COLUMBUS BAR

Lawyers QUARTERLY

SPRING 2007

A SUPPLEMENT TO THE DAILY REPORTER
CONTENT PROVIDED BY THE COLUMBUS BAR ASSOCIATION

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CORRECTION

In the fall issue of *Columbus Bar briefs*, "Keeping Up With Change – an insider's story" is the work of Amanda S. Coleman of Jones Day. Coleman is an adjunct faculty member at Columbus State. We regret the error and apologize to readers and the author.

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Any statements pertaining to the law contained in this magazine are intended solely to provide broad, general information, not legal advice. Readers should seek advice from a licensed attorney with regard to any specific legal issues.

CBA
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Liam

YOUR BEST MARKETING TOOL

By Alex Lagusch

It started the way the best things in life do, with a chance glance, a flirty follow-up, and a sudden gut felt knowledge: THIS IS THE REAL THING. (And we can make money from it.)

I was at home, smoking a high-end cigar, exhaling in the general direction of my ionizing atmospheric purifier, idly flipping through the pages of *American Legal Administrators Association* magazine. (*Austin Powers: International Man of Mystery*...eat my dust!)

A reference to a search engine caught my eye, and I followed it to the internet. The site I visited was designed to help people find attorneys. The look and feel told me it was probably targeting granola crunching, *New York Times* reading, Lexus ES (not GS) driving people. There was nary a yellow page within the site yet they suggested they could help me, a granola crunching, *New York Times* reading but NOT Lexus driving dude, find an attorney. So, just for fun I went to several of the listings to see who was there.

Lo and behold, I discovered "these are my peoples." Excellent attorneys I would actually call or recommend to friends. I thought, now hang on, baby, they must be paying big bucks for these listings.

Maybe it was the ionized atmosphere talking, maybe it wasn't, but for some reason, I picked up the phone and dialed up a couple of them. Found out I was right – they were paying big bucks. And loving it. Because these listings were working for them.

So I went back to my workbench to see if I could make one of these…a search engine that is. Howard Baker instantly appeared to me, asking "What don't I know, and when didn't I know it?" The answers were: mostly everything and right now, as it relates to search engines, anyway. So, I cast my inspiration toward another character, this time *Bob The Builder*…you know, the child's toy character who says "Can we fix it, yes we can." I do know something about financing bar projects and handling advertising. We've been advertising in a fairly significant way on radio and television and yellow pages since the Red Sea parted. This advertising stuff works. Can't it work for internet search engines? We decided it could.

But before our members would get any benefit, we had to build it. The Columbus Bar board shared the vision and approved dollars to green light the effort. We proceeded to hire the best: web development design group, Coexist, and focus group people, Lextant, and extensive attorney input from focus groups to one-on-one interviews and review of all sight content. The project was driven by the talented Anne Leonard-Palmer, whose mission was to research what the public wanted, what the brand should look like and what the site should contain. The goal? Crystal clear. To simply, and in a friendly manner, connect the public with attorneys in Central Ohio who could help them.

And that, dear readers, is essentially…well exactly, minus the atmospheric ionizer…how Liam started. Liam has been developed by the Columbus Bar to introduce you and your practice to potential clients looking for legal services on the internet. We go live to the public May 1 and we expect great success for all lawyers listed on Liam. Heck, Liam should be an important part of your marketing plan even if you don't have a marketing plan.

Say it's 2 a.m. in Westerville, (or 2 p.m. in Bexley) and Jane Q. Public is churning about a problem. She goes to her computer, types in some basic keywords. LiamLaw.com comes up, and she clicks on it. Rings a bell – she's heard about this on radio, TV, even in her mailbox. (This "rings a bell – heard about it" thing – a very big deal, see below.) She follows the easy instructions, loves the site, and seconds later, hits on a Columbus Bar member with the perfect profile. Bingo!

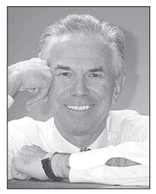
You want facts? Try these: The number of people nationally using online legal search is expected to reach as high as seven million per month according to the Pew Internet and the American Life Project. In 2006, on Yahoo alone, online searches for phrases that included *Columbus* and *Ohio lawyers* and/or *Attorneys* occurred over 50,000 times a month.

How does this help you, a Columbus Bar member who signs up for Liam? Fully half of every dollar from subscription revenues – 50 percent of what you pay – will be focused on local marketing efforts to introduce Liam and drive more consumers to the site in the first year. There are no additional fees/no percentage fees. Liam, however, will offer much more bang for your marketing dollar with strong, focused, creative local advertising to drive legal client traffic to you.

If you haven't already, go to LiamLaw.com and check it out. Scroll to the bottom and click ***Join Liam***; a process so easy to navigate, a caveman could do it. Become part of the best new thing to hit Columbus since the Columbus Bar! If you need more information first, feel free to schedule a meeting with Anne Leonard-Palmer to find out how this great new product can help your practice. Call her at 614/221-4112 or email: anne@liamlaw.com.

Liam. Heard about it. Yeah, baby!

alex@cbalaw.org



Alex Lagusch,
Columbus Bar
Executive Director

liam™

DOING THE Right Thing

Details on a noble calling

With so much media coverage highlighting attorneys' wrongdoings, it is no wonder many people have low opinions of those of us who have chosen law as our profession.

By Belinda S. Barnes

We see and hear it everyday – in TV shows, on radio and in the print media – stories about attorneys who have not lived up to the ideals of their profession. We hear stories of how attorneys have abused their clients' trust. We have been bombarded with stories about Anna Nicole Smith's attorney, wherein he has been accused of providing drugs to her which may have ultimately led to her death, and after death, abusing her trust by disseminating lurid videotapes of her. With so much media coverage highlighting attorneys' wrongdoings, it is no wonder many people have low opinions of those of us who have chosen law as our profession.

We seldom hear of the many attorneys who not only provide outstanding services to their clients, representing them respectfully and compassionately and keeping their best interests at heart, but who also give of themselves to others in meaningful ways, never seeking recognition for the extraordinary things they do to help make the world a better place.

Take Jack Alton, one of the founding members of Lane Alton & Horst. Jack has retired, but for many years he was a formidable trial attorney, skillfully and zealously representing his clients. Years ago Jack began visiting terminally ill attorneys – some of whom he knew, some he didn't – sitting at their bedside in their final days and talking to them about their experiences as lawyers, their families, whatever they wished to talk about. After their passing, Jack followed up, sending sympathy cards to their loved ones. In a quiet and unassuming way, Jack gave comfort to many people at the end of life.

Craig Scott, an attorney with Volkema Thomas, has spent his career representing persons who have been injured in automobile accidents or as the result of some other type of negligence. After the devastation that occurred in Southern Louisiana, Alabama and Mississippi as a result of Hurricane Katrina, Craig, his wife and their oldest daughter along with 18 other kids and four other adults spent their summer vacation in Mississippi helping to rebuild homes for people who had lost everything. He could have taken his family to a resort or on a cruise, but Craig and his family gave their precious time and energy to help people on the other side of the country. If you talk to Craig, he will tell you that the most hot, sweaty, uncomfortable week of his life was the week he spent in Mississippi last summer, but it was also one of the best experiences he has ever had – he and his family gained so much more than they gave. Yet, their help was invaluable to the people who were able to move back into their trailer from the tent on their front lawn where they had lived for the 11 months since the storm and to the man who had been living in a house without a roof for 11 months.

Jennifer Duvall is a former prosecutor and Common Pleas Court Staff Attorney who now works with Sanborn Brandon Duvall & Bobbitt. The summer before taking on the position of Judge David Fais's staff attorney, Jen went on a church mission to Africa. Jen spent 17 days in Zambia, one of the poorest nations in the world. She and her friends pampered pregnant women suffering from AIDS, organized a soccer tournament for orphans and delivered food and gifts to people who have little to nothing. Jen says she did this as an outreach, to help establish friendship with people on another continent.

These are simply three stories about three different attorneys who have honorably practiced different types of law, and who have chosen in unselfish ways to give back to others in their hour of need, whether locally, nationally or globally. These people acted without fanfare and with no desire for public acclaim, only a desire to do what they felt was the right thing to do, and I hope I have not embarrassed them by shining a spotlight on their good deeds.

Also, by no means are these three attorneys the only ones who unselfishly give of themselves. I know attorneys who donate time, money and resources to worthy causes such as the American Diabetes Association, Habitat for Humanity, Inner City Games, the Humane Society, the American Heart Association, Charity Newsies – the list could go on and on. The Columbus Bar and Columbus Bar Foundation do their part by sponsoring events such as the recent Rock and Bowl which raised over $100,000 for the Center for Family and Child Advocacy, and the Columbus Bar Foundation Gala, which over the years has raised large sums of money for various causes.

I have always believed my profession is a noble calling, and the attorneys I have written about in this article clearly justify this belief. So, when I hear someone "bash" attorneys, or see media coverage regarding an attorney who has behaved less than reputably, I reflect on the fact that many, if not most, attorneys went into the practice of law because they really wanted to help other people, and have devoted their lives to that calling.

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Belinda S. Barnes,
Columbus Bar
President

In Court

THE DYING ART OF

Jury Selection

By Frank A. Ray

"Ladies and Gentlemen, we are here to select a fair and impartial jury," instructs the trial judge.

When I hear this statement from the bench, I say to myself – "What do you mean 'we'?" As a trial lawyer, I work to seat a jury of people inclined to sign a verdict in favor of my client.

"We have now entered the initial phase of the trial, which we call voir dire, or jury selection," continues the trial judge in his instructions to prospective jurors.

Not entirely true. When lawyers undertake the voir dire process, they do so as "de-selection" of those jurors who are most likely to find against their clients.

Although the trial judge's laudable goal for voir dire is "selection of a fair and impartial jury," the trial lawyer's actual goals are as follows: establish the jurors' recognition, appreciation, and adoption of the "theme" of the client's case; interject as much favorable factual information in support of the client's case as the court will allow; educate the jurors on legal principles that apply to the client's presentation of the facts; present the client's side of the courtroom in a favorable light by exuding confidence, demonstrating commitment to the client's case, and showcasing preparedness; learn about the jurors' beliefs and attitudes in order to exercise challenges intelligently; and exercise challenges for cause and peremptory challenges to "de-select" prospective jurors who demonstrate leanings or interests contrary to those of the client.

While lawyers typically invest significant energy, thought, and time into preparation of opening statement, examination of witnesses, presentation of exhibits, closing argument, and jury instructions, those same lawyers likely have mistakenly omitted to commit the same level of energy, thought, and time into preparation of voir dire.

In planning for voir dire, trial counsel needs to determine the process undertaken and approved by the assigned trial judge. Once the trial lawyer understands the manner and method of conducting voir dire as directed and permitted by the trial judge, the trial lawyer needs to plan accordingly. In this regard, the trial lawyer needs to appreciate the extent and nature of the trial judge's own examination of prospective jurors. For example, in many federal trial courts, judges engage in an extensive generic examination of prospective jurors and allow only limited follow-up questioning by trial counsel. If such limited inquiry on voir dire is in a trial lawyer's future, the trial lawyer needs to craft and employ phraseology with targeted questions of prospective jurors aligned with pragmatic goals for voir dire as permitted by the bench.

As far in advance of voir dire as possible, trial counsel should secure access to the prospective jurors' completed questionnaires. The hand-written responses on the questionnaires should supply trial counsel with a launching pad for conversation with prospective jurors on a personal level that also relates to issues in the case.

During voir dire, many trial counsel fall into the trap of falling in love with the sound of their own voices. When trial counsel plunges into a lengthy monologue and when the last sentence in the narrative does not end with a question mark, counsel has invited a stinging reprimand from the trial judge. More importantly, trial counsel has probably succeeded in boring his or her jury with a failed opportunity to make a favorable impression.

Voir dire offers an opportunity for trial counsel's conversations with prospective jurors. In any meaningful conversation, a questioner should ask open-ended questions. This simplistic technique produces narrative responses from prospective jurors. The art of questioning equally calls on the questioner's capability to listen to answers and then follow-up with more questions in context to the answers.

Undeniably, the psychological principle of "primacy" applies to voir dire. The principle of "primacy" suggests that a person's first impression will serve as the most important and the most lasting impression. So, during voir dire, trial lawyers should seize the opportunity to demonstrate their humanness, humanity, confidence without arrogance, and commitment to a meritorious case.

An expert in jury selection with whom I have regularly worked over the years has convinced me that voir dire often boils down to a "popularity contest" between and among trial lawyers. My expert has further convinced me that the outcome of this popularity contest probably sustains itself as a "verdict" for the balance of the trial. In this regard, trial lawyers should appreciate that the psychological principle of "commonality" drives the initial identification of prospective jurors for or against the trial lawyer during voir dire.

Those identical psychological principles apply as jurors assess the litigants. If trial counsel can establish commonality between prospective jurors and clients on voir dire, the trial lawyer has advanced the second "popularity contest" in the case to a favorable conclusion.

If the trial lawyer makes an inquiry that could embarrass a prospective juror or which could evolve into a confrontation, the trial lawyer should approach the bench and secure a sequestered voir dire of the prospective juror.[1] If allowed, such an individual voir dire should occur outside the hearing of other prospective jurors.

When a juror demonstrates or concedes that he or she cannot serve as a fair and impartial arbiter of the facts or the law of the case, the trial court creates error by overruling a challenge for cause with respect to such a juror. However, in order for denial of a challenge for cause to constitute prejudicial error, counsel must exhaust all peremptory challenges.[2]

Under Ohio civil procedure, "each party" may excuse three prospective jurors by peremptory challenge, or excusal without expression of a reason.[3] Ohio procedure directs that in the event that multiple parties advance the same interest in a case, the multiple parties are merged as a single party for purposes of exhaustion of peremptory challenges.[4] Pursuant to federal statutory law, "In civil cases, each party shall be entitled to three peremptory challenges," however, the court applies discretion on whether to deem "several plaintiffs" or "several defendants" as a "single party" when calculating the litigants' number of peremptory challenges of prospective jurors.[5]

In determining the exhaustion of use of peremptory challenges, under Ohio civil procedure, if both "sides" sequentially waive challenges of jurors, then all challenges are waived; and the trial judge will swear the jury as constituted.[6]

Consistent with recent social studies, generic characterizations of leanings or inclinations of persons based on race or ethnicity simply do not work in assessing prospective jurors. Further, "de-selecting" jurors predicated on race or ethnicity is illegal. In criminal cases, the United States Supreme Court has prohibited the exercise of peremptory strikes of prospective jurors motivated by racial bias.[7] The Ohio Supreme Court has applied and adopted the same federal precedent with regard to civil jury trials which calls for reversible error in the event that peremptory challenges of prospective jurors are demonstrably motivated by racial bias.[8]

With regard to the total composition of the jury, lawyers need to remember that jurors function like most groups. Groups designate leaders. Leaders often control and direct how groups make decisions and act on those decisions. In my experience, on many occasions, I have been convinced that the dominating personality within the jury is the person to whom the "sale" of the entire trial should be directed.

While "fairness" remains the overall goal of the justice system and while judges who referee contested legal battles administer that goal, as I continue to practice as a trial lawyer in our adversarial system, I confess that I do not enter the courtroom with the mission of achieving "fairness."

Sorry, 'bout that, but in execution of voir dire, I contend that, as in every phase of a trial, it is axiomatic that the trial lawyer's primary goal is to channel jurors' inclinations toward the client's desired outcome of the case.

1. *Hankinson v. Brown (Franklin Co. 1981), 3 Ohio App.3d 249, 249-250; and Section 2313.42(J), Ohio Revised Code.*
2. *Id.*
3. *Rule 47(B), Ohio Rules of Civil Procedure.*
4. *Chakeres v. Merchants & Mechanics Federal Savings & Loan Assn. (Clark Co. 1962), 117 Ohio App. 351, dismissed, 174 Ohio St. 139.*
5. *Section 1871, Title 28, United States Code.*
6. *Rule 47(B), Ohio Rules of Civil Procedure.*
7. *Batson v. Kentucky (1986), 476 U. S. 79.*
8. *Hicks v. Westinghouse Materials Co. (1997), 78 Ohio St.3d 95.*

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Civil Jury Trials

FRANKLIN COUNTY COMMON PLEAS COURT

By Belinda S. Barnes & Joshua R. Bills

Verdict: $168,348.64. Auto Accident. Failure to Control. On December 23, 2001, at the intersection of State Route 314 and State Route 92 in Morrow County, plaintiff April M. Snyder, age 32, was a front seat passenger in a vehicle driven by her husband. Defendant, Timothy J. Snyder, lost control on the icy road, left the roadway and overturned the vehicle, which came to rest on its side. Plaintiff April Snyder alleged neck, back, right shoulder, head, chest and rib injuries, including a labral tear requiring surgery and a thoracic compression fracture that did not require surgery. Case settled post-verdict. Liability insurer paid verdict plus costs, along with a waiver of a $10,000 medical payments subrogation/reimbursement claim. Liability insurer and medical payments insurer were the same carrier. Medical bills: $34,348.64. No lost wages. Plaintiff's experts: Grant Lloyd Jones, M.D. and David M. Boyer, D.C. Defendant's expert: Richard Briggs, M.D. Settlement demand: $110,000. Settlement offer: $85,000. Three day trial. Plaintiff's attorney: John M. Gonzales. Defendant's attorney: Matthew R. Planey. Judge: Lynch (O'Grady). *April M. Snyder v. Timothy J. Snyder,* Case No. 03CVC-12-13976 (2005).

Verdict: $116,000.00. Premises Liability. Slip and Fall. On April 9, 2001, Plaintiff John Davis was shopping in a Kroger grocery store when he slipped and fell due to cooking oil which had been spilled in one of the aisles. Defendant Kroger contended there was no way to know how long the oil had been there and they had regulatory procedures to assure that such a spill would not sit on the floor for an extended period of time. The jury determined that the spill had existed for a sufficient amount of time that actual or constructive knowledge was present. Plaintiff claimed injuries to the hand, shoulder, wrist, low back and elbow. Medical bills: $25,094.71. Lost wages: $108,216.00. Plaintiff's expert: Dr. Mark Hathaway. Defendant's expert: Walter H. Hauser, M.D. Settlement demand: $200,000, then $225,000, then $1,500,000. Settlement offer: $30,000, then $50,000. Three day trial. Plaintiff's attorney: Steven Mathless. Defendant's attorneys: Kevin R. Bush and Jennifer J. Murphy. Judge: Reece (O'Grady). *John Davis v. The Kroger Company, et al.,* Case No. 03CVC-04-3758 (2004).

Verdict: $26,195.47. Dog Bite. Strict Liability. On June 27, 2002, plaintiff Sue Ann James' tip of her left index finger was amputated as she attempted to disentangle it from a dog leash owned by defendant Gina Ross Childers. Plaintiff was attempting to unravel her puppy from the dog leash that had wrapped around the puppy, and the dog leash wrapped around her index finger and amputated it. The injury was the loss of the tip of the index finger. Medical bills: $3,506.51. Lost wages: $465.07. Plaintiff's expert: Michael Ruff, M.D. (hand surgeon). No defense expert. Settlement demand: $30,000. No settlement offer. Two day trial. Plaintiff's attorney: J. Scott Bowman. Defendant's attorney: Todd L. Oberholtzer. Judge: Holbrook (Martin). *Sue Ann James v. Gina Ross Childers,* Case No. 03CVC-12-13844 (2005).

Verdict: $25,000.00. Auto Accident. ACDA. On September 3, 2003, on State Route 56 in Pickerington, Ohio, plaintiff Maxine Archie, age 39, was driving her 1996 Nissan Quest southbound on S.R. 256. She was stopped in traffic with her sister, Janice McKay, age 34, in the right front passenger seat. Defendant Karl Roudabush was driving his 1991 Econoline van, pulling a trailer, southbound on S.R. 256 and stopped in traffic in the lane to the left of the lane in which plaintiff was stopped. Traffic ahead of plaintiff began to move forward and Mr. Roudabush intended to move to his right into plaintiff's lane. As he moved to the right, plaintiff's vehicle did not move. The left front of Mr. Roudabush's van struck the right rear of plaintiff's vehicle at an estimated impact speed of 5 miles per hour. There was minimal property damage. However, the entire rear window of plaintiff's vehicle shattered on impact. Plaintiff Janice McKay was the only plaintiff at trial, and she alleged headaches, neck pain and low back pain. Plaintiff was treated at the emergency room and followed up with treatment at Pickerington Chiropractic Center. The jury awarded plaintiff Janice McKay $25,000: $8,000 for medical, $10,000 for pain and suffering and $7,000 for lost wages. There were no future damages awarded. Medical bills: $10,058.85. Lost wages: $13,186. Plaintiff's expert: James F. Thomas, M.D., Conway, Arkansas. Defendant's expert: Karl W. Kumler, M.D. Settlement demand: $60,000. Settlement offer: $19,000. Five day trial. Plaintiff's attorney: Charles Bendig. Defendant's attorney: Karen K. Rosenberg. Judge: *Brown. Maxine Archie, et al. v. Karl Roudabush, et al.,* Case No. 04CVC-01-1159 (2005).

Verdict: $8,002.27 for Robert Prodger; $3,646.96 for Delila Prodger. Auto Accident. Right of Way. On January 20, 2002, plaintiff Robert Prodger was eastbound on Schrock Road. Defendant Kristopher Trackler was northbound on Cleveland Avenue and ran a red light, causing a collision with plaintiff's vehicle. As a result of the collision, Robert Prodger alleged head, neck, back, rib and knee injuries. Delila, the passenger, alleged ribs, back and knee injuries. Medical bills: Rodger-$7,048.97; Delila-$3,396.96. Lost wages: Rodger-$446.40. Plaintiff's expert: Christopher Demas, M.D. No defense expert. Two day trial. Plaintiffs' attorney: Michael T. Irwin. Defendant's attorney: M. Jason Founds. Judge: Thompson (Brunner). *Robert Prodger, et al. v. Kristopher Trackler,* Case No. 03CVC-12-13457 (2005).

Verdict: Plaintiff $1,110.38; Defendant $14,107.98. Breach of Contract. In February 2003, plaintiff, C&W Investment Company LLC, filed a forcible entry and detainer action against defendant Tricia Smith and Secure Check, Inc. Defendant counterclaimed and alleged that they were not fully informed as to the extent of the construction activities which would be taking place in conjunction with I-670 when they entered into the lease with C&W. As a result of the construction, defendant claimed her business was interfered with. Secure Check moved prior to the lease term. Damages of $11,584.68 were alleged for contract damages by C&W. The jury determined that plaintiff C&W was entitled to $1,110.38 and that defendant was entitled to $14,107.98. Settlement demand: $11,584.68. Settlement offer: $0.00. Counterdemand: $239,000. Three day trial. Plaintiff's attorney: David A. Caborn. Defendant's attorney: Melinda B. Killworth. Judge: Connor (O'Grady). *C&W Investment Company LLC v. Tricia Smith, et al.,* Case No. 03CVA-04-4088 (2004).

Verdict: $0.00. Auto Accident. ACDA. On April 12, 2001, plaintiff Gholamraza Vahbati'bana was proceeding northbound in a 1998 Ford F150 pickup truck on North Souder Avenue when Scott Downin, while working for Don Ray Outdoor Advertising, was proceeding in a 1997 Ford F250 pickup and struck plaintiff's vehicle from behind. Plaintiff claimed lumbar spinal stenosis and two surgeries as a result of the accident. Plaintiff was granted summary judgment on the issue of negligence and the jury was allowed to determine proximate cause and damages. Medical bills: $38,000. Lost wages: $5,760. Plaintiff's experts: Brian Higgins, D.O. and Gordon J. Korby, D.O. Defendant's expert: Joseph Schlonsky, M.D. Settlement demand: $250,000. Settlement offer: $0.00. Four day trial. Plaintiff's attorney: Peggy Maguire. Defendant's attorney: Kenneth E. Harris. Judge: Crawford (Martin). *Gholamraza Vahbati'bana, et al. v. Scott T. Downin, et al.,* Case No. 03CVC-02-2001 (2004).

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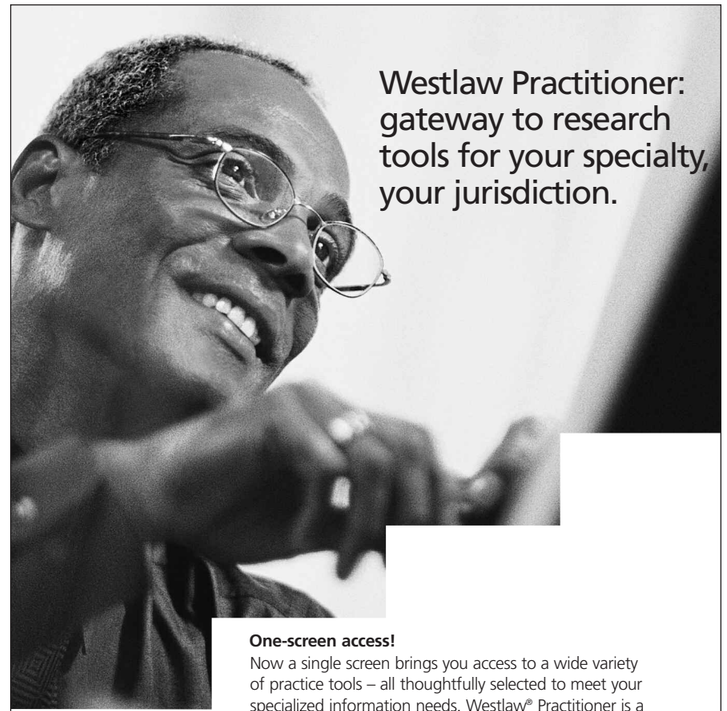

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Fireworks

SURROUNDING THE PUBLIC DUTY DOCTRINE

How the Scottstown Fireworks Fire almost changed the face of government liability

By William C. Becker Jr.

July 1996, Todd Hall, a mentally challenged young man, walked into a crowded fireworks store in Scottstown, Ohio, deliberately put his lit cigarette in touch with the wick of a crackling wheel firework and started a fire that killed nine people, injured nine others, and almost changed the face of government liability.

Once Todd Hall lit the first firework, the store, according to one eyewitness, lit up like a giant fuse. This same witness, a volunteer firefighter from West Virginia who was standing at the front door testified that by the time he comprehended what Todd Hall had done and the need to escape, the store was already half filled with thick, black, deadly smoke that would turn out to be toxic.

Ironically, the only party to have gone to trial, criminally or civilly, for this arson fire, was the State Fire Marshall; the same entity that trains firefighters and performs inspections of public buildings such as fireworks stores. Todd Hall was judged mentally incompetent to stand trial for his criminal act of arson. The store's owner and operator, as well as a number of other private defendants, settled before going to trial.

In another irony of the case, the State Fire Marshall visited the Scottstown store just five days before this tragic arson fire. Acting on a tip from one of the fireworks store's competitors, the Fire Marshall performed a "bust buy." The informant advised the Fire Marshall's office that this Scottstown store, Ohio River Fireworks was selling exhibition-type fireworks to customers who didn't have a license to display such fireworks.

The estates of those killed and the parties injured sued the Fire Marshall's office alleging a number of different theories of liability, among them that the Fire Marshall's office did not conduct an inspection of the fireworks store on the day of the "bust buy" and if they had, they would have discovered that the store's sprinkler system had been turned off. While there was evidence that the store's sprinkler system had been turned off on the day of the fire, there was no evidence it was off on the day of the "bust buy."

The acting chief of the licensing section of the State Fire Marshall's office had issued a memorandum requesting that all firework stores undergo a cursory inspection prior to the 4th of July.

With this background, the case proceeded to trial in the Ohio Court of Claims. A defense judgment was returned on the basis of the Public Duty Doctrine and affirmed by the Court of Appeals which ultimately found its way into the Ohio Supreme Court where the focus turned to this Doctrine.

The majority of jurisdictions across the United States upheld some form of public duty prior to the Ohio Supreme Court's decision in *Wallace v. Ohio Department of Commerce* (2002), 96 Ohio St. 3d 266. The Ohio Supreme Court had affirmed the Public Duty Doctrine nine times over a thirteen-year period.

The Public Duty Doctrine is a common law doctrine which holds that any time the government is satisfying a duty owed to the public generally (i.e. police, fire, building inspections), it is satisfying a general duty and no individual liability will be imposed absent a special relationship. The Supreme Court of Ohio in *Sawicki v. Village of Ottawa Hills* (1988), 37 Ohio St.3d 222 established a four-prong test for the establishment of a special relationship: (1) Assumption, through promises or actions of an affirmative duty to act on behalf of the injured party; (2) The injured party's reliance on this affirmative duty; (3) Knowledge that inaction would lead to harm; (4) Direct contact with the injured party.

In *Wallace*, by a four to three vote, with Justice Cook writing the majority opinion joined by Justices Douglas, Sweeney and Pfeiffer, the Supreme Court held, with regard to the State of Ohio as defendant, that the Public Duty Doctrine was inconsistent with the State's waiver of immunity found at R.C. §2743.02(A)(1). This statute states that the State shall be held to the same rules of liability as private parties. Justice Cook reasoned that since private litigants did not have the defense of public duty, and since the State was to be treated as a private litigant, then public duty defense would not be available as a defense to the State.

While the Supreme Court took away the Public Duty Doctrine as a defense for state defendants, it recognized that the state would have at its disposal traditional tort principles preventing it from becoming a *defacto* guarantor of individual safety.

These traditional tort principles start with the exceptions to the Public Duty Doctrine. The Supreme Court, and ultimately the Court of Appeals on remand, *Wallace v. Ohio Dept. of Commerce* (December 18, 2003), Case No. 99AP-1303 (Franklin County Court of Appeals), realized that before liability can be imposed for the failure to act or control a third-party, there must be a special relationship between the defendant and the third-party over whom the defendant was to have exercised some control. Thus, on remand, the Court of Appeals found there was no special relationship between the Fire Marshall and the arsonist in the Scottstown fire that would have imposed liability.

Another defense from the menu of traditional tort principles recognized by the Supreme Court was foreseeability, an issue affecting both duty and proximate cause. As applied on remand, the Court of Appeals found that it was not foreseeable that someone would deliberately light a firework in a fireworks store. It was also not foreseeable to the Fire Marshall's agents that if they didn't do an inspection on the day of the "bust buy," this tragedy would have ensued.

Lack of causation is another traditional tort defense. As the Supreme Court recognized, it will be extremely difficult for plaintiffs to prevail in cases where the theory is that the defendant didn't prevent or mitigate harm which the defendant didn't cause. Ultimately, on remand, the Court of Appeals once again found in the State's favor by concluding the act of arson was an intervening and superseding cause of plaintiffs' injuries and damages.

The *Wallace* decision reaffirmed the doctrine of discretionary immunity. This is a doctrine unique to the government. Like public duty, it's judicially created. However, discretionary immunity is distinct from public duty. Unlike public duty, it is not based on relationships and the ability to control or prevent harm.

Rather, the discretionary immunity doctrine stands for the proposition that when government is exercising a decision that involves a high degree of judgment and discretion, it will be immune from liability for making such a decision. As recognized in *Wallace* by the Supreme Court and then applied by the Court of Appeals, the decision to postpone the cursory seasonal inspection was a discretionary decision immune from suit. As held by the Court of Appeals, once the Fire Marshall decided to conduct a "bust buy" instead of a seasonal inspection, it was arguable whether they ever had to do the seasonal inspection. Regardless, the Fire Marshall had a reasonable time after the "bust buy" to do such an inspection. That time hadn't expired when the arson fire occurred.

With the amendment to R.C. 2743, public duty has come full circle. From being an established Supreme Court doctrine upheld nine times over thirteen years to being overruled by the Supreme Court in *Wallace*, the Public Duty Doctrine has now been firmly established in law by the General Assembly; no longer subject to judicial change.

Public Duty has been defined to include, as applied to this case, licensing and inspection by the State of Ohio. Whereas the doctrine existed at common law as a defense, it is now a statutory immunity insulating the state from liability. That immunity will not exist if there is a special relationship between the state and the injured party. In order for there to be a special relationship, all four of the following elements must be present: (1) Assumption by the state of a duty to act on behalf of the injured party; (2) Knowledge on the state's part that its inaction could lead to harm; (3) Some direct contact between the state and the injured party; and, (4) The injured parties' reliance on the state taking some action.

While the Supreme Court's decision in *Wallace v. Ohio Department of Commerce* may have created a lot of fireworks surrounding the Public Duty Doctrine, when the smoke clears, very little has changed. With the codification of the Public Duty Doctrine, absent a special relationship, the state is now immune from suit when fulfilling its duty to the public.

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William C. Becker Jr., OAG Court of Claims Defense

In re J.J. and "En Banc" proceedings

By Brad Hughes

In November 2006, the Ohio Supreme Court issued an opinion that may profoundly impact practice in Ohio's appellate courts. For the first time, the Supreme Court determined that Ohio's appellate courts are "duty-bound" to use en banc rehearings to resolve conflicting decisions issued from the same appellate district. (*In re J.J.*, 111 Ohio St.3d 205.)

The Facts

In re J.J. began as an action by the Department of Children and Family Services to obtain custody of a child. The juvenile-court magistrate transferred the case to a visiting judge – the first of several visiting judges who presided over the case. Eventually, a visiting judge awarded custody of the child to DCFS. On appeal, the Eighth District Court of Appeals held that the magistrate lacked authority to transfer cases to visiting judges, rendering the visiting judge's custody order void. The Ohio Supreme Court reversed the Eighth District's decision.

At first, the Supreme Court's opinion in *In re J.J.* appears to be a routine discussion of jurisdiction and waiver. Later, however, Justice O'Donnell addresses another, more unique issue in his opinion for the Court – the use of en banc proceedings.

Justice O'Donnell notes that the Eighth District issued two opinions in two different cases (both regarding transfers to visiting judges) on the same day, with separate three-judge panels reaching different results. Justice O'Donnell notes that conflicting rulings on the same legal issue create confusion for lawyers and litigants and undermine confidence in the judiciary. He explains that this kind of conflict could not be certified to the Ohio Supreme Court for resolution, because the Supreme Court's procedures for certified conflicts apply only to conflicting decisions between – not within – appellate districts. Justice O'Donnell concludes that the Eighth District should have resolved this intra-district conflict via an en banc rehearing by the District's full complement of judges – a procedure that the Eighth District had used in the past pursuant to its local rules.

In re J.J. does not limit its endorsement of en banc proceedings to the Eighth District. Instead, the Court states generally that "[a]ppellate courts are duty-bound to resolve conflicts within the district through en banc proceedings." The Court's endorsement of en banc rehearings is noteworthy for several reasons. For one, it is apparently unprecedented. This author is unaware of any prior opinion from the Supreme Court holding that Ohio's courts of appeal are duty-bound to use en banc rehearings.

Moreover, *In re J.J.* recognizes this duty without also recognizing that several appellate judges have deemed en banc proceedings to be unconstitutional. In *State v. Lett*, for example, a case in which the Eighth District had used en banc procedures, Judge Karpinski drafted a dissenting opinion asserting that such proceedings violate the Ohio Constitution. As Judge Karpinski notes, the Ohio Constitution provides that "three judges" shall participate in the hearing and disposition of each appeal and makes no provision for en banc consideration. Judge Karpinski notes that the Franklin County Court of Appeals denied a request for rehearing en banc for this reason in a 1982 opinion, *Schwan v. Riverside Methodist Hospital*. Judge Karpinski discusses the history of en banc proceedings in the federal courts, the Ohio legislature's failure to adopt statutes requiring en banc rehearings, and policy arguments against them. *In re J.J.*, while apparently imposing a duty on Ohio's appellate courts to use en banc proceedings, nowhere is mention of this controversy. Justice O'Donnell, himself a former Eighth District judge, imports into his opinion for the Court an aspect of Eighth District practice that not everyone agrees is legitimate.

Still another reason that *In re J.J.*'s endorsement of en banc rehearings is worth noting is that the Court imposes a duty to conduct them without prescribing specific rules to be applied. In the federal system, rules about en banc review are established in the Federal Rules of Appellate Procedure and local Circuit rules. Ohio's Rules of Appellate Procedure, in contrast, contain no provision for en banc rehearings.

The Eighth District appears to be unique among Ohio's appellate districts in having specific rules for en banc rehearings. Its local rule is triggered when the three-judge panel hearing an appeal determines that it must overrule a previous decision of the Eighth District or issue a decision in conflict therewith. The rule provides that a decision reached by the full en banc court will be binding upon the whole district. As Judge Karpinski noted in *Lett*, however, the Eighth District has not always applied each of the requirements set forth in its en banc rules.

Given the Supreme Court's recent declaration that appellate courts are duty-bound to employ en banc procedures, the Court's Commission on Rules may wish to consider amending Ohio's Rules of Appellate Procedure to add rules for those proceedings, such as those used in the Eighth District or in the federal courts. Attorneys who think their clients could benefit from an en banc rehearing after judgment in a given appeal may find *In re J.J.* to be the source for a "second bite at the appellate apple." On the other hand, counsel who want no part of an en banc rehearing after a successful outcome before a three-judge panel may be able to challenge the validity of en banc review using theories suggested by Judge Karpinski in *Lett*.

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New Night Court

HANDLES CIVIL PROTECTION ORDERS

By The Honorable David E. Cain

Night court is convening in Franklin County.

The nocturnal tribunal is taking over the rapidly growing number of requests for Civil Protection Orders (CPOs) and gives some relief to Common Pleas magistrates along with convenience to the participants.

The number of petitions for CPOs increased from 270 in 2002 to 588 in 2006, (64 new filings in the month of December alone).

Historically, the Clerk of Court's office provided CPO liaison services – helping people fill out the CPO petitions and taking them to a duty judge for a brief ex parte hearing under oath. However, the clerk informed the court last year that floor clerks would no longer be able to assist petitioners come January 1, 2007.

When an ex parte CPO is granted (nearly always) an evidentiary hearing is scheduled for the following week and the respondent is notified of his or her right to attend and contest.

Until now, the hearing was scheduled with one of the eight regular Common Pleas magistrates who are juggling three courtrooms in the Municipal Court building. The magistrates had been sharing four courtrooms but lost one because of the need for a "visiting judge" courtroom.

"Courtroom limitations force creativity," Atiba Jones, common pleas executive director, commented. The ideas of a night court grew out of his discussions with the magistrates on how to ease their time and space demands.

CPOs are popular because they provide a quick and powerful way to try to get a stalker to back off. A person armed with a CPO is much more likely to see an immediate arrest after calling police to report that the person named therein is banging on the door or sitting at the curb. The typical CPO prohibits the respondent from making any contact, direct or indirect, or being physically present within 500 feet of the petitioner – whether at home, work or play. And police are protected from liability for making arrests of CPO violations after only a cursory investigation.

Domestic violence ranks right up there with bar room fights on the police's least wanted list.

The new process still involves getting the ex parte CPO from the common pleas duty judge. But the "full hearings" are scheduled between 4 p.m. and 8 p.m. on Mondays through Fridays before the newly-hired part-time magistrate (who works 20 hours a week).

The CPO parties are coming to the courtroom in the Municipal Court building at a calmer and less crowded time. And they are much more likely able to do so without missing time from their regular employment.

The new program added $181,373 to the court's annual budget, nearly all of it for the salaries and benefits of the part-time magistrate, a full-time secretary, and two full-time CPO liaisons.

The night court is not to be confused with the night prosecutors program which is operated by the City Prosecutors Office in the municipal court building as a result of a campaign promise in 1977 by Greg Lashutka, who ran successfully for city attorney that year. The Night Prosecutor's Office has intake until 10 p.m. each week night and conducts mediations in situations involving misdemeanor allegations, Judge Steve McIntosh reported. McIntosh was serving as city prosecutor when he was elected to the common pleas bench last fall. He said only about ten percent of the cases in the night prosecutor's office go on to charges being filed.

Icebike

One attorney who should be especially glad to see the arrival of Spring is Doug Morgan of Calfee Halter & Griswold.

Over the past four years, Morgan has been riding his bicycle from home to downtown office and inviting any and all to join him in his effort to get people out of gas guzzling, air polluting vehicles.

He rode (weather permitting) from late spring to early fall. Lack of daylight (not cold air) was his only wintertime deterrent. This year he decided he could conquer that, too.

In January, Morgan violated one of his winter riding rules: Don't ride in snow or ice. His son, Corey, is a long distance runner and refuses to miss a single day of training. He googled "running in snow" and found several websites that provided tips on how to do it. So, Morgan googled "biking in snow" and was directed to a website called "icebike." It provided advice on clothing techniques and testimonials, along with photos of smiling cyclists. "I felt ashamed for even thinking about not cycling in snow." Morgan revealed.

So, the next day he started out and initially found his neighborhood streets "slushy but not too bad. But the walking bridge over Rt. 315 and the Olentangy River had four inches of snow, so I had to walk my bike over it. When I got to the bikepath I was surprised to see it had been plowed. The riding was easy. I thought, 'icebike is right. Cycling in the snow is great.'"

Unfortunately, only the half mile of bikepath through Whetstone Park was plowed, Morgan said. "The rest was a mixture of snow, slush and ice. My giddiness quickly evaporated the first time (of many) that I almost went down. I slowed down but found the faster I went, the more stable I was – but had greater risk of injury if I fell."

"My bike was icing up, especially the brakes and the gears. By the time I got downtown, I had only one workable gear left. I dragged my iced up bike into the elevator, and it immediately started melting, making a mess in the elevator."

Nonetheless, Morgan continues to commute by bicycle whenever possible.

"I am convinced that our current system which requires everyone over the age of 15 to have a 2000-pound hunk of metal to haul one person around town is unsustainable, wasteful and unhealthy. It has also contributed to the 'disconnecting' of our community over the past 25 years."

Morgan has been posting his "ship's logs" on a blog that can be reached at www.twowheeling.com.

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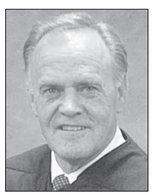

Honorable David E. Cain, Franklin County Common Pleas Court

U.S. Supreme v. Sixth Circuit

RE: PRISON LITIGATION REFORM

By The Honorable Mark R. Abel

The recent unanimous decision of the United States Supreme Court in *Jones v. Bock*, reversing panel decisions from a badly divided United States Court of Appeals for the Sixth Circuit, presents a contrast in styles of judicial decision-making. The particular issue that caused different panels of Sixth Circuit judges to reach diametrically opposite results was not a hot-button social issue. To the contrary, it was a seemingly arcane question of statutory interpretation. The dueling panels of the Sixth Circuit squared off on how to apply the requirement of the Prison Litigation Reform Act of 1995 (PLRA) that prisoners first grieve their claims that prison employees denied them a constitutional right through the prison's inmate grievance system.

One group of judges held that the PLRA imposed a "total exhaustion" rule. When a prisoner filed a lawsuit that included claims he had not grieved, the trial court was required to throw out the entire lawsuit. The opposing judges held that the trial court should dismiss the unexhausted claims, but proceed to adjudicate the exhausted claims.

The purpose of the PLRA was to reduce the number of prisoner civil rights filings in the federal courts. Before the Act, in many federal trial courts prisoner civil rights cases represented 15-20 percent of all the civil cases filed. The PLRA clamped down on prisoner filings by requiring prisoners to pay the entire $350 filing fee for civil lawsuits. Every month the prison cashier forwards to the court 20 percent of the money deposited in the inmate's prison account. It also requires judges to screen the merits of prisoner complaints shortly after they are filed. The judge must dismiss all claims that on their face lack merit. Yet even now, ten years after the Act's stringent provisions have been in place, prisoner civil rights cases alone are nearly 10 percent of all federal civil cases filed. When state and federal prisoner habeas corpus cases are added in, prisoner filings are 24 percent of all civil filings.

Considerable judicial resources are allocated to prisoner cases. In addition to judges' time, most federal trial courts employ two or three law clerks whose sole duties involve working on prisoner cases. Federal appellate courts employ staff attorneys who work on prisoner appeals and cases brought by litigants who are representing themselves.

As Chief Justice John Roberts said in *Bock*, most prisoner cases have no merit and many are frivolous. The challenge to judges "lies in ensuring that the flood of nonmeritorious claims does not submerge and effectively preclude consideration of the allegations with merit." The PLRA was intended to bring "fewer and better prisoner suits" into the federal courts.

In applying the PLRA, the Sixth Circuit adopted two rules that made it easier for judges to determine whether prisoners had exhausted their inmate grievance remedies. First, the prisoner's complaint had to show that he had taken each claim completely through the inmate grievance system. Second, a prisoner could not sue a prison official or employee unless he had named him in his inmate grievance.

Against this backdrop, it is easy to see the attraction of a "total exhaustion" rule. The burden of prisoner case filings could be reduced with minimal screening. Complaints filed by prisoner who failed to provide detailed information demonstrating they had grieved each of their claims against each defendant were summarily dismissed. The total exhaustion rule was announced in *Jones Bey*, a 2-1 decision authored by a district judge, one circuit judge joining him and the other dissenting.

In practice, the total exhaustion rule was harsh. Ill-educated and sometimes illiterate, prisoners are not articulate grievance writers. They are unlikely to meet pleading standards that they don't even know exist.

Dismissal means that if prisoners re-file, they will have to pay another $350 filing fee. That is a lot of money to the average prisoner whose monthly income is $15-$30. Finally, the prisoner has no chance to litigate the dismissed unexhausted claims in federal court. By the time the federal court dismisses the claims, the prison inmate grievance procedure is not available. For example, in Ohio, the inmate must file a grievance within 14 days of the event giving rise to the complaint. Once that deadline is missed, a civil rights complaint based on that event is forever barred.

For about a year, *Jones Bey* appeared to be the law of the Sixth Circuit. In March 2006, the U. S. Supreme Court agreed to decide whether the PLRA required total exhaustion. Despite the fact that the Supreme Court would soon decide the issue, two panels of the Sixth Circuit issued decisions last June stating that *Jones Bey* – and another reported decision following *Jones Bey* – were wrongly decided because two earlier cases had authoritatively stated that when there are both exhausted and unexhausted claims, the unexhausted claims should be dismissed and the exhausted claims litigated.

This public repudiation by a group of judges of a decision supported by another group of judges has not been the only divisive confrontation between Sixth Circuit judges. For example, some judges were also at odds in the University of Michigan Law School diversity admissions case and a series of death penalty habeas corpus cases.

Strong disagreement among appellate judges is to be expected. The legal issues they hear are frequently close calls. If there weren't strong arguments for the opposing positions, there shouldn't be an appeal.

Recognizing these divisions, experienced employment and civil rights litigators understand that the outcome of an appeal can be very "panel dependent." In these areas, there are often competing lines of case law. In close cases, some judges are more likely to follow one line of cases than the competing line. Yet even acknowledging these fault lines, it is extremely rare – if not unprecedented – for one panel of appellate judges to directly refuse to follow a legal rule announced and relied on by an earlier panel.

Indeed, the Sixth Circuit has a rule that a published decision resolving an issue is binding and cannot be overruled by another panel. Here the dueling panels accused each other of violating this rule. As an aside, I believe that *Jones Bey* was the law of the Circuit for the technical legal craft reason that the "rule" stated in the earlier cases was not used to decide a litigated issue in them. In other words, the judges in the pre-*Jones Bey* cases said what they believed the rule of law was, but they didn't rely on that rule to decide the case before them.

This gratuitous assertion of broad legal principles is not uncommon in appellate decision today. In some areas of the law, for example, employment discrimination, free speech, and freedom of religious belief, there are sharply competing substantive legal opinions. When they are in the majority in one of these cases, judges are sometimes tempted to write opinions that announce a broad rule that would determine the outcome of many similar cases – even though the broad rule is not needed to decide the dispute before them.

In my view, that tendency should be resisted. I recognize that appellate courts are most often the court of last resort for litigants because so few cases are heard by the Supreme Court. The temptation is great to influence how a large number of cases will be decided – in the absence of a Supreme Court ruling. The problem is that judges who volunteer their opinions about how future cases should be decided are acting as legislators, not judges.

The strength of our legal system is that judges decide only the very fact specific disputes before them. The relevant language of statutes passed by the legislature, specific constitutional provisions, and narrow rules announced in earlier court decisions guide the judge to a decision in that dispute.

When judges go beyond those narrow constraints and say more than is necessary to decide a dispute, they become unelected legislators. We claim a competence to decide how people should live their lives that we have not earned.

Supreme Court justices have not been immune from the temptation to reach beyond the facts of the dispute before them to set down broad legal rules to control how future disputes are resolved. But during its first year and a half, the Roberts' Supreme Court has tended to stick to the facts of the cases before them. That pattern continued in *Bock*.

In contrast the sharp divisions over the total exhaustion rule in the Sixth Circuit, the Chief Justice John Roberts led Supreme Court issued a unanimous decision. It struck down the Sixth Circuit requirement that prisoners plead exhaustion of prison administrative remedies. Failure to exhaust is a defense. Nothing in the law requires a prisoner to respond to a defense before a defendant asserts it. Further, the PLRA's requirement that judges screen prisoner complaints doesn't support the Sixth Circuit's rule requiring prisoners to prove exhaustion because the statute does not list failure to exhaust as a ground for dismissal on initial screening. Citing Justice Felix Frankfurter, Roberts wrote, "'Whatever temptations the statesmanship of policy-making might wisely suggest,' the judge's job is to construe the statute – not to make it better. The judge 'must not read in by way of creation,' but instead abide by the 'duty of restraint, th[e] humility of function as merely the translator of another's command.'"

The Supreme Court further held that "nothing in the statute imposes a 'name all defendants' requirement along the lines of the Sixth Circuit's judicially created rule." The *Jones Bey* total exhaustion rule fared no better. Commenting that "we have never heard of an entire complaint being thrown out simply because one of several discrete claims was barred by the statute of limitations," the Supreme Court rejected it.

So while many believe the Supreme Court to be deeply divided between "conservatives" and "liberals," the early days of the Roberts' Court suggest that most cases – even ones that starkly divide circuit judges – are discussed and debated in an atmosphere that permits detached professional judgment and leads to a decision that all the justices can accept. It is an achievement that lawyers and judges who must faithfully apply appellate decisions to the cases they are working on can only applaud.

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

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Serving The States

THE NEED TO EDUCATE EMPLOYERS ON USERRA

By Milan R. Kosanovich

They say that ignorance is bliss, but for employers with service members in the workforce, ignorance could be costly. With a continuing military conflict overseas, the number of reserve service members called into duty is steadily increasing and the length of time away from their regular employment is increasing as well. As a result, the number of employers — large and small — that need to be aware of their legal responsibilities under the Uniformed Services Reemployment Rights Act (USERRA) continues to expand.

Congress enacted USERRA to protect the livelihood of those citizens serving the country in the armed forces. The 1994 law was a response to the frustrations of veterans returning from the Persian Gulf in the early 1990s who encountered obstacles returning to the workforce that were not adequately addressed by the old Veterans' Reemployment Rights law from the 1940s. The newer law prohibits employers from discriminating against an employee or applicant for employment on the basis of service with the armed forces. It also forbids employers from taking any adverse action against an individual for exercising any USERRA rights. As Secretary of Labor Elaine L. Chao summarized at a press conference, "this legislation protects the jobs, health insurance and pension benefits of our nation's citizen soldiers, and others in uniformed service."

An Unfamiliar Law

Almost every employer knows the basic requirements of the Family Medical Leave Act (FMLA) or the Americans With Disabilities Act (ADA). Most clients could probably quote to you the United States Army slogans of "Be All That You Can Be" and "An Army of One," but very few know about USERRA other than the fact that they are required to display an informational poster on the law.

The Department of Defense established the Employer Support for Guard and Reserve (ESGR) to expressly promote cooperation between reserve service members and civilian employers. The ESGR ombudsmen work on the frontlines of the battle over USERRA in their efforts to resolve disputes regarding violations of the law. The ESGR ombudsmen have found that most problems concerning USERRA result from poor communication between employers and employees or from a lack of familiarization with the rights of each as defined by law.[1]

Unlike the FMLA and the ADA, which apply only to employers big enough to meet numerical thresholds, USERRA applies to virtually any business employing at least one person. This means it is a law all employers need to know about. Additionally, USERRA provides for very favorable protections to service members. Employers who violate the law risk payment of back wages, reinstatement of employees and liquidated damages. Not only that, employers could very well be facing Uncle Sam in the courtroom because the Department of Justice is authorized to sue on behalf of aggrieved service members.

The Importance for Ohio Employers

Ohio ranks sixth nationwide in the total number of reservists serving in the armed forces. Also increasing is the amount of time reservists spend on active duty. Before Operation Desert Storm in 1991, the average number of days a reservist spent on active duty was one. By 2004, the average number of days a reservist spent on active duty had risen to 75 days with 300 days being the average tour of duty for those reservists called up since September 11, 2001. This means that Ohio employers are now faced with the possibility of sustaining their business while also finding a way to fill the gap for employees who could be gone for longer and longer periods of time.

The size of the business has little effect on whether or not there are likely to be employees who are covered by USERRA. Just over one-quarter of all reservists work for private companies with more than 500 total employees, while just under one-fifth of all reservists are employed by private companies with less than 100 employees. Regardless of size all employers need to be aware of the likelihood that one or more of their employees have specific rights under USERRA.

Being Part of The Solution

Cases concerning USERRA commonly involve employers with an insufficient understanding of its application. Uninformed and unaware employers risk violating the law and subjecting themselves to a financial liability that could be easily avoided with a little bit of knowledge concerning their rights and responsibilities under the Act.

Practitioners can help to remedy this problem by bringing this issue to the attention of employers during client discussions. In the summer of 2006, the Department of Labor published the first regulations regarding USERRA. The question and answer format of these regulations should make it easy for the uninitiated practitioner to develop a basic understanding of the law, and more important, give them the ability to properly inform their clients on how to prevent an easily-avoided mistake.

Calling up every one of your clients to tell them about USERRA is impractical and unnecessary, but mentioning it in your next conversation with them might stop a problem before it starts. A 2002 survey by the Litigation section of the ABA revealed that doing a better job of communicating with clients was one of the most important things that lawyers could do to improve their reputation in American society.[2]

Practitioners should also know that the ESGR provides speakers and presentations on USERRA at no cost to interested groups, including employers. This might be a cost effective direction to send clients which would provide them with tools to better understand their obligations and rights under the law.

Trying to provide a detailed analysis of USERRA would be impracticable for this article, but raising awareness among practitioners about the need to discuss rights and responsibilities with clients may get the ball rolling to ensure that employers avoid liability and that the rights of service members are protected.

1. *Employer Support of the Guard and Reserve homepage, available at www.esgr.org.*
2. *Public Perception of Lawyers: Consumer Research Findings, Section of Litigation American Bar Association (April 2002), available at www.abanet. org.*

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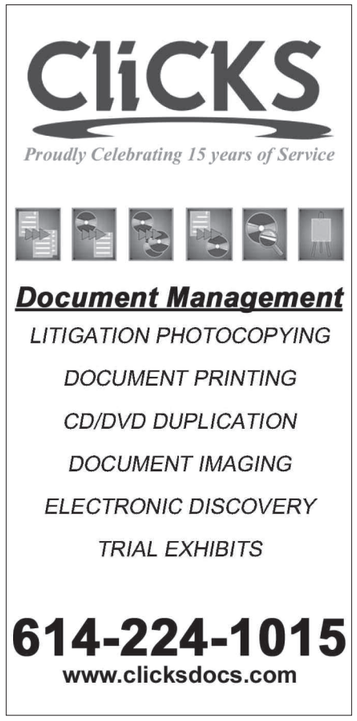

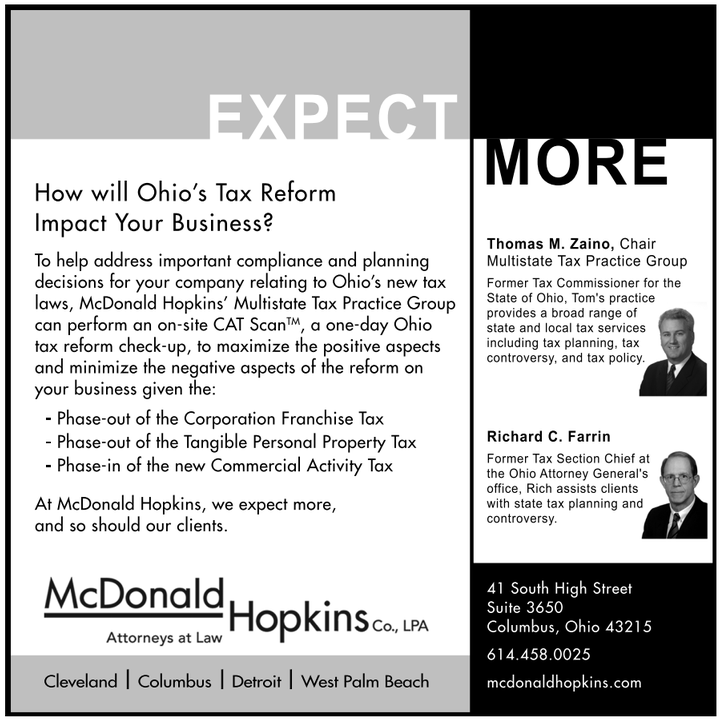

Blogs:

THE LATEST WORKPLACE MINEFIELD

By Jacklyn J. Ford

Blogs (sometimes also known as "blawgs") are web-based personal logs, somewhat akin to a cross between a diary and a website. While blogs are not inherently suspect or dangerous, responding to their misuse can create difficult challenges. As is often the case, the law has not entirely kept pace with this rapidly changing technology. And, humans being what they are, many formerly anonymous individuals have found themselves unwillingly positioned as very public examples of the dangers of playing with the newest form of fire.

Many blog-related cases reflect the chasm between available technology and what might best be called "common sense." Nowhere is this gap more obvious than in the case of Jessica Cutler, former staff assistant to U.S. Senator Mike DeWine. On May 5, 2004, Cutler created an Internet blog known as the "Washingtonienne." Over the next twelve days, Cutler posted blog entries describing her intimate activities with various men, including Washington lawyer Robert Steinbuch. On May 18, 2004, another Washington-based Internet site known as "Wonkette" allegedly posted a link to Cutler's blog, thus instantly expanding the audience for Cutler's writings. Washington gossip being what it is, it took very little time for the blog to find its way around the computers of Congressional offices, and for Cutler to be fired for using a Senate computer to write about her sexual escapades.

One year later, Steinbuch filed a civil action against Cutler, alleging invasion of privacy and intentional infliction of emotional distress. As stated in Steinbuch's Complaint, Cutler's blog described "in graphic detail the intimate amorous and sexual relationship between Cutler and the Plaintiff."[1] As noted by the District Court in a discovery ruling in December, 2006, "salacious details" of his brief relationship with Cutler were "offered willingly by plaintiff in his non-anonymous Complaint," leading the court to refuse to enter a protective order or otherwise seal documents in the case.[2]

Beyond the obvious question of why a plaintiff would want to publicly litigate the very revelations he says were terribly harmful to him, the Steinbuch/Cutler case also raises interesting questions about the legal ramifications of blogging.

Statutes of limitations on blog-related claims are unclear. Steinbuch filed his lawsuit just short of one year after the date of Cutler's last post about him. Cutler's lawyers argue that any claims based on the blog entries posted more than a year before the lawsuit was filed are time-barred under the applicable one-year statute of limitations. Steinbuch counters that, because of the potentially permanent nature of blog postings, and because each new posting arguably can be said to incorporate all the prior postings, each posting essentially "renewed" itself each time a new one was added. It remains to be seen what the district court will ultimately decide about when the statute of limitations begins to run on blog-based communications.

Blogging creates numerous potential employment-related issues. As Jessica Cutler learned, what you do on your computer can come back to you at work. While Cutler was fired for using her Senate computer to post blog updates, even bloggers who write their online entries in the privacy of their own homes can face a variety of employment-related consequences.[3] For example, blogs that reveal trade secrets or inside information can run afoul of company ethics guidelines, state statutes, or securities laws. Similarly, a blog that reveals that an employee has violated company policies, or has engaged in other inappropriate behavior, could form the basis for termination of the employee.

Wrongful termination cases based on blogging follow the same rules as other employment cases. Generally speaking, if you could get fired for saying it in the supermarket or on a billboard, you can get fired for saying it on a blog. However, some states prohibit the discipline or termination of employees for legal off-duty activity.[4] Even in these states, however, off-duty conduct that has on-duty implications may still form the basis disciplinary action.

Bloggers may be able to protect themselves to some degree by blogging anonymously and using password protections. Jessica Cutler's first mistake (other than, quite possibly, her relationship with Mr. Steinbuch) may have been her failure to password-protect her blog and preserve the anonymity of her subject. Although she referred to Steinbuch by his initials, it was only a matter of time before some of those reading the blog both recognized the subject and linked the blog to other sites.

Employers may, with caution, consider creating blogging policies for their employees.

While employers are free to develop policies about subjects such as disclosure of trade secrets, insider information, or other topics not appropriate for dissemination on a blog, not all policies that regulate employee speech are acceptable under the National Labor Relations Act. In some cases, such policies could be deemed to have a "chilling effect" on protected speech involving protected concerted activity and therefore constitute a potential unfair labor practice.[5] Consequently, as in all things related to blogging, employers should proceed with appropriate caution.

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1. Steinbuch v. Cutler, *2005 WL 1467405 (D.C. D.C. 2005).*
2. Steinbuch v. Cutler, *2006 WL 3543158 (D.C.D.C. 2006).*
3. *Various sources indicate that blog-based firings are on the rise. See, e.g., Konrad Lee, Anti-Employer Blogging: Employee Breach of the Duty of Loyalty and the Procedure for Allowing Discovery of a Blogger's Identity Before Service of Process is Effected, 2006 Duke L. & Tech. Rev. 0002, ¶¶ 20-22 (Jan. 17, 2006), http://www.law.duke.edu/ journals/ dltr/articles/PDF/2006 DLTR0002.pdf.*
4. *See, e.g., N.Y. Lab. Law § 201-d(2) (prohibiting termination of an employee because of " legal recreational activities outside work hours, off of the employer's premises and without use of the employer's equipment or other property").*
5. *See Adtranz, ABB Daimler-Benz, 253 F.3d 19 (D.C. Cir. 2001); see also Timekeeper Systems v. Leinweber, 323 NLRB No. 30, 154 LRRM 1233 (1997).*

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WHEN A CHILD HAS BEEN

Wrongly Suspended

Taking a stand against a push-out

Schools are pushing more and more children out of school through suspensions and expulsions for minor incidents and reporting more children to juvenile court for incidents that a decade ago were handled without involving the courts.

By Vanessa Coterel

Despite media hype to the contrary, juvenile violent crime has been decreasing since 1994. More significantly, violent crime in schools is no greater than it was in the 1970s.

"Today's high school seniors are *no* more likely than their parents were to be assaulted, injured, threatened or robbed in high school," according to Vincent Schiraldi, Director of the Justice Policy Institute. In fact, schools continue to be the safest place for children to be. Yet, schools are pushing more and more children out of school through suspensions and expulsions for minor incidents and reporting more children to juvenile court for incidents that a decade ago were handled without involving the courts. Zero tolerance policies contribute to more children being pushed out of school and miss a fundamental point about behavior: behavior, for children, is a form of communication.

Although children have limited procedural rights when facing suspension, let's look at the rights of youth and ways parents can respond so that children do not become part of the rising national wave of pushing children out of school.

First and foremost, children with disabilities who receive special education through an individualized education program (IEP) are afforded additional protections in situations where the school seeks to remove the child from school for more than ten days pursuant to the Individuals with Disabilities Improvement Act. A child with a disability should not be punished for behavior that is a manifestation of the child's disability. One of the protections available under the IDEA is the requirement that the school must first conduct a "manifestation determination review" to discern (1) if the conduct at issue was caused by or had a direct and substantial relationship to the student's disability or (2) if the conduct at issue was the direct result of the school district's failure to implement the student's IEP. If the student's conduct is determined to be a manifestation of his/her disability, the school cannot discipline the child in the same manner as a regular education student. Children with disabilities enter school behind their peers and removal from school makes it less likely that the child will catch up to same age peers. Therefore, the school district must continue to provide educational services to children with disabilities suspended for more than ten days to allow continued progress toward annual IEP goals.

An out-of-school suspension is the removal of a student from school for a period of up to ten days. Schools may impose a suspension for a number of school violations. Because students have a property interest in their education, however, schools must provide minimal due process protections to students prior to imposing a suspension. Most important, a principal or superintendent must provide notice to the student of the intent to impose a suspension. This notice must inform the student of his/her right to (1) appear before the principal or superintendent at an informal conference to challenge the intended suspension and (2) have an opportunity to explain his actions or to otherwise challenge the reason for the intended suspension.

Moreover, the principal or superintendent must notify the student's parent in writing of the out-of-school suspension within one school day after imposing discipline. This notice must document the reasons for the suspension and notify the student and parent of the student's right: to appeal the suspension to the board of education or its designee; to be represented in all appeal proceedings; to be granted a hearing before the board or its designee; and to request that the hearing be held in executive session.

Parents are entitled to notice of the appeal timeline for the suspension, which is usually within ten days from the date of the letter. Parents intending to appeal the suspension should immediately request in writing a hearing to appeal the suspension and keep a copy of this letter for their records. Consider seeking the assistance of a private attorney for the child or contact the Legal Aid Society of Columbus's Child and Youth Law Program to inquire about free legal representation.

Additionally, pay close attention to the suspension notice because this notice may also indicate the principal or superintendent's intent to expel the child for the alleged behavior. Students potentially facing expulsion have additional due process protections.

After submitting a request for an appeal hearing, write a letter to the school requesting a copy of the child's records including attendance records, school discipline records, progress reports, and any records regarding the alleged incident that formed the basis for the suspension; particularly any statements made by the child to the school regarding the alleged incident. Review the district's Student Code of Conduct to determine the types of behavior that will be subject to suspension. If the Student Code of Conduct does not document the behavior at issue as being subject to disciplinary action, arguably the student did not have notice.

At the suspension appeal hearing, the board or its designee is required to make a verbatim record of the hearing. This record is important in case the parent decides to appeal the decision of the school board to the Court of Common Pleas.

While challenging a school's implementation of disciplinary policies is an uphill battle, it is a worthwhile effort and may prevent school push-out.

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Clergy confidentiality and child abuse reporting

A COMPLEX RELATIONSHIP

By David T. Ball

For those of us who work with religious organizations, either through being a member of a particular religious community or practicing law in the field, one of the most difficult questions that arises has to do with the relationship between two responsibilities that the law imposes on clergy: (1) the duty not to reveal information that is disclosed to clergy with the intent that it will remain confidential, or "clergy confidentiality," and (2) the duty to report child abuse to children services or the police.

Until recently, Ohio law skirted the issue. Clergy were not named as mandatory reporters of suspected child abuse, whereas many other types of professionals were. This left clergy to decide whether they would choose to report child abuse even though they were not required to do so, or choose to maintain confidentiality, in each particular situation.

This past summer, however, Ohio's legislature added clergy to the list of mandatory reporters of suspected child abuse, along with a long list of other professionals that includes: attorneys; physicians; dentists, nurses and other health care professionals; psychologists and therapists; day-care administrators and employees; school teachers and other school employees; social workers; and social service employees, among others. The complexities of the relationship between clergy confidentiality and the clergy's responsibility to report child abuse, however, led the legislature to set out clergy reporting duties in a separate section of the statute. (Ohio Revised Code section 2151.421(A)(4)).

As it stands now, the complicated relationship between these potentially conflicting duties is probably best understood as follows. As a general rule, Ohio law exempts clergy from any legal obligation to reveal information that is communicated to them in confidence. (Ohio Revised Code section 2317.02(C)). The exception to this rule is that clergy may be required to reveal confidential information if the person who communicated that information to them gives the clergyperson permission to do so. (Persons under age 18, or who are mentally retarded or developmentally disabled and under the age of 21, who communicate information about child abuse to clergy are treated by statute as having given their permission for that information to be disclosed, even if they did not actually give permission for such disclosure.) Even with permission, however, clergy cannot be required to disclose information that is communicated in the context of a confession or other similar highly confidential situation. Clergy cannot be compelled to reveal information communicated as a "sacred trust" under any circumstances.

This means that even clergy are not required to reveal information communicated to them as a sacred trust, even if that information pertains to child abuse. This also means that unless the clergy confidentiality privilege is waived, clergy are not required to report information pertaining to child abuse that was communicated in confidence to them when they were acting in their professional capacity.

Under a variety of other circumstances, however, clergy may now be required by Ohio Revised Code section 2151.421(A)(4) to disclose information about child abuse. These situations would include when the person who communicated child abuse information has given permission for that information to be disclosed, or if that person has already testified about as to that information themselves. This would also include situations in which the child abuse information was not confidentially communicated in the first place. If the information is communicated in the presence of others, or if the clergyperson is not acting in their professional capacity when the information was communicated, then the information is not entitled to confidentiality protection.

The child abuse reporting statute contains some carefully chosen language about when clergy are required to report non-confidential information: when they have "reasonable cause to believe based on facts that would cause a reasonable person in a similar position to believe" that a child under 18 years of age (or someone under 21 years of age who is mentally retarded or developmentally disabled) has suffered or faces the threat of suffering physical or mental abuse.

The references here to "reasonable cause to believe" what a "reasonable person in a similar position" would believe mean that clergy cannot avoid their duty to report child abuse simply because they may not have actually believed that child abuse was taking place. This is an objective standard. The question is whether, in retrospect, a judge or other authority would determine that the clergyperson should have believed that child abuse was occurring, based on the facts and circumstances involved, regardless of what the clergyperson actually believed or didn't believe. If, objectively speaking, a "reasonable person" in a similar position would have found the information credible, it must be reported. Clergy who decide that the information they have received is not credible need to understand, in other words, that any decision not to report non-confidential information about child abuse can be second-guessed.

Going forward, there may be a need to fine-tune the current statutory relationship between clergy confidentiality and clergy child abuse reporting requirements. The current situation is a vast improvement over prior law, however, which completely avoided this complex relationship by omitting clergy from the list of mandatory child abuse reporters. Now the law requires that unless the information is protected as confidential or as a sacred trust, clergy have a duty to protect Ohio's children by reporting reasonable suspicions of child abuse.

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Better Lawyer™

a columbus bar publication for new lawyers

A New Option for New Lawyers: Mentoring

By Michael E. Heintz, Porter Wright Morris & Arthur[1]

Most attorneys are familiar with the requirement placed upon new lawyers to attend twelve hours of New Lawyer's Training by the end of the calendar year following admission to the bar. This two day program offered by various bar associations covers such topics as CLE obligations and professionalism, as well as break out sessions addressing areas of substantive law such as real estate, probate, and alternative dispute resolution.[2] However, critics say the program falls short of providing information on the mechanical, day-to-day practice of law. While the Training may provide information on selected legal areas or practice requirements, little opportunity or time exists to teach new lawyers about the actual practice of law.

Enter the Supreme Court of Ohio's "Lawyer-to-Lawyer" mentoring program. Initially the idea of Justice Terrence O'Donnell, the program pairs new lawyers with senior attorneys to form mentoring relationships and provide one-on-one counseling to those beginning their legal careers. The program seeks senior attorney mentors, who are then approved by the Supreme Court's Commission on Professionalism, and matches them with new lawyers. The paired attorneys must then meet for at least six, one-hour sessions over the course of the year to discuss a variety of topics approved by the Supreme Court. The Court encourages the pair to meet more than six times, and provides both topics and worksheets to help forward the discussions. Mentees receive credit for six hours, or one day, of New Lawyer's Training, and the mentors receive CLE credit.[3]

The pilot program began with lawyers admitted to the bar in May 2006. Due to the high response rate — 20% of those eligible enrolled in the program — attorneys admitted in November 2006 were also allowed to join. When the program expires June 30, 2007, the Supreme Court will evaluate the program and decide whether to continue it.

By all accounts, the program is already succeeding. Given the 550 new lawyers and mentors that volunteered, the program appears to be catching on. Both Lisa Eschleman, an attorney-mentor for 2007, and Jim Carpenter, Chair of the CBA's Mentoring Committee, trumpet the program as an excellent introduction to the "everyday practice of law" for new attorneys.

Eschleman sees the program not only as an opportunity to meet with her mentee on a series of topics, but also as a teaching opportunity to share her experiences. As a lawyer who has moved from private practice, to teaching, and now to nonprofit work, Eschleman knows firsthand the career flexibility that can come with a law license, and believes new attorneys should know the vast possibilities that are available. She is also looking forward to providing her mentee the chance to talk and ask questions on any number of topics that may come up. Eschleman appreciates the Supreme Court creating a structured program where both mentors and mentees are held responsible for meeting the expectations set for them.

Alternatively, Carpenter helped create the Supreme Court's program as a member of the development task force. Although the Columbus Bar Association offers its own new lawyer mentoring, Carpenter sees that program as not in competition with, but rather complementary to, the Supreme Court's efforts. The CBA strongly supports the Lawyer-to-Lawyer program, and Carpenter would not be surprised if the two mentoring systems evolved into a graduated set of options. He believes that while the Supreme Court's system is aimed exclusively at newly admitted lawyers, the CBA's program focuses on those attorneys who have been in practice, and are at the stage where they have "career" questions as opposed to issues concerning transition from law school to the practice of law. To that end, the CBA's program will pick up where the Supreme Court's logically leaves off. Carpenter believes there is a good fit between the two programs and that as an attorney progresses through a career, needs will change when it comes to seeking advice.

The Supreme Court will evaluate the Lawyer-to-Lawyer program later this summer to decide whether to continue it, and determine if any changes should be made. Based on early returns, the program seems a good addition to the tools available to new lawyers as they build successful careers. The positives of the program, including year-long counseling, providing a good source for answers concerning the transition into the practice of law, and having a source outside of one's office with whom to address sensitive issues, are all resources that can be helpful to new lawyers at the beginning of a career.

1. *The author thanks Lisa Eschleman and James Carpenter for their time and thoughts in writing this article.*
2. *All information on New Lawyer's Training provided by the Ohio State Bar Association's marketing materials.*
3. *All information on the Lawyer-to-Lawyer Mentoring program is taken from the Supreme Court's website, available at: http://www.sconet.state.oh.us/mentoring/default.asp.*

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Michael E. Heintz

The Best Things

New attorneys can do to grow their practice

By Karen Held Phipps,
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Whether you are a new attorney working for a firm or one that recently opened your own office, the best things that attorneys can do to grow their practice are basically the same.

Do What You Love

The first step on either path – law firm or solo – is to find an area of law for which you have a passion. Representing clients can be a tiring task, so having a passion and a love for the area of law you intend to practice is a necessity if you do not want to end up in the thirty percent of attorneys who decide not to practice law. To find an area of law that will keep you captivated for a career is not an easy task. Researching and talking to attorneys who specialize in the areas of law that interest you would be the best way to start.

Find A Mentor

Then find a mentor who can guide you through learning that practice area. You may need to find more than one mentor to allow you to learn about more than one practice area and to learn the business of practicing law. The two are distinct, and, if you practice in a large firm, the mentor role may be filled by several individuals.

Join Professional Associations

New attorneys must expand their exposure to other legal professionals. One way to do this is to join local and state bar associations. This will allow you to begin networking and building your contacts with other attorneys. Bar associations provide opportunities to join committees that focus on many practice areas. You will meet attorneys at different stages of their careers and your potential for mentoring relationships grows exponentially. Bar associations also provide the opportunity to learn about other practice areas. Novice attorneys can attend different committee meetings to learn about practice areas unfamiliar to them. Another advantage of the bar associations is it builds your referral base. Attorneys refer clients to attorneys they know who practice other areas of law. The more attorneys you meet the more clients you can potentially bring in.

Network Within The Legal Community

When joining a new organization or association, volunteer for the networking committee. This will allow you to send invitations and collect RSVPs. By doing this you have access to all members of the group and your contact information will be provided to each person who receives an invitation. This allows for greater name recognition and maximum exposure to all members. When the event occurs each attendee will know your name and if you greet the members as they arrive they will become familiar with you personally. The only cost to you is a few hours of your time; when starting out this is one of the most effective and productive ways to use your time.

Network Outside The Legal Community

Another effective way to grow your practice area is to network with people outside the legal community, starting with your current clients. Establishing a relationship with the client where they have an awareness of your personality, work ethic and capabilities will lead to referrals. To do so you will need to spend time with your clients in other settings than your office, such as a social or charity event. If you establish a strong relationship with your current clients they will think of you when others ask if they know a good attorney. The referral may not happen right away, but it will happen down the road if you have taken the time to establish a mutually respectful relationship.

Networking with other professionals can also be an avenue for growth of a practice. Community events often bring together a myriad of individuals. Attending a local fund raiser or PTA meeting can provide a number of new contacts. Other professionals such as accountants, business owners, medical providers and teachers come into contact with new people everyday. These individuals have the respect and trust of the individuals who they have professional relationships with. Again, the goal is to strive to be the first person that comes to mind when a professional is asked, "Can you recommend an attorney?"

Follow Up With Networking Contacts

You must follow up with your networking contacts. Once you have established a new contact, try to form a relationship with each individual. You can do so by setting up a breakfast or lunch meeting. Follow up a week or so later with a hand written note or a telephone call. The personal touch will make a difference. Once you have had several contacts with the individual then invite that person to a function at your office or another function that interests them. Most attorneys and professionals are interested in networking opportunities, when planning to attend an event, check your contacts and invite someone with a similar interest.

Participate In Community Service And Volunteer Work

Community service and volunteer work is another way to build name recognition. Giving back to the community can be done in many ways. For example, you can volunteer with the local legal aid society. This will provide an opportunity to learn different areas of law and to help your local community. Most firms encourage community service; working with legal aid can lead to opportunities for additional legal experience. Additionally, some legal clinics provide free CLE training to their volunteers.

Don't Overlook Business Development

The most commonly overlooked method to build a practice area is to study and research business development. Building a practice or developing your niche is business development. It is important to research and read as much as possible about business development. Mentor selection is key – select a mentor that is in the position that you are striving to reach. If your goal is to run your own office, find a sole practitioner that practices in your focus area and develop a relationship with that individual. Make sure that you have something to offer this individual and you can give back. The key to a business development is that the relationships formed are profitable for both parties. While you are determining who can best help you grow your practice area, always keep in mind that you need to give back to this individual for the relationship to be productive.

Karen Held Phipps

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New Lawyers Committee

Forging Ahead

The New Lawyers Committee is one of the most active committees at the Columbus Bar Association ... As our membership continues to grow, efforts have already begun for planning more events for this year and the next.

By Anthony Sharett,
Shumaker, Loop & Kendrick, LLP
Co-Chair, New Lawyers Committee

Year In Review

Former United States Supreme Court Justice William O. Douglas once said, "I would rather create a precedent than find one." In 2006, the Columbus Bar Association's New Lawyers Committee has been creating new precedents, growing exponentially, and taking an active role in furthering the professional goals of newly admitted practitioners.

The past year's highlights include the creation of the New Lawyers Committee Advisory Group consisting of members of the New Lawyers Committee. The goal of the Advisory Group is to expand upon the strong foundation the New Lawyers Committee has already created. To that end, the Advisory Group participated in a retreat in fall 2006 and redefined the mission statement of the New Lawyers committee along with setting the agenda for 2007. The Advisory Group decided that community stewardship, professional development and strengthening the relationships between attorneys and the judiciary should be the focus going forward.

With that in mind, the New Lawyers Committee has hosted a series of luncheons and after work gatherings. In one session, judges from the Franklin County Municipal Court in attendance candidly talked with the group about maintaining the integrity of the legal profession through civility and humility. The judges sat in small groups with the new lawyers and tackled tough questions throughout the session. In January of this year, the Committee hosted a professional development panel discussion. Representatives from private industry, professional consulting and private sector law talked with new lawyers about a range of topics including networking and professional decorum. Those in attendance remarked that both the format and topic of discussion were extremely beneficial to public and private sector attorneys.

The Year To Come

Anthony Sharett

Now for 2007! In February, the New Lawyers Committee participated in Rock 'n Bowl for Children's Hospital a fundraiser for the Center for Child and Family Advocacy at Children's Hospital. In March, the Committee will be hosting the New Lawyers: Life and the Law Partner Panel Lunch. The luncheon will feature authors of a collection of stories, anecdotes and essays under the same title. The panel will discuss their paths to partnership, life, and practice in central Ohio in what is certain to be a frank and riveting discussion. In April, the judges from the Franklin County Court of Common Pleas will attend to discuss with new lawyers the various issues that arise when practicing in their courtrooms. Traditionally, this presentation has been a favorite. Our service month comes in May where committee members will have the opportunity to assist those that are in need. Finally, in June we will hold a special summer gathering as a thank you for our dedicated new lawyer members and use the opportunity to get to know new members and summer associates.

As you can see, the New Lawyers Committee is one of the most active committees at the Columbus Bar Association. We want to thank all of our members for supporting the New Lawyer Events in 2006 and 2007. As our membership continues to grow, efforts have already begun for planning more events for this year and the next. As always, we encourage new members and new ideas. For more information regarding this committee, please go to www.cbalaw.org/newlawyers, or contact Lara Bertsch at lara@cbalaw.org or 614/221-4112. We hope to see fresh faces at our upcoming events.

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NEW LAWYERS FACTS

1 If you're a member in your first 5 years of legal practice or under the age of 35, you're a new lawyer.

2 The legal profession is great place to grow older. Not only do you become more distinguished each year, but you get to be 'young and up-and-coming' well into your 40's.

3 New lawyer members are automatically invited to special programs and events designed to support budding legal practice.

4 New Lawyers are one of the most diverse groups in the legal profession. More minority attorneys enter practice every day, and attorneys from many different backgrounds bring their perspectives to the practice. From people starting second and third careers to mothers and fathers of grown children starting practice, you never know who will be a new lawyer.

5 The first several years of practice are a unique time to build the relationships that will support a long, rewarding career.

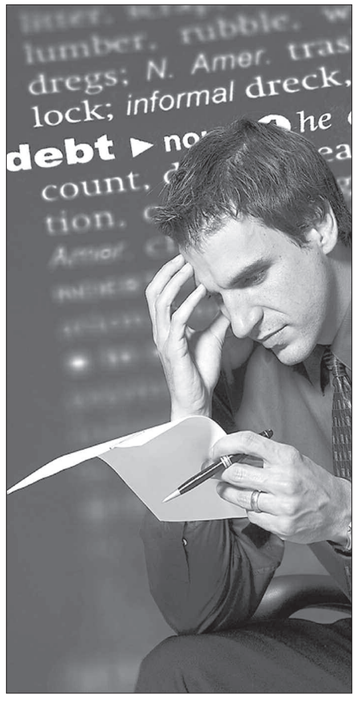
6 Pushing for flexible hours and family friendly schedules across the country, young men and women in the profession are challenging the assumption that lawyers choose between careers and family life.

7 In Columbus, new lawyers have a special gift for reaching out to young people. Through participation in Rock 'n Bowl, the group has supported the work that the Center for Child and Family Advocacy does daily for child victims of abuse. Through a mentoring program in conjunction with the Columbus Bar's Student Leadership Internship Program (SLIP), new lawyers connected to and encouraged aspiring attorneys at Columbus Public Schools.

Your Law School

Debt & You

Law school debt not only discourages new lawyers from public service positions, it also motivates them to leave public service positions just as they acquire the skills to make meaningful contributions. Such departures negatively affects public service agencies' ability to provide quality legal services to their clients.



By Jeff Hartranft,
Ohio Bureau of Workers' Compensation

In 1987, the average law school graduate entered the legal profession with $16,000 in outstanding loans. By 2002 the average law school loan debt was more than $80,000. As the legal profession is learning, debts of this magnitude present an additional challenge to new lawyers and have substantial impacts on career choice, job satisfaction and ethics.

Most of the official attention on law school debt has been focused on its impact on public service. Recently, the ABA commissioned a study on the effect of law school debt on public service. The title of that report, "Lifting the Burden: Law School Debt as a Barrier to Public Service," speaks for itself. The ABA study found that while a third of incoming law students indicated an interest in practicing in the public service sector only 3% ultimately were employed in this field. A parallel study confirmed the ABA's findings. According to a survey conducted by Equal Justice Works, law school debt prevented 66% of the respondents from even considering a public service career.[1]

In addition, the ABA study found many public service lawyers leave public service for private practice after 2 or 3 years, in a large part due to financial hardship. As the ABA concluded, law school debt not only discourages new lawyers from public service positions, it also motivates them to leave public service positions just as they acquire the skills to make meaningful contributions. Such departures negatively affects public service agencies' ability to provide quality legal services to their clients.

In order to alleviate this problem many law schools as well as the federal government and some states have implemented Loan Repayment Assistance Programs (LRAPs). Under these programs, recent graduates who enter public service are eligible to have a portion or even all of their debts forgiven if they remain in public service.

Some LRAPs provide the ability to completely wipe out law school debt. Under the LRAP offered by Stanford University's Boalt College of Law, qualifying graduates are eligible to have up to $100,000 of their law school loans repaid. The programs offered by Ohio law schools are much more modest. OSU's Moritz College of law offers a forgivable $4,000 loan for graduates entering public service. While the Cleveland-Marshall College of Law offers its qualifying graduates up to $9,000 in loan repayment assistance.

While much of the focus has been on the impact of loan debt on public service, studies indicate that it is also having an impact in the public sector. Driven by the need to repay their loans, new lawyers are increasingly making career decisions motivated solely by starting salary. This results in increased burnout rates, especially for those who have accepted "golden handcuffs" in order to pay off loans.

Studies have also shown that pressure to repay loan obligations is one of the leading causes of ethics violations for new lawyers. The relentless pressure for income to repay loan obligations can lead to lawyers taking on more cases then they can reasonably handle forcing them to cut corners or in extreme cases, commingle funds or use client funds to pay off personal debts, including student loans.

Assuming that you don't have access to a time machine allowing you to go back and tell your younger self to live frugally and not borrow that much money, what can you do about your law school debt? Declaring bankruptcy's out. Not only are student loans ordinarily non-dischargeable, but filing for bankruptcy ensures a visit from the disciplinary committee.

If you qualify for a LRAP, you should definitely try to participate. A list of law schools and government entities offering LRAPs and other loan repayment assistance can be found at www.equaljusticeworks.org/finance.

If your loan payments are a financial burden and you don't qualify for a LRAP, your best option is probably to consolidate and restructure your loans to extend the repayment period. This will result in paying more over the life of the loan but should reduce monthly payments to the point that they won't break your budget. Information on loan consolidation can be found on the Department of Education's website at www.loanconsolidation.ed.gov

To prevent other debt from adding to your financial burden, you should also resist the temptation to "keep up with the Joneses," particularly if Mr. Jones is the Senior Partner in the corner office down the hall.

Finally, try to keep things in perspective, your law degree is an investment that will pay off over time, if not immediately. Lenders are aware of this, so as long as the rest of your financial house is in order, your loan debt won't be an anchor on your credit rating. If nothing else, take solace in the words of a recent law school graduate $160,000 in debt, "the nice thing is, I'm pretty much judgment proof."

1. *Equal Justice Works, National Association for Law Placement and Partnership for Public Service, From Paper Chase to Money Chase: Law School Debt Diverts the Road to Public Service (2002). www.equal justiceworks.org*


Jeff Hartranft

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Do as We Say, Not as We Do! …or, Lawyer, Counsel Thyself![1]

By Kim H. Finley,
Office of the Ohio Insurance Liquidator

As attorneys and counselors at law, in part we are paid for our advice. Yet, some of us are failing to follow our own counsel. It's a classic case of "do as we say and not as we do" it seems.

Before I start outing my fellow lawyers, and potentially former friends, I'm coming clean with my own dirty little failing-to-follow-sound-legal-advice secrets. My husband and I have been married nearly 19 years, and we have three children ages 13, 10, and 7. We have no wills, no trusts, and no guardianships set up should anything happen to us. I feel like I should wear some type of scarlet letter….maybe an "S", and I'll let you decide if that is for "stupid," "slacker," or "sucker."

Although I am not an estate planning lawyer, anyone who's been to law school, knows enough to counsel a client to have important legal papers such as these drafted and executed. If I were in a position to counsel clients, I would certainly encourage them to do so for the protection and welfare of their family.

I'm not alone in this area, a colleague who asked for anonymity, related pretty much the same when I took an informal email survey for this article. This attorney said it was doubly bad in her household where both spouses were attorneys and one was even an estate planning lawyer. Yet they also did not have any estate documents disposing of their property or more importantly, dealing with the guardianship of their children.

Being legally unprepared, indifferent, or perhaps just willfully disobedient to our own advice seems prevalent in family law situations. Divorce attorney Susan Kenney-Pfalzer said she has no idea about her family finances. If her husband were to die, or they were to divorce, she admitted that she would not know where to begin.

"I trust him implicitly, but as a divorce lawyer, of course I would be aghast at a client who didn't have the first clue about her own finances," Kenney-Pfalzer said. She said she's not following her own advice because her husband is a math teacher and better at "that sort of thing." Furthermore, she said she is simply too busy with her law practice to care and she trusts him.

And what would she say to a client who told her that? "I would say that I understand, but now that the person is thinking about divorce, it's time to get educated!"

While estate planning or even understanding the diverse financial holdings of a marriage might qualify as fairly complex matters that some might argue would give even lawyers pause, even simple advice can go unheeded.

Attorney Christopher McCloskey said he sent a nagging email to clients, friends, and family chiding them that it only took a few minutes to walk down to a copier and throw the information in their wallet – i.e. license, credit cards, etc. – on the glass, press copy and stick the piece of paper in a file for safe keeping in case their wallets were ever lost or stolen.

"But I have yet to take that walk two years later," McCloskey admitted.

Fellow attorney Sherry Fleury knows how McCloskey feels. It's been three years since she received a form to change the beneficiary on her PERS account from her previous employment, yet she has not simply filled out the form and mailed it back.

While most of the best advice we give yet ignore ourselves appears to go to our personal affairs, one area did come up that concerned professional conduct. A few of those polled responded that some attorneys (they disclaimed that it was them personally) appeared not to be following their own employment law advice.


Kim H. Finley

Whether it is a lack of formal management training, or perhaps with some the ability to get by with it, a few respondents said advice given to clients about how to avoid discriminatory employment practices and procedures were not always followed every place they had worked as attorneys.

So what are we to do? First, let's stop making excuses for not having our legal houses in order. Having publicly revealed my shame, I can at least no longer be in denial.

Next, we can go down the hall to a colleague or call or email a law school buddy and perhaps get the expertise we need. Some of my hesitation has been because of my lack of estate planning experience. But I'm sure to have plenty of classmates or former co-workers who could help me with referrals or who could do the work for me.

And perhaps it is merely as simple as setting aside a few minutes to copy your wallet contents, or mail a form. Put this article down right now and just do it. Not only will you feel better, the next time you give legal advice, you'll know the smartest people heed it.

1 *Of course the phrase is "Physician, heal thyself…" and it is from a New Testament proverb in Luke Chapter 4. The meaning, though, is clear. Tend to one's own faults before addressing the concerns of others.*

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'What to wear':

NEW LAWYER EDITION

As spring nears and winter layers are shed, now might be a good time for new lawyers to take a look at their wardrobes and ask some hard questions. If clothes make the lawyer, do business casual clothes make people perceive you as less a lawyer? Perhaps, if you end up looking like the college law student while your summer associates look like they could be second chair at the next court of appeals argument.

Thankfully, some friends of Better Lawyer agreed to give a few pointers for new lawyers who want to keep looking professionally sharp. Follow their advice, and you'll not be one of those fashion "don'ts" sporting a black bar over your eyes in the back of some magazine.

Mark Kafantaris
Solo Practitioner, Kafantaris Law Offices

We can all agree that our profession is a bit confined in terms of what constitutes acceptable dress. Indeed much of our daily wardrobe is governed by whether we have court that day, are meeting a client, or are simply working on a file.

Yet, there might be something to the adage that "the clothes make the man." Prospective clients, witnesses, and jurors are constantly sizing us up by our appearance — just as we do them. And they can be less forgiving when something is amiss.

Have you heard the story about the guy who upon seeing the lawyer that sued him turned to his own lawyer and said "We shouldn't have too much trouble with him. Did you see his shirt; it's got a button missing."

What about the Judge who ordered his bailiff to note the new lawyers' shoes, and report to him if they were unkempt. Never mind that he himself walked around all day shoeless, and often sporting holes in his socks.

Yes, our profession is colorful indeed in dress as well as everything else. But we wouldn't have it any other way as there is no one else out there who understands us half as well as we understand ourselves.

Hope M. Sharett
Associate, Bricker & Eckler

My office has a business-casual dress code, but I generally choose to dress in business formal attire for work. Why, you might ask? Here are a couple of reasons why I think dressing up is worth the extra effort if you are a new lawyer:

Top Five Reasons to Suit-up for Work in a Business-Casual World

5. *You work faster if you are slightly uncomfortable. It's sad, but strangely true.*
4. *Why not fully commit to the role and dress like an attorney. Sure, you may not leave your desk today, but the people you pass in the hall will be convinced that at least your career is going somewhere.*
3. *You don't have to iron a suit.*
2. *You don't have to iron the back of your shirt if you wear a suit (please keep your jacket on!).*
1. *Because THEY'RE COMING… Okay, maybe the Summer Clerks are younger, more athletic, more well-read, more well-traveled, better at electronic research, fluent in Mandarin Chinese, and have plenty of spare time to shop, BUT they do not have to look more professional than you do, and really you shouldn't let them. Show a little pride in your JD and put on a suit!*

Jeff Mussman
Associate, Squire Sanders and Dempsey

Clothing speaks loudly, and in short, crude sentences. The last thing I want is for my clothes to contradict what I'm saying. Therefore, I choose clothes that give me the proper context and say as little else as possible. I wear suits and ties that are simple and classic. No surprises. I also pay attention to details, like the length of my tie, because missed details are distracting and would keep me from being seen in the context I want. My clothing is unremarkable by design. Jon Stewart wears a suit every night, yet he is very entertaining. His clothes are chosen to put him in a distinguished context and to keep the audience focused on his comedy, not his clothes.

Kerstin Sjoberg-Witt
Associate, Jones Day

I am an associate in the Trial Practice group at Jones Day, but Trial Practice is a bit of a misnomer because I do most of my work from my office, not in a courtroom. The positive side to working mostly in an office setting is the more casual dress that is expected. Our office is officially "business casual," the often referred to but seldom defined mode of dress that exists in many law firm environments today. In my personal quest to discover what this really means, I have developed a few guidelines that have served me well. First, comfort and fit are key. Clothes look better to others when you feel good in them. Second, attention to detail (such as a complementary accessory) adds a dressiness factor that can offset the most casual outfit. Third, when in doubt, do not wear it. If you have to ask: "Is this appropriate?" Find something else to wear.

Brianne Brown
Assistant Chief Legal Counsel, Auditor of State

Our office attire is formal (suits, hose and close-toed shoes), although we are permitted to dress business casual on Fridays.

In my wardrobe choices, versatility is important to me. I try to spend money wisely, purchasing a few expensive, neutrally-colored suits (black, brown, etc.) and shoes, and then bargain shopping for button down shirts, blouses and shells that I can mix and match under the suits. I also try to mix and match fun accessories to liven up an otherwise dull outfit.

I always strive to look professional, yet stylish, and some days I'm sure I do better than others on the latter. I try to avoid anything that's skimpy or revealing at all costs.

My advice for other new attorneys is to spend your money on fabulous, well-made suits and shoes, because that is what potential (and current) employers will notice, and go cheap on the rest.

One thing I absolutely hate seeing in professionals' dress is a great outfit and shoes, but an otherwise disheveled appearance (i.e., chipping nail polish, messy hair, sloppy or overdone make-up). You have to pay attention to the entire package, because inattention to details like your hair, nails, etc. can distract from an otherwise professional, polished appearance.

CHILD CARE AND THE NEW LAWYER PARENT—

It takes a village … 365 days a year

By Kim H. Finley,
Office of the Ohio Insurance Liquidator

Whether you're a single parent or have a dual career household, you share the challenge of finding (and keeping) appropriate child care. As desperate as that situation can be for any working parent, the burden can be even greater for new lawyers.

No new lawyer parent can truly devote the necessary hours learning the practice of law if child care issues are a distraction. Because the practice of law is so demanding, it is essential that you find not only a safe, loving and affordable child care setting, but also establish a back up plan should the primary caregiver be unavailable.

Not only do new lawyer parents have to consider primary and secondary care options, but care needs change as the child grows.

Birth To Age Five

If you select a daycare setting for birth to pre-school, and it is the right fit for your family, you typically can enjoy a four year relationship with a single provider. You come to cherish the regular hours, consistent routines, and familiar setting — even if the bill is more than your mortgage.

Care outside the home by professional enterprises is often referred to as institutional care. That is an unfortunate moniker because most daycares strive to present a happy, inviting and educational atmosphere for their young charges. Advantages of this type of care include state oversight through licensing requirements. In addition, some facilities offer hot lunches so you have one less chore in the morning.

Of course, this option isn't for everyone. There are more children per caregiver in this type of setting and, obviously, if a child is sick alternative arrangements must be made.

Finding a good day care takes planning, such as getting on waiting lists, and visiting for tours and information sessions. You can also get additional information about choosing the right daycare at http://www.occrra.org/.

Other options include home care, either in your home or the caregiver's. If you're really fortunate you might have a relative that wants to help out, but if not, there are services that can help find in-home caregivers. These can be found by searching for "Nannies" or "Sitters" in the paper, phone book, or on-line. If you go this route, it is imperative that you pay to have all the appropriate background checks and get numerous references.

For the adventurous, you might consider a program that supplies international au pairs, a young woman (usually) who lives with a family for a year. As you might assume, live-in child care can be cost prohibitive, especially for young professionals carrying student loans, a new mortgage and car payments. For more information on this type of arrangement, see http://www.iapa.org/.

Age Five Through Elementary School

You'd think raising a child to school age would ease the child care burden, but it simply morphs it. Instead of needing 10 to 12 hours of the same child care, you're now faced with jumbling care together like a patchwork quilt.

Because new lawyers are like most in the free world and actually start work well before the elementary school bells ring (typically around 9 a.m.), before school care is a must. In addition, the school day ends around 3:30 p.m. — about mid-day for many associates — so after school care is needed as well.

Before and after school options can include forming car pools with neighbors, but consider that you will need to reciprocate and determine if that is feasible. And remember, transportation at the right times is not the only issue. Your child may not be old enough to be home alone for those times even if you figure out a way to and from school. In some districts, the YMCA and YWCA run school based childcare programs before and after school and that is a very good alternative. The program is open from 7 a.m. till the start of school and again from the end of school till 6 p.m. Call your school or the YMCA, 224-9622, or YWCA, 224-9121, for more information.

Another option is local daycares that offer drop off and pickup service. Some of the larger franchises, such as Goddard School, Children's World and KinderCare, have vans that offer this service up to a certain age. Locations and prices vary so this will take some leg work.

Kim H. Finley

Summertime And The Living Is Far From Easy

Just in case you can't recall your primary school days, there is still this time called "summer break." Talk about a working parent's worst nightmare. Despite our society being far flung from its agrarian roots, our educational system has stuck to its 185 day calendar. When June comes, parents are back to finding all day child care until fall. This may come as a particular shock to new lawyer parents who just got used to having a child in school. Even if there are younger siblings in a full-time care setting, that may not be a viable option for your school-age child. And that scenario creates some interesting logistical challenges in regards to drop off and pick up times for the various providers.

Obviously there are institutional (depending on the age of the child), and home care options available, but another option is to tap into the hundreds of summer camps offered in the area. From COSI to the YMCA, summer day camp programs abound. There are athletic camps, theatre camps, high adventure camps, arts and crafts camps, and even inventions camps. Besides day camps, there are overnight camping opportunities.

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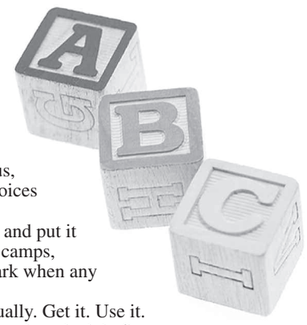
Tips on planning for summer child care:



- Start early. Summer camp planning begins in February. The popular ones can fill quickly. Plus, it is helpful to start early so you have lots of choices on dates.
- Print a blank calendar of June, July and August and put it in a small three ring binder. As you register for camps, mark through the weeks and note the camp. Mark when any payments and paperwork are due.
- Columbus Parent publishes a Camp Guide annually. Get it. Use it.
- Don't forget to put down your own vacation onto the schedule first. You don't want to schedule and pay for a camp only to discover that is a week you are on vacation.
- Start budgeting for the expense. Some camps are relatively inexpensive compared to weekly daycare rates. Others, however, can be costly, especially if they are residential. A down payment is usually required to register and payment of the entire fee is due before camp starts.

Mediation: What is it and how does it really work?

To have a successful mediation, the mediator needs to be able to figure out those motivating factors and then be flexible enough marshal the process accordingly to allow the parties to reach a mutual resolution.

By Christopher L. McCloskey, Bricker & Eckler, LLP

As a new lawyer, I had often heard other attorneys talk about "mediating" cases. At the time, I knew the Black's Law Dictionary definition of "mediation" ("A method of dispute resolution involving a neutral third party who tries to help the disputing parties reach a mutually agreeable solution but whose decision is not binding."), but I had no idea what went into a mediation or how it really worked.

Of course, I had the option to take a class in law school on mediation, which would have certainly given me the necessary insight into the process, but I chose instead to take a class on international law. As it turns out, however, the international law choice was not the more practical of the two, considering that my law practice here in Columbus neither consists of negotiating treaties on behalf of any of the 192 Member States of the United Nations, nor does it consist of prosecuting War Crimes before the International Court of Justice at The Hague, Netherlands; but I do need to mediate your run-of-the-mill lawsuit from time to time.

So, I signed up for a CLE class on mediation. The nickel-tour of what I learned about the process is as follows. The mediator brings the parties together in a conference room and gives them an introductory explanation of the process, informing them that the mediator is a neutral party whose role is merely to facilitate a voluntary resolution of the dispute and not to "decide" who wins and losses; that nothing confidentially disclosed to the mediator will be conveyed to the other side unless the party specifically authorizes the mediator to do so; and that the parties are encouraged to speak freely because none of the statements made by them during the mediation can be used against them as evidence at trial.

The show is then turned over to plaintiff's counsel to make an opening statement about how the plaintiff views the case and why the plaintiff's case will succeed at trial. The defendant's counsel is then given a similar opportunity make an opening statement to explain the shortfalls of the plaintiff's case and why it will not be successful at trial. Once the open remarks have concluded, the parties split up into different conference rooms and the mediator shuttles back and forth between the two rooms to caucus independently with the parties, listening to their arguments, playing "devil's advocate" and conveying the offers and counteroffers; all with the hope of reaching a mutual resolution of the dispute at some point.

The CLE class I attended was taught by Harold Paddock, who at the time was a Franklin County Magistrate and coordinator of "Settlement Week" in Franklin County, as well as a number of surrounding counties. In Franklin County, Settlement Week is typically conducted twice a year with the purpose of encouraging parties to resolve lawsuits through mediation. Specifically, over the course of the week, the court makes its conference rooms and facilities available for mediation free of charge, along with a volunteer mediator, and it encourages parties to participate so that their lawsuits can be resolved without going to trial. The obvious goal of the court is to free up the docket, but the advantage to the parties is that they can resolve their lawsuits without having to incur the continuing costs of protracted litigation.

The CLE class was offered free of charge, with the understanding that the attendees would participate in Settlement Week as a volunteer mediator. Of course, being a new lawyer with very little mediation experience, I was assigned to a relatively simple case with a low dollar amount in dispute. But I wasn't fazed. Armed with my new knowledge, I approached the case with the fervor of a million dollar dispute. I made my opening remarks and then gave opposing counsel an opportunity to do the same. As it turns out, the case was a fender-bender where the plaintiff suffered some soft tissue damage in her neck, which allegedly caused her significant and ongoing pain. Her medical expenses consisted of a number of visits to her chiropractor, which amounted to approximately $6,500. Her initial demand was $25,000, which included an amount for pain and suffering. The insurance adjuster for the defendant, however, only offered $6,500.

I then escorted the insurance adjuster and his counsel to a different conference room and began caucusing back and forth. I first explained to the plaintiff that Franklin County juries can be difficult to convince in these types of cases when there is only soft tissue damage – she dropped her demand to $20,000. I then changed gears and informed the defendant's adjuster that he will likely have his hands full at trial because the plaintiff is a very sympathetic and believable older woman that happens to look exactly like my beloved grandmother — he raised his offer to $8,500. The process was working.

Christopher L. McCloskey

After caucusing back and forth for the better part of an hour, I headed back to the plaintiff's room with the latest counteroffer from the defendant. When I entered the room, she looked me square in the eye and asked "How much longer is this going to go on?" "Ma'am, I'm prepared to stay here as long as it takes," I confidently responded. "Well, I'm not, sonny," she sternly replied. "I have an appointment for a cut-and-color at the hair salon in forty-five minutes that I don't plan on missing, so you go get that insurance adjuster and bring him back in here because I have a few things I want to say to him."

Although slightly rattled by the unorthodox request, I went to the other conference room and retrieved the adjuster and his counsel. Immediately upon our return, the plaintiff informed the adjuster that she accepted his latest offer and then proceeded to chastise him for the next twenty minutes about his conduct before the lawsuit was actually filed. Apparently, the adjuster wasn't convinced that she was actually injured in the accident despite her recapitulations about her inability to even lean her head back far enough to see the upper shelves of her kitchen cabinets. The adjuster, however, was clearly very seasoned, because, despite her contentious tone and castigatory remarks, he didn't make another peep once she announced that she had accepted his latest offer. At the end of her rant, I thought about asking her how, in light of her injuries, she was going to be able to lean her head back in shampoo basin at the hair salon, but then I realized there was absolutely no future in me asking that question; so I let it go.

At any rate, what I learned at the end of the day was that it's not always the strength of the legal issues in the case, or the efforts of the mediator, that drives a case to resolution. Sometimes the plaintiff just wants a forum to yell at the defendant and be able to finish in time to make it to a hair appointment. To have a successful mediation, however, the mediator needs to be able to figure out those motivating factors and then be flexible enough marshal the process accordingly to allow the parties to reach a mutual resolution.

If you would like more information on participating in Settlement Week, you can contact Harold Paddock at 614/839-0400 or Harold@SettlementWeek.com.

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Trademark Primer:

Using federal registration to protect your client's business names and logos

By Jon Murphy, Chappano Wood PLL

The lawsuit Cisco Systems recently filed against Apple Computer over Apple's use of the *iPhone* trademark illustrates the high stakes that can be at issue in trademark disputes as well as the importance of federally registering a trademark. It also provides a great opportunity to introduce new lawyers to an area of law with which many may be unfamiliar.

In early January, Apple unveiled its *iPhone*, the new all-in-one cell phone, digital media player, and internet communications device to be made available to consumers in June. Apple decided to use the *iPhone* name despite the fact that it's a federally-registered trademark owned by Cisco. Cisco promptly responded to Apple's announcement by filing a lawsuit in federal court seeking an injunction preventing Apple from using the *iPhone* name.

Businesses like Cisco and Apple recognize that trademarks, which are the marks and names businesses use to identify themselves and their products and services in the marketplace, can be nearly as valuable as the products themselves. Business names like *Xerox*, *Home Depot*, and *Starbucks* contribute immeasurably to the esteem in which such companies are held by consumers and investors. The same goes for product names like *iPod*, *Big Mac* and *Kleenex*. That's why it's critical for businesses to carefully choose their names and to vigilantly protect them from infringement by others.

Trademark infringement disputes are governed by federal, state and common law, which together aim to prevent businesses from unfairly capitalizing on the goodwill another company has developed in its marks and names. Federal trademark law also seeks to prevent consumers from being misled by the use of confusingly similar marks that originate from different sources. This issue of confusing similarity is the one on which many trademark disputes hinge.

Jon Murphy

Two additional concepts central to trademark law are priority and distinctiveness. Priority refers to the rule which holds that, generally speaking, the first business to actually use a trademark has rights in the mark that are superior to subsequent users of the mark. Almost as important is the issue of distinctiveness. Marks like *Kodak* and *Exxon* are inherently distinctive because they are coined terms that have no meaning aside from the companies they name. The more distinctive a mark is, the more likely courts will be to enforce the owner's rights in the mark. On the other hand, marks like *General Motors*, *International Business Machines*, and *Burger King*, which are descriptive of the products and services offered by these companies, are not inherently distinctive but have become well-known through continuous use over time. Such marks are said to have acquired "secondary meaning" and are protected to the same degree as distinctive marks.

Although trademark ownership may be created as soon as a business uses a distinct name, logo, or slogan to identify its business or product, businesses looking to protect marks often seek to register them with the United States Patent and Trademark Office ("USPTO"). This is because federal registration carries with it the presumption that the registrant is the mark's true owner and that later users deliberately copied the mark. This presumption makes it less difficult to prevail in trademark infringement suits.

Once a trademark application is submitted in proper form, an Examining Attorney at the USPTO reviews the application to determine whether it meets the requirements for federal registration. These requirements include, among others, that the mark be distinctive, that it is not confusingly similar to an existing registered or unregistered mark, and that the mark is not scandalous, immoral, or deceptive. If these requirements are met, the application will be "allowed" and published for opposition in the PTO's *Official Gazette*. Publication in the *Official Gazette* is intended to permit third parties the opportunity to notify the PTO of a desire to oppose registration of the pending application. Any third party that believes it may be damaged by registration of the mark has grounds to oppose an Application. Generally, such oppositions are filed when the owner of a mark feels the Application is confusingly similar to its federally-registered or unregistered mark. Potential opposers have 30 days from the date of publication to file an opposition action.

Only a small minority of applications that are published for opposition face opposition proceedings. Such proceedings are often uphill battles, as they are generally based either on unregistered marks or on registered marks that the Examining Attorney previously determined to be non-conflicting.

After an application based on actual use is published and the opposition period has expired with no oppositions being filed, the mark will be registered, and a certificate of registration will be sent to the applicant. Intent-to-use applications that are published and not opposed will only be added to the federal register after the applicant puts the mark into use in commerce and submits an "allegation of use" form to the PTO along with specimens depicting the mark as it is used in commerce.

Typically, it takes between 12 and 16 months from the date an application is filed for a trademark owner to obtain its registration certificate. Federal registrations are valid for 10 years, and may be renewed for additional 10-year periods. By registering and renewing their trademarks with the USPTO, companies take an important step in protecting their business names, logos, and slogans — valuable assets that help identify their products and services in the cluttered marketplace.

Obviously, this article is a brief introduction into the complex world of trademark law. But if you have a client looking to protect a new business name or logo, this will get you started.

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LEGAL WRITING TIP

Proofreading:

More than just spell checking

By Jameel S. Turner,
Bailey Cavalieri LLC

Jameel S. Turner

For new lawyers, being crunched for time on projects is more often the norm than the exception. Therefore, because of looming deadlines, neophyte lawyers may unintentionally neglect the proofreading and editing segment of their work. Often, time constraints reduce proofreading to a point-and-click on the "Spell Check" tab of the lawyer's word-processing software.

But even the most popular spell-checking software does not flag common drafting errors that can be easily overlooked by a lawyer eager to get a project off his or her desk. The following short list of common-drafting-errors-not-normally-flagged-by-spell-checking-software is aimed to assist novice lawyers who are routinely forced to proofread under strict time constraints.

1 Affect vs. Effect

Affect is a verb that means to influence. Effect is a noun that means result. If you affect something, you can cause an effect.

2 It's vs. Its

"It's" is a contraction for "it is" or "it has." "Its" is a possessive pronoun meaning belonging to. This is a drafting error easily overlooked when proofreading in a hurry or only using the spell checking software.

3 Farther vs. Further

Farther means more distant physically, as in the sentence, "She lives farther away from the university." Further means to or at a greater extent or degree, as in the sentence, "Nothing could be further from the truth."

4 Plain English

Most readers prefer ordinary English words over traditional legalese such as herewith, therein, and aforesaid. The best way to eliminate traditional legalese is to ask, "Would I say this if I were talking to someone face to face?" Replace legalese with ordinary English wherever possible in your work.

5 Personalize it

Finally, make sure that you always personalize your proofreading to specifically catch the types of errors that you tend to make. Because you know your own work best, always review your work one last time exclusively looking for the types of mistakes you tend to make, even if time is of the essence.

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TOP TEN *Mistakes* in Home Improvement

By Maureen P. Taylor,
Bricker & Eckler LLP

Maureen P. Taylor

Last October's storms in the Columbus area brought gusty winds, hail the size of ping pong balls, and enough door-to-door roofing salesmen to fill Value City Arena. Suddenly, every house in whole subdivisions needed new roofs and siding. "Home Improvement" was not just a nice idea when you got some extra money; it was a necessity. To this day — in my neighborhood, at least — every third driveway contains a dumpster, and the air is filled with sounds of hammering.

With all this home construction work going on, it seems like a good time to remind everyone of some of the things **not** to do when you are having work done on your home. Everyone has at least one "I Wish I'd Known Then" story to tell. So, with apologies to David Letterman, here are the Top 10 legal and practical errors to avoid when you are converting that half bath into a full bath, updating your kitchen, or getting a new roof.

MISTAKE No. 10
Not assuring that someone gets the appropriate permits.

If the work requires a permit, it is important to know — before the project starts — whether the permits will be your responsibility or the contractor's.

MISTAKE No. 9
Not understanding who is really going to be doing the work.

Many homeowners who contract with one company are distressed to find that a subcontractor actually performed the work. Subcontracting is a fairly standard practice and usually not a big concern, but it is good to know who the subcontractor will be before the work starts. "No surprises" is always the best rule.

MISTAKE No. 8
Not insisting on a Guaranteed Maximum Price.

You need to know up front what your project will cost. Even a Guaranteed Maximum Price can be modified, by mutual agreement, if unexpected conditions make the work way more expensive than anyone anticipated before the project began. But if you agree to a "time and materials" contract, you are providing incentive for a contractor to stretch the project out as long as possible, as additional hours mean more money in the bank. A reputable contractor won't do this, of course, but why provide the motivation?

Mistake No. 7
Paying for everything up front.

Don't do it! Although different contractors have different payment plans, it is fairly standard to pay one third when the contract is signed, one third when the work begins, and one third when it is done. The size of the contract and the length of time it will take may vary this, of course. If you are paying half or more up front, consider depositing the money in an escrow account.

MISTAKE No. 6
Not getting any changes agreed to in writing, signed — or at least initialed — by both parties.

You were sure when you left for work in the morning that the contractor understood you wanted the window moved a foot to the right of where it was in the original plans. But if the change was not in writing, you shouldn't be surprised at the end of the day to find the window a foot to the **left** — after all, he may have been looking at the window from the outside of the house instead of the inside. Get it in writing.

MISTAKE No. 5
Failing to specify the "scope" of the work.

"Scope" may be a term of art, but everyone understands the principle. If you want a bathtub and a stand-alone shower installed in your half bathroom, failing to specify exactly what you want may result in a one-piece tub-and-shower combination.

MISTAKE No. 4
Leaving the timeframe open-ended.

If you are expecting to have your new deck completed in time for your Fourth of July party, you had better say so, specifying a date when it must be substantially complete. (That was the situation in *Fuschino v. Smith*,[1] and because Fuschino had specified both that "time is of the essence" and that the deck would be completed by May 31, he was able to collect damages when the deck was not finished until October 19.)

MISTAKE No. 3
Not doing your homework to check out the contractor you are hiring.

If you work in a law firm that does construction law, you have access to a goldmine of information about contractors. Expert witnesses are particularly knowledgeable about good and bad companies in their areas of expertise. Running a simple conflicts check can tell you which companies your firm has sued – obviously, not the best ones to hire. But even if you don't know any construction lawyers, you can check with the Better Business Bureau and try to find out if the company you are considering is on Angie's List. (There is a membership fee to join Angie's List, but I have found that most companies who earn that distinction proudly declare it on their business cards and stationery.) Finally, there is always Google; if the company has had complaints wind up in court, you are likely to find them in a Google search.

MISTAKE No. 2
Not getting a written contract.

If you had begun with a written contract, even a one- or two-page listing of requirements and expectations, you could have avoided many of Mistakes 3 through 10.

MISTAKE No. 1
Doing it yourself!

Even if you did sleep in a Holiday Inn Express last night, you don't necessarily know how to install the plumbing for a shower or rewire your house. When you realize, in mid-project, that things aren't going so well — Why is that water collecting between your walls, anyway? — it will invariably cost you more to get someone to correct your errors than it would have cost to hire a professional in the first place. Hire the right person to begin with, and avoid the blow to your ego when you have to admit that despite umpteen years of college you can't hang a sheet of plywood properly.

[1] *Fuschino v. Smith (Jan. 5, 2001), 2d Dist. No. 2000-CA-31. This decision is frequently used to justify a plaintiff in collecting both actual damages and liquidated damages.*

mtaylor@bricker.com

Although different contractors have different payment plans, it is fairly standard to pay one third when the contract is signed, one third when the work begins, and one third when it is done

I need help! Time to hire support staff

By Susan Kenney-Pfalzer

I've been a solo practitioner in the area of family law for about two and a half years now and I have been pretty much a "one woman shop" until recently. But my practice had grown to the point where I really needed some help. Although it was a bit scary, I decided to take the plunge and hire my first staff person.

The first question I had to decide was whether I would hire an employee or use an independent contractor. Independent contractors (IC's) are people who contract to perform services for others. There are many benefits to using IC's, such as reduced costs in expenses, payroll, benefits and other overhead. IC's can also provide more flexibility than traditional employees in that you can use them when business is booming but then not have to worry about how to pay them when business is slow. Also, IC's are usually already experienced in their fields, thus eliminating the time and expense involved in training employees, and can often work from home, reducing your overhead.

There are also some cons to hiring IC's instead of employees, the scariest of which is getting hit with misclassification penalties. If you are audited by the IRS, and it determines that you misclassified someone as an IC rather than as an employee, you will have to pay back all taxes that should have been paid, with interest, plus a penalty.

There are a number of factors that the IRS looks at in determining how to classify a worker. For example, a worker is more likely to be classified as an IC if he or she:

- Furnishes the tools and materials needed to do the job;
- Works for more than one client company at a time;
- Pays his or her own business and traveling expenses; and
- Sets his or her own working hours.

The IRS is more likely to classify as an employee a worker who:

- Receives instructions and training from the hiring company;
- Works full time for the hiring company;
- Receives employee benefits; and
- Provides services integral to the hiring company's day-to-day operations.[1]

Also, having a written IC agreement can help "tip the scales" toward a worker being classified as an IC where all other factors are evenly balanced.

However, the Ohio Department of Taxation has a much narrower definition of an employee: "Every individual who performs services subject to either the control and/or will of an employer, whether as to what shall be done, is an employee for purposes of Ohio income tax."[2] Audits by state agencies are more common than IRS audits.

Of course, the other option, and some would say the safer option, is to hire an employee. You may only need a part-time employee, in which case you would probably not have to offer any company-sponsored benefits. Regardless of whether the employee is part-time or full-time, you will probably need to set up a payroll system or hire a company to administer your payroll, because the tax-related requirements of employers can be complicated. As an employer, you must withhold both federal and state income taxes as well as FICA (Social Security and Medicare taxes). You must also pay state unemployment tax and workers compensation premiums. Additionally, most full-time employees will expect some type of benefits package and there is usually added overhead to consider, especially if you need to move to a larger office to accommodate an employee.

I am not an expert in this area. I'm just trying to figure it out as I go along. In an informal poll of my peers practicing family law, it appears that most of them hire employees rather than independent contractors. However, I think you really need to look at it on a case by case basis. In my case, I found a great paralegal with lots of experience in my field (thus I don't need to train her). She's going to work mostly from home (thus using her own equipment) and has the opportunity to work for other attorneys at the same time she's doing work for me. She sets her own working hours for the most part and pays her own travel expenses. So after talking with my accountant, I feel pretty safe classifying her as an IC, even though I have heard some horror stories from other attorneys.

So, if you're thinking about hiring staff, consider your options but definitely talk to your accountant!

[1] *Hiring Independent Contractors FAQ, http://smallbusiness.findlaw.com, Thursday, Dec. 21, 2006*

[2] *Ohio Employer Withholding Tax General Guidelines, Ohio Department of Taxation, Rev. 8/06*

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Susan Kenney-Pfalzer

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Calendar

April 18 - Lunch with the Common Pleas Court judges at the Columbus Bar
Sit down for a roundtable chat with our friendly judiciary over lunch. You can discuss practice in and out of the courtroom with a small group of your peers and one of the judges over an informal lunch. For more information or reservations, contact Lara Bertsch, lara@cbalaw.org or 614/221-4112.

May 16 - Service Month
New lawyer members can explore the many opportunities for service in Columbus through the Columbus Bar and other organizations.

June 8 - Columbus Bar Annual Meeting
New Lawyers are invited to join the general membership in celebrating a year well spent and preparing for the coming year. Tables and individual tickets will on sale throughout May. Contact Lara Bertsch, New Lawyers Coordinator, lara@cbalaw.org or 614/221-4112.

June 13 - Summer Happy Hour for new lawyer members and summer associates
Each year, we hold a special summer party as a thank you for our dedicated new lawyer members and also use the opportunity to get to know new people. Last year we celebrated with gourmet appetizers at Shane's Gourmet Market in German Village. The year before, we sampled the food and micro-brews at Gordon Biersch in the Arena District. This year, who knows? Watch for an update, or email lara@cbalaw.org.

WHAT HAPPENS IN MEDIATION STAYS IN

Mediation

UMA survives a first attack

By Shirley A. Cochran

It all started when a corporation contacted a mediation center in Ohio to mediate between two employees. Before the mediation could be scheduled, one of the employees was terminated. The company, concerned about future personnel conflicts, asked the mediation center to help resolve other simmering disputes in the department of the former employee. The center's director sent out confidential questionnaires to the department's employees asking for issues to be discussed, met with groups of employees, facilitated the discussion of problem areas and assisted in resolving conflicts and disputes listed on the returned questionnaires and brought to light in the group meetings.

Following the discussions, the employees (not the mediation center) submitted to their board a plan of action to avoid issues of conflict, including those raised by the situation with the former employee. Meanwhile, litigation filed in Common Pleas Court pitted the former employee as a plaintiff against the corporation. Counsel for the plaintiff issued a subpoena duces tecum for the mediation center's records and sought testimony by the center's director regarding contacts with the defendant corporation.

That is when I received an email request for assistance. When I, along with several others, conducted training in the Uniform Mediation Act (UMA) in 2005, I encouraged anyone subpoenaed to contact me to track such incidents and offer help in quashing subpoenas if the mediation privilege was attacked.

The Uniform Mediation Act (UMA) was enacted by Ohio's legislature as Chapter 2710 of the Ohio Revised Code and became effective October 29, 2005. It repealed Ohio's former mediation privilege statute, replacing it with a broad protection of the confidentiality of the mediation process that is a cornerstone of why mediation works. In a mediation, if people believe that what goes on in the session will stay in that room, will be kept confidential, they are more likely to open up the discussion to what is really behind the dispute and be more willing to brainstorm solutions that may end the problem. To protect that confidentiality and keep the parties, mediator and nonparty participants from having to testify, the UMA provides a privilege personal to each person's position in the mediation. The mediator is able to refuse to testify about anything that happened at the mediation, with certain exceptions, and to keep others from testifying about what the mediator said during the process. Specifically, it provides: O.R.C. Section 2710.01 (A) "Mediation" means any process in which a mediator facilitates communication and negotiation between parties to assist them in reaching a voluntary agreement regarding their dispute.

2710.02 (A) Except as otherwise provided in division (B) or (C) of this section, sections 2710.01 to 2710.10 of the Revised Code apply to a mediation under any of the following circumstances: *** (3) The mediation parties use as a mediator an individual who holds himself or herself out as a mediator, or the mediation is provided by a person who holds himself out as providing mediation.

2710.03 (A) Except as otherwise provided in section 2710.05 of the Revised Code, a mediation communication is privileged as provided in division (B) of this section and is not subject to discovery or admissible in evidence in a proceeding unless waived or precluded as provided in section 2710.04 of the Revised Code. *** (B) In a proceeding, the following privileges apply: *** (2) A mediator may refuse to disclose a mediation communication. A mediator may prevent any other person from disclosing a mediation communication of the mediator.

In other words, if a person facilitates communication and negotiation between parties in dispute, assisting them in reaching a voluntary agreement about the dispute, and holds himself out to be a mediator, the privilege is theirs to assert to keep them from having to testify in discovery or in a proceeding.

It appeared fairly obvious that although there were two different instances involved, the center's staff attempted to facilitate the communication and negotiation between parties in dispute (originally plaintiff employee and a member of defendant's staff; secondly between members of defendant's staff in the department), assisted them in reaching voluntary agreement about the dispute (no agreement in the first instance as the session was never held; voluntary agreement in the second instance); the mediation center staff held themselves out as mediators, and the mediation center staff believed confidentiality is essential to the mediation process.

Plaintiff's counsel did not see it that way. He asserted the director acted as a consultant, and although he never explained what that meant, he felt if this privilege was permitted to stand all sorts of consultants could go into businesses and, by using "magic words" (such as mediation), keep from having to testify about anything that went on. A copy of testimony in a deposition of one of defendant corporation's employees was provided as proof that there was no mediation when the meetings with the departmental staff took place, but it was not clear why he thought that it was proof there was no mediation. A heated telephone conversation took place after the filing of the motion for a protection order where plaintiff's counsel made accusations of perverting the true meaning of the UMA, but in the end he withdrew the subpoena in a formal court filing making the motion moot while reiterating his accusation of frivolousness and perversion of the UMA. It was not a pretty win; but a win nonetheless.

Should anyone be aware of subpoenas issued for testimony about a mediation communication, please contact me or Maria Mone, Executive Director Ohio Commission on Conflict Management and Dispute Resolution, so we can be consistent in responses to attacks on Ohio's mediation privilege statute.

scochran@insight.rr.com

Shirley A. Cochran

Agency Adjudications in Ohio

THE CENTRAL PANEL PROPOSAL

By Christopher B. McNeil

Ohio businesses, license holders, and professionals regulated by state agencies, and the attorneys who serve them, should take note: 2007 promises to be a year with great potential for changing the way the state conducts agency business.

Two seemingly disparate forces will occur in 2007, both of which may significantly change how state executive agencies operate. The first, of course, is the inauguration of Ted Strickland. When he became Ohio's sixty-eighth governor, Governor Strickland became the head of one of the largest administrative systems in the country, one that has seen no small amount of attention paid to it, particularly in the area of workers compensation. Given the strength of his candidacy and his substantial bipartisan support, Governor Strickland will be well-positioned to thoroughly examine agency structure, particularly with respect to public accountability in all agency activities.

The second event is less widely known but has the potential for prompting a significant leap in the evolution of administrative process in Ohio. Later this year, the National Conference of Commissioners on Uniform State Laws will meet to discuss the report of the Drafting Committee to Revise the Model State Administrative Procedures Act. The drafting committee has spent two years examining the Model State APA, and is nearing the end of its commission. When it issues its report later this year, it will likely offer a model act that suggests substantial changes in the way agencies work. With it, the Conference of Commissioners will provide a thought-provoking analysis of known problems of agency rulemaking and adjudication. While these problems are not tied to any specific state, the areas of concern addressed by the drafting committee resonate in Ohio, and the suggestions for change may prove to be exceptionally relevant here, both to Ohio lawmakers and to its new governor.

Why The Ohio APA Might Be Due for An Overhaul

The Ohio APA may be long overdue for a comprehensive examination. Consider its roots: The modern Model Administrative Procedure Act took its original shape in 1946, largely based upon a successful APA model then in place in California. Prior to 1948 there was in Ohio no express statutory language authorizing courts to review decisions made by executive-branch agencies. The Ohio Constitution, however, granted to the legislature the power to create a means for reviewing agency action, and "[i]n 1948, the Ohio General Assembly exercised this authority by adopting the Ohio Administrative Procedure Act (APA), a version of the 1946 Model State Administrative Procedure Act (Model Act). This law set forth, inter alia, the basic framework for judicial review of state agency actions."[1] Enacting the general provisions of the 1946 Model State APA was, however, about the last legislative effort that focused on statewide agency process.

Since then, the Model State APA has been amended twice: first in 1961, and then in 1981. Some of the major features addressed by the 1961 revisions included requiring agency rulemaking to be used when implementing procedural rules; requiring notice, public input, and publication for agency rulemaking; allowing for judicial review of rules; imposing guarantees of fundamental fairness in adjudications, and providing for judicial review of agency adjudications. Although over half of the states adopted the 1961 Act or large parts of it, Ohio did not.

The Model APA was revisited again in 1981. This time, the changes were prompted by a greater experience with agency action, particularly in such areas as the environment, workplace safety and benefit programs.[2] Once again, however, Ohio did not implement the new Act.

Citing "dissatisfaction with agency rulemaking and adjudication," the drafting committee in 2004 began a review of legislative changes that have been made in states that had adopted earlier versions of the Model State APA. The drafting committee also noted that innovations such as the Internet also had to be taken into account in the new Model Act. And last, the drafting committee noted the substantial change in the structure of many state agency adjudication systems – citing that "since the 1981 Act, approximately thirty states have adopted central panel administrative law judge provisions." This change – from a system of adjudication operated by the agency (as is the case in Ohio) to a system where the adjudicator is employed not by the agency but by a stand-alone entity, independent of the agency but still part of the executive branch – was one of the most important innovations to be addressed by the current drafting committee.

The Central Panel Proposal

Perhaps the single most innovative recommendation in the Draft Act, the one that might most be useful to the new governor, is the proposal to create an Office of Administrative Hearings. The OAH is described as "an independent agency [created] for the purpose of separating the adjudicatory function from the investigatory, prosecutorial, and policy-making functions of agencies." The presiding officers, called Administrative Law Judges in the Draft Act, would be selected and appointed either by the Governor upon screening and recommendation of a judicial nominating committee, or through competitive examination in the classified civil service, or by a Chief ALJ. The ALJs then would be employees of the OAH, and would hear cases for those agencies that are assigned to the Office. The Chief ALJ would be appointed by the Governor with the advice and consent of the Senate, the House, or both, to a six-year term, and may be removed only for good cause.

All members of the Office would be required to abide by a code of conduct for administrative law judges, and the Chief ALJ would be required to "protect and ensure the decisional independence of each administrative law judge." The Chief ALJ would be charged with adopting a code of conduct for ALJs, and would be responsible for monitoring the quality of adjudications through training, observation, feedback and discipline of ALJs who do not meet appropriate standards of conduct and competence. The Chief ALJ would also appoint and remove the ALJs assigned to hear cases for state agencies.

Implications for The New Governor

It probably goes without saying, but the central panel concept is not universally embraced by state agencies. Certainly, the risk exists that ALJs who hear cases through an Office of Administrative Hearings may lack the expertise in agency programs needed to render an informed judgment in any given case. Further, agencies may have a highly efficient process already in place, one that needs no adjustments. Yet an OAH holds some real promise for the incoming governor.

First, it would permit the Governor to set clear goals for adjudication of agency cases – starting from such basic features as the length of time it takes for an agency to render a decision, to the cost associated with each case.

Second, it would foster public trust and confidence in agency adjudications, where it would be clear to the public that the adjudicator is structurally independent of the agency that is prosecuting the case.

Third, it would permit the Governor to implement a code of ethics applicable to agency adjudicators, one that would likely be modeled upon the relevant provisions of the Code of Judicial Conduct, allowing the Governor to hold hearing examiners accountable through a uniform and statewide code of professional ethics.

Fourth, it would permit the training of competent hearing examiners or ALJs in Ohio, while capturing the economies of scale to be realized by having one cadre of highly-qualified executive-branch adjudicators, ready to serve the state whenever the need arises.

Executive-branch adjudications are an essential part of our system of justice in Ohio, and have proven to be highly effective in providing due process to all who face agency action. As the new Governor evaluates the landscape of agency action, he will have the Revised Model State Administrative Procedure Act. The Model offers real promise for improving the transparency of agency decision-making, increasing the efficiency of administrative process, and ensuring public trust and confidence in each agency adjudication.

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1. *Howard N. Fenton, Return to Sender: The Remand Puzzle in Ohio Administrative Law, 29 Ohio N.U. L. Rev. 395, 397 (2003)*
2. *Prefatory Note to the Revised Model State Administrative Procedure Act, citing the Preface to the 1981 Model State Administrative Procedure Act.*

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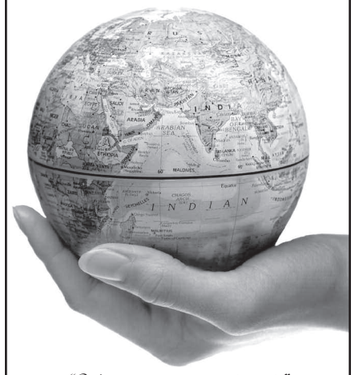
A world of information at your fingertips



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Diversions:

GIVE YOURSELF A BREAK

By Ken Kozlowski

I was asked to write a column dealing with web sites that one could use as a diversion from the rigors of practicing law. You know the times I'm talking about: the aftermath of a day-long deposition, fast approaching brief deadlines, bosses breathing down your neck – you get the picture. Every now and then you just need a short break – a time to dream about the next vacation, the next toy that you're going to buy, or even the next movie you'd like to see if you only had the time. The following ten web sites are some of my favorites within the "diversion" category. Please enjoy them, but not too much. You still have a lot of work to do.

Wikipedia
en.wikipedia.org/

Wikipedia is an online, interactive "encyclopedia." Entries are written by individuals, and can then be edited by others. This has led to some disconcerting moments such as when users discovered to their dismay that they had been identified as being on the grassy knoll during the JFK assassination. This is not to say that there is not a lot of good information on the site, just that one should take it with a grain of salt. Oh, and don't cite to Wikipedia too much in your briefs and other legal memoranda.

Farecast
www.farecast.com

This is a fairly new site that offers advice on when to purchase your airline tickets. After searching for a flight, an arrow will appear (up, down, sideways) with information on whether the fare will increase or decrease in price in the future and whether you should purchase now or wait. Links to ticket purchasing sites are also provided.

YouTube
www.youtube.com/

Everyone has heard of this site by now. Google bought it last year for $1.65 billion. It's a place to look around for video clips old and new. Some of them have been posted by individuals, as was the case with the Diet Coke/Mentos experiments. Others have even been posted by television networks themselves. Just remember that before clicking on a link to a video identified as "NSFW," that the acronym means "not safe for work."

iTunes
www.itunes.com

This is a web site and a piece of software. Owners of iPods will certainly have this on their computers because of the necessity of synching music and videos to the ubiquitous mp3 player. Other may want to check it out for its music store and the ability to play 30-second snippets of songs. Subscribers to the iTunes weekly email also have the opportunity to download a free "song of the week" for their listening pleasure.

Skype
www.skype.com

Skype is a provider of a Voice Over Internet Protocol (VoIP) telephony service. Those that are current Skype users can use their PCs to talk to each other over the Internet just like a regular phone call. Their Skype-Out service (free last year) allows one to call landlines and cell phones from your computer ($29.95 per year), while Skype-In provides you with an actual telephone number for incoming calls (approximately $45 per year; comes with free voice mail). Skype and other third-party vendors now offer various USB, cordless, and Wi-Fi phones for use with Skype. This is a great diversion, sometimes a time saver, and certainly a bargain for those that are near their computers a lot.

engadget
www.engadget.com/

This web log is one of the best for identifying trends in gadgetry, as they have correspondents with their fingers on the pulse of the markets in Japan, South Korea, and China. For those interested in the latest toys, a quick scan of the blog entries via an RSS reader is a must.

boingboing
boingboing.net/

This site, also a blog, covers a multitude of things dealing with technology, other web sites, copyright, world events, and sometimes even some "news of the weird." There is not a subject area that the site specializes in, which makes it an excellent way to stay current on topics that can be used for cocktail party conversations.

Internet Movie Database
www.imdb.com

I have a laptop at home in my kitchen on which the IMDb gets consulted often as we are watching television or movies. It is a great resource for ferreting out who "that guy" was in the movie you just watched. The movie entries also link to trailers, soundtrack information, directors, and the actors themselves.

Techbargains.com
www.techbargains.com

When you need to buy some technology, this web log is a good one to have on your newsreader. It not only identifies sale items, but also points out coupon codes that offer additional discounts and directly links to the merchant sites.

Download.com
www.download.com

The web site clnet provides this site that offers a cornucopia of free downloads in the areas of software, gaming, and music. They also have a set of weekly email newsletters that inform you of the latest and most popular downloads in the same areas.

The Trailer Mash
www.thetrailermash.com

This site is a true diversion. It provides "mash ups" of movie trailers that tend to change the genre of the movie from what was originally intended. Some examples are turning *The Ten Commandments* into the teen comedy *Ten Things I Hate About Commandments*, *The Shining* into a romantic comedy, and *Titanic* into *Titanic Two: The Surface*. The latter is one of my favorites as they have used footage from a number of movies to make it seem that the Jack Dawson character was found near the Titanic within a block of ice and is revived in present-day New York. Good stuff.

That's about it. I hope these sites provide you with a few moments of respite from the work day.

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Ken Kozlowski,
Director of
the Law Library,
Supreme Court of Ohio

Whop 'em up side the head

By Bruce Campbell

You would think that the medical folks, after slicing, dicing, poking and peeking into the interiors of billions of bodies (dead and alive) for several thousands of years, would know more or less everything about which gear makes which wheel turn in which direction. Apparently not.

Science Magazine just reported a recent discovery that a "silver dollar-sized" piece of meat inside the brain box, the "insula," does something really strange if you whack it and you happen to have a two-pack-a-day nicotine jones. When you insult (doctor talk for whack) the insula, it punishes you by denying you the pleasure of your craving. You somehow lose all desire to turn your lungs into bags of creosote. As Dave Barry would say, at this point, "I'm not making this stuff up."

If you are lucky enough to have this particular lump of brain thingies selectively fried, you will be freed instantly to use all that extra cash you formerly spent on smokes, patches, and hypnosis to buy prunes, broccoli, and other healthful crud. Or, more likely, you can fritter the windfall away on an HD TV the size of the scoreboard in the Horseshoe.

The reported study only dealt with the link between the insula and getting the gasper monkey off one's back, but there is speculation that it might foretell similar brain-area connections with other compulsive behaviors like over/under eating, gambling, Sudoku, or *American Idol* (Idle?) viewing. The time may be at hand when, by messing with this little patch gray matter – chemically, electronically, surgically, or by blunt trauma (see the title of this piece) – we can all become svelte but not too svelte, we can stop making "the Donald" rich at Atlantic City, we can use our leisure hours reading Proust and Joyce.

So why is Doctor Ethics writing about this medical advance? Thank you for asking. The thought running through the parts of my pea brain other than my insula is that, if we can eventually use brain science to overcome a nasty habit like putting scraps of noxious weeds rolled up in paper tubes in our mouth, setting them on fire and forcing smoke into lung sacks in lieu of oxygen, surely science can find a similar way to help that small, but ever-present, subset of lawyers who seem to suffer from a psychological dependence on procrastination, prevarication, dipping into trust accounts, boorish behavior in court, and gratuitous contumely toward fellow lawyers. It's probably not going to happen, but the thought is enticing. Meanwhile, folks who have jobs like mine need not fear obsolescence in the near term.

P.S. For baby boomers and subsequent generational types unschooled in ancient history, a silver dollar was an actual U.S. coin made out of actual silver – again, I'm not making this up – and it was about the size of a small iPod. People who carried a number of them in their pocket tended to list.

P.P.S. Speaking of ethics, the truly oblivious among you should wake up to the fact that the new Ohio Rules of Professional Conduct (all 191 pages of them – in the OBLIC version) are now in effect. The short story is that almost all of the stuff that was perfidious under the old Code still is, and some of the things that weren't explicitly designated as foul (i.e. not communicating adequately with clients; not putting certain things like fee contracts in writing) are now get-your-ticket-punched no-no's. You might want to skim the Rules before they skin you. As the trite but apposite expression goes, it doesn't take a brain surgeon to understand them. I promise you will not find them addictive.

bruce@cbalaw.org

Bruce Campbell,
CBA Bar Counsel

A DIFFERENT KIND OF

Pet Tale

Helping clients with estate plans

From The Humane Society of The United States

Thought lately about providing for pets in your clients' estate plans? Not likely. The subject seldom receives in-depth news coverage or even cocktail party discussion. But it deserves your attention. Because the bonds between people and their pets are usually so great (remember all the pet owners during Hurricane Katrina who risked their lives because they would not leave their pets behind?) giving some attention to this issue can provide peace of mind – for you and your clients.

All too often people assume they will survive their beloved pets. Even those who have conscientiously provided for their pets in their wills may have neglected to consider a trust and/or powers of attorney affecting their companion animals that would commence in cases of severe disability, when a will would not be read.

What can clients do now to prepare for the unexpected?

In the confusion that accompanies an unexpected illness, accident, or death, pets may be overlooked. In some cases, pets are discovered in the person's home days after the tragedy. To prevent this from happening, they should take these simple precautions:

Find at least two responsible friends or relatives who agree to serve as temporary emergency pet caregivers. Provide emergency caregivers with keys to the home, feeding and care instructions, the name and phone number for the pets' veterinarian, and information about the permanent care provisions made for the pet.

Make sure neighbors, friends, and relatives know how many pets are owned and the names and contact numbers of the individuals who have agreed to serve as emergency caregivers.

Carry a wallet alert card that lists the names and phone numbers of emergency pet caregivers.

Post removable "in case of emergency" notices on their doors or windows specifying how many and what types of pets are in the home. These notices will alert emergency response personnel during a fire or other home emergency. Avoid using stickers. Because these are often left behind by former residents, firefighters may assume the stickers are outdated, or worse, risk their lives trying to find a pet no longer in the house.

On the inside of front and back doors, affix removable notices listing emergency contact names and phone numbers.

Is a will the best way to provide for a pet?

Although a lawyer will help decide what type of document best suits your needs, clients should be aware of some drawbacks to a will. For example, a will takes effect only upon death, and it will not be probated and formally recognized by a court until days or even weeks later. What's more, if legal disputes arise, the final settlement of property may be prolonged. Even determining the rightful new owner of pets can get delayed. What this means is that it may take a long time for instructions regarding the pets' long-term care to be carried out.

This doesn't necessarily mean that people should not include provisions in their wills that provide for pets. It simply means that clients should explore creating additional documents that compensate for their wills' limitations.

How can setting up a trust help?

Unlike a will, a trust can provide for pets immediately – not only if your clients die, but also if they become ill or incapacitated. That's because clients determine when their trusts become effective. When a trust is created for pets, money is set aside to be used for the pets' care and trustees are specified to control the funds.

A trust created separately from the will carries certain benefits. It can be written to exclude certain assets from the probate process so that funds are more readily available to care for a pet and can be structured to provide for a pet even during a lengthy disability.

In recent years, specific pet trust legislation has been enacted in 35 states (including Ohio as of 2006) and the District of Columbia. The laws permit a person to create a trust for the care of designated domestic or pet animals and specifies that a pet owner's intent to provide for his or her animal can now be protected by the courts.

What is a reasonable sum to leave?

The answer to this question can vary widely, depending on the age, health, estimated lifespan and number of pets involved. The funds needed to care for a young horse will certainly be much greater than those needed for an aged parakeet.

It also depends on how much care the owner wishes the animals to receive. If the animals get cancer, diabetes, hip dysplasia, or some other ailment, what kind of treatment do pet owners want to provide and do they want to provide it indefinitely or for a limited period of time? Also, the pet owner may want to look into cremation and burial prices.

Pets can be expensive even when there are no emergencies. Pet food, grooming, routine veterinary care, vaccines, basic medications (like heartworm and flea preventatives), boarding and kennel fees, sitters, and teeth cleaning can add up to hundreds of dollars per animal per year. Horses, of course, mean additional, unique expenses.

Whereas leaving too much money in the trust can cause problems with heirs or potential heirs, leaving too little could compromise the care of the animal. The trust also should stipulate the frequency and amounts of payments, as well as adjustments for inflation. Finally, pet owners also may want to consider paying a fee to caretakers and/or trustees for their time and effort.

For more information

The HSUS fact sheet is available on the Internet at www.hsus.org/petsinwills.

Worry *and* Be Happy

By Frederic A. Portman

Who among us has not experienced the following:

1. Awakening at 3:00 a.m., in a cold sweat, trying to remember if you filed a Complaint before expiration of a particular statute of limitations;
2. Sitting in your office enjoying your morning cup of coffee when you are suddenly interrupted by a phone call from the judge's bailiff inquiring why you are not present for a pre-trial scheduled a year earlier;
3. Your trial is tomorrow. You have diligently prepared. You call your client to discuss one more thing and the phone number is disconnected. Will the client appear for the trial? Do you begin wishing you had gone to dental school?
4. It's Friday. You are in your office by 8:30 a.m. It is now 6:00 p.m. You gaze at your time chits and can account for a mere two hours of billable time. There is a note on your door from the managing partner inviting you for a chat on Saturday morning. Do you go home or just stay at the office all night trying to remember what you did all day?

The foregoing is a very short list of items that have changed your brain waves to a tsunami.

Ohio lawyers are required to earn 2.5 CLE credits in legal ethics, professionalism, and substance abuse instruction. The substance abuse course is mandated to combat an alarming increase in alcohol and drug abuse among lawyers.

I recently attended a workers' compensation seminar that covered dozens of statutes, rules and policies that one might overlook. Missing even one of those could be devastating to your client, the case, and your career.

The next topic was ethics. This topic was appropriate because it discussed all the disciplinary actions that could be filed if you forgot one of the statutes, rules and policies. Concentration during this part was difficult because I kept imagining my name in OBAR, not in a good way. During the break, I called my agent to make sure I paid my malpractice premium.

In the substance abuse portion of the seminar much time and material were devoted to the condition called OBSESSIVE COMPULSIVE DISORDER. The materials, gleaned from the National Institute of Health, 1994, defined this disorder in pertinent part as: "These are unwanted ideas or impulses that repeatedly well up in the mind of the person with OCD. Persistent fears that harm may come to self or a loved one, and unreasonable belief that one has a terrible illness, or an excessive need to do things correctly or perfectly are common. (Emphasis added).

Compulsion is described as repetitive behavior such as hand washing and checking. If the obsessive-compulsive behavior is extreme, i.e. interferes with everyday life, then you have Obsessive-Compulsive Disorder that should be treated.

I concluded that to avoid committing malpractice, keeping your name off the Disciplinary Counsel's Rolodex and staying employed, a lawyer must be obsessive and compulsive. The trick is to avoid the "disorder" which could prevent one from engaging in acceptable social and professional behavior.

I doubt most mental health professionals would embrace this conclusion. I bet they would if they read the new *Rules of Professional Conduct*.

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ON CLIENT DOCUMENT

Retention Policies

Changes to eDiscovery Rules should prompt review

By Michele Noble

Although it seems like another age, not so long ago only a few select employees had email or personal computers. The same technology which has enabled us to work as virtual teams has also generated vast amounts of electronic information. Today's computers typically come with hard drives that can store two gigabytes of information: the equivalent of two billion characters or two thousand average-sized novels. All of this information can be subject to discovery, placing new demands on organizational leaders to review their document retention policies.

Amendments to the *Federal Rules of Civil Procedure*, effective December 1, 2006, address changes to the discovery of electronically stored information. The amendments broaden the language of the rules: make clear that electronically-stored information is discoverable;[1] allow for the parties to agree on what format ediscovery will follow;[2] and allows for a party to resist e-discovery on the grounds that the information is inaccessible because of undue burden or cost.[3]

In addition, amendments to Rule 37 create a "safe harbor" exception for destroyed or recycled electronic documents. Rule 37(f) protects litigants when information is lost during the "routine, good-faith operation of an electronic information system."

A well-crafted document retention policy is key to this safe harbor provision. The safe harbor provision applies if: (1) there is a routine document retention policy of a computer system; (2) the party is acting in good faith, which requires compliance with any court order or party agreement, and the operation of litigation holds; and (3) there is not an independent duty – through statute, regulation, or common law – to preserve the evidence.

Your client should know that the safe harbor provision is limited. It applies to documents that have been destroyed or recycled in the normal course of business where there is no other legal requirement for maintaining the information. As the United States Supreme Court has noted, document retention policies are "common in business" and may be used to explain – and justify – the loss of information in appropriate circumstances.[4]

Ensuring compliance: creating a sound document retention policy

A good document retention policy should describe what and how information is be retained, and define when corporate records should be destroyed or recycled. Document retention policies should be tailored to fit the specific needs of the business involved and have legitimate business purposes in mind.

There are a number of document retention issues to consider before developing your policy including the security of the information to be retained; how the information is currently stored and how the information needs to be stored; backup and recovery of the information; the length of time to retain specific categories of documents; and the method of eventual destruction of the information.

Most important, an effective digital retention policy must be clearly communicated to employees and effectively implemented to meet the challenges posed by ediscovery.

Safe harbor provision may not provide complete protection

The safe harbor provision will only apply if the party is acting in "good faith." The Judicial Conference Committee Notes explain that "good faith" may require that routine document retention policies are suspended or modified with notice of litigation:

> Good faith in the routine operation of an information system may involve a party's intervention to modify or suspend certain features of that routine operation to prevent the loss of information, if that information is subject to a preservation obligation. A preservation obligation may arise from many sources, including common law, statutes, regulations, or a court order in the case. The good faith requirement of Rule 37(f) means that a party is not permitted to exploit the routine operation of an information system to thwart discovery obligations by allowing that operation to continue in order to destroy specific stored information that it is required to preserve.[5]

"Good faith" clearly requires the practice of litigation holds. There are two steps to a litigation hold. First, a litigation hold suspends any current destruction policy. Second, a notice of preservation is sent to all parties or persons that may have relevant data. The preservation notice should be as specific as possible in identifying electronic data without unnecessarily limiting the data sought, and includes dates limiting the scope of the data requested.

In addition, the safe harbor provision will not apply if there was an independent duty to preserve the documents. Your client's comprehensive document retention policy should address all statutory document retention requirements, which may include:

- Employment records: records pertinent to personnel decisions (i.e. applications, resumes, employment records used for termination/layoff purposes) maintained for one year after the decision is made; records of employees' names, addresses and pay rates retained for three years.
- Truth-in-Lending: documents covered by the Truth-in-Lending Act must be retained for two years.
- Manufacturers: manufacturers of new drugs must keep a variety of records for two years after the marketing application for the new drug is approved and manufacturers of medical devices must retain records of the device's effectiveness and any problems for the device.
- Sarbanes Oxley Act: 18 U.S.C. § 1520 requires accountants to retain corporate audit or work papers for 5 years and Section 103 requires retention of most work papers for 7 years.
- Financial Institutions: the U.S. Department of Treasury regulates document retention policies for financial institutions and mandate, for instance, that records concerning securities bought and sold must be retained for three years, and suspicious activity reports must be retained for five years.

1. *Rule 26(a)(1)(B) includes e-discovery in initial disclosures.*
2. *Rule 26(f)(3) directs the parties to specifically discuss e-discovery issues before the court's initial scheduling conference, and requires the parties to determine the format that the electronic information will be produced.*
3. *Rule 26(b)(2) provides that "A party need not provide discovery of electronically stored information from sources that the party identifies as not reasonably accessible because of undue burden or cost."*
4. *Arthur Andersen LLP v. United States, 544 U.S. 696, 704 (2005).*
5. *Committee on Rules of Practice and Procedure, Judicial Conference of the U.S., Report of the Judicial Conference (2005), www.uscourts.gov/rules/Reports/ST09-2005.pdf*

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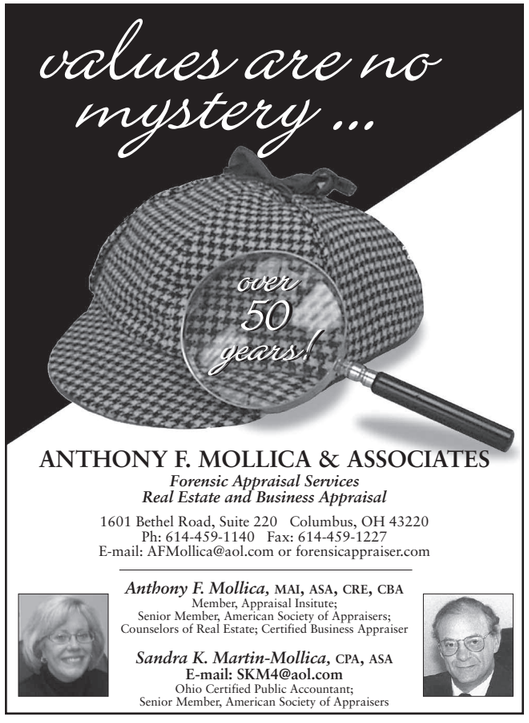
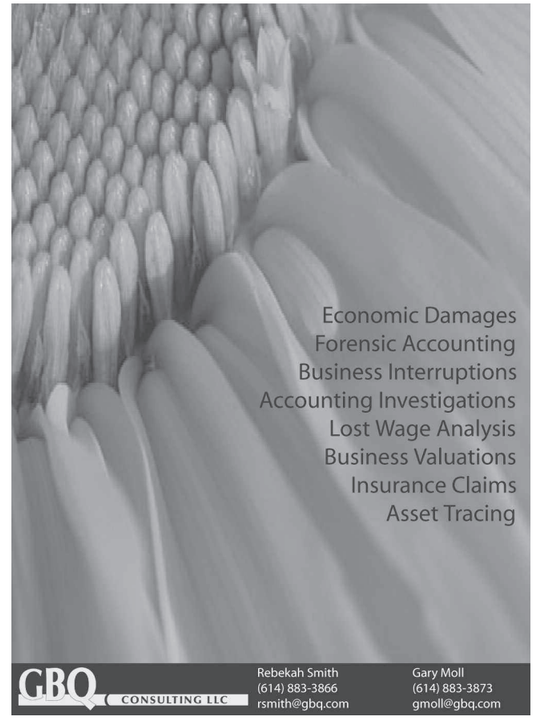
> As the United States Supreme Court has noted, document retention policies are "common in business" and may be used to explain – and justify – the loss of information in appropriate circumstances.





ON SENDING AND RECEIVING DOCUMENTS

Via Email

Understanding Metadata Ethics

By Alvin E. Mathews Jr.

The Technologically Savvy Lawyer

Gore Albert is a true renaissance man. He is a statesman, environmentalist, inventor, and one of his town's finest lawyers. Albert owns several patents. Some say he has taken credit for inventing the Internet. Albert is always on the cutting edge of technological innovation. He uses the hottest gadgets in his law practice, from the latest in hand-held devices to top of the line lap top computers. All his clients appreciate how technology allows him to handle their matters efficiently.

Albert constantly emails updates to clients. He routinely uses email in transactional matters and litigation communications with opposing counsel. His opposing counsel appreciate how he quickly responds in settlement negotiations, attaching relevant documents to email. Opposing counsel appreciate his use of red-lined documents during the negotiation of agreements.

Albert has only appreciated the favorable points of using email in his law practice. Several months ago, however, he began reading articles raising concerns about opposing counsel mining metadata. He realized he must be careful not to divulge any legal strategies or client confidences while e-mailing documents to opposing counsel.

Defining Metadata and Lawyer's Ethical Duties

Metadata is a term used to describe electronic data that is embedded in documents. Simply put, metadata is data about data. This data can be used, for example, to identify and review information about the document's editorial history. One may be able to discover, by reviewing metadata, previously deleted text, comments inserted in a document, the identity of individuals who have edited or viewed the document and the dates and times when they reviewed the document. This hidden data may show strategy considerations and legal advice provided by the lawyer to the client – information the sending lawyer thought he or she had deleted. Thus, legal ethics and professional responsibility commentators agree that lawyers who send email containing document attachments must use reasonable care to assure confidential information is not disclosed.

What duties does a lawyer have who receives a document containing metadata? Must the lawyer (1) refrain from examining the metadata; (2) refrain from using the metadata to obtain more knowledge regarding the documents history; (3) notify the disclosing lawyer; (4) return the document; and/or (5) refrain from the substantive use of the metadata against the disclosing party?

Ethic Opinions Regarding Metadata

The American Bar Association recently concluded that a lawyer does not have an obligation under the Model Rules of Professional conduct to refrain from examining and utilizing metadata embedded in email and other electronic information received from opposing parties and their lawyers.[1] The ABA opinion recognizes that the Model Rules do not directly deal with disclosure of metadata. The ABA concluded that, in the absence of a direct provision addressing metadata, guidance is provided in Model Rule 4.4(b), which governs the question of inadvertently sent documents and merely advises the recipient lawyer to notify the sender, exercise his or her professional judgment regarding the return of the document and otherwise follow the law of the jurisdiction. The ABA opinion recommends that lawyers who email attachments must take steps to guard against disclosure of metadata, including scrubbing metadata for documents prior to production and entering into "clawback" agreements as recommended by the Advisory Committee in connection with recent amendments to the Federal Rules of Civil Procedure.

Other states like New York take a different view.[2] According to the New York Committee on Professional Ethics, a lawyer has both a duty to refrain from the viewing or using metadata and a duty to notify adversaries of inadvertent production. On the question of inadvertent disclosure, New York takes a strict view. The committee opined that lawyers who receive confidential material, where clearly disclosure of the materials was not intended, should not examine the materials once the inadvertence is discovered, should notify the sender and should abide by the sender's instruction as to the need to return or to destroy the materials.

Careful Tips to Avoid Disclosure of Confidences through E-Mail Attachments

Lawyers sending or producing electronic documents may be able to limit the likelihood of transmitting metadata. Law firms should establish policies to protect themselves and their clients. First, lawyers using computers can avoid creating certain types of metadata in a computer generated document to begin with. Lawyers can opt against using redlining functions in word processing programs or not to embed comments in a document. Computer savvy lawyers can also "scrub" some kinds of embedded information in an electronic document before sending, producing or providing them to others. A lawyer who is concerned about the potential of providing to an adversary a document containing metadata also may be able to send a different version of the document without the embedded information. For example, a careful lawyer can send a hard copy, create a scanned image of the document or print it out and send it via facsimile. Finally, as noted above, the lawyer may seek to negotiate a confidentiality agreement, or if in litigation, a protective order, allowing the lawyer to prevent the introduction of evidence based upon the document that contains that embedded information.

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1. *ABA Standing Committee on Ethics and Professional Responsibility Formal Opinion 06-422(2006).*
2. *New York State Bar Association, Committee on Professional Ethics, Opinion Number 782. (Dec. 8, 2004).*

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Elevator Music can get you in trouble

By T. Earl LeVere

Has this ever happened to you? It's your birthday. And if that's not bad enough, your "friends" decide that to celebrate (or torment), they will take you to your favorite Mexican restaurant. Then, just when the sting of getting older is finally wearing off, one of your "friends" motions to the hostess. The hostess comes over, places an enormous sombrero on your head, and then the entire wait staff surrounds your table clapping and singing some birthday song that does not even remotely resemble "Happy Birthday to You."

When you're not personally the subject of that attention or spectacle, you might wonder why the servers are not singing "Happy Birthday to You," the tried and true favorite of young and old alike and the source of so many wonderful childhood memories.

The answer – copyright. Yes, copyright. A publishing company called Summy-Birchard Music (an AOL Time Warner entity) owns the copyright in the six-word song. Without an appropriate license, singing "Happy Birthday to You" in a public place violates the Summy-Birchard Music's "public performance" right in the song and constitutes copyright infringement. Summy-Birchard earns about $2 million each year in licensing fees from "Happy Birthday to You" plus substantial additional revenue from resolving copyright infringement claims arising out of unauthorized uses of the song. While some challenge whether this practice is legally or ethically correct, the fact remains that thousands of people pay for the right to sing "Happy Birthday to You" and many of those who don't end up facing an "unhappy" music publisher.

Similar public performance music issues can spring up in unexpected ways with other businesses as well. For example, many businesses play music in their lobbies or elevators for their customers' or employees' enjoyment. Without an appropriate license, however, lobby and elevator music can violate the publishers' public performance rights. Many people use the term "muzak" to refer generically to the arrangements of familiar music that we often hear in waiting rooms and elevators. In truth, however, Muzak, LLC is a 3,000+ employee company that creates, markets, and licenses all types of music, voice, and sound to companies to play in their offices and while callers are on hold. As part of the Muzak, LLC package, Muzak, LLC secures for its clients the rights to play the music at issue. Without this service, however, in most cases, using the music would constitute copyright infringement. In addition to music, many businesses show television broadcasts for their customers' while they wait. Similar rules apply to copyrighted video presentations that are displayed in areas open to the public and, without proper permissions from the copyright owners, these presentations can rise to the level of copyright infringement.

Not unmindful of the difficulties that this licensing and infringement structure can create for many businesses, especially smaller businesses, the Copyright Act contains some tailored exceptions. A special licensing and royalty structure exists for jukeboxes (specifically, "coin-operated phonorecord players"). Similarly, Congress enacted an exception that allows a business to play an audio or video transmission on "a single receiving apparatus of a kind commonly used in private homes" so long as the business does not retransmit the material or charge people to see or hear it. The "home system" exception, however, is somewhat technical in nature and, depending on the size of the establishment, limits the number of speakers and the size and number of "visual devices" (i.e., monitors) that the business may use without infringing the copyright. It also does not permit using a local audio broadcast as telephone hold music or piping the broadcast into elevators. So, if you're not careful, you might find that your elevator has a stop in federal court.

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Finding local legal help should have always been this easy

Law Office Management

STILL HOLDING

Conferences

The expensive, time-consuming, old-fashioned way?

By Larry Jeffres

Even if time weren't money, attorneys still would need more of it.

That's why many smart law firms are taking greater advantage of advances in telephone conferencing to cut the time and costs of bringing people together. At the same time, they are making the whole process of presentation, collaboration and fact gathering more effective.

In one example, judges are using conference calls for hearings dealing with brief procedural matters, thereby reducing out-of-office time for everyone concerned and easing court congestion. In another, law firms are taking depositions via conference call, especially when both sides know what a particular witness or expert is going to say, and they simply need to get the contents of the deposition introduced. In many jurisdictions, a court reporter can join the conference call from his own office, saving costly travel from all sides. And there are many more examples.

To be sure, law firms have used basic telephone conferencing since the days of Bell Telephone. However, they have had to resign themselves to working with the "system" – contacting the telephone company, making reservations, waiting on an operator trying to locate participants – not to mention the chore of scheduling around everyone's availability. It was time-consuming and costly! Moreover, if they needed to have a spur of the moment conference, they could just about forget it.

The good news is things have changed for the better in the world of conferencing.

Why "what we've always done" may be costing you time and money

Modern telephone conferencing service offers more choices than ever before, all of them tailor-made to streamline your conference calling and meet your special needs. For one thing, there are many options in providers today – not just "the telephone company." So, do a little homework before your next conference, and resist the habit of simply dialing your local or long distance telephone company. They may offer good local and long distance rates, yet not offer you the best services and rates for conferencing. (Do a quick check on the Columbus Bar web site: membership resources; click, benefits & discounts; click, conference calling.)

Once you've settled on your conferencing provider, you can choose from several types of conferencing services, depending on your need. The major choices include, from simplest, fastest and lowest cost to more powerful and feature-rich, conferencing-on-demand, operator-assisted conferencing, and web-assisted conferencing. The key is to use the conferencing service that will satisfy your conference requirements.

Conferencing-on-Demand

Perhaps the most useful of all conferencing services on a day-to-day basis, conferencing-on-demand has become hugely popular in the corporate environment, where efficiency is critical. Law firms have also begun to see its advantages in speed, simplicity and costs. In fact, many firms have found that they are saving up to 70 percent over the previous costs of conferences set up as an operator-assisted call. Perhaps even more important, the time savings are just as dramatic.

For one thing, there is no reservation to make, no operator to call, no waiting for scheduling to be confirmed. All you need is a pre-established account with your conference provider, who typically issues a dedicated call-in number and pass code for your use at any time you wish.

Not all such services work exactly the same, but are similar. One of the leading services of this type, ReadyConference Plus from Premiere Global Services (www.premconfaffinity.com) is representative of the most advanced systems.

Here's how it works

Once you've decided on the need and time for a conference:

- Notify selected participants and give them your call-in number and pass code.
- Participants call in to your number from any phone – even their cell phone – then enter the pass code you supplied.
- You call in to the same number from any phone, then enter the pass code plus one digit that establishes you as moderator of the conference.

That's all there is to it. It's all automated for your convenience!

What about privacy and security, billing codes and control of the conference? No problem. With ReadyConference Plus, all of these can be easily handled following simple instructions on the back of the wallet card you are given. You can even pre-schedule a ReadyConference Plus call at their web site and notify your participants in one easy step.

Here are some of the common applications of conferencing-on-demand by law firms: pre-trial hearings and strategy sessions; status updates; impromptu meetings; audio depositions; operator-assisted conference calls

While operator-assisted calls have been the default telephone conference historically, it needn't be for your next conference, especially if a simpler, less expensive conference makes sense. Nevertheless, there are a number of situations that will likely require the assistance of an operator, for example, conferences involving a large number of participants (75 or more), such as a large class-action group. Likewise, if you need to translate or transcribe the entire conference for later use an operator-assisted conference is best. In addition, many operator-assisted conference services provide special features such as Q&A management, polling, and international dial-in.

Another important type of operator-assisted conference involves the one-way presentation of information to a large audience. Examples are employee announcements, seminars and merger and acquisition presentations. Some providers, such as Premiere Global Services, now have a hybrid service of conferencing-on-demand and operator-assisted calling that dramatically reduces costs but still provides all operator assistance functions.

Web-assisted Conferencing

The internet didn't "change everything," as one tech pioneer announced in the '90s. However, it has added a powerful new capability to the collaborative process. The ability to present visuals, share documents, conduct polling and enable written interchanges has made the web-assisted conference even more effective than video conferences in most instances at far less cost.

If you haven't already discovered the amazing capabilities a web-assisted conference provides, you can ask for a demonstration from any of the leading conferencing providers.

The Last Word

Whenever you need to get parties in multiple locations together at one time – whether from across town, across the country, even across the world – consider the ease and cost effectiveness of a modern telephone conference. It could give you an edge on your next case.

www.premconfaffinity.com

Larry Jeffres,
Premiere Global Services

New age hiring

PODCASTS USED TO RECRUIT LAW FIRM ASSOCIATES

Forget fancy dinner parties, expensive sporting events and extensive reading material. Welcome to the new age of hiring in which podcasts are being used to recruit law firm associates. Legal Insight Media Inc. recently announced the development of TrueView podcasts, which enable law students to download perspectives from current associates and partners on their experiences working at a law firm.

"Law students receive a deluge of information from law firms all claiming to be different," said Beth Cuzzone, Director of Business Development for Boston, Massachusetts-based Goulston & Storrs, for which the TrueView podcasts were originally designed. "We wanted them to really understand our unique culture and what sets us apart, so we asked current associates to answer the prickly questions that students want to know but are afraid to ask. Legal Insight helped us design a podcast series covering frequently asked questions about *A Day in the Life, Having a Life* and *A Law Firm for Life*, and deliver it in a powerful and immediate way."

The TrueView videos can be displayed on the Web, within PowerPoint, in e-mails, on handheld devices and through podcasts.

"In the midst of a very competitive recruiting environment, firms are vying with one another to attract the attention of a new generation of law students – the online generation," said Peter Marx, President of Legal Insight Media. Studies show that the people, environment and culture are the top reasons law students select one firm over another. These students have been raised in the world of technology. They not only have new vehicles for getting information, they have a different mindset. They want to be in the driver's seat, controlling how, when and where they get it. Podcasts are a powerful medium for this."

For more information, visit *www.legalinsight.net*.

Legal Insight | media

On the rise

SURVEY: LEGAL EXPENSES INCREASING FOR ATTORNEYS

During the past year, legal expenses per attorney increased 7.9 percent, according to the *2006 Altman Weil Law Department Metrics Benchmarking Survey*, published in partnership with LexisNexis Martindale-Hubbell.

"After holding the line on expenses for the past several years, we're now seeing a significant jump," said Altman Weil Principal James Wilber. "General counsel can only do so much in response to billing rate increases, and there will always be critically important work that is predominantly price insensitive."

Total law department expenses in all companies surveyed averaged about $915,000 per lawyer. Of that, nearly $260,000 went toward compensation and benefits, the biggest internal expenditure. Outside expenditures increased 5.5 percent to more than $600,000 per lawyer on average for all law departments nationwide. Despite rising costs, only a quarter of law departments formally evaluate their outside counsel.

"Performance metrics are a critical component of managing outside counsel costs," said Barry Soloman, Esq., Vice President and General Manager of LexisNexis Martindale-Hubbell. "Client reviews also give in-house counsel the opportunity for a dialogue with their outside advisers on what's working and what's not."

Perhaps related to the difficulty of controlling outside legal expense, law departments continue to favor traditional billing arrangements with their outside counsel. According to the survey, the most frequently used methods are hourly billing, reduced hourly billing and time and expenses. Forty percent of reporting law departments reported never using alternative fee arrangements.

The survey, published annually, tracks U.S. law department expenditures, outside counsel relationships, operations and staffing. This year's survey includes data from 138 companies.

For more information, visit *www.altmanweilpubs.com*.

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This material was originally published in the July/August 2006 issue of *Legal Management*, the official journal of the Association of Legal Administrators (ALA), and is reprinted here with ALA's permission.

In 2006, ALA celebrates 35 years of supporting legal administrators, legal managers and other legal professionals in managing their law firms, legal departments and other legal-related organizations. With more than 10,000 members from 26 countries, ALA continues to be "*The* Source of Legal Management Information and Knowledge." Learn more about ALA at ***www.alanet.org***.

Multitasking mishaps

CELL PHONE USE, DRUNKENNESS IMPACT DRIVERS SIMILARLY

Psychologists at the University of Utah recently published a study showing that motorists who talk on handheld or hands-free cellular phones are as impaired as drunken drivers.

"Just like you put yourself and other people at risk when you drive drunk, you put yourself and others at risk when you use a cell phone and drive," said Psychology Professor David Strayer, the study's lead author.

Each of the study's 40 participants "drove" a PatrolSim driving simulator four times: once each while undistracted, while using a handheld cell phone, while using a hands-free cell phone and while intoxicated to the 0.08 percent blood-alcohol level after drinking vodka and orange juice. Participants followed a simulated pace car that braked intermittently.

Motorists who talked on either handheld or hands-free cell phones drove slightly slower, were 9 percent slower to hit the brakes, were 19 percent slower to resume normal speed after braking and were more likely to crash. Three study participants rear-ended the pace car. All were talking on cell phones. None were drunk.

Drivers drunk at the 0.08 percent blood-alcohol level drove more slowly than both undistracted drivers and drivers using cell phones, yet more aggressively. They followed the pace car more closely, were twice as likely to brake only four seconds before a collision would have occurred, and hit their brakes with 23 percent more force. None of the intoxicated drivers in this study crashed.

Concluded Assistant Professor of Psychology Frank Drews, the study's co-author: "Driving while talking on a cell phone is as bad as or maybe worse than driving drunk, which is completely unacceptable."

To learn more, visit *www.psych.utah.edu/Applied Cognition Lab*.

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SURVEY: LAW FIRMS SPEND THOUSANDS OVERHAULING WEB SITES

According to The Survey of Law Firm E-Marketing Practices, major U.S. law firms spend more than $40,000 each to overhaul their Web sites. Forty law firms, including many of the nation's most prominent, contributed data to the report.

Among the report's findings:

- Just less than 20 percent of the firms published blogs.
- More than half of the firms hired consulting firms when they overhauled (or initially created) their Web sites. Just less than 12 percent of firms did the designs or overhauls in-house, and those were mostly smaller firms.
- Less than 10 percent of the firms outsourced their Web site maintenance.
- Approximately 60 percent of the firms published e-newsletters, as did nearly 90 percent of the firms with 200 lawyers or more.
- Mean spending on electronic press release services was also relatively modest, with mean annual spending averaging $500.
- Nearly 58 percent of the firms used opt-in email marketing for promotional purposes.
- Most firms had not used banner advertising, though more than 30 percent planned to increase spending on such ads.
- Only 12.5 percent of the firms had paid search engines for higher search engine placement, a practice that was more common among smaller than larger firms.
- Approximately 32 percent of the firms said it was "likely" or "very likely" that within the next two years they would hire a consultant to help the firm appear higher in search engine rankings.
- Less than 3 percent of the firms had created podcasts for marketing purposes.

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Book Review

Among The Righteous:

LOST STORIES FROM THE HOLOCAUST'S LONG REACH INTO ARAB LANDS

By Robert Satloff, Reviewed by Janyce C. Katz

When there is a catastrophe, a murderous outbreak of cruelty, there are those who at great risk to themselves and to their families work to save the lives of those otherwise doomed.

Yad Vashem, a museum in Israel, celebrates those individuals who hazard so much to save even one Jew from the threat of death or deportation to a concentration camp. By the beginning of 2006, Yad Vashem had recognized 21,310 people. Now, because of Robert Satloff's book and his search, the first Arab candidate has been nominated for the award.

An expert on Arab and Islamic politics, Satloff thought surely there would have been at least one Arab whose name and deeds were worthy of preservation in Yad Vashem. Given the reach of the Holocaust into North Africa, confiscation of Jewish rights and property, he knew there had been some Arab Jewish cooperation. Satloff wanted to know why no Arab Muslim heroism had been recorded.

He began a search for truth against a full measure of obstacles. He found stories of people who could have been responsible for saving thousands of lives, but their tales, like the history of the Holocaust in the North African countries, had been ignored. Or worse – the facts changed.

He suspected that stories of great heroism had been covered up for a variety of reasons. World War II was a time when many Arabs under colonial control of France or Italy hoped the German Nazis might be the key to their independence and freedom. To have supported Nazis is not something to mention now.

Further, today's hatred for the westernized Israeli state results in an obscuring of the history of the 1940s and of cooperation between Arab and Jew during earlier time periods.

For many Arabs today, the acknowledgement of the Holocaust would encourage justification of a rationale for the existence of Israel – that Jews need a place in which they can live safely.

Despite obstacles, Satloff found courageous Arabic heroes worthy of being included in Yad Vashem, but needing confirmation. A person he called "the shinning star" was Abdelhamid Ben Badis, described as "an intensely devout man with a modern, open, tolerant view of the world." He founded the Algerian League of Muslims and Jews. Unfortunately, Ben Badis died in 1940, just about the time the Vichy France came to power and removed all the citizenship rights of the Jews of Algiers.

Satloff wrote that "one of the main sources of pro-Jewish sympathy among the Arab population of Algiers was the Muslim religious establishment." When Shaykh Taieb el-Okbi, a reformist leader in Algiers heard rumors that leaders of a French pro-Fascist group were prodding Muslim troops to launch a pogrom against the Jews of Algiers, he did all he could to prevent it, issuing a formal prohibition on Muslims from attacking Jews.

Satloff stumbled across one story from a Tunisian Jew, Anny Boukris, who ended her days in Los Angeles. Just weeks before she died, she told Satloff's colleague about her family's rescue. Informed by Germans that Anny's mother would be grabbed and thrust into a German bordello, the Arab, Khaled Abdelwahhab, spirited her entire family away to his farm in the middle of the night. It took years to verify Anny's story. When he finally put the pieces together, Satloff found that the descendents of Khaled thought he had rescued Germans, not Jews.

Since Satloff verified the saving of 23 Jews, Khaled Abdelwahhab was nominated for Yad Vashem and may be listed as its first Arab hero.

Perhaps the most significant rescue took place in Paris, although Satloff could only validate parts of the story. Twelve thousand Jews from Arab lands under the protectorate of France died in gas chambers and concentration camps.

Si Kaddour Benghabrit, a religious leader and the head of the Great Mosque of Paris is reputed to have hidden close to 1800 Jews below the Mosque. He also was said to have given North-African born Jews papers saying they were Moslems. It is even alleged that he set up tombstones with their names on them as "proof" for the Germans. Satloff could verify that at least a hundred were saved in the Great Mosque and that headstones were set up to help save Jews. He could not verify Benghabrit's role. Benghabrit, once a major figure, has fallen out of favor.

The final proof and the real story of the heroes will have to wait until the hatred and tension abates, and people are willing to share the records of that period.

This is an important book. It should be read.

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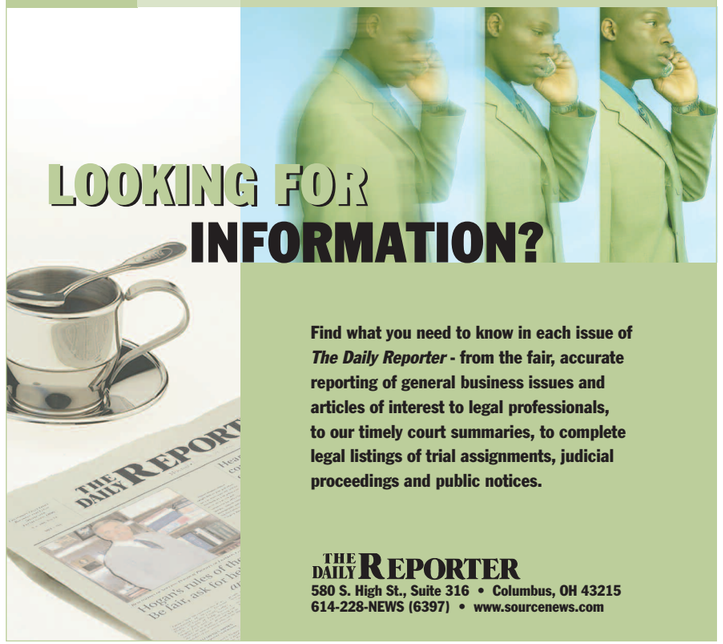

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