Federal Practice and Procedure Section Newsletter

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Chair's Message

by Elizabeth J. Sher

As the chair of the Federal Practice and Procedure Section of the New Jersey State Bar Association, I would like to (re)introduce you to the section and the inaugural issue of our newly revived and redesigned section newsletter. Our section is the only state bar section devoted to federal civil practice in New Jersey. From September to June each year, we host various events—educational and social—to enhance the experience of members of the state bar who practice in federal court.

During the 2012-13 year, for example, we hosted a reception at the Law Center for the newest federal judges and magistrate judges and their law clerks. We held a joint dinner meeting with the Federal Criminal Law Section at which the Honorable Esther Salas, U.S.D.J., and Carol Gillen, A.F.P.D., led an informative discussion on the interplay between federal and state criminal charges. We held a dinner meeting in early April with two presentations—one on the effect of sequestration on the New Jersey District Court (featuring analysis and comments by Wilfredo Torres, chief of federal probation; Christine Dozer, chief of U.S. Pretrial Services; and Jack O'Brien, chief deputy clerk at the U.S. District Court) and one on the mechanics of multi-district litigation (featuring the Honorable Lois Goodman, U.S.M.J.)—and an update on class action law since *Wal-Mart v. Dukes* (featuring Kerri Chewning, Esq.). At the annual state bar convention in Atlantic City, our section presented a program on e-discovery for state and federal practitioners, with presentations by members of the bench, bar, and litigation support industry with particular expertise in this area. Our next meeting is scheduled for June 24 at the Law Center—we hope you will join us!

As you can see, our section provides members varied and unique live opportunities to interact with and learn from federal practitioners, judges, magistrate judges, and other members of the federal family. In addition, we email advance announcements of proposed federal rule changes and adoptions. Now we have a revived newsletter, which is intended to supplement and enhance the educational benefits provided by our section. On behalf of the current and future officers of the section, I invite you to join our section and participate as an active member this year and in the years to come.

If you have any questions about the section, becoming a member, or getting more involved in our leadership and activities, please contact me (esher@daypitney.com), Jack O'Brien (John_O'Brien@njd.uscourts.gov), Kerri Chewning (kchewning@archerlaw.com) or Christopher Walsh (CWalsh@gibbonslaw.com), the current officers of the section. ■

Message From the Editors

We are pleased to announce the first edition of the newly revived and redesigned *Federal Practice and Procedure Section Newsletter.* The newsletter will be published quarterly to share the latest news from the Federal Practice and Procedure Section, historical facts about the District of New Jersey, important developments in federal case law, policy developments, and trends affecting federal practice. Each newsletter will also interview a judge of the District of New Jersey to get his or her perspective on practice and procedure in the federal courts.

We welcome members of the Federal Practice and Procedure Section to contact the editors if you are interested in submitting an article concerning an area in which you have an interest or expertise. We look forward to working together to continue to educate our members about important developments in federal practice. ■

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Inside this issue

An Interview With the Honorable Jerome B. Simandle, Chief Judge, United States District Court

by Maureen T. Coghlan

One of the defining characteristics of the District of New Jersey is the high quality of its judicial officers. Who better, then, to offer insight into best practices and procedures for practice in the district? To this end, the editors of the *Federal Practice and Procedure Section Newsletter* plan to interview members of our Judiciary about their personal experiences and suggestions for success. For our inaugural issue, we went straight to the top. Chief Judge Jerome B. Simandle graciously agreed to be our first interviewee, and offered valuable insight into federal practice and his own personal preferences.

Chief Judge Simandle has served as a judicial officer for the District of New Jersey for 30 years. He first took the bench as a magistrate judge in 1983. On April 1, 1992, President George H.W. Bush nominated Judge Simandle to serve as district judge. The Senate confirmed the nomination on May 21, and Judge Simandle received his commission on May 26, 1992. He was elevated to chief judge on Jan. 2, 2012.

What follows is a personal profile, a recipe for the successful federal practitioner and, writ large, a blueprint for individual achievement.

Where did you grow up?

I grew up in Binghamton, New York. My family lived there for over 50 years. I am the youngest of four. I have three older siblings, two brothers and a sister.

Binghamton was an interesting place to grow up. It's known as a manufacturing center, the birthplace of IBM, and several other high-tech industries, including flight simulators. My mother made flight simulators that were used to help astronauts train to land on the moon. My father worked for General Aniline and Film Corporation.

What inspired you to become a lawyer?

I was an engineering student at Princeton when the Center for Study of Responsive Law, a group sponsored by Ralph Nader, recruited me and other students, engineers, and lawyers to work in Washington, DC. My group worked on aviation safety and regulation of airplane manufacturers and airlines. I really admired the legal work being done and saw the good that came from it. I had never known lawyers before. There were none in my family. The center eventually became known as Public Citizen. I also worked with this organization one summer in law school. I was admitted to graduate school in architecture and urban planning when I changed my mind and applied to law school.

Where did you go to law school?

I graduated from the University of Pennsylvania Law School in 1976.

Is there a person or mentor you credit with helping you with your career?

Yes. Chief Judge John F. Gerry was a beloved and brilliant judge in our district who died far too young in 1995. He hired me as one of his first law clerks in 1975. I clerked for Judge Gerry for two years, beginning in 1976. He taught me by example things about judging and about life. He encouraged me every step of my career.

Judge Gerry's teaching style was direct. He did not speak in parables. He showed me how important it was to take a job seriously, but not yourself too seriously. He also emphasized the importance of listening before you talk. He was a great listener, very focused on the moment. Judge Gerry made you feel that you were at the center of the universe when you were with him. This was his way of treating everyone with respect. Judge Gerry also taught me the importance of being a good person first and that everything else, including being a good lawyer or judge, will follow. He was also very, very funny. In that regard, he set the bar so high that I've not tried to imitate him!

What do you count among your most notable life events or proudest professional accomplishments?

Certainly, I count marrying my wife Jane and becoming a step-father to two wonderful children, which changed my life, to which five beautiful grandchildren have been added.

With regard to my profession, my proudest moment was becoming a magistrate judge and working with the judges I so admired. This is a district-wide process where five names are put forward to the judges and one selected. I was 33 at the time, much too young. I had worked as an assistant United States attorney in the Civil Division for five years and had tried a number of cases, so for better or worse, the judges knew me. After the interviews, I could not have been more surprised when Chief Judge Fisher called me to tell me that I got the job. It was a great moment for me. But I was only seven years out of law school. For a while, I was always the youngest in the room, and now I'm one of the oldest!

What advice would you give to lawyers appearing before you for the first time?

I would tell lawyers to be prepared. Ask questions if you are unfamiliar with procedures and learn the procedures.

I would also advise an attorney not to be too reactive; don't rise to the bait that your opponent may cast on the water. Listen to the questions that I am asking and use those questions to your advantage. If I am asking questions, those are the issues that are troubling me. I also think it helps to know that a trial will be an attorney's first. This helps me adjust my expectations and guide an attorney who might be unfamiliar with procedures. I vowed when I took the bench never to engage in any hazing-type ritual for new attorneys.

What would you caution a lawyer practicing before you not to do?

Don't interrupt, don't twist facts, and don't overlook case precedent.

How would you describe your ideal brief?

An ideal brief is concise, interesting, has some 'life,' an advocate's edge, and is of such quality that it could even become part of an opinion. What I mean by life is it offers the party's point of view, it humanizes the client. For example, refers to the client by name, walks through the facts, and lays them out in an interesting way. I'd also caution against elaborating too much or using a lot of adjectives or adverbs. Use verbs to move the story along.

Also, don't leave out uncomfortable facts. A good brief should also provide the procedural basics, a statement regarding the court's jurisdiction and the proper standard of review. The standard of review should be adjusted for nuances. Don't be content with boilerplate language.

A good brief should also be specific about the relief requested. For example, make a cross-motion for summary judgment explicit; don't bury the request in the body of the brief. When an issue like a cross-motion for summary judgment is not raised in the procedurally correct way, a judge can lose confidence in the attorney's skills.

Also, identify the issues that need to be decided. In almost all of my opinions I include a sentence that says, "The principle issue to be decided is...." This sentence is so important that it's usually the last sentence I write, although it will appear near the beginning of the opinion. The brief should help me to answer the principle issue question and write that sentence.

An opposition brief or reply brief should also address an adversary's position point by point. Concessions can also be powerful tools of persuasion. An attorney shouldn't fight an issue that he or she has no chance of winning. A gracious concession can elevate an attorney's professional status in the eyes of the court.

Do you accept informal letter briefs?

Usually, I accept informal letter briefs when I ask for supplemental briefing at oral argument. If that's easier for an attorney, then that's fine. Otherwise, I expect attorneys to follow Local Rules 7.1 and 7.2. For example, a table of citations is important. Following the correct format is a confidence-building measure. Judges read thousands of pages a month, so a crisp letter brief can be most welcome.

What factors do you consider when weighing whether to grant permission to file a sur-reply?

I consider whether the original movant unexpectedly raised a new issue in a reply brief and whether the opposing attorney did not have an adequate opportunity to anticipate this new issue. I would not be inclined to grant permission if there has been a pattern of delay or neglect on the opposing attorney's part prior to seeking

leave to file a sur-reply. There are good reasons why sur-replies are disfavored.

What do you think are the most important attributes of a successful federal practitioner?

I would list civility, ability to listen and synthesize, an ability to listen to the judge and the adversary, to really pay attention. I would also say a familiarity with the rules—don't assume something to be true without checking. Successful practitioners have the personal attribute of being comfortable with their tasks. This is especially true for practice before a jury.

What common mistake(s) do you see practitioners make and what remedies would you suggest?

One mistake I see attorneys make is not taking advantage of oral argument. There is a healthy debate in our district about the role of oral argument. I am generally in favor of granting oral argument. Some judges in the district may be more reluctant. I think it's a common mistake not to use oral argument to an attorney's advantage. It is a second opportunity to persuade a judge in a completely different way than the briefing and to address an adversary's points. It is an opportunity to shape the argument. It is also an opportunity to address an issue that is troubling the judge or to explain confusing facts.

Another common mistake is failing to have a plan for how evidence will be admitted at trial. A good attorney will anticipate evidentiary problems before he or she comes to court. It is a mistake to overlook the Rules of Evidence. The way to win a judge's heart is to cite a specific rule and explain why it does or does not apply. For example, "Yes, Rule 803(6) allows a hearsay exception for records kept in the normal course of business, but these records were not kept in the course of a regularly conducted activity of the business, and therefore the exception should not apply."

Another mistake I see is a reluctance to concede obvious points. Attorneys should agree to stipulate to things that can reasonably be resolved via stipulation rather than require the testimony of a records custodian, for example.

Talking too fast can also be a major problem. In this electronic age, we seem to speed everything up. People think that they can say more if they say it fast. Abraham Lincoln did not rattle through the Gettysburg Address and arguably said more in that speech than in any other speech in American history. An attorney should visualize where a thought is going, picture what the paragraph looks like if written down. Make sure each sentence has a beginning, middle, and end. Your thoughts should be logical and comprehensible.

Repetition is also a common mistake. I promise you, the first time a judge hears it, he or she gets it. This is an especially dangerous mistake with a jury. Juries do not like to be talked down to by the attorneys. They are very smart people. They resent being talked down to as much as they resent incivility in the courtroom.

How would you recommend an attorney proceed if he or she thinks that oral argument would be helpful to the court?

I think the attorney must ask for oral argument. Judges say they don't get many requests for oral argument, or the request is tucked away as an afterthought. Make a statement as to why oral argument is requested. Maybe there's a novel issue, or the facts are complex, or the attorney simply would like to address the judge's questions.

Sometimes a judge may deny oral argument if it's clear that the party requesting will win the motion or there is nothing to debate. And, of course, oral argument costs time and money, and this time and expense may not be necessary.

A practitioner might also consider following up on his or her request for oral argument with a letter laying out the reasons for the request around the time of the motion return date. The letter might state the return date of the motion, note that oral argument has not been scheduled to date, and explain why argument could be helpful on a date convenient to the court. The worst way to request oral argument is to call chambers and make an *ex parte* request. A request for oral argument is a substantive matter that should always be put in writing.

What is your preferred procedure for receiving notification of an application for emergency relief? For example, should a practitioner file an emergent motion as well as contact your chambers to provide notice that a party is seeking emergent relief?

The attorney should certainly reach out to the clerk's office and give notice that the attorney is in final preparation for filing. The key thing is to have the application electronically filed. I would also recommend calling my

courtroom deputy, or call chambers, being careful to avoid any *ex parte* communication about the merits but simply to bring the matter to someone's attention. The documents should speak for themselves. Also, I would not recommend waiting until Friday at 4:30 p.m. to file for a temporary restraining order.

With regard to a motion to seal, do you prefer that materials subject to the motion be submitted to chambers in addition to being filed with the court?

Yes, I would prefer that materials subject to the motion be submitted to chambers, although the magistrate judges usually handle motions to seal. Submitting an extra set for review can be helpful.

Is being a judge what you thought it would be?

It's even better than I thought it could be. It's been an opportunity to make a difference and grow intellectually. I have genuinely enjoyed my association with my judicial colleagues over the decades. We genuinely enjoy working with one another. The opportunity to work with a dedicated professional staff and supremely talented law clerks is especially gratifying.

What do you find challenging about being chief judge?

My predecessor, Chief Judge Garrett Brown, was very generous in preparing me and he left our court in great shape when he retired. I became chief judge on Jan. 2, 2012, during a very difficult budgetary environment, when sequestration was around the corner and then hit on March 1, 2013. We have been planning austerity measure after austerity measure.

During the past two years, the caseload for the District of New Jersey has increased by 20 percent. We are the fastest-growing district of any large federal court. Those cases are managed and adjudicated by people, but we don't have the money to replace experienced staff who move on to other positions. We have been doing more with less. Plenty of businesses go through similar circumstances, but courts are different. We have no control over the number of customers we serve. We have a constitutional duty to serve everyone. We can't shrink our staff by five percent, particularly when we have a 20 percent increase in caseload, and we were already thin due to staffing cuts in the clerk's office, probation and pretrial services beginning in 2009.

It is also difficult to talk about furloughs. It's harmful for morale. We have efficient, professional staff. The idea of not being able to pay staff for all their hard work, if Congress doesn't adjust the budget by Oct. 1, is very, very difficult.

It is also a challenge to manage three large courthouse systems in Newark, Trenton, and Camden, each of which is bigger than some entire districts. For example, Camden has 12 judicial officers that will handle about 2,000 civil cases this year and many thousands of bankruptcy cases. Camden alone has more cases and judges than about 30 entire district courts, but Camden alone doesn't get nearly the resources that some smaller districts get. This means that we need to be tremendously efficient. We need to make sure that each vicinage shares the same benefits and burdens of life in federal court.

What do you find rewarding about being chief judge?

I am privileged to see all of the great work being done by our district judges and magistrate judges despite the heavy caseloads. I see firsthand how hard the judges and their staffs work. I also appreciate the dedication and professionalism of our probation, pretrial services, and clerk's office personnel. It is very rewarding to work with such dedicated staff throughout the state, particularly in a time of financial crisis. We are all pulling in the same direction.

I also find the opportunity to give some voice to the way the court system works very rewarding. I am in the position to respond to the community's concerns or misapprehensions about the federal court system. I enjoy doing public outreach, speaking at bar events, and participating in educational opportunities like CLEs.

What are your goals for the district?

Being chief judge means you have a lot of responsibilities but no individual power. What gets accomplished in the district is done by consensus. And fortunately, we do have a consensus on all the important things. I would like to build on that consensus. I would like to increase our openness to innovation and provide more educational opportunities for judges and staff.

I would also like to listen to the bar and propose changes that may need to be made. I have the pleasure of working with our active and helpful Lawyers Advisory Committee (LAC) under the leadership of Tom

Curtin. I have the opportunity to work with other judges to act as a sounding board for the LAC's ideas and to give them my honest reaction. I then can go back to the Board of Judges with these ideas, and very often we enact the proposals with minimal changes. I would like to continue to build on this relationship.

Like all our judges, we hope to maintain the District of New Jersey's excellence in complex litigation, including patents, class actions, and multi-district litigation generally. I am told that there is no federal court that has more MDL dockets than ours.

At the other end of the spectrum of our docket, I hope our district can continue to provide meaningful court access to unrepresented litigants and develop the *pro bono* panel of attorneys willing to accept appointments in worthy cases.

I would also like to be part of a process that demystifies the court system. Our judges continue to work closely with the Association of the Federal Bar and the New Jersey State Bar Association to explain the court to lawyers and the public. I want to do my part to ensure that our courts continue to be a place where people come to seek justice. This requires transparency, enacting the right rules, and setting the right tone.

Nothing can be done by any chief judge alone, least of all me. We will only succeed because of all our judges and staff. We succeed because of everyone.

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Rules Committee Considers Change to Evidence Rules

by Jonathan D. Klein

The Rules Committee is considering changes to two Federal Rules of Evidence that, if adopted, will impact the admissibility of hearsay evidence. The first is an amendment to Rule 801(d)(1)(B)—the hearsay exemption for certain prior consistent statements—that would make prior consistent statements admissible under the hearsay exemption whenever they would otherwise be admissible to rehabilitate the witness's credibility. The other three proposals amend Rules 803(6)-(8)—the hearsay exception for business records, absence of business records, and public records—which would clarify that the opponent has the burden of showing the proffered record is untrustworthy.

The proposed amendment to Rule 801(d)(1)(B) would add sub-Rule 801(d)(1)(B)(ii) to permit a declarant-witness's prior statement if the statement "otherwise rehabilitates the declarant's credibility as a witness."[1] The rationale for the proposed amendment is an inconsistency in the current rule that provides for admissibility only for consistent statements offered to rebut charges of recent fabrication or improper motive or influence, but does not allow other probative consistent statements to be admitted. As it stands, the current rule makes the applicable jury instruction impossible to follow and creates an artificial distinction between substantive and impeachment testimony for prior consistent statements that has little, if any, practical effect.

In proposing this amendment, the committee also approved an addition to the committee note to emphasize that the amended rule is not to be used to expand the admissibility of prior consistent statements or to allow the admission of cumulative consistent statement.[2]

The proposed amendments to Rules 803(6)-(8) clarify that the opponent bears the burden of showing a lack of trustworthiness to demonstrate that certain records of regularly conducted activity, the absence of a record of regularly conducted activity, and public records should be excluded as hearsay. To achieve this result, the amendments explicitly alter Rule 803(6)(E); Rule 803(7)(C); and Rule 803(8)(B) to state that a record shall not be excluded as hearsay if "the opponent does not show that the source of information or the method or circumstances of preparation indicate a lack of trustworthiness."[3] The rationale for the amendments is that, although most courts already impose the burden on the opponent, some have not.

The amendments to Rule 801(d)(1)(B) and Rules 803(6)-(8) were published for comment by the bench and bar, publishers, and the general public on Aug.15, 2012. The committee held two public hearings, on Jan. 4, 2013, and Jan. 22, 2013, and the six-month public comment period ended on Feb. 15, 2013.[4] Various members of the bench and bar submitted comments for review. The general tone focused on the real need for an amendment to Rule 801(d)(1)(B), particularly in its current form, which commentators believe: 1) sends a mixed message about the use of repetitive testimony to build on an appearance of trustworthiness, a concern discussed in the Supreme Court's decision in *Tome v. United States*,[5] and 2) unfairly expands the definition of prior consistent statements. All comments submitted regarding the amendments to Rules 803(6)-(8) supported the clarification.[6]

Now that the public comment period has closed, the committee will consider the public comments and determine whether to approve the amendments with any suggested additions/clarifications. If the amendments are approved, the committee will then transmit the proposed amendments to Rule 801(d)(1)(B) and Rules 803(6)-(8) to the Standing Committee, which will review and decide whether to approve them. The next step in the rulemaking process requires the Standing Committee to submit the amendment and proposals to the Judicial Conference with the recommendation that it approve the amendments and then forward them to the Supreme Court with a recommendation that each be adopted by the Court and transmitted to Congress. If the process continues without interruption, the amendment and proposals should take effect by Dec. 1, 2014. ■

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Endnotes

1. *See* Evidence Rules Advisory Committee, Proposed Amendments to the Federal Rules of Evidence (May 3, 2012), at http://www.uscourts.gov/uscourts/rules/rules-published-comment.pdf.
2. *See Id.*
3. *Id.*
5. *See* Hon. Mark R. Kravitz, Committee on Rules of Practice and Procedure of the Judicial Conference of the United States - Memorandum to Bench, Bar, and Public (Aug. 15, 2012), *at* http://www.uscourts.gov/uscourts/rules/rules-published-comment.pdf.
5. 513 U.S. 150 (1995)
6. *See* Public Comments Submitted for proposed Amendments to Rule 801(d)(1)(B) and Rules 803(6)-(8), *at* http://www.uscourts.gov/RulesAndPolicies/rules/proposed-amendments/evidence-rules-comments.aspx.

Rulemaking Process Primer

by Jonathan D. Klein

A well-crafted comment can provide insight into all aspects of a proposed amendment, help the Advisory Committee understand the practical implications of its proposal, and encourage necessary adjustments to ensure clarity in the rules (as the comments here will invariably do). The success of the rulemaking process depends on participation of the bench and bar to ensure clear rules.

Because of the rules' "pervasive and substantial impact" on the practice of law in the federal courts, "exacting and meticulous care [is required] in drafting rule changes." The "rulemaking process is time consuming and involves a minimum of seven stages of formal comment and review": 1) initial consideration by the Advisory Committee; 2) publication and public comment; 3) consideration of the public comments and final approval by the Advisory Committee; 4) approval by the Standing Committee; 5) Judicial Conference approval; 6) Supreme Court approval; and 7) congressional review.[1]

For future reference, if you would like to submit a written comment to a proposed amendment, consider effective strategies to ensure that your suggestion is persuasive to the committee. "The comment process is a form of advocacy," so comments "should focus on particular insights that the person or organization commenting has to offer to the committee."[2] Some helpful hints to remember when drafting a comment: 1) do not simply identify a problem with a rule, but suggest an alternative solution; 2) cite to model rules from other courts (if applicable); 3) consider statutes and case law; 4) highlight an inconsistency or ambiguity in a proposed rule; 5) engage in a meaningful analysis of the rule (a generic statement disregarding a proposal is not helpful); and, most importantly 6) ensure your comment is well-written, thorough, and logical.[3]

Endnotes

1. *See* Hon. Thomas F. Hogan, The Federal Rules of Practice and Procedure Administrative Office of the U.S. Courts (October 2011), *at* http://www.uscourts.gov/RulesAndPolicies/FederalRulemaking/RulemakingProcess/SummaryBenchBar.aspx.
2. *See* Luther T. Munford, "The Practical Litigator," The American Law Institute - American Bar Association Continuing Professional Education (July 1998), *at* http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Munford.pdf.
3. *See Id.*

How Did It All Begin? The Roots of the DNJ

by Sara F. Merin

While many of us routinely cross the thresholds of the federal courthouses in Camden, Newark, and Trenton, the storied history of the District of New Jersey is not as well known as, for example, the best place to stop for a cup of coffee before a hearing. In an attempt to shed more light on the district's past, this is the first of a series of articles that will highlight different aspects of our district's history. This first article starts at the beginning, with a look at the creation of the District of New Jersey, its first judge, and a short overview of its physical evolution into the district we have come to know today.

Formation and Early Years

The District of New Jersey was one of 13 judicial districts established by the Judiciary Act of 1789, the legislative implementation of the Constitution's provision for a system of federal courts, separate and apart from the existing state courts.[1] The Judiciary Act simultaneously established three circuits for the nation, each having two meetings of a circuit court, which consisted of the district judge for each district and two members of the United States Supreme Court (with a required quorum of only two judges). The District of New Jersey was assigned to the Middle Circuit, along with middle circuit Pennsylvania, Delaware, Maryland and Virginia.[2]

It was not until the Judiciary Act of 1801 reorganized the federal courts into six circuits that the District of New Jersey was assigned to the Third Circuit.[3] The same act also created a short-lived division of the District of New Jersey into two districts, East Jersey and West Jersey, although one judge served both districts.[4] The March 8, 1802, repeal of the Judiciary Act of 1801 saw the return of a singular District of New Jersey, effective July 1, 1802, but the Judiciary Act of 1802, 2 Stat. 156, enacted April 29, 1802, reinstated the division of the nation's judicial districts into circuits, so the Third Circuit remained.[5]

The District's First Judge

The first judge of the District of New Jersey was David Brearley, a federalist.[6] The nomination process for all of the first judicial nominees was non-controversial. Within two days of the Sept. 24, 1789, enactment of the Judiciary Act of 1789, President George Washington submitted his nominations for the justices of United States Supreme Court and for each district court (including Judge Brearley), and all the judges and justices that accepted their nominations were confirmed and commissioned within two days.[7]

Judge Brearley had a distinguished history of service to the nation, and to New Jersey. Born in Spring Grove, New Jersey (near Trenton) on Aug. 16, 1741, he worked as a lawyer in Allentown, New Jersey, until the Revolutionary War, in which he served as a lieutenant colonel in the Continental Army from 1776 to 1779.[8] After the war, Judge Brearley became the chief justice of the Supreme Court of New Jersey, serving from 1776 to 1789.[9] In 1787, he was a delegate from New Jersey to the federal Constitutional Convention.[10] Judge Brearley also bears the distinction of being the first federal judge to die on the bench, when on Aug. 17, 1790, less than a year into his tenure, he died.[11]

Judge Brearley was succeeded by Robert Morris, whose tenure began as a recess appointment, who was confirmed on Dec. 20, 1790. Judge Morris' tenure was considerably longer than his predecessor's: He served as the District of New Jersey's judge for 25 years, guiding the district through its formative years.[12]

This single-judge organization was one of significant duration. From 1789 through 1905, only one judge was assigned to the District of New Jersey at any given time, and that single judge sat only six times a year—for both the circuit and the district courts.[13]

The Road to Camden, Newark, and Trenton

The current locations of the district's three vicinages did not take shape until 1929.[14] Initially, court was not held in Camden, Newark, or Trenton. The first session of the District of New Jersey was quietly held on Dec. 22, 1789, in New Brunswick, with Judge Brearley presiding.[15] In those initial years, court was alternatively held in New Brunswick and Burlington.[16] In 1844, those venues were discontinued and court was held only in

Trenton—joining the circuit court—with occasional hearings held in other locations around the state.[17] The court first came to Newark in 1888, when it was authorized to conduct certain trials there, but only with consent of the parties.[18] In 1911, sessions of the court were authorized for Newark, and, beginning in 1913, court sessions were held in Newark and Trenton.[19] Sessions were not authorized at Camden until 1929, but from that point forward, the three-vicinage system that exists today has been in effect.[20] ■

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Endnotes

1. Judiciary Act of 1789, 1 Stat. 73, §§ 2, 3 (1789); U.S. Const. art. III, § 1.
2. Judiciary Act of 1789, 1 Stat. 73, § 4.
3. Judiciary Act of 1801, 2 Stat. 89, § 6; Federal Judicial Center, History of the Federal Judiciary, U.S. District Courts for the Districts of New Jersey, Legislative History (March 13, 2013), http://www.fjc.gov/history/home.nsf/page/courts_district_nj.html.
4. Judiciary Act of 1801, 2 Stat. 89, § 21; Federal Judicial Center, History of the Federal Judiciary, U.S. District Courts for the Districts of New Jersey, Legislative History, *supra*, note 3.
5. *Id.*
6. The Historical Society of the U.S. District Court for the District of New Jersey, Collections of the Historical Society of the U.S. District Court for the District of New Jersey 7 (1989).
7. Collections, *supra*, note 3 at 7; *see also* Mark Edward Lender, *This Honorable Court: The United States District Court for the District of New Jersey, 1789-2000* 12-13 (Rutgers Univ. Press 2006); Federal Judicial Center, History of the Federal Judiciary, David Brearley (March 18, 2013), http://www.fjc.gov/servlet/nGetInfo?jid=246&cid=106&ctype=dc&instate=nj&highlight=null.
8. Collections, *supra*, note 3 at 42; Federal Judicial Center, History of the Federal Judiciary, David Brearley, *supra*, note 7.
9. Collections, *supra*, note 3 at 42; Federal Judicial Center, History of the Federal Judiciary, David Brearley, *supra*, note 7.
10. Collections, *supra*, note 3 at 42; Federal Judicial Center, History of the Federal Judiciary, David Brearley, *supra*, note 7.
11. Lender, *supra*, note 4 at 22; Collections, *supra*, note 3 at 42; Federal Judicial Center, History of the Federal Judiciary, David Brearley, *supra*, note 7.
12. Lender, *supra*, note 4 at 23.
13. Federal Judicial Center, History of the Federal Judiciary, U.S. District Courts for the Districts of New Jersey, Legislative History, *supra*, note 3; Collections, *supra*, note 3 at 8.
14. Collections, *supra*, note 3 at 8.
15. *Id.*; Lender, *supra*, note 4 at 18.
16. Collections, *supra*, note 3 at 8.
17. *Id.*
18. *Id.*
19. *Id.*
20. *Id.*

Law & Technology

Suing a Swarm: Copyright Holder Faces Litigation Hurdles Caused by 'Torrent' Technology

by Jesse Ehnert

As new technologies appear, they bring with them new puzzles to be solved by courts and litigants. The Federal Rules of Civil Procedure have evolved, both through amendments and through judicial interpretation, to contend with such technological phenomena as e-discovery and electronic filing. In a recent series of cases, *Modern Woman, LLC v. Does 1-X*,[1] a relatively new file-sharing technology presented challenges for applying both party joinder and discovery rules.

According to complaints filed in the United States District Court for the District of New Jersey by plaintiff Modern Woman, LLC, a movie production company, a number of unidentified John Doe defendants copied and distributed Modern Woman's copyrighted motion picture using a file-sharing technology known as a torrent. The plaintiff, with the help of a counter-piracy technology firm, was able to identify the Internet protocol (IP) addresses of the computers involved in the alleged piracy. The individual users of those computers, however, were unknown.

Modern Woman alleged that the IP addresses were not sufficient to identify the actual defendants because the only way to tie IP addresses to actual individuals is through information held by the individuals' Internet service providers (ISPs), the entities that provide Internet service and, in doing so, assign IP addresses to its customers' computers. In order to obtain the necessary information, the plaintiff sought leave to serve subpoenas on the ISPs to obtain the names of its customers associated with the IP addresses.

The court found two barriers to granting the plaintiff's request, both of which were connected to the technologies underlying the alleged copyright violation. To understand the first barrier, which had to do with joining parties under Rule 20, it is necessary to understand the nature of torrent technology. Ordinarily, file-sharing networks permit an individual user to download a file from another individual user. Torrent technology was developed in response to inefficiencies inherent in that model. It decentralizes the sharing process; it permits an individual user to download pieces of a single file, simultaneously, from multiple users. The court explained that this system of file sharing, known as a swarm, results in the "viral spreading of the file by a continuous series of downloads and uploads, or distributions, between members of the swarm."[2]

The problem for Rule 20 purposes was that the court could not conclude that all of the users identified by IP address were "part of the same transaction."[3] The court cited a recent case involving a torrent, *Amselfilm Production GMBH & Co. KG v. Swarm 6A6DC and John Does 1-187*,[4] in which the joinder problem led the court to dismiss all claims except those against the first John Doe defendant. Following *Amselfilm*, the *Modern Woman* court entered an order to show cause directing the plaintiff to show why a similar dismissal was not warranted. The court also stated it would consider the plaintiff's request for expedited discovery only with respect to the first John Doe defendant, as designated by the IP address.

The second barrier was related to a more ordinary characteristic of Internet use. The court pointed out that a single Internet account can be used by multiple individuals. Therefore, the identifying information obtained through the ISP would identify the ISP's customer, but not necessarily the individual responsible for the file sharing. The responsible individual, the court noted, could be "someone in the subscriber's household, a visitor to the subscriber's home or even someone in the vicinity that gains access to the network."[5] The court characterized the distinction between subscriber and infringing party as "critical," and noted it was unlikely to be addressed by the plaintiff's discovery request.[6] The

court concluded that the problem with obtaining information from ISPs was twofold: Doing so could present an undue burden on innocent subscribers, while also failing to reveal the identity of the proper defendants.

The court, therefore, attempted to strike a balance between a plaintiff's right to protect its intellectual property with the potential burden on innocent ISP subscribers. Limiting its order to the ISP with the account of the first-designated defendant (due to the Rule 20 joinder problem), the court permitted Modern Woman to serve a subpoena seeking only the subscriber's name and address, and expressly forbade the plaintiff from seeking or obtaining a telephone number, email address, or other information. The court further noted that it had not found the plaintiff "may rely solely on the fact that the named defendant is the person identified as the subscriber associated with the IP address to prove that such person engaged in the acts set forth in the Complaint."

Torrent-based file sharing presents new efficiencies in the computing world, but, as we have seen, also presents new difficulties for courts and plaintiffs. For the courts, the challenge is in determining what constitutes a "transaction" in the digital realm of file sharing, and in developing and interpreting the best rules for balancing the plaintiff's interests with the public's privacy interests. Indeed, the court in *Modern Woman* acknowledged a split in federal courts nationwide over the first issue. Plaintiffs, meanwhile, will need to find successful means of identifying the proper defendants in online piracy cases and, if they are to litigate efficiently, establish a basis for connecting the defendants to a single transaction for joinder purposes.

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Endnotes

1. Civil Action No. 12-4858 (CCC) (JAD), 2013 U.S. Dist. LEXIS 27048 (D.N.J. Feb. 27, 2013); Civil Action No. 12-4859 (CCC) (JAD), 2013 U.S. Dist. LEXIS 26222 (D.N.J. Feb. 26, 2013); Civil Action No. 12-4860 (CCC) (JAD), 2013 U.S. Dist. LEXIS 27811 (D.N.J. Feb. 27, 2013). The three opinions are virtually identical, including Lexis pagination, and so for ease of reference are treated as a single case in subsequent citations.
2. *Id.* at *3.
3. *Id.* at *6-9.
4. No. 12-3865 (D.N.J. Oct. 10, 2012).
5. *Id.* at *11 (*quoting Third Degree Films, Inc. v. John Does 1-110*, Civ. A. No. 2:12-cv-5817 (D.N.J. Jan. 17, 2013)).
6. *Id.* at *11-12.

Commentary

Suffering Under Sequestration in the District of New Jersey: The Human Costs and, Ironically, Financial Costs of Austerity

by Jesse Ehnert

As a fraction of federal spending, $350 million is miniscule—approximately 1/10,000 of the total. For the federal court system, however, $350 million is massive. A recent cut in that amount to the court system's budget, the result of federal austerity measures, has had a devastating effect on the District of New Jersey (DNJ) in particular, and, if nothing changes, will do lasting harm to our justice system. The Federal Practice and Procedure Section spoke with Chief Judge Jerome B. Simandle and Jack O'Brien, the DNJ's chief deputy clerk of operations, to learn more about the growing crisis.

The cut is a result of the series of draconian, indiscriminate budget cuts known as *sequestration* or the *sequester*, which took effect at the beginning of March. "Congress never intended that it would go into effect," Judge Simandle explained, "and for good reason." When the budget cuts were passed, as part of the Budget Control Act of 2011, they were intended not as a real solution to the nation's budgetary problems, but as a scare tactic formulated by Congress to motivate itself to reach a more reasonable fiscal solution before the law took effect in 2013. But the tactic failed, and the threat became a reality. And among the categories of spending to be slashed were the budgets of the federal court system.

Although the courts constitute one of the three coequal branches of the federal government, their total budget of $7 billion represents only 0.2 percent of the total federal budget. The impact of the $350 million cut to an already small budget has been felt in all 94 federal districts. In the District of New Jersey, things are bad and getting worse.

A History of Money Troubles

Budgetary concerns are not new to the district. Because Congress has failed to pass a budget since April 2009, the courts have been operating under "continuing resolutions," stopgap measures passed by Congress that maintain the previous year's spending levels. While the district's funding has held constant, its costs have increased year after year. Over 8,500 new civil cases were filed in 2012, which amounts to a 20 percent increase over the past three years. The increase reflects the district's growing multidistrict litigation docket (one of the largest in the nation), and an influx of pharmaceutical and patent cases (in patent litigation we are the sixth-busiest district).

Judge Simandle explained the trouble with withholding funds from the courts while cases pile up: "Unlike a business or a law firm that can control how much work it does, we have no control. Constitutionally we have to take every case that comes in the door. And we still are a cottage industry, where every case is tailor-made. And it takes a lot of people to make it work."

Burgeoning caseload aside, there are other portions of the Judiciary's budget that simply cannot be reduced, even when funding decreases. Rent, for example. The DNJ does not own its courthouses and other buildings, and pays about a quarter of its annual budget in rental costs. Another must-pay category is judicial salaries, which constitutionally cannot be reduced. Other must-pays, such as the costs of jurors and attorneys representing indigent criminal defendants, are requirements grounded in the Sixth Amendment.

Thus, even before the sequestration cuts took effect, the DNJ had been suffering under difficult budgetary constraints. In order to manage ever-increasing costs without increased funding, the district has reduced

its staffing by nine percent over the past three years. Layoffs have been avoided, but as vacancies appear they are not being filled with new hires. According to a workforce formula set by the government, the clerk's office should have 151 employees. It currently has 128. The district's spending has also been curtailed by an austerity plan in effect throughout the Third Circuit, under which major repairs and improvements to court facilities are severely limited. As the sequestration deadline loomed on the horizon, the clerk's office scrounged for funds in preparation for the massive budget shortfall. "The last two years we've been trying to cut costs significantly, and we have," said O'Brien. Even basic line items like pens and paper have been scrutinized as sources of savings.

Justice Denied

In short, the district had already spent years doing a lot more with a lot less. Then, when sequestration took effect on March 1 of this year, the federal Judiciary's already strained budget was cut by $350 million nationwide, a full five percent of its $7 billion budget. But that five percent is a deceptively low figure, due to the substantial must-pay expenses—those costs that cannot be reduced and, in many cases, automatically increase each year. Because those costs cannot be controlled, the budget cuts are concentrated on the remaining areas, which suffer greatly. For instance, the DNJ's general salary budget and non-salary discretionary budget have been slashed by 14 percent and 20 percent, respectively. As a result of the cuts, many critical services provided through the Judiciary are being dramatically affected, and there will be human, as well as financial costs.

Hardest hit is the federal Public Defender's Office, which has seen its budget reduced more than any other part of the DNJ. As a result, the office announced 25 furlough days for all employees, in all three vicinages, resulting in a 20 percent salary cut from April until the end of September. The office also had to eliminate almost all funding for the use of experts in criminal cases, such as providing psychological testimony. This may well lead to the conviction of defendants with genuine defenses that are never asserted. The situation may also generate difficult constitutional issues: Although a person is not entitled to a perfect defense under the Constitution, the failure to produce an expert may be viewed as ineffective representation under the Sixth Amendment.

Two more judicial offices facing drastic cuts are the Pretrial Services Agency and the Probation Office, each an essential part of the federal criminal justice system. Pretrial service officers investigate criminal defendants awaiting trial, advise judges on bail decisions, and supervise defendants on pretrial release. The Probation Office is responsible for advising judges on appropriate sentences for convicted offenders, and for supervising convicted offenders out on probation. The agencies' budgets include salaries, training, electronic monitoring equipment, employment services, and treatment services for defendants suffering from substance abuse. With adequate funding, these agencies can prevent extended detentions of criminal defendants and of convicted offenders who are found capable of rehabilitation. For defendants awaiting trial, release on bail properly observes the presumption of innocence afforded to all citizens. For pretrial defendants and convicted offenders alike, supervised release serves several practical purposes, including reducing the costs of detention, promoting rehabilitation, and reducing recidivism.

Under sequestration, the Pretrial Services Agency is experiencing salary cuts as high as 20 percent. The agency needs 54 officers based on its current caseload, but can afford to employ less than 40. In order to avoid further reductions in staffing, the agency has taken money out of its equipment and treatment budgets. The Probation Office had 140 staffers in 2010, but it is expected that by September there will be only 103.

In addition to salary cuts, the agencies are suffering major cuts in their funding for addiction and psychological treatment, and for home confinement for individuals convicted of minor offenses. Under sequestration, both areas are being slashed by 20 percent. Meanwhile, about a fifth of the criminal cases in the DNJ involve defendants with a chemical dependency. As the treatment budget quickly runs out of funds, more people will remain in the penal system or be released without treatment, resulting in a higher recidivism rate. Similarly, the home-monitoring program has historically enjoyed an 85 percent success rate, meaning that only 15 percent of individuals become repeat offenders. Without adequate funding for the program, recidivism is expected to rise.

The Costs of Austerity

There will be human costs. The public defender's ability to represent criminal defendants is being

hampered. First-time arrestees and suspects of minor offenses will be unnecessarily detained before trial. With less money for rehabilitation, there will be more recidivism. Human liberty is a real cost of sequestration.

Meanwhile, and quite ironically, there are economic costs as well. Despite being driven by the purpose of austerity, in some ways sequestration is actually *costing taxpayers more*, due to the indiscriminate nature of the cuts. For instance, the cost of supervised release of a probationer is about $10 a day. When budget cuts send those individuals back into the penal system, the cost will fall on the Bureau of Prisons, a federal agency in the Executive Branch, which will pay $110 a day to house them.

Similarly, denying resources to the Public Defender's Office ultimately generates greater costs for the taxpayer. If a public defender is not available to represent a criminal defendant, then a private attorney will be appointed—at about double the price.

Inefficiencies abound. For instance, the district is in the process of converting its telephone system to voice-over-IP, a digital technology that will save the district more than 60 percent in telephone expenses. Due to sequestration, however, the one-time cost of the upgrade cannot be met this year in at least one vicinage. While the delay will result in reduced costs this year, the continued use of the old telephone system will ultimately generate more federal spending.

A Future at Risk

Budgetary issues are especially sensitive in the DNJ, which is the fastest growing large district court in the country, and the largest undivided district. A single vicinage in the DNJ is larger than some entire districts elsewhere. Yet the three vicinages are funded together, as a single entity, and under the recent austerity measure have struggled to share resources. Since sequestration, the Newark vicinage—where the majority of new complaints are filed—has been relying on the Camden vicinage to help process complaints. Camden is also helping the other two vicinages manage appeals to the Third Circuit and to the Federal Circuit.

Despite the budgetary mess, the district is committed to maintaining its core functions. "We answer every phone," O'Brien said. "You do not get a recording." Criminal cases will be heard, but are expected to take longer, especially during trials, due to the budget cuts affecting the Public Defender's Office and the U.S. Marshals Service. On the civil side, the district hopes to maintain its reputation as one of the speediest large district courts nationwide. But the Judiciary has tightened its fiscal belt almost to the breaking point, and at some point all services provided by the courts will suffer in some way.

Congress is supposed to vote on the 2014 budget this September. Unless they restore funding to the courts, more and more services will be hampered by furlough days and even layoffs as departments run out of ways to reallocate funds. Attorneys will see the quality and quantity of services decrease as staff levels and resources continue to dwindle.

A society is measured by its system of justice. Last year, 82 nations participated in exchange programs in which foreign judges were able to observe the civil and criminal justice systems in the United States. "To them," Judge Simandle explained, "we're a model of how to do it." Today, our status is at risk. "Maybe we've taken for granted that the courts will always be excellent," he added. "But without funding, we won't be." ■

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The DNJ Website—New and Improved

If you are a regular visitor to the website for the United States District Court for the District of New Jersey—**www.njd.uscourts.gov**—you have noticed it has recently undergone a major redesign, its most significant update since 2007.

The site has an updated look and feel, and has become more user-friendly. It is now easier than ever to find the tools you need to practice before the court.

The main page of the court's website provides faster access to many of the tools attorneys need most, such as:

- locations and telephone numbers for each vicinage;
- direct links to PACER and CM/ECF, as well as to the Local Rules and forms; and
- court news and announcements.

The Menus

The biggest change is the improvement in navigation. The contents of the site have been divided into nine basic categories, which are displayed as blue buttons near the top of the page. Those buttons serve as your main menu. The categories are:

1. Court info
2. Judges' info
3. Jury info
4. For attorneys
5. Filing without an attorney
6. Forms
7. Case info
9. Criminal Justice Act
10. Programs and services

Hover your mouse over each button, or simply click each button, and all features available under that category will become available.

The following is a sampling of key features available through the redesigned site.

Reference Tools at Your Fingertips

The motion schedule: The court publishes the schedule of motion days, including deadlines for initial filings, oppositions, and replies. The schedule can be found under *For Attorneys* as well as *Filing Without an Attorney*.

Determining your judge's preferences: Judicial preferences are set forth under *Judges' Info*, as well as in each judge's individual page. To access the individual pages, click on *Judges' Info*, then the appropriate vicinage, then the particular judge within that vicinage.

Finding forms and sample documents: Most forms and sample papers for both civil and criminal matters can be found under the *Forms* menu. To view a sample pre-trial order, however, look under *For Attorneys*.

Preparing for Your Day in Court

Need an interpreter? Information on the Federal Court Interpreter Program, as well as guidelines and forms, can be found under *Programs & Services*.

Questions about ADR? Information about arbitration and mediation, including a list of certified mediators and their resumes, can be found under *Programs & Services*.

Taking public transportation to the courts? While driving directions can be found under *Court Info*, there are also walking directions and maps available under *Jury Info*.

Locating a court reporter, and ordering transcripts: Information about requesting transcripts, including a directory of court reporters, fees, and forms, can be found under the *Case Info* menu.

Help is Available

Want larger text? The new website allows you to resize the text. The tool is at the top-right corner of each page. By default, the text is at the smallest setting. Click the "+" button to try out two larger font sizes.

Want to get news and announcements without visiting the website? You can have announcements sent directly to your email address. From the main page (www.njd.uscourts.gov), find the *News & Announcements* section on the right side of the page, and click the "View all" link. You will be taken to a page with a "Subscribe" link. Click the link, and enter your email address to subscribe.

Need help with CM/ECF? A list of CM/ECF resources can be found under *For Attorneys*. And right now, you can review some of the most common ECF mistakes: Go to *For Attorneys* > *Attorney Filing Forum*, and click on "Top Ten Most Common Electronic Filing Errors" to view a presentation on the topic. In case of an ECF "Technical Failure" (as defined in the ECF Policies and Procedures guide), navigate to *Court Info* > *Emergent Matters*.

Need help with anything else? The *Court Info* menu button provides a lot of helpful information, including a Frequently Asked Questions (FAQ) page, as well as

- directions to the courthouses
- clerk's office hours
- holiday schedules
- weather alert information
- fee information, and
- instructions for contacting the court in case of an emergent matters.