



# The Orator

*Newsletter of the Indianapolis Chapter of the Federal Bar Association*

**Volume 4, Issue 1**

**March 2010**

## **CONGRATULATIONS TO CIRCUIT JUDGE HAMILTON, CHIEF JUDGE YOUNG, MAGISTRATE JUDGE MAGNUS-STINSON AND MARION COUNTY SUPERIOR COURT JUDGE WALTON-PRATT**

The Indianapolis Chapter of the Federal Bar Association would like to congratulate Circuit Judge David F. Hamilton, Chief Judge Richard L. Young, Magistrate Judge Jane E. Magnus-Stinson, and Marion County Superior Court Judge Tanya Walton-Pratt on their recent achievements. Circuit Judge Hamilton joined the U.S. Court of Appeals for the Seventh Circuit and thus resigned from the U.S. District Court for the Southern District of Indiana on November 24, 2009. Upon Judge Hamilton's resignation from the District Court, the U.S. District Court, Southern District of Indiana came under new leadership when Chief Judge Young began his role as Chief Judge. In addition, on January 20, 2010, President Obama nominated both Magistrate Judge Magnus-Stinson and Marion County Superior Court Judge Walton-Pratt to serve as Article III Judges for the Indianapolis Division of the Southern District of Indiana.

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## A Message From Our President

*By Shelese Woods, Esq.*

### **President of the Indianapolis Chapter of the Federal Bar Association**

It is my pleasure to begin serving my first year as President of the Federal Bar Association's Indianapolis Chapter. Through the hard work and dedication of Immediate Past President Kathleen Hart, the Chapter has increased its membership and continues to have a high rate of membership renewals. To build on Kathleen's progress, and that of other past presidents, the 2010 Executive Board already held its first meeting and we look forward to implementing some exciting programs in 2010. Your 2010 Executive Board is:

- Kathleen Hart (Bose McKinney & Evans)- Immediate Past President
- Shelese Woods (U.S. Attorney's Office)- President
- Craig Williams (Hall Render Killian Heath & Lyman)- Vice-President
- Mickey Lee (Stewart & Irwin)- Treasurer
- Robert Seidler (Ogletree Deakins)- Secretary
- Dana Stutzman (Hall Render Killian Heath & Lyman)- Program Chair
- Koryn McHone (Barnes & Thornburg) – Newsletter Chair

One of our main goals is to provide high-quality continuing legal education to our members. Along those lines, we are pleased to announce that Chief Judge Richard Young has kindly agreed to present a one hour CLE on the subject of Advanced Trial Practice. The CLE will be held on **Wednesday, May 26, 2010 at 3:00 p.m. at Bose, McKinney & Evans**. Please mark your calendar and spread the word. A registration form is included in this newsletter.

We also plan to re-initiate our Introduction to the Federal Courts CLE for new (and not-so-new!) federal practitioners to be presented in the Fall of 2010. The Board also discussed organizing a summer service project as a way to allow our members to give back to the Indianapolis community.

We would also like to continue to increase our membership. In 2010, the National FBA is holding a Chapter Challenge Membership Campaign. If Indianapolis increases its membership even by a tiny percentage, we stand to win monetary awards. Please renew your membership this year and encourage others in your firm or office to join the FBA if they have not done so already.

Of special interest to FBA members is the 59<sup>th</sup> Annual Meeting of the Seventh Circuit Bar Association, to be held in Chicago May 2-4, 2010 at the Hotel InterContinental. This is always a wonderful opportunity to hear from federal judges and practitioners on issues facing our federal practice in the Seventh Circuit and nationally. Check the website of the Seventh Circuit Bar Association for registration information.

Speaking of the Windy City, the 2012 Annual Meeting of the Federal Bar Association will also be held in Chicago. For those of you interested in expanding your involvement in the FBA beyond Indianapolis, this is a perfect opportunity. Paul Freehling (Seyfarth Shaw), the President of the Chicago FBA Chapter, is looking for volunteers from Indianapolis to help organize the meeting. Please let me know if you are interested or feel free to contact Paul directly.

Finally, the FBA Younger Lawyers Division is hosting its annual Supreme Court Admissions Ceremony at the Court on Tuesday, June 1, 2010. As in years past, they will be inviting the Justices to join the attendees for a breakfast reception after the ceremony. Although the Younger Lawyers Division sponsors this event, FBA members of all ages and levels of practice are welcome to participate. More information is available at [www.fedbar.org](http://www.fedbar.org). Contact Adrienne Woolley at [awoolley@fedbar.org](mailto:awoolley@fedbar.org) or (571) 481-9100 with questions.

2010 looks to be a year of momentous change in the United States District for the Southern District of Indiana. We look forward to keeping you apprised of issues facing our federal practice, and welcome any input or suggestions you may have about how we may better serve you. Please feel free to contact me or another member of the Executive Board.

## The Lilly Ledbetter Fair Pay Act

By Robert F. Seidler, Esq.

Over a year ago, President Barack Obama signed the Lilly Ledbetter Fair Pay Act, overturning the U.S. Supreme Court's decision in *Ledbetter v. Goodyear Tire & Rubber Co., Inc.*, 550 U.S. 618 (2007), where the Court held by a 5-4 vote that Ledbetter, a former Goodyear supervisor, had made an untimely discrimination claim because it was not filed within the 180-day filing period from the pay decision.

Most notably, the Act adopted a "paycheck rule" under which each paycheck, even if not accompanied by discriminatory intent, triggers a new 180-day filing period, regardless of how long ago the initial discrimination occurred.

Accordingly, under the Act an employee hired 10 years ago at an allegedly discriminatory starting salary is able to timely challenge her starting pay on the ground that each subsequent paycheck, including the current paycheck, is diminished by that 10-year old allegedly discriminatory starting pay decision.

### Breadth of Act Still Up in the Air

Also, employee lawsuits under the Act are not likely to be limited to challenges to compensation decisions, because the Act, on its face, covers "compensation decision[s] or other practice[s]." Therefore, employees may challenge an allegedly discriminatory denial of promotion occurring years ago, on the theory that the employee's current paycheck would be larger but for the past discriminatory failure to promote. In fact, on February 5, 2009, the EEOC issued its first interpretive guidance on the Act and adopted that broad interpretation. The federal agency's guidance indicates that the Ledbetter Fair Pay Act applies to "a discriminatory compensation decision" or "other discriminatory practice affecting compensation."

Moreover, the first reported decision under the Ledbetter Fair Pay Act held that plaintiffs could timely challenge demotions that occurred 16 years before plaintiffs filed their EEOC charges because those demotions resulted in perpetual reductions in pay. The employees' current paychecks are less than they would have been had the employees not been demoted 16 years earlier. Thus, their claims are timely under the Fair Pay Act. *Bush v. Orange County Corrections Dept.*, 2009 WL 248230 (M.D. Fla. Feb. 2, 2009) at \*2. The court noted the irony of the timing of the Act's passage: "Thus, while [defendant's] untimeliness argument was valid prior to last week, with the passage of the Act [p]laintiffs' Title VII claims are no longer administratively barred."

Another early decision held that the Ledbetter Fair Pay Act applies to an allegedly discriminatory promotion decision, because the promotion, if granted, would have been

to a higher paying job. According to the court, the plaintiff would be receiving a higher paycheck today if she had not been denied a promotion in the past. *Gilmore v. Macy's Retail Holdings*, 2009 WL 305045 (D.N.J. Feb. 4, 2009).

However, another decision held that failure to promote claims do not challenge a "compensation decision" as contemplated by the Ledbetter Fair Pay Act. *Harris v. Auxilium Pharmaceuticals, Inc.* 2009 WL 3157275 (S.D.Tex.) (S.D.Tex., Sept. 28, 2009). The court reasoned that "[t]he rule set out in *Ledbetter* and prior cases--that 'current effects alone cannot breathe new life into prior uncharged discrimination'-- is still binding law for Title VII disparate treatment cases involving discrete acts other than pay."

More recently, the Third Circuit Court of Appeals held that the an employer's failure to respond to an employee's 2004 and 2005 requests for raises were discriminatory compensation decisions or practices because the result was the same as if the request had been expressly denied. However, the court rejected the argument that the employer's human resources department's rejection of the employee's claim of pay discrimination in August 2006 was a discriminatory compensation decision or practice, because, while the decision arguably affected the employee's compensation, to hold otherwise would encourage employers to ignore such complaints. *Mikula v. Allegheny County Of PA*, 583 F.3d 181 (3rd Cir. 2009).

What is clear from these, and other decisions is that the Act's seven key words - "a discriminatory compensation decision[s] or other practice[s]" - will provide a fertile ground for legal argument. Employers will naturally argue that the word "compensation" modifies both the words "decision" and "other practices," while employees and the EEOC will likely argue that "other practices" means just that - any other practice.

### Damages Under the Act

Because critics of the Supreme Court's decision felt that the decision threw into question the back pay period for compensation claims, the Ledbetter Fair Pay Act expressly states that aggrieved employees are entitled to two years of back pay, dating from the EEOC charge.

### Applies to Pending Claims

The final section of the Act applies its provisions to all pending claims. As a result, court decisions continue to come down almost daily with applications of the Act to pending lawsuits. Because it was effective immediately upon signing, the Act was also applied to all pending EEOC charges and other claims even if they had not yet reached the litigation stage.

- Mr. Seidler is a Shareholder of Ogletree, Deakins, Nash, Smoak & Stewart, P.C. and can be reached at (317) 916-2115 or robert.seidler@ogletreedekins.com

## Treating Physicians and the Rule 26 Expert Report Requirement

By *Diana C. Bauer, Esq.*

An issue arising with increasing frequency in federal court cases is whether a treating physician is required to provide an expert report under Rule 26(a)(2)(B) of the Federal Rules of Civil Procedure. In *Musser v. Gentiva Health Services*, 356 F.3d 751, 757 (7<sup>th</sup> Cir. 2004), the Seventh Circuit left no doubt that a treating physician must be disclosed as an expert witness under Rule 26(a)(2)(A), writing that “[k]nowing the identity of the opponent’s expert witnesses allows a party to properly prepare for trial.” Disclosure of treating physicians as expert witnesses fosters the underlying purpose of the Rule 26 disclosure requirements, eliminating unfair surprise and the so-called “trial by ambush.”

The *Musser* Court declined to answer the question of whether a treating physician is subject to the written report requirements of Rule 26(a)(2)(B), simply observing that a report may be required if the anticipated testimony exceeds the scope of care and treatment. 356 F.3d at 758, n. 3. More recently, the Seventh Circuit again deferred ruling on this issue. *Blaumeuser v. Hasenfang*, 345 Fed. Appx. 184 (7<sup>th</sup> Cir. 2009).

With no clear guidance from the Seventh Circuit, debates often arise as to whether a treating physician must prepare a Rule 26 report. The argument typically raised by the plaintiff is that a treating physician should be exempt from the report requirement because the treating physician was not “retained or specially employed to provide expert testimony,” as Rule 26 provides. In support of this position, the Advisory Committee Notes to Rule 26(a) (2) (B), 1993 amendments, provide that “a treating physician...can be deposed or called to testify at trial without any requirement for a written report.” There are cases endorsing the opinion that “the fact that a treating doctor proposes to give an opinion regarding the causation and permanency of his patient’s injury does not by itself make him a retained expert under FRCP 26(a) (2).” *Zurba v. United States*, 202 F.R.D. 590, 592 (N.D. Ill 2001).

However, numerous district courts within the Seventh Circuit hold that a treating physician is required to provide a written report where the treating physician intends to offer opinion testimony which goes beyond the scope of his care and treatment of the patient. Specifically, where a treating physician intends to provide testimony which goes beyond his or her diagnosis of treatment of the patient, and enters the realm of such complex medical issues as causation, prognosis, and permanency of injury, the treating physician is required to comply with the expert report requirements of Rule 26(a)(2)(B). See e.g., *Bell v. Columbia St. Mary’s Hospital Milwaukee, Inc.*, 2008 WESTLAW 163671, at \*3 (E.D. Wis. 2008) (requiring expert report from treating

physicians who intended to offer opinions on causation and future disability because such opinions would not be found in treatment records and requiring an expert report would be in “accordance with the general purpose of discovery in federal court, that evidence is readily exchanged in order to avoid so-called trial by ambush.”); *Griffith v. Northeast Illinois Regional Commuter Railroad Corp.*, 233 F.R.D. 513, 518-19 (N.D.Ill. 2006) (where a physician sought to give opinions as to the need for the plaintiff to undergo surgery because of a work-related injury, as well as an opinion that the plaintiff’s condition would become disabling without the surgery, the treating physician was required to prepare an expert report setting forth his opinions because “the physician is going beyond what he saw and did and why he did it. He was going beyond his personal involvement and the facts of the case in giving an opinion form because there is a lawsuit.”); *Sowell v. Burlington Northern & Santa Fe Railway Co.*, 2004 WESTLAW 2812090, at \*4 (N.D. Ill. 2004) (after examining cases permitting and not permitting causation opinions without report, “this court concludes that the requirement of a report for opinions on causation, permanency and prognosis is the better approach”); *Rebolledo v. Herr-Voss Corp.*, 100 F. Supp.2d 1034, 1039 (N.D.Ill. 2000) (testimony of treating physician who did not prepare a Rule 26(a)(2)(B) report limited to the observations made during the course of treating the plaintiff and to matters within the treating physician’s personal knowledge); *Zarecki v. National R.R. Passenger Corp.*, 914 F.Supp. 1566, 1573 (N.D.Ill. 1996) (striking treating physician’s affidavit with opinions on causation and foreseeability where the physician was not disclosed pursuant to Rule 26(a)(2) and failed to serve a report in compliance with Rule 26(a)(2)(B), with the Court writing that the treating physician’s “opinions as to ultimate causation and foreseeability are not derived solely from his treatment of Zarecki or his personal observations,” and therefore the opinions should have been disclosed in a report). Moreover, Magistrate Judge Cherry of the Northern District of Indiana opined in *Eagle Services Corp. v. H2O Industrial Services, Inc.*, 2005 WESTLAW 5988646 (N.D. Ind. 2005), that hired consultant could not offer causation opinions because she did not provide a written report analogizing the opinion testimony to that of a treating physician who seeks to offer opinions outside the scope of his care and treatment. In so holding, Magistrate Judge Cherry endorsed the line of sister district court cases requiring a written report from a treating physician who seeks to offer opinions as to causation, prognosis and permanency of injury.

Causation, prognosis and future disability are often hotly contested issues in personal injury and wrongful death cases, and the plaintiff bears the burden of proof. Requiring a written report from a treating physician who will testify on such critical issues fosters the underlying purposes of Rule 26. Causation opinions rarely appear in a treating physician’s medical records. Requiring written disclosure of a treating physician’s causation opinions permits

opposing counsel to better prepare for cross-examination of the physician. A plaintiff who discloses a treating physician but provides no report runs the risk of a court limiting testimony to care and treatment. Where no reports are provided, defense counsel has a solid basis for seeking the exclusion of any opinion testimony based upon the cases discussed above.

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## **Waiver Cases Involving Employer's Computer Systems Take Differing Approaches to New Privilege Issue**

**By William A. Nolan, Esq.**

Whether the attorney/client privilege is waived when an employee uses a company's computer to communicate with his/her *personal* attorney is a classic example of courts and lawyers grappling with the task of tailoring traditional legal principles to a new technological context. Employers have assumed that standard technology use policies that identify the computer system as company property are tantamount to the employee's waiver of the privilege. Some of the initial cases addressing the issue tended to support that view, but recent cases seem to be giving the policies behind the privilege greater weight.

The basic scenario is this: Employee communicates with employee's personal attorney in whole or in part using the employer's technology. Employer has occasion to review employee's technology use – usually but not always after employee has been terminated – and learns of these communications, and employee's lawyer immediately seeks to protect the communications as privileged. The issue arises not only in employment litigation, but in other contexts where the employee's e-mail communications may be relevant.

Litigators should familiarize themselves with these cases and be prepared to press their position when this arises in cases, while employers' and employees' lawyers alike should counsel their clients to take appropriate steps to avoid the potential pitfalls these cases highlight for both sides.

### **One Judicial Viewpoint: Employer Policies Can Drive Waiver of Privilege**

As noted, early cases generally declined to protect the privilege for employees who were subject to a policy providing that the computer system was the company's property and employees had no expectation of privacy therein. Certainly this line of cases continues – in *Leor Exploration v. Aguiar*, 2009 WL 3097207 (S.D. Fla. 2009), the former CEO and defendant in a fraud and breach of fiduciary case, claimed that e-mails sent over his employer's server to his personal attorney were protected

by the privilege. Given the employer's electronic monitoring policy, known to the defendant, the Florida district court found that the defendant had no reasonable expectation of privacy as to e-mails transmitted through the plaintiff's server and thus, no attorney-client privilege as to those communications. The court arrived at this decision, in part, by citing *Black v. State*, 920 So. 2d 668 (Fla. App. 2006), a criminal case where the attorney-client privilege was deemed waived when the defendant was informed that his telephone conversation with counsel would be taped.

Similarly, in *Scott v. Beth Israel Medical Center Inc.*, 2007 WL 3053351 (N.Y. Sup. 2007), the court addressed this issue in the context of a breach of contract action arising from the plaintiff's termination. During the course of the litigation, e-mails between the plaintiff and his lawyer — sent over the employer's e-mail system — came into the defendant's possession. The plaintiff argued the e-mails were protected under the privilege. The employer argued that the communications could not be deemed "confidential" because they were sent over its e-mail system. Further, the privilege was waived when the employee used the system subject to its e-mail policy, which was known to the plaintiff. The court agreed with the defendant and held that the e-mails plaintiff sent to his lawyer were not entitled to attorney-client privilege. Since the plaintiff had knowledge that his e-mails were accessible by the defendant employer, he could not claim a reasonable expectation of privacy in these communications.

Likewise, in *Kaufman v. SunGard Invest. Systems*, 2006 U.S. Dist. LEXIS 28149 (D.N.J. 2006), Carol Kaufman and OSI, a financial software company owned by Kaufman, initiated an action against SunGard, alleging, among other things, breach of contract in connection with SunGard's acquisition of OSI's assets and hiring of Kaufman as a senior executive. A dispute arose when SunGard obtained certain files off of Kaufman's company owned laptops, some of which were correspondences between Kaufman and her attorneys. The district court held that Kaufman had no reasonable expectation of privacy with regard to e-mails sent to an attorney on SunGard's laptops. According to the court, the attorney-client privilege was waived because Kaufman knowingly utilized SunGard's network with the knowledge that company policy provided that SunGard could search and monitor e-mail communications at any time. Like the above cases, Kaufman's knowledge of the visibility of her communications precluded a finding that she had a reasonable expectation of privacy in her correspondences.

### **Pro-Privilege View Gains Momentum**

However, the opposing viewpoint has becoming the majority view, at least for now. Perhaps the first case addressing the issue emphasized a strong policy protecting the attorney/client privilege. In *People v. Jiang*, 2005 WL 2035561 (Cal. Ct. App. 2005), the employer was not even a party to the proceeding. Rather, the case was a criminal

matter, and the prosecution sought – first in a subpoena and subsequently in “offline” follow up communications with the employer – to obtain the defendant’s e-mail communications from the employer. An unusual and notable fact here was that Jiang had created a special folder in his e-mail inbox for communications with his private lawyer, labeled it accordingly, and apparently made each such communication password protected.

The *Jiang* court found that the communications at issue retained their privileged character, focusing its analysis in part on Jiang’s efforts to maintain the privacy of the communications. The court’s analysis highlighted a number of possible pivotal facts, and weighed the competing policies behind the attorney/client privilege and the employer’s right to set rules relating to technology that it owns. The court wrote in part:

[W]e are convinced that defendant’s belief in the confidentiality of his attorney-client information was an objectively reasonable one. Nothing in the agreement defendant signed would have suggested to a reasonable person that Cadence would make any effort to gain access to information in documents on an employee’s Cadence-issued computer that were clearly segregated as personal and password-protected. The agreement was designed to protect Cadence’s intellectual property, not to invade the privacy of its employees. And nothing in the Cadence agreement barred employees from using their employer-issued computers for personal matters. Under the circumstances of this case, it was objectively reasonable for defendant to expect that attorney-client information in the password-protected documents he placed in a segregated folder marked “Attorney” on his Cadence-issued laptop would remain confidential.

Three more recent decisions likewise protected the privilege. In *Curto v. Medical World Communications Inc.*, 2006 WL 1318387 (E.D.N.Y. 2006), a wage claim against the plaintiff’s former employer, the plaintiff had deleted personal files including correspondence with her attorney prior to returning two company laptops. The employer hired a computer forensics expert to retrieve the deleted files. The district court held that the mere fact that a company computer is used by an employee should not result in a loss of the attorney-client privilege.

In *Curto*, the employee had sent e-mails from a home office that was not connected to the company’s e-mail server – an important distinction from the trio of pro-employer cases first referenced above. Also important, and an increasingly common point of reference for courts, was that

the court took a hard look at the employer’s monitoring practices. It seemed important to the court that the employer had monitored employee e-mails on occasions. In other words the employer may retain the right to monitor, but that right may be diminished if the employer does not regularly actually do so. This seems incongruous to employers, but appears to provide an “angle” to courts not entirely comfortable with classifying an arguably protected communication as not covered by the attorney-client privilege.

Similarly, in *Stengart v. LCA Holdings, Inc.*, 973 A.2d 390 (N.J. App. 2009), plaintiff Marina Stengart sued the employer, Loving Care, alleging among other things a hostile work environment leading to her constructive discharge in violation of discrimination laws.

Loving Care had provided Stengart with a laptop computer and a work e-mail address. Stengart had communicated with her attorneys about her anticipated lawsuit against Loving Care via e-mail sent from this laptop, but similar to Curto, by accessing her personal Yahoo! account. After Stengart filed suit, Loving Care created a forensic image of the hard drive from her laptop. Loving Care’s counsel discovered and read numerous communications between Stengart and her counsel. Significantly, Loving Care’s counsel did not inform Stengart’s attorney that the forensic image included these communications.

During discovery, Loving Care referenced some of these communications. Stengart’s counsel requested the immediate identification of similar communications, the return of the originals and all copies, and the identification of the individuals responsible for collecting them. The trial judge, however, found that the e-mails were not protected by the privilege. Specifically, the court held that Stengart was on sufficient notice that her e-mails would be viewed accessible by the company. The appeals court, however, questioned the enforceability of a company policy that purports to transform private e-mails between an employee and an attorney into company property merely because they were sent via a company computer, and said that doing so furthers no legitimate business interest. *Stengart* is now before the New Jersey Supreme Court.

Our story culminates (until the next decision, at least) with *Convertino v. United States Department of Justice*, 2009 WL 4716034 (D.D.C. 2009). In *Convertino*, Plaintiff Richard Convertino claimed that his employer, the Department of Justice, improperly disclosed information about him to a reporter for the *Detroit Free Press*, in contravention of the Privacy Act. The disclosed information most likely consisted of one or more documents from an investigation into possible prosecutorial misconduct on Convertino’s part. To prove his case, Convertino served a discovery request on the DOJ seeking production of some 736 documents.

Among these documents were e-mails between Jonathan Tukul, another DOJ employee, to his personal attorney. Tukul had originally been a named defendant in Convertino's suit and was corresponding with his attorney using his work computer. The issue was whether Tukul had waived the attorney-client privilege by sending these e-mails using the DOJ's equipment.

The court first observed that Tukul's disclosure was inadvertent; he never intended the DOJ to access these e-mails. Thus, the question was whether the intent to communicate in confidence was objectively reasonable. The court considered a number of factors in answering this question, including whether (1) the DOJ maintained a policy banning personal or other objectionable use, (2) it monitored the use of its employees' computer or e-mail, (3) third parties had a right of access to the computer or e-mails, and (4) it notified Tukul of these policies, or if he was aware of these policies. *Id. citing In re Asia Global Crossing, Ltd.*, 322 B.R. 247, 258 (S.D.N.Y. 2005).

Here, the court found that Tukul's expectation of privacy was reasonable. First, the DOJ did not ban personal use of company e-mail. And while Tukul was aware that his employer had access to his personal e-mails, he was unaware that the DOJ would regularly access and save e-mails from his account. Tukul also worked to keep his e-mails private by deleting them as they came into his account – unaware that they were still on the DOJ servers.

### **Going Forward**

In conclusion, from the practitioner's standpoint, there is case law (though not yet in most jurisdictions) to support both litigation positions. Litigators who find themselves on either side of this issue might begin with the following factual checklist to help formulate their position. This represents points that have been key in the decisions discussed above:

- Does the employer have a technology use policy making clear that the company e-mail system is company property and that the employer has the absolute right to monitor employee e-mails? (Most companies do.)
- Did the employer manifest awareness of that policy?
- Is there any guidance in the employer policy on the use of company e-mail for personal use?
- How often did the employer exercise its right to monitor electronic communications?
- Was some personal e-mail account or equipment involved such that the employer might be found to have a great expectation of privacy than strictly using company e-mail?

- Did the employee take steps to keep the communications with his or her attorney confidential (e.g. separate folders, passwording, etc.)?

These have been the key factual points in case law to date and are the initial items litigators should examine with their clients before formulating their positions. Employers' counsel should review each of these points pro-actively with their clients to position their clients as well as possible in future litigation.

- Mr. Nolan is a Partner at Barnes & Thornburg LLP and can be reached at (614) 628-1401 or [bill.nolan@btlaw.com](mailto:bill.nolan@btlaw.com). Additionally Peter Tschanz, a law clerk at Barnes & Thornburg LLP, assisted in preparing this article.

## **CALENDAR OF EVENTS**

**Please save the date for these upcoming events:**

### **59th Annual Meeting of the Seventh Circuit Bar Association and Judicial Conference of the Seventh Circuit**

**May 2-4, 2010**

**Chicago, Illinois**

**Event to be held at the Hotel InterContinental**

**For additional information, please visit the Seventh Circuit Bar Association's website at the following address: [www.7thcircuitbar.org](http://www.7thcircuitbar.org)**

### **Advanced Trial Practice CLE Program Hosted by the Indianapolis Chapter of the Federal Bar Association with Feature Presentation by Hon. Chief Judge Richard L. Young**

**May 26, 2010**

**Indianapolis, Indiana**

**3:00 p.m.**

**Bose McKinney & Evans, LLP**

**111 Monument Circle, Suite 2700**

**Indianapolis, Indiana 46204**

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**Federal Bar Association - Indianapolis Chapter  
Advanced Trial Practice CLE  
May 26, 2010 at 3:00 p.m.  
Bose McKinney & Evans**

Name: \_\_\_\_\_ Law Firm: \_\_\_\_\_

Address: \_\_\_\_\_

Phone Number: \_\_\_\_\_ Years of Practice: \_\_\_\_\_

Indiana Bar No.: \_\_\_\_\_

FBA Member (\$35): \_\_\_\_\_

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\*Membership registration will be available on May 26, 2010 if you choose to join the FBA to receive the discounted rate.

Enclosed is my check made payable to the Federal Bar Association in the amount of \$ \_\_\_\_\_.

**Please return completed registration form and payment to:**

**Dana Stutzman  
Hall Render Killian Heath and Lyman  
One American Square, Suite 2000  
Box 82064,  
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**Any questions? Call Dana Stutzman (Hall Render Killian Heath & Lyman) at (317) 633-4884.**

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