

## INSIDE THIS ISSUE:

<i>President's Perspective</i>	2
<i>News and Current Events</i>	3
<i>New Concern to Publicly Held Companies: Protection of Whistleblowers under the Sarbanes-Oxley Act</i>	4
<i>Belated Removal of Employment Cases on the Basis of ERISA Preemption</i>	6
<i>Commentary – Diversity Or Bust?</i>	8
<i>A Board Response</i>	9
<i>Spotlight on Fellows Robert Belton Francis Raucci Edward Shoemaker</i>	11

## INDUCTION DINNER TO BE HELD AT HISTORIC PALACE HOTEL

San Francisco will be the host city for this summer's Annual Induction Dinner, an evening which is sure to be filled with great food, great company and great celebration as Fellows and their guests gather for the eighth year to honor the newest members. The Palace Hotel, a San Francisco landmark, will welcome the College for this gala evening scheduled to be held Sunday, August 10th. Our cocktail reception will take place in the beautiful Garden Court and dinner will be served in the Grand Ballroom.

Inspired by visionary William Ralston, the Palace Hotel opened its doors to great acclaim on October 2, 1875, but not before experiencing tragedy. Ralston, who had commissioned an architect to study Europe's finest hotels, exhausted his banking empire to finance his dream and its five million dollar price tag. Shortly before the Palace opened, the Bank of California, which Ralston founded, closed its doors due to solvency issues. His body was found floating in the San Francisco Bay the next day after a routine swim. Cause of death was reportedly a stroke, although some skeptics suggested, given what had happened, that suicide might be more likely. Ralston's partner, Senator William Sharon, however, remained steadfast and followed through on the dream, opening an exquisite hotel where admirers were awed by the four hydraulic elevators.

Although the hotel survived the earthquake of 1906, it did not survive the devastation that followed. Ravaged by fire, the hotel was a total loss. Three years later, in 1909, the Palace reopened. With its incredible architecture, dome stained glass ceiling and Austrian crystal chandeliers, the Garden Court became the centerpiece of the hotel, hosting many of the nation's prestigious events. President Woodrow Wilson hosted several luncheons there, and in 1945, the official banquet honoring the opening session of the United Nations was held in the Garden Court. In January 1989, the Palace once again closed for renovations and updating, reopening in 1991 to glamorous elegance reminiscent of its turn of the century grace.

Mark your calendars now – Sunday, August 10th - for what is sure to be an evening of grand celebration in downtown San Francisco. Please keep in mind that because of the ABA's Annual Convention and prior booking arrangements that have been made with many downtown hotels, we are unable to secure any discounted room rates. A brochure, included with this newsletter, provides relevant information about the event, including hotels located in close proximity to the Palace.



*Palace Hotel lobby*

## PRESIDENT'S PERSPECTIVE

By Robert M. Dohrmann

Our Board of Governors, including six new Board members, got off to an energetic start with a daylong meeting on January 11th in New Orleans. Our goal is to design programs that will involve our Fellows in ways that can tap the enormous levels of knowledge and experience they have to offer. Participating with our returning Governors were new board members Lonny Dolin, Barry Kearney, Kathy Krieger, Mary Ann Sedey and Maurice Wexler. Our other recent recruit, Gloria Portela, was unable to attend. In case you missed the last edition of this newsletter which ran their biographical sketches, you can view it on our website, [www.laborandemploymentcollege.org](http://www.laborandemploymentcollege.org). Here are some of the ideas set in motion for events we plan to see later this year and on into the future as well.

**Regional Meetings.** Board Member Wayne Outten suggested we arrange meetings in metropolitan areas and offered to implement the suggestion with an inaugural meeting of Fellows in the New York and New Jersey area, which would be held in conjunction with the New York State Bar's Labor and Employment Law Section Annual Meeting. The Board approved the idea and the meeting took place on January 23rd, hosted by Wayne and our Vice President Joe Garrison. The notice being short, attendance was limited to fifteen Fellows, but many who could not attend responded enthusiastically to the idea. The group plans future meetings this year and an annual gathering during the NYSBA meeting in January of each year. From these sessions I believe an abundance of ideas will come that can enhance our sense of fellowship.

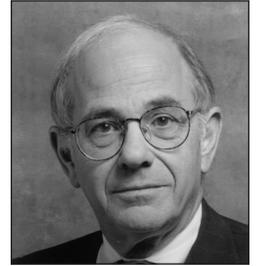
Meanwhile we hope to hold similar meetings in the Chicago, District of Columbia, and Philadelphia areas and, as they materialize, to start an inexorable march south and west.

**The Work of the Board's Committees.** One of the most important functions delegated

to a committee of the Board of Governors is tying together the work of the Circuit Credentials Committees after their tasks are completed. The work of the Board committee takes place mid-May of each year and this year will occur shortly before the next meeting of the Board of Governors, scheduled for May 19th in Washington, D.C.

The Board's Credentials Committee members are Butch Powell, Chair, and Vicky Abrahamson, John Higgins, Don MacDonald, George Nicolau, Charles Werner and Maurice Wexler. The Nomination process, which closed March 1st, produced a large number of nominees in such numbers as to indicate we are approaching the membership limitations discussed by Steve Pepe in our last newsletter.

**Annual Induction Dinner.** This year we will again combine with the American Bar Association's Annual Meeting, this time in San Francisco, and hold our induction dinner on Sunday, August 10th. The event will take place at the Palace Hotel where we will have the exclusive use of the Garden Court, a San Francisco landmark of considerable architectural significance. As in Washington last year, we will have a sufficiently spacious venue for the sizeable number we expect to attend.



Robert M. Dohrmann

*This year we will again combine with the American Bar Association's Annual Meeting, this time in San Francisco, and hold our induction dinner on Sunday, August 10th.*

## NEWS AND CURRENT EVENTS

**Nominations of New Fellows** – With the application deadline for new Fellows having just passed (March 1st), the Circuit Credentials Committees have begun work on reviewing and recommending candidates for the Class of 2003. A total of 117 applications were forwarded to the various committees for due diligence. Keeping in mind the recently instituted membership cap, which puts a limit of no more than sixty new members in one year, the committees and the Board of Governors will have their work cut out for them. Final decisions will be made at a Board meeting on Monday, May 19th. Letters of congratulations will be sent to the newly elected Fellows during that week. For those applicants who are not selected for membership, a letter to their nominators will be mailed shortly thereafter with such notification. As mentioned earlier, the Annual Induction ceremony will take place on Sunday, August 10th at The Palace Hotel in San Francisco.

**Lecture** – Be sure to save the date of November 7, 2003 for the College's annual lecture event. This year's program will feature an exciting and timely panel discussion, "Corporate Corruption and Corporate Image: How To Deal With It Before The Public And In Front Of Juries." Our speakers will examine the impact of recent issues involving the conduct of major corporations (Enron, Tyco, MCIWorldcom, et al.) on the way the public in general, and juries in particular, weigh the credibility and accountability on a variety of issues (regardless of whether the corporation has itself engaged in the type of misconduct) that has dominated the headlines.

We have secured an excellent panel on this topic. Our moderator will be Veta Richardson, Executive Director of the Minority Corporate Counsel Association. The panelists include Galina Davidoff of DecisionQuest, one of the foremost jury consultant companies in the United States, who has recently completed a

study of jury perceptions of corporations; and Dr. Valerie Hans, whose book, *Business on Trial: The Civil Jury and Corporate Responsibility* helped establish her as a nationally recognized expert on jury behavior. They will be joined by an additional panelist with expertise in the area of corporate image and public relations.

The program promises to be a practical exploration of whether and how plaintiff and union counsel can use the corporate misconduct issue to their clients' advantage, whether and how management counsel can blunt the force of business headlines both in general and in particular cases, and how the issue may affect the resolution of cases. Watch the newsletter for more information on our speakers and details on our next lecture event this November.

**Pro Bono Award** – At its January meeting, the Board of Governors authorized the creation of a committee to consider and recommend a proposal that the College have an annual Pro Bono Award. We are an organization that is committed to goals of high ethical standards and service to the bar, the bench and the public. In the Board's view, the annual recognition of the pro bono service of one of our members would greatly advance these goals

If you are interested in helping us develop a Pro Bono Award Program for consideration by the Board of Governors, contact Susan Was at the College's office.

### Slate of Officers for 2003

Robert M. Dohrmann – President  
Joseph D. Garrison – Vice President  
John E. Higgins, Jr. – Secretary  
Gloria M. Portela – Treasurer

*This year's program will feature an exciting and timely panel discussion, "Corporate Corruption and Corporate Image: How To Deal With It Before The Public And In Front Of Juries."*

## NEW CONCERN TO PUBLICLY HELD COMPANIES: PROTECTION OF WHISTLEBLOWERS UNDER THE SARBANES-OXLEY ACT

By G. Roger King

*Inducted as a Fellow of the College in 1997, Mr. King is a management lawyer in the law firm of Jones Day Reavis & Pogue in Columbus, Ohio. The author wishes to acknowledge the assistance of Brian Ray, an associate at Jones Day, in preparing this article.*

*The employee has the burden of making a prima facie showing to the DOL that his or her protected conduct was "a contributing factor" in the employer's action(s).*

In response to the Enron debacle, Congress passed the Sarbanes-Oxley Act ("the Act"), which imposes sweeping new oversight requirements on executives, boards of directors, accounting firms, and lawyers of publicly held companies. Although the oversight provisions banning direct loans to officers and directors, imposing certain accounting and auditing procedures, and requiring broad corporate disclosures have received much media attention, the Act also includes a whistleblower provision, with accompanying civil and criminal penalties, that has received little of the scrutiny it deserves. This commentary details the parameters of the Act's whistleblower provision and offers certain compliance insights.

**Reporting Procedures.** Section 301 of the Act (15 U.S.C. § 78F), which requires publicly traded companies to establish audit committees, further requires such committees to establish procedures for "the confidential, anonymous submission by employees... of concerns regarding questionable accounting or auditing matters." As with internal discrimination or harassment reporting procedures, any such reporting procedure should be designed to encourage employees to report their concerns.

**Protection of Whistleblowers.** In addition to requiring companies to establish internal reporting procedures, the Act contains stiff penalties, both civil and criminal, for any acts of retaliation against employees who report possible violations of the Act or other federal laws and regulations.

**Civil Penalties Protected Conduct.** Under Section 806 of the Act (18 U.S.C. § 1514A), "no officer, employee, contractor, subcontractor, or agent" of a publicly traded company may take a negative employment action (discharge, demotion, or suspension), threaten, harass, "or otherwise discriminate against" an employee because

the employee lawfully provided information, "or otherwise assisted or participated in an investigation or proceeding relating to an alleged violation of the accounting and auditing procedures of the Act, any rule or regulation of the Securities and Exchange Commission, or any other federal law relating to fraud against shareholders." This provision only applies to the furnishing of information to (i) a federal regulatory or law enforcement agency, (ii) a member of Congress "or any committee of Congress," or (iii) "a person with supervisory authority over the employee (or other such person working for the employer who has the authority to investigate, discover, or terminate misconduct)."

The Act extends protection to employees who engage in the protected activity, so long as the employee reasonably believed the conduct he or she reported was a violation of the Act or other federal shareholder fraud law or regulation.

**Prerequisites to Filing Suit.** In order to take advantage of the Act's compensatory damages provision, the employee must file a complaint with the Department of Labor within 90 days of the alleged discharge or discrimination. The employee has the burden of making a prima facie showing to the DOL that his or her protected conduct was "a contributing factor" in the employer's action(s). The burden then shifts to the employer to demonstrate, by *clear and convincing evidence*, that it would have taken the adverse employment action irrespective of the employee's protected activity.

If the DOL decides to hold a hearing, it must do so expeditiously and must issue a final order within 120 days after the hearing. Judicial review is available only by way of appeal to the Court of Appeals. However, such an appeal does not automatically stay the DOL's order. The employee may bring the matter to federal district court only if the DOL does not resolve the mat

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ter within 180 days and there is no showing that the delay was the result of the employee's bad faith. The Act does not provide for a jury trial.

**Available Remedies.** An employee who prevails upon a claim of retaliation under the Act may obtain: (i) reinstatement to the same position and seniority status that the employee would have had but for the adverse employment action; (ii) back pay; (iii) interest; (iv) compensatory damages "necessary to make the employee whole;" and (v) litigation costs, including reasonable attorneys' fees and costs, and expert witness fees. Punitive damages are not available.

Importantly, the Act does not preempt existing state law or collective bargaining agreement protections for whistleblowers.

**Criminal Penalties.** Section 1107 of the Act (18 U.S.C. § 1513) provides that anyone may be criminally prosecuted, fined, and/or jailed for up to 10 years if they intentionally retaliate against an employee who provides "to a law enforcement officer *any truthful information* relating to the commission or possible commission of *any Federal offense...*" Intentional retaliation is defined in the Act as "any action harmful to any person, including interference with the lawful employment or livelihood" of such person.

**Key Points for Compliance.** Employers familiar with federal employment and labor statutes will note the similarities between the civil protections offered by the Sarbanes-Oxley Act and those offered by existing state and federal protections of employees. For one thing, the employee must demonstrate a prima facie case of retaliation causally connected to the employee's engagement in action protected by the statute. Moreover, the employee may pursue civil damages for retaliation, even if the information or investigation ultimately turn out to be groundless.

However, there are some key differences. In the employer's favor, unlike most state and federal statutes, the employee is not entitled to punitive damages or a jury trial. Moreover, the employee must file a complaint with the Department of Labor in a relatively short time, within 90 days of the alleged violation of the Act, in order to preserve his or her civil claim. In the employee's favor, whereas in most anti-discrimination

statutes the burden of proof of discriminatory or retaliatory intent ultimately rests upon the employee, the Sarbanes-Oxley Act alters the familiar landscape significantly, requiring the employer to prove by clear and convincing evidence that it would have taken the action at issue regardless of the employee's protected activity. In addition, the Act includes harsh criminal penalties that can ensnare *anyone* who intentionally retaliates against *anyone* who cooperates with a law enforcement agency investigating any possible federal offense. These differences notwithstanding, given the similarities between the Act's language and the various federal anti-discrimination statutes, the courts and the DOL are likely to apply general principles of labor and employment law where needed to fill in gaps in the statute.

Therefore, as with all statutes aimed at protecting employees, employers must train all management and supervisory personnel on the Sarbanes-Oxley Act's requirements and must take extra care when considering the termination, demotion, or even reassignment of an employee who has complained about possible securities fraud or who has provided information, either internally or externally, relating to a possible violation of federal securities laws and/or regulations. If the company decides to move forward with the proposed adverse employment action in such a case, the company should be sure to document carefully the reasons for all actions taken. If a protected employee reports harassment, the company should respond quickly, investigate, and take immediate remedial action, as necessary. The company should set up an effective internal reporting procedure for suspected accounting and securities irregularities, and clearly inform all employees of the reporting procedure. Finally, employers should remind all employees that compliance with federal securities laws is a very serious matter, that harassment of employees who report possible accounting and securities fraud will not be tolerated, and that anyone who retaliates against or otherwise harasses a protected employee will be subjected to discipline, up to and including immediate termination.

*Employers familiar with federal employment and labor statutes will note the similarities between the civil protections offered by the Sarbanes-Oxley Act and those offered by existing state and federal protections of employees.*

## BELATED REMOVAL OF EMPLOYMENT CASES ON THE BASIS OF ERISA PREEMPTION

By Lawrence F. Febeley

*Inducted as a Fellow of the College in 2001, Mr. Febeley is a management lawyer in the law firm of Kegler Brown Hill & Ritter in Columbus, Ohio.*

In most jurisdictions, defendants in employment cases prefer to litigate in federal court. Among the principal reasons for this preference are the required unanimity of jury verdicts, case-loads and time to trial, the perceived quality of judicial review and analysis, familiarity with discrimination proof paradigms, and the courage or willingness to grant summary judgment. For many of the same considerations, plaintiffs prefer to litigate in state court. As a result, plaintiffs tend to draft complaints based wholly on state law claims, and in a manner that precludes removal by the defendant to federal court based upon a federal question.

Because most employers and their employees usually reside in the same state, employment cases rarely qualify for federal court jurisdiction on the basis of diversity. Even so, in many states, like Ohio, supervisors can be sued individually on a discrimination claim, with the result that complete diversity will not exist even if the employer is a citizen of a different state. With diversity jurisdiction being rare, and where the complaint is framed in terms of state discrimination statutes and common law claims, federal court jurisdiction is often difficult to justify. One frequent basis for removal in employment cases, however, is ERISA preemption.

**Basic Removal Principles** Ordinarily, a defendant may remove a case to federal court only if it could have been filed in federal court in the first place. That means that the federal court must have original subject matter jurisdiction. 28 U.S.C. §1441(a). In the case of preemption, removal requires that plaintiff's claim must be "founded on a claim or right arising under ... the laws of the United States." 28 U.S.C. §1441(b). If federal question jurisdiction exists, the case may be removable under 28 U.S.C. §1331.

A plaintiff frequently can control whether the claims are litigated in state court or federal court. The "well pleaded complaint rule" provides that federal court jurisdiction exists only when a federal question is presented on the face

of plaintiff's properly constructed complaint. *Caterpillar, Inc. v. Williams*, 482 U.S. 386, 392 (1987); *Metropolitan Life Ins. Co. v. Taylor*, 481 U.S. 58, 63 (1987). Therefore, a plaintiff can often avoid federal question jurisdiction, and thereby preclude removal, by framing the complaint exclusively in state law. *Caterpillar, Inc. v. Williams*, supra; *Abearn v. Charter Twp. of Bloomfield*, 100 F.3d 451, 456 (6<sup>th</sup> Cir. 1996).

Federal preemption is usually a *defense* to plaintiff's claims on the merits. As such, it generally is not a proper basis for removal because of the effect of the well-pleaded complaint rule. *Metropolitan Life Ins. Co. v. Taylor*, supra; *Tolton v. American Biodyne, Inc.*, 48 F.3d 937, 941 (6<sup>th</sup> Cir. 1995).

However, there is an exception to the well-pleaded complaint rule. The exception arises where Congress has so completely preempted an area of law that any complaint presenting such claims is deemed to necessarily be federal in nature. In such a case, "any claim purportedly based on that pre-empted state law is considered, from its inception, a federal claim and therefore arises under federal law." *Caterpillar, Inc. v. Williams*, supra; *Strong v. Telectronics Pacing Systems, Inc.*, 78 F.3d 256, 259 (6<sup>th</sup> Cir. 1996).

**ERISA Preemption.** The Employee Retirement Income Security Act of 1974, 29 U.S.C. §100, et seq., has an extremely broad preemption provision. The Act specifically preempts any state or local law, or cause of action, which "relates to" a covered ERISA benefit plan. 29 U.S.C. §1144(a). The U.S. Supreme Court has ruled that a state law (including decisional law) "relates to" a benefit plan if it "has a connection with or reference to such a plan." *Shaw v. Delta Air Lines, inc.*, 463 U.S. 85, 96-97 (1983); *Tinsley v. General Motors Corp.*, 227 F.3d 700, 703 (6<sup>th</sup> Cir. 2000). Subsequently, in *Pilot Life Insurance Co. v. Dedeaux*, 481 U.S. 41 (1987), the Supreme Court reaffirmed the "deliberately expansive" breadth of ERISA preemption. Thus, a state law cause of action is

*Federal preemption is usually a defense to plaintiff's claims on the merits.*

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preempted if “it has connection with or reference to” an ERISA plan. *Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 730 (1983). The only exception to the “relates to” test is where the state law or claim has only a “tenuous, remote, or peripheral” effect on the ERISA plan. *Shaw v. Delta Air Lines, Inc.*, supra, 463 U.S. at 100, n 21.

Given this expansive scope of preemption, defense counsel will frequently invoke ERISA preemption to remove a case to federal court whenever a state law or state cause of action, or perhaps even a damage claim, is based upon or relates to an ERISA plan. (In such a case, ERISA may provide both a basis for removal and a substantive defense to the claims.)

Early in the development of the preemption doctrine, defendants argued that if the damages sought by a plaintiff included any pertaining to an ERISA plan (e.g., pension benefits or health insurance benefits), ERISA preemption should apply. See, e.g., *Pratt v. Delta Air Lines, Inc.* 675 F.Supp. 991 (D. Md. 1987) (wrongful discharge claim preempted by ERISA because a portion of the relief involved matters regulated by ERISA). It is now well-established, however, that no ERISA preemption arises where a loss of benefits is a mere consequence of, but not a motivation for, the termination of employment. See, *Gavolik v. Continental Can Co.*, 812 F.2d 834 (3<sup>rd</sup> Cir. 1987), cert. denied, 484 U.S. 979 (1987); *Garavuso v. Shoe Corp. of America Fund*, 709 F.Supp. 1423 (S.D. Ohio 1989). Thus, including the value of benefits in a civil remedy does not precipitate ERISA preemption because an isolated tort recovery has a “tenuous, remote, or peripheral” effect on an ERISA plan. *Shaw v. Delta Air Lines, Inc.*, supra; *Ethridge v. Harbor House Restaurant*, 861 F.2d 1389 (9<sup>th</sup> Cir. 1988); *Pizlo v. Bethlehem Steel Corp.*, 884 F.2d 116 (4<sup>th</sup> Cir. 1989).

Indeed, the Sixth Circuit has established a three-part test for determining whether a state law claim is one which “relates to” an ERISA plan, and is therefore preempted, or instead is “remote and peripheral” in connection to the ERISA plan and therefore not preempted. The three elements of the test are (1) whether the state law represents a traditional exercise of state authority, (2) whether the law affects relationships between principal ERISA entities, and

(3) what effect the law and the claim, if upheld, will have on the plan. *Firestone Tire & Rubber Co. v. Neusser*, 810 F.2d 550, 555 (6<sup>th</sup> Cir. 1987).

Preemption and removal are not synonymous. Just because a claim is preempted does not mean that removal is necessarily proper. Therefore, ERISA preemption alone does not automatically convert a state law claim into a federal question. *Metropolitan Ins. Co. v. Taylor*, supra; *Warner v. Ford Motor Co.*, 46 F.3d 531, 534 (6<sup>th</sup> Cir. 1995). Unless a state law claim is “completely preempted” by ERISA, even if it is preempted under §1444(a) for substantive law purposes, the claim is not removable to federal court. *Wright v. General Motors Corp.*, 262 F.3d 610, 614 (6<sup>th</sup> Cir. 2001). The well-pleaded complaint rule bars removal based solely on a federal law defense. *Tolton v. American Biodyne*, 48 F.3d 937, 941 (6<sup>th</sup> Cir. 1995).

The “complete preemption” doctrine provides that when Congress intends a federal statute to completely preempt an area of state law, “any claim purportedly based on that preempted state law is considered, from its inception, a federal claim and therefore arises under federal law.” *Caterpillar, Inc. v. Williams*, supra. ERISA Section 501(a) states that a participant or beneficiary may bring a civil action (a) to recover benefits due to him under the terms of his plan, (b) to enforce his rights under the terms of the plan, and (c) to clarify his rights to benefits under the plan. 29 U.S.C. §1132(a)(1). In addition, a participant or a beneficiary may bring an action for breach of fiduciary duty. 29 U.S.C. §1132(a)(2). Thus, the complete preemption exception for removal is limited to state law claims that fall within these ERISA civil enforcement provisions. *Warner v. Ford Motor Co.*, supra. As a result, any state law cause of action that seeks relief that is available under ERISA is “completely preempted,” and therefore removable to federal court. In short, since Congress has completely preempted state court jurisdiction in these circumstances, the fact that the complaint is framed only in terms of state law does not bar removal.

**Removal Procedure.** To effectuate removal, the defendant must file a notice of removal with both the federal and state courts. The notice must be filed within thirty days after receipt of “the initial pleading setting forth the claim for

*Preemption and removal are not synonymous. Just because a claim is preempted does not mean that removal is necessarily proper.*

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## COMMENTARY – DIVERSITY OR BUST?

*By Arnold Pedowitz*

*A plaintiff's lawyer, Mr. Pedowitz practices law in New York City and was inducted as a Fellow of the College in 2001.*

How are we going to achieve a diverse membership in the College given that nominations are made by existing Fellows and that most of us are white males without disabilities? I think that there is a way, but it will take your cooperation and work. In other words, unless you are willing to accept that there is a shortcoming in this area, and unless you will participate in helping to cure it, we are not likely to succeed.

If you have a question as to whether diversity is an issue, I ask that you use the non-scientific, non-all-inclusive, unreliable, visual and verbal test. In other words, simply look around at our annual dinner, and speak with the attendees. You will then observe that if diversity is a goal, success has not been achieved. On accepting the problem as one deserving of resolution we next have to develop a winning strategy. I don't know where President Bush would come out on my suggestions but I think it important that we take affirmative action towards our goal. By this I mean that an action plan that has each of us taking responsibility must be implemented, and as soon as possible.

First we need to look at the nomination process and how you and I propose people for the College. We each know excellent practitioners and scholars. In fact, most of them are our friends, whether socially or professionally. Naturally, therefore, when it comes time to make a nomination whom do we think of but our friends and which of them we can put forward this year. This of course raises the uncomfortable question of who our friends are. But let us not get stuck there.

There are also personal political decisions that we make such as: if I nominate Harry will Jeff be upset; or, should I nominate Sam because of that huge referral he just made; or, can I nominate Bill who really impressed me but he is my most tenacious adversary? Then there are the uncomfortable questions like: if from the pool of worthy people I nominate someone who is African American or Hispanic will I be seen as a "liberal" or someone who is "trying to look good" or someone who is making a proposal simply to effect diversity and not based on merit?

And what about the issue of merit? Aren't we defeating the purpose and/or integrity of the College if we base decisions on anything other than merit? I think that the answer to this and

other questions is simply that it is time to take a new approach to our decision making. It is easy to nominate a friend. Everyone wants to have friends with them in the College - let's spread the honor and sit with them at the dinner. It's fair and fun; or is it? Fair to me is promoting equality on a broad basis. Fun to me is enjoyment with my friends after knowing that I have been doing the right thing. That is why I am writing this article.

There are many terrific practitioners and scholars who are part of the diverse community. They are just as deserving of nomination based upon their excellence as those who would be the natural objects of our attention; but history has shown that they are not first on our list. Therefore, what we need to do when contemplating a nomination is to say that this year I am going to find a deserving practitioner or scholar from the diverse community and put his/her name forward.

Our friends will understand when we tell them that we have selected other friends this year because diversity is important to us and we have been asked to help insure that the College will have a diverse membership. While some may belittle our action by suggesting that we are pandering, etc., I think that we will just have to tough out their comments. My personal experience is that such thoughts generally are intended to salve the feelings of the speaker who feels rejected and that they have no long term effect. On the subject of merit, it does not have to suffer. There are many highly qualified people out there and it is simply a matter of identifying and nominating them. If each of us does this then we will quickly achieve balance.

Balance should be our goal. What the term means I don't know; but I do know that we don't have it now. You may reasonably ask how can I seek balance when I can't even define the term. My answer to you is that there will be balance when we do the visual and verbal test and the result seems appropriate. In the first instance I suggest that it will be sufficient if we each look into our hearts for a decision as to whether balance has been achieved or not. You are each my Fellows. You selected me and I selected you. At this point I have every confidence that if you open yourselves to the issue we will shortly find that it no longer is one.

*There are many terrific practitioners and scholars who are part of the diverse community.*

## A BOARD RESPONSE

*By Stephen P. Pepe*

*Mr. Pepe is serving his last year on the Board of Governors and was President of the College in 2002.*

The Board of Governors welcomes and is in agreement with Arnie's goals and wholeheartedly supports his call for Fellows to nominate qualified candidates from underrepresented groups.

The Board has already implemented several initiatives to address this issue. Thus, in several articles in recent newsletters, the Board has published the statistics, recognized and acknowledged our shortcomings and asked for the Fellows' assistance. In 2002, the Board set a goal for each Board member in 2003 to nominate or cause to be nominated one or two candidates from underrepresented groups. At last summer's induction dinner, in my brief remarks, I again acknowledged our shortcomings and asked the Fellows to help us address it. When we filled six Board vacancies for 2003, we were mindful of our responsibilities to provide leadership in this area and, of the six outstanding and highly qualified new Board members, four are from underrepresented groups.

Speaking for myself, I do not believe addressing this issue will do anything but enhance the College's integrity and standards. The five percent Circuit limitation on Fellows (10% for D.C.) will insure that College Fellows are the best of the best. Having seen the hard and diligent work performed by the Circuit Credentials Committees, which represents all disciplines, and personally having participated in the Board's review of their work, I can assure you that candidates who meet the high standards of the By-Laws will become Fellows regardless of their personality, styles of practice or political views. Neither the Circuit Credentials Committee nor the Board would permit any other result. I agree with Arnie that qualified candidates from underrepresented groups are available and it is our collective responsibility to find and nominate them!

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relief.” 28 U.S. §1446(b). Thus, in the normal situation, the removal notice must be filed within thirty days of service of plaintiff’s complaint. When a case is initially removable and the defendant does not file the notice of removal within thirty days of service of the complaint, the right to remove is lost. The thirty day period is strictly construed; compliance with it is mandatory and cannot be extended by the court or agreement. See, *Schmitt v. Ins. Co. of N. America*, 845 F.2d 1546, 1557 (9<sup>th</sup> Cir. 1988); *Huffman v. Saul Holdings Ltd. Partnership*, 194 F.3d 1072, 1079 (10<sup>th</sup> Cir. 1999).

**Belated Removal.** What if the complaint filed by the plaintiff contains no grounds for removal but, as the case progresses, grounds for removal arise? Section 1446 anticipates this eventuality. The second paragraph of Section 1446(b), which many attorneys are unaware of, provides:

“If the case stated by the initial pleading is not removable, a notice of removal may be filed within thirty days after receipt by the defendant ... of a copy of an *amended pleading, motion, order or other paper* from which it may first be ascertained that the case is one which is or has become removable ...” [28 U.S.C. §1446(b)]

Therefore, if the plaintiff files an amended complaint which includes for the first time an ERISA claim, or which is subject to ERISA preemption, the case would be removable to federal court, provided that the defendant filed a notice of removal within thirty days of service of the amended complaint.

The Code section that allows the belated removal of the case – well after the filing of the initial complaint – speaks in terms of pleadings, motions, orders, and “other papers” as the predicate for removal. Last year, the Sixth Circuit joined courts in other circuits in ruling that this language is not as restrictive as it may seem at first blush.

In *Peters v. Lincoln Electric Company*, 285 F.3d 456 (6<sup>th</sup> Cir. 2002), the complaint filed in the state court by the plaintiff asserted unspecified claims for breach of contract and detrimental reliance. The complaint also contained an age discrimination claim, but the claim was premised only on the Ohio anti-discrimination

statute. There were no grounds for removal on the face of the complaint. However, after the case progressed in the state court, the plaintiff was deposed. When asked the precise nature of his claims, the plaintiff testified that, among others, the employer breached a promise to continue his participation in a supplemental executive retirement plan. On the basis of this testimony, the defendant filed a notice of removal, citing ERISA preemption. Construing Section 1446(b), the Sixth Circuit ruled that deposition testimony may constitute an “other paper” within the meaning of the removal statute:

“This court ... finds that a plaintiff’s response to deposition questioning may constitute an “other paper” under Section 1446(b). The intent of §1446(b) is to ‘make sure that a defendant has an opportunity to assert the congressionally bestowed right to remove upon being given notice in the course of the case that the right exists. [Citations omitted]. Unquestionably, information elicited during a deposition may serve that purpose.” [*Peters v. Lincoln Electric Company*, supra, at 466].

The result is that, at least in the Sixth Circuit, a defendant may remove a case to federal court even if the grounds do not appear on the face of the complaint, if the plaintiff’s testimony establishes that they are alleging a federal claim.

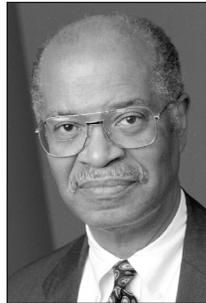
In this regard, the thirty day period for filing a notice of removal begins to run “from the date that a defendant has solid and unambiguous information that the case is removable.” *Holston v. Carolina Freight Carriers Corp.*, 936 F.2d 573 (6<sup>th</sup> Cir. 1991); *Sanborn Plastics Corp. v. St. Paul Fire and Marine Ins. Co.*, 753 F. Supp. 660, 663 (N.D. Ohio 1990) (first indication of the pursuit of a federal claim given with submission of proposed jury instructions).

**Conclusion.** Removal to federal court can be a powerful and desirable tool for defendants. Counsel for both plaintiffs and defendants must remain vigilant throughout the course of litigation. Even where grounds for removal do not appear on the face of the complaint, and where the initial thirty-day period for removal has elapsed, a case may still belatedly be removed whenever allegations of a federal claim arise.

*The thirty day period is strictly construed; compliance with it is mandatory and cannot be extended by the court or agreement.*

## SPOTLIGHT ON FELLOWS

► **Fellow Robert Belton**, Professor of Law at Vanderbilt University Law School, was awarded the Clyde Ferguson Award by the Minority Groups Section of the Association of American



*Robert Belton*

Law Schools at its annual meeting which was held in Washington, DC this past January.

The Ferguson Award is given to an outstanding law teacher who, in the course of his or her career, has achieved excellence in the area of public service, teaching and scholarship. The award, named for one of the first tenured black professors at Harvard Law School, also aims to recognize teachers who have provided support, encouragement and mentoring to colleagues, students and aspiring legal educators.

Professor Belton was elected a Fellow of the College in 2000.

► **Fellow Francis (Hank) Raucci**, an Of Counsel partner with Gough, Shanahan, Johnson and Waterman in Helena, MT, recently returned from Cuba. He was a member of the delegation of the Criminal Justice Committee which met with members of the Cuban Supreme Court, National Assembly and Public Defenders' Office. As part of the program, he participated in the ongoing debates and discussions regarding civil liberties and safeguards within the US, Cuban and Latin American systems of criminal justice and jurisprudence. He attended hearings, both procedural and substantive, within the Cuban system. He is co-author of a paper of Cuban jurisprudence, before and after the Revolution, which will appear this spring in the *Journal of Criminal Justice*.

Mr. Raucci was elected a Fellow of the College in the inaugural class of 1996.

► **Fellow Edward Shumaker** was named Executive Director of the National Education Association of New Hampshire. With over 13,000 members, NEA-NH is New Hampshire's largest teacher organization and its largest labor union. Mr. Shumaker is a partner and past president of the Concord, NH law firm of Gallagher, Callahan & Gartrell where he concentrates in employment law and heads the firm's alternative dispute resolution practice.

In addition to serving as Ambassador to Trinidad, Mr. Shumaker was the first Fellow from New Hampshire, elected to the College in 1996. He is a panel arbitrator with the American Arbitration Association as well as an active member for the New Hampshire federal and superior courts and the New Hampshire Human Rights Commission. While Ambassador, he established and obtained corporate funding for eighteen new Fulbright Scholarships to enable the best and brightest young Trinidadians to each bachelors and masters degrees at leading US universities. His initiative became the largest privately funded Fulbright program in the world and is now a model for other.

*The Newsletter Committee continues to strongly encourage all Fellows to submit for publication any honors, accomplishments or other notable relative information.*

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