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WESTERN DISTRICT OF WASHINGTON

On the Cover:

The Tacoma Union Station Courthouse in 1911 (above), and one hundred years later in 2011 (below).

Photo courtesy of The Tacoma Public Library.

The Federal Bar Association News is a publication of the Federal Bar Association of the Western District of Washington. Comments and proposed articles should be addressed to:

Christopher Emch
Foster Pepper PLLC
1111 Third Avenue, Suite 3400
Seattle, WA 98101.3299
206.447.8904
emchc@foster.com

Joanna Plichta Boisen
Foster Pepper PLLC
1111 Third Avenue, Suite 3400
Seattle, WA 98101.3299
206.447.5144
boisj@foster.com

President's Message

Securing Justice for All in a Digital World

By Jim Savitt

The information revolution has changed the way and speed at which we work, play, and communicate. It appears to have resulted in major gains in productivity in a wide range of economic activity. But it is far less clear that it has improved the administration of justice. Based on what I hear from colleagues, it appears that the information revolution may be making our system more expensive — in many cases prohibitively expensive — without either making the system more efficient or better enabling the courts to determine the actual facts and apply the law.

Access to justice – the ability of those with less means to obtain meaningful access to our courts – is widely and rightly acknowledged by the Federal Bar Association (FBA) as a serious concern and problem. The FBA's Pro Bono Panel and Federal Civil Rights Clinic are two programs created to address this issue. We must remain vigilant in our collective efforts to ensure that those of low and moderate means can afford to seek redress or to defend themselves in the courts.

But the information explosion has spawned a related problem, that may be both more insidious and more prevalent. Too much information and the burdens and expenses of locating and retrieving it skewed the cost benefit analysis of litigation. Back in 1983 when I began my career at a large New York City firm it occurred to me that the high-speed copy machine – then itself a relatively new development – had significantly changed law practice. First, our clients were acquiring these machines, and they were increasing dramatically the quantum of paper they were generating and keeping. Second, lawyers had the high-speed machines too, and thus could produce and review substantially more information. This certainly resulted in more information that was available to support and to defend legal claims, arguments and positions. And it required more lawyers and legal support to undertake this review. But I questioned whether it resulted in better justice—whether it enabled us as advocates and, more importantly, the courts as arbitrators, to better find and know "the truth."

Fast forward a generation, and the high-speed copier now is a quaint, antiquated piece of technology. But the concerns raised by the information explosion are significantly greater. As recently as the 1980s, with the exception of the few papers that might be scattered on one's desk at any given time, one had to intend to save something. Now, however, the exact opposite is true: one has to act affirmatively to delete an electronic document—and often even that does not prevent the storage of the data somewhere on a hard drive or in cyberspace. At the same time, an expansion in available storage capacity has led to an outlandish increase in data storage. In the early years of my practice, a given witness on a moderate-sized commercial matter might have only a box or two of hard-copy documents, which typically could be readily segregated and reviewed. I am told that now a given "document" custodian usually has at least 1 GB of data to be reviewed (and frequently much more). This is the rough equivalent of approximately 20 banker's boxes worth of material.

In short, the rise of email and other digital technology has generated an exponential expansion of the documents and information that might be relevant to any legal dispute – and thus which might be requested, reviewed, produced and contested. And it seems that this trend will continue.

The result has been a major, perhaps massive, increase in the cost of many cases. The increase is not due solely to the vast time often required to identify, collect, process, review and produce information that might support one's claim or be responsive to discovery requests. It also results from "litigation within the litigation": disagreements and motion practice about how to search electronic data, how to produce it, whether it has been destroyed or deleted, sanctions for such destruction, and so on.

The courts are grappling with these issues too, and attempting to provide guidance. The vast bulk of the decisional law to date has been produced by our federal courts. Some of the decisions to date impose severe sanctions for conduct that is deemed grossly negligent but plainly was not

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By Melissa Muir

Baby Boomers Retiring, Changes in Leadership Abounding

The Court has decided to consolidate probation and pretrial services as a result of a recent baby-boomer retirement wave. Long-time District Court Executive Bruce Rifkin retired last year and Chief Probation Officer William Corn and Chief Pretrial Services Officer Tim McTighe also retired. To address leadership transitions affected by these retirements, Chief Judge Robert Lasnik organized the first-ever judges' retreat where it was decided that the two offices would be consolidated.

Chief Judge Lasnik swears in new Chief Probation and Pretrial Services Officer Connie Smith.

A Brief History of Pretrial Services

In 1982, Congress granted the federal judiciary statutory authority to deliver pretrial services. Each district could independently decide how to manage probation and pretrial services, and nearly half of the country's districts separated the two. As then-Chief Judge Barbara Jacobs Rothstein recalls, our district was one of the last in the country to create a separate pretrial services office, reluctantly, in late 1988. Over the last decade, however, the Judicial Conference and Ninth Circuit have encouraged other courts to consider consolidating probation and pretrial services when a chief retires or when it will result in increased efficiencies without compromising the pretrial services mission. Some courts have since chosen to bring the two offices back together.

Bob Westinghouse, U.S. Attorneys Office, and Tom Hillier, Federal Public Defender, attend the swearing-in ceremony.

Western Washington's Way

Recognizing the upcoming leadership changes in both organizations as a "unique opportunity to improve upon the excellence we already enjoy in our district," Chief Judge Lasnik appointed Judge Marsha Pechman to chair the Committee to Consider Consolidation with Judges Ronald Leighton and Karen Strombom. The Committee was to consider the impacts of consolidation and make a recommendation to the Court. Judge Pechman and the Committee identified key factors to consider and key stakeholders to include in the process.

The Committee first held open meetings with district staff to describe the process and encourage direct and confidential input. The Committee then invited bar representatives and affected agencies to share their perspective, which included Criminal Justice Act (CJA) panel members Xenon Olbertz and Allen Bentley and members of the Federal Public Defender's and United States Attorney's Offices.

The Committee considered the impacts of consolidation on the commitment to the mission of pretrial services, district programs and services, efficiencies, and opportunities for staff. They considered national research, looked at courts that decided to consolidate and courts that stayed separate, but the Committee's primary focus was on our district's needs and future.

Swearing-in ceremony.

The Big Decision

A year later, and with considerably more information, the full Court met off-site again. With an eye to the strength, flexibility and creativity of a larger combined organization, the judges voted overwhelmingly to consolidate the pretrial services and probation departments. "The process devoted to this decision was the most thorough and comprehensive I have seen in my 11 years on the federal bench and my 20 years as a judge," said Chief Judge Lasnik. The court asked the two outgoing chiefs to work closely together while the court moved to the next important decision: who would lead this new organization?

A Force of Nature

Last spring, with assistance from the bar and sister agencies, the Court began a nationwide recruitment effort to

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Chief's Corner

The Service of Our Senior Judges

By Chief Judge Robert Lasnik

Many of you have heard of the title "Senior Judge," but I bet very few of you know how important they are to the administration of justice in our federal courts. By statute, a judge who is at least 65 and whose service as an Article III judge, added to his/her age, equals 80 is eligible to take senior status (e.g., age 67 with 13 years as a district judge). This is also the formula for retirement. The thing most people do not understand is that the judge who "goes senior" and continues to hear cases gets paid the same amount of money as a judge who retires and does no more work for the courts. The senior judge maintains a chambers and some staff, based on the percentage of a full caseload that the judge carries.

Without the willingness of our senior judges to continue to hear cases, the federal courts would be in dire straits. We have not had a new judges' bill approved by Congress since 1990. Every year one is introduced (which reflects that the Western District of Washington is entitled to another district judge based on workload indicators). These bills have fared as well as our annual requests for a pay increase—which is to say they have failed miserably.

Senior judges in 2010 nationwide handled 21% of the caseload in federal courts. In our district over the last four years senior judges have handled on average 28% of our cases. The Clerk of the Ninth Circuit Court of Appeals, Molly Dwyer, reports that senior circuit judges handle 33% of their appellate caseload. The combination of vacant seats, long waits for confirmation and insufficient authorized judgeships has created a crisis in the courts that would bring justice to its knees were it not for our senior judges.

Earlier this year at one of our weekly judges' meetings, both Senior District Judges Jack Coughenour and Tom Zilly talked about the back-to-back trials they had each just finished. They engaged in some good-natured banter for the benefit of the "active" district judges musing about "why are we doing this?" and "it's not easy to explain to people that we are not hearing cases because we need the extra cash—that we would get paid the same if we just left the bench and took a trip somewhere warm." I constantly remind our senior judges that they have absolutely no obligation to take on more work. They have earned their senior status and they should fully enjoy this time to do some of the things they never got to do while dealing with the relentless grind of being a trial judge.

Members of the federal bar also appreciate what a great resource it is to have experienced trial judges like Jack Coughenour and Tom Zilly in Seattle and Bob Bryan in Tacoma to handle complex civil cases and criminal cases. And that benefit does not just flow to the Western District of Washington because senior judges can hear cases throughout the United States. Districts facing large backlogs, such as the District of Arizona, and districts facing conflict situations for their bench, such as the prosecution of the individuals charged with plotting the assassination of the Chief Judge in the District of Alaska, call upon our senior judges to rescue them. Judge Coughenour just returned from Tucson where he handled a murder case previously assigned to Chief Judge John Roll, and Judge Bryan will be handling the criminal case in Alaska discussed above. And Judge Zilly will be posted to the Southern District of New York to help them out this spring.

Although they no longer hear cases, Senior District Judges Carolyn Dimmick and Walter McGovern participate in judges' meetings from time to time and Judge Dimmick is a member of an important Ninth Circuit Committee on Space and Security. We benefit greatly from the wisdom that comes from Judge McGovern's 40 years on the federal bench. Between them, Judges McGovern and Dimmick represent 98 years of judicial experience at almost every level of the state court system as well as the federal trial court. Both Judge McGovern and Judge Dimmick played an important role in selecting Bill McCool, our new Clerk of Court, and Connie Smith, our new Chief of Probation and Pretrial Services.

The graying of our federal bench is reflected in the fact that 12% of the Article III federal judges are now over 80. In the middle district of Pennsylvania, they have 11 judges and eight are senior judges. Five are over

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Recent Developments in the CR 39.1 Program

By Michele A. Gammer

The U.S. District Court for the Western District of Washington has long been a leader in the use of alternative dispute resolution (ADR). Since 1978, when Local Civil Rule 39.1 was originally adopted, attorneys have served as neutrals in thousands of civil cases in this district, handling mediations and voluntary arbitrations. This article highlights key aspects of and recent developments in our district's CR 39.1 program.

Upcoming Brown Bag and Practice Tips for Counsel

In the Western District, federal practitioners with pending civil cases regularly select mediators and participate in mediations. Later this year, the Federal Bar Association's (FBA) ADR Committee will sponsor a brown bag to bring mediators and litigators together to discuss their respective roles. Attendees will have the opportunity to hear from experienced mediators about pre-mediation planning, effective negotiation tips and strategies, and closing and documenting the settlement. An invitation to this program will go out in early fall. In the meantime, it is helpful to keep in mind CR 39.1's specific guidance on mediation procedures.

When a case is designated for mediation, the rule provides that the parties' counsel shall select a mediator from the register posted on the Court's website and file notice of the selection with the Clerk of the Court. Typically, counsel contacts proposed mediators on the register to ascertain availability and potential conflicts of interest before selection. The parties may also select a mediator who is not on the register if the parties agree and obtain permission of the Court. In situations where the parties are unable to agree on a mediator, the rule contemplates that the plaintiff's attorney may apply to the Court for the designation of a mediator from the register. At least thirty days prior to the mediation, counsel are required to meet (preferably in person) in an effort to resolve the dispute. If such efforts fail, each party is required to provide the mediator with a memorandum (no longer than 10 pages) presenting its contentions as to liability and damages. Copies of the memorandum must be served on all other parties. The rule also contemplates that each party will deliver to the mediator a confidential statement of its current offer or demand, which shall not be served on the other parties.

Attendance at the mediation is specifically prescribed in the rule: the attorney primarily responsible for each party's case must attend. In addition, parties and insurers having authority to settle and to adjust pre-existing settlement authority are required to attend the mediation in person. While the mediator may excuse the party or representative of the insurer from personal attendance, mediators may do so only in exceptional circumstances and, under those circumstances, the party or representative is required to be on call by telephone during the entire mediation proceeding. The lack of availability of a party or insurer representative is frequently cited by mediators in this district as one of the key reasons that cases do not settle. At the conclusion of the mediation, the mediator provides to the judge, the Clerk's Office, and the parties written confirmation of when the mediation occurred and whether the case has resolved. The mediator is also allowed to submit a letter to the judge and parties expressing the mediator's views as to whether appointment of a settlement judge or use of other ADR procedures would be advisable.

Qualification Requirements for Neutrals Include Training and Pro Bono Service

In late 1990's, the Court adopted enhanced qualification requirements for attorney neutrals on the register. The rule now provides that, to qualify as a neutral, an attorney must: (1) have been a member of the bar of a federal district court for at least seven years; (2) be a member of the bar of the United States District Court of the Western District of Washington; (3) have devoted a substantial portion of his or her practice to litigation; (4) have met the training requirements set by general order; and (5) have agreed to accept appointment to serve as a neutral on a pro bono basis when appropriate.

While the rule is flexible on the subject of compensation and states in which neutrals are "eligible to receive compensation," neutrals are expected to serve on a pro bono basis from time to time when appropriate. Neutrals who are contacted by the parties or ADR Committee Co-Chair to serve in a particular case without compensation should realize that the Court expects the neutral to accept mediations on a pro bono basis from time to time. Most often such requests are made in cases in which the plaintiff appears pro se or is represented by pro bono counsel. The civil docket in this district includes a sizable number of pro se cases. By way of example, in 2010, 469 cases or 29% of the docket were filed by pro se litigants. Of those cases, 370 were non-prisoner petitions involving primarily civil rights, employment, and breach of contract claims. Because the FBA

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