FEDERAL PRACTICE SECTION NEWSLETTER

CONNECTICUT BAR ASSOCIATION SUMMER 2002

Members of Federal Bench Participate in Round Table Discussion with Young Lawyers

By: Anthony R. Minchella
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An event that no young lawyer in this district should have missed (but which, sadly, many did) took place on April 24, 2002. That evening, the Federal Practice Committee of the Young Lawyers Section of the Connecticut Bar Association (wow, that's a mouthful), sponsored the Third Annual Federal Judges Roundtable at Quinnipiac University Law School.

Judges Dorsey and Hall, and Magistrate Judges Fitzsimmons, Martinez and Garfinkel each spent over two hours (in a very informal setting) dining with young lawyers and discussing over coffee and desert issues ranging from tips on effective discovery practice to war stories that exemplify what to do and not to do when practicing in this district. The judges and magistrate judges answered questions from attendees about proper presentation in their courts, and even asked the attendees for their opinions on certain issues, for example, with the recent rule change adopting the time limit for depositions. It was a rare opportunity to exchange ideas and observations with these esteemed members of our federal bench. While the evening provided many important tips (some obvious but many not) on effective federal practice in this district, an important theme for young lawyers dominated the event: the judges and magistrate judges pay attention to how you advocate and present yourself, to everyone in the courtroom. Therefore, be courteous, be professional, and be civil.

A final but most important note for young lawyers seeking federal practice experience: **PLEASE CONSIDER ACCEPTING A PRO BONO CIVIL CASE**. Cynthia Earle, Staff Attorney, administers the district's pro bono civil assignment system, and many pro se parties

(Please see page 8, Round Table Discussion)

BOOK REVIEW: Empire Falls by Richard Russo

By: Deborah S. Russo
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If you do most of your summer reading on the beach or on an airplane, you may be tempted to pass up Richard Russo's latest book, Empire Falls. After all, books that win the Pulitzer Prize for Literature may be worthy reads, but generally they just doesn't sound all that entertaining. But like all of Mr. Russo's books, Empire Falls is a fascinating story that will capture you from the very first page.

Empire Falls is a small, down-on-its-heels town in upstate New York. The town's very name suggests its heritage. Once a prosperous manufacturing town, the town faces a bleak present and a bleaker future. But despite its economic troubles, the town's natives refuse to give up on it. Whatever the evidence may be to the contrary, the residents of Empire Falls are always ready to believe that the town is on its way back. Better days are surely ahead.

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Notice Pleading Versus Fact Pleading – Which is Better?

By: James T. Shearin
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Under Rule 8 of the Federal Rules of Civil Procedure, a party filing a claim in federal court must simply prepare a short and plain statement of its causes of action. By contrast, a fact pleading in state court requires substantially more detail; theoretically, a plaintiff is suppose to set forth the requisite facts that correspond to the elements of each claim. Which is better? The answer, in my opinion, is somewhere in the middle.

In many respects, the problem with federal pleadings is that short means "really short" and plain means "really plain." In some situations, absurdly pled complaints which provide no notice whatsoever have been sustained in the face of a challenge solely because of the view that a fact pleading is not necessary. Motions for more definite statement are unheard of and, even when filed, are rarely granted. Somewhere along the way, we adopted the notion that we could take care of many of the detail issues through written discovery. The problem, however, is that under modern discovery there is a presumption of no more than twenty-five interrogatories (including subparts) and often the written discovery doesn't come until after the responsive pleading is due. So, a defendant is caught either in the quandary of filing an answer that has no teeth or a motion that cannot be granted because the noticed pleading, the complaint, leaves open too many doors.

Moreover, changing the battle field from the pleading stage to the discovery stage can be a frustrating and expensive experience. If a complaint is vague, imagine what kind of interrogatory answer you get back when you ask the plaintiff to specify the facts which support paragraph 7 of the complaint. If the response is less than satisfactory, does the Rule 37 motion work? Usually, the only real means of developing the detail is through a series of expensive depositions.

There are exceptions to notice pleading, all of which are covered under Rule 9(b). The most well known of these is pleading fraud . The Second Circuit has said that the reason why greater specificity is required with fraud claims is because the defendant should not be subject to such a scurrilous allegation if, in fact, there is not sufficient detail to support such a claim. I guess three decades ago, that theory may have worked, but in today's litigious society is it any worse to be called fraudulent then it is to be called someone who violates another's civil rights or a sexual harasser. It seems to me that the same reasons why we require specificity in Rule 9(b) claims is the same reason why it should be required in all federal complaints. Without it, needless time, money and effort is spent figuring out what it is the plaintiff really had in mind when it instituted the suit.

Fact pleading is not perfect. There is no reason to exalt form over substance, and sometimes a Request to Revise can be expensive in and of itself. All in all, however, it should not be too much to ask an employee to allege each and every basis for why she claims the employer violated one or more federal statutes governing her employment, just like we ask those involved in an accident to explain each and every way the defendant was negligent.

By requiring just a little more detail, we will make the discovery process more focused and less expensive, and undoubtedly make the litigation process more meaningful. □

The Advocate Witness Rule and Imputed Disqualification of Law Firms: District Court Local Rule 33 Poses Challenges for Connecticut Practitioners

By: Robert P. Dolian and Claire E. Ryan
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I. Introduction

A long time client, a local company, has a multi-million dollar dispute with an Ohio company. Your corporate partner has worked with this client for years and was the chief negotiator of the contract that is at the center of the dispute. You personally have successfully represented the client in disputes on several occasions. You understand the client's business and over the years have worked with the CEO and several members of top management. The CEO wants you to be trial counsel.

Sounds like a great case, right? It would be except for one thing: Local District Court Rule 33. With limited exceptions, that rule