



Federal Bar Association - Eastern District of Michigan Chapter - 40 years of service to our Federal Bench and Bar

U.S. Attorney Selects Management Team

On January 14, 2001, U.S. Attorney Jeffrey G. Collins announced the selection of Alan Gershel as Chief Assistant United States Attorney, and Pamela J. Thompson as Executive Assistant U.S. Attorney.

Gershel, who also will continue as Chief of the Office's Criminal Division, joined the U.S. Attorney's Office in 1980. At various times throughout his federal career, he has served as Acting United States Attorney and Chief Assistant in the Eastern District and as Deputy Assistant Attorney General for the Department of Justice's Criminal Divi-



Executive Assistant United States Attorney Pamela J. Thompson and United States Attorney Jeffrey G. Collins

sion in Washington, D.C. Thompson, who previously served as Chief of the Defensive Litigation Unit in the Office's Civil Division, has been an Assistant U.S. Attorney since 1976.

McCree Luncheon To Feature Mayor Kwame Kilpatrick and Saul Green

An outstanding program is in place for this year's Wade Hampton McCree Award luncheon, featuring a keynote address by newly elected Detroit Mayor Kwame Kilpatrick and presentation of the McCree Award to Saul Green, former United States Attorney for the Eastern District of Michigan.

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President's Column

Brian D. Figot, President

The State of the Chapter, Part III:

Alex: I'd Like Potpourri for \$200.00 Please

Since the last Chapter Newsletter appeared in your mailbox, we have made tremendous strides toward achieving goals which have been in the Chapter's sights for the past few years. Some of the changes will be readily apparent. Others will become more evident over the next few months. All are geared toward making the Chapter more user-friendly and responsive to its membership and its constituencies.

In fact, so much has happened — and is happening — that no single theme is appropriate for this column.

The City of Detroit has a new Mayor. The Eastern District of Michigan Chapter has a new Mayer. The Mayor, of course, is Kwame Kilpatrick. The Mayer, in case you haven't heard yet, is John Mayer, former Court Administrator of the United States District Court for the Eastern District of Michigan.

John Mayer has agreed to serve as the Executive Director of our Chapter, to guide us toward improved operations and to help us construct new systems, including the imaginative use of our new website (www.fbamich.com) in order to improve the services we provide to our membership, the Bench, the Bar and the public.

Mayor Kilpatrick will deliver the keynote address at the upcoming Wade Hampton McCree Award Luncheon to honor the memory of Judge McCree and applaud the accomplishments of Saul Green, the Immediate Past

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President's (continued)

U.S. Attorney, this year's recipient of the Chapter's prestigious McCree Award.

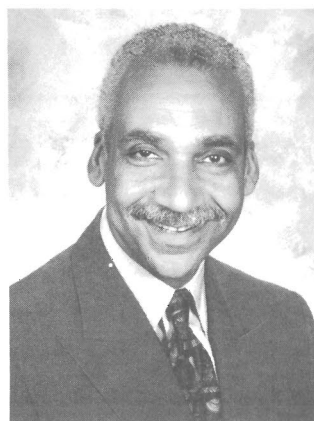
Meanwhile, the Communications Initiative, the initial step of which was launching the Chapter's first website in the latter part of 2001, is about to enter a new and exciting phase. Soon, you will be able to go on-line to a secure website in order to renew your membership and register for Chapter events. Instead of filling out the same form year after year and mailing it in with your check, you will (if you want) access your member information, update it if necessary, and click your payment automatically and electronically.

This ambitious program for the modernization of our administrative processes through website enhancements is entirely the result of the generosity of the Judges of the Eastern District of Michigan. When you received the last Newsletter, we could only dream of being able to utilize a system of automated management – realization lay far beyond the narrow means provided by our limited budget. The Bench saw our need and responded with an act of kindness and beneficence, providing the Chapter with an unprecedented monetary donation that will make our dream a reality. Chief Judge Lawrence P. Zatkoff, in informing the Chapter of the donation on December 17, 2001, cited to the unanimous support of the Bench when he presented the proposal to its members. This Chapter, he continued, is seen as a solid investment.

Our continued dedication to our Chapter's Mission Statement is the most appropriate way for us to express our gratitude to the Bench on an ongoing basis.

As we go forward in a new year, each of us needs to reconsider the support which we provide the Chapter. The first level of support is in what we do through the committees in which we are involved. In each committee this year, ask what those committees have done (and what can they do) to promote professionalism, education, civility and ethics, provide service to the Bench and Bar, and advance social responsibility in the administration of justice in the courts and in the community.

It is also important to look to our own financial well-being as a Chapter. The need for payment of local dues is often overlooked when dues are remitted to our National organization. Local dues are billed locally, and mailed to our local address (please note the change of address). Pay those dues. Become a **sustaining** member, and help us sustain the momentum we are building!



Saul Green

McCree (continued)

The luncheon, hosted each February by the FBA, honors the late Judge Wade H. McCree, Jr., who was one of Detroit's most prominent lawyers. He served as Solicitor General of the United States, Judge of the Wayne County Circuit Court, United States District Court for the Eastern District of Michigan, and United

States Court of Appeals for the Sixth Circuit. The McCree Award honors Judge McCree's memory by recognizing individuals or groups committed to social justice.

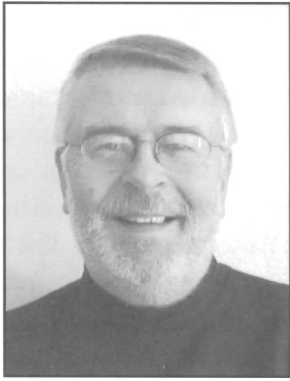
The event will be held on February 20, 2002, at the Crowne Plaza Pontchartrain with a reception at 11:30 and lunch at noon. For tickets, contact Grant Gilezan at ggilezan@dykema.com or (313) 568-6789.

Gilman Award Nominations

Nominations are now being accepted for the 2002 Leonard Gilman Award for an outstanding practitioner of criminal law. The award will be presented at the FBA luncheon on April 18, 2002 where the District's new U.S. Attorney Jeffrey G. Collins, will be the key note speaker.

This award honors the memory of Leonard Gilman who served as United States Attorney in the Eastern District from 1981 until his death in 1985. Len spent his entire life in public service as a prosecutor who never forgot that every case involved unique human beings and that compassion was not weakness. The Gilman Award is given annually to a person who embodies Len's ideals of decency, fairness and respect for others and who emulates his commitment to excellence, professionalism and public service in the criminal justice system.

Nominations for the Gilman Award should be submitted by March 1, 2002 to Michael Leibson, 211 West Fort Street, Suite 2000, Detroit, MI 48226 or michael.leibson@usdoj.gov. For luncheon ticket information contact Grant Gilezan at 313-568-6789 or ggilezan@dykema.com.



John Mayer

FBA Welcomes John Mayer As Executive Director

The Executive Board has approved the recommendation of the officers that John Mayer be appointed Executive Director of the Eastern District of Michigan Chapter. He assumed his duties on December 5, 2001.

John is well-known in the Detroit legal community and joins us after thirty years of service in court administration. John was the Court Administrator for the Eastern District of Michigan from 1979 to 1999 and served in the Michigan courts from 1971 to 1979 as Associate State Court Administrator and Oakland County Circuit Court Administrator. Prior to that, he served the Ohio courts as Deputy Administrative Director of the Ohio Supreme Court. He is also a past President of the Chapter.

John has served on several rules committees for the state and federal courts and as an adjunct professor of law at Capital University Law School, in Columbus, Ohio, and of criminal justice at Wayne State University. He received his BA *cum laude* from Oberlin College, his J.D. from Columbia Law School and his M.A. from Columbia University. His experience with the federal courts makes him a welcome addition to our leadership.

From Court Administrator Dave Weaver

On behalf of the Court I would like to wish you all a happy and productive new year. Since I last wrote, there have been a number of important and interesting developments in the Court.

At their December 10, 2001, meeting, the Judges of the U.S. District Court for the Eastern District of Michigan approved two very important matters. The Bench had been considering making a donation to a relief organization in the wake of the September 11, 2001 terrorist attacks and, after researching many worthy organizations, unanimously approved \$5,000 donations to the Robin Hood Relief Fund and to the Windows of Hope Family Relief Fund. Both donations were given on behalf of the Bench and the

Bar of the Eastern District of Michigan. The Bench also considered a request for a donation submitted by Chapter President Brian Figot on behalf of the Eastern District of Michigan Chapter of the FBA. The Bench unanimously approved a one-time donation of \$15,000 that will be used to modernize computer systems that track and process the administrative matters of the organization. In support of the donation, Chief Judge Zatkoff cited the ongoing good work of the Chapter on behalf of the Bench.

The Merit Selection Panel (MSP) has held several meetings to consider applications for the vacant magistrate judge position in Detroit. The MSP will conclude its work in February 2002 and present its recommendations to the Bench for further action.

Security measures remain heightened at all Federal Court facilities throughout the District. As I have mentioned in the past, when entering a courthouse you will be required to show a photo ID and have all packages, brief cases, etc. x-rayed. The safety of all Court staff, the bar and the public continues to be of the highest priority and your ongoing cooperation and patience with all Court security staff is greatly appreciated.

Under a new national program initiated by the Administrative Office of the U.S. Courts, all Court facilities in the Eastern District of Michigan were recently tested for the presence of threatening chemical and biological substances. I am pleased to report that the results of all tests throughout the District were negative.

In technology news, the first high tech courtroom in the District will be completed early this Spring in courtroom 242 in the Theodore Levin United States Courthouse in Detroit. The courtroom will be available to all district judges for hearings or trials requiring advanced evidence presentation equipment. The Sixth Circuit Court of Appeals also approved funding to begin design on a second high tech courtroom.

The Court submitted a request to the Administrative Office to implement the new Case Management/ Electronic Case Files (CM/ECF) system in the second quarter of 2003. CM/ECF will replace the Court's current case management system and at the Court's discretion, allow the electronic filing of documents via the Internet.

Remember, you can submit questions or suggestions for future articles to mie_fba@mied.uscourts.gov.

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Judge
Victoria A. Roberts

Spotlight On Judge Victoria A. Roberts

By Kris Dighe

Judge Victoria A. Roberts is a hometown success story. With roots in Detroit, she is deeply committed to the City and the people of Michigan. Her sincerity and warmth are not revealed on a sheet of paper, but are better

reflected in a casual conversation over a cup of coffee while seated in her chambers preparing for this article. One measure of her commitment was the State Bar of Michigan's honoring her last fall with its highest and most prestigious honor, the Roberts P. Hudson Award for rendering unselfish and outstanding service to the State Bar, the legal profession and the public. The reasons Judge Roberts received the award included her creation of the State Bar Task Force on Race/Ethnic and Gender Issues in the Courts and Legal Profession, as well as her Access to Justice campaign to increase funding for legal services to the poor while she was President of the State Bar.

Being on the federal bench is not what she aspired to while in school. Judge Roberts was born in Detroit and, after graduating as valedictorian from St. Martin de Porres High School, entered the University of Michigan in 1969. There, with a passion for writing, she studied journalism and sociology, with no intention of going to law school. Instead, Victoria Roberts wanted to utilize her writing skills by working for a newspaper.

Her dream of being a journalist and writing for a living was thwarted. During her senior year at the University of Michigan, and not wanting to leave Detroit, citizen Roberts applied to the two Detroit newspapers, seeking an opportunity to work as a reporter in the City in which she grew up. However, she was told by one newspaper that although she had great credentials, the paper had just hired a black reporter. Having filled its quota of one, the newspaper did not have a place for this aspiring journalist.

Judge Roberts, although deeply stung and hurt by this discrimination and rejection, did not let that defeat her. She was encouraged to attend law school so that she could be in a position to fight the kind of attitudes and actions that she had faced. She took the Law School Admissions Test, applied to several law schools, and chose one that for the first time allowed her to venture outside of Michigan for an extended period of time – Northeastern University School

of Law in Boston.

One of the main reasons Judge Roberts chose to attend Northeastern was its unusual Cooperative Legal Education Program. In that program, students alternate three-month long quarters attending academic classes full-time, with quarters working full-time in a law environment, enabling students to develop and refine practical lawyering skills as well as gain direction in their career goals. It was a rigorous program, with students receiving grades for their work in the cooperative program. Ironically, while racial discrimination was one of the reasons she choose to go to law school, when she went to Boston, it too was facing its own difficult racial issues. Not only was the fall of 1973 Victoria Roberts' first semester of law school in Boston, it also was the start of the busing program in Boston's public schools. Needless to say, Boston was in turmoil.

After graduating from law school, Judge Roberts returned to Detroit and had a varied career that prepared her well for the bench. She first worked for the Michigan Court of Appeals for a year as a Research Attorney. Next she moved on to the Lewis, White, Clay & Graves law firm, where she became a partner and developed a practice that included insurance defense and municipal law. Then, she accepted an offer to work at American Motors Corporation as an in-house Senior Litigation Attorney, where she worked on Jeep roll-over cases. Her career path then took her to the U.S. Attorney's Office for three years, defending the government in civil cases, with an emphasis on medical malpractice cases.

Judge Roberts' final stop before taking the bench was ten years at the law firm of Goodman, Eden, Millender, & Bedrosian, ultimately becoming the managing partner. There, she engaged in plaintiffs work such as medical malpractice, personal injury and housing discrimination cases. She also provided legal services to the Big Brothers/Big Sisters organization on a *pro bono* basis, served as a mediator for the Wayne County Circuit Court, and was a member of the Attorney Discipline Board's Hearing Panel.

On June 26, 1998, the United States Senate confirmed Judge Roberts' nomination to the United States District Court for the Eastern District of Michigan, with no opposition. Senator Carl Levin accurately predicted that she would serve on the federal bench with "honor and dignity."

Despite her accolades and achievements, Judge Roberts has remained true to her Detroit roots. She and her family live in North Rosedale Park where she participates in community activities including her block club. She prefers that her neighbors call her Victoria rather than "Judge." Judge Roberts also gets to write for a living.

FBA Holds 49th New Lawyers Seminar

On December 4th and 5th, the FBA held its 49th New Lawyers Seminar at the Federal Courthouse. This year's Seminar was attended by approximately seventy-five attorneys from throughout lower Michigan, most of whom had recently passed the bar examination. As part of the Seminar, the FBA sponsored an admission ceremony at which attendees were sworn into practice before the U.S. District Court.

The nationally recognized two-day Seminar is intended to provide practical pointers and "nuts and bolts" information not generally provided in law school to attorneys new to the practice of law. It also can serve as a "refresher" to attorneys changing practice specialties or transferring in from other jurisdictions. Speakers at the seminar include Federal and State judges and magistrate judges, and attorneys who are experts in their fields of practice. This year's seminar included presentations by Chief Judge Lawrence P. Zatkoff, Judge Patrick J. Duggan, Judge John Corbett O'Meara, Magistrate Judge Virginia Morgan, Wayne County Circuit Judge William J. Giovan, Chief Assistant U.S. Attorney Alan Gershel, David Dumouchel of Butzel Long, Tim Wittlinger of Clark, Hill, Brian Legghio, who specializes in high profile criminal defense cases, and Joseph Conrad Smith, a personal injury attorney who discussed starting a firm and selecting clients.

Attendees lauded the December program and the experience of those making presentations. Special thanks to all who contribute to the continued success of this program.



From left to right: Daniel M. Share, James K. Robinson, Brian Figot, Thomas O'Brian, Michael Leibson and Kirk Cheyfitz at the Rakow Luncheon

Rakow Luncheon Honors Students

The FBA hosted its annual Rakow Scholarship Awards Luncheon on Thursday, November 15, 2001, in the Main Ballroom of the Crowne Plaza Pontchartrain Hotel in Detroit. The luncheon honors the memory of Edward H. Rakow, who served as the Assistant Regional Adminis-

trator for the Securities and Exchange Commission in Detroit for 26 years, and who was instrumental in founding the Eastern District of Michigan Chapter of the FBA. Each year, scholarships are awarded in Mr. Rakow's name to a deserving student attending each Michigan law school. This year's recipients honored at the luncheon were: Patrick Anthony, University of Detroit Mercy Law School; Mary Chartier-Mittendorf, Thomas M. Cooley Law School; Scott Ciupak, Michigan State University-Detroit College of Law; Brent Koeller, University of Michigan Law School; and Sandra Wells, Wayne State University Law School.

The luncheon was also the occasion for the annual meeting of the Historical Society for the U.S. District Court for the Eastern District of Michigan. The meeting featured a panel discussion on United States v. Narciso, which involved the 1970's prosecution of nurses for the alleged murder of their patients. The panelists were Daniel M. Share, Judge Philip Pratt's law clerk at the time, defense counsel Thomas O'Brien, then U.S. Attorney James K. Robinson, and Detroit Free Press Reporter Kirk Cheyfitz, who covered the case. The lively and informative discussion was moderated by Assistant U.S. Attorney and former Chapter President, Michael C. Leibson.

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Historical Perspective: A Conversation With Judge Horace W. Gilmore By John H. Dise, Jr.

Since its inception, the Historical Society has had a very active oral history project. The interviews for thirteen oral histories are finished, and all but a couple of the

(see page 6)

Judge Gilmore (continued)

transcripts are completed. Over the next few years, articles summarizing some of the more interesting portions of these oral histories will appear in the Historical Society Newsletter.

The first such article, in April, will present Judge Gilmore's story, from his early life in Ohio through his involvement in World War II and Michigan politics, to his career as a lawyer, author, activist, legal scholar and judge in State and Federal court. Below is a chronicle of the early part of his life, through February 1946, when he started work as a law clerk for Judge Charles Simons of the 6th Circuit, and passed the bar exam.

Judge Gilmore was born on April 4, 1918, in Circleville, Ohio. His mother was a native of Circleville. Her father, Judge Gilmore's grandfather for whom he was named, was reputedly the finest sports editor in the country and worked for the *Cincinnati Inquirer*.

Judge Gilmore's father was a district manager for the Columbus and Southern Ohio Electric Company. The majority of Judge Gilmore's ancestors settled in New Jersey, and can be traced back to the first arrival of settlers in Massachusetts in 1630.

Circleville was a farming community of about 7,000 people, and the Container Corporation of America was its largest employer. The town also had a couple of other big mills and three canning factories.

Judge Gilmore graduated from Circleville High School in 1935. He was editor of the yearbook, manager of the football team and one of the writers for the school newspaper. He was in the senior class play, a three-act comedy called "The Youngest!" He played the oldest son. His forensic interests included debating and membership in Epsilon Mu Sigma, an honorary English Society. He was in Hi-Y, the YMCA organization for high-school boys.

The school yearbook described Judge Gilmore as "classical, big, blustery, benevolent, aiming high, has great ambitions and the stuff to carry them out." He still remembers his teachers: "[T]here were several excellent teachers. I think we were lucky to have some very good teachers. My math teacher, Margaret Mattenson, was a very good teacher. Marian Hitler, who taught Biology, was one of the best teachers I ever had. The Latin teacher, Elma Raines, was excellent." He thinks it was "quite unusual" to have so many outstanding teachers in a small high school like his in central Ohio.

Judge Gilmore entered the University of Michigan in the fall of 1935. He had been accepted at Kenyon College, a small Episcopal school in Gambier, Ohio. He was very active in the Episcopal Church and for a while thought of becoming an Episcopal priest.

Entering Michigan with the idea of being a physician, he started taking the required science curriculum, but became interested in the *Michigan Daily*. He started working on the paper at the beginning of his second semester, and by the end of his first year switched to political science as a major. He "became utterly fascinated with the *Michigan Daily*" and "spent all [his] time there during [his] second, third and fourth years."

His senior year he was city editor and "had every intention of becoming a newspaperman." He became acquainted with others who eventually made the news their career. "I knew Mike Wallace slightly in Ann Arbor. He was a classmate. My close friends were all on the *Daily*, because, as I said, I spent all my time there. Stan Swinton was there. He was a class behind me. He became First Vice-President of Associated Press. I knew Marshall Schulman, the fellow who became the leading expert on Russia at Columbia. Elsie Pierce, the first woman editor, was there when I was." Peter Lisagor, who became Washington correspondent for the *Chicago Daily News* also worked at the *Daily*.

In September 1939, Judge Gilmore entered the University of Michigan Law School. One Sunday afternoon, in late April or early May, he was sitting at a desk at the *Daily* still planning to become a journalist. He had applied to Princeton with the goal of getting a masters degree in English, but had received a rejection letter. Jim Pollock said to him, "Why go to Princeton? Stay here in political science, get your doctorate, and you can teach here, and be a journalist." Then the phone rang. It was his mother who called to offer a suggestion. There were several lawyers in her family, and she didn't want her son to leave school. She said, "How about trying law school. Would you be willing to go for at least one year? I'll pay for it. But see if you like it, and try it." With that phone call, his whole career path changed. He filed his application within a few days, and was admitted in the class starting in September.

He was in his senior year of law school when Pearl Harbor was attacked on December 7, 1941. He obtained a commission in the Navy, but was able to delay his entrance until he graduated from Law School on May 30, 1942.

On June 20, 1942, he was married to his first wife Mary who was then a junior at Wellesley, and also from Circleville. He had known her from the time he first approached her on her front porch and offered her a cookie. (This first courting activity is memorialized in a black and white photograph.)

He was sworn in by the Navy on June 29, 1942, and immediately sent to Harvard for training. At Harvard, he was assigned to the Supply Corps where he stayed for

four months studying the “art” of supplying a fleet of ships overseas. When he finished in late fall, he was assigned to the *USS America* which was a converted luxury liner. He thought, “Boy, this is really good. I’ll spend the war in a luxury liner cruising.” However, after leaving the graduation ceremony he was in the subway station at Harvard Square when a Navy official caught up with him and told him to return to school immediately. At first he thought it was a joke, but when he returned to the school there was a telegram waiting for him saying that he had been reassigned to the Landing Craft Infantry (LCI) and to report immediately to Virginia for duty.

LCI’s were commissioned ships, one hundred and fifty feet long and flat-bottomed with twenty-foot beams. Their mission was to take up to two hundred troops, that would stay aboard for twenty-four hours, and land them on a beach. He was on the staff of the Commander of a flotilla of twenty-four LCI’s which was based in Little Creek, just outside of Norfolk, Virginia,

The flotilla spent from November 1942 to February 1943 training off the coast of Maryland. During the training, his wife joined him and they lived in a hotel in Norfolk. One night, in February 1943, the Commander issued an order that no one could leave the base except officers with wives. Such officers were allowed to go home for the night, but had to return at 8:00 in the morning and could not tell their wives that they were leaving on a mission. In the morning, he just “walked out and went overseas.”

“We took off with our twenty-four ships. They didn’t know whether they were seaworthy or not. They didn’t know whether they could go across the Atlantic on flat-bottoms and we took off in February and went to Bermuda. We stayed there for two or three days, then took off for North Africa and took twenty-six days going from

Bermuda to Gibraltar in a flat-bottomed tub. It was quite a trip.”

As the Germans were being driven out of Southern Spain, his group moved along the coast until December when they were headquartered in Naples, Italy. He participated in the landings at Anzio in January 1944. The landings were carried out so flawlessly, and German resistance

was so light, that British and American units gained their first day’s objectives by noon, moving three to four miles inland by nightfall. It was sunny and warm, making it very hard to believe that a war was going on and that he was in the middle of it. Although the Germans were surprised, the landing force was ordered to hold its position. Within a week the Germans countered to eliminate what Hitler called the “Anzio abscess.”



Lt. Horace Gilmore and his mother, Lucile (Mrs. Charles) Gilmore, 1942.

Judge Gilmore’s ship was conveying soldiers when another ship blew up near the beach. “The beach was blowing up and all hell broke loose.” The officer on the bridge of his ship, who was inexperienced, headed over to assist in the rescue. “The whole area was mined. He put us right down on top of the mine. The LCI sank in three minutes. It just rolled over and went down. There were sixty people aboard. Thirty of them were killed. Twenty-nine got a Purple Heart and one did not. Me. I didn’t have a scratch. But, of course, the ship sank out from under me. I didn’t know what to do. It was just slowly turning and going down. The captain’s order was to abandon ship.”

There was a life raft about thirty feet away, but it was overloaded. The sailors in the life raft were calling for him to jump. Judge Gilmore had glasses on at the time. “The only thing I thought of that second was, what do I do with the glasses, leave them on, put them in my pocket, or throw them away? I put them in my pocket and jumped into the water, held on, and got to the raft. We held onto it for about

If you are interested in publishing an article on any topic of interest to the Federal Bench and Bar or have an item for the “News & Moves” section, please call Elisa Angeli, at 313/496-7635, or Mike Riordan, at 313-226-9602. New writers are always welcome.

Judge Gilmore (continued)

five hours until daylight came along and someone picked us up. It was quite an experience.”

In June 1944, Judge Gilmore ended up in New York again. His wife was finishing her degree at Columbia Journalism School. He remained in the Navy for several months and was assigned to an office in Detroit where he completed his Navy career.

Fed. R. Civ. Proc. 26(a)(1) – The Initial Disclosure Rule: What It Requires and When It Requires It

By Gary W. Faria

Federal Rule of Civil Procedure 26(a)(1) recently became effective in our District following the 2000 amendments to the Federal Rules of Civil Procedure. Although Rule 26(a)(1) was originally adopted as part of the 1993 amendments, individual Districts were permitted to opt out of its requirements. Our District availed itself of that option. That option was removed by the 2000 amendments to the F.R.C.P.s, and our District accordingly recently amended L.R. 26.3 to remove its prior provision that Rule 26(a)(1)’s initial disclosure provisions “shall not apply to any case.”

While Judicial Districts no longer may opt out of the Rule 26(a)(1) requirements, the Rule does permit the parties, or the District Judge, to dispense with the initial disclosure requirements in a particular case. Rule 26(a)(1) provides that the disclosures must be made “except . . . to the extent otherwise stipulated or directed by order.”

What “Initial Disclosures” Are Required

Rule 26(a)(1) imposes significant disclosure requirements on parties to civil actions. Information supporting a party’s claims or defenses must be disclosed, whether opposing parties ask for it or not. Such information must be disclosed early in the case, and supplemented to the extent additional information becomes available. No longer is the opposition’s failure to frame its formal discovery requests sufficiently carefully, or broadly, an arguable reason not to disclose information on which a party may rely.

Basic information concerning documents, claimed damages, persons with potentially relevant information, and insurance coverage must be disclosed. This requirement goes hand in hand with the other 1993 amendments to the

F.R.C.P.’s limiting the amount of discovery that may be conducted, and delaying any discovery until after formulation of a Rule 26(f) discovery plan and its arrangements for the Rule 26(a)(1) initial disclosures. By requiring that basic core information be disclosed early, whether it is requested or not, opposing parties theoretically are provided with the information needed to focus, and limit, subsequent interrogatories, document requests, and depositions.

Except as otherwise stipulated or ordered, Rule 26(a)(1) requires that each party provide to all other parties, without awaiting a discovery request, the following:

- Persons with knowledge: Names, addresses, and telephone numbers of each individual “likely to have discoverable information that the disclosing party may use to support its claims or defenses,” and identification of the “subjects of the information” known to those individuals.
- Documents: Copies, or a description by category and location, of all documents within the disclosing party’s possession, custody or control “that the disclosing party may use to support its claims or defenses.”
- Damages: A computation of any category of damages claimed, and the making available for inspection and copying of related or supporting documents.
- Insurance: Any insurance agreement under which an insurer may be liable to satisfy all or part of any judgment, or to indemnify or reimburse another for payments made to satisfy a judgment.

When Initial Disclosures Must Be Made

One of the specified purposes of the Rule 26(f) conference is to arrange for the Rule 26(a)(1) initial disclosures. The initial disclosures are to be made within fourteen days of the conference, unless the parties stipulate to another time. The Rules do not require the Court to enter an order adopting such a stipulation for the stipulation to be effective: the fourteen-day requirement may be modified “by stipulation or Court order.” However, any agreed modification of the timing of Rule 26(a)(1) initial disclosures is to be included in the Rule 26(f) discovery plan as a proposal to the Court prior to issuance of a scheduling order. Under Rule 16(b)(4), the Court in its scheduling order may, but is not required to, address any modification to Rule 26(a)(1)’s timing requirements proposed by the parties.

Of course, Rule 16(b)(4) also contemplates that the Court may impose a schedule for Rule 26(a)(1) initial disclosures in the scheduling order, whether or not the parties propose arrangements for the disclosures in the Rule 26(f) discovery plan. However, the procedure set by Rules 16(b), 26(a)(1) and 26(f), collectively, contemplates that the initial

disclosures should have been made prior to issuance of a scheduling order unless other arrangements are proposed in the Rule 26(f) report to the Court.

Clarification of the District Judge's Rule 26(a)(1) practices at the outset of the case is important. There is no requirement in Rule 16(b) for the Court to direct compliance with Rule 26(a)(1) in order for its requirements to apply, and Rule 26(a)(1) specifically provides that the opposing party's failure to make its initial disclosures does not excuse other parties from making theirs. Therefore, even in cases where the Court and the opposition have not addressed Rule 26(a)(1), a party who seeks to rely on information not previously disclosed as part of the initial disclosures or supplements thereof as required by Rule 26(e)(1), is proceeding at its peril. See Rule 37(c)(1); compare, Concrete Materials Corporation, Inc. v. C.J. Mahan Construction Company, No. 95-6657, 1997 WL 151741 (6th Cir. March 28, 1997) (unpublished); Vance v. United States, No. 98-5488, 1999 WL 455435 (6th Cir. June 25, 1999) (unpublished).

Is There An Affirmative Duty To Gather Information To Be Disclosed?

Initial disclosures must be made "based on the information then reasonably available" to the disclosing party, and a party "is not excused from making its disclosures because it has not fully completed its investigation of the case." This language suggests an affirmative duty, within reason, to gather and review available information so that the required disclosures may be made. The published decisions on this subject are not definitive concerning the extent of this affirmative duty, but they do support the view that lack of present knowledge is an excuse only if the party has made reasonable efforts to ascertain the information to be disclosed from the information "reasonably available" to it. See generally, Viveros v. Nationwide Janitorial Association, Inc., 200 F.R.D. 681, 683-684 (N.D.Ga. 2000); Burrell v. Crown Central Petroleum, 177 F.R.D. 376, 384-387 (E.D.Tex. 1997).

Rule 26(e)(1) requires the supplementation of disclosures under Rule 26(a)(1) if the disclosing party learns that the prior disclosures were incomplete or incorrect in some material respect, and if the additional or corrective information is not otherwise made known to other parties through other discovery means. Thus, the requirement to provide information on which a party will rely to support its case, whether the opposition asks for it or not, remains throughout the litigation. To the extent the information was not reasonably available to the disclosing party earlier when the initial disclosures were made, it must be disclosed through supplemental disclosures when it becomes available, either under Rule 26(e)(1) or otherwise.

Summary

Rule 26(a)(1) is new to this District, and brings significant potential benefits and significant potential pitfalls. Correctly followed, it should serve to facilitate and expedite discovery, and to obviate disputes over a party's obligation to disclose certain basic information in response to particular interrogatories or documents requests. On the other hand, failure to correctly follow its requirements, or to successfully stipulate or obtain a Court order that its requirements need not be followed in a particular case, may have serious consequences. With the recent addition of Rule 26(a)(1) for Federal Court practitioners in this District, we would all probably be wise to take a fresh look at the interrelationship of Rules 16(b), 26(a), 26(e), 26(f) and 37(c).

Amendments to Federal Rules of Civil Procedure

On December 1, 2001, a number of minor amendments to the Federal Rules of Civil Procedure became effective. The amendments cover three general topic areas: (1) service of process, (2) the copyright rules, and (3) housekeeping changes.

Electronic and Other Means of Service

The most significant amendment is a revision of the service of process rules to permit electronic service on parties who give their written consent. Under Rule 5(b), electronic service is now proper provided that the person served consents in writing. The date of receipt of service is the date of the electronic transmission, however such service is not effective if the party making service subsequently learns that the attempted electronic service did not reach the person being served.

In connection with this change, Rule 6(e) was amended to allow a party served by electronic means an additional three days to respond. This three day rule brings the electronic service rules into harmony with the service by mail rules so that there is no potential disadvantage to using electronic service.

Finally, Rule 77(d) was also amended so that, with the consent of the parties, a court can serve notice by electronic means.

Copyright Rules

In response to critics who charged that the Copyright Rules of Practice were obsolete and widely ignored, the Judicial Conference and Congress abrogated the rules ef-

(see page 10)

Amendments (continued)

fective December 1, 2001. Now, all copyright practice will be governed exclusively by the Federal Rules of Civil Procedure. In connection with this change the Conference added a new subpart (f) to Rule 65 on injunctive relief. Under Rule 65(f), copyright impoundment proceedings will be governed by Rule 65 instead of the now-obsolete copyright rules. The addition to subpart (f) does not limit the use of trademark procedures in cases where both trademark and copyright claims are raised.

Finally, Rule 81(a)(1) was amended to remove references to the copyright rules and to state more explicitly that the Federal Rules of Civil Procedure do not apply in Federal bankruptcy proceedings when the Federal Rules of Bankruptcy Procedure provide guidance in the area.

Technical Amendment

Rule 82 was amended to delete a reference to 28 U.S.C. §1393, which was repealed in 1988.

Michigan Legislature Amends Prejudgment Interest Statute

By: Mark T. Boonstra

The Legislature recently lightened the load somewhat for certain defendants, by revising the prejudgment interest provisions of the Michigan Revised Judicature Act. In adopting HB 4448, the legislature clarified a nagging statutory ambiguity under which certain courts had found a 12% statutory prejudgment rate of interest to be applicable to judgments on written contracts, regardless of whether the contracts themselves specified a rate of interest.

MCL 600.6013(5) had provided for the 12% rate to be applied to judgments on "written instruments," a term that was not defined in the statute. The standard prejudgment interest rate that otherwise was applicable (under MCL 600.6013(6)) to judgments in civil actions was a floating (and currently much lower) rate tied to 5-year U.S. treasury notes.

In a 1998 decision, the Michigan Supreme Court, in Yaldo v. North Pointe Ins. Co., 457 Mich. 341, 578 N.W. 2d 274 (1998), voted 4 to 3 to apply the 12% "written instrument" rate to an insurance policy that, by its very nature, did not specify a rate of interest. Decisions since Yaldo were inconsistent, but some had extended the reach of the 12% rate to other types of written contracts, even outside of the insurance context.

In adopting HB 4448, the Michigan legislature effectively adopted Justice Taylor's dissent in the Yaldo case (in which he had been joined by Justices Boyle and Weaver). There Justice Taylor had contended that the legislative history of the Revised Judicature Act showed that the term "written instrument" was originally intended by the legislature to cover *only* interest-bearing instruments, and not other types of written contracts.

The legislative history of HB 4448 indicates an intent to statutorily affirm Justice Taylor's dissent in Yaldo, so as to clarify that the 12% prejudgment interest rate applies *only* to written instruments bearing a specified interest rate, and thus to treat oral and written contracts equally. The legislation effects this clarification and applies the floating rate of interest, in lieu of the 12% "written instrument" rate, to civil actions filed before July 1, 2001, and as to which there was no final, non-appealable judgment as of July 1, 2001.

Even absent the passage of HB 4448, the effect of Yaldo might have been short-lived, since the composition of the Michigan Supreme Court has markedly changed since 1998, and since other cases were making their way to the Supreme Court seeking further review of this issue. The statutory remedy of HB 4448 may now obviate the need for further judicial review.

Having previously passed the Michigan House of Representatives, HB 4448 was adopted by the Michigan Senate on November 28, 2001, and was signed into law (as 2001 PA 175) by Governor Engler on December 11, 2001. Because it did not receive immediate effect in the Senate, the new legislation will take effect on March 22, 2002, 90 days after the adjournment of the 2001 legislative session. It applies to civil actions in Michigan courts and to Federal Court actions applying Michigan substantive law under diversity jurisdiction.

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julia.pidgeon@usdoj.gov or
Grant Gilezan at ggilezan@dykema.com**

Calendar of Events

Bankruptcy Section Luncheon

February 27, 2002

12:00 noon

Location: Crowne Plaza Ponchartrain Hotel, Detroit

Contact: David Lerner (248) 901-4010 or

Claretta Evans (313) 226-7912

Ticket Price: \$28 members/\$30 nonmembers

Featured Speaker: U.S. Bankruptcy Judge
Steven W. Rhodes

Annual McCree Luncheon

February 20, 2002

11:30 a.m. - 1:00 p.m.

Location: Crowne Plaza Ponchartrain Hotel, Detroit

Contact: Grant Gilezan (313) 568-6789 or

ggilezan@dykema.com

Ticket Price: \$28 members/\$30 nonmembers

Featured Speaker: Kwame Kilpatrick, new mayor
of Detroit

Award Recipient: Saul Green, former
U.S. Attorney

Eastern District of Michigan

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