Articles »

The Implications of Campbell-Ewald Co. v. Gomez for Consumers and Class Action Lawsuits
By André M. Board
A small victory for consumers and a means for the financially powerful to avoid putative class actions.

To Kill (Or Imprison for Life) a Juvenile: The Proper Exercise of Judicial Discretion for Sentencing a Juvenile Offender
By André M. Board
The implications of the decision in United States v. Under Seal solidifying the constitutional protections against "cruel and unusual punishments."

When It Comes to Being Out at Work, Some Things Haven't Budged in 30 Years
By William Weinberger
Half of the states allow people to be fired for being LGBT. That means millions of us still live in fear of workplace discrimination.

What's Proportionality Got to Do with It? An Update on the Revised Federal Discovery Rules
By Robert K. Dixon
Recent cases show that courts are requiring litigators to be more precise in their discovery requests.

Practice Points »

Vetting Your Expert Witness
By Florence Johnson
Knowing who to choose and why takes practice.
What You Should Know about the Taxation of Costs
By Florence M. Johnson
What the FRCP and U.S. Code Title 28 say on the matter.

6 Tips for Conducting a Deposition Fearlessly
By Sathima H. Jones
Depos can fill a young attorney with dread. But remember: They get easier with practice.
The Implications of *Campbell-Ewald Co. v. Gomez* for Consumers and Class Action Lawsuits

*By André M. Board – May 15, 2017*

Consumer protection laws provide legal recourse for individuals who are harmed by abusive business practices or defective products. See Consumer Rights—Consumer Protection Law, HG.org. These laws hold sellers of goods and services accountable when they exploit a consumer's lack of knowledge or bargaining power. Manufacturers are also held responsible for defective products that injure consumers. A class of consumers seeking compensation for the harm suffered because of abusive business practices or defective products presents a serious litigation hazard to even the largest corporations due to the potential award of substantial monetary damages. However, a corporation can ensure the matter is not presented before a court by settling with the named plaintiff. Settlement offers are a defendant's countermeasure to litigation, sizable monetary judgments, or punitive damages.

Cited: *Campbell-Ewald Co. v. Gomez*, 136 S. Ct. 663 (2016), examined whether an unaccepted offer to satisfy the named plaintiff's individual claim is sufficient to moot a putative class action claim. *Gomez* considers a plaintiff's ability to reject a settlement offer or offer of judgment and maintain a case and controversy required by Article III. The Court was split on the application of Article III and Federal Rule 68 regarding the lower courts' ability to provide relief after a settlement offer has been made to the plaintiff. The Court held that the class representative's rejection of the settlement offer did not moot the plaintiff's individual or putative class action claims. The Court opined that a rejected settlement offer retained the initial interest of both parties in the litigation. The plaintiff did not choose to obtain any relief from the defendant's offer and is therefore still entitled to relief from the court. This case provides procedural protection for consumers seeking to pursue individual and putative class actions. However, it also provides powerful corporations alternative means to force individuals into settlements and avoid putative class actions. This will be detrimental to consumers seeking legal redress for harm caused by abusive business practices or poorly made goods.

This case note discusses how *Gomez* protects a plaintiff's ability to bring independent and putative class action claims. Second, it discusses the future implications *Gomez* will have on class action claims. Finally, this case note briefly discusses the implications *Gomez* will have on Fourth Circuit jurisprudence and consumers within those markets.

The Case

In this matter, the consumer, Jose Gomez, asserted personal and punitive class action claims...
against Campbell-Ewald Company for violations under the Telephone Consumer Protection Act (TCPA). The TCPA "prohibits any person, absent prior express consent of a telephone-call recipient, from 'mak[ing] any call . . . using any automatic dialing system . . . to any telephone number assigned to a paging service [or] cellular telephone service.'" A text message to a cellular telephone qualifies as a "call."

The U.S. Navy hired Campbell, a nationwide advertising and marketing communication agency, to facilitate a multimedia recruiting campaign that involved sending text messages to young adults, encouraging them to learn more about the Navy. The Navy informed Campbell that the messages should be sent only to individuals who "opted in" to receive marketing solicitations regarding Navy service. Gomez, who did not consent, received one of these messages, which thereby violated the TCPA.

Gomez filed a class action suit in the U.S. District Court for the Central District of California on behalf of a nationwide class of individuals who had also received messages without consent. He sought treble statutory damages, costs, and attorney fees, and to enjoin Campbell from sending unsolicited messages. Prior to the deadline for Gomez to file a motion for class certification, Campbell proposed to settle Gomez's individual claim and filed an offer of judgment pursuant to Federal Rule of Civil Procedure 68. Campbell offered to pay Gomez's costs, excluding attorney fees, and $1,503 per message Gomez could prove he received. This settlement offer satisfied his personal treble damages claim.

Campbell argued that no Article III case and controversy remained because its offer mooted Gomez's individual claim by providing him with complete relief. Furthermore, Campbell asserted Gomez had not moved for class certification before his claim became moot, which consequently mooted the putative class action claim. The district court denied Campbell's motion because Gomez's filing for certification would relate back to the date he filed the complaint. Campbell appealed.

The Court of Appeals for the Ninth Circuit agreed that Gomez's case remained live because an unaccepted offer, even if it would make a plaintiff whole, is insufficient to render that claim moot. The court also stated that an unaccepted offer of judgment made before a motion for class certification is filed did not moot a class action lawsuit.

The U.S. Supreme Court granted certiorari to resolve the incongruity concerning whether an unaccepted offer moots a plaintiff's claim, thus depriving federal courts of jurisdiction. The Court explained that under principles of contract law, Campbell's settlement offer and Rule 68 offer of judgment, once rejected, had no continued efficacy. The parties retained the same stake in the litigation they had at the outset and remained adverse because Gomez rejected the settlement offer and Campbell denied. The Court held that an unaccepted settlement offer or...
offer of judgment does not moot a plaintiff's case and that the district court retained jurisdiction to adjudicate the complaint.

Background

Article III of the U.S. Constitution and Federal Rule of Civil Procedure 68 provide the legal basis for the Gomez decision. Article III limits federal courts' jurisdiction to "cases" and "controversies." The Court has interpreted this requirement to demand that an actual controversy be present throughout all stages of review, not merely when the complaint is filed. A case becomes moot when it is impossible for a court to grant relief to the petitioner. To avoid mootness, the parties must have a concrete interest, however small, in the litigation's outcome. Gomez held that Rule 68 did not render a case moot when an offer of judgment is rejected.

Rule 68 states a defendant "may serve on an opposing party an offer to allow judgment on specified terms." An unaccepted offer is considered withdrawn but does not preclude a later offer. The rule contains a built-in sanction: "If the [ultimate] judgment . . . is not more favorable than the unaccepted offer, the offeree must pay the costs incurred after the offer was made." Gomez used prior Court decisions regarding whether an unaccepted offer of judgment affects a court's ability to provide relief under Article III.

Genesis HealthCare Corp. v. Symczyk, 133 S. Ct. 1523 (2013), limits the possibility of bringing a class action lawsuit. Symczyk held that an unaccepted settlement offer that satisfies the claim moots the individual and the coinciding collective action. In dissent, Justice Kagan opined that the operative issue was whether the individual's claim become moot before the court could consider the merits of the collective action. She stated, "An unaccepted settlement offer—like any unaccepted contract offer—is a legal nullity, with no operative effect." She continued, "Symczyk's individual stake in the lawsuit thus remained what it had always been, [as well as] the court's capacity to grant her relief" in deciding if a rejected settlement offer is moot. However, the Court has also decided that mootness is predicated on the ability of the defendant to provide the proposed relief. In California v. San Pablo & Tulare R.R. Co., 149 U.S. 308 (1893), the Court held:

Any obligation of the defendant to pay . . . the sums sued for in this case, together with interest, penalties, and costs, has been extinguished by the offer to pay all these sums, and the deposit of the money in a bank . . . which have the same effect as actual payment and receipt of the money.

The Court reasoned that if the money was deposited in an account in the plaintiff's name, the Court had no duty to decide the plaintiff's rights because they were no longer at issue. Although San Pablo and Symczyk address when a settlement offer or payment of the claim moots an individual's claim, these holdings will also affect a class action claim within the same complaint.
A plaintiff's ability to maintain a class action, after his or her individual claims is mooted, is predicated on whether the class has been certified or erroneously denied certification. The Court in *Sosna v. Iowa*, 419 U.S. 393 (1975), explained that "[w]hen the District Court certifie[s] the propriety of the class action, the class . . . acquire[s] a legal status separate from the interest asserted by [the named plaintiff]. . . . [T]his factor significantly affects the mootness determination." *U.S. Parole Commission v. Geraghty*, 445 U.S. 388 (1980), expanded the *Sosna* limitations by allowing a named plaintiff to appeal the denial of certification while maintaining the class action. Prior to *Gomez*, the Fourth Circuit held that a claim was moot when a plaintiff received the relief sought. Accordingly, an unaccepted settlement offer of complete relief would moot the claim. Complete relief is defined as a settlement offer that includes no conditions, imposes no confidentiality requirement, and includes an offer for entry of judgment.

*Gomez* provides clarity on an issue that has been incorrectly applied by many courts. However, it did not discuss whether a plaintiff's claims would be moot if a defendant deposited the full amount of the plaintiff's claim into an account payable in the plaintiff's name. In addition, it is undecided if a deposited settlement offer could also moot a class action claim. These omissions provide an opportunity for larger corporations to skillfully avoid class action lawsuits. Although *Gomez* provides protection to a plaintiff seeking judicial relief, it fails to consider the future implications of providing consumer protection from corporate abuse and neglect.

**Analysis**

*Gomez and the benefits to consumers.* *Gomez* represents a small victory for consumers that are seeking legal redress for harm caused by abusive business practices or poorly made goods. The policy behind Rule 68 is to encourage settlements and avoid litigation, but it can be used by defendants to avoid collective actions. The rule, in some instances, has allowed defendants to "pick off" the named plaintiffs to "frustrate the goals" of punitive class action lawsuits. *Gomez* limits the possibility of a defendant abusing its power by permitting a plaintiff to reject a settlement that fully satisfies the plaintiff's individual claim. Individual and class action claims can be filed without being mooted after a settlement offer is rejected. The case remains a case and controversy during the class-certification process and the class representative will be afforded a fair opportunity to demonstrate that certification is warranted. *Gomez* was the cure to *Symczyk* and the forced settlements it encouraged. Although plaintiffs can reject undesired settlement offers and maintain Article III requirements, *Gomez* allows for alternatives that could produce a similar mooting effect the holding sought to disallow.

*The effects of Gomez on class actions.* In *Gomez*, Justice Ginsburg expressly stated that the Court would not consider whether the holding would have been different if a
defendant deposited the full amount of the claim in an account payable to the plaintiff. *Gomez*, in combination with *San Pablo*, establishes the possibility of mootness by the defendant’s ability to pay. This will have tremendous implications for pending class actions. Corporations that have substantial financial resources will benefit most from this alternative to force settlement. *Gomez* has now invited a negligent, abusive corporation to eliminate a possible class action suit by paying off the named plaintiff. The Court has established that an offer to settle is not sufficient, but if you allocate and provide the relief, the entire claim may be dismissed.

This will essentially eliminate the strength or effectiveness of class action suits. A defendant can evade accountability by allocating funds in an account for an individual’s claim, thereby rendering a putative class action moot. A powerful defendant can evade a judicial determination of whether the plaintiff or those similarly situated are entitled to compensatory relief or punitive damages. The Trump administration and Republican majority in the House of Representatives and Senate have demonstrated their commitment to protecting and promoting the interests of big businesses. Accordingly, with the likelihood that a conservative justice would be appointed, Justice Roberts’s dissent in *Gomez* foreshadows how a conservative Supreme Court will rule on this issue. Although *Gomez* enables courts to ensure that protections are provided to individual and putative class action claims, defendants are provided a viable alternative to avoid the case.

**The effects of Gomez on the Fourth Circuit.** Since the *Gomez* decision, the Fourth Circuit has embraced the new protections afforded to plaintiffs who do not accept a defendant's settlement offer. However, as the U.S. District Court for the District of South Carolina properly stated in *Career Counseling, Inc. v. Amsterdam Printing & Litho, Inc.*, No. 3:15-cv-05061 (2016),

> [s]ince *Campbell-Ewald*, the Court of Appeals for the Fourth Circuit has not addressed the related, but separate, issue of whether a defendant can moot a putative Rule 23 class action by picking off a named plaintiff’s individual claim with a judgment offer for which funds have been tendered, or with a judgment offer that a named plaintiff accepts.

*Gomez* provides a financially powerful defendant an opportunity to dictate whether a plaintiff and his or her claims will be heard before a court. The Fourth Circuit would have benefited from the guidance of the Court on these issues. However, these matters will be contested in this circuit by consumers who have suffered similar harm by a defendant and are seeking legal redress. Corporations should not be burdened by meritless claims; however, they should not be permitted to dictate whether a plaintiff
will be allowed to bring individual claims or the claims of a class of individuals before a court. The question should not be whether a large corporation allocated funds to satisfy an individual claim. A court should consider the gravity of the harm and the implications for those who were similarly affected by the harm caused.

**Conclusion**

*Gomez* correctly overruled *Symczyk* by determining that a rejected offer to satisfy an individual claim does not moot the action. However, *Gomez* creates alternatives that promote forced settlements in favor of a company seeking to avoid the scales of justice. A powerful defendant should not be allowed to avoid litigation when the harm is so egregious that punitive damages should be considered. This issue will lead to abuse by large corporations and will deprive consumers of their legal right to be heard by a court.

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To Kill (Or Imprison for Life) a Juvenile: The Proper Exercise of Judicial Discretion for Sentencing a Juvenile Offender

By André M. Board – May 15, 2017

The killing of a mockingbird, in the Pulitzer Prize–winning novel *To Kill a Mockingbird*, is emblematic of the destruction of innocence. The songbird, in the literary piece, embodied a purity that brought harm to no one and should not be killed. A child or adolescent reflects that same innocence, and that wholesomeness invokes an earnest protection from harm. However, what if that mockingbird or adolescent harms another? Does the law seek to shelter the now "juvenile" from the retributive hand of justice? *United States v. Under Seal*, 819 F.3d 715 (4th Cir. 2016), engages this matter from the purview of legislative intent and constitutional jurisprudence.

The severability of unconstitutional provisions within statutes to punish juvenile criminal acts was an issue of first impression for the court. Previous Supreme Court decisions prohibited juveniles from being sentenced to death or to mandatory life without parole. In *Under Seal*, the government sought to prosecute a juvenile for murder in aid of racketeering under 18 U.S.C. § 1959(a)(1), by severing or excising the statute to permit punishment under an inapplicable crime. The appellate court held that it is impermissible to use excision to combine the penalty provisions for two distinct criminal acts. The court found the government's proposal to amount to an impermissible judicial rewriting of the statute's murder penalty provision. Courts are provided the discretion to interpret legislative intent when determining the applicability of the law to a set of facts, but courts cannot rule in a manner that would alter the purpose or punishment set forth by the statute.

This case note discusses the effect the *Under Seal* decision will have on subsequent cases involving criminal acts charged against a juvenile. Second, it discusses how the decision in *Under Seal* limits the potential abuse of the principle of severability to prosecute crimes generally. Finally, the note briefly discusses the implications retroactivity will have on previous convictions.

The Case

In this matter, the government sought to transfer a juvenile defendant for prosecution as an adult. The defendant was almost 18 years old when he allegedly participated in a gang-related murder. The government sought to prosecute the defendant for murder in aid of racketeering under 18 U.S.C. § 1959(a)(1). This statute provides that whoever, while engaged in
racketeering, murders another individual will be punished by death or life imprisonment; for kidnapping, the punishment is imprisonment for any term of years or life. The government filed a delinquency information and certification against the defendant and moved to transfer him for prosecution as an adult for murder in aid of racketeering. The district court concluded that although factors were present to support the transfer, granting the motion would be unconstitutional. The court explained that it lacked discretion to sentence a defendant to less than the statutory mandatory minimum life sentence for a violation of section 1959(a) for murder. Court precedent held that imposing a mandatory life sentence on a juvenile was constitutionally prohibited. The court rejected this argument and explained that section 1959(a)(1) could be excised to permit a term of years sentence for a juvenile. The court reasoned that it had no authority under section 1959(a)(1) to impose a sentence other than the mandatory minimum provided by the statute required for murder.

The appellate court reviewed not only the district court’s statutory and constitutional rulings related to the denied motion to transfer but also whether the denial was an abuse of discretion. On appeal, the government contended that the impermissible punishments can be excised from section 1959(a)(1), leaving intact language for the separate act of kidnapping in aid of racketeering, which would authorize a term of years up to a discretionary maximum sentence of life. The appellate court held the government's proposal contravened the principles governing both severance and due process. The appellate court found the government's proposal an impermissible judicial rewriting of the statute's murder penalty provision. The court agreed that the defendant cannot be prosecuted for murder in aid of racketeering because his conviction would require the court to impose an unconstitutional sentence against a juvenile. Furthermore, the appellate court affirmed the district court’s denial of the government’s motion to transfer the defendant for prosecution as an adult.

Background
The Juvenile Justice and Delinquency Prevention Act states that a juvenile, between 15 and 18 years old, can be transferred to adult status for prosecution if he or she allegedly committed certain violent crimes, such as murder. A juvenile can be transferred if, after a hearing, a preponderance of the evidence shows that transferring the juvenile is in the interest of justice. In deciding to transfer a juvenile, a court considers the defendant's age, social background, nature of the alleged offense, and the juvenile's prior delinquency record. However, satisfying these conditions does not ensure the transfer, prosecution, or sentencing of a juvenile. The Supreme Court’s interpretation of the U.S. Constitution has provided guidance on the constitutionality of sentencing juveniles.

The Eighth and Fourteenth Amendments of the U.S. Constitution prohibit sentencing a juvenile to the death penalty. The Eighth Amendment, applicable to the states through the Due Process
Clause of the Fourteenth Amendment, prohibits cruel and unusual punishment. The Supreme Court explained how the death penalty would be a disproportionate, cruel and unusual punishment if applied to a juvenile in *Roper v. Simmons*, 543 U.S. 551 (2005). The death penalty's purpose is to promote retribution and deterrence of capital crimes by prospective offenders. *Roper* explained the Court's prior decisions regarding the execution of a juvenile and how such a punishment would "offend civilized standards of decency." Sentencing a juvenile to a death is rare and antiquated; the last juvenile execution, under the age of 16, was in 1948. The Court opined that "[t]he reasons why juveniles are not trusted with the privileges and responsibilities of an adult also explain why their irresponsible conduct is not as morally reprehensible as that of an adult." Furthermore, "a lack of maturity" and an "underdeveloped sense of responsibility found in youth more often than in adults" are acceptable rationales for a juvenile's criminal behavior. Last, the Court explained that juveniles are more vulnerable or susceptible to peer pressure and have less experience and control over their environment, and that their character is not as well formed as that of an adult. The Court concluded that these characteristics substantiated an Eighth Amendment prohibition of the death penalty on a juvenile.

The Eighth Amendment also prohibits sentencing juveniles found guilty of murder to mandatory life without parole. *Miller v. Alabama*, 132 S. Ct. 2455 (2012), examined how a mandatory life sentence for a juvenile is "cruel and unusual punishment" under the Eighth Amendment. In *Miller*, a 14-year-old was charged with capital felony murder while committing arson. The lower court approved the defendant's transfer from juvenile status to be sentenced as an adult. The charged crime carried a mandatory minimum punishment of life without parole. The lower court held that life without parole was "not overly harsh when compared to the crime" and the mandatory nature of the sentencing scheme was permissible under the Eighth Amendment.

*Graham v. Florida*, 560 U.S. 48 (2010), held that life without parole violates the Eighth Amendment when imposed on juvenile non-homicide offenders. *Miller* examined the precedent regarding categorical bans on sentencing practices based on the culpability of the juvenile and the severity of the penalty. *Roper* and *Graham* established that children are constitutionally different from adults for the purposes of sentencing. Juveniles are deemed by the Court to have a diminished culpability and greater prospects for reformation, making them "less deserving of the most severe punishments." However, *Miller* did limit this theory by asserting that a juvenile whose crimes reflect irreparable corruption may be sentenced to life without parole. *Miller* further extended the rationale provided in *Graham* to forbid a sentencing scheme that mandates life in prison without the possibility of parole. Such a scheme poses a great risk of disproportionate punishment when youth and its embodied characteristics are disregarded.
The Court in Montgomery v. Louisiana, 136 S. Ct. 718 (2016), gave the Miller holding a retroactive effect. A retroactive effect would permit juveniles sentenced, before the Miller decision, to life imprisonment without parole an opportunity to be reheard under a collateral review (an attack on the judgment). The Court reasoned that the retroactive effect would not require a "relitigation" of sentences or convictions in every case in which a juvenile received mandatory life without parole. The government would have to find a remedy that would not force a juvenile, whose crimes reflect only transient immaturity and who has since matured, to serve a disproportionate sentence in violation of the Eighth Amendment.

In Under Seal, the government argued to sever or excise the unconstitutional portions of the statute to apply the remaining portions. When a court determines that a statute contains unconstitutional provisions, it has the authority to "try to limit the solution to the problem" by "sever[ing] its problematic portions while leaving the remainder intact." A court can sever a statute and eliminate unconstitutional provisions of a statute so long as the remaining statute is fully operative as law and the congressional intent is not modified. However, if the "balance of the legislation is incapable of functioning independently," then severance is not permissible. Furthermore, a void in the statutory language cannot be filled by looking to other offenses.

The government in Under Seal proposed a penalty provision that would differ from the intent of the legislature, which would counter the Constitution's guarantee of due process. A defendant must receive fair notice of the conduct that will subject him or her to punishment and the penalty the government may impose. The right to a fair warning may be unlawfully omitted by an "unforeseeable and retroactive" judicial severability analysis resulting from excising one penalty provision to apply another.

The principle of severability was a matter of first impression for the court in Under Seal. The decision provides another consideration that needs to be made when sentencing a juvenile for a heinous crime. The appellate court in this matter appropriately followed the precedent of juvenile sentencing and prohibited the principle of severance because the action would change the legislative intent or the primary purpose of the statute. If the court permitted the application of severance or excision, as proposed by the government in this matter, it would empower the judiciary to create laws, a power exclusively reserved for the legislative branch. Furthermore, if the judiciary is provided this type of latitude, statutory law could be modified by prosecutors throughout the county to convict and sentence to a desired result.

Analysis

Judiciary authority limitations. The powers of the branches of government are clearly defined and divided. Laws are created and amended by Congress. The judiciary
interprets these laws and enforces the congressional intent. The government, in *Under Seal*, proposed to sever unconstitutional provisions of a statute to permit a constitutional punishment of an unrelated crime. The court properly denied this application because it would extend judiciary discretion beyond its power. The judiciary cannot create new laws or modify them in manner that would alter or invalidate legislative intent. Limiting the breadth of severability and its overall application in *Under Seal* ensures prosecutors will remain within the bounds of judiciary power regarding statutory interpretation.

**Preventing an abuse of government prosecutor power.** The goal of every prosecutor is to put guilty criminals in prison. The prosecution applies statutory law to facts to ensure a judicial conviction and that the violating offender receives an applicable punishment. A prosecutor should not be given the ability to sever unconstitutional punishment provisions within a statutory law only to assert punishments of an inapplicable crime within the same law. This action not only would be a miscarriage of justice but would create a disparate impact on sentencing. This type of action would promote higher conviction rates and infringe on the legislative purpose the statute was created to serve. The appellate court in *Under Seal* appropriately limited the government’s ability to sever the applicable statute in a way that would punish a criminal juvenile offender contrary to the congressional intent.

**Retroactivity of Miller.** *Miller* created a retroactivity of sentencing on collateral review that will have future implications on prior decisions. *Under Seal* did not completely address the retroactivity implications of *Miller* because it was not applicable to the facts of the case. However, *Under Seal* further defines the protections afforded to criminal juveniles sentenced to death or mandatory life imprisonment without parole. Any juveniles sentenced to death or life without parole, prior to *Miller*, will seek collateral review of their judgment in reliance on the rationale in *Under Seal*. The issue of retroactive remedies for now unconstitutional juvenile sentences, if left in its current state, will become problematic for lower courts.

The Supreme Court must now ensure that the lower courts appropriately apply the rule from *Miller* regarding resentencing matters of retroactivity. *Miller* established that juveniles cannot be sentenced to life imprisonment without parole. Lower courts must evaluate the factors established in *Miller*, the defendant’s age and whether the crime reflects transient immaturity, to determine if the sentencing is protected under the Eighth Amendment.
Pursuant to *Miller*, the Supreme Court of Louisiana must release the now 70-year-old Henry Montgomery, who received at the age of 17 an automatic life sentence without parole. The court has an opportunity to free an individual who has served time beyond the promotion of retribution and deterrence of capital crimes by juveniles. States have a responsibility to effectively apply the retroactivity of *Miller* by reducing sentences or providing opportunities for parole. Mr. Montgomery and individuals similarly situated are owed a debt by the U.S. government: to be provided the constitutional protection they are entitled to.

**Conclusion**

The *Under Seal* decision further defines the sentencing of juvenile offenders. *Under Seal* establishes the parameters for the use of severance and excision in eliminating unconstitutional provisions of a statute. *Under Seal* can be used to further support retroactive resentencing or the inclusion of parole provisions in a life sentence. The decision represents another case that solidifies the constitutional protections provided to juveniles from "cruel and unusual punishments" under the Eighth Amendment.

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When It Comes to Being Out at Work, Some Things Haven't Budged in 30 Years

By William Weinberger – May 15, 2017

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In September 1982, I started my first job at a firm after law school, at the Los Angeles office of what was then one of the five largest firms in the United States. On Friday evening, the young attorneys would meet in the main conference room, where the firm supplied a well-stocked cart of spirits and mixers. This "happy hour" was my most uncomfortable, miserable time at the firm. And yet I continued to attend, because I thought it was necessary to be part of the clan.

But I was not part of the clan: I was gay and not out at the firm. After several drinks, some of the associates—I remember in particular one senior associate and a younger associate he mentored—would begin telling jokes about lesbians and gay men, and those jokes continued relentlessly. I left the gathering as soon as I could, after calculating how long I needed to stay to avoid the appearance that I was leaving because of the jokes.

In short, soon after I joined the firm, I learned starkly that it most likely would not want me and, even if it did, it was not a place I would want to spend my career. That conclusion resulted not from a deficiency in my legal acumen—the firm would barely have had the opportunity to assess it—or my dissatisfaction with the firm's practice. It resulted from the open hostility expressed toward gays and my fears about the stability of my job prospects in light of the lack of legal protections.

I joined the firm because I was uncertain about my new life in Los Angeles. I had never lived in Los Angeles and moved there to be with my partner, Michael, whom I had met at the end of our second year in law school, and from whom I had been separated for a year after we graduated while I clerked for a federal judge in Cleveland. I chose a firm that also had offices in New York and Washington, D.C., where I had expected to land, and a strong national reputation. This way, if Los Angeles did not work out, I would have good prospects in my formerly intended city.

During the first happy hour at which I experienced the homophobic bigotry, I was flummoxed. I knew there were conservative elements in the firm. But, perhaps naively, I did not expect such open hostility at my work, in a professional setting of my peers. At the time, in 1982 or 1983, the firm could have fired me with impunity for being gay. I thought and expected that the behavior exhibited by the two associates and either joined in or not stopped by others was an
aberration. When the same homophobic talk occurred at the following Friday happy hour, I was mortified.

Eventually, I found excuses not to attend the happy hours, and I decided that I would leave the firm. My reasoning was: First, as a gay man, I have no chance of making partner in the firm. Second, even if the firm eventually offered me partnership, these were not people with whom I wanted to be closely associated long-term.

In the meantime, the comments I heard at the Friday evening happy hours and occasionally other times had their impact on me, particularly before I made the decision to leave the firm. I made efforts not to draw attention to myself. My level of discomfort grew around partners in my practice area whom I knew to be conservative and the associates who had instigated the homophobic comments. I feared disclosure and termination of my employment, and the inability to find employment elsewhere. Maybe I should have had the courage to confront the homophobia. At the time, in a new job in a new city with little social support, I chose to stay quiet.

But when I decided that I would actively seek employment at another firm, I started to work pro bono with National Gay Rights Advocates on a matter involving the refusal of an insurance company to give the same spousal discount in automobile insurance rates to unmarried gay partners as it offered to married spouses. And I became more actively involved in the local LGBT lawyers association. I knew I was leaving the firm; I decided that keeping my sexual orientation secret was no longer a priority.

I did not write this piece to criticize that firm. I suspect that my experience was not very different from that of any other closeted gay or lesbian attorneys at major firms elsewhere at the time. The firm now boasts several LGBT partners, has a perfect score on the Human Rights Campaign’s Corporate Equality Index, and describes a diversity program prominently on its website. Smart marketing? Of course. Sincere change of heart or window dressing to attract work from large corporations with major legal needs? Who knows? But whatever the reason the firm is promoting diversity, it is significant progress from when I worked there.

What I learned and experienced is this: The lack of employment protections for an LGBT employee and lack of policies or a program to honor and support diverse employees in a business or firm adversely impacts both employee and employer.

Some may contend that, because the legal profession and major corporations have made sufficient progress in promoting diversity, the lack of federal and state employment protections for LGBT workers does not matter. But, as I experienced, the lack of those protections significantly affects an employee’s sense of safety and support. The diversity efforts by law
firms and businesses have occurred because of cultural shifts, grassroots and media campaigns to change hearts and minds, and the legal protections that activists have persuaded state and local governments to adopt as well as the LGBT rights cases that lawyers have brought and won in the courts. Without those protections, the cultural shifts and diversity programs would have been much less likely.

A firm that does not honor and support diversity suffers a loss of potential—potential talent from attorneys who choose to practice where they feel supported, potentially different perspectives that not only could make the firm more attractive to diverse clients but also could enrich the lives of those at the firm, and potential diverse markets into which the firm’s services could expand. An attorney or any employee who works without protections can be hampered by work in a hostile, unsupportive environment. The energy needed either to address fears of disclosure and/or termination or to fight the bigotry can divert the employee from peak performance and contributions.

A firm that does honor and support diversity can thrive as a result of these potentials. My experience in representing employers is that most of them, out of a combination of simple decency and financial incentive, are open to diversity programs, but most importantly, they want to abide by laws prohibiting discrimination against LGBT workers.

Diversity programs go only so far. Until and unless LGBT workers know they are protected by law, they speak openly with undue risk; their potential is stymied. I experienced this in the early 1980s. This message is particularly important considering the change in national political leadership. The shift in political climate has gone beyond just resisting the establishment of legal protections for LGBT workers; efforts are under way in some states and on the federal level to enact further restrictions on LGBT rights and to prohibit the adoption of local employment protections for LGBT workers. Sustained efforts are critical to assure LGBT workers throughout the country are protected and that protections already established in the law for diverse employees are not rolled back.

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What’s Proportionality Got to Do with It? An Update on the Revised Federal Discovery Rules

By Robert K. Dixon – May 15, 2017

The Federal Rules of Civil Procedure underwent significant changes in December 2015. (See Jeff Bennion, "Everything You Need to Know about the New FRCP Amendments," Above the Law, Dec. 1, 2015.) These changes affected Rules 1, 4, 16, 26, 30, 31, 33, 34, 37, 55, and 84. In particular, revisions to Rule 26 affected the scope of permissible discovery in litigation, which is now limited to information relevant to a claim or defense that is proportional to the needs of the case. Interestingly, some have noted that the "proportionality" requirement has narrowed the scope of discovery (XTO Energy, Inc. v. ATD, LLC, No. CIV 14-1021 (D.N.M. 2016)), while others have noted that the proportionality approach to discovery is not a significant change, given that most of the rules changes to Rule 26(b) were adopted in 1983. Regardless of your viewpoint—whether the rule change is a renewed focus on the "proportionality" requirement or a brand-new element for evaluating discovery—the effect remains the same: Litigators need to be able to defend and attack discovery on proportionality grounds.

Scope of Discovery

Under Rule 26(b), the scope of discovery includes information that is relevant to the claims and defenses and is "proportional to the needs of the case." In addition, the courts "must limit the frequency or extent of proposed discovery [that] is outside the scope permitted by Rule 26(b)(1)." In Noble Roman's, Inc. v. Hattenhauer Distributing Co., No. 1:14-cv-01734-WTL-DML (2016), for example, the Southern District of Indiana found that even though the discovery sought might have been relevant, it "fail[ed] the proportionality test" because it sought information that was too far outside the scope of the contested issues in the litigation.

Proportionality Factors

Rule 26(b) specific lists six proportionality factors: (1) importance of the issues at stake in the action, (2) the amount in controversy, (3) the parties' relative access to relevant information, (4) the parties' resources, (5) the importance of the discovery in resolving the issues, and (6) whether the burden or expense of the proposed discovery outweighs its likely benefit. The court will typically analyze these six factors on a case-by-case basis.

The Duke Guidelines and Practices for Implementing the 2015 Discovery Amendments to Achieve Proportionality (Duke Guidelines) "explain amendments to Federal Rule of Civil Procedure 26(b) . . . and recommend useful, practical, and concrete implementing procedures and practices that build on the amendments' framework." The Duke Guidelines explain the six factors as follows:

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• The first factor—the importance of the issues at stake—"recognizes that many cases raise issues that are important for reasons beyond any money the parties may stand to gain or lose in a particular case."

• The second factor—the amount in controversy—is typically "the amount the plaintiff claims or could claim in good faith."

• The third factor—access to information—"addresses the extent to which each party has access to relevant information in the case. The issues to be examined include the extent to which a party needs formal discovery because relevant information is not otherwise available to that party."

• The fourth factor—the parties' resources—"means more than a party's financial resources. It includes the technological, administrative, and human resources needed to perform the discovery tasks."

• The fifth factor—the importance of discovery—"examines the importance of the discovery to resolving the issues in the case."

• The sixth factor—whether the burden or expense outweighs the benefit—analyzes the "burden or expense of the discovery in relation to its likely benefit. There is no fixed burden-to-benefit ratio that defines what is or is not proportional."

**Cases Applying the Proportionality Requirement**

Courts might limit discovery if the parties already have enough information to meet their needs in the case. For example, a Colorado district court denied a plaintiff’s request to require GM to produce complex modeling software that, while relevant, was not proportional to the needs of the case because the plaintiff failed to show that the other discovery the plaintiff obtained was not adequate. See Pertile v. GM, 2016 WL 1059450 (D. Colo. Mar. 17, 2016).

Courts may limit discovery to the product at issue. A Tennessee district court, for example, did not order Chrysler to produce documents related to its use of certain technologies on vehicles that were not the model vehicle at issue. See Turner v. Chrysler, 2016 WL 323748 (M.D. Tenn. Jan. 27, 2016).

Discovery directed at employees or documents of party affiliates, especially foreign affiliates, may run afool of the proportionality requirements. For example, the plaintiffs in one case moved to compel the depositions of employees of the defendant's European affiliate and to compel production of documents from Europe. However, the Arizona district court denied both motions because (1) the requested depositions were not proportional to the needs of the case...
and (2) the document requests were not narrowly tailored to the needs of the case. See In re Bard IVC Filters Prods. Liab. Litig., 2016 WL 4943393 (D. Ariz. Sept. 16, 2016).

Shortcomings related to technology or programs used by clients may undermine the responding party's proportionality argument. A Virginia district court, for example, refused to prevent the search of 30,000 emails or shift costs on proportionality grounds where the party selected to use a system that automatically deleted information after three days. See Wagoner v. Lewis Gale Med. Ctr., 2016 U.S. LEXIS 91323 (W.D. Va. July 14, 2016).

Conclusion
In light of the proportionality requirements, litigators must become more precise when requesting information and documents to ensure that such requests are narrowly tailored to support their clients' claims and defenses. In addition, litigators should look for opportunities to challenge discovery from the opposition that is outside the proportionality limits of the case.

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You have a case that requires expert testimony. Where do you start? Lawyers should be aware that there are number of services that assist with the location of expert witnesses, but knowing who to choose and why takes practice.

**Background**
Always review the expert vitae thoroughly. Is the expert's schooling relevant? Do you have a doctor that is only a doctor of osteopathy and not medicine? Does the expert witness maintain current professional memberships? In medical malpractice matters and you are looking for causation expert or one to just opine on the standard of care? Ask does/did your doctor have hospital privileges anywhere? Does the expert have to meet any specific locality rules before being offered to the court? My jurisdiction has a persnickety rule that requires experts in medical matters to come from contiguous states. I suggest that you read some (all) of the experts printed works to decide if there are written speeches or published articles that could run afoul of anything in your case. Does it matter to your office if the expert testifies in more of one type of case or for one side in litigation more than another? Be truthful about what you are looking for in an expert and rest assured there will be one out there for your matter.

**References**
Ask for references from other firms that have hired the expert in the past. I have had to write more than a few references for experts that I have hired in the past and there a few more that I would have loved to critique but did not get asked. I have had candid conversations with other lawyers about certain experts that I was considering strongly and after conversing I did not hire them. Ask critical questions during these calls or emails and assure them that you will not discuss negative comments with the expert.

**Read that Expert Retainer**
Will the expert expect payment from the firm only? What are the terms and is the expense something that you can live with and better yet pass along to the client? Retention of Experts is costly and one mistake can tank your case. Expenses for expert testimony is a cost of litigation that increases yearly and having the ability to hire an expert is a luxury that should not be squandered. Most experts accept payment only from the firm that hires them and clearly advise in their retainer contracts that the contract is with the firm and not the client. The reason for this provision is that if payment is not made then the expert can sue the firm and not the client.
Retainer Essential Elements
Make sure there is a clear definition of the work for which you have retained the expert. What is the initial charge for retainer and what will you receive for it. When the retainer is, exhausted what notice is given to the firm and how often does one expect to receive billing. Most importantly how does the expert expect to get paid? What is the expert expecting once a bill is submitted regarding pay turnaround? Due on receipt or 30 days out? If you are lucky, maybe conclusion of the case?

What does the expert charge for deposition in person versus a telephonic appearance? Are you paying door step to door step travel expenses? Does the expert dictate lodging requests and airline requirements? Will you have to pay for trial testimony only or will the expert be paid if appearing each day even if not testifying, i.e. for preparation as well as trial appearances?

These are considerations for any practitioner so that you will get the most bang for your litigation dollar.

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What You Should Know about the Taxation of Costs

By Florence Johnson – April 28, 2017

The case is finished. The judge has issued a ruling and whether you when or lose you must address moving for the taxation of costs or how to oppose.

Moving for Taxation of Cost

Are you the prevailing party who can recover costs? At the beginning of my career some 25 years ago, it was not widespread practice to go after a plaintiff for costs. Now, as the most common of litigation tactics, some motions to tax costs are spurned out of the need for firms big and small ones to recoup money spent defending non-meritorious cases. Other motions to tax costs are used as a strategic sword against future litigants. Either way it is an effective and necessary part of the practice.

Federal Rule of Civil Procedure 54(d) outlines which party can recover its costs other than attorney's fees. Rule 54. Judgment; Costs

(a) Definition; Form. "Judgment" as used in these rules includes a decree and any order from which an appeal lies. A judgment should not include recitals of pleadings, a master's report, or a record of prior proceedings.

... 

(d) Costs; Attorney's Fees.

(1) Costs Other Than Attorney's Fees. Unless a federal statute, these rules, or a court order provides otherwise, costs—other than attorney's fees—should be allowed to the prevailing party. But costs against the United States, its officers, and its agencies may be imposed only to the extent allowed by law. The clerk may tax costs on 14 days' notice. On motion served within the next 7 days, the court may review the clerk's action.

If you fall into the categories outlined above from Rule 54(d) then you should itemize the expenses that have been incurred during the life of the matter.

What can you ask for recovery on? Courts routinely find that the deposition costs are recoverable. A party can recover for both the audio and visual versions of one deposition even if only one version of the deposition is ultimately used. You can recover
for your firm's in-house printing cost, postage and mailing to name a few areas properly recoverable under Rule 54.

It is best to review United States Code Section 28 U.S.C. § 1920 which details the limits of recovery of costs to the following specific items:

1. Fees of the clerk and marshal;
2. Fees for printed or electronically recorded manuscripts necessarily obtained for use in the case;
3. Fees and disbursements for printing and witnesses;
4. Fees for exemplification and the costs of making copies of any materials where the copies are necessarily obtained for use in the case;
5. Docket fees under Section 1923 of the Title; and
6. Compensation for court appointed experts, compensation of interpreters, and salaries, fees, expenses, and costs of special interpretation services under Section 1828 of this Title.

The non-prevailing party will more than likely oppose the taxation motion, but normally, if you are the prevailing party and your costs are not unreasonable, the Clerk of Court will award them. Attorneys seeking to recover costs in state court matters should check the local rules in your jurisdiction about what costs are recoverable.

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6 Tips for Conducting a Deposition Fearlessly

By Sathima H. Jones – March 30, 2017

For new associates, conducting your first deposition can be a fear-inducing venture. But depositions play a key role in the litigation process. As a new associate, the first, second, third, and maybe even fourth deposition you take can fill you with dread. But remember: It does get easier with practice.

Some law schools offer litigation training, but not much time is spent on depositions. Interestingly, many civil litigators spend more man-hours conducting and attending depositions than spent conducting trials. For this reason, it’s important for young attorneys to bear in mind a few tips while conducting and defending depositions.

1. Be Confident
The first thing to remember when conducting depositions is maintain composure and confidence. Remember that you can easily become your own worst enemy if you think in terms of “success” or “failure” during the deposition. It’s a discovery tool and not the actual trial. Sitting in on a deposition can go a long way toward easing into the process and allow you to focus more clearly on fact-gathering.

2. Be Prepared
It goes without saying that young litigators are workhorses, who usually know the case details inside and out. But, prior to a deposition, it’s important to reexamine key discovery, study your file thoroughly, and consider any facts that may require additional development through testimony. Additionally, it is helpful to consider your case strategy as you prepare. Your theory of the case will help to guide your course of questions.

3. Use Bullet Points, But Don’t Write an Extensive Outline
Aside from the initial script (including the rules governing the interview, offer of breaks, etc.) refrain from writing out long prepared questions. Write out your points of questioning in order in brief, bulleted statements. Remember that you are soliciting information from a live person, who will easily get grow bored by hearing you read aloud. Furthermore, you can get more out of a witness if you can turn the deposition into a conversation, flow with the conversation and, as you move along, strike points from your outline as they arise during the deposition to remind yourself that a specific topic was covered. A deposition may go on tangents throughout the course of testimony. Those tangents can lead your witness to a place where they are talkative, comfortable and ready to reveal valuable information unprompted. Allowing yourself to stray from a rigorously prepared outline often yields results.
4. Study the Rules
Thoroughly examine the applicable court rules on depositions. For example, there may be time limits for examining witnesses, rules on conferring with your client, and rules related to allowable objections throughout the deposition. During an early deposition in which I was only an observant young attorney, everyone agreed to “the usual stipulations.” To be candid, I had no idea what that meant. I now know that the “usual stipulations” mean that you are reserving, not waiving, your objections until the time of trial, except objections as to form. You are also agreeing that the deposition was properly noticed and the court reporter is duly qualified. But, at the time, it felt like some sort of ceremonial gilded secret.

Save yourself the embarrassment and remember that it is important to familiarize yourself with the rules in your jurisdiction that govern depositions.

5. Do Not Be Bullied
Know where you want to end up. Since you have your prepared deposition outline, you are familiar with what you want to know. As a young attorney, you are likely to be overly thorough in asking questions (and follow-up questions) for fear of making a mistake or missing something. This can lead to extra-long depositions at this early stage. You may receive some pushback from opposing counsel, but do not let that sway you—take your time if you need it. A creative compromise is to offer everyone a short break if you feel rattled or pressured.

6. Review Your Work
After your first deposition, review the transcript with an eye toward examining your verbal habits. Don't be embarrassed; we all have them, whether it's a “yeah,” “right,” “um-huh,” “huh,” or “okay.” It’s natural to have habitual speech patterns because we are accustomed to everyday conversations, but it’s not pretty unnatural to have a transcriptionist record your every utterance verbatim. You will see some stuff that makes you cringe, but reviewing your transcripts will help you remain mindful of habits you want to break prior to your next deposition.

Remember that no one was born with the skills to depose a witness. Every lawyer was once a new lawyer taking their first deposition.

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