COLUMBUS BAR

Lawyers QUARTERLY

FALL 2007

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President's Page

Memoria

Ethics

Cain & Abel

In Court

Written Law

Interiors

Better Lawyer

Afterward

Legal Trends

Techno*law*gy

Reflections

Employment Law

Criminal Law

Book Review

Calendar

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Notes

ON IMPROVING THE ADMINISTRATION OF JUSTICE

LSC funded programs provide basic legal services to those living at or below the poverty income line. Some 50 million Americans qualify for these services.

By Nelson E Genshaft

I recently had the opportunity to attend the annual meeting of the National Conference of Bar Presidents, which is held in conjunction with the annual meeting of the American Bar Association. The ABA represents the interests of its 420,000 members and what it says about legislative and civil rights issues should be important to all lawyers in this country. The ABA maintains a Government Affairs Office in Washington to advise the Administration and Congress on issues that are important to lawyers. The legislative advocacy session at the ABA meeting is always interesting and highlights those issues that are at the forefront of efforts to improve the administration of justice in the United States. These issues are important at the local level, and include:

Funding of the Legal Services Corporation

The LSC is the organization responsible for funding civil legal services programs that serve the poor in this country. For FY 2007, LSC received $348.6 million in funds, which was LSC's highest level since its budget was slashed in 1996, when funding went from $415 million to $278 million. For FY 2008, the Administration has proposed a reduction of $37 million to $310.2 million, which is actually less than the LSC received in 1981. The LSC has recommended a funding increase for FY 2008 to $430.6 million, an $82 million increase over 2007. The ABA supports this request because:

LSC supports appropriations to 138 local legal aid programs nationwide, running legal services programs supervised by local boards that set their own priorities.

LSC funded programs provide basic legal services to those living at or below the poverty income line. Some 50 million Americans qualify for these services; however a 2005 report on what is called the Justice Gap states that between 70 and 80 percent of the legal needs of the poor are still unmet; and that one of every two eligible clients who seek assistance is turned away because of lack of resources.

The most challenging needs are family disasters (job loss, divorce, health crises, housing loss, domestic violence and child custody), natural disasters (hurricanes, tornadoes, floods, fires) and national disasters such as 9/11. Clearly a crisis exists for millions of low income Americans who do not have access to the justice.

Financial Assistance for Legal Aid Attorneys

Senator Tom Harkin of Iowa, who started his career as a Legal Aid lawyer, has introduced a bill to amend the Higher Education Act of 1965 to provide funding for student loan repayment for Legal Aid lawyers. Noting that the promise of "equal justice under law" rings hollow if the most vulnerable of Americans are denied access to the justice system, Sen. Harkin's bill seeks to encourage new lawyers to work in Legal Aid jobs. The ABA supports this legislation, noting that the average annual starting salary for legal aid lawyers is now $35,000, but the average annual loan repayment burden for a new law school graduate is $12,000. This forces many law school graduates to either forego public service or leave for better paying jobs. Funding would be used to repay federal student loans and cap the monthly payments. In exchange, recipients would agree to work for Legal Aid for minimum periods of time, with full loan forgiveness after ten years of service.

Habeas Corpus

The ABA supports the proposed Habeas Corpus Restoration Act, which would restore to federal courts the ability to hear habeas petitions from any of the 385 detainees at Guantanamo Bay. In 2006 Congress included a provision in the Military Commissions Act that prohibited judicial review of habeas corpus claims filed by detainees who were in U.S. custody at the time the law was passed. In a letter dated June 6, 2007 to Senators Leahy and Specter, both on the Senate Judiciary Committee, ABA President Karen Martin noted:

The central importance of the writ of habeas corpus has been reaffirmed by the U.S. Supreme Court on multiple occasions. In 2004, the Supreme Court ruled in *Rasul v. Bush* that the federal courts have jurisdiction to consider petitions for writs of habeas corpus from Guantanamo detainees under the federal habeas statute. In *Hamdan v. Rumsfeld*, the Supreme Court held that the framework for judicial review established by the Detainee Treatment Act did not apply to habeas corpus claims that were already pending in the U.S. courts.

Karen Mathis's letter goes on to note that the government has indicated its intention to try approximately 60 to 80 of the detainees before a military commission. Under current law, the remaining prisoners may be held indefinitely as "enemy combatants . . . without ever being charged and without access to meaningful federal judicial review of the legitimacy of their detention." The goal of the Habeas Corpus Restoration Act is to "establish procedures that inspire public confidence in the system and that we would find acceptable if applied to our own service members."

Federal Judicial Salaries Restoration Act of 2007

The ABA supports legislation proposed by Senator Leahy to enact a pay increase for federal judges. District Court judges, who now make $165,200, would earn $247,800, and a judge on the Court of Appeals would go from $175,100 to $262,700, a 50% increase. While noting that this is a substantial increase, the ABA points out that because federal judges' salaries have been tied to the pay of members of Congress, the judges' compensation has actually declined by 25% since 1969, the last year in which there was any comprehensive adjustment of judicial salaries. Judges' salaries compared to the compensation of lawyers in private practice, law school deans and leaders of non-profit organizations are significantly lower. The median salary for law school deans is now about $230,000, 42% more than the salary of a district court judge. The relatively low pay of federal judges plays out with fewer talented attorneys joining the federal bench and some experienced sitting judges leaving. The ABA says that "the consequence of inadequate salaries should be of grave concern to all of us; judicial excellence is at stake." The Columbus Bar board of governors will consider a recommendation from a subcommittee that we join other state and local bar associations in supporting the legislation for a pay increase for federal judges.

Other issues of concern include Immigration Reform (badly needed as the current system is dysfunctional both from a theoretical and practical standpoint), the Foreign Intelligence Surveillance Act (the increase in warrantless surveillance of American citizens, without adequate checks and balances to prevent invasions of privacy) and the erosion of the attorney-client privilege and work product protections (enforcement agencies now routinely require corporations to waive the privilege in order to cut a more favorable agreement).

We at the Columbus Bar will continue to monitor these issues and be helpful when we can. This may include telling our legislators about our support of pending legislation, articles to newspapers and press releases to let the public know of our position. I would like to hear from our members about their views on these issues, so feel free to write to me at *neg@columbus lawyer.net* or through the Columbus Bar offices.

Nelson E Genshaft, Strip Hoppers Leithart McGrath & Terlecky

REMEMBERING

Max Kravitz

Max gave 100% of himself to everything he did. If he was your friend, he was your friend for life and he would do any and every thing to help you in a time of need. Max was the eternal optimist. No matter how bad the facts and/or the law, Max knew that "This is a winnable case."

Husband, father, teacher, lawyer, mentor, friend, golfer, Max was all of these and more. No one we have ever known enjoyed life more than Max and no one we have ever known was better at all of these roles (except golfer) than Max.

Max gave 100% of himself to everything he did. If he was your friend, he was your friend for life and he would do any and every thing to help you in a time of need. Max was the eternal optimist. No matter how bad the facts and/or the law, Max knew that "This is a winnable case."

Max believed strongly that those less fortunate than he deserved the best representation possible. Not only did he provide pro bono services, he'd drag his friends in with him to make sure the client got the best there was. His capacity for caring for others was boundless. He represented unpopular persons and causes as zealously and eagerly as he represented his friends. He hated it when the system wasn't fair.

Max was well known and respected as a professor and lawyer in the Columbus legal community, but he was equally well known and respected by the national criminal defense bar. Such respect was evidenced by the fact that he held high office in the American Board of Criminal Lawyers, the National Association of Criminal Defense Lawyers and the Ohio Association of Criminal Defense Lawyers. His clients were scattered across the country and Max was quick to hop in a car or on an airplane to be with them in their times of troubles.

Max worked his entire career to make the criminal justice system better. Whether as a more than 30 year member of the Capital Law School facility, a member of the Ohio Criminal Sentencing Commission or as a member of the Sixth Circuit Advisory Committee on Rules, Max was constantly concerned about making the system not only work, but work in a manner which was fair to everyone.

His ability to go from absentminded professor to bad putter to nationally respected criminal defense counsel in the blink of an eye was a joy to behold – especially the bad putter role. No one outworked or outplayed Max. He approached everything he did with an enthusiasm that few could match.

Max's love for his wife Janet and sons Bret and Zachary was limitless. He was always ready to tell you of his love for them and how proud he was of their latest accomplishments. If you spent more than a few minutes in his presence, he would be on the telephone to one or more of them to tell them of his latest idea or theory or the shot he had just hit on the golf course or what he had eaten at his latest meal.

The Columbus legal community and the nation have lost a skilled teacher and attorney. We have lost a friend, roommate and golfing partner. We are all better for the time we knew and loved him. Shut your eyes and think of Max's face. We'll bet you remember his infectious grin. We'll bet you're smiling too.

Ethics

THREE RODENTS, ONE WOLF, SEVEN JUSTICES AND

Three Magic Words

By Bruce Campbell

Three intrepid guinea pigs, Harry, Joe and Pearly, set off with irrational exuberance to make their way in life, each with a hundred recently-inherited Ben Franklins tucked into his money belt. After days of wandering through the sands of suburbia, they came to a sylvan glade and there decided to establish themselves.

Harry set about making a house out of a pile of ALR 3d volumes someone had dumped near the woods. Stepping back to admire his handiwork, Harry was approached by a wolf named Blitzer who had cleverly disguised himself as Al Gore (black cloths and heavy padding). "Al" told Harry that he needed to reduce his "environmental footprint" and that for only fifty Ben Franklins he would "recycle" the new home for him. Harry didn't know what recycling was but had heard it was something everyone should do. He unhesitatingly handed over fifty Bens to Blitzer. The next day he returned to find no trace of his house. Unbeknownst to him, the house had been pulverized to make cat litter.

Joe opted to build his house of tree branches. He had learned to do this watching "This Old Wickiup" on PBS. And a posh house it was, though as yet without a roof. On cue, appeared the wolf Blitzer, this time dressed as Bob Vila sporting a carpenter's apron. He told Joe that such a fine house deserved a roof of slate, which, as it happened, his company could install for only fifty Bens. Indeed, that very afternoon a crew came to put a slate roof ("guaranteed for the life of the dwelling") on the house of sticks. Joe paid; Blitzer split. An hour later, the house collapsed under the weight of the roof. The slate shattered on impact along with Joe's dreams.

Meanwhile, Pearly was busy making an earth-sheltered house on the side of a hill overlooking the glade. Blitzer, now posing as Martha Stewart (in a bright orange one-piece outfit), happened by. She suggested that, if the brook in front of the house were dammed, Pearly would have lakefront property oozing with *feng shui*. She said she had recently come to know some parolees, who, for fifty Bens, would dam the stream. The deal was struck. A truck soon appeared, driven by two women who looked as if they might have just set fire to their grandmothers for kicks. They dumped dirt and riprap into the stream to form a dam (totally without regard to lower riparian rights, it must be noted). Hard upon came a drenching rain. The lake filled, inundating and undermining the house. Pearly watched sadly as his home slid into the lake. Its *feng shui* escaped into the cosmos.

The baleful brothers came together to share their tales of misfortune. As they wallowed in their mutual misery, a skanky stranger appeared in a bedraggled three-piece suit and carrying a frayed Land's End briefcase. He introduced himself as George W. Blitzer, Esq. of the firm of Blitzer Filch and Rook, LLP. "I have heard your heart-rending stories, and I am here to do a little justice" said G.W.B. "For a flat fee of just one hundred fifty Ben Franklins, a sum that I have reason to believe you may possess amongst you, I will be your legal champion. I will sue the living bejebbers out of the low culprits who have treated you so execrably. I will assault them with depositions and pepper them with discovery motions. I will litigate, advocate, fulminate, irritate, incapacitate, and financially eviscerate these flimflammers, before you can say 'treble damages.'" The guinea pigs three, eager for vindication, handed over their remaining funds to Blitzer who walked off saying to himself, "Lady Justice been verlee, verlee good to me."

Hearing nothing about their litigation for many months, the pigs used the computer at the homeless shelter in which they now lived to check the Supreme Court's website. G. Wolf Blitzer, Esq., it turned out, had long since been disbarred after his conviction for felonious mopery in the night season.

Moral: There is a limit to everything – except foolishness and greed.

[Clumsy segue into semi-seriousness]: In a recent ethics case involving legal fees, the Supreme Court of Ohio used three thought-provoking words (not to suggest, of course, that *any* of their words are less than riveting). Harry, Joe and Pearly, at some point during their journey from sylvan glade to penury, probably expressed a dumbed-down equivalent of the words. A banner at the meeting hall of the Clients Outraged by Irrational Fees (COIF) bears the words. In one form or another, the words are also the principal subject matter of many screeds against lawyers that flow daily into the ethics department at the old CB&A.

As nearly as our crack law clerk, Doug, "Sniffer Dog," Althauser, has been able to discover, the Front Street Seven (FSS) have used these three words together in only one prior ethics case in a wholly different context.

But, before we get to the new case and the words, a short review is in order. Under the old Code's DR2-106 and the new Rule1.5[a] a lawyer cannot charge – sing along here if you like – "an illegal or clearly excessive fee . . . a fee that is in excess of a *reasonable* fee." This naked bromide is augmented by "factors to be considered in determining reasonableness," one of which is "the amount involved and the results obtained." Rule 1.0 (i) gives us a definition (albeit, a tautological one) of the word reasonable: "'Reasonable' or 'reasonably,' when used in relation to conduct by a lawyer, denotes the conduct of a reasonably prudent and competent lawyer." Swell! A reasonable fee is one charged by a reasonable lawyer acting reasonably. Now, all we need is street corner peddlers (à la Hollywood) selling maps to the chambers of "reasonable lawyers" so we can track them down and check out their billing practices.

Given the vagaries of the Rules, the real meaning of "clearly excessive fee" must be garnered from a progression of Supreme Court cases. And that, dear reader, brings us to *Disciplinary Counsel v. Johnson*, 113 Ohio St.3d 344, 2007-Ohio-2074, one of the most recent cases in that string.

Skipping details not germane, *Johnson* involves a lawyer accused of charging excessive fees in probate proceedings while acting as a guardian. Disciplinary Counsel presented testimony of an attorney with expertise in probate practice. The expert "questioned respondent's failure to evaluate the cost to [the client] for continuing to pursue a claim [a lawsuit to recoup estate assets] with little chance of recovery." *Id.* {¶ 47}. He told the hearing panel, that respondent had "kept that lawsuit alive and kept churning the file creating events ... to achieve billable hours on something that . . . no rational, competent, ethical lawyer would allow his client to do . . . ." *Id.* {¶ 64}.

The *Johnson* Court found the expert's testimony persuasive and then made the following pronouncement (without citation to prior cases):

"[The expert's] remarks underscore a *fundamental tenet*: attorney fees are not justified merely because the lawyer has charged his professional time and expenses at reasonable rates; a legitimate purpose must also explain why the lawyer spent that time and incurred those costs. Here, however, respondent admitted that he did not even consider a *cost-benefit analysis*. We therefore have no doubt that respondent continued to aggressively pursue any legal claim on [the clients'] to the point where his fees consumed most of the recovered assets . . . " *Id.* {¶ 71}(emphasis supplied).

Ta Da! There they are – the three magic words, *"cost-benefit analysis."* And they are framed by the introductory designation, "*fundamental tenet*." Sounds like a signal worth paying attention to. It isn't just the fee that must be reasonable; the work expended must also be reasonable when balanced with the potential benefit to the client.

Moreover, the opinion suggests that the cost-benefit calculations must be made in advance of a course of action, not after the cost has eclipsed even the most optimistic assessment of potential benefit. That in turn, bring into play new Rule 1.4 covering communication with the client and requiring that, "(b) a lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation."

But, wait. What if a judge implicitly authorized the doing of the legal work in question? Argument rejected, says the FSS. Here, counsel "advocated [for] these pursuits," and the court was not actually called upon to assess the necessity of the work to be done. *Id.* {¶ 72}.

Well then, what about the client's wishes? If the client says he wants the work done, whatever the likelihood of success, isn't the lawyer allowed, neigh compelled, to pull out all restraints? Not always, say the Supremes. Where, as here, the client's "susceptibility to a lawyer's influence" was high, the situation "cried out for respondent to scrupulously follow fiduciary standards of care." *Id.* {¶ 74}.

All of which brings us back to our duped guinea pigs and the wolf in barrister's clothing. There are a few lawyers in our midst – *and please note that I am not commenting here in any way on the respondent in the cited case* – who peddle the legal equivalent of recycling schemes, slate roofs, and *feng shui* to the credulous. These anomalous Juris Defrauders pray upon the vulnerabilities of clients: their felt need to seek legal protection in the absence of any real threat; their desperate hopes for reward against all rational expectation; and, their rage-driven demands for pointless revenge at any cost. Brandishing the pretext of "zealous advocacy," these renegade lawyers, in truth, are motivated by raw avarice.

The directness of the language in the *Johnson* decision and the début of "cost-benefit" calculus in Ohio ethics law should cause Blitzer Filch and Rook, LLP to rethink its business plan. Consumers of legal services like Harry, Joe and Pearly, should take comfort in the fact the Supreme Court of Ohio has declared legal predators unworthy of protection.

[Afterthought]: If lawyers are seen to operate successfully on a cost-benefit ethic in assessing fees for services, perhaps, in time, the federal government may come to embrace the concept. Or not. Paris Hilton will likely become a tenured professor at MIT before that happens.

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Bruce Campbell, CBA Bar Counsel

Settling Malpractice

UNDER THE NEW RULES

Under old DR 6-102 of the Code of Professional Responsibility an attorney could not "attempt to exonerate himself or herself from or limit his or her liability to a client for personal malpractice."

By Charles J. Kettlewell

You represented Dad and Child in their respective personal injury cases resulting from a single car accident wherein Mom was driving the family and went off the road. The accident occurred on January 1, 2004. Because Mom was driving and it was a single car accident, Dad and Child's cases were taken on via underinsured/uninsured motorist coverage. Big Insurance Co. (BIC) was Mom's insurance provider. Child's case settled within two years, negotiations in Dad's cases stalled and wound up on your back burner, although in December 2004 BIC sent a letter offering to settle Dad's case for $10,000.00 dollars.

Recently, a claims representative at BIC sent you a letter advising you that BIC's position is that there was a two-year statute of limitations on Dad's case which ran on January 1, 2006, and as such, BIC is now denying Dad's UM claim. A review of the applicable law confirms that the statute of limitations has run. What do you do now?

You have very likely committed malpractice, and you need to notify Dad. What do you tell him? Can you offer to settle the case for the last $10,000.00 dollar BIC offer? What if Dad's medical bills were more? What if BIC's policy limits were less? Can you settle with Dad for less?

Under **old** DR 6-102 of the Code of Professional Responsibility an attorney could not "attempt to exonerate himself or herself from or limit his or her liability to a client for personal malpractice." Under this language it was questionable as to whether an attorney could settle a malpractice claim directly with a client without risking a violation of DR 6-102. Under the old Code, Dad would have to have simply been advised of his claim and advised to seek other counsel — other counsel who would likely charge Dad a fee. Under DR 6-102 advising Dad that he didn't **have** to retain other counsel if he did not want to could have put you at risk of attempting to settle directly with Dad and thereby exonerate yourself for your liability. It was unclear, at best, whether Dad's informed consent to negotiate directly without counsel could be obtained.

Under new Rule 1.8(h) of the Rules of Professional Conduct, adopted February 1, 2007, an attorney may settle malpractice directly with a client provided certain conditions are met. The relevant sections of Rule 1.8(h) provide: A lawyer shall not do any of the following . . .

(2) settle a claim or potential claim for such liability unless all of the following apply:

(i) the settlement is not unconscionable, inequitable, or unfair; (ii) the client or former client is advised in writing of the desirability of seeking and is given a reasonable opportunity to seek the advice of independent legal counsel in connection therewith; (iii) the client or former client gives informed consent.[1]

Given the adoption of Rule 1.8(h) you may ultimately ethically enter into negotiations directly with Dad after the conditions required by the rule are met. To comply with the informed consent requirement of 1.8(h)(iii) you should send a letter to Dad advising him of the facts leading to his malpractice claim against you, your opinion as to the value of his claim (including Big Insurance Co.'s offer to settle his case for $10,000.00 and perhaps a reasonable rate of interest which could have been earned had the offer been accepted back when it was made), and that Dad should seek independent counsel before he considers accepting any offer you may make him. Under 1.8(h)(ii) Dad must also be given a "reasonable" opportunity to consider any settlement offer you may make and/or obtain the advice of independent counsel, before any settlement agreement can be negotiated and entered. Finally, under 1.8(h)(i) the settlement cannot be unconscionable, inequitable, or unfair, regardless of whether Dad elected to negotiate with or without the advice of independent counsel.

Although it is not required by Rule 1.8, it's not a bad idea to request that Dad sign and return a copy of your disclosure letter for you to keep in your records. This way, in the (hopefully) unlikely event Dad later regrets his decision to not retain counsel, he cannot allege he did not receive your letter communicating to him his options and rights.

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[1] *Italicized terms in the Rules of Professional Conduct are defined in Rule 1.0:*

1.0(f) "Informed consent" denotes the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct.

1.0(i) "Reasonable" or "reasonably" when used in relation to conduct by a lawyer denotes the conduct of a reasonably prudent and competent lawyer.

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Christensen Christensen Donchatz Kettlewell & Owens

Rectifying Client Fraud

By Alvin E. Mathews Jr.

Gabriele Lincoln is one of the busiest litigators in his small Ohio town. He has amassed a great reputation in the courtroom, but his best quality is his honesty, which has garnered him the nickname "Honest Gabe."

Most of Gabe's cases are car accident cases. One of his clients is Jan Cook, a local newspaper writer, who was rear-ended on her way home from work. Gabe is confident that he will receive a recovery from the other driver in the accident because liability was clearly established by the rear-end collision. Thus, the only issue is the extent of Jan's damages, including an injury to Jan's lower back.

Gabe's confidence in the case grows after Jan's deposition. In the deposition, Jan testified that she never had been in a car accident before and had never suffered any injury to her back. Pleased with the deposition, Gabe diligently begins preparing the settlement demand to opposing counsel. In reviewing the file to prepare the demand letter, Gabe discovers the questionnaire he normally has his clients complete. Jan's client questionnaire reveals that she was involved in another car accident, five years previous, in which she had injured her lower back.

Gabe immediately schedules a meeting to discuss this inconsistency with Jan and she acknowledges the prior car accident. She bluntly tells Gabe that she listed the prior accident on the questionnaire because she knew Gabe had to keep it confidential. Jan has a problem with fabrication. Jan further states she has no intention of revealing the earlier injury to the opposing lawyer and party because she is afraid it will ruin her lawsuit. Jan stresses to Gabe that she really needs the money from the lawsuit, does not want to drop it, and does not want to disclose the prior car accident or injury to her back.

Generally, Ohio Rule of Professional Conduct 1.6(a) prohibits a lawyer from revealing information relating to the representation of a client unless the client gives informed consent. Other conduct rules, however, may subordinate the lawyer's duty of confidentiality to obligations of candor to the tribunal and truthfulness as statements to others.[1] Where a client engages in fraudulent conduct affecting the tribunal and offers material evidence that is discovered to be false, the lawyer must not knowingly fail to rectify the fraud. Such rectification, as a final resort, may require disclosure of a client confidence to the tribunal.[2]

Disclosure is not the first step in resolving this type of ethical dilemma. The lawyer is required to attempt to persuade the client to rectify the misconduct.[3] Additionally, the lawyer must advise the client that he or she will have to rectify the record if the client fails to do so. If the client fails to correct the fraud, the lawyer is required by Rule 3.3 and 4.1 to take reasonable remedial measures. The lawyer is also given grounds to withdraw from the case under Rule 1.16(b).[4] Upon withdrawal, the lawyer can disavow any positions taken by the lawyer that were based on the client's misrepresentations. When a client uses a lawyer's services to commit a fraud, however, withdrawing alone does not remedy the situation. Rule 3.3 or 4.1 requires a lawyer to disclose a client's fraud to the extent necessary to avoid assisting the fraud even if the client information is protected by Rule 1.6.

Thus, in the situation of Honest Gabe representing Jan, Gabe knows of Jan's false testimony and must disclose Jan's material misrepresentations to the court and/or to opposing counsel if she fails to rectify the situation. The duty of candor to the tribunal trumps the duty of confidentiality in this situation.

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1. *Prof. Cond. Rules 3.3 and 4.1*
2. *Comment, ¶10, Prof. Cond. Rule 3.3*
3. *Id.*
4. *Prof. Cond. Rule 1.16(b)*

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"DREAM CRUISE"

IS A RIDE DOWN MEMORY LANE

When "muscle" cars – like Mustangs, Chargers, GTOs and Challengers – hit the scene in the mid to late sixties, a four-mile stretch of Woodward slightly south of Pontiac became a notorious race track.

By The Honorable David E. Cain

If you're a baby boomer, or within a few years either way, chances are you've been to the Rock and Roll Hall of Fame in Cleveland.

But if you just can't get enough of reliving the "glory days" try the Dream Cruise in Detroit.

Or, perhaps you'd just like to see what a 16-mile party looks like.

The Dream Cruise is a continuous re-circulating parade of the Motor City's finest moments – classic cars from every decade of the last century and a collage of about everything else that moves on wheels.

It runs along the four lanes each way of Woodward Avenue from 8-mile Road in Ferndale to Pontiac where the northbound lanes do a loop and become the southbound lanes. Cruisers have been through a 16-mile circle by the time they get back to Ferndale where most start all over again.

The "official" Dream Cruise is the third Saturday of August each year. But now-a-days the eager roadsters begin cruising at midweek.

The original Dream Cruise was created and promoted by the oldies radio station WOMC in Detroit. But by this year's 13th annual, the cruise has taken on a life of its own with sponsors and other supporting organizations focusing on the 16 miles of lawn chairs, tents, parties, vendors, bandstands with live entertainment and concessionaires.

An estimated one million individuals watched at least part of the cruise that included some 30,000 cars this year.

An added event was "Hands Along Woodward" on Sunday afternoon when thousands of enthusiasts lined the west side of the avenue from Hart Plaza in Detroit to Pontiac and they held hands for five minutes while church bells sounded a celebration of the road's 200th birthday.

It was named for the planner who originally laid out the City of Detroit and is reputed to have been the first paved street in the United States. The hand-holding was planned by the Woodward Avenue Action Association.

While the cruise features everything from horseless buggies to the latest luxury lines, the baby boom generation was definitely in the majority as the most common vehicles were mint condition cars that were popular with people who reached driving age in the sixties. That's when Woodward Avenue – lined with drive-in restaurants and other attractions – probably reached its peak for cruising all year round.

I personally remember Woodward from the early sixties when I attended a small college in South Central Michigan for a couple of years. When I'd go home for a weekend with a friend from the Detroit area, he would ask on Saturday night if I wanted to go uptown or downtown. "Uptown" was cruising Woodward Avenue.

When "muscle" cars – like Mustangs, Chargers, GTOs and Challengers – hit the scene in the mid to late sixties, a four-mile stretch of Woodward slightly south of Pontiac became a notorious race track. With multiple lanes, mostly darkness and very little police patrolling, there wasn't much to stop the young men with their hot cars. Racing for the pink slip (the car title) was common. But all that stopped in 1972 after two racers came over a crest and flew down the long hill without noticing a car holding a family of five stopped at a red light. Everyone was killed. And the police immediately cracked down.

But the cruising continued in Ferndale, Royal Oak and Birmingham: Guys just looking for "chicks."

All that has now turned into something that is very family friendly, at least during the cruise weekends. For many, the event has become an annual reunion for family and friends. Some businesses along the strip have turned it into the annual company picnic. Some people rent parking places on private lots to show off classics or set up camps. Others come at 6 a.m. to get a metered space that fronts on the avenue (but sits back behind the sidewalk).

My wife, Mary Ann, and I started going because our son, Alex, is the executive chef for a Cameron Mitchell Fish Market in downtown Birmingham. He lives about a mile east of the famed thoroughfare. Like many of the local residents, he is now hosting an annual Dream Cruise BBQ in his backyard from which one can commute by foot back and forth to the avenue.

It took only a few minutes of watching the cruise to catch such delights as a souped up golf cart, a stretch Barricuda, a hearse that spits fire out its dual tailpipes, hundreds of priceless classics of all sizes, and a women in a Honda Civic who was just trying to get her family home before inadvertently pulling onto Woodward Avenue.

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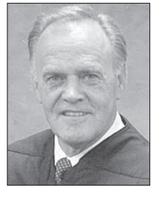
Honorable David E. Cain, Franklin County Common Pleas Court



JUDGE ALGENON MARBLEY

Celebrates Ten Years on Bench

By The Honorable Mark R. Abel

This month, Monte Marbley celebrates ten years as a federal trial court judge. It has been a busy decade filled not only with the daily run of civil and criminal cases that are the steady diet of every trial judge, but also with more than his share of high profile cases, teaching, and service to the community.

Among the cases that have received attention from the media was a 1998 suit under the National Historic Preservation Act to preserve the limestone buildings at the old Ohio Penitentiary, which would have blocked development of the Arena District. Judge Marbley dismissed the lawsuit because no federal funds had been used at the penitentiary site. His death penalty cases included Wilford Lee Berry, who abandoned his pending appeals and "volunteered" to be executed. The Supreme Court of Ohio found that Berry was competent to waive his appeals, and the Sixth Circuit held that the competency determination precluded Berry's family from bringing a federal habeas corpus on his behalf. Marbley has been the trial judge in two federal death penalty cases. In 2005, John Richard Mayhew was convicted of a kidnaping that resulted in the death of the victim; and this year a month long trial resulted in the conviction of Thomas Henderson for two execution-style slayings of witnesses who provided evidence supporting his earlier conviction for bank robbery. In neither case did the jury recommend the death penalty.

Other high profile cases include the terrorism charges against Nuradin Abdi, who pleaded guilty in July to conspiring to provide material support or resources to terrorist; mail fraud charges against state judge Don S. McAuliffe, who was convicted for collecting insurance proceeds for fire damages to a dwelling he had caused to be set on fire; and conspiracy to impede the IRS from collecting revenue charges against Richard Schultz, who was convicted of a conspiracy allegedly arising out of his sending money out of the country to avoid paying a $5 million civil judgment against him.

During the 2004 Presidential election, Judge Marbley handled the voter ID lawsuit. The parties were able to agree to a procedure for handling challenged ballots. In 2004, the Judge ruled against the ACLU, holding that Franklin County Children's Services did not violate the Establishment Clause when it sponsored a gospel concert. On the lighter side, Marbley held that a Pickerington software programmer was not denied his First Amendment free speech rights when the Columbus Metropolitan Library required him to wear shoes to enter the library.

Monte Marbley's path to hearing these and hundreds of other cases each year began when Senator John Glenn recommended him for a judgeship in May 1997, and President Bill Clinton nominated him that August. The U.S. Senate quickly confirmed him as a district judge in October 1997. Judge Algenon L. Marbley received his commission and was sworn in as a judge in November 1997.

Marbley is a North Carolina native. He was a North Carolina Fellow at the University of North Carolina, where he earned a bachelor of arts degree in 1976 and his J.D. from Northwestern University in 1979.

Before coming to the bench, he had a varied practice as a busy trial lawyer. He began as an associate at Montgomery and Holland in Chicago, handling general civil litigation and criminal defense in state and federal court; then assistant general counsel in the U.S. Department of Health and Human Services Chicago regional attorney's office.

In 1986, Marbley joined Vorys Sater Seymour and Pease in Columbus. He was engaged in business, products liability, and employment litigation. He also represented The Ohio State University, Franklin County Children's Services and Project Linden, Inc. and was active in community affairs and legal education.

On the bench, he has continued to generously give time to the community and young lawyers. He is the Secretary of Children's Hospital Board of Trustees; Chairman of the Board of Directors of KIPP, a Columbus charter school; and a member of the Board of Trustees for the Martin Luther King, Jr. Performing & Cultural Arts Complex.

Judge Marbley was a member of the University of North Carolina Board of Visitors from 2003 to 2007. This May, Governor Ted Strickland appointed him to a nine-year term on the OSU Board of Trustees. He is a member of its Academic and Student Affairs Committee and the Medical Center Affairs Committee.

Perhaps his greatest love is mentoring students and young lawyers. Shortly after he was sworn in as a judge, Marbley told the *Columbus Dispatch* that as a young lawyer he had great mentors who helped him hone his skills as a trial lawyer. He has added his own experiences as a litigator and judge to the mix and now is passing on his knowledge to law students. He has taught trial advocacy at both Capital and Moritz. He currently is teaching trial advocacy two semesters a year at OSU. For the past seven years he has taught at the Harvard Trial Advocacy Workshop and speaks frequently at continuing legal education.

The Judge's law clerks and semester-long externs from Capital and OSU enjoy working in his Chambers because they not only have a behind-the-scenes opportunity to watch a judge work, but also because he acts as a mentor and teacher who prepares them for the practice of law. Judge Marbley has had 22 law clerks. His current law clerks are Christopher Gorman, Soren Aandahl and Allison Ehlert. His legal assistant, Cherida West, has been with the Judge for 13 years. His courtroom deputy is Betty Clark, and his court reporter is Shawna Evans.

A special time for the Judge is his annual late July picnic for his law clerks and staff. When it began, it was a small get together. Now law clerks, their spouses and young children (and even a few parents from central Ohio) gather from around the country. Six of the Judge's former law clerks work in Washington, D.C., four in Chicago, four in Columbus, and one each in Boston, Detroit, L.A. and San Diego.

The Judge is holding a reception this month to mark his ten years on the bench.

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Honorable Mark R. Abel, U.S. District Court

Civil Jury Trials

FRANKLIN COUNTY COMMON PLEAS COURT

By Belinda S. Barnes & Joshua R. Bills

Verdict: For Defendant on Counterclaim for $56,000. Breach of Contract/Professional Negligence. Plaintiff Jester Jones Schifer Architects, Ltd. contracted with Defendant Ohio State School Facilities Commission (OSFC) to perform an assessment for repair and renovation of Bundy Elementary School located in Defendant Wellston City School District. Faced with pending claims against it by Wellston, Plaintiff initially filed a declaratory judgment action to have its contract with OSFC declared void. In a case of first impression in Ohio, Defendant Wellston counterclaimed and asserted that the assessment was not properly done causing the OSFC not to fund needed repairs at Bundy, including a new HVAC system, removal of floor tile, electrical upgrades, sewer repairs and additional site work. Wellston claimed that the flawed assessment cost the school district some $535,648.00 in OSFC funding. Both parties dismissed the OSFC prior to trial The jury found only the HVAC system to be improperly assessed. Plaintiff's experts: Clyde Henry and David Price (Architects). No defense expert. Settlement demand: $450,000.00. No settlement offer. Ten day trial. Plaintiff's attorneys: Donald W. Gregory, Ted M. McKinniss and Rebecca L. Roderer-Price. Defendants' attorneys: Jack Rosati, Jr. and Maureen P. Taylor. Judge: Hogan. *Jester Jones Schifer Architects, Ltd. v. Ohio State School Facilities Commission, et al., Case No. 03CVH-05-5799 (2005).*

Verdict: $25,952.84. Conversion. Plaintiff, Darel Reynolds, dba CMH Industries, Inc., brought an action for conversion of a certain amount of its checks intended for deposit at defendant Key Bank. Defendant alleged plaintiff's funds were improperly diverted through fault of both plaintiff and defendant. The jury after deliberation returned a verdict of $35,071.40 with comparative fault 26% to plaintiff and 74% to defendant. No plaintiff's expert. No defense expert. Settlement demand: $35,000 plus interest. Settlement offer: $7,000. Two day trial. Plaintiff's attorneys: James C. Carpenter and Vincent I. Holzhall. Defendant's attorneys: Alexander M. Andrews and Rebecca B. Jacobs. Judge: Sheward. *CMH Industries, Inc. v. Key Bank, Case No. 03CVH-01-83 (2005).*

Verdict: $24,392.00. Auto Accident. ACDA. Plaintiff Jung Sook Kim on April 14, 2003 was stopped in eastbound traffic on Trabue Road. Defendant Rosalie Stewart was also proceeding eastbound on Trabue Road and failed to maintain an assured clear distance. As a result of the impact, plaintiff alleged injuries to his neck, back and left arm. Medical bills: $7,660.18. Lost wages: $1,500. Plaintiff's expert: Rod Durgin, Ph.D. Defendant's expert: Karl W. Kumler, M.D. Settlement demand: $45,000. No settlement offer. Four day trial. Plaintiff's attorney: Charles H. Bendig. Defendant's attorney: Mitchell M. Tallan. Judge: Hogan (Martin). *Jung Sook Kim, et al. v. Rosalie Stewart, Case No. 03CVC-08-8879 (2005).*

Verdict: $18,500.00. Auto Accident. Right of Way. On October 7, 2001, plaintiff Margaret Smith was northbound on East Town Street near Fifth Street. Defendant Frances Williamson failed to yield the right of way. As a result of the impact, plaintiff sustained a contusion to her left forearm, a contusion to her left wrist, and lumbosacral and cervical spine soft tissue injuries. Medical bills: $8,876. Lost wages: $9,000. Plaintiff's expert: Michael Downey, M.D. Defendant's expert: Gerald Steiman, M.D. Settlement demand: $20,000. Settlement offer: $11,725. Two day trial. Plaintiff's attorney: Walter W. Messenger. Defendant's attorney: Kevin J. Zimmerman. Judge: Holbrook (Angel). *Margaret Smith v. Frances M. Williamson, Case No. 03CVC-10-10794 (2005).*

Verdict: $1,214.93. Auto Accident. Right of Way. On September 1, 2001, plaintiff Iesha Norris was crossing Sherwood Boulevard as a pedestrian when she was struck by a vehicle driven by defendant Regina Lugo. As a result of the impact, plaintiff sustained soft tissue injuries to her entire back. Medical bills: $4,799. Plaintiff's expert: Scott Cohen, D.C. No defense expert. Settlement offer: $2,000. Two day trial. Plaintiff's attorney: Walter W. Messenger. Defendant's attorney: Beau K. Rymers. Judge: Sheward. *Iesha P. Norris v. Regina I. Lugo, et al., Case No. 03CVC-09-9625 (2004).*

Verdict: $0.00. Racial Harassment. Plaintiff Laurie Mowery, a Caucasian female, was hired as a civilian data entry operator on November 9,1998 in the permit section of the Department of Public Safety, Division of Fire. Ms. Mowery's immediate supervisor was an African-American male, Lt. Arthur Wiley. Plaintiff alleged, upon receipt of a write-up by Lt. Wiley in March or April, 1999, that the atmosphere toward Caucasian employees had become hostile. Plaintiff claimed the African-American employees were given longer lunch hours and preferential treatment. She had to keep precise timesheets and sign in and out, while her African-American counterparts did not. Plaintiff also claimed that Lt. Wiley would scream in her face in front of her co-workers. According to Plaintiff, Lt. Wiley would state, "Let's make a stand," and co-workers put flyers in employees' mailboxes with racial epithets. Plaintiff also claimed that when she told the Battalion Chief about these flyers he said, "Now you know how it feels to be Black." On April 14, 1999, Wiley ordered Plaintiff to write herself up, despite her claim that she was on time. When Plaintiff complained, she was charged with insubordination. Plaintiff presented an internal EEO complaint. At trial, the jury found no racial harassment or abusive environment. The jury also found that the City of Columbus exercised reasonable care to protect and correct racial harassment. The jury found Plaintiff failed to take advantage of protective or corrective opportunities provided by the City of Columbus. The jury also determined there was no hostile work environment. Plaintiff appealed. The Court of Appeals affirmed. Five day trial. Plaintiff's attorneys: Charles H. Cooper, Jr. and Rex H. Elliott. Defendant's attorney: Pamela J. Gordon. Judge: Reece. *Laurie Mowery v. City of Columbus, et al., 03CVH-03-2477 (2005).*

Verdict: $0.00. Medical Malpractice. Decedent, a 50-year-old woman married with children, developed nasal "stuffiness" and bleeding during September 2001. She was initially treated with antibiotics, but did not improve. She then developed otitis media with effusion. Endoscopic evaluation and a biopsy of the right nasal cavity and right sphenoid mass led to a diagnosis of small cleaved non-Hodgkin's lymphoma. She was referred to OSU Medical Center. Her initial consultation was with Dr. Porcu. Biopsy materials were sent to pathology at OSU for analysis. The pathologist made a diagnosis of Granlocytic sarcoma on February 15, 2002. Decedent was admitted to OSU Medical Center February 20, 2002 and remained for approximately one month. Additional biopsies were obtained. She received induction chemotherapy. Radiation therapy was then provided by Dr. Grecula over the period of April 8 until April 19. Simultaneously, she was evaluated by the medical oncologists. Her case was presented to the leukemia committee. The consensus of opinion was that she was at high risk for relapse. The committee recommended she have allogeneic transplant during her first remission. Dr. Ed Copeland, the director of the bone marrow transplant team, met with the Decedent April 26, 2002. His notes indicate he spent 45 minutes counseling Decedent and her husband explaining not only the transplant process but alternate treatments. Dr. Copeland obtained a consent. Dr. Tom Lin also evaluated the patient and obtained a consent to proceed with the stem cell transplant. The risks, including infection and death, were discussed. Decedent was admitted to OSU Medical Center May 29, 2002 to undergo the procedure. She was examined by Dr. Copeland who wrote the orders for chemotherapy. The records reveal that her actual therapy commenced May 30 when Busulphan was administered. Day 2 of her chemotherapy was monitored by Dr. Avelos. Decedent had developed a rash and slightly elevated temperature. It was on day 3 of her chemotherapy that D. Molina rotated onto the service. The Busulphan was continued and vancomycin started for a presumed infection. The fourth and final day of her Busulphan was also monitored by Dr. Molina. Additional antibiotic coverage was ordered. Blood cultures were negative and remained so throughout this hospital admission. This completed her Busulphan therapy. The following day Cytoxan was administered. This was a two-day protocol. This ablative therapy was to prepare her for transplant. Antibiotic therapy continued. June 2, 2002 the donor's stem cells were infused to rescue her from the chemotherapy. At no time did blood cultures return with a positive finding. The antibiotic therapy was for presumed infection. Decedent's course thereafter was stormy. Fevers fluctuated but were persistent. She remained on antibiotics. She developed mucositis. Finally, on June 15, 2002, she coded. She was placed on a ventilator, resuscitated, but remained in suspected acute respiratory distress syndrome. She experienced multiorgan failure and expired June 19, 2002. The issues were whether Dr. Molina should have proceeded with the Busulphan and Cytoxan in the face of the Decedent's presumed sepsis and if the chemotherapy had been discontinued, would the Decedent have survived. A jury found that Dr. Molina did not deviate from the standard of care and returned a verdict for the defendant. Plaintiff's expert: Arther J. Weiss, M.D. Defense expert: Defendant Arthur Molina, M.D.; Dr. Tallman; Dr. Laughlin. Settlement demand: $2 million. No settlement offer. Seven day trial. Plaintiff's attorneys: Leigh-Ann M. Sims and Nicole D. McCormick. Defendant's attorney: Thomas D. Hunter. Judge: Bender. **Lance Boyer, Executor of the Estate of Mary Jane Boyer v. Arthur Molina, M.D., Case No. 03CVA-08-8587 (2006).**

Verdict: $0.00. Wrongful death. Gunshot/Battery. Plaintiffs, relatives of Kevon Matthews, filed a lawsuit against Reynoldsburg Police Officer David Burks. Mr. Matthews failed to stop his vehicle after a Reynoldsburg Police Officer had signaled with lights and sirens to pull over. While fleeing the other officer, Mr. Matthews' car struck Officer Burks' police cruiser. When Officer Burks exited his vehicle, Mr. Matthews drove his car at Officer Burks. As a result of Matthews' actions, Officer Burks fired his pistol to stop the car from running over him. One of the bullets struck and killed Mr. Matthews. Plaintiffs alleged that Officer Burks was reckless in creating a situation where he had to use deadly force. Plaintiffs' expert: Joe Key (Virginia-police use of force). Defense experts: Sam Faulkner (police procedures) and Rickey Stansifer (accident reconstructionist). Plaintiff claims no settlement demand. Defendant claims a demand of $1.7 million. No settlement offer. Eight day trial. Plaintiffs' attorneys: Jacob A. Schlosser and Jeffrey D. Boyd. Defendant's attorneys: Mark Landes and Douglas C. Boatright. Judge: Sheeran. Thomas N. Taneff, Admin. for the *Estate of Kevon Matthews, Deceased v. Reynoldsburg City, Ohio Municipal Corporation, et al., Case Nos. 03CVC-12-13326 and 04CVC-12-12782 (2005).*

Verdict: $0.00. Breach of Contract. Loss of Economic Opportunity. The case was first initiated as a preemptory declaratory judgment action by Greater Columbus Arts Council, Inc. (GCAC) with respect to the contractual rights of Coldiron Concessions, Inc. to exercise its right of first refusal to extend the parties' non-alcoholic beverage contract for The Columbus Arts Festival for a second five (5) year term. Coldiron counterclaimed. Prior to trial, a Rule 41 Stipulation of Dismissal was filed. Negotiations ensued but no settlement was reached. Coldiron refiled a Complaint stating claims for breach of contract, lost profits and lost economic opportunity, but by this time, GCAC had already awarded the non-alcoholic vendor agreement to another company without permitting Coldiron to match the bid. Coldiron proceeded on its damages claims based on historical profits since Coldiron had been the provider for five (5) previous years. The major issue for determination by the jury was whether or not GCAC had waived its right to terminate/revoke Coldiron's right of first refusal to extend the term by accepting Coldiron's payments (in full) late under the terms of the contract. The jury returned a defense verdict based on its belief that GCAC did not waive its right to terminate Coldiron's contract by accepting late payments from Coldiron. This case is really a "waiver" case as it relates to contractual rights. A $5,000 settlement offer by GCAC before trial was rejected by Coldiron. Plaintiff's expert: Richard Ferguson, CPA (Retained but did not testify at trial. Instead Coldiron's owner testified as to damages.) No defense expert. Three day trial. Plaintiff's attorney: Randal D. Robinson. Defendant's attorney: Craig R. Carlson. Judge: Crawford. *Coldiron Concessions, Inc. v. The Greater Columbus Arts Council, Inc., Case No. 03CVH-10-11206 (2004).*

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Appealing Dilemmas

By David C. Levine

Advising your client on whether to appeal a particular trial court decision is a tricky endeavor. The appellate lawyer has to deal with client concerns, well-founded or not; client expectations, based in reality or not; and client demands, reasonable or not. Most of all, though, the appellate lawyer operates in a world where concrete information about how appeals are decided is hard to come by.

We've all been there: our client loses at trial, or loses a dispositive motion, such as a motion to dismiss or for summary judgment. The client, convinced of the merit of his or her position says: "Appeal this, all the way to the Supreme Court if necessary. It's the principal of the thing." Or, your client is on the victorious side, and the opposing party has filed an appeal, in your client's eyes, likely a frivolous appeal.

The client may or may not have a point. The case may be weak, the law bad, or the facts worse. The court might have erred, but it might not be reversible error. What to do? How do you advise your client, in either situation? In many ways, it is easier when the other side appeals; there is no decision to make, the judgment must be defended.

Regardless of which side of an appeal your client is on, some things stay the same.

First, undertake a comprehensive, independent review of a case. Is there merit to the other side's position? Did the trial court make an error of a kind likely to result in a reversal? Perhaps this is a time to re-look at settlement possibilities. Many cases settle while an appeal is pending; many courts employ lawyers, under one name or another, whose job it is to attempt to mediate settlements of cases after they have been appealed. David Doyle of the Franklin County Court of Appeals is one such person. The United States Circuit Courts of Appeal employ such lawyers; I have brought cases to settlement while an appeal was pending in the Sixth Circuit and the Seventh Circuit.

Along these same lines, an appeal can be used as a bargaining tool. A few years ago I had an unusual case in state court that was appealed three times to the district court of appeals. My client kept prevailing before the trial court and kept getting bounced at the court of appeals. One attempt to get before the Ohio Supreme Court had failed. Finally, after the third appeal to the court of appeals, the case was again in a position to attempt an appeal to the Ohio Supreme Court. I represented the defendant, and I was confident the Supreme Court would hear the case. Plaintiffs' counsel was equally convinced that the Supreme Court would never hear the case.

During the course of the litigation, all attempts at settlement had failed. Plaintiff demanded more money than my client was willing to pay. On the day the Supreme Court accepted the case, Plaintiff made a new, significantly reduced demand, and the case settled almost immediately. (Thus presenting the intellectually-curious lawyer's biggest disappointment — I'll never know what the Supreme Court would have had to say about the very interesting legal issue it had agreed to decide.)

If settlement is out of the question, or if you try and fail, then it is on to the merits of the appeal. Clients want to know their chance of winning the appeal. That's always a difficult question to answer, though if your client is the appellee, the odds are quite good. But, as the old saying goes, never assume anything. One of the most overlooked aspects of an appeal is the standard of review. Is your client stuck with the malleable, ill-defined "abuse of discretion" standard, which usually translates into a loss for the appellant, or is your client in the much stronger position of a review of a question of law? Questions of law are reviewed de novo, so asking a court to review a question of law is a stronger position to be in than an abuse-of-discretion appeal.

But all questions of law are not created equal. Did the trial court make an error in applying settled law? Perhaps the trial court correctly applied settled law, but your position is calling for a change in that law. That's a harder way to go. Maybe you and your client are facing a question of first impression, either in your appellate district or in the state. If so, what is the weight of authority in those other jurisdictions that have addressed the question. You are far better off if the weight of authority is on your side, than if you want your court of appeals to adopt a minority view. A district court of appeals is more likely to follow the weight of authority than to follow a minority view. The laws of physics, particularly inertia, apply to all courts.

All of this uncertainty is made more frustrating by the lack of data on how appeals get decided. For example, say your client has just won a motion for summary judgment. The standard for granting a summary judgment is well-known, and not subject to argument. The standard of review is equally well known — the court of appeals reviews a grant of summary judgment de novo and applies the same standard as the trial court. Okay, but just how often are summary judgments affirmed? We don't know. The courts of appeal don't keep such statistics.

The courts of appeal keep and report to the Ohio Supreme Court certain data on gross numbers of very broad categories of cases: criminal appeals, civil appeals, original actions, appeals of domestic, probate, and juvenile cases, and administrative appeals. The courts of appeal report how many cases they decided, how many got dismissed, how many got waylaid by a bankruptcy stay. They also report a bunch of factoids about how long cases have been pending, and the like.

What is the significance of this lack of information? Well, when your client asks "what are my odds of winning this appeal?" there is nothing concrete you can say. Intuitively, we all know that the odds of getting a reversal of a summary judgment are more favorable than the odds of obtaining a reversal on an abuse-of-discretion item, but we can't say how much better. We don't even know the overall rate of affirmance of civil appeals, as an example. Yet when the client demands to know if his summary judgment, or jury verdict, will withstand the appeal, we are unable to provide any concrete answer to the client's very fair and reasonable question.

Certainly when it comes down to an individual case, no person can predict the outcome with certainty, even if we had better data. But I, and I suspect others, would feel much more comfortable being able to say something like this to a client: "This appeal will likely cost $XX,XXX. The trial court ruled against you. In Franklin County, the affirmance rate for summary judgments is XX%. Your case is maybe better (or worse) than the typical case because of _____. Are those odds worth $XX,XXX to you?"

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ABOUT VALIDITY OF A MECHANICS' LIEN AND

Proving "Substantial Compliance"

This case involved competing liens on land known as Gender Park that the Qualstan Corporation owned when it filed for Chapter 11 bankruptcy in August 2002.

By Tyson A. Crist

Back in the spring of 2005, *Construction Focus* reported on a decision by the United States Bankruptcy Court for the Southern District of Ohio in which mechanics' lien claimants prevailed in a priority dispute over a construction mortgage. Since then, the United States District Court for the Southern District of Ohio denied the mortgagee's appeal, affirming the decision in favor of the mechanics' lien claimants. The mortgagee did not appeal to the Sixth Circuit Court of Appeals. These decisions are also important, and worthy of this report, because one of the mechanics' lien claimants was able to show compliance with the mechanics' lien service requirement – Ohio Revised Code § 1311.07 – by proving at trial that the owner actually knew about the lien.

In recap, this case involved competing liens on land known as Gender Park that the Qualstan Corporation owned when it filed for Chapter 11 bankruptcy in August 2002. Because only one notice of commencement was filed back in 1997, the mechanics' liens recorded against phase three in 2002 had priority over the construction mortgage recorded in 1998 as to most of the sale proceeds realized in the bankruptcy.

Separate from the priority dispute, the mortgagee had contested the validity of one of the mechanics' liens on the basis that it was not properly served on the owner as required by O.R.C. § 1311.07. This section of the Ohio mechanics' lien law states that "[a]ny person filing an affidavit pursuant to section 1311.06 of the Revised Code shall serve a copy of the affidavit on the owner ... of the improved property ... within thirty days after filing the affidavit." In conjunction, section 1311.19 of the O.R.C. specifies several ways in which service can be accomplished.

At trial, the mechanics' lien claimant admitted that it had not served the affidavit in writing. The claimant, however, rebutted the mortgagee's challenge to validity for failure to serve by testifying that it had given the owner oral notice. Further, the testimony reflected that within the applicable time-period, the owner called the claimant and was very, very upset that the claimant had recorded its mechanics' lien. Previously, the owner had pressured subcontractors not to record mechanics' liens because it might "force a bank issue." Together, these facts established that the owner, in fact, knew about the mechanics' lien. Moreover, the testimony reflected that the claimant had not served the mechanics' lien on the owner because the claimant was concerned about adverse consequences.

The Bankruptcy Court found that although the statute and case law in Ohio make service of the affidavit mandatory, the lack of written service did not invalidate the mechanics' lien. The Bankruptcy Court opined that in this particular circumstance it was "reasonable that a subcontractor would not serve an affidavit to an owner for fear of retaliation." Further, the Bankruptcy Court held that the reason for serving an affidavit of mechanics' lien "is to put the owner on notice and to allow the owners to contest the affidavit." The owner knew that it had not paid a number of subcontractors and the owner had tried to prevent the subcontractors from filing mechanics' liens. The owner knew about this claimant's mechanics' lien.

On appeal, the District Court held that "the Bankruptcy Court did not err in concluding that actual, oral notice was sufficient under the circumstances." Citing to Ohio case law, the District Court further stated that Ohio Rev. Code § 1311.22 makes clear that "substantial compliance" is sufficient for validity of the lien, because "[t]he plain intent of this statute is to assure that notice of a lien claim against property is provided to the owner" and O.R.C. § 1311.07 "provides for both constructive and actual notice." In short, the owner's timely, actual notice of the mechanic's lien, although not in writing, fulfilled the purpose of O.R.C. § 1311.07 and "substantial compliance" was sufficient under these circumstances.

While this case does not exemplify the preferred manner in which to comply with O.R.C. § 1311.07, as O.R.C. § 1311.19 specifies the manner in which service should be normally given, the District Court ruling provides claimants with another argument regarding the validity of service when a mechanics' lien is challenged for failure to serve the affidavit in writing.

The District Court's ruling was issued on January 3, 2007, in Case No. 2:05-cv-00593-JLG. This decision is similar to a ruling by the United States Bankruptcy Court for the Northern District of Ohio that found a mechanics' lien valid where the owner admitted it received notice within the time provided by O.R.C. § 1311.07. *In re Desert Village Ltd. P'ship*, 321 B.R. 443, 449-50 (Bankr. N.D. Ohio 2004) (holding that the whole purpose of O.R.C. § 1311.07 is to "ensure that the party affected by the lien is provided notice thereof").

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THE ROLE OF FORMS IN

Legal Writing

By Chris McNeil

Recently I was invited to teach a small section of legal writing at Moritz College of Law. This was a welcome change for me, having taught legal research and writing at Capital University Law School for a dozen or so years. It gave me a chance to observe the differences between the two schools, to experience first hand, if you will, the reality shifts that exist between tiers.

The experience was not unlike what happens when a lawyer migrates from one firm to another. Throughout our careers, most of us will change jobs once, maybe twice, maybe more times. I've done so six times during the twenty-six years I've practiced law, and there's a recurrent nightmare that accompanies this kind of professional migration. In each new location, whether it's a law firm, a governmental entity, or a law school, there's an institutional ethic and an archive of forms, both of which have to be mastered, almost immediately upon arrival. The nightmare comes from the concern that there's a standard, institutionalized way of doing one thing or another; that the standard won't be patently obvious; and that I'll proceed in ignorance of the standard, to my client's detriment and to my own embarrassment.

Standard, institutionalized ways of doing things are a staple in the legal profession, and with good reason. Once we've figured out how to write a due-on-sale clause, a testamentary bequest, or a buy-sell agreement, we tend to want to leave it be (particularly if our drafting is guided by a legislative mandate, a court decision, or some other external authority). Given that ours is such a word-based profession, we quite properly guard against tinkering with perfection, especially if we're the ones who achieved such a state of writing grace.

Transitioning into a new work environment calls for a fresh look at the forms we encounter. Whether it's a standard client retainer letter, a run-of-the-mill separation agreement, or a will based almost wholly on boilerplate language, we're still obliged to evaluate the words we're using – to use our lawyerly skills in the evaluation of the text – to determine whether this is something we'd feel right about putting our name on. Because no matter how gentrified or well-established our new firm or office might be, we're still one-hundred percent accountable for whatever writing we put forward. Despite the fact that this form or that phrase has long been used in the hallowed halls of your new establishment, you're still responsible for the product, once you put your name on it.

This point became clearer to me when I invited representatives from Lexis and Westlaw to meet with my OSU students. These presentations involved showing the students services by which legal researchers can acquire copies of petitions, answers, motions, virtually any kind of legal writing, for just about every possible legal situation. Almost immediately, I realized that these products represented a quantum shift in how we should conduct our research and how we are likely to prepare our written products. Now, instead of just relying on examples found in our own law firm or governmental office, we have the world at our fingertips. While I'm told some legal writing professors prohibit students from accessing these, my sense is that this resource is but one more tool all of us must master. There's no loss in reading the best motions from the top law firms in the country, provided we understand that we still need to do our own work.

To their credit, the students recognized both the practical and the ethical implications of having access to these samples. Unlike legal writing classes of just five or ten years ago, where print form books were about all we could turn to, this class of legal writers has an entire universe of actual briefs, motions, transactional models, you name it, it's on line (for a price). The question came up: when we draw from a pdf version of a pleading we find on line, do we acknowledge the source? Maybe, maybe not, but in any event we need to note for our own private records where we got the form; and we need to be very sure that our finished product is our own work.

So what's a transitioning lawyer to do, given the likelihood that we'll all change our jobs at least a couple of times over the course of our careers? Should we accept the institution's forms and standard phrases? Probably not; and not just because of the ubiquity of instructional models available on line. We have an affirmative obligation to be in charge of our writing. As we inherit cases from now-departed partners or senior associates, we have an affirmative duty to our clients, to use our professional reading and reasoning skills – independent of what's preceded our entry into the matter. If the firm or office has standard language in a codicil or an employment agreement, we have a duty to understand what that language means, and a further duty to determine whether the words effectively implement the ideas at hand.

As my own clinical instructor reminded me, way back in the day: if you live by the form, you will die by the form. Rule 11 is an unforgiving master in an increasingly complex legal world. The fact that Lexis and Westlaw now offer PDF versions of actual motions, responses, complaints, answers, and transactional clauses to suit virtually every legal need changes little, except that it broadens exponentially the sources of models that are now available to us as legal writers. As mechanics of the written and spoken word, we're well advised to familiarize ourselves with these resources, and to learn what we can from them. We're also required to question the adequacy of forms relied upon by our peers and supervisors. But in the end, we stand or fall on, and will be judged by, the words we choose, regardless of their source.

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Chris McNeil,
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2nd District Requires Substance in Notice of Appeals under Ohio APA

By Chris McNeil

The Second District recently affirmed the dismissal of an administrative appeal based on the appellant's failure to set forth grounds in its notice of appeal. Taking a hard look at the requirements found in Ohio's Administrative Procedure Act, the court made it clear that boilerplate notices of appeal will no longer be sufficient to invoke the court's jurisdiction in appeals from agency action.

The case[1] arose after the Charitable Law Section of the Ohio Attorney General's office issued an Adjudication Order rejecting the charitable bingo license sought by David May Ministries. David May Ministries filed a notice of appeal in the Greene County Court of Common Pleas, using language typical of this kind of notice. Closely following the language of R.C. 119.12, the notice of appeal stated that "[t]he Adjudication Order is not supported by reliable, probative, or substantial evidence, and is contrary to law." This language, the court held, does not indicate how the Adjudication Order fell short, and "in the absence of some facts or legal basis indicating the nature of its claims, David May Ministries has failed to comply with the requirement that it set forth the grounds for its appeal." [P27-28]

The court explained that appeals under the APA must include a statement of "grounds" for the appeal, and that this calls for the appellant to identify "some particular error or defect in the agency's proceedings." [P26] David May Ministries failed to do so when its notice of appeal "merely reiterate[s] the basis upon which the court may reverse, vacate or modify an order." [Id.] The failure to provide information about the grounds for appeal constitutes a jurisdictional defect, the court held, and required the dismissal of the appeal.

The court rejected the appellant's claim that R.C. 119.12 should be liberally construed, and that the parties all knew what the issue was in this case. The requirement that grounds be set forth in the notice of appeal is for the benefit of the common pleas court, which acts as an appellate court in appeals under the APA. The jurisdictional requirements of agency appeals have consistently been strictly construed, and the notice requirement is designed to aid common pleas courts when they receive these appeals. While the parties may understand what the issues are in such an appeal, a court "would not ordinarily be privy to such conversations." [P34] Specifying the grounds for the appeal in the notice "informs the court of the basis for the appeal and assists the court in disposing of the appeal in an expeditious manner." [Id.]

[1] *David May Ministries v. State ex rel Jim Petro, 2007 Ohio 3454, 2007 Ohio App. LEXIS 3198 (2d Dist. July 6, 2007)*

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STATEWIDE COURT REPORTER CERTIFICATION – Why?

By Linda Sturm

What's next — the gal who cuts my hair will have to have a license? Oh, she does. As does the barber, manicurist, appraiser, auctioneer, hearing aid distributor, dietician, social worker.

Ah-ha! Someone who has a physical or monetary effect on another, licensing or certification is there to protect the public.

Daily inside the courtrooms of Ohio life or death decisions are made, trials involving millions of dollars are litigated, reputations are at stake, injured parties put their trust in the justice system. Each of these parties depends upon some type of system to record every utterance in the courtroom and a verbatim record that may well affect their life and/or livelihood.

Ohio Supreme Court Chief Justice Thomas Moyer stated on March 18, 2006, "We live in a time when our courts are, it seems, increasingly important to so many decisions that are made that affect people's lives, and those decisions are based upon, as we know in our adversary system, facts and testimony and evidence that we hope produce fair and just decisions. And all of that – the presentation of evidence, testimony, and so forth – is meaningless if it's not accurately recorded and reported as part of a record…."

Today in Ohio the person responsible for the production of that verbatim record is not required to be certified, no minimum standards must be met. There is no code of professionalism or ethics to be followed. This is true for court reporters in the courtroom as well as for those who produce the record in discovery that may later be used to base settlement decisions upon or to be filed in court.

As background, "most" court reporters graduate from a court reporting school where they are taught a method of steno writing. They also must complete and pass other related courses. The skills requirement to graduate is passing three tests dictated at 225 words per minute with 95% accuracy.

Unlike other service professionals, who are then required to take a state examination given to every individual who desires to practice that profession in Ohio, the "graduate" court reporter can begin the practice of court reporting without such examination. In fact, there is no requirement in Ohio that one must graduate from ANY type of school to be a court reporter.

Since the 1920s the Ohio Court Reporters Association (OCRA) has seen this as a problem that could result in dire consequences.

Last year Chief Justice Moyer addressed the annual conference of OCRA, and he stated that certification "announces to all Ohioans that you meet rigorous standards and that the record you produce is accurate and reliable." At that time he also announced that at the request of OCRA he was establishing a task force on the certification of court reporters.

As professional court reporters, most believe that it is of utmost importance that all court reporters be uniformly tested and certified. We believe that the service we provide is critical to our judicial system, and we are proud that many court reporters in Ohio have already attained their Registered Professional Reporter status. However, Ohio should be among the 30 states that recognize that court reporting requires skill and knowledge, and those reporters must possess the requisite skill and knowledge if they are to participate in a process that involves issues such as life, death, reputation, and monetary punishment and award.

Beyond the question of "Why certification of court reporters" is another query: "Are steno reporters becoming obsolete?" An interesting topic and one I have fielded since I started court reporting school in 1974. That question would take me well beyond my 900-word allowance; but it should be addressed as to how that topic affects certification, and that is: Certification of court reporters is important no matter what the method of making the record is.

The reality of the state of technology today is that courts in Ohio make a record by utilizing different methods. The important point in that reality is that no matter what that method is, the record is still the backbone of the justice system upon which everyone relies, the judge, the parties, the attorneys, and the public.

The debate on the best and most cost-effective method to make a record is for another day. The fact is, no matter what technology is used, a human being must be involved in the origination and in the final transcription and certification thereof.

The task force made a decision at the outset that however the record is made and produced, the person responsible should be termed a "court reporter" and must be qualified and must meet certain minimum requirements.

As we see more of our courts turning to digital technology, we must be assured that those operating the equipment have the knowledge to do so; those monitoring must know court procedure and be aware of the importance of every word in the record; those who transcribe from recordings must assure participants and the public that they have the knowledge of court procedure, what goes into the record, what does not, and certify that they are impartial. Stenographic court reporters are trained in many more areas than just steno. Certified court reporters are tested not only on skill but also must pass a written knowledge examination regarding court procedures, vocabulary, grammar, punctuation and ethics. Remember a sitcom called "Ed"? Ed was a lawyer who lost his job and came home to run the local bowling alley. Ed lost his job due to a misplaced comma. A TV show, yes; but the significance of vocabulary, grammar and punctuation in a transcript – point well taken.

The complete Report and Recommendations of the Supreme Court of Ohio Task Force on the Certification of Court Reporters is available through the Ohio Supreme Court (www.sconet. state.oh.us/publications/CourtReporterTF/report.pdf).

The task force was chaired by the very astute and insightful Judge Mary Donovan, Second District Court of Appeals. H. Ritchey Hollenbaugh, sustaining member of the Columbus Bar, was also an integral member. Other members were Steve Collier Toledo; Judge Michael Ward, Athens; Judge Chad Carey, Wilmington; Nick Selvaggio, Urbana; Gary Yates, court administrator, Butler County; Bruce Matthews, RDR, CRR, Cleveland; and myself, Linda Sturm, past president of OCRA. John VanNorman, Ohio Supreme Court, was our staff liaison. Everyone worked diligently in putting together these important recommendations.

On behalf of the court reporters of Ohio, I thank everyone for their support as this very important issue goes forward.

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Linda Sturm, President, Professional Reporters, Inc.

> Daily inside the courtrooms of Ohio life or death decisions are made, trials involving millions of dollars are litigated, reputations are at stake, injured parties put their trust in the justice system. Each of these parties depends upon some type of system to record every utterance in the courtroom and a verbatim record that may well affect their life and/or livelihood.

Spreading "Democracy" in The Muslim World

AND THE ROLE OF SEMANTICS

By Fazeel S. Khan

The word semantics is commonly defined as "the meaning that can be derived from words or some other form of expression." As lawyers, we are quite familiar with the value of semantics. Whether it is a word in a statute, a term found in a decision, or an idiom used by a witness, we utilize semantics to argue interpretations that further our clients' interests. We provide meanings to words that go beyond their common import so that the substance of what is being presented may be captured. The process of employing effective interpretations to words in order to further a specific agenda, however, may prove beneficial beyond the realm of "lawyering"; it may also help promote democracy in the Muslim world.

The word democracy has no single definition. It means different things to different people. For some, it equates to a system of governance wherein a written constitution is supreme. The British though would necessarily disagree, for they have no written constitution. For others, it means a governing structure wherein persons are elected strictly by popular vote. This, however, does not hold true in representative democracies like the U.S. Still others view democracy as a political scheme whereby all people are guaranteed equality. Try reconciling this with the caste system prevalent in the so-called largest democracy in the world, India, or the years of slavery experienced in America's early history. Clearly, when promoting something as complex and multifaceted as democracy to the Muslim world – where the concept is generally held suspect as an inherently western idea that attempts to deny the sovereignty of God over His creation through the establishment of man-made rules – a more descriptive interpretation of the term is required.

A general consensus may be reached in defining democracy, at its core, as a system of governance wherein: 1) majority opinion is accepted, and 2) minority/individual rights are protected. By deconstructing the term to this basic two part formula, the system being promoted is more easily understood. It demystifies the western concept by providing tangible mechanisms that may be correlated with established principles found in Islamic tradition.

For instance, the essence of majority rule finds explicit support in the Quran, the holy scripture of Islam. The Quran, in its forty-second chapter titled Al-Shura ("The Counsel"), specifically praises those: "whose affairs are (decided) by counsel among themselves" (42:38). In this verse, we find the foundation for the establishment of a government by council or parliamentary government. This principle was put into practice by no other than Muhammad himself, the holy prophet of Islam. Recorded history bears witness to him not only engaging in consultative processes with regard to administrative matters and state affairs, but also accepting the majority view despite his personal opinion at times being to the contrary.

The basis of a majority rule system is further espoused in Islamic tradition by the Quran instructing: "Surely God commands you to make over (positions of) trust (in government or affairs of the state) to those worthy of them" (4:58). This verse plainly calls for the institutionalization of an electoral process whereby the people determine who they want as their representatives. This principle was also practically demonstrated in the early history of Islam by the Muslims electing the first four Khalifas (i.e. heads of state after Muhammad) either by agreement of all parties, by nomination after consultation with leading representatives of the community, or by appointment by an elective council.

Similarly, the fundamental elements of the minority/individual rights notion are unequivocally upheld in Islamic tradition. The Quran champions the equality of all mankind: "All men are a single nation" (2:213). It also features what some believe to be the magna carta of religious tolerance by declaring: "There is no compulsion in matters of religion" (2:256). Even the economic independence of the sexes is advanced: "For men is the benefit of that they earn. And for women the benefit of what they earn" (4:32). Again, undisputed history bears testimony to the distinguished civil liberties enjoyed by non-Muslims under early Muslim rule, the protected status of Jews in Spain being an illustrious example.

And just as it is understood in western democracies that the formation of fair and impartial tribunals that address the claims of aggrieved parties is essential to ensure the protection of minority/individual rights, the Quran likewise provides: "Judge between all men justly and follow not any bias, lest it lead thee astray from the path of truth" (38:26). Muhammad himself applied this principle to the fullest extent possible. He provided persons of other faiths living within Muslim communities the option, in certain circumstances, of being judged according to their own laws, if they so chose, so that fair adjudication may be achieved.

Clearly, the foundational components underlying the broad term democracy share many commonalities with entrenched Islamic principles governing statehood. Unfortunately, the term democracy in and of itself does not instinctively strike such parallels in the minds of common Muslims living in purported "Islamic States." Rather, it is more often than not perceived as a foreign concept, at odds with the basic tenets of their faith. In order to spread democracy in the Muslim world, this misunderstanding must be corrected. The establishment of democratic forms of government in this region is much more likely to be realized if the basic concepts of majority rule and minority/individual rights are presented in terms of the people's own authoritative traditions.

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Better Lawyer™

a columbus bar publication for new lawyers

Lawyers:

Then & Now

By Mark Kafantaris, Kafantaris Law Offices

The good old days weren't necessarily always better, but they certainly were different. It doesn't take long after bar admission to figure out that the "when I was your age" stories of the now partners, leaders and mentors of our fine city aren't as much something to relate to, as to wonder at, for today's up and coming lawyers. I've included some of the gems I've heard along to way, to add to your own personal collections of odd, outlandish, or sometimes even wild stories

We start with our old friend Bruce Campbell and his first job at legal aid. Early on, a senior lawyer in the office handed him a file, told him it was a no-brainer, and sent him to the courthouse to settle the case. Campbell quickly reviewed it and rushed into the courtroom, eager to let the other side know how the divorce could be resolved. Glancing across the courtroom, he saw a well-dressed man in a suit talking to another fellow in a leather motorcycle jacket. When he made the settlement offer, the other man listened for a moment, glanced at the disheveled man in the leather jacket, then turned back to Campbell and said "don't you think you should take all this up with my lawyer?"

Conversely, Bill Saxbe easily recognized the lawyers that worked for him at the Ohio Attorney General's Office. He knew where to find the good ones when he wanted to dispose of a difficult case in a hurry. His tactic? Saxbe would take his colleague, Warren "Vince" Rakestraw, over to a popular tavern to seek out members of his staff on their lunch break. During one such trip, Saxbe, upon recognizing several members of his staff, yelled, "Does anybody have a school law case?" "I got one," responded a lawyer from the other end of the bar. Saxbe slid the file in front of him and said, "Well now you've got two. Win, lose, or settle. Just don't bring it back!" Turning to leave, Saxbe saw the beverage the lawyer had in his hand, and shot him a line of friendly advice: "If you've got to drink during the day," he told him, "at least drink gin and not vodka. That way the judge will know you're drunk, but not stupid as well!"

Woman lawyers didn't have it easy then, but according to Ed Morgan, some, who had their own quirks, like their male counterparts, demanded, and received, unique treatment from other attorneys, and even the courts. This was the case for a certain elderly female lawyer known for her feisty criminal defense tactics. When the judge ordered everybody back at one o'clock to resume the trial, she turned to him and said with authority, "Now judge, I thought we discussed this earlier." The judge seemed to have forgotten, but the prosecutor distinctly remembered, and they talked at some length. Not caring to watch their small talk, she folded her arms, turned her back to them, and stared at the ceiling. Finally the judge said "I stand corrected. We will resume back here at two o'clock." And so it went everyday during the trial so as not to interfere with the defense lawyer's noon nap.

Often, legal matters were handled in informal, and sometimes surprising, ways. For Judge Pat Sheeran, his first day as a juvenile prosecutor landed him a felonious assault case and a supervising attorney who had wondered off. While gathering his bearings, he recalled picking up the baseball bat that was the case's main exhibit He then approached the veteran detectives, and asked why they hadn't marked it for trial. After rolling their eyes at the young prosecutor, one of them took out his pocket knife and carved a big "X" on the side and said "there's your mark!" Fortunately, the case settled and the marked bat was never offered as evidence.

However, he was not so fortunate some years later. Then, Judge Sheeran prosecuted a pro se defendant in a robbery trial. A store clerk had just identified the defendant as the man who robbed her. This defendant, eager to show that she could not have possibly known that, exclaimed, "How did you know it was me? I was wearing a mask!"

Being your own lawyer can be tricky, but it's sometimes a handful representing others too. When Joe Rotondo repeatedly asked leading questions through direct examination, the prosecutor finally objected. "Well of course I am judge," retorted Joe. "This dumb SOB needs some help!"

Maybe those were the good old days, when colorful personalities abounded, eccentricities were tolerated, bar functions (and bars) were well attended, and law seemed more profession than business, even if it was a little unorthodox.

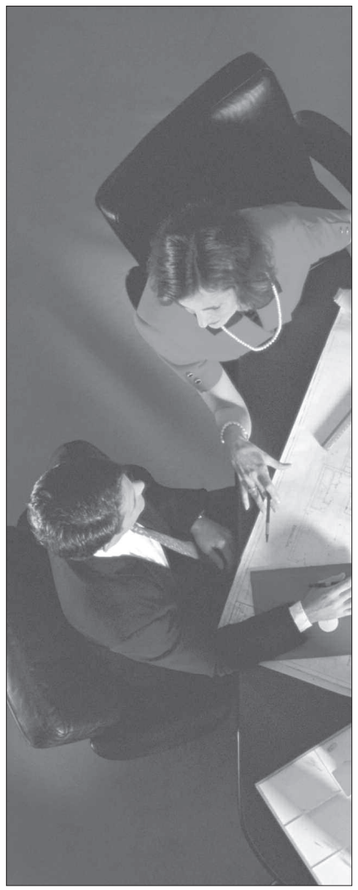
If the proper study of Mankind is Man, as Alexander Pope said, then nobody knows the subject better than the lawyers among us who've represented people across the spectrum of human behavior over many years of change in our community, legal and otherwise. Yes, some of them did it in their own peculiar way, but in the end, they battled with many of the problems inherent in the law and the process of forging a community out of different and differing individuals. Their continued work and guidance make life better for us all.

mark@kafantaris.com **Mark Kafantaris**

Legal Secretary 101:

Working with legal secretaries for the first time

The key to developing an efficient attorney/legal secretary relationship is to communicate openly with one another and establish an atmosphere of openness, trust and confidence between the legal secretary and the attorney.



By Jameel S. Turner, Bailey Cavalieri

Jameel S. Turner

Whether a new attorney is in the public or private sector, learning how to develop an efficient relationship with your legal secretary is a daunting task. While some new attorneys may feel apprehensive about allowing a complete stranger to open their mail, view their e-mails, and transcribe their phone messages, establishing a quality working relationship with your legal secretary can exponentially increase a new attorney's efficiency and overall productivity.

While ethical restrictions do not permit attorneys to allow secretaries to perform any legal analysis, there are several other tasks that secretaries can perform to increase an attorney's overall efficiency. Legal secretaries can perform a variety of word processing, record-keeping, and scheduling tasks that allow the attorney to direct his or her attention to other matters. It remains the attorney's responsibility to evaluate the areas in his or her law practice where the legal secretary can be the most helpful, and then, through feedback, refine the secretary's ability to perform necessary tasks in those areas.

The key to developing an efficient attorney/legal secretary relationship is to communicate openly with one another and establish an atmosphere of openness, trust and confidence between the legal secretary and the attorney. The following guidelines will assist you in fostering a productive, efficient, and congenial relationship with your legal secretary.

COMMUNICATE

Communication is paramount to a successful relationship with your secretary. Take time to get to know your legal secretary personally, so that he or she has a better understanding of how your past legal experiences have affected you and what your expectations are. Upon meeting a new secretary, new attorneys should invite their secretary to lunch or a similar casual setting to discuss the attorney's expectations and also confer regarding any previous negative experiences the secretary may have had.

Provide Meaningful Work to Inspire Trust. To establish confidence in your legal secretary, you will need to give your secretary the opportunity to earn your trust by performing meaningful tasks. Because attorneys are independent by nature, it may be difficult for you to allow your secretary to perform tasks you are used to performing on your own, such as proofreading and spell-checking. However, the more confidence you demonstrate in your secretary by providing meaningful work, the harder the secretary will strive to meet your expectations.

R-E-S-P-E-C-T

Remember that your assistant is a human being there to assist you and not your, or the law firm's, property. Like most people, legal secretaries will have good days and bad days, and new attorneys need to be mindful of that. Legal secretaries should be shown the same level of respect given to a client or any other colleague. Moreover, because the overwhelming majority of legal secretaries are women, many male attorneys have female secretaries. Male attorneys in particular should remember that a large part of establishing a comfortable and respectful working relationship with your secretary includes making sure that your relationship remains professional at all times and free from sexual innuendo or harassment.

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TIPS for Women Attorneys:

Building a successful relationship with your administrative assistant

By Priya J. Bathija, Buckingham Doolittle & Burroughs

Starting out as an attorney is terrifying. Most often, new attorneys rarely realize how little they know about the law until they start their first job. This phase of life is often very stressful for women attorneys who are coping with balancing family responsibilities along with a career. Fortunately, in addition to supervising attorneys and mentors, you have an administrative assistant to help you develop into successful attorney.

Although you may not realize it at first, your administrative assistant can be your greatest asset in your career. Your assistant can answer questions about various types of procedures (i.e. court and/or office procedures), simplify administrative tasks, and help you develop your relationship with your supervising attorney or other senior attorneys. In short, her work can help you gain back time in your day, which can be spent billing more hours, relaxing with family, or networking with potential clients.

You may be reading this and thinking: my assistant can do all that? The answer is: yes! But remember, your administrative assistant will not become a valuable asset unless you work closely with her to develop a successful working relationship. Obviously, each administrative assistant and work environment is different, and the steps you need to take to build a successful working relationship with your assistant will vary. However, there are some general steps women attorneys can take to develop sound working relationships with administrative assistants.

These include the following:

Communication

Your administrative assistant can only be as helpful as you allow her to be. Many times, we get busy taking care of our own work, and just expect that our administrative assistants will automatically know what we are thinking. You must take the time to communicate your thoughts effectively and provide the tools and instructions your administrative assistant needs to complete assignments.

Training

As an attorney, you will have administrative obligations that occur on a regular basis. These tasks are often tedious and time-consuming and can easily be delegated to your administrative assistant. However, before delegating, take some time to educate your administrative assistant on how you would like these tasks completed.

Do not forget, however, that training goes both ways. Your administrative assistant will be much more experienced than you are in completing administrative tasks and there will be many times when she has already adopted methods to complete these tasks. Listening and adopting those same methods may be more efficient than reinventing the wheel.

Assess your needs and plan ahead

No one likes surprises. One way to avoid surprises in your relationship with your administrative assistant is to meet with your assistant daily — either in the morning or the afternoon. At that meeting, you can review your schedule, go over important deadlines, or review what must be submitted during the day. This time will allow your assistant to clarify instructions, and, if necessary, discuss any additional issues your assistant may have.

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Priya J. Bathija

Go ahead and let the other team know they suck

By Jeffrey Hartranft, Ohio Bureau of Workers' Compensation

Jeffrey Hartranft

Times have been tough for tailgating Buckeye fans. A crackdown on violations of open container law, public intoxication, and indecent exposure has placed a damper on many traditional pre-game activities. But there is one ray of sunshine in these dark times. The Ohio courts have upheld a fan's right to heckle.

In September of 2001, Jeffrey Swiecicki and some friends were sitting in the left field bleachers of Jacobs Field drinking beer and heckling the Indian's left fielder, Russell Branyan. In the seventh inning, an off-duty police officer working security heard Mr. Swiecicki yell "Russell Branyan, you suck. You have a big ass." Upon hearing this, the officer approached Mr. Swiecicki and instructed him to leave the bleachers. Mr. Swiecicki resisted and the officer took him into custody.

Mr. Swiecicki was charged with and convicted of disorderly conduct. The conviction was reversed on appeal. In striking down the disorderly conduct the Court found that the prosecution failed to establish that Mr. Swiecicki engaged in conduct "likely to be offensive or to cause inconvenience, annoyance or alarm to persons of ordinary sensibilities."[1] The Court held:

> [F]ans are emotionally involved in every play and customarily manifest their approval or disappointment with words or gestures...Appropriate conduct in this type of setting differs from what may be appropriate in a church library or orchestra hall. While persons of ordinary sensibilities might be offended, inconvenienced or alarmed by similar conduct in other settings, the words uttered by Swiecicki to voice his displeasure at Banyan's lack of speed in a baseball game can hardly be perceived as offensive to ordinary sensibilities rising to the level of criminal conduct; some in attendance may even have shared his sentiments.[2]

So be on your best behavior before the game, but after kickoff feel free to give expression to your feelings about the skill (or lack there of) of the other team; secure in the knowledge that the law is on your side. (Although just to be safe, you might want to leave their mothers out of it.)

1. *Cleveland City Code § 605.03(b)(1)*
2. *Cleveland v. Swiecicki (8th Dist. 2002), 149 Ohio App.3d 77, 81.*

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New lawyers, in particular, need to take a moment to read Rule 5.2: Responsibilities of a Subordinate Lawyer, and Rule 5.3: Responsibilities Regarding Nonlawyer Assistants.

The New OHIO RULES OF PROFESSIONAL CONDUCT:

What is expected of new lawyers?

By Michael E. Heintz,
Porter Wright Morris & Arthur

By now, every Ohio lawyer should know the state adopted new Rules of Professional Conduct effective February 1, 2007. If you missed this development, its time to come out of your cave and read a copy, as all lawyers need to be aware of the new standards and rules. New Lawyers, in particular, need to take a moment to read Rule 5.2: Responsibilities of a Subordinate Lawyer, and Rule 5.3: Responsibilities Regarding Nonlawyer Assistants.[1] The Rules contain significant distinctions from the old Code of Professional Responsibility, as applied to "subordinate" attorneys and "supervisory" roles.

First, new Rule 5.2 contains two brief paragraphs that are broader than the Code:

(a) A lawyer is bound by the Ohio Rules of Professional Conduct notwithstanding that the lawyer acted at the direction of another person.
(b) A subordinate lawyer does not violate the Ohio Rules of Professional Conduct if that lawyer acts in accordance with a supervisory lawyer's reasonable resolution of a question of professional duty.

Of course, all lawyers were required to follow the Disciplinary Rules found in the Code; however, it did not contain any provision comparable to Rule 5.2, which specifically makes a subordinate lawyer individually responsible for misconduct even if she was following the instructions of a supervisor. Additionally, Comment 2 to Rule 5.2 explains that while subsection (b) provides some protection to subordinate lawyers who rely on supervisors in "matter[s] involving professional judgment as to ethical duty," a subordinate lawyer is not relieved of responsibility if "the question can reasonably be answered in only one way." In such situations, "the duty of both lawyers is clear and they are equally responsible for fulfilling it."

Note the tension between the professional responsibilities imposed on a junior lawyer under the Rules, and the practical reality that a subordinate is to follow the instructions of the project supervisor. Comment 1 provides some leniency, however, in those circumstances where the subordinate acts in accordance with a supervisor's instructions: "Although a lawyer is not relieved of responsibility for a violation by the fact that the lawyer acted at the direction of a supervisor, that fact may be relevant in determining whether a lawyer had the knowledge required to render conduct a violation of the rules." As such, subordinate attorneys are responsible for seeking guidance, from a mentor, firm counsel or ombudsman, or other trusted colleague, should they have questions concerning the validity of a supervisor's instructions. However, this problem is not easily solved, especially in small firms or offices. Should you have questions, and do not have the resources within your office, there are options around Columbus for obtaining advice and guidance from experienced attorneys. Options include the CBA's mentoring program or the Ohio State Bar Association's Silent Partner program.

In addition, under Rule 5.3, a lawyer is now also liable for the unethical behavior of nonlawyer assistants. Because most New Lawyers are working with secretaries and interns for the first time, it is important to know that Rule 5.3(b) states: "A lawyer having direct supervisory authority over the nonlawyer shall make reasonable efforts to ensure that the person's conduct is compatible with the professional obligations of the lawyer." Further, if supervising attorneys order, have knowledge of, or ratify conduct of the nonlawyer assistant who runs afoul of Rules 5.3(c) they "shall be responsible for conduct of such a person that would be a violation of the [Rules]." Comment 1 specifically references legal assistants, interns, secretaries, and paraprofessionals as within the bounds of 5.3 — all people New Lawyers work with regularly. Like Rule 5.2, there was no comparable section in the prior Code of Professional Responsibility.

Finally, there is one more intricacy of the Rules: the Comments, unlike the Ethical Considerations under the Code, are binding on attorneys just as well. Consequently, it is just as critical to read the Comments to the Rules, as it is to read the Rules themselves.

These are important responsibilities to remember. If you have not read the new Rules, take a few minutes and do so. They contain changes and new responsibilities associated with the practice, some of which are significant. The Rules bind all lawyers to a standard of conduct, and New Lawyers in subordinate-supervisor relationships need to know what is expected of them. The new Rules now reference subordinate lawyers in ways the prior Code did not. Electronic copies are available at the Ohio Supreme Court's website at: www.sconet.state.oh.us/Atty-Svcs/ProfConduct/rules/default.asp.

1. All quotations come from the Ohio Rules of Professional Conduct and associated Comments.

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Michael E. Heintz

How to Get What You Want

You can get what you want, and just believing that is the first step.

By Nicole VanderDoes,
Luper Neidenthal & Logan

As a new lawyer, you may feel like everyone is in control of your career (and life) but you. But you have the ability to get what you want with a little initiative.

Like it or not, law firms are businesses, so your firm's top priority is the bottom line. But the bottom line includes a lot of factors, including your billable hours and collected fees, getting new clients and keeping existing ones happy, and hiring and retaining good lawyers (that's you). If you're satisfied personally and professionally, your firm's bottom line will benefit, and sometimes you need to gently remind the firm of that fact.

If what you want is personal, the burden probably rests upon you to get it within the confines imposed by your employer. For instance, do you want to spend more time with your spouse or children? One option is to work a couple hours from home every evening to take advantage of family time. If evening commitments, such as church involvement or Clippers games, are what you're looking for, a solution I found was to work half-days on the weekend to make up for the time. Even if it sometimes feels like it, your employer does not own you twenty-four hours a day, at least not without your permission. There are always tradeoffs you can make to get what you want once you identify your priorities.

Professionally, you can get anything you want if you approach it the right way. The first step to getting what you want is to figure out what it is. If you feel dissatisfied, you can't just complain, you have to figure out what would make you feel more fulfilled. Once you know your goal, the next step is to evaluate whether it is something that you have the power to achieve on your own or whether you need to enlist the support of your employer.

If what you want is professional, your employer should share the burden. Whatever type of entity you work for, you can get your employer's support if you present what you want in a way that makes it clear that it is in your employer's best interest.

Don't tell my firm, but here are my secrets that have helped me get what I want professionally, and that can work for you, too, as long as they are backed up by a genuine desire to advance yourself professionally for the benefit of your employer.

Enlist supporters

Identify partners who are likely to support you, and explain in person why what you want is a great idea and how it will benefit the firm. This is your chance to impress them with your enthusiasm and initiative and to develop a consistent message for your supporters to repeat when they become your advocates. Once your supporters are convinced, it is likely they will suggest that you put something in writing, and that is when you tell them you're already working on that and you really appreciate their support (creating an implicit promise on their part to do so).

Submit a written proposal

Write a proposal that outlines exactly what you are asking for and explaining how it will benefit the firm. Explain how many different law firms will be represented at the conference you want to attend, tell them how much you expect to generate in fees in the first year of practice in a new area, or list the judges who are members of the organization you want to join. Be as specific as possible about the time or money commitment you are seeking so that the firm can make an informed decision. And when you submit your proposal, invite feedback and follow-up questions.

Nicole VanderDoes

Follow up

Check in with your supporters about how your proposal was received, if there are any concerns you ought to address, and specifically ask when you can expect a decision. If the firm says yes, great! Follow through promptly on the action you asked the firm to support, and report back on your success. If you pursue your goal with the firm's support, but it does not turn out as you hoped, report back on the actions you have taken, how much you appreciate the firm's support, and what you have learned from the experience that you are going to use to benefit the firm in the future.

If the firm rejects your proposal, don't give up! Pay to go to a conference yourself, use the CBA to get in touch with a mentor in a new area of law, take CLEs that are relevant to your goal, join an industry group and attend meetings, or do whatever else you can on your own. Take steps to reach your goal yourself and then report back to the firm on the relationships you've developed, what you've learned, the opportunities you've created, the new business you've generated, and ask that the firm consider supporting you going forward. When you continue to show initiative in pursuing what is important to you, even when the firm does not initially support you, it will help the firm recognize that you are taking ownership of your career and the firm will want to buy into your success too.

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Researching Expert Witnesses

An expert is a man who has stopped thinking – he knows! — *Frank Lloyd Wright*

By Mandy Schermer,
Porter Wright Morris & Arthur

Expert witnesses play a valuable role in the litigation process. Many cases become a "battle of the experts" and these individuals frequently influence the outcome. Depending on the cause of action and the underlying facts, expert witnesses in fields such as engineering, medicine, accounting, or psychology may provide the evidence that prompts the parties to negotiate a resolution outside of court or influences the fact-finder at trial. In many cases, strategy decisions from the moment a new complaint is received until the case is resolved will focus on getting the judge or jury to accept a favorable expert's story and, similarly, discrediting opposing experts.

After an opposing party discloses expert witnesses, research into the expert's past may reveal "skeletons in the closet." These skeletons may provide evidence to limit, discredit, or exclude the expert's testimony at hearing or trial. To evaluate the experience and credentials of opposing experts, many publicly available resources provide useful information. Some resources include:[1]

LEGAL DATABASES

Searches in Lexis or Westlaw databases offer a wealth of information, such as:

- Biographical information contained in trial motions or briefs;
- Previous trial testimony;
- Trial verdicts and settlement;
- Potential testimony patterns;
- Whether the expert's previous testimony or qualifications was challenged or denied admissibility;
- Other expert witnesses who have given opinions on the same subject matter; and
- Previous drafts of the expert's resume or publications that may have been used as exhibits to dispositive or evidentiary motions.

A published case opinion specifically excluding the testimony of an opposing expert in a similar case will be valuable when preparing for deposition. Tunnel vision for the case specifically excluding your expert from trial could prevent you from uncovering equally valuable "skeletons" in the expert's closet. Before automatically rejecting a case that may initially appear irrelevant, quickly review it to identify any facts regarding an expert's personal background, bias, or prejudice. Failure to think strategically may result in a lost opportunity.

For example, a search for a particular toxicologist in a chemical exposure case revealed a similar case that excluded the expert's testimony regarding causation. While this is clearly helpful, the expert had also given testimony in criminal cases regarding multiple bizarre exculpatory theories, and participated in a contentious divorce proceeding that revealed strange personal medical and psychological information about the expert. Fixation on the chemical exposure case to the exclusion of the other published cases could have resulted in the loss of valuable cross-examination and impeachment material.

INTERNET SEARCH ENGINES

Google, or other internet search engines, are great resources for information on experts. You may locate an expert's personal webpage, articles, book chapters, research, presentations, blog postings, newsgroup or discussion posts, and other biographical information. Remember to use the advanced search functions and the expert's full name (including middle initial) for better results. Also, check news websites in the expert's nearest metropolitan area for potential media quotes. Additional helpful websites include: www.findarticles.com (periodicals dating back to 1998); www.briefreporter.com (free searches but charge for downloading); and www.juryverdicts.com or www.morelaw.com (jury verdicts).

LICENSING

Check the applicable state licensing boards in the expert's industry. Verify the expert attained the appropriate educational credentials to register in the state. Similarly, check the expert's current professional registration status and look for any irregularity, disciplinary action, or customer/patient complaints against the expert. You may also locate helpful information to include in deposition questioning from any professional codes, standards, ethical requirements, aspirational goals, or professional trends unique to the expert's industry.

INVESTIGATE CREDENTIALS

Not all expert credentials are created equally. Many "experts" have multi-syllabic job titles and multi-letter alphabet soup credentials, but this alone is insufficient to demonstrate true expert qualifications. A few industries have developed up solely for litigation purposes. Research the underlying field, including the respected professional organizations within the industry, to help identify "sham" organizations.

For example, a plaintiff once identified a life care planner to provide expert testimony regarding the cost of future medical care. It was perplexing how a full-time supermarket pharmacist became an expert regarding life care planning, until an internet search revealed that the credentialing agency is an unregulated for-profit entity conveying medical-sounding credentials in exchange for completion of an online course and payment of the requisite fee. More troubling, the agency's website provides canned answers to "Sample Deposition Questions" to ensure that the "experts" use appropriate terminology in response to deposition questions on credentialing.

The trier of fact is not likely to be persuaded by an expert's credentials alone. "Skeletons" that may adversely impact the juror's perception of an opposing expert may be valuable cross-examination or impeachment evidence. With some research and analysis of the variety of available informational resources, you will be well prepared to evaluate the strengths and weaknesses of friendly and opposing experts and plan an effective case strategy.

1. *Please refer to Effective Expert Testimony by David M. Malone and Pault J. Zwier, NITA 2006 for a complete discussion of expert witness issues.*

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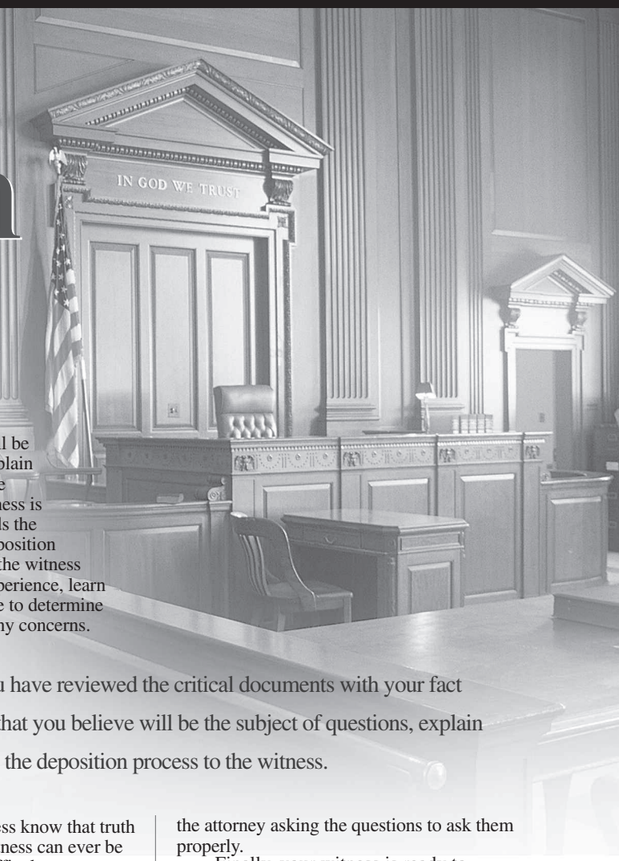
Mandy Schermer

Preparing a fact witness for Deposition



By James D. Abrams,
Chester Willcox & Saxbe

You've gotten your first chance to defend a discovery deposition. That's the good news! Now what? The easy and common answer is **PREPARATION**, **PREPARATION** and **MORE PREPARATION**. The more difficult part is understanding how best to accomplish that task.

Lawyer Preparation

First, know your case; validate your view with a more senior lawyer. To properly prepare a witness, a lawyer has to understand the elements of the claims that require proof, and the documents that are available to either support or defend those claims. Additionally, the lawyer must have a solid understanding of the witnesses' role in the development of the case.

For example, in preparing a fact witness, the lawyer must be crystal clear regarding how the witness fits into the story she is going to tell at trial. Ask the question whether the witness has the "key" to the case or simply is offered for background fact development. Think of the victim of the automobile accident being the witness with the keys while the responding officer is simply giving the framework within which the victim's story is told.

Second, you must understand how and why objections are used during the taking of the deposition. Ohio Civil Rule 32(D) is your guide. Know the rule and its related cases; understand the impact of a failure to make necessary objections. Certain objections are not waived by the failure to make them before or during the deposition. However, the rule is very clear that if the objection might be obviated or removed if made at the time, make the objection. An interesting example of what not to do during a deposition can be found at *Sandberg v. John T. Crouch Co., Inc.,* 2d Dist. No. 21342, 2006-Ohio-4519.

Finally, remember, this is discovery first. However, opposing counsel is looking to "lock in" the testimony so that there is a box around what your witnesses will be able to say at a later time.

Fact Witness Preparation

Your witness should be dictating the facts in response to questions, i.e. the testimony is a report of the facts. In order for your witness to accomplish this task, certain "rules" were established that are great "takeaways" for a new lawyer learning how to prepare her fact witnesses for their deposition.

Before you have reviewed the critical documents with your fact witness that you believe will be the subject of questions, explain the deposition process to the witness. Make sure the witness is comfortable and understands the setting within which the deposition will be taken. Of course, if the witness has had prior deposition experience, learn a little about that experience to determine whether your witness has any concerns.

Before you have reviewed the critical documents with your fact witness that you believe will be the subject of questions, explain the deposition process to the witness.

At the outset, let your witness know that truth is the best equalizer. No witness can ever be really intimidated by the difficult cross-examination of an aggressive lawyer when she answers questions truthfully.

In order to answer questions properly, however, certain steps need to be taken. Following these steps will lead to a successful deposition defense. First, the witness must be made to understand that they have to **HEAR** the question in order to properly answer the question. Hearing the question means listening to, and not anticipating, the question. Wait until the question is fully asked before proceeding.

Next, the witness must **UNDERSTAND** the question. No witness can determine whether they can answer the question without understanding the question. Make sure the witness knows that it is okay to advise the attorney taking the deposition that she does not understand what it is that is being asked. Once the witness understands the question, it will be easier for her to formulate an answer.

Then, **FORMULATE** the answer. Do not let your witness speak before she is clear how she intends to answer the question. Will she be able to simply answer yes or no? Will she have to give a qualified answer? This step is critical in the process. If she takes her time, the witness will be able to be clear in her response. Also, this is a good place to remind your witness that they are not obligated to volunteer any information unless it is necessary to clarify an answer. It is the job of the attorney asking the questions to ask them properly.

Finally, your witness is ready to **ARTICULATE** her answer. To quote a seasoned trial attorney, "this is where the witness pushes the send button." Until now, the attorney asking the question has heard no response at all. With the proper timing, this step will be simple. Let your witness answer unless you have objections that need to be made! The key here is that the witness must be comfortable answering, and has taken the right amount of time to respond.

Defending your witnesses at discovery depositions can be accomplished more easily if you are prepared and you have properly prepared your witnesses. You must know the case, know the documents, and know how and when to use objections.

Your witness must be equally prepared. Describe the process that they will experience. Remind them that they must **HEAR** the questions, **UNDERSTAND** the questions, **FORMULATE** the answers, and then **ARTICULATE** the answers. Following this model and answering truthfully will result in a more successful, efficient deposition.

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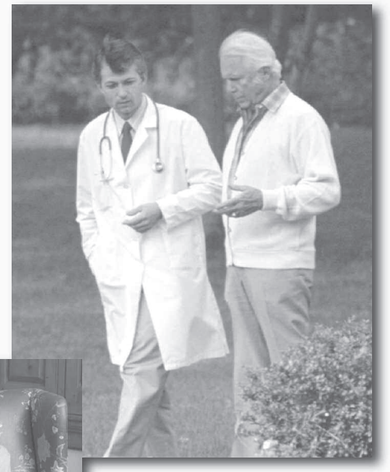
James D. Abrams

Caring for an aging parent or loved one:

Consider The Options Early



Even if there is no impending crisis, it is important to learn about and evaluate the options so that your loved one receives the best care possible when the need arises.

By Lisa Kathumbi, Bricker & Eckler

America's population aged 85 and over will increase by 50% from 2000 to 2010,[2] and there will be a 73% increase in the over-65 population between 2010 and 2030.[3] This major change in demographics has significant implications for those likely to be involved in the care and support of an aging parent or loved one. In particular, it raises the issue of how to choose long-term care options, if or when it becomes necessary to do so. To avoid being forced to make a hasty decision, it is important to begin considering the various long-term options well in advance.

What Are The Options?

Available information when making a long-term care decision can be overwhelming. Long-term care can include both medical and non-medical care, as well as assistance with health and personal needs. Care can be provided at home, at a community agency, in an assisted living facility, in a nursing home, or through one of many other alternatives. The costs, benefits, and disadvantages of the various long-term care alternatives will vary according to your family's needs and circumstances. Even if there is no impending crisis, however, it is important to learn about and evaluate the options so that your loved one receives the best care possible when the need arises.

HOME HEALTH CARE

For many people, securing in-home health care is the preferred option for long-term care because it is convenient and designed according to your family's needs. Home health care is in-home assistance provided by family members, friends, and/or paid professionals.[4] The advantages and disadvantages of home health care depend, in part, on whether you work through an agency or hire providers independently.

WORKING WITH AN AGENCY

More than 20,000 home health agencies exist in the United States today. One of the major advantages to working with a home health care agency is that the agency generally handles the hiring and employment of the caregiver, including background checks, payroll, and taxes. If your loved one needs specialized caregivers, an agency may also be able to coordinate a team to provide comprehensive services. Additionally, if the agency is licensed by the state or required to meet federal requirements (e.g. Medicare certified facilities), another advantage is that this type of agency will be held to certain measurable standards. While working with an agency has its advantages, one major disadvantage is that you may have less of a role in the selection of the particular caregiver(s). In addition, health care agencies can be very expensive, particularly if your loved one requires various forms of specialized care.

HIRING AN INDEPENDENT PROVIDER

An alternative to a home health agency is to employ professionals privately. This option will give you more control over the selection of the caregiver, and tends to be less expensive than going through an agency. However, if you select this option, you will be responsible for the hiring, supervision, and payment of these health care workers. And, as a direct employer, you will need to consider tax responsibilities, benefits, and insurance liability. For example, you will have to consider whether your insurance will cover the health care provider if, for example, there is an accident in your home. Some of these responsibilities may be limited, or eliminated, if you hire the caregiver as an independent contractor subject to specific terms, as opposed to hiring her as an employee.

ASSISTED LIVING

In addition to home health care, another common form of long-term care for parents or loved ones is assisted living. Assisted living is a group living arrangement where residents receive help with activities of daily living such as eating, bathing, taking medication, and getting to appointments. In general, assisted living serves as a middle ground between independent living and a nursing home environment. One of the major advantages of this option is that your loved one is able to retain a degree of independence and autonomy while enjoying the possibility for companionship, social and recreational activities, without home maintenance concerns. A significant drawback, however, is that while costs will vary significantly depending on the size of the living areas, services provided, and type of help needed, this option still tends to be more costly on average than some of the other long-term care options available. It is also worth noting that these facilities are regulated at the state level, but currently there are no federal regulations in place.

OTHER LONG-TERM CARE OPTIONS

In addition to the two most popular options discussed above, there are several other options worth highlighting. They include:

- **Community Based Services.** Community based services involve programs such as adult day care, meal programs, senior centers, transportation and other services.
- **Housing for Aging and Disabled Individuals.** The Federal Government and most states, including Ohio, have programs that help pay for housing for older people with low or moderate incomes.
- **Continuing Care Retirement Communities (CCRC).** CCRCs offer different levels of care based on the needs of the resident. The general concept of the CCRC is that residents can stay in one place for the rest of their lives rather than moving each time they need a new level of care.
- **Nursing Homes.** Nursing homes offer services to people who need more medical care than what other long term care options offer. These facilities offer a wide range of personal care and health services.

Evaluation and Decision Making

When choosing long-term health care, it is important to talk with your loved one to determine the type of care they may need over time. When evaluating the quality of a potential provider, there are a number of websites that provide advice and questions to ask when selecting a long-term care provider, including the National Association for Home Care, http://www.nahc.org/ famcar_selecting.html, and the Ohio State University Medical Center, http://medicalcenter.osu.edu/patientcare/healthinformation/otherhealthtopics/HomeHealthHospiceElderCar4520/ChoosingaProvider/. Most importantly, by considering your options early you can help to ensure that your loved one receives the best possible care when care is needed.

1. *Lisa would like to thank Nellie So, Bricker & Eckler summer law clerk and Boston College law student, for her research assistance.*
2. *Lynne Kirk, MD, FACP, President of the American College of Physicians, Testimony for the Record of the American College of Physicians before the House Energy and Commerce Committee Subcommittee on Health (July 27, 2006).*
3. *The American Medical Student Association, Why Should I Consider Becoming a Geriatrician? available at http://www.amsa.org/ger/ger1.cfm.*
4. *Often, the term home care is used to distinguish non-medical care or custodial care, which is care provided by persons who are not nurses, doctors, or other licensed medical personnel, from the term home health care, which refers to care provided by licensed medical personnel.*

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Lisa Kathumbi

Snapshots of The Struggle

Supreme Conflict: The Inside Story of The Struggle for Control of The United States Supreme Court By Jan Crawford Greenburg

Reviewed by Chris Geidner, Ohio Attorney General's Office

If a masterful storyteller weaves the tapestry of an epic tale, the narration is seamless and the direction is clear. Jan Crawford Greenburg knows she is telling an epic tale, but – at least in this format of a full-length book – she is not a masterful storyteller.

Supreme Conflict is an impressive assemblage of many of the most interesting insights into the past 20 years of the Supreme Court of the United States. From a new perspective of the first months of Justice Clarence Thomas's time on the Court to the behind-the-scenes White House miscues that led to the debacle that was Harriet Miers's nomination to the Court, Greenburg has the sources and the stories that make this book a must-read for Supreme Court junkies.

The reporting is first-rate, with Greenburg relying on interviews with nine Supreme Court justices, Supreme Court clerks and appellate judges, Administration officials from the past four presidencies and senators and their staffs. The papers of presidents and justices provide still more information in Greenburg's file of facts. Moreover, Greenburg manages to write more than 300 pages about the Supreme Court with a fair enough voice that her ideological perspective – if she has one – is never obvious.

The name-dropping of and stories behind the past two decades of would-be justices alone – from Kenneth Starr and Senator Orrin Hatch to Attorney General Alberto Gonzales and Ohio's own Judge Alice Batchelder – provide for juicy, People-like reading for those of us who consider such gossip to be more than worthy of our time. Unfortunately, most of the book reads just like that – an extended, law dork-worthy version of People.

Rather than being witness to an epic tale, which Greenburg could have accomplished had she properly marshaled her army of anecdotes, the reader instead merely flips through a scrapbook of snapshots taken of that tale. The continuity between chapters is not the best – each chapter appears to read as a stand-alone episode – and the transitions are superficial at best.

Even more jarring, some of Greenburg's stories are reintroduced multiple times with no clear reference to the previous introduction or explanation of how the reintroduction fits with the initial discussion or even why the repeated mention is necessary. Greenburg spends ten pages in chapter six fastidiously reviewing the unusual development of the Court's decision in Planned Parenthood of Southeastern Pennsylvania v. Casey. In chapters nine and twelve, though, Greenburg explains again how the votes "surpris[ed] administration lawyers" and that the case "would produce bitter divisions at the Supreme Court"– points already thoroughly explained.

Chris Geidner

Some points are repeated an almost incredible number of times throughout the book. If someone out there doesn't yet know that Justice David Souter's nomination turned out to be an extraordinary disappointment to conservatives, just open Supreme Conflict to a random page. The odds are it's there. Although it's possible that such a point bears repeating in telling the tale of the Rehnquist and Roberts Courts, its reintroduction throughout the book does not appear as a theme but is instead presented as a new, declaratory statement each time.

In addition to problems with the narrative path of the story, the book lacks a clear audience. Greenburg is doing her best to write a book that can keep the attention of both lawyers obsessed with the minutiae of the Supreme Court's inner-workings and non-lawyers who have only the most superficial understanding of the legal system.

This is Greenburg's impossible dream, and the impossibility of the task is painfully clear at times. The same book shares information on how Supreme Court "appeals are called petitions for certiorari, and [are] filed as lengthy, detailed legal briefs" and later contains three pages discussing a never-published reference to Marbury v. Madison in Justice Thomas's draft of the majority opinion in a union-organizing case. If the first rule of writing is to know your audience, then Greenburg is trying – with as awkward a result as one would imagine – to write to two, widely divergent, audiences.

Despite the book's faults, Greenburg is an excellent reporter who knows how to find and report a meaty story. More importantly, she does so without the ideological bias present in many books about the Supreme Court.

In Supreme Conflict, Greenburg shares with the world many stories essential to any real understanding of where the Supreme Court is today and how it got there. As such, Greenburg has put together a valuable resource – if not a great book – for those who want that understanding.

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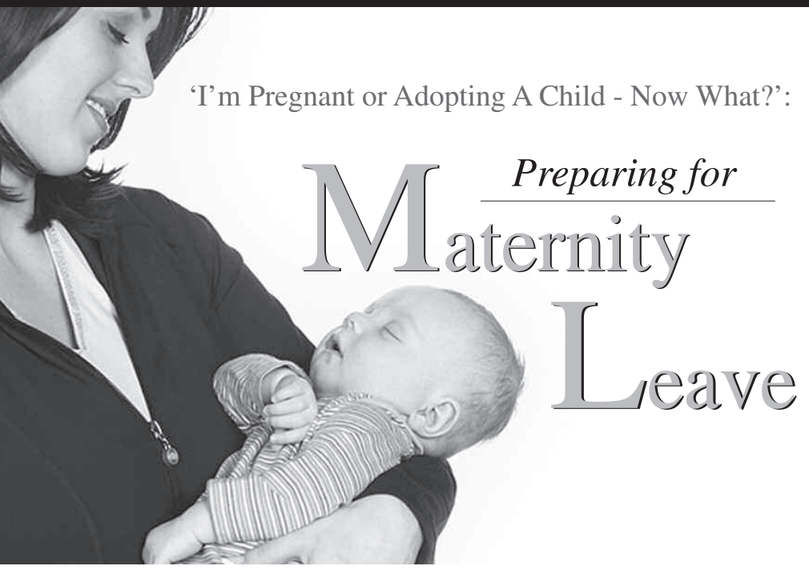


'I'm Pregnant or Adopting A Child - Now What?':

Preparing for Maternity Leave

By Brianne Brown,
Assistant Chief Legal Counsel,
Ohio Auditor of State

Congratulations! You are going to have or adopt a baby. This happy occasion soon leads to many questions. Will I stay home with my child? Or will I go back to work? If so, what is my office's maternity leave policy? Actual paid "maternity leave" is unusual in the United States; although some companies do offer paid time off. The picture improved in 1993 with the passage of the Family and Medical Leave Act (FMLA), which entitles most workers to up to 12 weeks of job-protected medical leave for birth or adoption. However, the FMLA doesn't cover everyone. You'll want to start looking into your options well before the baby arrives. Thankfully, some friends of Better Lawyer agreed to share their maternity leave experience.

Brianne Brown

By Emily Smith, Associate,
Carlile Patchen & Murphy

After my son's birth, I utilized my firm's maternity leave policy that included eight weeks of paid leave at 100% pay for full-time attorneys who have been employed at least twelve months, although the firm paid me for an additional two weeks.

Emily Smith

My firm's policy provides an added benefit if an employee needs to work at a reduced schedule for a few months in addition to the paid leave. This benefit became necessary after my son was born. When he was three weeks old, I learned that my post-leave childcare arrangement was no longer available. Luckily, I was able to find a part-time spot for my son at a childcare facility, but this opportunity hinged my employer. I submitted a written proposal to my practice group leader and the managing partner that included my proposed reduced schedule, salary and benefits information. The firm accepted my proposal and was incredibly supportive. After two months, I returned to a full-time work schedule. My advice to pregnant attorneys: communicate with your employer about unexpected situations that can easily arise. You might find more support than you expected.

By Emily Root, Associate,
Squire Sanders & Dempsey

My firm has set policies about maternity leave: 12 weeks of paid leave, additional time by using vacation time or FMLA leave, and billable-hour goals waived while you're gone. Precisely <u>when</u> to begin maternity leave and how to transition cases is not as formalized.

Emily Root

At my firm, attorneys typically create a memo at least two months before their due dates, outlining all of their cases, detailing what will need to be done and who will be covering each matter. It's a good idea to give a copy to assistants, receptionists, other attorneys who are working on the case, and the relevant practice group leaders. The actual transition starts about a month before the attorney expects to be gone. Once you've transitioned your cases, you may need to find other work to fill your workday. I found that I could do discrete research projects on other cases, as long as I sent daily email updates on my findings and progress so someone else could finish the project if I suddenly went into labor. Although they're not billable, online CLEs are another good way to productively fill your time.

By Rebecca Roderer Price, Associate,
Kegler, Brown, Hill & Ritter Co.

When my husband and I discovered that we were expecting our first child, we were so excited! To my delight, the attorneys were genuinely happy for me. I knew Kegler had a policy for maternity leave, but I didn't have a clue what it actually said!

Rebecca Roderer Price

The policy entitled me to 12 weeks of paid leave - no vacation or sick time penalties, no interruption in pay, and no interruption in other benefits. I had to give Kegler 60 days notice that I would be taking leave. One month prior to my leave, I developed a leave memorandum and began transitioning my case responsibility to other attorneys. I began my leave immediately upon my daughter's birth. I returned to work on a part time schedule when she was 16 weeks old. My daughter is now over 7 months old and I remain on a flexible schedule. I am in the office 3 days a week and have a 60% billable requirement. My compensation and partnership track are prorated accordingly. I am excited about this balance between lawyer and new mom!

By Brianne Brown,
Assistant Chief Legal Counsel,
Ohio Auditor of State

I am due to give birth to my son in November. As thrilled as my husband and I were to discover I was expecting our first child, I immediately began to pursue my maternity leave options.

I soon learned that all permanent employees are entitled to take up to a maximum of six weeks of leave immediately following the birth or adoption of a child, although our office grants leave up to the FMLA maximum of 12 weeks. Employees must complete a 14-day waiting period before receiving leave benefits, which begins on the date of the birth of an employee's child or the placement of an adopted child into the employee's custody. During this period, an employee may use any form of accrued paid leave or compensatory time, and/or may work at the discretion of the Employer. The remaining four weeks of leave are paid at 70 percent of the employee's regular rate of pay. Employees may utilize sick, vacation, personal leave, or compensatory time to supplement their wages up to a combined 100 percent of their regular rate of pay. Employees are also allowed to work a reduced schedule during any portion of this period.

AGENCY SPOTLIGHT:
Ohio Auditor of State (The Legal Division)

By Desiree Blankenship & Matthew Walker,
Assistant Chief Legal Counsels,
Ohio Auditor of State

With approximately 900 employees, the majority of which are auditors, the Ohio Auditor of State's Office is one of the largest accounting offices in the country. However, there is also a legal facet to the office, which, while less well known than the accounting side, is nonetheless an important part of the auditing process.

Overview of The Office of The Auditor of State

The Auditor of State is the constitutional officer responsible for auditing all public offices in Ohio including cities, villages, schools, universities, counties and townships. The office also audits state agencies, boards and commissions. The office's primary function is to ensure that public funds are spent in accordance with state and local law. To accomplish this goal, the Auditor of State is granted specific powers, duties, and responsibilities, most of which can be found in Chapter 117 of the Ohio Revised Code. Some examples of this authority include the power to issue findings for recovery, issue and serve subpoenas, and to declare certain public offices "unauditable."

Overview of The Legal Division of The Auditor of State

The Auditor of State's Legal Division is comprised of eight attorneys, and is primarily responsible for providing written and verbal legal advice to field auditors. Each assistant counsel is assigned to handle legal matters for one or more regional areas of the State. While the Legal Division is small in terms of the number of attorneys and support staff, it still plays an integral role in the day-to-day proceedings of the office. As an audit progresses, a variety of legal questions and stumbling blocks often arise. Once an auditor identifies a potential legal issue, the attorney will help to determine whether the entity being audited is complying with applicable Revised Code sections, Attorney General Opinions, case law, and any relevant local provisions. Even more importantly, before an audit is released, an assistant counsel must review, and approve or disapprove, all findings for recovery and noncompliance citations prior to their insertion into a final audit report. When reviewing a finding for recovery, there must be adequate legal support before it can be issued, while noncompliance citations require a determination that the law has been properly stated.

Additionally, the Auditor of State's Legal Division provides legal support to both constituents and local governments by helping them to prospectively comply with state and federal auditing requirements. Such advice is given through bulletins, informal verbal or written opinions, and conferences held for the benefit of local government officials and employees. The Legal Division also provides continuing education programming for these public officials and employees, as well as internal instruction for the auditors. This continuing education includes specific training programs, such as those for village or township fiscal officers, as well as seminars that discuss pertinent local government issues.

In addition to the assistant counsels and support staff, the Auditor's Legal Division is also made up of the Special Investigations Unit ("SIU") and the Open Government Unit ("OGU"). The SIU is involved in all potential criminal actions. SIU's objective is to reduce and recover the loss of public funds from theft, embezzlement or fraud. The SIU works closely with various divisions within the Office, as well as local, state and federal government and law enforcement officials to battle public corruption.

The OGU works to educate both public and private entities on Ohio's Public Records Law and Open Meetings Act. In doing so, the OGU makes available training seminars that instruct constituents, government officials and employees, on their rights and duties under these laws. In addition, the OGU is working with the Ohio Attorney General's Office to publish a resource manual that explains and summarizes the various requirements of the Acts, and answers many commonly asked questions.

Priorities and Accomplishments of The Auditor of State

As the first certified public accountant to serve as Ohio's Auditor of State, Auditor Taylor has focused on improving efficiency and accountability in the operations of state government. For example, one of her priorities is to revamp the internal audit function of state government to safeguard against fraud and corruption. Another top priority for Auditor Taylor is to strengthen the financial accountability and oversight of charter schools in order to reduce the potential for fraud, waste and abuse of public money. One measure Auditor Taylor implemented to achieve this end is by conducting Community School Training Programs across the state to provide instruction on how charter schools can prepare for an audit, as well as financial and accounting advice for school fiscal officers, board members and sponsors. Auditor Taylor has also made Medicaid reform a major focus by working with the legislature to enact into law cost saving initiatives to the $13 billion dollar a year state program.

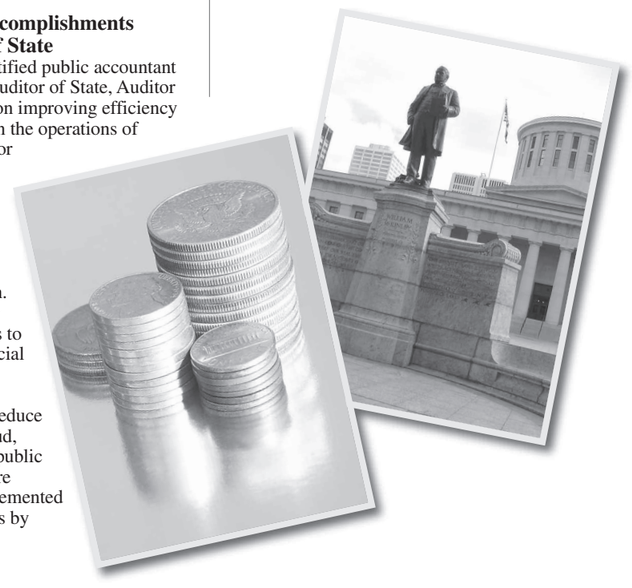
Desiree Blankenship

Matthew Walker

In Conclusion

Thus, while not always visible, the Auditor of State's Legal Division is doing its part to make sure public money is spent properly and pursuant to the law. The responsibilities involved touch on a wide variety of legal topics, and provide exposure to the current issues affecting state and local governments at all levels.

Desiree and Matthew can be contacted at 800-282-0370.



LEGAL WRITING TIP

Drafting Effective Legal Me-mails

By Jameel S. Turner, Bailey Cavalieri

A legal "me-mail" is a distant cousin to the legal memorandum. A me-mail is a condensed version of a legal memorandum that is sent to the client electronically via e-mail in lieu of a legal memorandum. The purpose of sending the response to the client via me-mail is usually because the client would like an answer quickly, and drafting a formal legal memorandum is not practical or efficient. Me-mails are helpful in answering elementary legal questions that can be researched quickly and explained in a few sentences or paragraphs.

Nowadays, nearly all law firms and solo practitioners answer simple client inquiries via me-mail. Therefore, there is no doubt that newer attorneys will need to become increasingly comfortable with drafting me-mails as their careers progress. Even though me-mails are somewhat less formal than legal memorandums, me-mails are still subject to a few basic rules that newer attorneys should keep in mind:

1. One and done

Me-mails should be written with the same amount of time and care as writing a letter to a client. Because me-mails are often quick and delivered in between other tasks the attorney is working on, it is easy to fall into the habit of sending incomplete me-mails that require one or two follow up me-mails. Remember, recipients do not like to keep getting information piecemeal, so newer attorneys should compose me-mails very carefully and avoid sending any me-mail until all relevant information can be conveyed at once, even if you are in a time crunch.

2. Understand your audience

Email by nature is an inherently informal mode of communication because the reader will be interacting with a computer screen as opposed to an individual. For me-mails written to friends or colleagues, often a decreased level of formality may be used. But, for me-mails sent to clients, a level of formality equal to that of a legal memorandum should always be employed.

3. Know your software

Every email system contains security features that could impact your me-mail. For example, some e-mail systems strip attached documents of metadata and tracked changes before the email can be sent. You should be familiar with your email system's security features that could potentially impact your me-mail before sending it.

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Jameel S. Turner

Better Lawyer
a columbus bar publication for new lawyers

Calendar

Better Lawyer is all about lawyers learning to excel in our challenging profession. Whether you've just been admitted or have been practicing as long as you can remember, we welcome you to a new year of Columbus Bar membership.

As usual, the Columbus Bar makes a special effort to support those just entering the profession. In addition to a formal mentoring program, all of us here at the Columbus Bar are mentors for our newly admitted colleagues — board, staff and members.

This year, we'll be partnering with community groups to help new lawyers get to know each other and their peers in other professions. Each event is planned to give attendees a chance to meet other professionals, including attorneys, pick up a few practical people skills, and practice them in a friendly environment.

If you are in your first five years of practice, you'll receive email invitations to events and programs designed with you in mind. Also, keep an eye on the Columbus Bar Friday in *The Daily Reporter* for invitations and photos.

February

Lunch with Local Judges
As a new attorney, you'll sit with a few colleagues and one of the members of our esteemed Common Pleas or Municipal bench for informal conversation. Watch your email and *The Daily Reporter* for the date.

June

Summer Happy Hour Celebration
Join Columbus Bar members, friends, and summer associates for an open house celebration of summer. Each year we choose a special venue and a tasty menu to celebrate a year well spent. Watch your e-mail and *The Daily Reporter* for the date.

In addition to these planned events, we'll be keeping an eye out for opportunities to join other community groups for special events. You'll hear about these events as they come up, over email and *The Daily Reporter*.

If you have any questions concerning events and programs for new lawyer members, please contact Lara Bertsch at 221-4112 or Lar@cbalaw.org.

UNEARTHING OHIO'S BURIAL RIGHTS

Human Bodies and Parts Thereof

House Bill 426, effective October 12, 2006, permits a living person to sign a legally binding document designating an agent to make funeral arrangements.

By David E. Kauffman

I once had a prospective client who, during his initial estate planning consultation, wanted to include a provision for a "Sky Burial" in his will. Not knowing exactly what that entailed (and predating the age of Google), I did some research and discovered that a Sky Burial is an ancient Tibetan ritual involving, among other things, a mountain and vultures. Fortunately, in this case, the client did not schedule a follow-up appointment. Though a Sky Burial would never "fly" in Ohio, recently enacted HB 426 does make it easier for Ohio residents to specify their burial and funeral arrangements.

House Bill 426, which was effective October 12, 2006, permits a living person to sign a legally binding document designating an agent to make funeral arrangements. Should a person not make such a designation, the new law provides a prioritization of persons that can make post-death arrangements.

R.C. 2108.70 (established by HB 426) sets the right to assign burial and funeral decisions. Subparagraph B reads in part: (B) An adult who is of sound mind may execute * * * a written declaration assigning to a representative . . . the following rights: (1) The right to direct the disposition, after death, of the declarant's body . . . .This right includes the right to determine the location, manner and conditions of the disposition of the declarant's bodily remains. (2) The right to make arrangements and purchase goods and services for the declarant's funeral. This right includes the right to determine the location, manner and condition of the declarant's funeral. (3) The right to make arrangements and purchase goods and services for the declarant's burial, cremation or other manner of final disposition. This right includes the right to determine the location, manner and condition of the declarant's burial, cremation or other manner of final disposition.

To create a valid declaration of assignment, R.C. 2108.72 requires the document be in writing, signed and dated by the declarant, and either notarized or signed in the presence of two witnesses. The assignment must include a statement that the declarant is willfully and voluntarily appointing the representative to have the binding right of disposition for the declarant's body upon death.

The declarant may outline his/her preferences regarding how the right of disposition should be exercised, including any religious observances he/she wishes the agent to consider. The declarant may designate specific funds to pay for the disposition.

The assignment must state that the written declaration becomes effective on the declarant's death, and that the declarant revokes any prior assignments. Under RC 2108.90, and pursuant to RC 2101.24, the probate court in the county in which the declarant resided at the time of death, or the county in which a living person whose post-death arrangements are the subject of dispute resides, has exclusive jurisdiction over actions resulting from RC 2108.70 to 2108.89.

The new law establishes the priority among family members in making funeral and burial arrangements when no assignment exists. Under RC 2108.81(B), if the decedent did not properly appoint a designee to provide for his or her bodily remains, then the order of priority for the right of disposition is: (1) The surviving spouse; (2) The surviving children, collectively; (3) The surviving parent or parents; (4) The surviving siblings, collectively; (5) The surviving grandparent or grandparents; (6) The lineal descendants of the deceased person's grandparents; (7) The designated guardian; (8) Any other person willing to assume the right of disposition.

Ohio's new burial rights statute also impacts who is responsible for payment of services for the burial or disposition. Obviously, any person may assume liability for funeral and burial costs by signing a contract. However, R.C. 2108.89(B) also holds a person to whom the right of disposition is assigned pursuant to R.C. 2108.81, and who has purchased goods or services associated with an exercise of the right liable for the reasonable cost of disposition.

House Bill 426 also amends RC 2117.25(A)(2) to increase from $2,000 to $4,000 for funeral expenses and an amount not exceeding $3,000 (formerly $2,000) for burial and cemetery expenses, which have a priority of payment by a fiduciary after the payment of administration expenses. Additionally, the priority payment of excess funeral expenses over and above the $4,000, after the expenses of the decedent's last illness, was increased from $1,000 to $2,000.

With the enactment of HB 426, Ohio attorneys now have another service that may be extended to clients completing their estate plans. A sample document, which would comply with R.C.2108.70, is included in the language of the statute. For now, the sky is the limit in Ohio.

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David E. Kauffman, Schottenstein Zox & Dunn

Relief

FROM SPOUSAL SUPPORT PAYMENTS UPON RETIREMENT?

By Heather G. Sowald

A pretty simple scenario: Our protagonist, let's call him Garden Gee, is 63 and in good health. He decides to retire while he is still in good health, has savings, and can access his 401(k) account and begin receiving his monthly pension from his employer.

The Rub:

Ten years ago, Garden and his wife of 30 years divorced, and all of their marital assets were equally divided between them, including his 401(k) and his pension plan. He agreed to pay spousal support of $2,500 each month until either of them died, or his wife remarried or cohabited. His ex-wife and he also agreed that the court should retain jurisdiction to modify these orders in the future.

The Question:

Garden wants to know if the court will terminate or significantly reduce his spousal support payments now that he is retiring and will be primarily living off of his pension and other assets that he had previously been awarded in the divorce case.

The Answer:

Well, you know the answer to give Garden — "Maybe yes, maybe no." There are no Ohio Supreme Court cases on the subject, and as many answers as you can imagine to give Garden, there is a court of appeals decision in Ohio that will back up his position or, alternatively, will bolster his ex-wife's arguments.

The Legal Tests:

The first burden Garden has to show is that there has been a change of circumstances. A "change of circumstances" includes, but is not limited to, "... any increase or involuntary decrease in the party's wages, salary, bonuses, living expenses, or medical expenses." R.C. 3105.18(F). Interestingly, many courts interpret this to mean that there has to be a "substantial" or "drastic" change of circumstances, thereby creating a much higher burden on the obligor than the statute requires.

Many courts have also stated that the changed circumstances must not have been foreseen or contemplated, such as a long-term illness. Clearly, retirement is a foreseen event. But, generally, judges' decisions after a divorce trial limit the terms for the termination of spousal support to death or the wife's remarriage, and do not mention retirement. Further, wives in divorce negotiations frequently refuse to allow "retirement" to be stated as a reason for the court to later modify or terminate an ongoing spousal support award.

Divorce settlement negotiations are already difficult enough, without trying to resolve the amount, length and modifiability of spousal support if such award is warranted. When the issue of adding "retirement" as a reason for modifying or terminating the support is thrown into the mix, each side tries to negotiate a best-case future scenario: He wants to have a definitive date, such as his 63rd birthday. She does not want that because he may continue to work much longer than a set age. He then suggests that the spousal support should terminate upon his retirement. She does not want that because he might "retire" the next month after the divorce. There is also the struggle to define what "retirement" means. Many people now retire from their fulltime position, but then take on part-time or consulting work, or perhaps become self-employed.

The Other Question Is:

What is considered to be a normal age of retirement? What if Garden was a government employee who was eligible to receive full retirement benefits after 30 years of employment and he was only 55 years old? Many courts have found that retiring early does not warrant a reduction or termination of spousal support. If Garden, at age 63, is healthy and capable of continuing to work for many more years, is that early retirement?

Garden's changed circumstances are clearly voluntary, not involuntary. However, if the court finds that he is of normal retirement age, that "event of aging" might make it an "involuntary" decrease in his income.

The second test: If the court has found that Garden did not retire too early and that he has met his "change of circumstances" burden, the court next has to consider whether or not spousal support is still appropriate. If it is not, then the court will terminate the order. If it is still appropriate, the court is faced with the decision of what a reasonable amount should be under the particular circumstances.

In order to make that decision, the court has to consider all of the evidence presented by Garden and his ex-wife in light of the relevant factors listed in R.C. § 3105.18(C), inter alia: the income of the parties from all sources; the parties' relative earning abilities; the ages and physical, mental, and emotional conditions of the parties; the retirement benefits of the parties; the duration of the marriage; the relative extent of the parties' educations; the parties' relative assets and liabilities; the contribution of each party to the education, training, or earning ability of the other party; the time and expense needed for the spouse seeking support to acquire education, training, or job experience; the tax consequences of a spousal support award; and any other factor that is relevant and equitable.

But, what if Garden has re-married? The court will consider his present spouse's income and assets and her contributions to the couple's overhead and other expenses.

What if Garden's ex-wife is living in a residence that is expensive to maintain, but she was relying on the spousal support payments in order to maintain her lifestyle there?

Garden will also present his issue that if he continues to pay spousal support, then that is unfair double-dipping. He had previously divided the marital assets and pension funds with his ex-wife, yet those he was left with would now have to be the source of his ongoing spousal support payments to his ex-wife, while hers remain intact.

This post-decree issue regarding the modification or termination of spousal support upon the payor's retirement are difficult to resolve through negotiation. If there is no agreement reached by the parties on this matter, each party will present his or her evidence as to current monthly expenses, assets, income from all sources, and other pertinent evidence, along with his or her request for what the court should order and leave it all in the hands of the assigned trier-of-fact.

Conclusion:

Tell Garden to be prepared for a legal battle in the court system, that it is not as clear-cut and simple as he hopes it will be, and that there is no way to predict the outcome.

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Heather G. Sowald,
Sowald Sowald
& Clouse

THE (ALMOST) Last Word

By Lloyd E. Fisher Jr.

"Dust to dust" doesn't necessarily mean "dry as dust." Sometimes an estate plan reveals interesting insights on the character of the testator.

Calvin Coolidge, notoriously laconic during his lifetime, was equally brief in death. His will, the shortest of any U.S. president, simply said: "Not unmindful of my son, John, I give all estate, both real and personal, to my wife, Grace Coolidge, in fee simple."

In contrast, an Indiana woman wrote a will that contained over 95,000 words in four bound volumes. Her estate was small; the will was mostly comments about friends and relatives.

Not all wills are in stuffy legal jargon. An Englishman wrote:

> "All my worldly goods, now or to be in store, I give to my beloved wife, now and forevermore. I give them freely, no limit do I fix, This is my Will, she's executrix."

Patrick Henry, famous for his "Give me liberty or give me death" speech, left his estate to his wife on the condition that she never remarry. She felt strongly about HER liberty, challenged the will and won!

When Marilyn Monroe died in 1962, her estate assets were valued at about $93,000 and she left them to her acting coach and her psychologist. Years later, the flesh-colored rhinestone-trimmed dress that she wore as she sang "Happy Birthday" to Jack Kennedy sold for over $1,000,000.

Eleanor Ritchey, one of the heirs to the Quaker State Oil fortune, died in Florida in 1968. She gave 1700 pairs of shoes and over 1200 boxes of stationery to the Salvation Army and the rest of her 4 million dollar estate was left to care for her dogs – about 150 of them. When Musketeer, the last dog, died in 1984, the appreciated assets were used to establish a center for research in canine diseases at Auburn University.

A Canadian attorney and politician, Charles Vance Millar, was known as a practical joker during his lifetime. He continued the tradition in his estate plan by giving shares of stock in a race track to a judge and a preacher who had opposed his efforts to legalize pari-mutual betting. To several Protestant ministers who had opposed alcohol, he gave shares in a brewery. Three of his friends who were known to dislike each other were left the joint ownership of Millar's vacation home.

The major portion of Mr. Millar's estate established what became known as the "Toronto Baby Derby." The assets were to be held in trust for ten years and then the principal and accumulated income were to be distributed to the Toronto woman or women who had given birth to the most children in the ten-year period. At least one woman was disqualified because her ten babies were fathered by two husbands, but four women, each of whom had nine children, shared the prize. The contest became the plot for a television movie, "The Great Stork Derby".

Mary Grady was the last survivor of three siblings who lived in Delaware County, Ohio. None of them ever married and they all lived frugal, reclusive lives. At Mary's death, she provided that her estate was to be given to an order of Roman Catholic nuns, on the condition that they build and operate a hospital on the Grady farm property north of Delaware. If the order declined the gift, it was to pass to another sisterhood, subject to the same conditions, and if they disclaimed, the assets were to be given to a Methodist organization to build and operate the hospital! In a display of ecumenical common sense, all of the religious organizations agreed that it was not then financially feasible to build a second hospital in Delaware. With the blessing of the Delaware County Probate Court, the legacy passed to the existing hospital. Thus, Grady Memorial Hospital.

Grace Kelly, the movie star who became the Princess of Monaco, was the daughter of "Jack" Kelly, a Philadelphia bricklayer and Olympic rowing champion, who became a wealthy contractor. Jack wrote his own Will in green ink a few months before he died in 1960. In it he included some interesting comments about his gifts and his personal philosophy. His final words for his children were:

"In this document I can only give you things, but if I had the choice to give worldly goods or character, I would give you character. The reason I say that is, with character you will get worldly goods because character is loyalty, honesty, ability, sportsmanship and, I hope, a sense of humor."

Great last words!

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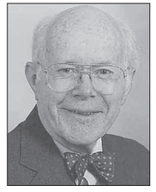

Lloyd E. Fisher Jr., Porter Wright Morris & Arthur

Patrick Henry, famous for his "Give me liberty or give me death" speech, left his estate to his wife on the condition that she never remarry. She felt strongly about HER liberty, challenged the will and won!

Don't Be Afraid of Retirement

I have had, and anticipate continuing to have, great personal satisfaction in my community involvement.

The Complete Lawyer Interview: John C. Hartranft

TCL What is your age and how long have you been in the profession?

I am 64 and completing my 40th year in the profession. I am an anomaly in today's world, but there are still a few of us in the profession who have spent our entire career with one firm.

TCL What are you doing now? How long have you been doing it?

I have been a banking and commercial law lawyer most of my career with some forays into failed financial institutions law, bankruptcy and litigation.

TCL At what point did you realize that you wanted to make a change in your life and career, either in your current position or by doing something altogether different?

I had watched with concern over the years as friends, family and other lawyers retired at 65 or older and "immediately" encountered health or other problems which prevented them from pursuing some or all the interests (travel, physical activities or other hobbies) they had hoped to enjoy in retirement. I had said for many years that I hoped to retire at 60 or no later than 62. Somehow I got busy and missed my deadlines, but my dwindling enjoyment of parts of the practice made it easier for me to say "enough is enough."

TCL Did you ever feel that the typical aging process had a negative effect on your work? Can you explain?

To a certain extent. I think that most older large-firm lawyers find it more difficult to attract new work as they get older and their contacts with corporate clients retire or move into positions where they are no longer responsible for the assignment of legal work. I also found the more rapid pace of the practice caused by the new technology less satisfying. Today's practice is more impersonal and more hectic, and neither of these aspects appeals to me.

TCL What fears or obstacles did you have to overcome as you made the change?

There is always concern about having the financial resources to live the way you and your spouse would like to live in retirement. However, my wife and I had been responsible for the financial affairs of our mothers for many years. During that time I watched with interest as their non-health care related needs sharply diminished. I became more comfortable with the fact that the financial planners overestimated the amounts needed.

My other concern was the need to identify activities other than granddaughters, travel and golf in which to get involved after retirement. Talking to others who retired and taking stock of the needs in the community convinced me that there were plenty of meaningful and rewarding activities available.

TCL Did you consult with any experts, consultants, coaches or mentors while you planned this career transition?

For the answer to this question and still more, go online to The Complete Lawyer, Volume 3, Issue 4. www.thecompletelawyer.com/volume3/issue4/index.php

John C. Hartranft, Porter Wright Morris & Arthur

Show Me The Money

Is your client's 401(k) fully disclosed and reasonable?

The 401(k) plans are governed by the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 USC. § 1001, et. seq. Depending on the size of the plan, it may require investment, administrative, legal, record-keeping, audit or other related services.

By Scott J. Stitt

In September 2006 seven class-action lawsuits were filed regarding the fees paid for 401(k) services.[1] Since that date, additional cases have been filed, and more are expected to come.[2] These lawsuits could revolutionize the administration of 401(k) plans and affect everyone with such a plan.

The 401(k) plans are governed by the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 USC. § 1001, et. seq. Depending on the size of the plan, it may require investment, administrative, legal, record-keeping, audit or other related services. For example, many plans incur fees related to the administration of the Plan by an outside administration firm, and fees are often paid to the investment firm that offers the funds available in the plan.

ERISA § 404(c) (29 USC § 1104(c)) provides a "safe harbor" from liability for losses a plan participant suffers in a 401(k) account when the participant exercises control over the assets in the account. To be eligible for the "safe harbor," the participant must have been provided with the opportunity to obtain sufficient information to make informed decisions regarding the investment alternatives available under the plan, which includes a description of all transaction fees and expenses.[3] The "safe harbor" specifically applies to "reasonable expenses" charged by the plan, so there are two key questions in the 401(k) cases – first, whether the expenses have been adequately disclosed, and second, whether the expenses are reasonable.

In many of the lawsuits filed to date, the plaintiffs allege that certain revenue sharing payments and other expenses have not been disclosed to participants in violation of ERISA § 404(c) and its regulations. Revenue sharing is the portion of the fee – usually charged by the asset manager, such as a mutual fund company – that is shared with other service providers, such as the third-party administrator or others. The asset management firm therefore collects its fee, and pays a portion of that fee to the other service providers in lieu of those providers being paid directly from the plan.

This arrangement is one of the practices that is alleged to violate ERISA. For example, in the lawsuit asserted against International Paper,[4] the allegation is that participants were not provided with full disclosure regarding the revenue sharing payments and other expenses. In addition, the lawsuit also asserts that certain revenue sharing amounts were not, in fact, paid to the plan's other service providers, but were kept by the asset managers. This allegedly resulted in the plan paying higher fees to the service providers than it should have paid, because the providers should have already been paid through revenue sharing rather than from the plan directly.

A different 401(k) lawsuit alleges that participants paid for active management when, in fact, they were not provided such management. And yet another 401(k) suit alleges that even in the absence of any revenue sharing, the amounts paid to the service providers were in excess of reasonable compensation.

While each complaint differs based upon the terms of the 401(k) plan at issue, each complaint asserts that the improper and excessive payment of fees by the plan constitutes a breach of fiduciary duty under ERISA. The remedies for these claims can be extensive. Section 409 of ERISA permits personal liability not only for payment to the plan of all losses suffered but also for disgorgement of any profits that may have been earned on the ill-gotten funds, as well as other equitable or remedial relief as the court may deem appropriate.

Further complicating this already complicated area of law is the recently enacted Pension Protection Act of 2006, which allows the plan to delegate fiduciary responsibility for 401(k) investments to a registered investment representative designated by the plan. This change in the law will undoubtedly have an effect upon 401(k) management and the expenses incurred.

However, the fees that may be charged are still subject to the regulations requiring full disclosure, and could still be the subject of liability if not fully disclosed or unreasonable. The Department of Labor has proposed strengthening its regulations to require disclosure of revenue sharing and other indirect forms of compensation on the Plan's Annual Report (the Form 5500) filed every year with the Department.[5] Such disclosure may reveal more examples of revenue sharing that may be the subject of future litigation. And Congress and the Department of Labor are also exploring additional avenues for regulation on this subject.[6]

The 401(k) lawsuits, and the resulting regulatory developments, have the ability to revolutionize every 401(k), because every plan that utilizes revenue sharing or another fee structure that is poorly understood by participants could find itself the subject of an ERISA breach of fiduciary duty claim. Everyone with a 401(k) Plan – whether a plan fiduciary, a corporate sponsor of a 401(k) or an individual who participates in a 401(k) – should therefore fully understand the fees being paid to all of the plan's service providers, including not only direct payments but also revenue-sharing arrangements if applicable. All expenses should be fully disclosed so that all participants can easily understand the costs being charged, and the fees should be no more than reasonable.

While the 401(k) lawsuits are still very early in the litigation, participants and companies that sponsor 401(k) plans are likely to be dealing with these fee issues for many years to come.

1. *The original seven defendants are Lockheed Martin, General Dynamics, United Technologies, Bechtel Group, Caterpillar, Exelon, and International Paper.*
2. *As of July 2007, 17 such suits had been filed.*
3. *29 CFR § 2550.404c-1(b)(2)(i)(B)*
4. *Case No. 06-703, in the U.S. District Court for the Southern District of Illinois.*
5. *71 Fed. Reg. 41616 (July 21, 2006).*
6. *The DOL's discussion of its "Consultant/Advisor Project," focusing on the receipt of "improper, undisclosed compensation by pension consultants and other investment advisors," is available at www.dol.gov/ebsa/erisa_ enforcement.html*

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What's in A Name?

By Robert L. Ellis

Although many complex areas of law are well-understood both by businesses and by their attorneys, one area that seems to be an ongoing source of confusion involves a simple concept: names. We all take names pretty much for granted – car, tree, email, Ohio State – because they are so fundamental to language.

In the world of commerce, names are not taken for granted. Names identify a business as well as its goods and services, and distinguish them from the names, goods, and services of other businesses. Several types of names have legal significance.

A *trademark* serves to identify the origin of goods or services. From a legal standpoint, a trademark functions as an adjective: "Colgate" toothpaste, "Wendy's" restaurants, "Nokia" phones, and even the "Ohio State" university. Even though they may be adjectives legally, well-known trademarks often become nouns linguistically and serve to identify the trademarked thing itself: Coke, White Castle, iPod, Ohio State. When this happens, the trademark owner has to make sure that the noun continues to identify *only* the owner's goods or services, and not *all* such goods or services. The names "aspirin," "cellophane," and "escalator" used to be trademarks but they became generic nouns because their owners did not take adequate measures to ensure that they stayed proprietary. For years, the Coca-Cola Company has aggressively protected the "Coke" trademark so that it won't suffer the same fate. The company sends investigators into restaurants to order "Coke" and if the beverage served is not indeed Coke, the restaurant will hear from Coca-Cola's attorneys. That is why anyone who orders a Coke at a restaurant where Pepsi is served will likely hear "Is Pepsi ok?"

A company name itself can never be trademarked, but company names are often the same as the company trademark: Coca-Cola, Kinko's, H&R Block, Google. This is generally desirable since the more closely the trademark is associated with the company, the less likely the name will become generic. (The fact that Google has also become a verb associated only with Google Inc. and not just any search engine is so much the better for that company.)

The same trademark can and often does identify different products and services from different companies: Paramount is a federally-registered trademark of Paramount Pictures Corporation, but Paramount is also a federally registered trademark of various other companies to identify the origin of such goods and services as vending machine rental, industrial storage equipment, and hardwood flooring. This is possible as long as there is no danger of mis-identification in the relevant market sectors. Apple is used as a trademark for computers, banking services, and phonograph records, for example, without any apparent confusion. Some trademarks, however, are so famous that they have become "strong" marks that pre-empt the entire field: IBM, McDonald's, Toshiba. Even though Toshiba is not in the banking business, no other company could start a Toshiba bank.

Another source of confusion about trademarks is how trademark rights are acquired. In the United States, trademark rights arise as a result of commercial use of the mark, not by registration. Valid non-registered "common law" trademarks are common. One often sees "TM" (trademark) or "SM" (service mark – the same but for services) next to a logo or product name; that indicates that the company believes it has common law rights to the logo or name.

There are both state and federal trademark registrations. Every state has a trademark registration law. Ohio's is §1329.54 ff. State trademark registration is an endless source of confusion because many businesses that register trademarks at the state level believe they have acquired some sort of rights by virtue of the registration. A state trademark registration does not imply that the registrant has any rights to use the mark, since there is no review of state-level applications for possible infringement.

Federal registration solidifies rights and is well worth the effort if the mark is worth protecting:

- The ® designation can appear only on federally-registered marks. (There is no particular form to designating a state-registered mark.)
- By applying federally, one establishes a "priority date" that is valid not only in the U.S. but also, in many cases, internationally. The priority date can now pre-date the first-use date.
- A registration, if granted, creates a presumption that the mark is valid. The presumption becomes incontestable after five years.
- Registration of a mark is public notice of ownership. Because registered marks are easy to research, registration helps other companies avoid infringing one's mark.
- Registration means much better remedies for infringement, including the right to sue in federal court, damages, attorney fees, barring imports of infringing items. Registration also eliminates the "innocent mistake" defense.

Another type of name is the trade name. Not every state has a trade name registration act. Ohio does. Ohio defines a "trade name" as "a name used in business or trade to designate the business of the user and to which the user asserts a right to exclusive use." There is no state-level review of trade name applications, and thus a trade name registration does not imply that the registrant has any rights to use the name.

There are also "fictitious name" registrations. Ohio defines a "fictitious name" as "a name used in business or trade that the user has not registered as a trade name or is not entitled to register as a trade name." A fictitious name registration just puts the public on notice that someone is doing business under a made-up name, but registration itself does not give the user any exclusive right to use the name.

Finally, domain names have legal significance as well. A domain name can function as a trademark in the same way as any other word, but unlike in the real world, in the online world there can be only one "paramount.com."When a trademark dispute arises involving a domain name, there is a special online process administered by the World Intellectual Property Organization (WIPO) for determining who has the right to it without having to initiate a lawsuit.

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Notes
ON CHILDREN IN KINSHIP

By Susan Eisenman

While grandparents have long been an important child care resource particularly for single parent and dual worker families, many grandparents are now shouldering the primary parental role.

Four and a half million children in the United States are currently living in grandparent-headed households. Another million and a half children are living in other kinship homes. This is a thirty percent increase in the past fifteen years. The increase in children in kinship care is largely the result of parental inabilities to care for their own children due to substance abuse, incarceration, HIV/AIDS, child abuse and neglect, domestic and community violence, unemployment and poverty. Sometimes the shift in the roles has occurred by intrafamily agreement. Other times the local children's services agency may have intervened to find a safe place for the children.

The child welfare system was instructed to seek relative placements in preference to foster care by federal mandates enacted in the early 90s. However the federal mandate failed to put into place accompanying supports and recognition mechanisms. These kinship families faced a variety of barriers in obtaining services and resources for these children. Grandparents experienced difficulties enrolling the children in school, authorizing medical care, maintaining public housing leases, and accessing government and employment related benefits for the children. Often the grandparents were also unable to obtain appropriate financial assistance from the absent parents. Almost one-fifth of these families live below the poverty line.

One option is grandparent adoption. Such adoptions provide the child with permanence and simplify obtaining necessary benefits and authorizations. Nearly a quarter of Ohio grandparent headed families indicated in a recent survey that they would like to adopt if they were able to do so. Often, grandchildren who are adopted qualify for social security benefits or other retirement based benefits under the grandparent's account.

If the parents have failed to support or to visit with the child during the past year, the adoption can proceed without parental consent. Other times the parents consent as an acknowledgement of the important role the grandparents have played in the child's life.

Grandparents who wish to adopt must undergo a home assessment or homestudy. This review is intended to insure that the adoption is in the child's best interest. The grandparent must submit references, physicals and fingerprint clearances. An assessor will then visit the home and interview the grandparents and the child (children). Finally the assessor will submit a report to the court. The home need not to be luxurious or fancy but basic standards of health and safety are necessary.

A hearing is then held before a judge or magistrate to review the reports and oversee the best interest of the child. Over eleven years, the child will be privately interviewed by the judge and the child will be asked to consent.

While the grandparents have the option to change the child's name, sometimes everyone agrees to maintain the current nomenclature. It is really up to the family whether to change the name. After the adoption is granted the state will issue a new birth certificate listing the grandparents as the parents. The child's school, medical, social security, and community records can then be changed to reflect the new "legal" parents.

A final step in the process is a review of the grandparent's estate plan. A will may need to be changed to include arrangements for the child in the event of the grandparent's demise. Likewise, the child's new status may require a change in the asset distribution plan.

Grandparent adoption may not be appropriate for every family. However for many families it is a positive alternative providing much needed assistance to nana and grandpa.

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"The Truth Is Out There"

THOUGHTS ON LEGAL WEB BLOGS

By Yimei Chen

I occasionally browse legal blogs (aka blawgs) for legal news or updates, which I find to be very informative. I've often thought of creating my own but, so far, I'm not sure if it's worth the effort. However, my recent research has shown that a web blog is an effective and inexpensive way to market an attorney's legal services.

According to Bill Gratsch, Four Purposes for Blawgs, posted February 2003, purposes are (1) research; (2) supporting existing clients; (3) marketing lawyer expertise; and (4) gaining new clients.

The first purpose, research, offers an inexpensive and efficient way to notify a large audience of a legal research question or information. In the beginning of legal blogging, librarians and law professors, being early adopters of legal blogs, used them to share their research questions and answers. As time goes on, the legal blogs have expanded globally. Now, legal blogs enable librarians, researchers, marketing, public relations and practice management professionals to share their expertise with the world.

Traditionally, law firms have marketed their attorney's expertise by writing articles, giving seminars, mailing paper summaries, calling respective clients, offering newsfeeds, and other similar services. Compared to these traditional practices, legal blogs can be a cheap and convenient way of sending information to clients. An attorney can convey a daily message of legal updates to a large number of clients in a matter of minutes.

While most attorneys can perceive the value of legal blogs in supporting existing clients and marketing lawyer expertise, they do not often see or hear any attorney gaining new clients from legal blogs alone. In the 2007 Legal Technology Survey Report by the American Bar Association's Legal Technology Resource Center (LTRC), only five percent of lawyers say their firm has a blog, and only five percent say they maintain a personal legal-topic blog. Blogging, as the LTRC's Laura Ikens puts it, "is not catching fire just yet." Interestingly, those traditional ways law firms use to generate new clients can be done by legal blogging more efficiently.

Could it be that since legal blogging has not been established as a way to gain new clients, law firms are ignoring many of its other benefits?

It is true that many corporate decision makers are not active web users beyond remote email and using the corporate extranet or intranet. It is also true that old ways of gaining new clients via networking and seminars still work their magic. However, in assessing the effectiveness of using legal blogging, we must compare blogging to the long-established methods of generating new clients: in-person seminars, entertainment, and networking. Attorneys use these methods to create opportunities to talk to potential clients. Through these conversations, attorneys can gain trust and recognition from these potential clients. In such ways, these methods ultimately help an attorney generate new clients.

Like these traditional legal marketing methods, "Blogging is about conversation." Specifically, it involves potential clientele in a conversation about a particular legal subject matter and gains trust and recognition during that process, especially for foreign clients. More important, compared to the enormous amount of time required in drafting an article for publication in traditional media, a blog entry can be added to a website in a matter of minutes, consisting of a single paragraph covering breaking legal issues.

Since web blogging is relatively new, no statistics are available to show that legal blogging can assist in generating new clients. Still, since many attorneys generate new clients through their existing and past clients, web blogging can definitely assist in such a process. So far, it seems that legal blogging is an effective and inexpensive way to generate new clients and support existing clients.

But, what about the perceived lack of authenticity for legal blogs? The perception stems from the fact that legal blogs do not usually pass through specific editorial criteria. As such, their content is subject to mistakes and other errors. Nevertheless, it is worthwhile to note that the legal blogs are not legal review articles. They are mostly headlines, summaries, and comments. Moreover, legal blogs are still subjected to peer review.

In 2006, there were as many as 489 article citations of legal blogs by law review articles, with 75 legal blogs being cited. The legal blogs with the most citations are: Sentencing Law and Policy (78); The Volokh Conspiracy (62); Balkinization (32); SCOTUS Blog (32); How Appealing (30); Legal Theory Blog (30); Lessig Blog (21); Patently-O: Patent Law Blog (17); ProfessorBainbridge.com (16); The Becker-Posner Blog (12); Leiter Reports (10); White Collar Crime Prof Blog (10).

More important, media have begun to take notice of legal blogs and to post their own web blogs: The Wall Street Journal's Law Blog, Court TV's Best Defense, Fortune's Legal Pad, FindLaw's Common Law, Law.com's Legal Blog Watch, and Legal Times's Blog of the Legal Times, among others.

In fact, the Wall Street Journal online cites cases from web blogs: at http://blogs.wsj.com/law/2007/07/05/juries-fashion-statements-discuss/, a Wall Street Journal reporter Peter Lattman stated that "On Tuesday, Judge Marcia Cooke dismissed the panel until next week for a holiday break. Thanks to Law Blog friend David Markus at the Southern District of Florida Blog, we learned that the Padilla jury is all about making fashion statements."

With both media and law review taking notice of legal blogging, a properly maintained blog can be a valuable instrument for assisting a law firm in marketing lawyer expertise and sharing research results with a global community.

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WHAT HAPPENED TO THE

Handshake?

By Benjamin L. Zox

Early in my career as a real estate lawyer, I was representing the buyer of a commercial property. One of the downsides of representing developers or real estate entrepreneurs is they are always in a hurry. This transaction, as I recall, was no exception.

The seller's lawyer was an experienced solo practitioner whom I had never met but knew by reputation. I also knew his client well and like him a lot, although I think that is irrelevant to this story.

There was no real estate broker involved in the transaction so I prepared the closing statement and all other closing documents. In my haste to meet my client's unreasonable time demands, I made an error in calculating the real estate tax portion to the detriment of my client and to the benefit of the seller.

In reviewing the closing statement, the seller's lawyer discovered this error. There were three ways he could have handled the matter: 1) not say anything; 2) point out the error in front of everyone; 3) point out the error to me in private. Fortunately for me, he opted for number 3, and I corrected the error before circulating the closing statement for signature.

I was very grateful to this lawyer and thanked him profusely. I also told him I hoped I would have the opportunity to return the favor. The great thing about practicing law in Columbus, Ohio is that I did have that opportunity. I was thrilled to be able to balance the ledger, so to speak.

Although this incident probably occurred at least forty years ago, I hope that type of behavior is not a relic of a bygone era. I know I learned from the experience and tried to conduct my legal practice in the same manner over the years. Hopefully, my clients did not suffer in the process. I like to think I was able to accomplish more for them using this type of approach than I would have otherwise.

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Individual Liability under Chapter 4112

The misuse of authority standard

By Christopher Hogan

Ohio's Fair Employment Practices Act, codified at Chapter 4112 of the Ohio Revised Code, prohibits discrimination in the terms or conditions of employment on the basis of "race, color, religion, sex, national origin, disability, age, or ancestry."[1] In 1999, the Ohio Supreme Court issued its decision in *Genaro v. Cent. Transport, Inc.*,[2] ruling that "a supervisor/manager may be held jointly and/or severally liable with her/his employer for discriminatory conduct of the supervisor/manager in violation of R.C. Chapter 4112."

The majority rooted its rationale in the definition of employer found in R.C. 4112.01(A)(2). That section defines "employer" as "any person employing four or more persons within the state, and any person acting directly or indirectly in the interest of an employer."[3] Relying on that last clause, the majority concluded that Chapter 4112's definition of employer "by its very terms, encompasses individual supervisors and managers whose conduct violates the provisions of R.C. Chapter 4112."[4]

Although *Genaro* made it the law of the state that "supervisors" could be held individually liable for violations of Chapter 4112, the court did not have occasion to define the term, nor has it defined the term in a subsequent decision. The Genaro court also did not indicate whether supervisors could be held personally liable simply by virtue of their managerial status or whether something more was required. In the wake of *Genaro* the state courts in Ohio have similarly not had an opportunity to address the standard of personal liability under *Genaro*. However, a handful of federal district courts in Ohio have reasoned that Genaro liability extends only to those employees who exercise supervisory authority in a manner prohibited by Chapter 4112.

For example, the Northern District of Ohio, in *McCormick v. Kmart Distribution Center*,[5] deployed a two-stage analysis to determine whether the individual defendant could be held individually liable, pursuant to *Genaro*. The court first evaluated the amount of authority that the defendant wielded over the plaintiff. Finding that the defendant had exercised authority over the plaintiff sufficient to be named as a Genaro defendant, the court next analyzed whether the defendant supervisor could be held personally liable. To answer this question, the court asked whether the defendant had "misused" his supervisory authority in a manner that violated Chapter 4112. The court found this additional stage of analysis necessary to determine whether the defendant was "acting directly or indirectly in the interests of an employer," which is the statutory language the Genaro majority found so compelling. Thus, while the court in *Genaro* was concerned only with determining whether an individual supervisor can be a proper party defendant under Chapter 4112, the court in *McCormick* was further concerned with determining the substantive standard of liability that applies to such defendants.

The "misuse of authority" standard is one answer to a couple of conundrums posed by *Genaro*. First, in the age of "Team Leaders" and other nebulous titles, the standard provides a limiting principle that prevents Genaro liability from extending to employees who, in reality, are co-workers. This vulnerability in Genaro's rationale was pointed out by Justice Cook in her dissenting opinion. All employees are capable of acting directly or indirectly in the interests of their employers and do so on a daily basis.

Second, the misuse of authority standard furthers the salutary anti-discriminatory purposes of Chapter 4112 by piercing through formalities of title and reaching anyone who misuses company power in a manner that violates Chapter 4112. Further, because an employee's exercise of company power is perhaps the best evidence that he or she is acting in the interests of an employer, such a touchstone inquiry would also help clear the murky waters of causation in discrimination actions. For example, the standard would help clarify when individuals, such as HR managers, who often serve in consultative rather than supervisory roles, face the specter of personal liability.

However, this standard also has the potential to curtail the reach of Chapter 4112, particularly in the context of discriminatory harassment that does not culminate in a tangible employment action. This type of harassment — traditionally known as "hostile environment" harassment — need not be incidental to an exercise of supervisory authority. In addition, as the United States Supreme Court has noted in the context of these types of harassment claims, the "harassing supervisor often acts for personal motives, motives unrelated and even antithetical to the objectives of the employer."[6] Thus one can argue that Genaro's rationale does not support the extension of individual liability to supervisors who create a hostile environment, for they are generally not acting directly or indirectly in the interests of their employers.

Whether personal liability under Chapter 4112 should ultimately flow from supervisory status or from an unlawful use of supervisory authority (or both) is a question without a definitive answer. The misuse of authority standard is one answer. But is it consistent with the mandate to liberally construe Chapter 4112?

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1. *R.C. 4112.02(A).*
2. *84 Ohio St.3d 293.*
3. *R.C. 4112.01(A)(2) (emphasis added).*
4. *84 Ohio St.3d at 296.*
5. *163 F.Supp.2d 807, 823 (N.D. Ohio 2001).*
6. *Burlington Industries v. Ellerth, 524 U.S. 742, 757, 118 S.Ct. 2257 (1998).*

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DNA

FROM FINGERPRINTS

A number of scientific investigators observed that DNA can be obtained from a wide array of fingerprints, but not all fingerprints give DNA profiles.

By Julie A. Heinig, PhD.

DNA technology is increasingly used as one of the most effective forensic tools to exonerate or convict a suspect in a criminal case. Advances in forensic DNA technology in recent years allow analysts to extract DNA from evidence without any visible stains. For example, it is possible to obtain a DNA profile from a baseball cap left at the scene of the crime and match it to a suspect who swore he was never there. Not only can we get DNA from the bloodstain on a knife and match it to the victim, but we can also swab the handle and get the DNA profile from the suspect who committed the crime. Due to good collection techniques and PCR (amplification of DNA) commercial technology, the likelihood of getting DNA from the inside of a glove or the handle of the weapon is much better now than it ever used to be.

The question often asked is, "Can we get DNA from a single fingerprint?" To answer this question, consider this: when people touch things, they may leave behind DNA from cells sloughed off upon contact. How many cells are sloughed off depends on various factors, including how much they sweat. A number of scientific investigators observed that DNA can be obtained from a wide array of fingerprints, but not all fingerprints give DNA profiles. The amount of DNA associated with a fingerprint will vary from person to person and can vary with the same person.

STR DNA, which is used for human identification, is extracted from nucleated cells. The ability to obtain reliable DNA profiles from fingerprints is dependant on the number of nucleated cells collected from the fingerprints. The more cells there are in a stain or on a surface, the more DNA there will be. If there are very few cells available, it is referred as "low copy number DNA profiling." In theory, all you need is one nucleated cell to obtain DNA. However, using PCR commercial technology, one nanogram of DNA is generally needed to obtain a DNA profile, which is equivalent to about 150 nucleated cells.

In the UK, forensic scientists have been performing DNA typing from fingerprints for several years. This type of analysis is not common in the U.S. and remains in the research and development stages. According to Dr. Lawrence Koblinsky, a professor of forensic science at John Jay College of Criminal Justice in New York, low copy number DNA profiling, used in the UK on DNA fingerprints, typically uses only 5 to 20 cells. Koblinsky observed that if ordinary PCR techniques are used with only 20 cells, a DNA profile will not be obtained. If the PCR procedure is modified, a DNA profile can be produced (Law Enforcement Technology, 2005). The UK uses a low copy number model, which is described by Gill et al. in "Forensic Science International," 2000, 112, 17-40. Koblinksy stated that "touch DNA" will not be admissible in U.S. courts until it meets the acceptable standards for new technology in courtrooms. Standards for this type of analysis have to be set by the Scientific Working Group for DNA Analysis Methods (SWGDAM).

Different surfaces can also result in different yields of DNA. It has been reported by Dr. Robert Bever from Bode Technology Group that from their validation studies, in general, it was easier to obtain DNA from non-porous surfaces (plastic and glass) than from porous ones (i.e. paper).

Scientists from DNA Diagnostics Center (DDC) have performed preliminary studies on the ability to obtain DNA profiles from fingerprints. Quite the opposite has been observed from that of the Bode group in terms of extracting DNA from paper. Instead of swabbing the fingerprint off the surface of the paper, DDC scientists cut the fingerprint section from the paper, which was used for DNA extraction. DDC has found that it is easier to obtain DNA from a cut section of paper rather than a swabbed section of paper.

Many factors affect the ability of obtaining DNA profile from fingerprints. The length of time the finger was held on the surface is an important factor. It was observed that if a person touched the surface for a minimum of 60 seconds, then DNA could be obtained. DDC also found that DNA can be obtained from chemically processed prints. It was found that black powder, fluorescent powder, magnetic powder and cyanoacrylate (superglue) did not interfere with DNA typing.

The careful collection of the fingerprint from the evidence is very important. Other groups suggest that the collection of cells associated with a fingerprint should be done with a moist swab followed by a dry swab. DDC scientists were able to get partial DNA profiles from swabbing fingerprints on a glass mirror, a plastic lid, and a metal lid.

Obtaining DNA from a fingerprint is in the preliminary stages of investigation. But, as the techniques of collection, extraction, and amplification improve, obtaining DNA fingerprints will become more common. Fingerprint identification is certainly valuable and far cheaper than DNA analysis. However, if insufficient ridge detail is available to make a fingerprint match in a criminal investigation, DNA identification of that fingerprint may prove to be invaluable.

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BENCH PRESS: The Collision of Courts, Politics, and The Media

Edited by Keith J. Bybee
(Published by Stanford University Press, September 2007)
Reviewed by Janyce C. Katz

The book *Bench Press* grew out of a conference of the same name held in Washington, D.C. (2003). Syracuse University's College of Law, Maxwell School of Citizenship and Public Affairs, and S.I. Newhouse School of Public Communications organized the conference.

The book, like the conference, features articles from academics, practitioners and journalists focused on questions of judicial independence and legitimacy. It sparked a new interdisciplinary program at Syracuse University – a first in the country.

Some of the authors of *Bench Press* analyze the history of attempts to improve the public perception of courts. For example, Charles Gardner Geyh (Indiana University) traced the development of the principle that public officials should not only behave properly but appear to behave properly. Harold See, a Justice on the Supreme Court of Alabama wrote a brief history of the judicial selection process.

C. Alan Tarr (Rutgers University) wrote about the attempts to depoliticize the judicial system but warned that the politization of judicial races has recently been increasing.

Bench Press's editor, Keith J. Bybee, argued that his book is "a first-of-its-kind effort" to bring together "academics and practitioners to assess questions of judicial independence and judicial legitimacy from a variety of viewpoints."

While this is certainly a book that should be read, there have been important steps elsewhere to bring forth the best possible judicial system. Those attempts should have been thoroughly described in *Bench Press*. But, they were merely touched on by various commentators.

For example, in 1938, Ohio attempted to become the first state to adopt an appointive/elections used as a merit check system, but the attempt failed. Missouri claimed that honor. In the late 1980s, the Ohio League of Women Voters joined with other organizations to advance a version of the merit system called now the "Missouri Plan."

But, based upon a wide-spread fear that a judicial merit selection plan would remove a right to vote for important positions, the voters defeated the proposal. At this time, Ohio retains its unique mixture of partisan election in primaries and non partisan elections during the general election.

There have been other efforts to improve the public's impression of the operation of the judicial system in Ohio. Chief Justice Thomas Moyer has been a leader in judicial reform in Ohio and nationally. In recognition of his efforts, the Chief Justice was appointed to the Board of the national non partisan judicial group, Justice at Stake. Recently, Justice at Stake joined with the American Judicature Society to applaud Governor Ted Strickland's Judicial Appointments Recommendations Panel. The creation of the Panel was touted as a means of minimizing the influence of politics in picking judges and focusing the appointment process on professional qualifications.

Currently, HB 173 promises to improve the judicial system. Among other changes to the process of becoming a judge, the bill proposes longer terms for judges and more years of practice before becoming a judge.

Unfortunately, even with all the above plus more efforts, it is difficult to ascertain what progress has been made toward improving the public perception of the judiciary in Ohio. Countering all the good work of organizations and people, according to Justice at Stake, Ohio is the State in which the most money was spent on judicial campaigns in recent years.

Bench Press cites dismal results of a nation-wide survey made by Syracuse University's Maxwell Poll in 2005. The Maxwell Poll reported "an astounding 82 percent of those surveyed believe that the partisan background of judges influences court decision making." This belief is coupled with the belief that "judges often merely pretend their decisions are derived from the law and the Constitution."

Bench Press contributors, like the Ohio leadership, point to the cost of campaigns, the advertisements, the interest groups that focus on one particular issue and other problems as distorting the traditional impartiality of judges as well as the public perception of impartiality.

But in the Afterword to *Bench Press*, former New York Times columnist Anthony Lewis argues that most people still believe in judicial independence. He blames the public's ignorance for the current problems in the judicial system.

Perhaps one reason to read Bench Press is to remind us of the importance of educating the public about the legal system. Another reason? We believe in the importance of Justice for everyone equally.

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Upcoming CBA Events

OCTOBER 2007

MONDAY	TUESDAY	WEDNESDAY	THURSDAY	FRIDAY
12—1 Real Property 1	11:30—1 Litigation Management:Voir Dire for Civil Cases 2 12—1 Estate & Gift Tax 12—1 Municipal Court 4—5 Technology & the Law	12—1 Criminal Law 3 12—1 Government Agencies 12—1 Labor & Employment 12—1 Minorities in the Law	9—12:15 Everything Email: Legal Writing for the Legal Professional 4 12—1 Common Pleas 12—1 Employee Benefits	9—12:15 Keep it Safe: Protect client confidences, client funds and your firm 5
12—1 Family Law 8	11:30—1 Litigation Management : Criminal Discovery 9 12—1 Construction 12—1 Legal Research & Info 12—1 Probate	12—1:15 Taxing Matters: "A" Reorganizations 10 12—1 Environmental Law 12—1 Federal Court 12—1 Professionalism	12—1 Bankruptcy 11 12—1 Health Care	12—1 ADR 12
15	11:30—1 Litigation Management: Deposition Strategies 6 12—1 Juvenile Law	1—4:15 BMV Law Basics and the Impact of DUS, NOL, OVIs 17 12—1 Small Firm/Solo Practitioners	18	8:30—5 Immigration Law Conference 19
22	11:30—1 Litigation Management: Opening Statement and Direct Exam of Lay Witnesses 23	9—12:15 Getting Paid for Your Services 24 1:30—4:45 Role of the Guardian ad Litem in Juvenile Court	9—12:15 Cashing In: Buying or selling a law practice 25 1:30 - 4:15 Message to Ohio Lawyers (Ethics, Prof, Sub Abuse)	9—12:15 Beyond the Birds and Bees: What every attorney should know about family building through adoption 26
29	11:30—1 Litigation Management: Direct Examination of Experts 30	31		

NOVEMBER 2007

MONDAY	TUESDAY	WEDNESDAY	THURSDAY	FRIDAY
			9—12:15 Management for Lawyers 1 12—1 Common Pleas 12– 1 Employee Benefits 1:30—4:45 Professionals & Criminals	8:30—4:45 Chester Professionalism Institute at Fawcett Center for Tomorrow 2
12—1 Real Property 5	11:30-1 Litigation Management: Cross Examination of Experts and Lay Witnesses 6 12—1 Estate & Gift Tax 12—1 Municipal Court 4—5 Technology & the Law	12—1 Criminal Law 7 12—1 Government Agencies 12—1 Labor & Employment 12—1 Minorities in the Law	12—1 Bankruptcy 8 12—1 Health Care 4—5 Workers' Comp	12—1 ADR 9
9:00—4:30 Advanced Issues for Guardians ad Litem: Effective use of collateral professionals 12 12—1 Family Law	11:30-1 Litigation Management: Closing Arguments 13 12—1 Construction 12—1 Legal Research & Info 12—1 Probate 12—1 Juvenile Law	12—1:15 Taxing Matters: Partnership Merger Rules 14 12—1 Environmental Law 12—1 Federal Court 12—1 Professionalism 12—1 Business Tax	9—12:15 Prospect & Flourish: An attorney's guide to growing a practice 15	9—12:15 A Lawyer's Guide to Financial Statements and Business Valuation 16
19	1:30—4:45 Role of the Guardian ad Litem in Domestic Court 20	12—1 Small Firm/Solo Practitioners 21	22	23
26	27	9—12:15 Tech 101: Electrons are the New Paper 28 1:30—4:45 Women Layers—Sandwich Generation: Between a rock and a hard place	9—1:00 The Dark Side of Legal Negotiations: How to manage unruly clients, unprepared opposing counsel and unexpected curveballs at the negotiation table 29	9—11:45 Ethics, Professionalism, and Substance Abuse—LIVE Seminar 30 1:30—4:45 A Whole New World: Immigration issues for juvenile, family practitioners

Black = CLE
Gray = Committee meetings

Look in the Friday edition of The Daily Reporter for December CLE listings!

Liam knows Columbus Law.

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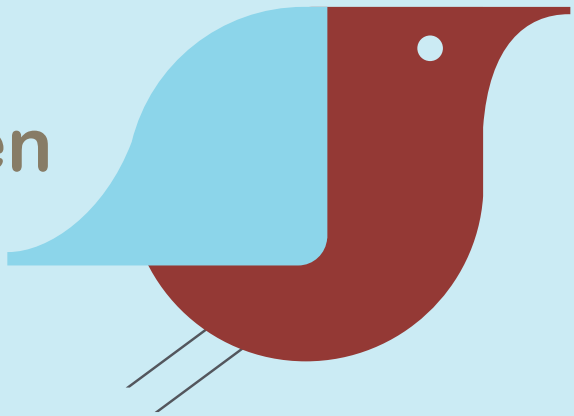

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