

The MARYLAND LITIGATOR



MSBA LITIGATION SECTION

SEPTEMBER 2011

Trust No One – Redact or Seal Private Information

BY KAREN L. FEDERMAN HENRY, ESQ.

As attorneys, we regularly receive personal and confidential information from our clients. Our professional standards require us to protect the information from unauthorized review. And attorney-client privilege prevents us from disclosing the information to the public. Yet, the nature of litigation often requires the exchange of the same private information with opposing counsel, the opposing party, and the court. Even information that may not amount to probative evidence at trial must be provided during discovery, and it must contain enough information that the party can verify its accuracy independently. In some types of cases, the emotions of the parties raise the level of distrust so high that any alteration of a document triggers challenges and greater animosity. As long as the materials remain in the hands (and files) of the attorneys, the concern of unauthorized disclosure remains limited. But what happens when the case goes to court—are we as vigilant in that process as our clients expect and deserve?

The Maryland Rules establish a presumption that court records are open to the public for inspection. This presumption includes exhibits attached to motions or marked for identification at trial. Md. Rule 16-1002. Anyone who can inspect the records also can obtain copies of those records. Md. Rule 16-1003. For government attorneys, this does not raise an eyebrow—governmental entities already provide a great deal of information through the Maryland Public Information Act, which encourages disclosure as a routine matter. Whether public or private, most of the time, disclosure of documents does not cause concern, because the information is known to witnesses and many people already. When a case involves documents that contain social security numbers, tax returns,

bank statements with account numbers, or medical information, however, a client's privacy—and even the potential for identity theft—make it essential for an attorney to have adequate knowledge of the Rules governing court records.

Recognizing that some information requires protection automatically, the Rules require denial of inspection of specific categories of records as well as records that are confidential by law. Rule 16-1006 lists those categories, which include adoptions, guardianship of minors, juvenile matters, confidential attorney grievance information, criminal warrants and charging documents (for a limited period of time), grand jury investigations, medical reports regarding an infectious disease, and individual tax returns. In addition, the court will not allow inspection of a record that would reveal a social security number (other than the last four digits), the identity of a person who reports abuse, the home address or phone number of a government employee, or the identity of a person who has reviewed a sex offender's registration statement. Md. Rule 16-1007.

The caveat with these protections, however, is that the custodian of court records does not have to review the documents to make the determination of what needs to be withheld. Instead, the person who files a record that may need protection from public access must inform the custodian of the information that is confidential and not subject to inspection. Md. Rule 16-1010. By now, you should have a growing pit in your stomach. Relax, depending on the information you seek

(continued on Page 7)

THE MARYLAND LITIGATOR

- EDITORIAL BOARD -

ERIN A. COHN, ESQ.
- ECCLESTON & WOLF, P.C. -

CHRISTOPHER S.
GUNDERSON, ESQ.
- SAUL EWING LLP -

SARAH D. MANN,
ESQ.
- BODIE, DOLINA, SMITH &
HOBBS, P.C. -

JOHN P. MARKOV,
ESQ. (Chair)
- ASSOCIATE COUNTY
ATTORNEY -

KATHLEEN A.
MCGINLEY, ESQ.
- OBER, KALER, GRIMES &
SHRIVER, P.C. -

JENNIFER K.
SQUILLARIO, ESQ.
- DLA PIPER US LLP -

KATHRYN F.
WEINRICH, ESQ.
- BODIE, DOLINA, SMITH &
HOBBS, P.C. -

MESSAGE FROM THE CHAIR

By M. NATALIE McSHERRY, Esq.

The Litigation Section is off to a running start this year, thanks to the great work of our immediate past Chair – Mary V. Murphy – from Howard County, and the Strategic Planning meeting under her leadership. We are focused on providing our members with information and continuing education on topics relating to litigation in all its forms and levels. Last year we focused on practice in the Maryland District Court. This year our focus is on practice in the Circuit Court. That focus, however, is not to be confused with tunnel vision, as we continue to address issues that apply to all levels and courts and types of litigation.

Our programs at the Annual Meeting in Ocean City had a technology theme and were very well received. The panel on electronic discovery presented a hands-on panel of the true nuts and bolts of electronic discovery. Our programs on social media and use of technology at trial were also timely and useful.

This fall we are presenting The Direct and Cross-Examination of an Expert Witness in Circuit Court: A Litigation Skills Workshop for Civil Cases. This workshop will afford participants a valuable hands-on opportunity to acquire or refine your expert witness trial skills in a supportive environment. Instruction by a faculty of esteemed Maryland judges and experienced trial attorneys will focus on the core competencies essential for handling expert witnesses at the trial of a civil case in the Circuit Courts of Maryland. Join us on October 10th, 2011 from 9:00 a.m. to 1:30 p.m. in Baltimore for this outstanding skill building program. 4 hours CLE credit with VA & PA. For more information and to register click on the link below: www.legalspan.com/msba/calendar.asp?UGUID=&ItemID=20110815-124242-131851.

On October 27, we will be sponsoring a program presented by our appellate practice committee on Post Trial Motions. It will be held at the University of Maryland in College Park. Watch for emails about it.

(continued on Page 10)

◆ ◆ ◆ TABLE OF CONTENTS ◆ ◆ ◆

- 3 REPUTATION ON APPEAL
- 4 JUROR MISCONDUCT AND THE INTERNET
- 5 RECORDS RETENTION AND THE DUTY TO PRESERVE INFORMATION
- 7 JULY 1, 2011 AMENDMENTS TO THE LOCAL RULES FOR THE U.S. DISTRICT COURT FOR THE DISTRICT OF MARYLAND

REPUTATION ON APPEAL

BY GLENN GROSSMAN, ESQ.

*Good name in man and woman, dear my lord,
Is the immediate jewel of their souls.
Who steals my purse steals trash. 'Tis something, nothing:
'Twas mine, 'tis his, and has been slave to thousands.
But he that filches from me my good name
Robs me of that which not enriches him
And makes me poor indeed.*

- William Shakespeare, *Othello*, Act III, Scene III

All federal courts of appeal that have had occasion to address the subject appear to agree that mere chiding remarks about an attorney by a judge do not amount to an appealable sanction. What is not so clear is when a judge's remarks are such that they are more than "chiding" and give rise to a sanction that is appealable. In *Adams v. Ford Motor Co.*, 3rd Cir., No 08-3950, August 5, 2011, the Court of Appeals for the Third Circuit heard a lawyer's appeal of a judge's determination that he had violated a rule of professional conduct but expressly stated that he was not imposing any discipline. The Court determined that the magistrate judge had, in effect, reprimanded the lawyer in a publicly accessible order and he was therefore entitled to appeal.

The *Adams* case, in the United States District Court for the Virgin Islands, involved a personal injury claim against Ford. The jury awarded the plaintiff \$2.3 million but found her to be 77.5 percent at fault. The plaintiff's attorney, Vincent Colianni, concerned that there had been a clerical error on the verdict form, called the foreperson, but when he was unable to reach him, he called Alicia Barnes, another juror. When she asked whether it was permissible for her to speak to him, Colianni replied that it was. He placed the call on speakerphone and three of his associates heard the conversation, which lasted only about a minute. Ms. Barnes said that she was uncomfortable discussing the case with him, at which point the call was ended. Shortly after the call, Ms. Adams contacted Magistrate Judge Cannon, and complained about the contact. The magistrate judge told her to put her complaint in writing, which she did in a letter. In her complaint, she stated that she found Mr. Colianni's conduct

to be "reprehensible" and "bordering on harassment."

The judge set the matter in for a hearing the next day. At the hearing, the judge read the juror's letter and the text of ABA Model Rule 3.5 into the record. Colianni was asked to recount his version of the call and the reasons for it. He told the court that he wished to determine how his client's damages had been calculated and he explained that he informed Ms. Barnes that she was under no obligation to speak to him. He immediately ended the call when she expressed her discomfort. After he received memoranda from both parties, the magistrate judge issued an order in which he found that Colianni had "had engaged in misconduct by his post-verdict communication with a juror in contravention of American Bar Association Model Rule of Professional Conduct 3.5(c)."¹ He went on to state that he would not "disbar, suspend or reprimand" Colianni, but that he would refer the matter to the Virgin Islands Bar Association for a "formal investigation and disciplinary proceedings." Colianni sought to have the order sealed but was rebuffed.

The government claimed that Colianni had no "standing" to appeal because he had suffered no imminent injury that could be redressed by a favorable appellate decision. Specifically, Colianni had not been sanctioned or reprimanded and therefore had no cognizable injury. The Court noted that while it had never before determined whether a finding of attorney

(continued on Page 8)

¹ Rule 3.5 Impartiality And Decorum Of The Tribunal

A lawyer shall not:

(c) communicate with a juror or prospective juror after discharge of the jury if:

- (1) the communication is prohibited by law or court order;
- (2) the juror has made known to the lawyer a desire not to communicate; or
- (3) the communication involves misrepresentation, coercion, duress or harassment

The Model Rule has not been adopted in Maryland; the closest equivalent: Rule 3.5 (a) (5): A lawyer shall not: after discharge of a jury from further consideration of a case with which the lawyer is connected, ask questions of or make comments to a jury member that are calculated to harass or embarrass the jury member or to influence the jury member's actions in future jury service

N.B.: Local Rule, United States District Court for the District of Maryland: Rule 107, Subsection 16: Unless permitted by the presiding judge, no attorney or party shall directly or through an agent interview or question any juror, alternate juror or prospective juror with respect to that juror's jury service.

JUROR MISCONDUCT AND THE INTERNET

BY ANDREW RADDING, ESQ., GEOFFREY W. WASHINGTON, ESQ., AND CHRISTINE R. HOGAN

“A criminal defendant’s right to have an impartial jury is one of the most fundamental rights under both the U.S. Constitution and the Maryland Declaration of Rights.”

- *Jenkins v. State*, 375 Md. 284 at 299 (2003).

“We have a criminal jury system which is superior to any other in the world; and its efficiency is only marred by the difficulty of finding 12 men everyday who don’t know anything and can’t read.”

-Mark Twain 1873

The Internet is a vital tool for attorneys. We use it to market our professional services, to locate other lawyers, consultants, or experts, and to research an existing or potential client, opposing parties, witnesses, experts, even jurors. With the explosion in popularity of social media websites, blogs, online forums, and sites like Wikipedia, it is increasingly likely that at least one person involved in your case will utilize one of these sites during a trial. Proving that not even judges are above such practices, in *U.S. v. Bari* (599 F.3d 176, (2d Cir. N.Y. 2010), a trial judge Google-searched images of rain hats to confirm his intuition regarding the variety of available rain hats, which was an issue in the case. Unfortunately, the Internet can be a litigator’s worst nightmare when the same information falls into the hands of a juror.

As Internet sites are an increasingly integral part of everyday life, jurors may increasingly believe it acceptable to consult many of the tools which they commonly use in their daily lives, such as, Facebook, MySpace, information-gathering websites like Google and Bing, not to mention encyclopedia sites such as Wikipedia without taking into account the evidentiary prerequisites required for admissibility of potential evidence. The Maryland Court of Appeals addressed the ramifications of these concerns (that someone other than the purported person may have created a Facebook or MySpace page, or that someone other than the purported poster may have posted to the page in question) in *Griffin v. State*, 419 Md. 343, 19 A.3d 415 (2011).

Juror Misconduct

Now that research which once required a trip to the library can be accomplished with a few clicks on a computer or smart phone, there has been a rise in juror misconduct involving the internet. With technological advances constantly making information more easily accessible via the Internet, it will only become easier for a juror to engage in misconduct. Therefore, the problem of juror misconduct via the Internet must be addressed and its harmful effects reversed as soon as

possible to restore the judicial system to its intended purpose: the fair resolution of legal issues.

The potential consequences of juror misconduct are numerous and grave; not only for the parties to the case at issue, but for attorneys, judges, and taxpayers. Information found online may not be accurate or admissible as evidence, either because of hearsay issues or because they do not meet the *Daubert* and *Frye* standards, as well as the threshold issue of authentication. Hearsay objections will surely arise if messages sent between users of Facebook or MySpace, postings on a blog, or on a website are proffered in the courtroom; however, these are likely the very sorts of information that a juror is likely to come across in his or her research on a case. The inability to refute information through cross-examination provides an additional means by which the rules of evidence may be subverted if jurors are presented a one-sided opinion on an issue which they have found on the internet.

The possibility of a juror discovering evidence suppressed at trial because it violates a criminal defendant’s constitutional rights is another concern because it precludes the defendant from confronting a witness. With this heightened risk of juror misconduct, the possibility (especially in high profile cases) that parties interested in the outcome of a case will begin to plant misinformation online in an attempt to take advantage of the possibility that a juror may conduct internet research is both real and plausible.

Although dismissal of a juror who has conducted such research is one possible solution, what if there are no alternates left to replace the errant juror? What if the behavior is not discovered until the case has been submitted to the jury for deliberation, vastly increasing the likelihood that the rest of the jury will also be exposed to the information? And how does a judge confirm a suspicion that a juror has conducted inappropriate research without violating the privacy rights of jurors? Does monitoring jurors’ social media usage during trial implicate their 1st Amendment rights?

If the juror’s impropriety is discovered too late, courts may only be left with the option of reversing a conviction, which might allow a defendant who would have otherwise been found guilty to be set free, or declaring a mistrial, the effects of which are expensive and time consuming. Just as important is the concern that the juror’s misconduct might never be discovered.

(continued on Page 10)

RECORDS RETENTION AND THE DUTY TO PRESERVE INFORMATION

By W. LAWRENCE WESCOTT, II, Esq.

- REVERE STRATEGIES, LLC • CHAIR, TECHNOLOGY COMMITTEE OF LITIGATION SECTION -

The triggering of the duty to preserve electronic information in a lawsuit can trigger a great deal of panic in an organization. In *Victor Stanley, Inc. v. Creative Pipe, Inc.*, 269 F.R.D. 497, 521-22 (D. Md. 2010), Judge Grimm stated that “[t]he common law imposes the obligation to preserve evidence from the moment that litigation is reasonably anticipated... [and] for a defendant, at the latest, when the defendant is served with the complaint.” The duty can be triggered in a number of ways, including by receipt of a letter threatening litigation and demanding that information relating to the dispute be preserved.²

The consequences of the failure to preserve information are varied. Depending upon the facts of the case, sanctions can vary from monetary penalties, an adverse inference instruction, all the way to terminating sanctions in extreme cases. Thus, for example, in *Nursing Home Pension Fund, Inc. v. Oracle Corp.*, 254 F.R.D. 559, 566 (C.D. Cal. 2008), the court granted an adverse inference instruction in connection with emails of Oracle CEO Larry Ellison in part because defendants either destroyed or failed to preserve the emails when they had notice that the emails were relevant to the litigation.

Thus, a natural reaction of many organizations is to clamp down and try to preserve anything, and sort everything out later. From a legal standpoint, this is not necessary.³

In some cases, determining what information is relevant to the matter can be well defined and straightforward. Perhaps there are one or two custodians who have relevant information, and perhaps further, those individuals have organized their electronic information into folders (email as well as electronic documents, such as word processing documents and spreadsheets) and keep it in one place on the company network. Thus, the process may simply involve copying those folders

(taking care, of course, to preserve the underlying metadata) to an electronically “safe” area to insure the information is not deleted or changed.

Often though the information relevant to the matter is widely dispersed across the firm. The company may have designated places on its networks for information storage, but may not have any policies regarding the management of electronic information. This results in each person determining what information they will store and how and where they will store it. The result can be information chaos.

Another tendency of most organizations is to save information indefinitely. Most individuals keep their electronic documents forever if they can, unless forced to delete information because of space limitations. In addition, in the course of backing up the organization’s computers, the IT department may keep the backup media indefinitely. Both actions may have consequences impacting the organization’s discovery obligations.

The discipline of records management treats information as an asset, with a defined lifecycle. As information is an asset, the information is managed for the benefit of the organization. Records management principles recognize that there is a cost to the generation of information, as well as a cost to the retention of that information. Once the information has reached the end of its lifecycle, there is no longer any business, legal, or regulatory reason to retain it, and the information should be destroyed (assuming no applicable litigation hold is in place for any of this information).⁴

A records retention schedule has several benefits in the context of electronic discovery. Such schedules involve the classification of information and can help counsel identify the location of relevant information.

One of the major costs of electronic discovery, however, stems from the volume of information often involved in litigation. Thus, by defining categories of information that are generated and, more importantly, that are retained (pursuant to the retention period of that information), a records retention schedule can facilitate the reduction of the volume of information subject to electronic discovery.

(continued on Page 9)

¹ *Goodman v. Praxair Services*, 632 F. Supp. 2d. 494, 511 (D. Md. 2009).

² *Goodman v. Praxair Services*, 632 F. Supp. 2d. 494, 511 (D. Md. 2009).

³ For example, in *Zubulake v. UBS Warburg*, 220 F.R.D. 212, 217 (S.D.N.Y. 2003), Judge Scheindlin stated that an organization was not required to “preserve every shred of paper, every e-mail or electronic document, and every backup tape.”

⁴ See generally Randolph A. Kahn & Barclay T. Blair, *Information Nation*, 24 (2d ed. 2009).

JULY 1, 2011 AMENDMENTS TO THE LOCAL RULES FOR THE U.S. DISTRICT COURT FOR THE DISTRICT OF MARYLAND

BY KATHLEEN MCGINLEY, ESQ.

Effective July 1, 2011, the U.S. District Court for the District of Maryland amended its Local Rules, specifically changing seven existing rules and adding seven new rules applicable only to patent cases. Below is a brief summary of the changes:

Local Rule 102:

(1)(b)(iii): Amended to remove the duty of *pro se* litigants to keep an address within the District of Maryland.

(1)(c): Now exempts Rules 112.1 and 112.2 (discussed below) from certificate of service requirements if not filed electronically.

Local Rule 109:

(2)(b): Edited to clarify that motions requesting an award of attorneys' fees should be prepared in accordance with this rule, as well as, any applicable Rules and Guidance for Determining Attorneys' Fees in Certain Cases in Appendix B.

Local Rule 112:

(1): Added sections (f) and (g) regarding filing and service requirements, including electronic service, of habeas corpus petitions.

(2): Added section (c) regarding service requirements, including limited electronic service, of prisoner civil rights actions.

Local Rule 301:

(5)(a): Amended the time for filing an objection to a Magistrate Judge's non-dispositive order to fourteen days after service of the order, instead of fourteen days from entry of the order.

Local Rule 701:

(1)(a): Amended to require prospective members be familiar with the Federal Rules of Criminal Procedure, Federal Rules of Bankruptcy and the Local Bankruptcy Rules only if such rules are relevant to that prospective member's area of practice.

(1)(a)-(b): Amended to require prospective members to be active members in good standing of the highest court of any state or the District of Columbia, instead of just members in good standing.

Local Rule 702:

(1): Amended to allow eligible law students to appear before Bankruptcy Judges in addition to Magistrate Judges and District Court Judges.

Local Rule 705:

(2): Amended to allow an attorney convicted of serious crime "a show cause period" of thirty days to explain why disbarment or another punishment should not be imposed following an order of suspension.

(4)(c)(i): Significantly amends the process for how the Court will review petitions for reinstatement.

Local Rules 801-807:

Added to detail requirements for cases involving patent claims, such as infringement, validity, enforceability, inventor identity errors and false marking claims pursuant to 35 U.S.C. § 292.

The amended Local Rules are available on the Court's website at www.mdd.uscourts.gov.

The Litigation and Construction Law Sections
present

Litigating Government Contract Disputes With the State of Maryland

November 16, 2011

6:00 p.m.

Sheraton Columbia Town Center Hotel

10207 Wincopin Circle, Columbia, MD 21044

\$45 includes dinner, beer/wine

\$55 for non-section members

Our experienced panelists: **David Chaisson**, Deputy Counsel of OAG Contract Litigation Division; **Dana Dembrow**, Member of Maryland State Board of Contract Appeals; **Denise Ferguson**, Counsel to Maryland Department of Transportation; and **Kenneth Sorteberg**, Partner, Huddles Jones Sorteberg & Dachille PC.

Christopher R. Ryon, Associate at Kahn, Smith & Collins, P.A., will act as moderator.

Register Online at

www.msba.org/forms/events/govcontractdisputes.asp

Civil and Family Law Post-Trial Motions Practice

~ *WHAT TO KNOW IN EFFECTIVE POST-TRIAL FILINGS AT TRIAL, STANDARDS OF REVIEW, INTERLOCUTORY MATTERS, TOLLING REQUIREMENTS, PRESERVATION, AND TIMELINESS FOR APPEALS* ~

Thursday, October 27, 2011
6:30 p.m. – 9:00 p.m.
UNIVERSITY OF MARYLAND GOLF COURSE
Golf Course Road (Off University Blvd. & Stadium Dr.)
(GPS Address-100 Golf Course Clubhouse, College Park)

\$20.00 per person—(Advance Registration by October 7, 2011)
\$25.00 per person—(Payment Received after October 7, 2011)

SPEAKERS:
HON. JOSEPH F. MURPHY, JR.
HON. JAMES R. EYLER
KEVIN ARTHUR

SPACE IS LIMITED
PLEASE REGISTER AND PAY IN ADVANCE BY CONTACTING:
Georgia Perry, Executive Director
Prince George's County Bar Association (301) 952-1442; GPerry@pgcba.com

PRESENTED BY

The Litigation Section's
Appellate Practice Committee
&
Prince George's County Bar
Association

PRIVATE INFO...

(continued from page 1)

to protect, the methods may involve simple redaction or more formal requests.

For documents that contain only limited sensitive information (like home addresses and phone numbers or social security numbers), the simplest method of protection is to redact that information before submitting it to the court. Assuming the parties have exchanged the documents already and there is not a question of authenticity, this should satisfy the evidentiary requirements, while protecting the client's confidential information. Be careful with the redactions—if you submit multiple documents that use the same account number or information being redacted, make sure to redact consistently. A savvy identity thief can scour documents to find one with the last 4 digits and another with the first set of digits to gain the entire account number or social security number.

Where the document or record contains more extensive confidential information, a more formal method of bringing the matter to the court custodian's attention becomes useful. The Rules provide two formal approaches to protecting information. First, a party may file a motion to seal or otherwise limit inspection of a case record. Md. Rule 16-1009(a)(1)

(A). Another option is to file a request to shield information in a case record. Md. Rule 16-1009(b)(2). The main difference between the two is that the seal applies to the entire case record, while the shield may apply to certain information or exhibits within the case record. In either instance, the request must identify the reasons for the seal or shield and the information that should not be disclosed.

The need for diligence becomes even greater when filing documents electronically—the materials become much more easily accessible to a larger number of people. (Here comes that pit again!) The United States District Court has extensive instructions for filing redacted documents and sealing documents or a file in its manual for using the electronic filing system. Of course, the manual assumes that you know what information you want to protect, so the important item to know is that there are separate provisions for redacted documents and sealed documents. For sealed items, a motion for protective order must have been filed either before submitting the record or included with the document you seek to file as “sealed.”

(continued on Page 8)

REPUTATION...

(continued from page 3)

misconduct in an order that is unaccompanied by a formal reprimand or monetary penalties constituted a "sanction," it determined that here it did. Therefore, Colianni had standing to appeal. The unsealed order "directly undermine[d]" the attorney's reputation and standing in the community, particularly in the small legal community of the Virgin Islands. Even assuming that the order was not a reprimand, the Court found that it bore a greater resemblance to a reprimand than a mere critical comment. The magistrate judge's conclusion that Colianni violated the Model Rule carried consequences that are similar to those of a formal reprimand: if the order was affirmed, the attorney faced disciplinary action from the Virgin Islands Bar Association.

The Court found that the magistrate judge was clearly erroneous in determining that Colianni had violated the Rule. Although the judge had not specified which of the subsections he believed had been violated, it was clear that since there was no order or law prohibiting the contact, subsection (1) could not be implicated. The juror was unknown to Colianni and he informed her that she was not obligated to speak with him. She spoke to him until she said she was uncomfortable, at which time the conversation ended; subsection (2) was also inapposite. As to subsection (3), the Court found that the interaction between Colianni and the juror could not "possibly constitute harassment" and, because the magistrate judge based his ruling on a clearly erroneous assessment of the evidence, the Court found that the magistrate judge had abused his discretion.

The appeals court also vacated the judge's order as it found that Colianni's due process rights had been violated. As the Court found the order to be equivalent to a reprimand, it found the magistrate judge obliged to follow the Local Rule relating to discipline. He should have referred the matter to the Chief Judge for investigation and sealed the order. He did neither.

Additionally, Colianni's due process rights were found to have been violated as he had no notice of possible sanctions he faced prior to the judge's order that found that he engaged in misconduct. The Court's review of the transcript led it to conclude that Colianni's claim that that he did not realize the gravity of the circumstances and had no reason to believe that he might be subject to disciplinary proceedings, was entirely credible. The appeals court found that Colianni did not have sufficient opportunity to be heard. There was no evidentiary hearing so Colianni did not have the opportunity to present witnesses including those who heard the conversation. The complaining juror was not heard. For all these reasons the order was vacated.

The Court reviewed a number of cases that addressed judicial criticism as an appealable sanction. While chiding remarks will not give rise to standing to appeal, courts have nearly uniformly agreed that an order rising to the level of a reprimand qualifies as an appealable sanction. Only the Seventh Circuit has held otherwise, requiring monetary liability. *Clark Equip. Co. v. Lift Parts Mfg. Co., Inc.*, 972 F.2d 817, 820 (7th Cir.1992). There is less agreement about when a factual finding in an opinion that a lawyer's conduct is improper is itself a sanction giving standing to appeal, or whether the court must explicitly order that the conduct is sanctionable. Nevertheless, it appears that outside the Seventh Circuit, if there is an express finding of a violation of an ethics rule or if the order is expressly identified as a sanction, the order will be appealable. If the ruling is "inordinately injurious to a lawyer's reputation," the ruling is appealable in the Ninth Circuit. *United States v. Talao*, 222 F.3rd 1133 (2000). The Tenth Circuit held that referring a lawyer's alleged misconduct to a state disciplinary agency is not appealable (*Teaford v. Ford Motor Co.*, 338 F.3d 1179 (2003)), but the Second Circuit ruled that it is. *In re Goldstein*, 430 F.3d 106 (2005).

Regardless of a particular Court's determination of the right to appeal an ostensible sanction, especially arising out of post-trial communication with jurors, it is obviously best to have no need to appeal because no adverse comment about one's conduct has been made. The lawyer's awareness of Local Rules, customs and, most importantly, the ethics rules of the jurisdiction in which he or she practices, is the key to avoiding the fight that need not be fought.

PRIVATE INFO...

(continued from page 7)

The Court of Appeals for the Fourth Circuit provides a useful set of details with its electronic filing instructions, based on Appellate Local Rule 25. The Fourth Circuit recognizes the continuation of sealed records, if they were sealed in the trial court. In a separate Administrative Order, the Fourth Circuit specifies information that attorneys must redact, and what may be left unredacted: redact social security numbers (include only the last 4 digits if this is needed); redact names of minor children—only include initials; redact dates of birth—only include the year of birth; redact financial account numbers—only include the last 4 digits of the account and only if it is relevant to the case; and redact home addresses—in criminal cases, if needed, only include the city and state. The Administrative Order also notes a few exemptions that

(continued on Page 9)

RECORDS RETENTION...

(continued from page 5)

A records retention schedule gives the organization permission to destroy information, which is no longer required for the firm's operations or subject to legal or regulatory requirements. The courts have consistently upheld the destruction of information pursuant to records retention schedules when not needed for legal or regulatory reasons.⁵

An organization cannot adopt just any records retention policy; the policy must have some reasonable relationship to its business goals.⁶ When that demand letter comes in, or the complaint is filed, it is too late to "get religion" and suddenly adopt a records retention policy with retention periods, which just happen to end when the contested events begin.

Furthermore, a records retention policy is of no value when it is not followed. In *Murphy Oil USA v. Fluor Daniel, Inc.*, 2002 U.S. Dist. LEXIS 3196 (E.D. La. Feb. 19, 2002), the defendant retained backup tapes for 14 months, despite a 45 day recycling policy. The court required defendant to produce those tapes, giving it the option of having plaintiff's counsel review the tapes, or incurring the cost of prior review itself. The court observed that had defendant followed its policy, "the e-mail issue would be moot."

The importance of information management policies in connection with an entity's archiving policies was perhaps most graphically demonstrated in a case where financier Ronald Perelman sued Morgan Stanley in connection with the purchase by Sunbeam of Perelman's camping business, the Coleman Company. The plaintiff sought Morgan Stanley's emails in connection with the transaction. The problem for Morgan Stanley was that it kept finding new sources of emails after certifying on several occasions that it had found everything. A failure to produce email attachments

was discovered only after plaintiffs had hired a third-party vendor to double check Morgan Stanley's compliance with a previous court order. In addition, Morgan Stanley had continued to overwrite emails in violation of an SEC regulation requiring emails to be kept in a readily accessible format for two years.⁷

The net result of these and similar discovery failures ultimately led to the granting of plaintiff's motion for default judgment. In the subsequent trial on damages, the jury entered a \$1.58 billion verdict (although reversed on other grounds on appeal).

A records retention policy brings many benefits to the organization in electronic discovery and other contexts. Had Morgan Stanley implemented and followed a records retention schedule, it would have followed the two year retention period for email, and would have been able to produce the backup tapes when requested, as it would have known where they were kept. It would not have taken the efforts of a third-party vendor to make sure that it was complying with its discovery obligations.

Implementation of a records retention schedule forces an organization to examine why it creates information and to justify why it retains it. The information is organized so it can be readily accessed – a benefit not only in the discovery context, but in everyday operations. The attachment of the duty to preserve is of course another key reason to retain information – but if the information loses its value before the duty attaches, it can be legitimately destroyed, thus reducing the overall volume of information subject to discovery requests.

PRIVATE INFO...

(continued from page 9)

permit password protection so that the parties and their attorneys may access the documents, but not the general public (e.g. immigration, social security cases). (See Fourth Circuit Administrative Order 08-01, Rule 12)

In an age of ever-advancing technology, it becomes increasingly difficult to protect private information. Overlooking the information contained in court records should not contribute to undue disclosure of confidential information. Check out the Rules and trust no one!

⁵ See, e.g. *Andersen v. United States*, 544 U.S. 696, 704 (2005) ("It is, of course, not wrongful for a manager to instruct his employees to comply with a valid document retention policy under ordinary circumstances."); *Petcou v. C.H. Robinson Worldwide, Inc.*, 2008 WL 542684 (N.D. Ga. Feb. 25, 2008) ("It does not appear that Defendant acted in bad faith in following its established policy for retention and destruction of e-mails.")

⁶ See Hon. Paul W. Grimm, Michael D. Berman, Conor R. Crowley & Leslie Wharton, "Proportionality in the Post-Hoc Analysis of Pre-Litigation Preservation Decisions," 37 U. Balt. L. Rev. 381, 388, n 27 (citing cases discussing reasonableness of document retention policies).

⁷ *Coleman (Parent) Holdings, Inc. v. Morgan Stanley & Co., Inc.*, Order on Coleman (Parent) Holdings, Inc's Motion for Adverse Inference Instruction due to Morgan Stanley's Destruction of E-mails and Morgan Stanley's Noncompliance with the Court's April 16, 2005 Agreed Order, and Motion for Additional Relief and Order on Plaintiff's Motion to Compel Further Discovery Regarding Morgan Stanley's Destruction and Non-Production of Emails, Case No. 502003CA005045XXOCAI (Fla. Cir. Ct. Mar. 1, 2005).

MESSAGE...

(continued from page 2)

November 16 looks like the date for a program co-sponsored with the newly created Construction Law Section on "Litigating Government Contract Disputes with the State of Maryland." The program will include a panel of experienced practitioners from within and outside of government, so it should be truly worthwhile.

In February we will present a short evening program on attorney trust/escrow accounts in Columbia, Maryland, and in April will host a dinner with Circuit Court judges, giving our members an opportunity to meet and speak informally with Circuit Court judges, and the judges an opportunity to remind practitioners of their insights and pet topics of discussion.

There are new rules under discussion in the Rules Committee all the time, with expected rules any day on ADR and foreclosure, so keep your eyes peeled for that. One good way to stay current is to sign up for the section List Serv. The List Serv is well controlled, so that infractions of etiquette are rare. It is intended as a way for practitioners to request advice or suggestions, and for others to share information that would be useful to fellow litigators. If you are a member, you may sign up on the MSBA website.

The Section Council meets monthly and welcomes suggestions for programs or other projects that would benefit our members. This newsletter – The Litigator – is another of our efforts to provide useful information. Thanks to all on the Section Council and our various committees for all the hard work that goes into this product and our programs.

I was reminded recently of the high level of collegiality that exists among the members of the Litigation Section in Maryland. Maryland is a small state, so those of us who appear in its courts tend to get to know each other and learn early on how important it is to treat each other, court personnel, parties, witnesses and jurors with courtesy and respect. That level of professionalism permeates our section to the extent that its absence, when it occurs, is noticeable as an exception to the general rule. It proves that worthy adversaries with diametrically opposed positions can debate, disagree and come to a resolution without personal animosity and disrespect. Let's try to spread that idea to those who have not yet learned it, or somehow forgotten it!

[www.msba.org/sec_comm/
sections/litigation/index.htm](http://www.msba.org/sec_comm/sections/litigation/index.htm)

JUROR MISCONDUCT...

(continued from page 4)

A recent case in England was the first prosecution of a juror for contempt of court where misconduct involved improper internet use. The case tested the ramifications arising from such misconduct where it was discovered that, despite the judge's admonition against communicating about the case via the internet, a juror had been funneling information about jury deliberations to a defendant who had been dismissed from the case earlier while it had continued as to her former co-defendants; the juror asserted that she was unaware of the identity of the individual with whom she was communicating. The juror also admitted to conducting internet research on the dismissed defendant's boyfriend who was still a defendant in the case. Ultimately, the case, which had previously been delayed twice before, had to be re-tried. The juror and former defendant plead guilty and were sentenced to imprisonment, including an eight month sentence for the juror.

Maryland appellate courts have required new trials whenever juror misconduct suggests "even the hint of possible bias or prejudice." *Wardlaw v. State*, 185 Md. App. 440, 451 (2009). This is the rule even when the case appears to be otherwise error-free and the trial judge made findings that the misconduct was not material to the fairness of the verdict(s) reached. This is a sobering and expensive thought in light of the rise in juror misconduct and the ease of accessibility to outside means of research.

In *Wardlaw*, the appellant was tried before a jury on various charges of sexual offenses deviance, including two counts of incest with his 17 year old daughter. He was convicted of 3 counts of assault in the second degree, the jury deadlocked on the charges of sexual child abuse and incest, and a mistrial was declared on those counts. One of the jurors researched ODD (Oppositional Defiant Disorder) after testimony from appellant's daughter's therapeutic behavioral specialist indicated that appellant's daughter, the alleged victim, was diagnosed with ODD without providing any explanation as to what ODD is. The juror disclosed to his fellow jurors that according to his Internet research, lying was a characteristic of ODD.

Upon discovering the juror's conduct, the trial court refused to declare a mistrial; however, the Court of Special Appeals characterized the juror's research as "egregious misconduct". The appellate court said that upon discovery of the juror's misconduct, the jury should have been voir-dired to determine whether it could still render an impartial verdict based on the evidence presented at trial. Since the jurors were not polled, the court failed to rebut the presumption of prejudice which attaches as a result of egregious misconduct by a juror. The

(continued on Page 11)

JUROR MISCONDUCT...

(continued from page 10)

Court of Special Appeals held that the trial court's failure to voir dire the entire jury was reversible error.

Allan Jake Clark v. State of Maryland, No. 0953/08 (Md. Ct. Special App. Dec. 3, 2009) is an unreported case having bearing on this issue. In this murder case, a bailiff discovered printouts from Wikipedia articles in the jury room. The printouts were entries on "livor mortis" and "algor mortis", and they discussed how time and place of death may be established by analyzing how blood settles in a body; which was an issue in the case. The trial court consulted the jurors and concluded that only one juror had conducted outside research and viewed the articles. The jury convicted Clark of first-degree murder, and the trial judge denied a defense motion for a mistrial. The appellate court reversed in a unanimous decision, holding that an "adverse influence on a single juror compromises the impartiality of the entire jury panel" Judge Moylan, writing for the panel of the Court of Special Appeals which overturned the decision (quoted in *The Baltimore Sun*).

In the 2009 Sheila Dixon trial, five jurors became Facebook friends during the course of the trial and allegedly discussed the case. After conviction, Mayor Dixon filed a motion to set aside the verdict, one of her arguments being that the "Facebook Five's" activities constituted jury misconduct under Maryland law. However, the issue became moot when the Mayor entered into a plea agreement that resolved all of her outstanding legal issues.

A recent Texas case showed the pitfalls of ill-advised Facebook "friend" requests where a juror attempted to "friend" the defendant in a tort action; the defendant alerted her attorneys, who alerted the court. The juror, initially claiming he thought he was sending his request to another person with the same name as the defendant, was removed from the jury immediately and pled guilty to contempt and was sentenced to two days community service. Unfortunately for the juror, Texas recently updated its standard judge's instructions to jurors to include admonitions that social media are as off-limits as personal contact with participants in a case. Several other states have similarly updated their standard juror instructions, thus potentially exposing offending jurors to contempt penalties as well.

Perhaps the standards mandating mistrial or reversal should be reviewed considering the modern realities facing jurors and trial judges. The factors used by the Eighth Circuit in *United States v. Swinton*, 75 F.3d 374, 382 (1996) are:

1. Whether the extrinsic evidence was received by the jury and the manner in which it was received;

2. Whether it was available to the jury for a lengthy period of time
3. Whether it was discussed and considered extensively by the jury
4. Whether it was introduced before a verdict was reached, and if so at what point during the deliberations was it introduced; and
5. Whether it was reasonably likely to affect the verdict, considering the strength of the plaintiff's case and whether it outweighed any possible prejudice caused by the extrinsic evidence.

Although sequestration of the jury might be a possibility, it is expensive, and an even bigger imposition on jurors' lives than jury duty itself. Since it is generally only done during deliberations, the jury would have the opportunity to conduct outside research prior thereto, which renders sequestration essentially ineffective. Sequestration can still provide a strong solution in conjunction with anonymous juries for high profile cases; insulating jurors from people attempting to contact them electronically to influence them.

Prospective jurors should be notified in the first information they receive from the courts prior to reporting to jury duty that they will be limited in accessing online information while serving on the jury. During the jury selection process, a judge may ask potential jurors whether and with what frequency they use the Internet and social media sites in order to ascertain the potential likelihood of the juror conducting outside research. The judge should ask questions that address jurors' actual internet use, and ask whether the jurors would be able to abide by the necessary restrictions during trial. A lengthy or high-profile trial calls for more detailed and circumspect questioning.

In every jury trial, instructions should be given that specifically reference social media websites such as Wikipedia, Facebook and MySpace when a judge is informing the jurors of the rules regarding outside research and contacts. Judges should tell the jury more than just that outside consideration is unfair; they should say WHY it's unfair. Jurors should be reminded of this instruction, most importantly, when the jury separates at the end of the day.

Some believe that the use of such specific instructions will serve only to increase the number of violations by suggesting actions that would not otherwise have occurred to jurors. However, the growing body of case law involving jurors' improper use of technology suggests that use of specific in-

(continued on Page 12)

JUROR MISCONDUCT...

(continued from page 11)

structions, in conjunction with a justification for prohibiting such conduct will at least reduce the number of unintentional violations, and may help to deter jurors who might not understand the harm that can flow from their seemingly harmless actions. The possibility of contempt should also be discussed. MSBA's Maryland Pattern Jury Instruction Committee is currently drafting an instruction on the topic for dissemination to bench and bar which will likely be completed in late 2011.

A potentially positive effect of the potential for juror misconduct is that it can encourage attorneys and judges to fully present information to jurors; it discourages placing information before jurors in an incomplete manner which will tempt conscientious jurors to conduct outside research to complete the puzzle, such as in the *Wardlaw* case. Now, more than ever, counsel should prepare cases to answer obvious (and some not so obvious) questions that will arise.

Further methods to prevent juror misconduct include drafting a written agreement to be signed by each juror which acknowledges the court's instructions. The formality of a written agreement may serve to impress upon jurors the gravity of the court's instructions.

To prevent juror temptation, courthouses offering free WiFi access, could require a password to access WiFi, block certain websites such as Facebook or Wikipedia, or have the bailiff take custody of jurors' electronic devices, not to be returned during breaks; and removing all electronic devices from the jurors' possession during deliberations.

Although removing temptation from the jurors while they are in the courtroom does not mean a juror will not go home and conduct research. Taking precautions during the day can emphasize the importance of refraining from conducting research at home.

Providing opportunities for jurors to bring any question or issue that is of major concern to them to the attention of the court and counsel has been a procedure which has been allowed in other state and federal courts. See *SEC v. Koenig*, 557 F.3d 736, (7th Cir. Ill. 2009).

Many judges are unlikely to impose sanctions upon jurors even when "misconduct" has occurred. The reluctance to punish jurors may have quite a bit to do with the fact that response rates to jury summonses are already barely adequate.

Some believe that the use of specific instructions will serve only to increase the number of violations by suggesting actions that would not otherwise have occurred to jurors.

However, it is apparent that the *status quo* must be modified. In so modifying, we should show respect for jurors in explaining the 'why' of the rules of procedure: Wikipedia entries are not subject cross-examination; evidence must be authenticated on the record; insurance cannot be considered etc. The jury system has withstood many changes; from minorities and women being added to the jury pool, damaging public attention from various media sources like newspapers, radio, and television, and the requirement of the jury to take into account complicated or technological issues. This is yet another to be resolved.

UPCOMING EVENTS

- **OCTOBER 6, 2011. Bar Association of Baltimore City.** Breakfast with the Bench. "Practical, Mundane – and Effective – Planning for Civil Trials In Circuit Court: Judge Pam White's 20 Favorite Tips in 30 Minutes." 8:00 A.M. – 9:00 A.M. Whiteford, Taylor & Preston, L.L.P. 7 St. Paul Street, 19th Floor, Baltimore, MD 21202.
- **OCTOBER 10, 2011. Litigation Section.** The Direct and Cross-Examination of an Expert Witness in Circuit Court: A Litigation Skills Workshop for Civil Cases. 8:30 A.M. – 1:30 P.M. District Court for Baltimore City, 5800 Wabash Avenue, Baltimore, MD 21215.
- **OCTOBER 27, 2011. Prince George's County Bar Association and Appellate Practice Committee of Litigation Section.** Civil and Family Law Post-Trial Motions Practice: What to Know in Effective Post-Trial Filings at Trial, Standards of Review, Interlocutory Matters, Tolling Requirements, Preservation, and Timeliness for Appeals. 6:00 P.M. - 9:00 P.M. University of Maryland Golf Course, Golf Course Road (Off University Blvd. & Stadium Dr.) (GPS Address-100 Golf Course Clubhouse, College Park).
- **NOVEMBER 3, 2011. Section Council Meeting.** Location TBD.
- **NOVEMBER 16, 2011. Litigation and Construction Law Sections.** "Litigating Government Contract Disputes with the State of Maryland." 6:00 P.M. Sheraton Columbia Town Center Hotel. 10207 Wincopin Circle, Columbia, MD 21044.