes to Civil Rule 26 apply work-product protection to draft expert reports and most communications between experts and hiring counsel. The changes expressly provide that the provisions of Rule 26(b)(3)(A) and (B) which protect work product apply to "drafts of any report or disclosure" required of an expert and "communications between [a] party's attorney and any witness" required to provide an expert report.

There are exceptions for attorney-expert communications regarding (1) compensation of the expert; (2) facts or data provided by the attorney and relied upon by the expert; and (3) assumptions provided by the attorney and relied upon by the expert.

The rule changes are intended to address problems created by the 1993 amendments to Rule 26, which have been interpreted as allowing discovery of all communications between an expert and the retaining lawyer, and of all draft expert reports. As the Rules Committee noted, that interpretation has caused lawyers to take artificial and sometimes elaborate steps to avoid creating a discoverable record, such as hiring two experts (one to develop the opinions and another to testify) and having experts avoid taking notes or creating anything that can be called a "draft" report, while trying to discover such notes and drafts from the other side. By the same token, the Rules Committee found that lawyers are spending significant deposition time in an often vain attempt to show that the opposing expert's opinions have been shaped by the retaining lawyer. The Rules Committee concluded that discovery into draft reports and all communications between an expert and retaining counsel is an ineffective way to expose the weaknesses of an expert's opinions, is time-consuming and expensive, and leads to wasteful litigation practices.

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Changes to Rule 26(a)(2) also address witnesses who are expected to provide expert testimony but who are not required to provide a report, either because they are not "retained or specially employed to provide expert testimony in the case" or because they are not employees whose duties regularly involve giving expert testimony. The rule changes require a party who intends to rely on such an expert to disclose the subject matter of the expert's testimony and summarize the facts and opinions the witness is expected to offer.

Rule 56: Several changes to Civil Rule 56 set forth procedures for presenting and deciding motions for summary judgment. The changes are designed to make the rule current with actual practices and to create consistency of practice among the various districts.

Continued on page 20