Rule 1

" . . . just, speedy, and expeditious . . . "

Western District Of Wisconsin Bar Association

Volume 23, Number 1 March 2014

Live Testimony And Written Remarks Of James D. Peterson, Nominee For District Court Judge On The United States District Court For The Western District Of Wisconsin

transcribed and compiled by Richard Briles Moriarty

WDBA members may appreciate reviewing the live testimony, and subsequent written questions, associated with the recent approval, by the Senate Judiciary Committee, of the nomination of James D. Peterson for the District Court judicial seat that has, for far too long, been vacant. The responses by Nominee Peterson provide considerable insight into how he would approach performing the duties of a District Court judge. Separately, it is heartening to learn that the WDBA Newsletter is on at least one Senator's reading list.

LIVE TESTIMONY, SENATE JUDICIARY COMMITTEE, JANUARY 8, 2014

Senator Christopher Coons (D.Del.) asked the three judicial nominees to each articulate their "judicial philosophy." Nominee Peterson was the last of the three to respond:

Nominee Peterson: "I also agree [with the other judicial nominees] that I don't have a judicial philosophy in the sense that I have some preconceived approach to deciding the results of any particular case. As a district court judge if I am confirmed, I would do my best to comply with Rule 1 of the Federal Rules of Civil Procedure, which suggests – indeed requires – that we do all we can to secure the just, speedy and expeditious of matters.

So I would have a philosophy as a district court judge that people will get early trial dates, trial dates would be firm, I would work hard to decide motions promptly, so that people would get a decision that was thorough, well-reasoned, understandable and prompt."

(Continued on page 2)

Enforcing Forum Selection Clauses After Atlantic Marine

Deborah C. Meiners
DeWitt Ross & Stevens S.C.

In 2006, the Seventh Circuit established that a party may challenge venue based upon a forum-selection clause through a motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(3). *Muzumdar v. Wellness Int'l Network, Ltd.*, 438 F.3d 759, 760 (7th Cir. 2006). Several other circuits sanctioned the same procedure. See, e.g. *Sucampo Pharm., Inc. v. Astellas Pharma, Inc.*, 471 F.3d 544, 549-50 (4th Cir. 2006); *Slater v. Energy Servs. Grp. Int'l, Inc.*, 634 F.3d 1326, 1333 (11th Cir. 2011). Others, however, did not. See, e.g. *Kerobo v. Sw. Clean Fuels, Corp.*, 285 F.3d 531, 535 (6th Cir. 2002).

The U.S. Supreme Court has now resolved the circuit split and clarified the proper procedural vehicle for a challenge to venue based upon a forum-selection clause. On December 3, 2013, the Court issued a unanimous decision in *Atlantic Marine Construction Co. v. United States District Court for the Western District of Texas,* 134 S.Ct. 568 (2013), which eliminates the option to enforce a forum-selection clause through a Rule 12(b)(3) motion.

(Continued on page 6)

Western District of Wisconsin Bar Association 2013-2014

Executive Committee

James D. Peterson, President
(608) 284-2618 jpeterson@gklaw.com
Jeffrey A. Simmons, VP / President Elect
(608) 258-4267 jsimmons@foley.com
Matthew J. Duchemin, Secretary
(608) 283-2478 matthew.duchemin@quarles.com
Sarah H. Siskind, Treasurer
(608) 255-5200 ssiskind@lawmbg.com
Richard Moriarty, Immediate Past President
(608) 267-2796 moriartyrb@doj.state.wi.us

Committee Chairs

Communications
Sarah A. Zylstra
Richard Moriarty
Courthouse Facilities
Richard Briles Moriarty
Membership
Jeffrey A. Simmons
Pro Se/Pro Bono
David Anstaett
Rules, Practice & Procedure
Kenneth B. Axe
Website Committee
Matthew J. Duchemin
Alternative Dispute Resolution
James R. Troupis

Directors

Peter Oppeneer (Ex Officio -Permanent [Clerk]
Tim O'Shea 2011-2114
Tim Edwards 2011-2114
Emily Feinstein 2011-2014
Andrew N. DeClercq 2012-2015
Kevin Palmersheim 2012-2015
Deborah Meiners 2012-2015
Kenneth B. Axe 2013-2016
Michael Lieberman 2013-2016
Monica Burkert-Brist 2013-2016

Past Presidents on Board of Governors

Robert E. Shumaker (Ex Officio) 2009-14
Sarah A. Zylstra (Ex Officio) 2010-15
Andrew J. Clarkowski (Ex Officio) 2011-16
Lynn Stathas (Ex Officio) 2012-17
Richard Moriarty (Ex Officio 2013-18

Peterson Testimony

Continued from page 1

Senator Coons: "Admirable. It would be great if this institution was also thorough and prompt. If I might, working backwards, [starting with Nominee Peterson], what do you see as your role in assuring access to justice in this country for litigants who might appear before you."

Nominee Peterson: "I think one of the great virtues of our American justice system is that, once you get into a court, particularly a federal court, it doesn't matter whether you're rich or poor or have resources, you get the same kind of decision regardless of your resources. I think the district courts have an important role in assuring that people who might not be able to afford lavish representation or sometimes basic representation get a fair hearing despite that. For example, in the Western District of Wisconsin, we have very able pro se clerks that handle cases brought by unrepresented individuals and those individuals, despite lack of counsel,get a very thorough and fair hearing."

Senator Coons: "Our legal system relies fundamentally on active advocacy before the bench – on parties who heighten the differences and thus zealous advocacy. You bring a variety of strengths and skills and backgrounds to your potential service on the bench. How would you distinguish between the period when you were before the bench, as an advocate, and the period that you might soon enter where you were serving on the bench? …."

Nominee Peterson: "I have been an advocate, that's been an important part of my role as a lawyer, but I've also been a counselor, which I think in many cases is an even more important role for my clients. And as a counselor, I help them not advance a particular position in a forum but really deliberate about what really is the right thing to do. That, I think, is excellent preparation for the role of a judge. So if I am confirmed, I think that, as a transition from advocacy to a more deliberative decider, it is a transition that I would be well prepared to make."

Senator Charles Grassley (R.Iowa): "I'm going to start with Mr. Peterson. You've done some pro bono work on behalf of the Freedom From Religion Foundation, filing a Supreme Court brief in two Establishment Clause cases, McCrary and Van Orton. You've argued against Ten Commandments displays on government properties.

(Continued on next Page)

Peterson Testimony

Continued from page 2

(Senator Grassly Continues) In one case, you argued that a particular display had the effect of "quoting non-believers as outsiders to the political community." I'm not here to question your belief in regard to that, but since you're going to be a judge and be impartial, I have a two-part question. How does that statement affect your view? And what assurances could you give the Committee that you would be fair to all litigants who come before you including those of religious faith who may be concerned about your advocacy on behalf of non-theism."

Nominee Peterson: "The first part of the answer is quite simple: my personal views would play no role whatsoever in my decision-making on constitutional issues involving any aspect of the First Amendment or any other constitutional provision.

My work on behalf of the Freedom From Religion Foundation was on behalf of a former and long-time client of the firm. It was not pro bono work; it was engaged work that we did. My firm has a long history of advocating on behalf of the First Amendment interests of a wide variety of clients across the political spectrum. I consider it a great honor to have worked on matters that are of great importance on the First Amendment. As I said, we've represented the whole political spectrum on those issues and I would take every case as it comes and decide them according to the law. The position that we advocated on behalf of the Freedom from Religion Foundation was vindicated in one of those Supreme Court cases and rejected in another. Those decisions are, by definition, right. They're from the Supreme Court and I would follow them to the letter, Sir."

RESPONSES TO WRITTEN QUESTIONS

QUESTIONS FROM SENATOR TED CRUZ (R.TEXAS)

Senator Cruz: Describe how you would characterize your judicial philosophy, and identify which U.S. Supreme Court Justice's judicial philosophy from the Warren, Burger, or Rehnquist Courts is most analogous with yours.

Nominee Peterson: I am not sufficiently familiar with the philosophies of the individual justices to identify any one of them as similar to my own. Moreover, I do not have any philosophy that would predict my approach to deciding a particular case, except that I would decide each case impartially on the basis of the admissible evidence and the law. As a district court judge, my judicial philosophy would focus on efficient case management. If confirmed, I would set reasonably fast case schedules with firm dates, give full consideration to dispositive motions, and decide all motions promptly.

Senator Cruz: Do you believe originalism should be used to interpret the Constitution? If so, how and in what form (i.e., original intent, original public meaning, or some other form)?

Nominee Peterson: Pursuant to District of Columbia v. Heller, 554 U.S. 570, 605 (2008), the contemporaneous public understanding of a legal text is a critical tool of constitutional interpretation. If confirmed, I will follow this and all other Supreme Court precedent concerning constitutional interpretation.

Senator Cruz: If a decision is precedent today while you're going through the confirmation process, under what circumstance would you overrule that precedent as a judge?

Nominee Peterson: None. As a district judge, it would not be within my authority to overrule precedent, and I would not attempt to do so.

Senator Cruz: Explain whether you agree that "State sovereign interests . . . are more properly protected by procedural safeguards inherent in the structure of the federal system than by judicially created limitations on federal power." Garcia v. San Antonio Metro Transit Auth., 469 U.S. 528, 552 (1985).

Nominee Peterson: The statement from Garcia reflects the Supreme Court's determination that state interests are protected in Congress through the political process, whereas its own interpretation of the Commerce Clause in National League of Cities v. Usery, 426 U.S. 833 (1976), had proved unworkable and produced inconsistent results. If confirmed, I would follow Garcia and subsequent decisions in which the Supreme Court identified constitutional limitations on congressional power. See, e.g., United States v. Lopez, 514 U.S. 549 (1995); United States v. Morrison, 529 U.S. 598 (2000).

(Continued on next page)

Peterson Testimony

Continued from page 3

QUESTIONS FROM
SENATOR CHARLES GRASSLEY (R. IOWA)

Senator Grassley: You wrote in the February 2010 newsletter for the Western District of Wisconsin Bar Association that, "For nearly every plaintiff that is drawn to the Western District of Wisconsin, there is a defendant who would prefer to litigate somewhere else." Please explain what you meant by this statement.

Nominee Peterson: I wrote that statement in an article to provide guidance to litigants on motions to transfer venue filed in the Western District of Wisconsin. The statement reflects that the plaintiff's choice of venue is often perceived as providing a tactical advantage. Thus, many defendants, when possible, try to challenge the plaintiff's choice by filing a motion to transfer the case to venue of the defendant's choosing. I was not suggesting that the Western District of Wisconsin had any pro-plaintiff bias, and I have observed no such bias in my experience with the court.

Senator Grassley: During your hearing I asked you about your work with the Freedom From Religion Foundation. You said your law firm has worked on both sides of religious liberty issues. Have you personally worked on any cases that defended the religious side of religious liberty? If so, please describe your involvement in them.

Nominee Peterson: At the hearing, I testified that my firm has a long history of advocating the First Amendment interests of clients across the political spectrum. To cite one recent and notable example of my firm's defense of the free exercise of religious liberty, my colleagues represent Archbishop Jerome E. Listecki, as Trustee of the Archdiocese of Milwaukee Catholic Cemetery Perpetual Care Trust, in an appeal of a bankruptcy court decision. Our firm successfully argued that the bankruptcy decision infringed the Trust's rights under the Religious Freedom Restoration Act and the Free Exercise Clause of the First Amendment. Although I have not been counsel of record in Free Exercise Clause cases, I have advised my colleagues on litigation strategy in such cases.

Religious liberty is a fundamental right of every citizen. If confirmed, I will treat the religious convictions of anyone who appears before me with respect, and faithfully follow Supreme Court and Seventh Circuit precedent in deciding First Amendment cases.

Senator Grassley: What is the most important attribute of a judge, and do you possess it?

Nominee Peterson: A good judge must have many qualities. But the single most important attribute of a judge is to be fair, setting aside any personal interest or bias, to decide cases strictly on the admissible evidence and the governing law. I have this attribute.

Senator Grassley: Please explain your view of the appropriate temperament of a judge. What elements of judicial temperament do you consider the most important, and do you meet that standard?

Nominee Peterson: A judge should be even-tempered, patient, thoughtful, and decisive. The temperament of the judge should be one that leaves even the losing party with the conviction that he or she has been fully and fairly heard. I have demonstrated this temperament both in my personal life and in my career.

Senator Grassley: In general, Supreme Court precedents are binding on all lower federal courts and Circuit Court precedents are binding on the district courts within the particular circuit. Please describe your commitment to following the precedents of higher courts faithfully and giving them full force and effect, even if you personally disagree with such precedents?

Nominee Peterson: If confirmed, I will be absolutely committed to following binding precedent regardless of any personal opinion.

Senator Grassley: At times, judges are faced with cases of first impression. If there were no controlling precedent that was dispositive on an issue with which you were presented, to what sources would you turn for persuasive authority? What principles will guide you, or what methods will you employ, in deciding cases of first impression?

Nominee Peterson: If faced with a matter of first impression, I would apply established principles of legal analysis. If the matter involved statutory interpretation, I would begin with the text of the law, which in most cases is decisive as the best expression of legislative intent. I would turn next to judicial constructions of related laws, then to other recognized sources of authority, aiming at all times to effectuate the legislative purpose.

(Continued on next page)

Senator Grassley: What would you do if you believed the Supreme Court or the Court of Appeals had seriously erred in rendering a decision? Would you apply that decision or would you use your best judgment of the merits to decide the case?

Nominee Peterson: I would always follow Supreme Court and Court of Appeals precedent regardless of any personal opinion.

Senator Grassley: Under what circumstances do you believe it appropriate for a federal court to declare a statute enacted by Congress unconstitutional?

Nominee Peterson: All validly enacted statutes carry a presumption of constitutionality. A federal court should declare a statute unconstitutional only when that decision is necessary to decide the case and it is clear that the statute exceeds Congress' constitutional authority or that it violates a constitutional right.

Senator Grassley: In your view, is it ever proper for judges to rely on foreign law, or the views of the "world community," in determining the meaning of the Constitution? Please explain.

Nominee Peterson: No. In matters of constitutional interpretation, a district judge should consider only those sources authorized by Supreme Court or Circuit Court precedent.

Senator Grassley: What assurances or evidence can you give this Committee that, if confirmed, your decisions will remain grounded in precedent and the text of the law rather than any underlying political ideology or motivation?

Nominee Peterson: In my practice, I have represented clients with diverse interests and political perspectives and I have never declined to undertake a representation because of the client's political ideology or motivation. If confirmed, I will decide cases based on precedent and the law, and never to serve some political ideology or motivation.

Senator Grassley: What assurances or evidence can you give the Committee and future litigants that you will put aside any personal views and be fair to all who appear before you, if confirmed?

Nominee Peterson: If confirmed, I pledge to put aside my personal views, treat every party as equal under the law, and decide cases impartially on the law and the evidence, as reflected in the oath of office, which I will take without reservation.

Senator Grassley: If confirmed, how do you intend to manage your caseload?

Nominee Peterson: If confirmed, I expect to follow many of the case-management practices of my predecessor, the late Honorable John C. Shabaz. I will set early and firm trial dates, see that discovery disputes are decided expeditiously, and I will give full consideration to dispositive motions and decide them promptly.

Senator Grassley: Do you believe that judges have a role in controlling the pace and conduct of litigation and, if confirmed, what specific steps would you take to control your docket?

Nominee Peterson: Yes. In consultation with counsel for the litigants, I would set the quickest reasonable litigation schedule and a firm trial date. This approach requires diligence from both counsel and the court, but I believe that it is the best way to secure the just, speedy, and expeditious determination of matters.

Senator Grassley: You have spent your entire legal career as an advocate for your clients. As a judge, you will have a very different role. Please describe how you will reach a decision in cases that come before you and to what sources of information you will look for guidance. What do you expect to be most difficult part of this transition for you?

Nominee Peterson: I began my law career as a judicial clerk to a judge that I admire, an experience that prepared me well for a career as a litigator. If confirmed, I will draw on that experience again as I make the transition to the bench. In deciding cases, I will begin with a careful review of the submissions of counsel, and a careful evaluation of the evidence submitted. I will test the arguments of counsel by verifying the authorities they cite, and I will conduct my own review of the primary law and legal research. The role of judge will present many new challenges, but I expect that developing expertise in criminal law and procedure to be the most challenging aspect of the transition. I am confident that I can handle this challenge through hard work, careful study, and with the mentoring and assistance of my future colleagues at the court.

(Continued on next page)

Peterson Testimony

Continued from page 5

Senator Grassley: According to the website of American Association for Justice (AAJ), it has established a Judicial Task Force, with the stated goals including the following: "To increase the number of pro-civil justice federal judges, increase the level of professional diversity of federal judicial nominees, identify nominees that may have an anti-civil justice bias, increase the number of trial lawyers serving on individual Senator's judicial selection committees."

Senator Grassley: Have you had any contact with the AAJ, the AAJ Judicial Task Force, or any individual or group associated with AAJ regarding your nomination? If yes, please detail what individuals you had contact with, the dates of the contacts, and the subject matter of the communications.

Nominee Peterson: No.

Senator Grassley: Are you aware of any endorsements or promised endorsements by AAJ, the AAJ Judicial Task Force, or any individual or group associated with AAJ made to the White House or the Department of Justice regarding your nomination? If yes, please detail what individuals or groups made the endorsements, when the endorsements were made, and to whom the endorsements were made.

Nominee Peterson: No.

Senator Grassley: Please describe with particularity the process by which these questions were answered.

Nominee Peterson: I received a copy of the questions from an attorney in the Office of Legal Policy of the Department of Justice. I drafted responses, submitted them to the same attorney for review, and submitted them in final form.

Senator Grassley: Do these answers reflect your true and personal views?

Nominee Peterson: Yes

After Atlantic Marine

Continued from page 1

Atlantic Marine arose from a commonplace dispute regarding payment on a construction project. Atlantic Marine Construction Co., Inc. ("Atlantic Marine"), a Virginia corporation with its principal place of business in Virginia, entered into a contract to construct a child development center at Fort Hood, which lies in the Western District of Texas. Atlantic Marine subcontracted certain work on the project to J-Crew Management, Inc. ("J-Crew"), a Texas corporation. The subcontract included a forum-selection clause stating that all disputes "shall be litigated in the Circuit Court for the City of Norfolk, Virginia, or the United States District Court for the Eastern District of Virginia, Norfolk Division." 134 S.Ct. at 575.

Notwithstanding the forum-selection provision in the subcontract, J-Crew sued Atlantic Marine in the Western District of Texas after a payment dispute arose. Atlantic Marine moved to dismiss under Rule 12(b)(3) and 28 U.S.C. § 1406(a) or, in the alternative, to transfer venue pursuant to 28 U.S.C. § 1404(a). The district court denied both motions, and the Fifth Circuit denied Atlantic Marine's petition for a writ of mandamus.

The *Atlantic Marine* decision, authored by Justice Alito, addresses the interplay between the three procedural rules underlying Atlantic Marine's motions, as well as a fourth rule – 28 U.S.C. § 1391(b) – which governs venue generally. These rules provide as follows:

- 28 U.S.C. § 1391(b)(1)-(3) sets forth three categories of judicial districts in which a civil action may be venued. A case may be brought (1) where any defendant resides, if all defendants are residents of the state in which the district is located; (2) where a substantial part of the events or omissions occurred, or where a substantial part of the subject property is situated; or (3) in any judicial district in which any defendant is subject to the court's personal jurisdiction.

- Rule 12(b)(3) lists "improper venue" as one of the defenses a party must assert in a responsive pleading and "may assert … by motion."

(Continued on next page)

- 28 U.S.C. § 1404(a) provides that, "[f]or the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought or to any district or division to which all parties have consented."

- 28 U.S.C. § 1406(a) provides that "[t]he district court of a district in which is filed a case laying venue in the wrong division or district shall dismiss, or if it be in the interest of justice, transfer such case to any district or division in which it could have been brought.

In *Atlantic Marine*, the Court first held that neither § 1406(a) nor Rule 12(b)(3) are proper procedural vehicles for enforcing a forum-selection clause. Those provisions "allow dismissal only when venue is 'wrong' or 'improper,'" respectively. 134 S.Ct. at 577. The question of whether venue is "wrong" or "improper" is "generally governed by 28 U.S.C. § 1391." Id. If "the case falls within one of the three categories set out in § 1391(b) … venue is proper; if it does not, venue is improper." *Id.*

The three categories set forth in § 1391(b) "say nothing about a forum-selection clause." *Id.* Therefore, "[w]hether the parties entered into a contract containing a forum-selection clause has no bearing on whether a case falls into one of the categories of cases listed in § 1391(b)" – and by extension, has no bearing on whether venue is "wrong" or "improper." *Id*. Accordingly, litigants can no longer assert that a forum-selection clause requires dismissal for "improper venue" under Rule 12(b)(3), as was previously allowed by the Seventh Circuit under *Muzumdar.*

If Rule 12(b)(3) is no longer a permissible means of enforcing a forum-selection clause, then what is? The answer, according to *Atlantic Marine*, depends upon whether the forum-selection clause points to a federal or non-federal forum. If federal, then a motion under § 1404(a) is appropriate. *Id.* at 579 ("Section 1404(a) therefore provides a mechanism for enforcement of forum-selection clauses that point to a particular federal district."). If non-federal, then the doctrine of forum *non conveniens* provides a remedy. Id. at 580 ("[T]he appropriate way to enforce a forum-selection clause pointing to a state or foreign forum is through the doctrine of *forum non conveniens.*"). Id.

According to the Court, both alternatives for enforcement of a forum-selection clause require the same analysis, since "Section 1404(a) is merely a codification of the doctrine of *forum non conveniens* for the subset of cases in which the transferee forum is within the federal court system." *Id*. Accordingly, *Atlantic Marine* advises that "courts should evaluate a forum-selection clause pointing to a nonfederal forum in the same way that they evaluate a forum-selection clause pointing to a federal forum." *Id.*

Having settled the question of the proper procedural method of enforcing a forum-selection clause, the Court next turned to the effect of such a clause on an analysis of venue under § 1404(a) or the doctrine of *forum non conveniens*.[1] The Court held that some "adjustments [are] required in a § 1404(a) analysis when the transfer motion is premised on a forum-selection clause." *Id.* at 581. In particular, the Court identified three such adjustments, each of which weighs in favor of parties seeking to enforce a forum-selection clause:

- "First, the plaintiff's choice of forum merits no weight." *Id.* According to the Court, "when a plaintiff agrees by contract to bring suit only in a specified forum—presumably in exchange for other binding promises by the defendants—the plaintiff has effectively exercised its 'venue privilege' before a dispute arises." *Id.* at 582.
- "Second, a court evaluating a defendant's § 1404(a) motion to transfer based on a forum-selection clause should not consider arguments about the parties' private interests." *Id*. By agreeing to a forum-selection clause, the Court found, parties "waive the right to challenge the preselected forum as inconvenient or less convenient for themselves or their witnesses." Id. Instead, the Court held that "a district court may consider arguments about public-interest factors only." *Id*.
- "Third, when a party bound by a forum-selection clause flouts its contractual obligation and files suit in a different forum, a § 1404(a) transfer of venue will not carry with it the original venue's choice-of-law rules." *Id*. To require otherwise, the Court remarked, would be "inequitable" and "encourage gamesmanship." *Id.* at 583.

(Continued on next page)

1 The Court was careful to note that its analysis of the effect of a forum-selection clause on a motion brought under either § 1404(a) or the doctrine of forum non conveniens "presupposes a contractually valid forum-selection clause." Id. at 581, n.5.

After Atlantic Marine

Continued from page 7

Ultimately, the Court remanded the case to allow the lower courts to address whether any "public-interest factors" justified denial of Atlantic Marine's motion to transfer based upon the forum-selection clause in the sub-contract. *Id.* at 584.

In sum, *Atlantic Marine* impacts the practitioner on both sides of a motion to enforce a forum-selection clause:

1. When seeking to enforce a forum-selection clause, do not bring a motion to dismiss under Rule 12(b)(3) or § 1406(a), as such motions are no longer proper. Instead, bring a motion under § 1404(a) or the doctrine of forum non conveniens, depending upon whether the forum-selection clause points to a federal or non-federal forum. Motions to dismiss under Rule 12(b)(3) based upon a forum-selection clause will be denied in the wake of *Atlantic Marine. See, e.g. Cline v. Carnival Corp.,* 2014 WL 550738, *5 (N.D. Texas Feb. 12, 2014); *Monastiero v. appMobi, Inc*., 2014 WL 524463, **5-6 (N.D. Cal. Feb. 6, 2014); *Republic Bus. Credit, LLC v. Greystone & Co., Inc.*, 2014 WL 122102, *8 (E.D. Louisiana Jan. 10, 2014); *JPMorgan Chase Bank, N.A. v. Trade Show Fabrications West, Inc.*, 2014 WL 347476 (D. Nev. Jan. 29, 2014).

2. When seeking to avoid a forum-selection clause, continue to assert (i) any defenses to the validity of such provision, and (ii) any public-interest factors that weigh against its enforcement. After Atlantic Marine, the venue analysis has become more unfavorable to parties seeking to avoid a forum-selection clause. However, courts can only proceed to this analysis if such clause is valid. Moreover, even after *Atlantic Marine,* courts have continued to disregard forum-selection clauses on grounds of public policy. *See, e.g. Monastiero*, 2014 WL 524463, **4-5; Stewart v. Am. Van Lines, 2014 WL 243509, **4-5 (E.D. Tex. Jan. 21, 2014).

President's Corner

By Jeffrey A. Simmons

As the WDBA's incoming president, I am pleased to report that the New Year is off to a great start in the Western District of Wisconsin. After more than five years, it appears that the District's long-time judicial vacancy will soon be a thing of the past. Last month the Senate Judiciary Committee approved President Obama's nomination of the WDBA's current president, Jim Peterson, to fill the vacancy that has remained open since Judge Shabaz retired in January 2009. Barring the unexpected, we hope to see Judge Peterson on the bench by the end of May.

WDBA members got a chance to mingle with the District's present and future judges and clerk of court during our happy hour social at Brocach last month. This was our second happy hour social and both have been so successful that we plan to make it a regular event. Thanks to everyone who attended.

We have a great speaker lined up for the WDBA's annual luncheon and CLE program --renowned author and legal writing instructor Bryan Garner. Professor Garner coauthored two books with Justice Antonin Scalia, Making Your Case: The Art of Persuading Judges and Reading Law: The Interpretation of Legal Texts, and he is a frequent contributor to the ABA Journal. In addition to being our luncheon speaker, Professor Garner will be providing an hour-long CLE program on legal writing for all attendees.

Our annual luncheon is scheduled for Friday, May 30 at Madison's new public library. And if all goes well, we will hold an investiture ceremony for a new judge later that same day at the Overture Center. I hope to see you all there.

Mark Your Calendar

May 30, 2014

Annual Meeting & Luncheon

The Admissibility Of Electronically Stored Information Under The Federal Rules Of Evidence

Timothy D. Edwards
Cullen Weston Pines & Bach LLP

In the past twelve years, the legal community has generated hundreds of articles and judicial decisions regarding the discovery of electronically stored information ("ESI"). Only recently, there has been an increased focus on the admissibility of the ESI, which can pose unique and difficult challenges. This article will provide a general framework for the admissibility of ESI under the Federal Rules of Evidence by addressing threshold questions of relevancy, authenticity and the application of the hearsay doctrine to computer systems.[1]

As a preliminary matter, the Federal Rules of Evidence apply to "electronically stored information" as they do to other types of evidence. FRE Rule 101(b)(6) provides that "a reference to any kind of written material or any other medium includes electronically stored information."[2] In addressing the authenticity of ESI, it is up to the court to make the preliminary decision on admissibility. The ultimate question as to the weight of the evidence, including its authenticity, is a question of fact, and up to the trier of fact to decide.[3] In making its preliminary determination under Rule 104(a), the court is not bound by the Federal Rules of Evidence except those relating to privilege.[4]

The admissibility of ESI is not governed by special rules. Instead, the admissibility of ESI is governed by existing evidentiary rules whose application will vary based upon the unique qualities of the information in question. These distinctions can generate different foundational requirements for the admissibility of ESI through the application of existing rules of evidence.

The first step in understanding the admissibility of ESI requires a comparison of ESI to traditional paper documents. Years ago, the law looked to the "original" document, or a copy of that document, for proof of authenticity and, most case, admissibility. Unlike paper documents, which are defined by a permanent object, ESI is usually a collection of information that can be freely rearranged by different computer applications. These applications do not always contain complete or accurate information about earlier modifications or previous states of the information in question. This raises a critical distinction between ESI and paper documents for purposes of authentication: absent a physical object, such as a signed contract, the reliability of ESI depends on the examination of pure information, the integrity of the system in which it is stored, and the purpose for which it is offered.

Absent proof of fraud, courts traditionally accept paper documents once the basic foundational requirements for authentication have been met. This assumption does not necessarily apply to ESI because ESI is produced by systems that do not always contain information about previous versions of the author or the data, including reliable metadata.[5] Because ESI is editable it is difficult, if not impossible, to determine whether ESI is what the proponent offers it to be. Systems edit documents routinely, as do humans, leaving no way to trace these changes, or completely verify whether a document is "original" in traditional terms. Absent proof of an "original," the authentication of ESI will necessarily depend on other evidence, including circumstantial evidence that invites inferences about the reliability of the information and the integrity of the system that it came from.

The untestability of ESI presents challenging evidentiary problems. Instead of asking whether the information is in its original state, the proponent of ESI will necessarily focus on the process, or system's integrity, to support a finding that the information has been maintained or preserved in its original state or some modification thereof. This requires consideration of the following evidentiary issues that typically surface when electronically stored information is offered into evidence: (1) relevance, (2) authenticity, (3) hearsay issues, (4) whether the best evidence rule applies, and (5) whether the probative value of the ESI is outweighed by considerations of unfair prejudice.[6]

(Continued on next page)

Electronically Stored Evidence

Continued from page 9

Part I of this article will address questions concerning the authenticity of electronically stored information. Part II will address remaining questions surrounding relevance, hearsay and the best evidence rule.

I. Authenticity

Evidence must be authenticated before it is admitted.[7] To meet this standard, the proponent of the evidence must introduce evidence sufficient to support a finding that it is what the proponent claims it to be.[8] "Authentication and identification represent a special aspect of relevancy . . . This requirement of showing authenticity or identity falls into the category of relevancy dependent upon the fulfillment of a condition of fact and is governed by the procedure set forth in Rule 104(b), Fed. R. Evid.[9] This is commonly referred to as "laying a foundation." To authenticate a document, its proponent must establish that the document is what it purports to be, and that there is a relationship between the document, and individual, and the issues of the case.[10]

With ESI this hurdle appears to be insurmountable, as ESI can change over time without detection unless specific precautions are used. As a result, it is difficult, if not impossible, to literally "authenticate" an ESI document as an "original" with the same level of comfort one would have with a traditional, paper counterpart. The standard for authentication of ESI must take these factors into account by adopting a different test, with the same rule, which assures that the purported document is what its proponent says it is.

Thankfully, this test is not as difficult to satisfy as one might think. To authenticate ESI, its proponent must establish sufficient to support a finding that it has not been changed since it was originally created.[11] Instead of focusing on whether the document is the "original," this requires an inquiry into the reliability of the system that created the document and an analysis of circumstantial evidence, such as comparisons and other safeguards used to preserve the integrity of the information. Here, authenticity is defined by the integrity of the data, which supports a finding that the object has remained whole, or has stayed the same, since its creation.

There are various methods for testing the integrity of ESI. First, the proponent of the ESI can compare challenged information with information that is trusted, or has integrity. Circumstantial evidence of similarity between two sets of ESI can allow for an inference of integrity under the correct circumstances.[12] Some computer users insure integrity by controlling when, and if, the information is edited (i.e., through "read only" applications). Finally, "HASH" techniques and encryption can be employed to preserve and test the integrity of information in a very reliable fashion. Of course, the integrity of information that is produced by these systems will depend on the integrity of the systems themselves. If they are modified or altered, the inference of integrity does not follow.

Understanding the difference between ESI and paper documents is only the first step in establishing the authenticity of ESI. Originality, now replaced with the principle of integrity, is no longer the starting point for assessing the authenticity of ESI. Instead, the proponent of the evidence must provide sufficient evidence to support a finding that the proposed ESI has not been changed since its original creation.

This can be done through direct or circumstantial evidence. Direct evidence would be testimony from the author of an e-mail who created the record. Circumstantial evidence would include a variety of information that raises a reasonable inference of authenticity, including metadata, hash values, encryption, time stamps or a proper chain of custody.[13] As a reference point, Rule 901 provides a non-exclusive list identifying how extrinsic evidence can demonstrate authenticity that applies directly to ESI:

A. Authentication Through Extrinsic Evidence.

i. Testimony of witness with knowledge

ESI evidence can be authenticated through "[t]estimony of a witness with knowledge that a matter is what it is claimed to be."[14] To satisify this standard, the witness must provide testimony that tends to establish the integrity of the document, i.e., that it has not been changed since its creation. For example, the witness can testify about the process by which the electronically stored information is created, acquired, maintained, and preserved without alteration or change, and the safeguards taken to preserve the authenticity of the information during the production phase. The witness need not have personal knowledge of the particular exhibit, so long as he or she has personal knowledge of how that exhibit is routinely made and why there is sufficient evidence to support a finding of integrity.

ii. Comparison by trier or expert witness

Under this rule, the proponent of the electronic evidence may provide testimony that compares the evidence with specimens that have previously been authenticated.[15] This rule allows either expert opinion testimony to authenticate a questioned document by comparing it to one known to be authentic, or by permitting the fact finder to do so. E-mails, for example, can be authenticated under this test. Once a similar email has been authenticated and admitted, either through another evidentiary rule or by judicial notice, that email can be used as the basis for comparison, and a strong inference that the proposed email has not been changed since its creation.

iii. Distinctive characteristics and the like

This rule is the most frequently used to authenticate email.[16] It provides that evidence can be authenticated through its "[a]ppearance, contents, substance, internal patterns, or other distinctive characteristics, taken in conjunction with circumstances."[17] Distinctive characteristics in an email, such as the e-mail address or screen name of the person, help authenticate such evidence.[18]

Further, "hash values" or "metadata" may be used to authenticate ESI. A hash value is a "unique numerical identifier that can be assigned to a file, a group of files, or a portion of a file, based on a standard mathematical algorithm applied to the characteristics of the data set."[19] This trait is used to guarantee the authenticity of an original data set and "can be used as a digital equivalent of the Bates stamp used in paper document production." Other methods, such as encryption, or the use of digital signatures, can also establish the integrity of ESI.

iv. Public records or reports

Under this rule, extrinsic evidence can be used to authenticate documents where the evidence was "authorized by law to be recorded or filed and in fact recorded or filed in a public office, or a purported public record, report, statement, or data compilation, in any form, is from the public office where items of this nature are kept."[20] The proponent of the evidence needs to show that the office from which the records were taken is the legal custodian of records. This can be accomplished through testimony of an officer authorized to testify to the custodianship or through a certificate of authenticity from the public office. This test can be used to authenticate records such as, tax returns, military records, social security records, government agencies records, data compilations, which may include computer stored records.

v. Ancient documents or data compilations

This test permits authentication of documents if the evidence "[i]s in a condition that creates no suspicion concerning its authenticity; [w]as in a place where it, if authentic, would likely be; and [h]as been in existence 20 years or more at the time it is offered."[21] While this test may not apply now given its 20 year timeframe, it is important to note given its relation to the hearsay rule. If an ESI exhibit has been in existence for over 20 years, under Rule 901(8), such evidence can be authenticated. This method of authentication can qualify the exhibit under a corresponding hearsay exception, so that the exhibit may then be admitted for the truth of its contents.[22]

Self-Authentication

The Federal Rules of Evidence also permit proponents of evidence to use self-authentication to admit evidence.[23] While there are several categories that provide an efficient method for authenticating evidence, three are particularly relevant in the ESI context:

i Official publications

"Books, pamphlets or other publications purporting to be issued by public authority" are self-authenticating under Rule 902 of the Federal Rules of Evidence. Thus, an e-mail, newsletter, or website published by a public authority can be self-authenticating.

ii Trade inscriptions and the like

Evidence may be authenticated by "[i]nscriptions, signs, tags or labels purporting to have been affixed in the course of business and indicating ownership, control or origin."[24] Many business or trade communications, such as e-mails, contain information showing the origin of the transmission and identify the company. Such indicators may be sufficient to authenticate an e-mail.

iii. Certified domestic records of regularly conducted activity

Rule 902(11) provides a method of self-authentication for records of regularly conducted activity. This rule mirrors the requirements of the business records hearsay exception to the hearsay rule.[25] The authentication rule states that extrinsic evidence of authenticity is not required if the evidence is an "original or a duplicate of a domestic record of regularly conducted activity that would be admissible under [the business record hearsay exception] if accompanied by a written certification of its custodian or other qualified person." The proponent must demonstrate that the person is familiar with and can certify "that the record was kept in the course of the regularly conducted activity" and "that the record was made of the regularly conducted activity as a regular practice."[26]

This method of self-authentication is important to ESI since most business records are now stored in electronic format. And, authenticating evidence in this manner may also admit the evidence for its truth because it qualifies under the business records exception to the hearsay rule. To support the admissibility of ESI under the business records exception, the proponent should demonstrate that the information was kept pursuant to regularly conducted business activity that would satisfy the business records to the hearsay rule and that the "business activity" in question insured the integrity of the information.

(end of Part I)

Part II of Attorney Timothy Edwards' article will appear in the May issue of our newsletter

Endnotes for Part I appear on Page 13

(Endnotes)

1 For further information regarding the admissibility of ESI under the Wisconsin Rules of Evidence, see Timothy Edwards, The Admissibility of Electronically Stored Information (Wisconsin Lawyer, January 2014).
2 Doali-Miller v. Super Value, Inc., 2012 U.S. Dist. Lexis 50841 (D. Md. Apr. 11, 2012).
3 Fed. R. Evid. 104, 901 and 1008; see also United States v. Goichman, 547 F.2d 778, 784 (3d. Cir. 1976)("only requirement is that there has been substantial evidence evidence from which the jury could infer that the document was authentic"); see also George L. Paul, The "Authenticity Crisis" in Real Evidence, 15 Prac. Litigator No. 6, at 45-49.
4 Fed. R. Evid. 104(a) and 1101(d)(1)
5 American Exp. Travel Related Servs. v. Vinhee, 336 BR 437, 443-45 (Bankr. Fed. App. 2005).
6 Lorraine v. Markel Am. Ins. Co., 241 F.R.D. 534 (D. Md. 2007).
7 Fed. R. Evid., Rule 901.
8 Id.
9 Fed. R. Evid. 901, Advisory Committee Note.
10 United States v. Scott-Emuakpor, U.S. Dist. Lexis 3118 at *37-38 (W.D. Mich 2000).
11 Id.
12 George Paul, Foundations of Digital Evidence 50-52 (ABA 2008). This is an excellent resource for anyone interested in this topic.
13 Lorraine at 241 F.R.D. at 540 (recognizing metadata as a "useful tool" for authenticating records").
14 Fed. R. Evid., 901(b).
15 Fed. R. Evid., 901(b).
16 Lorraine, 241 F.R.D. at 546.
17 Fed. R. Evid., 901(b).
18 See United States v. Siddiqui, 235 F.3d 1318, 1322-23 (11th Cir. 2000) (allowing the authentication of an e-mail entirely by circumstantial evidence, including the presence of the defendant's work e-mail address, content of which the defendant was familiar with, use of the defendant's nickname).
19 Lorraine, 241 F.R.D. at 546–57.
20 Fed. Rule. Evid., 901(b).
21 Fed. Rule. Evid., 901(b)
22 Fed. Rule. Evid., 803(6)
23 Fed. Rule. Evid., 902
24 Fed. Rule. Evid., 902(7).
25 Fed. Rule. Evid., 803(6).
26 Fed. Rule. Evid., 902(12)

Clerk's Corner

A review of 2013 filings - By Peter Oppeneer

This issue's article covers the type of information that I always thought only a clerk could love, but since many have expressed (or at least feigned) interest in our filing statistics, I am providing a brief summary and analysis of Western District filings in calendar year 2013. For the full summary, complete with exciting graphics, be sure to attend the Bar Association's annual CLE event at the court on Friday, May 30.

Civil filings held steady in 2013 at 916 cases, down just 8 cases from 2012. From an historical perspective, this number is well above the 800 or fewer civil cases that were typical prior to 2011. In terms of weighted civil filings, we had 629 cases per judgeship, making the Western District the 18th busiest among the 94 district courts. Criminal filings showed a considerable jump from 147 in both 2011 and 2012 to 182 in 2013.

When we dig a little deeper into the details of our 2013 civil filings, three types of cases stand out as impacting the court's workload: Social security, Labor and Intellectual Property. Social security appeals nearly reached the century mark last year at 98, more than triple what they were in 2010, reflecting a nationwide trend. There were 86 cases in the labor category, up from 61 in 2012, including a significant portion of Fair Labor Standards Act class action complaints. Total Intellectual property cases increased slightly from 2012, but included fewer patent and more copyright claims. Prisoner complaints held steady around the 270 mark. There were 128 cases where non-prisoners represented themselves. Combining these, in over forty percent of our civil cases plaintiffs were unrepresented by counsel.

If you are interested in exploring court statistics on your own for our court or any other federal court visit www.uscourts.gov and click the statistics tab.