



Table of Contents

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President’s Letter--  
Participate Live..... 1

Eulogy for Don Davis,  
February 16, 2023 .....2

District Court Roundup .....5

Appellate Roundup - Spring 2023  
Noteworthy Cases from the  
Sixth Circuit..... 7

Call for Articles .....8

Reminder: Time to Renew Your  
FBA Membership.....9

Help Wanted—Pro Bono Trial  
Attorneys for Prisoner Civil  
Rights Cases.....9

Upcoming Events .....9

President’s Letter--Participate Live

Britt Cobb, President  
Federal Bar Association, W.D. Michigan

The pandemic changed the way we do things. Businesses, organizations, and even courts discovered that it is more economical, broadly accessible, health friendly and climate friendly to conduct a lot of business by videoconferencing. All of those things are true, and some amount of virtual engagement is here to stay. But “Zoom fatigue” is a real thing, virtual meetings are often plagued by technical problems (the FBA is working on our own Zoom problems), and many businesses are bringing people “back to the office” full time as they have realized that there really is no substitute for conducting business and events in person, on many levels.

As everyone readjusts to the old way of doing things, we encourage you to take advantage of our programming in person as much as your schedule allows. Sometimes it is hard to make time or find the energy to show up in person, but my experience is that you never regret it when you do. Often, it’s the casual encounters with members of the bench and bar at these events that teach us more about how to be better lawyers and colleagues than the formal presentation itself. Our long-term FBA members should make a point to bring a young associate to in person events. And to our newer members, don’t be shy about attending in person! Our bar is small enough that you will always see somebody that you know and hopefully meet new people that will make your next in-person event even more enjoyable.

I got some feedback after my last President’s Column that it would be helpful to post information about our events on social media, not just on the website and through email blasts. Please follow us on Facebook (under West Michigan Chapter of the Federal Bar Association), Instagram (@westmichiganfederalbar), and LinkedIn (under Western District of Michigan Chapter of the Federal Bar Association) to keep up with the latest on our events and programs.

I look forward to seeing you this spring! Please contact me or any of the officers if there are ways that the FBA can better serve you.



*Britt Cobb is the 2023 president of the West Michigan Chapter of the FBA. She is a partner at Willey & Chamberlain LLP in Grand Rapids, where she focuses on federal practice in Michigan, handling everything from serious drug trafficking and fraud offenses to more minor federal offenses.*



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## Eulogy for Don Davis, February 16, 2023

By Matt Borgula

***Editor's Note:** Matt Borgula delivered the eulogy for Don Davis at Don's funeral service at Fountain Street Church on February 16, 2023. He graciously gave us permission to publish his remarks here.*

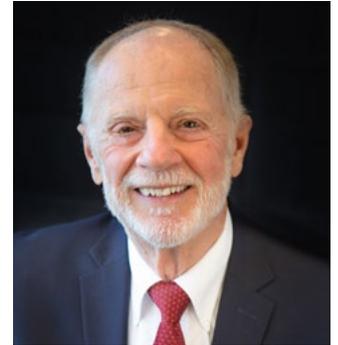
Good afternoon. Don Davis was my colleague and mentor for over twenty years. But to me, he was much more than that—he was, first and foremost, my friend. It is my great honor to speak with you today about Don, and tell you why he was such a remarkable person.

I first met Don in 2003 at the United States Attorney's Office, after I accepted a position as an Assistant United States Attorney. I had moved to Grand Rapids from Chicago with my wife, Jennifer, who later accepted a job in the same office, and still works there today, as the First Assistant United States Attorney. I was a new AUSA, and I was green. I came from a fancy law firm in Chicago. Don did not waste a single moment before introducing himself. I still remember the first words out of his mouth: "Do you run?" I told him that yes, I was capable of running but did not make a normal practice of doing it.

Despite my lack of running prowess, Don invited me to join him and a group of other prosecutors for daily runs at noon. Every day we would meet up at Grand Rapids Community College and run through the streets of downtown Grand Rapids. Jogging was difficult for me. I never really enjoyed it, and it didn't help that we were expected to *talk* the entire time. Debates ensued, usually over the law or policy, sometimes current events; there seemed to be no topic that could escape discussion. As Don would say, "The lower the stakes, the more heated the discussion."

Don was always in the middle of it. This was Don's element. He loved collaboration and debate on any issue—especially issues of law and justice. Sometimes these discussions became intense, maybe too intense, and those that were in good enough shape to break away might move ahead and avoid the debate. I was not one of those people. But even if I decided to drop behind, Don would never let anyone run alone. "Leave no man behind," he would always say.

Above all else, running was an opportunity for social interaction that Don loved. Don ran the Fifth Third River Bank Run over 40 times, and he never ran it alone. Usually donning a well thought out t-shirt, with Spock, the Marine Corps, or something that would draw attention. Why? Because he enjoyed the interaction with other runners. He loved meeting people on those runs. There were times when I ran that race with Don, twenty years his junior, and could not keep up. He would try to pull me forward, and I would plead, "Please, please, just go." He never finished the race alone though. When I finally staggered across the finish line, there he was, ready to tell me the life story of some random stranger he'd met along the way. Running that race was really a reflection of how Don lived his life. Work hard. Do your best. Enjoy the journey. Meet and get to know people along with way.



Don Davis (1948-2023)

## Eulogy for Don Davis

Continued from page 2

It was no different in his career. Don Davis was a fabulous trial attorney. One could argue that he was one of the most accomplished federal practitioners in the history of the Western District of Michigan. Over 75 jury trials. I'm unaware that he ever lost one, including his last two as a criminal defense attorney. And if there is someone out there today who knows of a defeat, please don't tell me. I don't want to know. He argued 125 times before the Sixth Circuit Court of Appeals. He earned countless awards for his cases, some of which are displayed outside this auditorium. He tried the last death penalty case in this District. He tried almost every type of trial, including civil cases, over his four decades of public service. He literally has four walls of awards from federal agencies, thanking him for his service to our country.

Don was integral part of the Hillman Advocacy Program. He held every office of the local chapter of the Federal Bar Association and attended meetings for as long as there has been a local chapter in this District. He was one of the founding members of the District's historical society. Countless groups and organizations he helped and assisted over the years. He held just about every office in the United States Attorney's Office, including Assistant United States Attorney, First Assistant, Criminal Chief, Senior Litigation Counsel, and, of course, United States Attorney.

I served under him when he was U.S. Attorney, and he was a great boss, because his only agenda was to provide support to those that worked for him. He would walk around the office and ask, "What are you working on?" He was genuinely interested, he cared, and he wanted to help.

After "retiring" from the United States Attorney's Office, he joined our law firm. Why? Because he loved and missed the collaboration, working together, helping people. That is



why Don loved practicing law. Sure, he loved the law and he loved to debate it, but it was those relationships that mattered, with attorneys, on the prosecution and the defense; with agents, especially the IRS; and with the judges. He valued those relationships more than any award he ever won.

I see so many of those he valued out here today. Those who interacted with Don along with way. And those of you who knew Don know that you didn't exactly "interact" with Don Davis. You experienced Don Davis.

He was an amazing story teller. Once you met him and talked to him, you felt like you knew all the people and places he had experienced. That is why he was so memorable. Don was always interested in whoever he was talking to, almost as if he was collecting stories that he would be able to share in the future. He always had a story at the ready so that the person in front of him would feel comfortable and relate to Don. You remembered Don because he remembered you. He valued your friendship, and he made sure you knew it.

Now, in honor of Don, I'm going to do something he was apt to do: take a 180 degree turn and talk about some-

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## Eulogy for Don Davis

Continued from page 3

thing completely off-topic. Tomatoes. I want to talk to you about tomatoes. Don loved tomatoes. Shortly after I met Don, probably on one of the runs, I told him that I come from a long line of gardeners, going back to my roots in Italy.

Don loved learning about people. He also loved to learn new things, and Don decided that he was going to grow tomatoes. And when Don Davis learned something, it became an obsession. He didn't just buy a couple of plants and stick them into the ground. He learned everything about growing tomatoes. He knew all the varieties. He studied all the potential viruses and fungi that could afflict your plants. He then set out to grow them from seed . . . in his house . . . with grow lamps, and because I shared his passion for tomatoes, I did it too. There we were, each starting grow operations worthy of DEA surveillance, in our homes. Mine were in our bedroom. Don's were all over his house. Linda and my wife, Jennifer, patiently put up with this only on the promise that there would be wonderful produce 5–6 months later.

When it came time to plant, Don didn't just have a mere 16 plants like I did. He had what could only be considered a tomato crop. As many 48 plants, 15–20 varieties. Why did he do this? Because Don wanted something he could collaborate on, and he loved to learn. It was the essence of life for him. It's what drove him.

And it wasn't only tomatoes. Don seemed to have a pocket expertise on a myriad of offbeat topics. I am positive that someone here today has heard the history of IPA craft beer, episodes of Star Trek (including all the various spin-offs series), random historical events, and something he called "ice camping" (which he had done just the week before he passed).

While Don talked much about the things he had learned or the places he'd been, his greatest love was his family. Linda, Erin, Trevor, and his grandkids. You gave his life meaning. He talked of you often. He bragged about his grandkids. Not only to his friends but to just about anyone that would listen. There are many people in this room that have heard the story of how he set Erin up with her husband Scott. How on one of those many runs, he and I hatched a plan to set up his daughter with my good friend from high school, and it worked! We were only slightly disappointed when neither of their children were named some derivative of "Don" or "Matt."

Trevor, I'm sure you're not aware of this but on one particular long and drawn out case, a federal judge had heard so many times about your Dad's adventures to Germany to visit you that he refused to set any hearings without checking Don's calendar first. "I suppose we have to make sure this next hear-



ing doesn't conflict with apple picking season in Germany," he would say. You were always on your father's mind.

Linda, he cherished you, and every story he told about you left the impression that he believed he was the luckiest guy on earth.

To all of you who showed up today, Don would be so grateful to all of you that are here. His family, his friends, his colleagues. And I know that he would want you to remember him as a man who loved life, who loved to learn, who loved people.

I last saw Don the day before he passed. We were sitting in our conference room, with a group of lawyers, talking, collaborating. He was in his element. I will remember him in that moment, knowing that even in his final days he was still doing what he loved to do, and I will speak of him often.



***Matt Borgula** is a partner at SBBL Law in Grand Rapids, where he represents individuals and businesses in criminal prosecutions, grand jury investigations, and civil enforcement actions brought by state and federal agencies. He is a past president of the West Michigan Chapter of the FBA.*

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# District Court Roundup

By C.J. Schneider and Richard Perez

## ***Boylan v. Nagy, 2:19-cv-210, 2/14/2023, Hon. Maarten Vermaat***

Petitioner, Deshawn Boylan, previously pleaded guilty to unlawful driving away after driving away a vehicle not his own (“UDAA”). The owner of the vehicle chased the stolen vehicle, while two other men in Petitioner’s group followed in a different vehicle. After stopping abruptly, one of the individuals pulled out a gun and fired several shots at the owner. At Petitioner’s sentencing, the sentencing court determined that he did not act in concert with others that led to the death of the owner. More than a year later, the State charged Petitioner with felony murder for the death of the owner during the commission of UDAA. During the trial, the prosecution relitigated whether Petitioner acted in concert with others, and Petitioner was convicted.

Petitioner later filed a habeas corpus petition, contending that his trial counsel was ineffective for failing to file a motion to quash. Petitioner argued that, under a theory of collateral estoppel, the UDAA sentencing court’s prior determination that the Petitioner did not act in concert with others precluded relitigation of that fact during Petitioner’s prosecution for felony murder.

The Court concluded that the Michigan Court of Appeals unreasonably applied the federal ineffective-assistance standard in rejecting Petitioner’s claim. The Court reasoned that the state court wholly ignored the factual findings made at Petitioner’s UDAA sentencing and failed to consider both the preclusive effect of such findings and whether a motion to quash premised upon collateral estoppel would have suc-

ceeded. The Court further concluded that Petitioner had presented the rare case where habeas relief was warranted, and granted his petition, vacating the conviction and sentence for first-degree felony murder.

Deshawn Boylan appeared pro se. AAG’s Andrea M. Christensen-Brown and John S. Pallas represented the State.

## ***United States v. Henderson, 1:22-cr-169, 3/13/2023, Hon. Paul Maloney***

Defendant, Tyrone Henderson, was charged with three crimes: (1) possession with the intent to distribute 400 grams or more of fentanyl, 100 grams or more of heroin, and 50 grams or more of methamphetamine; (2) felon in possession of firearms; and (3) possession of firearms in furtherance of a drug trafficking crimes. Defendant filed a motion for disclosure of exculpatory evidence and documents under *Brady v. Maryland*, requesting documents regarding confidential informants that provided probable cause for a search warrant. The Court denied Defendant’s motion.

The Court concluded that Defendant did not meet his burden for the request, reasoning that the Sixth Circuit has not held that *Brady* or *Giglio* apply to challenges to a search warrant under these circumstances. The informant is considered a tipster, not an active participant in Defendant’s alleged crimes; Defendant’s desire to substantiate the truth of the information presented in the search warrant did not demon-

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**District Roundup**  
Continued from page 5

strate how the requested information would materially aid his defense; and the government's need to protect the identity of confidential informants weighed against disclosure.

AUSAs Joel Fauson and Erin Lane represented the United States. Geoffrey Upshaw of the Law Office of Geoffrey Upshaw represented Tyrone Henderson.

***Brown et al. v. City of Wyoming et al.***  
**1:21-cv-855, 2/28/2023, Hon. Hala Jarbou**

Plaintiffs brought an action under § 1983 and state law against police officers, individually and in their official capacities, the city, and the chief of police, alleging § 1983 claims against the officers based on unreasonable search and seizure, excessive force, and equal-protection violations; a § 1983 municipal-liability claim against city; a § 1983 supervisory-liability claim against chief, state-law claims for assault, battery, and false imprisonment against officers; and a state-law claim for intentional infliction of emotional distress against all defendants. The claims arose out of an incident in which officers drew guns and handcuffed Plaintiffs while they were showing and viewing a home for sale.

The Court granted Defendants' motion for summary judgment with respect to the federal claims and certain of the state claims, holding that the officers were entitled to qualified immunity, did not use excessive force when they handcuffed or pointed guns at Plaintiffs, and had probable cause to believe the plaintiffs were breaking and entering the home. The Court further held that Plaintiffs were not deprived of equal protection and failed to state a claim for supervisory liability under § 1983.

The Court reasoned that the officers' conduct was not so egregious that a constitutional violation was apparent, that the Plaintiffs were only detained at gunpoint until the risk to officer safety was neutralized and the handcuffs were secured, and that there was no municipal policy or custom to support a *Monell* claim.

The Court declined to exercise supplemental jurisdiction over the remaining state-law claims and dismissed them without prejudice.

Ayanna Hatchett, Christopher Desmond, Madeline Sinkovich, and Vernon Johnson of Johnson Law PLC, Detroit, MI, represented the plaintiffs. Andrew Brege, Alexandra Page, Thomas Beindit, and Carlito Young of Rosati, Schultz, Joppich & Amtsbuechler represented the defendants.



**C.J. Schneider** is a member at Miller Johnson in Grand Rapids. He practices in commercial crisis counseling and litigation, helping businesses and nonprofit organizations successfully navigate high-profile matters, including mass tort claims, high-stakes contract disputes, global supply chain emergencies, and corporate governance reform.



**Richard Perez** is an associate at Miller Johnson in Grand Rapids. His litigation practice primarily focuses on commercial, governmental, and criminal litigation in all phases of disputes and investigations.



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# Appellate Roundup - Spring 2023

## Noteworthy Cases from the Sixth Circuit

By Ashley Yuill

### ***Stryker Employment Company, LLC v. Abbas*, 60 F.4th 372 (6th Cir. 2023)**

In reviewing this non-compete dispute, the Sixth Circuit reminded litigants that federal law governs a district court's power to issue a preliminary injunction and that district courts have discretion to craft an injunction that preserves the status quo. After a former employee took a job with a competitor, two Stryker affiliates sued him for breach of contract and misappropriation of trade secrets. Relying on noncompetition, nondisclosure, and nonsolicitation agreements with the ex-employee, Stryker successfully obtained a preliminary injunction prohibiting him from working for the competitor for one year.

On appeal, the former employee argued that the injunction—which prohibited him from working for the competitor “in any capacity”—amounted to an industry-wide ban, but the Sixth Circuit disagreed. Because the employee had often worked beyond the scope of his official position at Stryker, the Court reasoned, the district court properly exercised its discretion in using broad language to preserve the status quo. Moreover, the district court made clear that it was amenable to modifying the injunction if the parties identified a position for the employee that would not violate the non-compete agreement. Because the preliminary injunction simply preserved the status quo and

was consistent with the parties' contract, the Sixth Circuit concluded, it was not overbroad.

The Sixth Circuit also affirmed the preliminary injunction's prohibition on the former employee having ex parte communications with lawyers representing the new employer in other litigation against Stryker. The court of appeals concluded that including that prohibition was not an abuse of discretion given the district court's finding that the employee was privy to confidential information, the disclosure of which to a competitor or a competitor's counsel would detrimentally affect Stryker.

Bradley K. Glazier of Cunningham Dalman PC and Matthew W. Daley of Hawley Troxell represented the appellant-employee. Andrea J. Bernard, Charles R. Quigg, and Jarrod H. Trombley of Warner Norcross + Judd LLP represented the appellees.

### ***United States ex rel. Martin v. Hathaway*, No. 22-1463, 2023 WL 2661358 (6th Cir. Mar. 28, 2023)**

The Sixth Circuit contributed to a circuit split over the interpretation of the Anti-Kickback Statute when it affirmed the dismissal of this *qui tam* lawsuit filed by an ophthalmologist under the False Claims Act. The ophthalmologist alleged

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## Appellate Roundup

Continued from page 7

that Oaklawn Hospital declined to hire her in return for a commitment from another ophthalmologist to continue referring patients, but the Sixth Circuit held that this claim could not establish a cognizable kickback scheme. In doing so, it issued two notable holdings.

First, the Sixth Circuit interpreted “remuneration” under the Anti-Kickback Statute to mean only payments and other transfers of value, and not simply any act that might be valuable to another person. In this case, the Sixth Circuit reasoned, there was no evidence that anyone paid anyone anything or changed the value or cost of any services that otherwise would have been received; thus, there was no “remuneration” under the Anti-Kickback Statute.

Second, the Sixth Circuit adopted a “but-for” causation standard for False Claims Act cases predicated on alleged violations of the Anti-Kickback Statute. Only submitted claims “resulting from” a violation of the Anti-Kickback Statute are covered by the False Claims Act, and circuits are divided on what it means for a claim to “result from” an alleged violation. The Sixth Circuit sided with the Eighth Circuit on this question. Noting that the ordinary meaning of “resulting from” is “but-for causation,” the Sixth Circuit held a *qui tam* plaintiff must prove that a claim for reimbursement would not have occurred but for the illegal kickback. Because the relator in this case could not meet this standard, the Sixth Circuit affirmed the dismissal of the complaint.

The relator ophthalmologist was represented by Julie A. Gafkay of Gafkay Law PLC and Floyd E. Gates and Christopher J. Zdarsky of Bodman PLC. Mary Massaron of Plunkett Cooney represented the referring ophthalmologist. Oaklawn Hospital was represented by Jonathan S. Feld, Mark J. Magyar, and Andrew T. VanEgmond of Dykema Gossett PLLC and Lisa A. McNiff of Schroeder DeGraw PLLC.

### ***Rodriguez v. Hirshberg Acceptance Corp.*, 62 F.4th 270 (6th Cir. 2023)**

Although district courts enjoy significant discretion in managing their caseloads, the Sixth Circuit recently recognized that this freedom is not limitless. In 2018, Judge Neff administratively closed this putative class action when it appeared that a pending Sixth Circuit decision would resolve the issues in dispute. After the plaintiff belatedly moved to reopen the case, Judge Neff refused the request because there was no excusable neglect that warranted an extension to the

original deadline. The case was left administratively closed and was eventually terminated.

On appeal, the plaintiff argued that Judge Neff erred by refusing to reopen the administratively closed case, and the Sixth Circuit agreed. Judge Neff had cited Federal Rule of Civil Procedure 6(b)(1)(B)—which provides a means for extending a missed deadline once an action has been commenced—as authority for not reopening the case, but the Sixth Circuit reasoned that authority to extend a deadline “should not be confused with authority to dismiss the action altogether.” The district court abused its discretion by elevating Rule 6(b)(1)(B) to serve as a means for terminating a case, the Court held.

Although it sympathized with district courts who have to manage busy dockets, the Sixth Circuit clarified that the district court had to rely on another procedural tool, such as Federal Rule of Civil Procedure 41(b), to dismiss this case. Accordingly, the panel reversed Judge Neff’s order denying the motion to reopen and remanded this case for further proceedings.

Curtis C. Warner of Warner Legal represented the plaintiff-appellant. Kathleen H. Klaus and Jesse L. Roth of Maddin Hauser Roth & Heller PC represented the defendants-appellees.



*Ashley Yuill focuses on litigation and dispute resolution, including appeals, at Warner Norcross + Judd LLP.*

## Call for Articles

Interested in contributing to *Bar & Bench*? We invite you to draft an article on a subject of interest to federal practitioners in the Western District of Michigan. Please contact our editor, Charlie Quigg, at [cquigg@wnj.com](mailto:cquigg@wnj.com) for more information.

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## Reminder: Time to Renew Your FBA Membership

Thank you for your continued membership in the West Michigan Chapter of the Federal Bar Association! If you haven't yet renewed your membership for 2023, please do so today.

Membership in our local chapter of the FBA provides you exclusive access to events, our newsletter and email updates about the district, all providing unique opportunities to connect with members of the bench and bar. Our annual dues remain a great value at only \$50.00 for 2023.



You may renew your membership quickly and easily via PayPal on our website: <https://westmichiganfederalbar.org/annual-membership-checkout/>. If paying by check payable to the West Michigan Chapter of the Federal Bar Association, please mail it to the FBA, P.O. Box 2303, Grand Rapids, MI 49501-2303. Please include with your check a list of the names of all attorneys you are paying for along with your firm name, address, phone number, and email address.

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## Help Wanted—Pro Bono Trial Attorneys for Prisoner Civil Rights Cases

Each year, members of our chapter represent prison inmates whose civil rights claims have survived summary judgment and are headed to trial. The district court is again looking for attorneys to accept pro bono appointments in this worthwhile program. The Western District's prisoner civil rights pro bono program presents an excellent opportunity for trial work, without lengthy discovery. We encourage our members—and especially our young lawyers, for whom trial experience can be hard to find—to participate. The link to the Court's Pro Bono Plan is: <https://www.miwd.uscourts.gov/sites/miwd/files/Pro%20Bono%20Guidelines.pdf>.

If you are interested in learning more, please attend our upcoming program on § 1983 cases, which will be held

on May 3 from 12:00 pm to 1:30 pm at Warner Norcross + Judd's Grand Rapids office (150 Ottawa Avenue NW). During the program, Magistrate Judge Phillip Green, MSU College of Law Professor Dan Manville, and AAG Allan Soros will provide an overview of § 1983 cases, including the process, best practices, and strategies to handle a prisoner rights case under § 1983, as well as information on the Court's Prisoner Early Mediation program.

If you aren't able to attend the May 3 program but would like to learn more or volunteer, please email [stephanie\\_carpenter@miwd.uscourts.gov](mailto:stephanie_carpenter@miwd.uscourts.gov), and either Stephanie Carpenter or Judge Ray Kent can tell you about the process.

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## Upcoming Events

- May 3, 12:00 p.m.** ..... Prisoner Rights: An Overview of § 1983 Cases at Warner Norcross + Judd's Grand Rapids office (150 Ottawa Avenue NW)
- Summer (date to be confirmed)..** Program at Founders Brewing Company
- June 24, 6:00 p.m.** ..... Kalamazoo County Bar Association Law Day Celebration with Jeff Daniels (ticket required; contact Chris Tracy ([ctracy@wnj.com](mailto:ctracy@wnj.com)) for more info)