COLUMBUS BAR

Lawyers QUARTERLY

WINTER 2007

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Do The Right Thing

No More "Winning At Any Cost" Elections

By Belinda S. Barnes

People often ask me questions like "Why are you so happy?" or "Why are you always smiling?" Lately, I easily answer that question by responding, "Because I watch very little regular TV." This, of course, causes people to look at me strangely. But, it's true. I have a four-year-old and a two-year-old, and they control the TV, so the most popular programs in our house are the Disney Channel's *Higgley Town Heroes*, *Little Einsteins*, *The Wiggles*, and *Mickey Mouse Club*.

Thus, I have a happy TV world. Everyone is nice and helpful. They work together to try and solve problems. They don't call each other nasty names. They don't make fun of each other. They don't try to advance their own interests at the expense of others.

As you can see, when the TV is playing in our house, pleasant thoughts are floating around. This past November, when I tried to sneak a moment to watch televised morning or evening news, however, I was bombarded by the negativity of the campaign advertisements of politicians and the two main political parties. It was depressing, embarrassing, sad, and scary. These were the people who were then, and are now, making decisions about my future and my kids' future. Their decisions would affect whether we feel safe in our own homes, whether our children were safe at school, whether we felt and were financially secure, whether there would be appropriate funding so that our children can get a good education, and on and on.

Yet, these were also the people who were willing in political advertisements to twist the truth so that it was no longer recognizable. These were the people who were willing to distort their opponent's name to try to make some political point. These were the people who twisted cute jingles into mean-spirited attacks upon their opponent. These were the people who attacked their opponent for upholding the Constitution of the United States, as well as state law.

Sadly, many of these politicians are also attorneys. They should know better. Lawyers have a professional responsibility "to maintain a respectful attitude toward the courts, not for the sake of the temporary incumbent of the judicial office, but for the maintenance of its supreme importance." Gov. Bar R. IV, § 2. Lawyers "should assist in maintaining the integrity and competence of the legal profession." Canon 1, Code of Professional Responsibility. Lawyers "should assist the legal profession in fulfilling its duty to make legal counsel available." Canon 2, Code of Professional Responsibility. Lawyers "should assist in improving the legal system." Canon 8, Code of Professional Responsibility. Lawyers "should avoid even the appearance of professional impropriety." Canon 9, Code of Professional Responsibility.

In spite of these rules which govern lawyers in Ohio, many lawyers who run for political office have apparently decided that "winning at any cost" is more important than doing what is right. From what I have seen, Ohio politicians are no different than the politicians in other states. But that is no excuse. They should be ashamed of themselves. I am ashamed for them. These tactics have got to stop. The disenfranchised are becoming more disenfranchised. Violence in the United States is escalating. Hopelessness abounds. And political ads are just adding fuel to the fire.

My "Pollyanna" hope for the next election(s) is that the politicians and political parties abandon their counterproductive tactics and instead, spend their time and energy working together like the *Higgley Town Heroes* to solve problems. If that happens, my children might just get lucky enough to be asked in the future why they are always so happy and why they are always smiling.

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Belinda S. Barnes,
Columbus Bar President

"[Human] nature, Mr. Ulner, is what we are put in this world to rise above."

– Hepburn to Bogart in *African Queen*

Letter From The Executive Director

By Alex Lagusch

We didn't HAVE to do it. No one ASKED us to do it… but after decades of *Bar briefs*, we've changed the name. I hope you noticed!

I share our magazine with many other bar associations and not only do they insist on borrowing our initials, CBA (Connecticut, Chicago, Cincinnati, and the like), they often choose a blockbuster name like "Bar Briefs" for their literary contribution. If you "google" the name, you'll see it's everywhere (along with fun boxers and shorts on sale). "Bar Briefs" adorns the covers of bar publications from Dayton to Louisiana, Kansas City to Maryland, Macomb County to Louisville… Mississippi, Kentucky, and Washington D.C… okay, you get my drift – too much of an overexposed good thing! After all, what is a "brief" anyway - a written document that outlines a party's legal arguments in a case. We're not arguing about anything. We are a member organization for Franklin County attorneys (contrary to the caller last year who asked our receptionist for the recipe for a White Russian) and our goal has always been to provide valuable benefits, exceptional service, and timely pertinent information.

Columbus Bar Lawyers Quarterly is written by Columbus Bar lawyer members and, true to its name, it is published quarterly (we are so clever). We join the rarified air of such literary contributions as *Drawn & Quarterly, Management Accounting Quarterly,* and *Cornell Hotel and Restaurant Administration Quarterly*.) Distribution of our *Quarterly* is broader than just the Columbus Bar membership - about 20,000 non-lawyer business people receive it as well - so it's nice exposure for our writers. We wanted to create a title that would appeal to the non-lawyer and lawyer alike. We queried the membership for alternative titles - sort of "top this one if you can" - and I'm pleased to report that *Quarterly* reigned supreme.

What else has changed? Typography? Lay out? Yes, they are both new and improved. Our goal for article length remains 800 words. That's fairly brief (no pun intended) but with a publication that features over 30 authors, we don't want to discourage readers who want to scan all the great articles but may not have the time to "please turn to page…"

We may be criticized by some for changing for the sake of change. You may ask, "Alex, how often do you see *Horse And Hound* changing name and format? To which I answer, "Piffle." Of course you remember what old Heraclitus said, "Nothing endures but change."

And we are nothing if not enduring - or is that endearing?? – we've been around since 1869!

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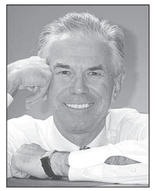

Alex Lagusch,
Columbus Bar Executive Director

Change In Legal Authority Has Little Effect On CBCF

By The Honorable David E. Cain

Judges no longer have legal authority over the operation of the Community Based Corrections Facility (CBCF).

The board of directors to be known as the Facility Governing Board (FGB), now consists of private citizens, although the CBCF continues to operate as a public facility.

The transition was seamless, thanks to the planning by Director Bud Potter and his staff. CBCF employees were apt not to notice.

Half dozen judges had sat on the former Judicial Corrections Board, chaired pursuant to statute by the presiding judge of the Common Pleas Court, and set policy and authorized the actions of the CBCF administrative staff.

In 2003, the Board of Commissioners on Grievances and Discipline of the Ohio Supreme Court issued an opinion that a judge's participation on a JCB violates the Code of Judicial Conduct, setting off an alarm throughout the statewide judicial corrections community. It was widely believed that the judges' involvement in the programming, conditions and lengths of stay was a primary reason for the long-recognized success of the CBCFs.

After many months of discussing and planning and, finally, legislation and implementation, it appears that CBCFs will roll on without any noticeable effect.

The JCB has become a JAB (Judicial Advisory Board) and judges will continue to be involved with treatment of residents – but as advisors rather than legal authorities.

The new Facilities Governing Board is made up of five members appointed by the JAB (two thirds) and by the county commissioners (one third). The initial appointees are: Dale Crawford, a former Judge and JCB chair; Bob Gloeckner, who recently retired after directing Alvis House(s) for many years; Joseph Scott and J. Scott Weisman, both practicing attorneys; Valarie Still, a former professional basketball player who now runs a foundation to help young females and Michael Taylor, who is with the Ohio Fraternal Order of Police.

Eighteen CBCFs are currently operating around the state. They are creatures of statutes enacted in the mid-1980s with the idea of slowing down the cost increases due to rapidly expanding prison populations by diverting amenable defendants into locked up treatment facilities where the stay would be shorter than typical imprisonments. And, of course, long-term dynamic savings occur when recidivism rates go down.

The statutes provided for the Ohio Department of Rehabilitation and Corrections (ODRC) pay all costs of construction and operation while maintaining financial oversight and issuing minimum operating standards. The Franklin County Common Pleas Court decided in 1989 to establish a CBCF. The local facility opened at 1745 Alum Creek Drive in 1993 and has been receiving about 900 referrals annually for screening while admitting about 520 a year. The average length of stay is 142 days. The annual operating budget is $52 million. In addition to drug treatment, the residents (including a wing of female residents) are given programming in everything from domestic violence and parenting to job readiness and training for GED.

Upon request in 2003, Jonathan Marshall, secretary to the disciplinary board, issued an opinion that judges' participation on JCB interferes with the faithful performance of judicial duties. The judges are required to seek funding from the ODRC which frequently has cases pending in Common Pleas Court. Furthermore, the court's attempt to meet residency quotas established by the ODRC may affect sentencing decisions. The judges' involvement in business, financial and employment decisions go beyond judicial functions and detract from judicial duties, Marshall said.

Meetings immediately ensued with representatives of the ODRC, judges and the CBDF. A committee formed to begin the process of designing alternatives and getting legislation to allow them. Potter was an active participant.

The legislation providing for the formation of JGBs and JABs was finally enacted in 2006.

A few weeks ago, the JCB met for the last time. That meeting was immediately followed by the first meeting of the JAB and the first set of advisories was basically to make no changes in the operations and staff. The first meeting at the FGB quickly followed and, so far, life at the CBCF has continued virtually unscathed by the legal headaches.

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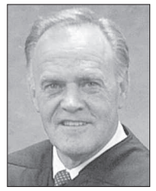

Honorable David E. Cain, Franklin County Common Pleas Court

New Judicial Portrait And Federal Public Defender

By The Honorable Mark R. Abel

Judge Smith's Portrait Presented

At the end of October, a ceremony was held presenting the portrait of Judge George C. Smith. It will be installed in the Judge's first floor courtroom. The handsome portrait shows the judge seated in a chair in his dark, mahogany wooded chambers. The judge is in his black robe, illuminated by spot lighting, looking directly at the viewer. Behind him to his right are his law books and over his left shoulder a corner of an American flag. The internationally recognized artist, Terry Rodgers, captured the judge's rare ability to engage litigators and litigants one-on-one, persuasively presenting his view on the merits of the issues that divide the parties and prevent them from reaching a reasonable compromise.

Chief Judge Sandra Beckwith presided. She said that she and her colleagues valued George Smith's wit, humor and good cheer. The Chairman of the Portrait Committee, John Zeiger, Zeiger Tigges & Little, presented the portrait. The judge's children, former State Representative Geoffrey Smith, and lawyer Elizabeth (Smith) Fligner unveiled the portrait. His son Curtis Smith, a stockbroker in New York, was unable to attend at the last moment because of an ankle injury. Barbara Wood Smith, the Judge's partner in life and in his career, had a seat of honor.

Frank Ray, Chester Wilcox & Saxbe, a past President of the Columbus Bar, offered remarks both as a former assistant Franklin County prosecutor under Smith, and a prominent civil litigator who has appeared before the judge for a good number of years. He noted the large number of Judge Smith's assistant prosecutors now serving as judges. Dean Nancy H. Rogers of The Ohio State University Moritz College of Law spoke on behalf of the judge's alma mater, of its pride in his accomplishments during a career devoted to public service. She said that the judge got an early start on his judicial career as a justice of the Moritz College of Law's student court.

Among those who joined in the celebration of the judge's career were 14 of his 20 law clerks and special guests Chief Justice Tom Moyer and *Columbus Dispatch* publisher John F. Wolfe.

After graduation from the Moritz College of Law in 1959, Judge Smith began his career in the Columbus City Attorney's office and became executive assistant to the mayor of Columbus in 1962 at age 26. In 1964, he served on Ohio Attorney General William Saxbe's Highway Task Force. In 1965, Smith became chief civil counsel for the Franklin County Prosecutor. He rose to the position of Franklin County Prosecutor in 1971. Nine years later, he became a Franklin County Municipal Court judge. In 1985, Smith was elected to the Common Pleas Court bench. President Reagan appointed him a United States District Court Judge in 1987. He succeeded Joseph P. Kinneary.

Judge Smith has been active in the community. He has been recognized by the Supreme Court of Ohio for superior judicial service and by the Ohio Prosecuting Attorneys Association as an Outstanding Ohio Prosecutor. His alma mater honored him with the

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

2005-2006 William K. Thomas Distinguished Jurist Award. He was Chairman of the Perry's Victory and International Peace Memorial at Put-in-Bay, where he spearheaded the building of a visitors' center and museum.

Federal Public Defender Steve Nolder

In November, Steven S. Nolder was sworn in as federal defender for the Southern District of Ohio. He has been acting defender since the district's first defender, Steve Keller, was forced to retire in 2005 because of disability.

Steve Nolder earned his J.D. with honors from Capital University Law School in 1987. He has been a federal defender since 1995, and he was named first assistant in 2004. Steve has provided a vigorous defense to defendants charged with a wide variety of federal criminal law offenses ranging from misdemeanor to capital murder charges. For many years, Steve prepared the federal defender's newsletter – *Precedential Value* – collecting and summarizing Sixth Circuit and Supreme Court criminal law decisions. He has also been a frequent lecturer in CLE programs, teaching the federal sentencing guidelines and other aspects of federal criminal defense.

Federal defenders are appointed by the federal courts of appeal. The Sixth Circuit merit selection panel for the position of Southern District of Ohio Federal Defender included Kevin Connors, Vorys Sater Seymour and Pease, and Sam Shamansky, Samuel H. Shamansky Co.

There are nine assistant federal public defenders in the Southern District of Ohio. They represent roughly half of the defendants prosecuted in the district. Last year they handled about 800 criminal cases.

Steve Nolder says that he, the attorneys in his office, and their support staff are all committed to providing vigorous, high quality representation to their clients. Under the leadership of Steve Keller, the office gained the confidence of the judges of the court that the defenders would provide effective representation to indigent criminal defendants. Steve hopes to maintain and build on that base. He does not foresee any major changes.

The federal defender faces the same limitations as the court in managing an increasing caseload with limited resources. The CJA now pays defense counsel $92 an hour. Attorneys appointed to represent defendants in capital cases and complex criminal cases will soon face a higher level of scrutiny of their fees. The Sixth Circuit will be a demonstration court for case budgeting. The history of the CJA has been that a relatively few high budget cases – capital offenses and death penalty habeas corpus – command a disproportionate share of the funds available to pay indigent criminals' defense counsel. The Sixth Circuit will employ a lawyer with significant criminal defense experience to assist counsel in preparing a realistic case budget that will provide a good defense at a reasonable cost.

The federal defender has offices in Columbus, Cincinnati, and Dayton. Columbus federal defenders are Gordon Hobson, Alan Pfeuffer, Alison Clark, and Suzanne Slowey.

More information about the Federal Public Defender's Office for the Southern District of Ohio may be found at: www.fpd-ohs.org/.

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Proselytization In The Workplace:

The Challenge Of Balancing Employee Rights

By David T. Ball

A recent Seventh Circuit decision highlights the challenge that employers face when one employee feels compelled to challenge another employee's beliefs or conduct on religious grounds. *Piggee v. Carl Sandburg College*[1] involved a cosmetology instructor at a public community college who, upon learning that one of her students was gay, placed two religious pamphlets in her student's smock during a clinical instruction session, telling her student to read the pamphlets and inviting him to discuss them with her later.

Both pamphlets were in comic-book format; the first was titled "Sin City,"and the second was titled "Doom Town." Collectively, they told stories that referred to Sodom and Gomorrah and portrayed negatively AIDS research, gay pride, and ministers who preach God's unconditional love.

The cosmetology student complained to the college's administration and the college investigated the student's complaint. When the instructor confirmed what the student had alleged, the college found that the student had been sexually harassed. The college's report explained: "It has been found that…, [the instructor] has been proselytizing in the hopes of changing [the student's] sexual orientation and religious beliefs." Subsequently the college decided not to renew the instructor's contract for the next year.

The instructor brought suit, and the college was granted summary judgment. On appeal, the Seventh Circuit emphasized that the instructor's expression of her religious views regarding homosexuality to her gay student had a negative impact on the college's ability to fulfill its educational mission. It inhibited her ability to teach by undermining her relationship with that student, as well as other students who were offended by her conduct. It disrupted her student's education, as he began to avoid her "like the plague." On this basis, the Seventh Circuit affirmed the district court's decision, ruling that the college's legitimate interest in promoting its educational mission outweighed the instructor's rights to religious self-expression, including her first amendment rights as an employee at a public institution.

In the Ninth Circuit, a similar case arose in the private employment context. In *Bodett v. CoxCom, Inc.*,[2] a supervisor told one of her subordinates that homosexuality was a sin and that the employee should break off her relationship with another woman. The supervisor asked her subordinate to join her in prayer and at church. After the company terminated the supervisor for violating its anti-harassment policy, she filed suit alleging that she had been discriminated against on the basis of her religion in violation of Title VII. The district court and the Ninth Circuit sided with the company on the grounds that the employee had not shown that the company's assertion that it had fired her for violating its anti-harassment policy, and not because of her religious beliefs, was pre-textual.

Though the courts are dealing with an increasing number of cases involving outright proselytization in the workplace, the contours of the law in this area are still being established. For example, though the Seventh Circuit upheld the college's termination of the cosmetology instructor on the basis that she sexually harassed her gay student by proselytizing him, the court acknowledged that "the sexual harassment policy may not have been a perfect fit for the behavior at issue here."[3]

With the law in this area so undefined, it is difficult to assess the exposure that an employer faces for an insufficient response to employee harassment versus the employer's exposure for disciplining rather than accommodating an employee who is proselytizing in the workplace. The challenge of balancing employee rights to a harassment-free workplace against another employee's rights to accommodation of their practice of religion is no simple matter.

The risk of significant liability is greatest when the employer makes little or no effort to accommodate employee religious practice. When problems arise, employers can reduce their exposure by soliciting and considering employee suggestions; documenting the reasons for rejecting any suggested accommodation; and allowing employees to swap work assignments or transfer locations in appropriate circumstances. Proactive measures, such as employee training sessions on religious harassment and religious accommodation, can help prevent such problems from arising in the future.

This is a challenge for employers that will not go away. It seems to be more than a coincidence that workplace proselytization is increasing at the same time that increased legal protections against discrimination and harassment on the basis of sexual orientation are being enacted. Employers need to handle workplace proselytization complaints as carefully as sexual harassment allegations if they are to succeed in avoiding the disruption caused by confrontations between workers of differing beliefs, and liability due to hasty responses.

David T.Ball has a dual background in theology and law, Ph.D. and J.D.

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1 464 F.3d 667 (2006).
2 366 F.3d 736 (9th Cir. 2004).
3 2006 U.S. App. LEXIS 23733, at *20.

David T. Ball,
Schottenstein Zox & Dunn

Burlington Northern & Sante Fe Railway v. White[1]

The New Standard For Employee Retaliation Claims

By Janine H. Jones

On June 22, 2006, the U.S. Supreme Court issued an important decision which has significantly altered the prima facie elements of a Title VII retaliation claim. This seemingly "employee-friendly" decision will undoubtedly increase the number of retaliation claims filed by employees and will arguably make obtaining summary judgment on such claims increasingly difficult.

In *Burlington*, White was hired as a "track laborer," and her initial duties were to operate a forklift. Four months later, White complained that her immediate supervisor made repeated insulting and inappropriate remarks regarding women. As a result of her complaints, her supervisor was suspended and ordered to attend sexual harassment training. Soon thereafter, Burlington removed White from her forklift duties and assigned her to "less desirable" duties within her job description, thereby creating the opportunity for a "more senior man" to have the "less arduous and cleaner job" of forklift operator.

Based on this change in her job responsibilities, White filed a charge with the Equal Employment Opportunity Commission (EEOC) alleging gender-based discrimination and retaliation. Shortly thereafter, White filed another EEOC retaliation charge alleging that Burlington was monitoring her daily activities. A few days after filing her second charge, White was suspended without pay following a disagreement with her immediate supervisor. White grieved her suspension and was awarded back pay for the 37 days she was suspended. She filed another EEOC charge for the suspension and then received her EEOC "Right-to-Sue" letter, filed suit in federal court, and convinced a jury to find in her favor that both the change in her job responsibilities and her unpaid suspension amounted to retaliation. The Sixth Circuit Court of Appeals eventually affirmed White's retaliation claims and Burlington appealed.

On appeal, Burlington argued that to prevail in her retaliations claims, White had to show that the challenged action constituted a materially adverse change in the terms and conditions of her employment. In resolving a split between the Circuit courts of Appeal, the Supreme Court held "that the anti-retaliation provision of Title VII does not confine the actions and harms it forbids to those that are related to employment or occur at the workplace." The court further held "that the provision covers those (and only those) employer actions that would have been materially adverse to a reasonable employee or job applicant....the employer's actions must be harmful to the point that they could well dissuade a reasonable worker from making or supporting a charge of discrimination." The court also held that in order to prevent "petty slights and minor annoyances," an objective standard must be utilized to be judicially administrable. This "objective" standard requires material adversity to separate significant from trivial harms and the reactions of a "reasonable" employee. Additionally, the court "phrased the standard in general terms because the significance of any act of retaliation will often depend on the particular circumstances. Context matters."

This decision could potentially open the floodgates in deciding the "objective" standard and "context." While we do not yet fully know how the Sixth Circuit will interpret the Supreme Court's decision, employers will likely be faced with defending a barrage of retaliation claims until such time as a clear standard is enunciated. Shifting gears from its pre-Burlington standard where the lack of an adverse employment action precluded a plaintiff from establishing a prima facie case of retaliation, the Sixth Circuit must now consider the "context" of the alleged retaliatory actions following an internal or external complaint of discrimination and courts will look to the "objective" standard as set forth in *Burlington* regardless of whether the action "concern[s] employment and the workplace."

Since the decision was issued, almost all of the circuits have issued decisions interpreting the Burlington standard. The Sixth Circuit, for instance, has examined several cases on this issue; *Randolph v. Ohio Department of Youth Services*, *Jordan v. City of Cleveland, and Doucet v. University of Cincinnati.*

While it remains to be seen how far the courts will extend the Burlington standard, possibly even beyond Title VII, the decision stresses the need for employers to be extremely diligent in training supervisors in anti-retaliation principles and consistent treatment of employees who have filed internal or external complaints of discrimination. Remember: the fact that an employee has filed a complaint of discrimination does not automatically shield that employee from counseling or discipline in the normal course of business; however, when faced with disciplining an employee who has complained of discrimination, either internally or externally, it is always advisable to consult with an employment attorney prior to taking action.

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[1] 126 S. Ct. 2405 (2006).

Janine H. Jones,
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Antenuptial Agreements Are Becoming More Popular

By Scott N. Friedman

I have been asked to prepare or review more antenuptial agreements this year than last year. In fact, I have seen a steady increase in the creation of antenuptial agreements over the last several years. To try and analyze the reasons why this is happening, one must first look towards trends and the law in Ohio.

There are growing numbers of second, third and fourth marriages, and people getting married for the first time are older and have accumulated more property and wealth. The divorce rate in Ohio, and nationally, fluctuates, but has hovered around 50 percent for first marriages. An antenuptial agreement is most often designed to protect assets and address issues of support in the event of a divorce, dissolution, or legal separation. There are usually some estate planning provisions contained in antenuptial agreements, but its main purpose is protection in the event of marriage termination.

Ohio Revised Code 3105.171 is the revised code section dealing with division of marital property and separate property in divorce, dissolution and legal separation. ORC 3105.171(A) (6) (a) (v) defines separate property as all real and personal property and any interest in real or personal property excluded by a valid antenuptial agreement. Property can be, for example, real estate, a business, retirement accounts, or an important piece of jewelry. Most often, individuals want to protect the distribution of assets accumulated prior to the marriage, from the spouse entering into the antenuptial agreement, in the event of divorce.

Ohio law generally upholds valid antenuptial agreements. We look to Ohio case law for factors to analyze antenuptial agreement validity. The agreement must be entered into without fraud, duress, coercion, or overreaching; there must be full disclosure or understanding of the nature, value, and extent of each intended spouse's property; and the terms of the agreement should not promote or encourage divorce or profiteering by divorce.[1] The *Gross* case decided by the Ohio Supreme Court established those factors. The *Gross* case also dealt with a provision in the antenuptial agreement dealing with alimony (now referred to as spousal support). In addition to the other factors listed herein, any provisions setting forth spousal support in an antenuptial agreement shall meet the test of conscionability at the time of the marriage termination or legal separation. In other words, is it conscionable to indicate no spousal support for a wife, who has not worked during the marriage, has stayed at home with the children, and has been married to this spouse for 25 years, and her spouse earns over one million dollars per year?

Because of these factors, it is recommended that both spouses have individual legal counsel and that the agreement is signed at a reasonable time prior to the wedding and without evidence of coercion. In addition, both spouses should fully disclose all assets, liabilities, and income and the information should be contained on an exhibit attached to the final antenuptial agreement. Further, if spousal support is going to be dealt with, one should consider addressing some of the issues herein.

Now that we have looked at the basic principles underlying the validity of antenuptial agreements, let's go back to why they are becoming more popular. Most often, with first time marriages, it is family of the intended spouse who is asking for the agreement. There may be valuable family assets or a business that could be passed down to the next generation. Another popular reason relates to the trend of people waiting longer to get married; they are older; they have developed wealth, real estate, a business, retirement. They want that protected. Others may be getting married but are still not sure it is the right thing to do. Maybe the relationship has been rocky even before the marriage.

Second, third, fourth, etc., marriages generally come with a different reason. Some have been through a nasty, expensive divorce and want to avoid repeating that process. Others want to be able to preserve assets for children from a previous marriage. This is where certain estate planning provisions may also be addressed. What happens in the event of a spouse's death while still married or while estranged from that spouse? It is important to deal with these questions in both an antenuptial agreement as well as in other more detailed estate planning documents such as a will or a trust. It is important for the attorney drafting the estate plan to be aware of and follow the terms of the antenuptial agreement.

Our media, especially the national media, seems to glorify divorce. Read the headlines about celebrity divorces. We have a reality show dealing with divorce cases and another show that deals with adultery. Newspaper columns, radio talk shows, and television talk shows on divorce are common. Perhaps this exposure to the divorce process has led to more antenuptial agreements.

The decision to enter into an antenuptial agreement is very personal. It is a conversation intended spouses should consider having at the same time they discuss how many children to have or whether one will work after children. These discussions are not easy, but in some cases necessary, for both individuals to feel comfortable about their future together.

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[1] Gross v. Gross (1984) 11 Ohio St. 3d 99

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Fostering Successful Parenting:

Home Visitation Using The Nurse-Family Partnership Model

By Yvette McGee Brown

The Center for Child and Family Advocacy (CCFA), having a mission of fostering a safe community by breaking the cycle of violence through coordinated, comprehensive services in the treatment and prevention of child abuse and domestic violence, is launching the Nurse-Family Partnership (NFP) home visitation program in Central Ohio. The NFP program is a primary prevention program for low income, first time mothers. In partnership with The Ohio State University (OSU) Medical Center Obstetrics and Gynecology Clinics, CCFA will receive referrals for mothers who meet NFP criteria. Participation is completely voluntary and at no cost to the client.

The primary audience for the NFP consists of medically underserved, low-income, first-time mothers. Nationally, mothers enrolled in the NFP have a median age of 19 and have completed 11 years of education (median years). Only 47 percent of them have completed high school, 39 percent are enrolled in high school, and 79 percent are unmarried. The mothers have a median household income of $13,500. Of the 17,000 annual births in Franklin County each year, 1,700 children are born to mothers younger than 19 years of age.

Based on patient profiles reported by OSU, CCFA expects to enroll a large percentage of minority participants from throughout Franklin County and surrounding counties. Significant portions of this population have histories of:

- Substance abuse (23 percent)
- Teen pregnancy (22 percent)
- Mental health/psychiatric problems (21 percent)
- Cigarette smoking (28 percent)
- Lack of breastfeeding (76 percent)

Our goal is to help first-time mothers understand the connection between their well-being and their baby's health. Nurse home visitors will visit families at least once a week, for up to three years, beginning in pregnancy and decreasing over time, as mother and baby progress. During pregnancy, the nurse will work with the mother on negative behaviors related to substance abuse, poor nutrition, and domestic violence — significant risk factors for pre-term delivery, low birthweight, and infant neuro-developmental impairment. Following delivery, the emphasis shifts to enhancing the quality of family functioning, including physical and emotional health of mother and child; environmental health and safety; quality of caregiving for the infant and toddler; maternal life course development; and family and friend support. The nurse visitor will also work with the mother on delaying a second pregnancy; getting back to school or work; and identifying healthy life choices for her and her baby. The nurse visitor will help her understand appropriate developmental expectations for the baby and the importance of well-baby care.

We anticipate that the implementation of the NFP in Columbus will provide invaluable data to develop an intervention model that effectively addresses domestic violence. Though there has been limited success with home visitation in addressing issues of domestic violence, our medical director, Dr. Philip V. Scribano, after studying the model, believes that we can have an impact with this population. We are one of only four NFP sites nationally to be approved to participate in a rigorous study to develop methods of intervention, within the context of the NFP model, to reduce domestic violence in this high risk population.

The published results of a 15-year follow-up study of the original NFP trial in Elmira, New York, demonstrates the potential of this model to significantly change outcomes for young mothers and their children. In that study, researchers demonstrated that nurse-visited unmarried women had fewer subsequent pregnancies and greater spacing between first and second pregnancies; fewer arrests; and lower rates of alcohol and drug abuse. Additionally, women visited by nurses were less likely to be identified as the perpetrators of child abuse and neglect. The children in the Elmira study also showed long-term benefits, including fewer sexual partners, fewer cigarettes smoked, fewer alcoholic beverages consumed, and fewer parent- and school-reported behavior problems. Similar results have been reported in communities that differ from Elmira, including urban areas and communities with different ethnic and racial demographics.

The four primary goals for our three-year pilot, with examples of their measurable outcomes, are:

1. To improve prenatal health:
   - Increased use of appropriate community services
   - Decreased use of nicotine
   - Reduced pregnancy-related medical complications
2. To improve children's physical and emotional health:
   - High immunization rates
   - More stimulating/supportive home environments
   - Fewer injuries and emergency room visits
3. To improve families' self-sufficiency:
   - Greater workforce and/or school participation
   - Delayed subsequent pregnancies
   - Fewer months on public assistance
4. To reduce intimate partner violence:
   - Low rates of state-verified incidents and child abuse and neglect
   - Fewer episodes of intimate partner violence
   - More appropriate parenting attitudes and behaviors

This program would not be possible without the generous investment of Central Benefits Healthcare Foundation. Central Benefit's $500,000 transformational gift is making this project possible. Other funding sources include Cardinal Health, the Columbus Medical Association Foundation, The Columbus Foundation, and the Harry C. Moores Foundation. We are truly fortunate to live in a community that supports children and provides opportunities to improve their lives.

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It Takes Nine To Tango:
The Dance Of Mediation

By James A. Readey

On a beautiful Ohio day in late November, the annual Miller family Thanksgiving feast was being prepared and the large family was gathering at Judy's home. Judy dispatched her 18-year old daughter Holly to pick up "Grandpa" Billy Miller as none of his offspring felt he should drive himself.

Twenty minutes later, with Grandpa Billy beside her, Holly was slowing and turning left into the driveway when, from the opposite direction, a large feed truck blasted the old Mustang on the passenger side. Grandpa Billy, a non-believer in seat belts, was ejected and died instantly of massive head injuries.

A wrongful death suit was brought against the truck driver and his employer by daughter Ruth, the administrator of Grandpa Billy's estate for the benefit of his next of kin. The case was fraught with difficult liability and damage issues but was settled for $600,000. The "easy" part of the legal proceedings over, I was called in to mediate among the next of kin the equitable split of the $400,000 left after the attorneys' fees were deducted.[1] Grandpa Billy left five grown children: Judy, Connie, Ruth, Charles and Clint; and one brother, Tom, also survived him.

In the new administration building in the small county seat, I met with the three lawyers representing the nine next of kin present, vying for their "fair share" of the settlement. The clients were already ensconced in three different meeting rooms in the building. I came that morning well prepared, fresh from a good night's sleep, and encouraged by the optimism all three lawyers had expressed to me in their position statements.

The three lawyers told me it would be a "major mistake" to put everyone together in the same room for my opening remarks (my first hint that there was anger and deep family divisiveness), so I met separately with each group and their respective attorneys. Contrary to the optimism expressed in their written position statements, the attorneys revealed that while they hoped for a settlement, they were pessimistic about the possibility.

Celeste Darby represented Connie and Ruth and their children, and was the attorney handling administration of Billy's estate. Ruth came alone, but Connie had her husband, Homer, with her in addition to her three grown children, who I learned were there solely at her insistence. Celeste privately shared with me that this was her (Celeste's) first mediation experience, and she was clearly very nervous.

Jeff Baumgartner, a skilled personal injury lawyer, represented Charles and Clint (and their children), and also "Uncle Tom," Grandpa Billy's 70-year old brother. Early on, Jeff had recognized the potential conflicts of interest among the various next of kin and urged the heirs to discuss the ultimate split as the mediation grew more imminent, hoping they could work it out themselves. The arguing and rhetoric had only, however, become more vociferous and acrimonious.

John Porterfield, a business lawyer in the local community and Miller family friend, represented Judy and her three children, including Holly, who miraculously survived the crash with only minor injuries. Neither Holly nor her siblings were present.

In speaking to the three groups, I heard much of what I had already read in the three Position Statements. The probate judge at the second pre-trial conference had unsuccessfully tried to broker a settlement; exasperated, he then "strongly encouraged" settlement, and ultimately ordered the matter to be mediated.

I met first with Clint, Charles, Uncle Tom and their attorney, Jeff. Clint and Charles emphasized that it was they who kept, in their "spare time," the farm going as their dad Billy aged, and that the farm was mortgaged heavily and equipment was deteriorating. Clint and Charles extolled the virtue of how close Billy had stayed to his brother Tom over the years, insisting that Tom should receive something. Clint privately shared with me that Billy especially liked Brad, Clint's 17-year old son, who was devastated by the loss of his grandfather and should, he said, receive some money also. Uncle Tom said nothing.

I then visited with Ruth, Connie, Connie's husband and their three children, and their attorney, Celeste. Ruth was clearly the main one to spend time helping Billy before and after their mother died, taking him dinner, getting his groceries, and keeping his refrigerator and freezer stocked. She took his laundry alternately to Connie and Judy to do every other week, and she picked it up cleaned and pressed to return to Billy at the farm. To my surprise, Ruth insisted that Billy would have wanted none of this fighting, and she proposed an even split five ways among the children.

Connie, however, resented her sister Judy getting any money, not only because Judy's daughter Holly may have caused Billy's death, but because Judy was "a poor mother and even a worse daughter," who never could manage money. Connie's three children, all grown, were in the room, but Connie mostly stated their cases for them, as they quietly nodded in agreement. Connie assured me that each of her three children would be "independently voting" and she would not interfere with their choices.

When I moved on to speak to Judy and her attorney John, I found her to be a tearful wreck. The sudden loss of her father, the horrible scene in front of her house that fateful Thanksgiving Day, and her daughter Holly's severe depression and nearly suicidal guilt since the accident were all converging on her as she described, continuously sobbing, the deterioration of their family over this tragedy.

Playing off Ruth's apparent leadership in the family and her suggestion for an even five-way split, I went to work. I started with Judy who, to my amazement, offered to settle her 20 percent share for 15 percent, suggesting I offer her remaining five percent either equally to the other siblings or to Connie, whom she knew to be her most vocal detractor. I decided to go to Ruth, Connie, and Connie's three children last. I felt if I could get Charles and Clint (and Uncle Tom) on board next, then Connie and her children might be less inclined to kill the deal if the rest of the family was in agreement.

Clint and Charles were non-committal as I presented the idea of a five-way split, with Judy giving up five percent to Connie or equally to be split by the others. Clint insisted that his son Brad and Uncle Tom should split the extra five percent, and said Connie was a "hot-headed money-grabber," not entitled to it. Uncle Tom stood up and said grandly that he wanted no money from Billy, that Billy's love was plenty for him. He felt Brad would agree and that Clint, if he chose, could pass on some of Clint's 20 percent to Brad. I chimed in that the other adult children were intending, so far as I could tell, to pass on some of their respective shares to their own children "from Grandpa Billy," which seemed to be true. Clint and Charles agreed on the equal split proposal. Their attorney, Jeff, was a great help getting them to that point.

When I went to see Ruth, Connie and Connie's three children, I clearly and rationally (I thought) laid the proposal before them, including Judy's offer to give five percent of her share to Connie. Ruth seemed to nod with approval, Connie said nothing but was clearly seething, and her kids sat totally poker-faced. I urged all of them to take as much time as they needed to consider not only their feelings, but those of all the Miller family members, and what it could mean to have this behind them, to begin the healing, to defuse the fighting – to stop spending money on attorneys' fees. Their attorney Celeste almost chanted "Hallelujah" as I finished, smiled broadly and thanked me for all of my "wisdom."

I was sure I had "nailed it," and not left anything out. It was as exhilarating to me as delivering a whiz-bang closing argument to a jury. I felt I had been at the top of my game and was sure we had a settlement. I left the room and waited, reminding the other participants it takes "all nine to tango" (Judy, Clint, Charles, Ruth, Connie, Connie's three children, and Uncle Tom). Anything less than unanimity would fall short.

Fifteen minutes passed, then 30, then 45, then an hour. I wandered the building, perplexed. What could be taking so long? Finally, one of Connie's children hailed me down and I returned to the "Ruth and Connie Room." Connie and Ruth both sported tear-stained faces, and Connie's three children were grim-faced and unsmiling. Celeste (whose face was drawn and ashen) announced quietly that she was sorry, there was no settlement; her clients were tired and had given it their best, but they were terminating the mediation. There was no dissuading them, and it was clear I was not going to get any explanations that day. We had been there eight hours.

Now that's a bad day for a mediator, let me tell you. I learned the next day from a weary Celeste that Connie killed the settlement single-handedly. Even her three kids voted with Ruth in favor of the settlement, but Connie was steadfast in railing against Judy (and Holly). "Fifteen percent to them was 15 percent too much," Connie had declared. Clearly I should have spent more time with Connie, allowing her to vent and getting a better understanding of the depth of her convictions, which I had underestimated.

A month later, after more depositions had been taken, motions filed, night-oil burned, family wounds undoubtedly deepened, and thousands more dollars wasted, the matter settled on the morning of trial. I am told that Judy gave up a little more, which Connie acquired, and Clint, Charles and Ruth secretly gave some of their shares to Judy. Somehow I just could not shake the feeling that I had failed those people.

Disappointment aside, we all live to fight another day. I used the experience to remind me to work more intensely with the people I identify as having the most trouble making peace. It also reminds me that I am not Superman or David Copperfield, and I will not be able to help parties settle every matter I encounter. The lesson is not to beat myself up and dwell on the failure to settle, but to reach my own inner peace so I am renewed and prepared as a mediator to face the next challenging group of people with a problem.

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[1] The attorney who negotiated the settlement had agreed to pay the litigation expenses out of his one-third contingent fee, leaving exactly $400,000 to split up.

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Tax Issues In The Year Of Divorce

Thoughts About Appropriate Allocations

By Susan A. Moussi

A taxpayer's filing status, for any year, is determined by his or her marital status as of December 31. Therefore, if you are single on December 31, you will file as a single taxpayer for the entire year ending December 31, no matter what your status was during the year. This rule, when unknown or forgotten, may leave one party, solely, to bear the tax cost of (or to receive benefit of) the tax consequences that occurred during the marriage. It also means that certain items of income and deduction will need to be allocated between the two separate returns.

Asset or Liability- Taxes As of Date of Valuation

The typical marital balance sheet includes cash, investments, real estate, autos, household items, retirement plans, mortgages, loans, and credit card debt. Many taxpayers find themselves with some amount to be paid (or an amount due to them) when they file.

If tax returns were not required to be prepared on a calendar-year basis, married couples who divorce would have two tax returns in the year of divorce. One would be a joint return that would reflect income and deductions from January 1 through the date of divorce. The other return would be a single return (or Head-of-Household) for the remaining portion of the calendar year. The joint return would leave both husband and wife obligated for any tax liability (or both entitled to any refund). This would seem to be a reasonable way to handle a dual-status tax year, yet this is not how it's done.

A value could be calculated by preparing a draft of a partial-year return, which reflects the income and deductions, up to the time of the valuation date, to determine any tax liability or refund. Documents should be available, for the most part, to do this. Year-to-date pay statements could be used to determine income and withholdings as of the date of valuation; broker statements would provide investment income and gains/losses; self-employed individuals could produce year-to-date profit and loss statements; charitable contributions could be summarized; and information on mortgage interest incurred and real estate taxes paid could also be available. Some information may not be available, like information for partnership interests, but could be estimated based on the last year's information or some other reasonable method.

Income and Deductions in the Year of Divorce

Some months after the divorce is final, each spouse will be sitting down with their respective preparers to file their tax return for the year before. Questions about claiming mortgage interest, real estate taxes, and estimated tax payments (made while married) often come up. If these were agreed to while the couple was disentangling their financial affairs, each would be clear on how they were going to allocate these marriage-related items.

There are some guidelines issued by the IRS on the allocation of income, deductions, and other tax-related payments that occurred during the marriage. Here are some of those guidelines:

- Income is reported by the person who has earned the income. Therefore, all wages and self-employment income is reported by the husband or wife who earned it, even though this income may have been used to support both husband and wife.
- Investment earnings in joint accounts are normally reported under one primary social security number, but would be divided equally on two separate returns. If the investment earnings are generated from an individually-owned account, with earnings allocated to one spouse only, that spouse claims the income.
- Deductions are generally claimed by the individual who paid it from their own account. However, if a deductible expense was paid from a joint account, the deduction is typically divided equally, with exceptions for mortgage interest and real estate taxes.
- Estimated tax payments will be considered to be paid in proportion to the taxpayers' separate tax liability, unless agreed otherwise. It has been my experience that the IRS gives credit to the primary taxpayer (usually the husband), even when you instruct them otherwise. This is usually corrected with some letter writing.

The tax issues listed above relate to the year the couple is divorcing, not some time in the future when an asset is eventually sold or liquidated; they should not be confused with "after-tax" marital balance sheets. Tax laws and rates do not have to be presumed when discussing the year of divorce; they are known, for the most part.

Encourage your clients to seek out the assistance of a tax preparer to help them understand these issues and to assist them in developing an allocation of the tax-related items that makes sense. I believe your clients will thank you for bringing these issues to their attention.

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Domestic Downsizing

Make A Life Transition Seamless

By Janine E. Aquino

Whether facing an unexpected situation or planning for retirement, changing homes or lifestyles can be a confusing and emotional time. It is often hard enough to manage the changes in one's personal life, without having to worry about the details of selling a home and property to move into a new home or a long-term care facility.

Sometimes, choosing a new home — whether it is in a long-term care facility or condominium — is the easiest part; sorting through a lifetime of personal belongings is the most challenging. Downsizing the contents of a home can be made simpler by enlisting the help of an estate settlement company.

In situations where the family is taking care of the downsizing, there are additional emotional stresses that can slow down the process. More often than not, it is the children who are most sensitive to the move. They often feel guilty or are having a hard time accepting the change in their parent's life. If the stress of sorting a lifetime of belongings becomes too much, an estate settlement company can help. They will quickly and professionally move the downsizing process along, from sorting and appraising items to be sold, to packing the belongings and moving them to the new address.

I have seen situations where someone has lived in his or her home for over 30 years and, in that time, has never organized or thoroughly cleaned out any part of the home. In situations like this, it is easy to see how packing and moving can quickly become overwhelming and stressful.

The most important part of downsizing is determining what can be moved, what can be stored, what is trash, and what can be sold. Once everything is sorted, the real research begins. Both valuables and everyday items, sometimes considered of little worth, such as furniture and dinnerware, can actually be worth substantial amounts of money, helping to pay for moving or other personal expenses.

An estate settlement company will enlist the expertise of auctioneer services to help someone who is downsizing get the best price for furniture, antiques and other belongings. An estate settlement company can also facilitate donating the unwanted, but still useful, items to charitable organizations. As an outside party in a sensitive situation, an estate settlement company provides impartial guidance on handling personal belongings. Estate settlement companies also partner with elder care and domestic downsizing attorneys.

Estate settlement companies have been through the downsizing process numerous times and have the skills and resources to make this important transition in someone's life seamless—one filled with excitement, not anxiety.

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History On Trial

By Deborah E. Lipstadt (Ecco, 2005)

Reviewed by Janyce C. Katz

If Elie Wiesel is correct, to deny the Holocaust is to defame the dead.

Deborah Lipstadt, the Emory University Dorot Professor of Modern Jewish Studies, and her publisher, Penguin Books were sued in the British Court system for libel by David Irving, a freelance historian who claimed she had falsely characterized him as a Holocaust denier and a distorter of historical evidence.

Lipstadt found herself fighting for the honor of history. The trial took place in England, where she had the burden of proving her historical analysis was factually correct and his was not. *History On Trial* describes her fight.

The book also raises important U.S. Constitutional issues. If the free expression doctrine protects the right to have, hold, and express personal opinions and beliefs, how should intentionally false statements be treated?

It has been argued that there is no such thing as a false idea under the first amendment of the United States Constitution. A pernicious opinion is to be corrected by the competition of other ideas – in a "marketplace of ideas." See, e.g. *Gertz v. Robert Welch, Inc.* (1974), 418 U.S. 323,339-40. But, can it?

The argument is that if there is false speech or lies about political candidates during an election, there should still be no regulation of speech because the danger of government suppressing true facts supported by a minority, while regulating the lies, is too strong.

Lies about an individual can create false beliefs, which can destroy that person's life. But limiting such speech could prevent the utterance of truths.

Repeated lies about individuals who have different customs can become believable. For example, as noted in the movie *Hotel Rwanda*, the slaughter of Tutsies can be directly traced to radio broadcast encouragement of such action.

Speech is not protected if it immediately incites violence in the U.S. Other countries limit damaging speech against groups.

Here, when Jon Stewart pokes fun at politicians and issues, it is protected free speech. Satire elsewhere, such as cartoons published under the Danish free speech law, can provoke violent reactions from those offended by them.

This is the dilemma – to limit speech that is derogatory of groups and risk the suppression of valuable truths. With that comes the problem of who defines and enforces what is "derogatory." Or, if ideas are allowed to battle in the "marketplace of ideas," the idea backed by greater resources could overshadow other ideas.

Lipstadt is a strong believer in the "marketplace of ideas." She is said to be dismayed that Austria arrested Irving based upon his denial of the existence of gas chambers.[1] She believes that history and facts will triumph over lies.

Lipstadt's problems with Irving started when she wrote *Denying the Holocaust, the Growing Assault on Truth and Memory*. Her book described the Holocaust deniers who argue that the systemic murder of millions of Jews and millions of others by Nazis during World War II never occurred, some of whom are tenured academics.

David Irving was one such person. Although not accepted by "real" historians affiliated with academic institutions, the good-looking, charming Irving wrote books which reviewers loved and which sold well.

His first book, *The Destruction of Dresden*, was thought to advance an important point of view. Only during the Lipstadt trial did it come out that the book's footnotes were inaccurate and that facts, such as the number of people killed by allied bombing, were greatly exaggerated.

In his 1977 book, *Hitler's War*, Irving claimed that Hitler did not plan the "Final Solution," and did not know of the murder of millions. By the mid 1980s, Irving had associated himself with the Holocaust-denying *Institute for Historical Review*, was giving lectures to far right groups, and was publicly denying that the Germans exterminated Jews in gas chambers.

To defend herself, Lipstadt assembled a team of outstanding attorneys, including Anthony Juliuis and later, libel barrister Richard Rampton QC. They retained as expert witnesses people such as Professor Richard J. Evans, an historian of Modern History who, after two years of research, concluded that not one sentence written by Irving could be trusted for accuracy.

That Irving held strong anti-Jewish views also came out in the trial. One piece of evidence introduced into the record was a "poem" he made up for his child, "I am a baby Aryan, Not Jewish or Sectarian…"

At the end of the trial, Mr. Justice Gray found that Irving "for his own ideological reasons persistently and deliberately misrepresented and manipulated historical evidence."

Simple, you say. Justice and the "marketplace of ideas" won. But, as Lipstadt pointed out in her book, it wasn't so simple.

Many people had been convinced by Irving's books that his facts were accurate. Lack of knowledge about his bigotry made his ideas about the Nazi leaders and their actions during World War II seem more plausible.

Had Lipstadt not mounted a strong case to defend herself, Irving's ideas that there had been no organized death policy of Hitler and the Nazis, no gas chambers at Auschwitz, etc., would have been strengthened.

Court is expensive. Lipstadt's lawyers were pro bono until they could no longer afford to continue. Lipstadt was pressured to settle. Les Wexner, founder of The Limited, alerted to the problem, coordinated a fund raising effort, which financed the cost of the trial. Plus, Emory University, Lipstadt's employer, backed her 100 percent.

While focused on the trial of a scholar of Jewish history against a denier of the Holocaust, the real problem pointed out by *History on Trial* that both free speech and history depend upon the ability to access the truth.

Irving lost the trial, but Holocaust denial lives on, as evidenced by the President of Iran who says the Holocaust never happened. These falsehoods, like other similar lies, are still given credence and could "win" in the marketplace of ideas.

To be able to discern truth in the "marketplace of ideas," the public must be well-educated, able to discern the difference between lies and facts, and not afraid to do so. A strong, free press must validate facts before printing them and good historians must chronicle what really happened. Otherwise, the liars win.

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[1] Irving was found to have violated the Austrian federal law in prohibiting National Socialist activities, when he made a speech in 1989 denying the existence of gas chambers.

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Put It In Writing:

The Various Documentation Requirements Of The Ohio Rules Of Professional Conduct

By Alvin E. Mathews Jr.

Charles Chaplin, a famous attorney in Metropolis, Ohio, has practiced for over 40 years. An eloquent speaker in the courtroom, he's developed the bad habit of not writing anything down.

Charlie obtains great results for his clients, yet recognizes his weakness is written communication. He always has good intentions of developing sound written fee agreements and engagement letters but never gets around to doing so. In fact, most of his client agreements are handled by a handshake. Surprisingly, he's managed to avoid bar association grievances over communication and fee disputes.

Panic set in when Charlie received the press release from the Ohio Supreme Court about enhanced writing requirements being the foremost feature of the Ohio Rules of Professional Conduct, effective February 1, 2007. He wondered, "How will I ever survive practicing law under these new rules?" He decided to call his ethics lawyer and learn what the rules were all about.

Charlie's ethics lawyer, Marshall Thurgood, encouraged Charlie to incorporate the new writing requirements into his practice. Marshall advised Charlie that there are over 20 new writing requirements in the Ohio Rules of Professional Conduct. The writing requirements can be found in Rules 1.5, 1.7, 1.8, 1.9, 1.10, 1.11, 1.12, and 1.15.

Marshall advised that Charlie will encounter a few of these requirements on a daily basis and other requirements only periodically. For instance, since Rule 1.5 relates to legal fees, Charlie must remember that all non-refundable and earned-upon-receipt fee agreements charged in his criminal practice have to be in writing, disclosing that unearned fees must be returned to the client if the engagement is not completed. Similarly, written contingent fee agreements on Charlie's occasional personal injury cases will continue to be required and, at the end of the engagement, a written closing statement signed by the client and each lawyer is also required. Charlie will also have to obtain written client consent after full disclosure of any fee sharing agreements with lawyers who are not in his firm.

Marshall advised Charlie that there are also writing requirements in the conflicts of interest rules that Charlie may use regularly. For instance, under Rule 1.7, Charlie's clients must give "informed consent," confirmed in writing, to any conflict of interest. Other specific types of conflicts of interest require additional written confirmation. Rule 1.8 requires the terms of a proposed attorney/client business transaction be fully disclosed in writing to the client, advising the desirability of seeking the advice of independent counsel, along with informed consent, in a writing signed by the client, containing the essential terms of a proposed transaction, the lawyer's role in the transaction, and including whether the lawyer is representing the client. Charlie is intrigued that, pursuant to Rule 1.8, insurance defense counsel must provide to all clients a "statement of insured's rights." Also, Marshall advised Charlie that, under Rule 1.8, a lawyer who seeks to settle a claim for malpractice with a client must advise the client, in writing, of the desirability of seeking independent counsel.

Additionally, Marshall advised Charlie that, pursuant to Rule 1.9, former clients must give informed consent, confirmed in writing, to a conflict of interest presented in a new client engagement taken on by their former counsel. Likewise, Charlie learns that, under Rule 1.10, a lawyer, when moving to a new firm, must give written notice of a conflict of interest to a client of the former firm about his or her relocation.

Marshall also advises Charlie about requirements for government lawyers and judges moving to or from private practice. In Rule 1.11, government lawyers must give informed consent, confirmed in writing, when the lawyer's representation of a private party conflicts with their former work in a government agency as well as providing written notification to the government agency. The government lawyer must obtain the government agency's informed consent, confirmed in writing, when the lawyer proposes to participate in the matter in which the lawyer substantially participated while in private practice. All parties must give informed consent, confirmed in writing, whenever a lawyer seeks to represent a party after having served in a judicative role in the matter. Rule 1.12 requires written notice to all parties when a lawyer seeks to represent a party after one of the lawyer's partner or associates previously served in a judicative role in the matter.

Finally, Charlie learns of the writing requirement for handling third party funds, set forth clearly by Rule 1.15. Any variation on general requirements of prompt delivery of a client's or a third person's funds must be made by agreement, confirmed in writing.

After Marshall advised Charlie about the writing requirements and assured him that only a few of them would impact his practice regularly, Charlie felt much more at ease and realized that the new writing requirements would make him a better lawyer. His clients would be better informed about their legal matters. His weakness in communicating with his clients would be strengthened by following the new requirements and Charlie could continue to avoid client grievances and fee disputes.

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"Famous" Trademarks Get Enhanced Legal Protection

By Michael J. Gallagher

A case with Sixth Circuit roots has led to the unusual step of a congressional overturning of the Supreme Court on a trademark matter, with implications for large and small trademark holders alike.

The Supreme Court's decision in *Moseley v. V Secret Catalogue, Inc.* (537 U.S. 418 (2003)) involved a small store owner's attempt to use the name "Victor's Little Secret" against the protests of the giant Victoria's Secret company. The district court in Kentucky, finding that the record contained no evidence of actual confusion between the parties' marks, concluded that "no likelihood of confusion exists as a matter of law." It entered summary judgment for petitioners, Victor and Cathy Moseley, on trademark infringement and unfair competition claims. However, as to a claim brought under the 1995 revision of the Trademark Dilution Act of 1946, the court first found the two marks sufficiently similar to cause dilution, and then found "that Defendants' mark dilutes Plaintiffs' mark because of its tarnishing effect upon the Victoria's Secret mark."

The Sixth Circuit affirmed, and the Supreme Court was confronted with a growing circuit split on the issue as to whether trademark dilution required an actual lessening of the ability of a mark to distinguish goods, or whether more diffuse "tarnishment" of a famous mark might suffice. The evidence showed that while those who saw "Victor's Little Secret" thought of an association to Victoria's Secret, there was no evidence that they had formed a lesser opinion of the Columbus retailer as a result. With no lessening of the capacity of the Victoria's Secret mark to identify and distinguish goods or services sold in Victoria's Secret stores or advertised in its catalogs, the Supreme Court held that the text of the Trademark Dilution Act "unambiguously" required a showing of actual dilution, rather than a likelihood of dilution, such as might be posed by trademark tarnishment.

While stating that it was not establishing a requirement for actual financial loss to bring a dilution action, the court was unclear as to how the owner of a famous mark might prove dilution. If, as it has been written, dilution is a slow and gradual process like a cancer that destroys the value of a mark, significant real damage could be done before traditional proof of this damage might be available. Trademark owners, backed by the International Trademark Association (INTA) began lobbying for congressional enactment of a stronger anti-dilution statute. The resulting Trademark Dilution Revision Act (TDRA) of 2006 passed and was signed into law by President Bush.

The law overturns the decision in *Moseley*, and establishes two kinds of dilution: dilution by blurring and dilution by tarnishment. "Blurring" is defined as an association arising from the similarity between a mark or a trade name and a famous mark that impairs the distinctiveness of the famous mark. "Tarnishment" is an association arising from similarity that harms the reputation of the famous mark. Therefore, the Moseley situation would fall within "tarnishment," and the owners would have a cause of action for dilution without having to prove a loss of their mark's ability to differentiate. Without an actual damage requirement, owners of famous marks should now have an easier time obtaining injunctions to protect their marks.

In response to first amendment concerns regarding the possible breadth of interpretation of what might "harm the reputation" of a mark, exemptions were placed in the law for "fair use," such as comparative advertising, parody, and criticism. Also included were exemptions for all forms of news reporting and commentary and any non-commercial use of a mark.

Reaching beyond the Moseley decision, the law makes other changes affecting trademark law. The law defining what makes a mark "famous" was never clear, and the TDRA, in addition to providing that courts may consider "all relevant factors," now provides four suggested considerations in making a determination of "fame." These are 1) the duration, extent, and reach of advertising and publicity of the mark; 2) the amount, volume, and geographic extent of sales under the mark; 3) the extent of actual recognition of the mark; and 4) whether the mark was federally registered.

The TDRA also stops what had been a growing trend to accept fame within niche markets as satisfying the requirements for a famous mark. A famous mark must now be "widely recognized by the general consuming public of the United States as a designation of source." This may be a significant setback to owners of marks that are well-known in the specialty markets that they serve, but that are not well known by the wider public. If the value of a mark is its recognition within a specialty market, dilution could destroy a niche owner's value in a mark without leaving any legal recourse.

The TDRA is not limited to trademark enforcement, but makes changes in the way trademarks are examined and registered. A likelihood of dilution, either by blurring or tarnishment, is now grounds for opposition to, or refusal of, a trademark application, as well as grounds for cancellation of a registered trademark. This will make it easier for owners of famous marks to block dilution at earlier stages. Overall, the law is certainly a win for owners of nationally known marks, but a possible loss for specialty brands, and a definite change and clarification in trademark law.

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New And Precise Language Now Imperative In Garnishment Affidavits

The Haves v. The May Haves

By Courtney V. Cook and Jeffrey S. Hyslip

In wage and non-wage garnishment proceedings, a recent court decision makes it imperative that garnishment affidavits contain the precise language from Ohio's recently revised Garnishment Affidavit law. Rather than affidavits stating that the creditor has reason to believe the garnishee "has" some of the debtor's non-exempt property or earnings, a creditor should state that he has reason to believe the garnishee "may have" some of the non-exempt property or earnings. Without incorporating this new language in garnishment affidavits, creditors and their lawyers may be subject to civil liability under the federal Fair Debt Collection Practices Act ("FDCPA").

This conclusion is a result of the Sixth Circuit Court of Appeals case of *Todd v. Weltman, Weinberg & Reis*[1]. The Todd case revolved around the requirement in Ohio that creditors file affidavits in order to garnish debtors' property or earnings.[2] In *Todd*, the Sixth Circuit held that a creditor submitting such an affidavit does not have the protection of absolute immunity under FDCPA and an interpretation of Ohio law. In effect, this ruling means that a creditor has no protection from civil liability if his affidavit is not honest.

The major problem with the Todd decision was not that it required the affiants to believe that to which they were testifying. Rather, it was that the Court insisted that, under Ohio law, a creditor could not file an honest affidavit for a non-wage garnishment without first conducting a debtor examination or providing some other compelling reason to believe that the property garnished in fact contained non-exempt property; a creditor who filed a garnishment affidavit without first conducting a debtor's examination or some other form of discovery could be civilly liable to the debtor under the FDCPA. Unfortunately, conducting a debtor's examination for every garnishment could create major headaches for creditors in both the added expense of a debtor examination and the risks created in alerting the debtor to accounts that could be garnished.

The status of Ohio law on garnishment affidavits after the Todd case is muddied, but it is clear that when the Sixth Circuit decided *Todd*, it was not basing its decision on current Ohio law. *Todd v. Weltman, Weinberg, & Reis Co.* was an appeal from a federal district court case of the same name, decided on August 3, 2004. In the district court's opinion, the Court relied upon the Ohio non-wage garnishment affidavit statute as *then* written, which stated, in relevant part, that the creditor or his attorney must attest in an affidavit that he has "good reason to believe and does believe that the person named in the affidavit as the garnishee ***has*** property, other than personal earnings, of the judgment debtor that is not exempt."[3]

The judgment creditors (*Todd)* used this language in affidavits to garnish the judgment debtors' bank accounts, but the judgment debtors' bank accounts contained only exempt property. The judgment debtors (*Todd)* then filed an action in federal court against the creditors based on this affidavit, alleging that the creditors had no factual basis for the belief that the bank accounts contained non-exempt assets because the creditors had not conducted a judgment debtor exam or prepared any discovery. By allegedly lying in the affidavit (*Todd*), the debtors claimed that the creditors violated the FDCPA, which provides that a collector may not use any false representation in connection with the collection of a debt.

The defendant-creditors in *Todd* then filed a motion for judgment on the pleadings, arguing, in part, that the doctrine of witness immunity prevented the plaintiff-debtors from succeeding on their claim. The district court found, on the facts alleged in *Todd*, that the defendants were not immune from suit on the basis of the witness immunity doctrine.

On November 5, 2004, after the defendants had filed an appeal of the district court's decision, Ohio instituted a significant change in the wording of both the wage and non-wage garnishment affidavit statutes. This change involved removing the word "has" in favor of "may have."[4] The difference between the statutory language prior to the district court's decision and subsequent to its decision is as follows:

> *Old version: the affiant must attest that he "has good reason to believe and does believe that the person named in the affidavit as the garnishee* ***has*** *property, other than personal earnings, of the judgment debtor that is not exempt."*
>
> *Current version: the affiant must attest that he "has a reasonable basis to believe that the person named in the affidavit as the garnishee* ***may have*** *property, other than personal earnings, of the judgment debtor that is not exempt."*

The significance of this change of just one word can not be overstated. Under a plain text interpretation of the old language, an affiant could only submit a truthful affidavit if he actually had some evidence indicating that there was *in fact* non-exempt property in a bank account. Under a plain text interpretation of the new language, however, an affiant could submit a truthful affidavit if he had some evidence indicating it was *possible* there was non-exempt property in a bank account. Thus, knowing a person has a bank account under the old language would not be sufficient to believe there was non-exempt property in it; however, under the new language it probably would be sufficient.

Unfortunately, when the Sixth Circuit affirmed the district court's decision that witness immunity did not apply, it did not discuss this change in language. Rather, it repeatedly refers to Ohio law as requiring an affidavit to be unequivocal. However, the new language is far from requiring such an unequivocal affidavit. Rather, the change in language implicitly allows equivocation. Fortunately, the Sixth Circuit's decision does not change nor threaten this plain meaning interpretation of the new language and attorneys are most likely safe when signing affidavits without discovery if they use the current statute's vernacular in the affidavit.

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1 434 F.3d 432 (6th Cir. 2006).
2 *See* OHIO REV. CODE ANN. §§ 2716.11, 2716.03 (Anderson 2006).
3 *Id.* at 907 (emphasis added).
4 *See* 2003 Ohio HB 420; *see also* OHIO REV. CODE ANN. §§ 2716.03(A)(2), 2716.11(B) (reflecting this change).

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Physician Assistant Law Expanded In Ohio

49th State To Allow Prescriptive Powers

By Timothy J. Cahill

Earlier this year, the Ohio law governing physician assistants underwent a sea change. The law, which became effective on May 17, 2006, and is codified in Chapter 4730 of the Ohio Revised Code, significantly increases the autonomy of physician assistants, allowing them to prescribe medications under certain conditions. Additionally, physician assistants may now treat new patients, and physicians are no longer required to countersign physician assistants' orders. Because of this increased autonomy, however, the new law also enhances physician assistants' education requirements and modifies the supervisory relationship between a physician and a physician assistant.

Physician assistants are health professionals who practice medicine under the supervision of a licensed physician. Among other things, physician assistants conduct physical exams, order and interpret tests, implement treatment plans, and assist in surgery. Historically, physician assistant education programs awarded associate or bachelor's degrees.

Under prior Ohio law, an individual seeking to practice as a physician assistant obtained a "certificate of registration." After obtaining this certificate, a physician assistant and a supervising physician entered into a supervision agreement that required approval by the State Medical Board ("the Board"). In addition to a supervision agreement, physician assistants and their supervising physicians had "standard utilization plans." These plans, which also required Board approval, authorized physician assistants to perform certain statutorily-prescribed routine procedures. For a physician assistant to be authorized to perform any services outside the scope of the statutorily-prescribed procedures, the supervising physician had to obtain Board approval of a "supplemental utilization plan."

In addition to the practice limitations set forth in both "standard and supplemental utilization plans," physician assistants could generally not evaluate new patients nor established patients with a new condition; a supervising physician had to personally evaluate these patients before a physician assistant could implement a plan of care. Additionally, supervising physicians were required to countersign all physician assistant medical orders. Finally, physician assistants were prohibited from prescribing medications.

Under the new law, the document issued by the Board allowing physician assistants to practice in Ohio is a "certificate to practice" instead of a "certificate of registration." The prior law did not specify the educational requirements needed to practice as a physician assistant but, effective January 1, 2008, a master's degree or higher is required to receive a "certificate to practice." Physician assistants must continue to enter into supervision agreements with supervising physicians, but the functions of "standard utilization plans" and "supplemental utilization plans" have been replaced by Board-approved "physician supervisory plans" and "special services plans." The statutorily-prescribed list of services included under a "physician supervisory plan" is broader than what was permitted under the "standard utilization plan," reducing needs for "special services plans."

One significant change from the prior law is that a "physician supervisory plan" or "special services plan" is not required for physician assistants who practice in hospitals or health care facilities; this includes ambulatory surgical facilities, freestanding or mobile diagnostic imaging, and freestanding centers for dialysis, inpatient rehabilitation, birthing, and radiation therapy. In hospitals or health care facilities, physician assistant practices are now governed by the policies of the hospital or facility and Board approval of these policies is not required. A supervising physician within a hospital or facility, however, may impose limitations on the physician assistant's practice that are more restrictive than the hospital's or facility's policies.

As noted, the new law is significant in that it provides physician assistants with greater autonomy, eliminating limitations placed on their ability to treat both new and established patients within the parameters of their physician supervisory and special services plans. Also eliminated is the countersignature requirement for physician assistant medical orders. The most significant change, however, is the ability the new law grants physician assistants to prescribe medications and therapeutic devices.

By granting physician assistants prescriptive authority, Ohio is now the 49th state to permit physician assistants to prescribe. The new law also brings physician assistants in line with advanced practice nurses, such as clinical nurse specialists and certified nurse practitioners, who already have limited authority to prescribe.

Like advanced practice nurses, physician assistants must obtain a "Certificate to Prescribe" before prescribing medications. To qualify for a "Certificate to Prescribe," a physician assistant must:

- hold a master's degree or higher unless, for a period of two years after the effective date of the administrative rules relating to the new law, a physician assistant has ten years of clinical experience
- complete 65 hours of instruction in pharmacology
- complete a one-year provisional period of physician-delegated prescriptive authority

A "Certificate to Prescribe" provides a physician assistant with limited prescriptive authority. First, they may only prescribe drugs and therapeutic devices that are listed on a formulary that will be created by the Board. Second, because a physician assistant's prescriptive authority is physician-delegated, the supervising physician may place conditions on the physician assistant's ability to prescribe, such as limitations on prescribing certain drugs or dosages. Physician assistants will not be able to apply for a "Certificate to Prescribe" until the Board adopts administrative rules relating to the implementation of the new prescriptive authority. This should occur by May 2007.

To account for the increased autonomy granted to physician assistants, the new law requires physicians to establish a quality assurance system with the physician assistants they supervise. Such a system is designed to facilitate the supervising physician's routine review of selected portions of the physician assistant's patient record entries and medical orders, among other things. If a supervising physician does not already have a Board-approved quality assurance system in place, he or she should implement a plan in accordance with the requirements in the statute as soon as possible.

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Comprehensive Immigration Reform Is Almost Here. . . Or Not

By Kenneth J. Robinson

On November 9, 2006, the American political landscape experienced a seismic shift. This event may impact no single area of law more profoundly than the area of immigration law, and offers hope for practical and comprehensive immigration reform. (N.B. I did write may.)

There is consensus that our current legal framework (designed to support economic development, promote family unity, and secure our borders from threats to national security and illegal immigration), simply does not work. Business, academia, the health care industry and industries associated with hospitality, construction, and agriculture complain that their ability to attract and retain qualified labor (or, in the case of universities – students) is undermined by our current immigration system. U.S. citizens and green card holders chafe at long waits preventing foreign relatives from joining them in the United States. Further, we cannot stop, much less monitor, who is crossing our borders or what materials come into the U.S. without having been inspected by Customs and Border Protection.

While the Senate and the President have been in agreement that sweeping changes are necessary to our immigration system (including proposals to address both "border/enforcement" and "benefits"); the House of Representatives promoted an "enforcement only" approach which did not reasonably address the realities of dealing with an estimated 11 to 13 million undocumented aliens in the U.S. This "nativist" (or xenophobic) approach would punish the undocumented and force their departure. The Senate made progress in the spring of 2006 with its historic debate on and passage of a bipartisan bill, S. 2611. Unfortunately, House leadership stymied that effort and the legislation remains stalled.

Why should we expect Comprehensive Immigration Reform ("CIR") following the midterm elections of 2006? From a cynical standpoint, the answer lies in President Bush's desire for a legacy other than staying the course in Iraq, failed initiatives on Social Security reform, and a pattern of bloated government spending. Bush has always been eager to pass immigration reform and court Hispanic voters. In addition, while immigration reform is a political issue, it is not necessarily a partisan one. The strange bedfellows of conservative "big business" and liberal unions find themselves on the same side of the issue. Furthermore, the recent elections have repudiated or deposed key opponents of CIR.

What would CIR look like? Reformers insist that immigration reform must contain three components: (1) an opportunity for people already living and working here to earn permanent legal status; (2) a new temporary worker program with adequate labor protections so that essential workers can enter the U.S. safely, legally and expeditiously; and (3) backlog reductions in family-based immigration so that families can unite in a timely manner.

CIR would impact the entire country. For example, the "fence" lobby has already profited from recent legislative changes. President Bush recently signed into law the Secure Fence Act of 2006 (H.R. 6061/P.L. 109-367), legislation authorizing 700 miles of fencing along the southwest border. Additionally, the REAL ID Act, signed into law on May 11, 2005, requires that states meet stringent standards for drivers' licenses to be accepted for federal purposes (such as boarding commercial aircraft or entering federal buildings) which will phase in and fully apply in May 2008. These requirements include verification of the citizenship or lawful immigration status of driver's license applicants and limiting the issuance of temporary drivers' licenses, valid only during the period of lawful stay, to certain categories of aliens. The practical and financial impact of the act is not certain at this time; however, what is certain is that the act will make it more difficult for persons to obtain a license, prevent many U.S. citizens (who cannot prove their citizenship) and lawful residents from being able to get a license, and increase both the risk of identity theft and cost to obtain a license. States will need to independently verify the authenticity of the evidence of citizenship or immigration status; currently, there are no systems in place to do this. Furthermore, most BMVs do not have the technology necessary to comply with many measures of the act. Congress did not appropriate funds to reimburse states for costs of compliance, which may be in the billions of dollars. The state of Virginia has estimated that implementation of the act will cost them $240 million, or $45 per license, and additional maintenance of the system will be in the tens of millions of dollars annually.

Ohio *may* be getting in on the action too, raising ongoing issues of state preemption of federal immigration laws. In September, Representative Bill Seitz (R-30 district, Cincinnati) presented sponsor testimony on HB 654. The bill addresses state enforcement of immigration laws in Ohio, and key provisions of the bill include using taxpayer dollars to create and fund a state office to enforce federal immigration laws; requires state and local agencies to pay the costs of training their employees to recognize immigration status; makes employers legally and financially responsible for enforcing immigration laws; bans companies found to be employing undocumented immigrants from working on state projects for two years – even though they have complied with federal law - and criminalizes anyone assisting undocumented aliens, even for humanitarian purposes; and will subject Ohio minority citizens and legal immigrants to racial profiling.[1]

Thus, immigration reform will continue to be at the forefront of political discourse. Whether this next Congress takes action remains to be seen, but the issue cannot continue to smolder. Our leaders must soon forge a bi-partisan and workable accommodation, lest the issue itself trigger a new seismic political eruption.

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[1] Fallout from the results of the local elections, which witnessed an increase in minority party representation in the Statehouse, is unclear; however, sources inform the author - - as of the writing of this article - - that the majority has considered abandoning its proposed immigration initiatives.

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What Do You Mean The Release Isn't Valid?

The Importance Of Probating Minor Settlements

By Sandra R. McIntosh and Elizabeth H. Mangen

Personal injury claims are often resolved by way of a settlement. In the case of a minor claimant, however, reaching a settlement is sometimes just the beginning of the process. Once a compromise of a minor's claim is reached, the person paying the claim must consider whether that settlement should be "probated," meaning whether a probate court judge should give his or her stamp of approval to the settlement.

Probate court approval of a minor settlement is necessary in order for the release to be considered valid and binding. Thus, all minor settlements should be probated in all non-first-party cases to properly protect the interests of the insured/defendant. In first-party claims, however, it is usually left to the insurance claims representative to decide if the costs necessary to probate a settlement are warranted. Specifically, if the settlement is small, should the time and money necessary to obtain probate court approval of that settlement be expended, or is it worth the risk that the minor will not make another claim?

If it is decided that probate court approval of the minor settlement will be sought, the good news is that the process is fairly routine. There are, however, some unique local rules of which you should be aware.

Ohio Revised Code § 2111.18 governs the settlements of minors. That section provides, "When personal injury * * * is caused to a ward by wrongful act * * * that would entitle the ward to maintain an action and recover damages for the injury, * * * the guardian of the estate of the ward may adjust and settle the claim *with the advice, approval, and consent of the probate court*[1]. * * * The court may authorize the minor or person receiving the moneys to execute a complete release on account of the receipt. The payment shall be a complete and final discharge of any such claim." The policy behind this statute is to protect minors against others whose interests may be adverse to theirs[2].

R.C. 2111.18 binds a minor to a settlement even if his injuries later turn out to be worse than anticipated[3]. As the Ohio Supreme Court has stated, "In the absence of a showing of prejudicial error in the proceedings or of fraud or collusion on the part of those involved, a settlement of an injured minor's claim for damages by his guardian in conformity with the provisions of [R.C. 2111.18], is valid and binding on the minor and may not be set aside[4]."

Without probate court approval, a release of a minor's claims is not binding and enforceable. In *Brewer v. Akron Gen. Med. Ctr.* (Jan. 27, 1999)[5], the Court held, "The safeguards of R.C. 2111.18 are designed to insure that any settlement or release of a child's claims is, in fact, in the best interests of the child. Consequently, *only when a release '[is] done in [the child's] behalf, honestly, fairly, upon proper investigation and with the approval of the appropriate tribunal, shall [a release] be held as binding upon them as similar actions taken by adults*[6].'"

In short, if probate court approval of a minor settlement is not obtained, the release is not binding and the claim could be re-opened either by someone representing the minor before he or she obtains the age of majority, or by the minor him or herself after reaching the age of majority.

Although the process of obtaining probate court approval of minor settlements is fairly routine, it does involve time and expense. Specifically, the probate court will want to know how the minor sustained injury, the diagnosis and treatment of the injury, and the minor's prognosis. Medical records will have to be gathered, which can be a time-consuming process. In addition, as with any personal injury settlement, it is important to note whether medical expenses remain outstanding, and whether any have been paid by a private health insurance company which may have a lien on the settlement proceeds. Finally, the unique nature of the probate process requires that the parents of a minor be notified of the hearing on the settlement. This can be challenging if the parents are not married and the non-custodial parent is difficult to locate. In the end, sometimes the amount of time necessary to obtain probate court approval of a minor settlement can be measured in months.

In terms of costs, the party paying the settlement will need to pay an attorney to prepare the forms and attend the hearing. Depending on the attorney's hourly rate, the length of the hearing, and whether a guardianship is necessary, the cost could be several hundred dollars. A fee must also be paid to the probate court to open a minor settlement case. In Franklin County, the fee is $63. Miscellaneous fees, such as for certified copies of documents and copies of medical records, will also arise.

Because the process can cost hundreds of dollars and can take months to complete, many paying minor settlements may choose to forego requiring the claimant to complete the process, and take the risk that the minor will not assert an additional claim down the road. This is a risk-benefit analysis only the party paying the settlement can complete; however, refiling of claims long after the party paying the settlement believed they were settled is a significant risk to consider.

When probating minor settlements, the local rules of each county's probate court should be consulted as the process varies slightly by county. In Franklin County, an attorney retained by the party or insurance company paying the settlement may not prepare the probate paperwork for an unrepresented claimant[7]. This means that the claimant must either retain an attorney or prepare the paperwork themselves. Most claimants are not willing and/or able to prepare the paperwork themselves, and the prospect of having to pay an attorney may be a deal breaker in terms of settlement. Therefore, in Franklin County, insurers are often forced to pay a claimant's attorney to review the paperwork prepared by the defense attorney and attend the hearing on behalf of the claimant. Being aware of this rule ahead of time, however, allows insureds and their representatives to prepare accordingly, and highlights the importance of being familiar with local rules.

Anyone settling a personal injury claim with a minor claimant should be aware that the release will not be valid and binding on the claimant unless probate court approval of the settlement is obtained. This is a routine process, but one that can be time-consuming, sometimes expensive, and complicated by local rules. Being familiar with the process before a settlement is reached, however, will help avoid potentially expensive pitfalls down the road.

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1. If the amount of the settlement is $10,000 or less, the court may authorize the settlement without the appointment of a guardian and authorize the delivery of moneys to the natural guardian of the minor, to the person by whom the minor is maintained, or to the minor herself. R.C. 2118.18.
2. In the Matter of the Guardianship of: Adam Matyaszek, 159 Ohio App.3d 424, 2004-Ohio167, 824 N.E.2d 132, at ¶27; n.7.
3. Id. at ¶79 (citing In re Guardianship of Kelley (1961), 172 Ohio St. 177.)
4. Kelley, at syllabus.
5. 9th Dist. No. 19068, 1999 Ohio App. LEXIS 162.
6. Id. (quoting Kelley, supra, at 182-83, quoting Thompson v. Maxwell Land Grant & Ry. Co. (1897), 168 U.S. 451, 466, 42 L.Ed. 539, 18 S.Ct. 121).
7. Franklin County Probate Court Local Rule 67.3; Ohio Rule of Superintendence 67.

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U.S. Supreme Court Watch:

Pending Cases Continue To Define Roberts Court In Workplace Law

By William A. Nolan and Meghan E. Hill

Last year, the U.S. Supreme Court issued what was to many practitioners a surprisingly pro-employee decision in *Burlington Northern & Santa Fe Ry. v. White*, 126 S.Ct. 2405 (2006), in which the Court appeared to expansively read Title VII with respect to the availability of retaliation claims. Two employment cases in particular before the court this term will continue to show the court's direction in workplace cases.

Ledbetter v. Goodyear Tire & Rubber Co., No. 05-1074, will address whether discriminatory pay decisions outside the statute of limitations period can be considered in a claim alleging illegal pay discrimination under Title VII. For Title VII discrimination claims to be timely, an EEOC charge must have been filed within 180 days (or 300 days, depending on the state) after the alleged unlawful practice occurred. Thus, only those practices occurring within that period prior to the filing of the charge can form the basis for liability.

Lilly Ledbetter began working as a supervisor in Goodyear's Gadsden, Alabama, plant in 1979. Her supervisor consistently ranked Ledbetter's annual performance at or near the bottom of her co-workers. At the end of 1997, she was receiving less than all other area managers; the lowest paid male was making 15 percent more and the highest paid male 40 percent more than her.

Ledbetter's last salary review was in February 1998. In March 1998, Ledbetter filed an EEOC charge alleging pay discrimination because of her sex. Ledbetter retired November 1998 and filed a lawsuit November 1999.

Goodyear argued that Ledbetter could sue only on those decisions within the 180 days prior to filing the charge. The trial court allowed Ledbetter to challenge every annual review since 1979, though only one such review fell within the 180-day period prior to the charge. A jury found for Ledbetter and Goodyear appealed. The Eleventh Circuit reversed, holding that Ledbetter was permitted to challenge only the pay raise made within the limitations period and, by extension, the one immediately beforehand.

Ledbetter could have far reaching effects for employers and employees. If plaintiffs are allowed to challenge pay decisions prior to the limitation period, employers seemingly would need to keep all records related to pay and promotions in perpetuity. Without documentation, an employer could be hard pressed to articulate a business reason for a pay decision made years ago.

Employee advocates contend that a ruling for the employer will make it difficult for employees to challenge pay discrimination. They say it is difficult for employees to learn whether they are being paid less than co-workers, and by the time 180 days has passed much of the suspected discrimination will be outside the period. Also, where salaries are increased annually by a percentage over the previous year, a rule that prevents challenges to past discrimination in salary may allow an employer to grant annual raises that are discriminatory in dollar amount so long as the percentage increase is nondiscriminatory.

Davenport v. Washington Education Association, No. 05-1589, addresses whether a state can tell a union that it has to get nonmembers' consent before it uses "fair share" or "agency" fees for political purposes without infringing on the union's first amendment rights. Fair share issues are always highly charged and the case is sure to attract much attention and scrutiny as indicative of the court's orientation towards unions generally.

Washington state voters, in a referendum on campaign finance reform, passed a "right to work" statute. This law requires a union to obtain affirmative authorization of nonmembers before spending their fees for political purposes. Thus, their fees cannot be spent for political purposes unless they opt ***in***. Public sector unions typically are allowed to spend fair share fees for political purposes unless a nonmember opts ***out***, makes an objection as established in *Chicago Teachers Union v. Hudson*, 475 U.S. 292 (1986).

The Washington Supreme Court held that this statute violates the first amendment of the U.S. Constitution because it imposes an "extremely costly" burden on the union, and it violates the rights of members because a "presumption of dissent" burdens their "right to associate themselves with the union on political issues." In essence, then, the case pits the first amendment rights of nonmembers against those of members and unions.

The case is closely watched by unions and national right-to-work advocates, backed by campaign finance reformers. At stake, potentially, is much of the money that unions rely on to fund political activities. According to an amicus brief filed by the Campaign Legal Center, a group supporting campaign finance regulation, the Washington decision, if left in place and followed by other state courts, could be used "as authority to strike down state law 'opt-in' restrictions on labor union political activity" in 14 other states.

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Representing The Purchaser Of A Condominium Unit

Cover The Bases Without Losing Your Shirt

By Kenton L. Kuehnle

The greatest challenge in representing the purchaser of a condominium unit is trying to figure out how to cover all the bases without losing your shirt. If an attorney could look at all documents, button down all issues, and make sure the client understood all facets and risks, they'd only have to fear the client's reaction to the bill for the actual time invested in the process. There are ways to cut down time involved and, where appropriate, involve the client in the decision about how much protection he can afford.

First, get a copy of the contract your client has signed along with the condominium documents. The Columbus Board of Realtors has a form that lists sources of information and where such documents can be secured. Do not feel ashamed to insist that the listing broker assist you in rounding up the information you need. The title company can supply you with a copy of the condominium declaration and the drawings pertinent to your client's unit, specifically showing any easements running underneath the unit. The standard contract requires this information and, if you want to review the facts before you arrive at the closing, you'll need to insist that you get these documents in advance.

Ask for an ALTA Condominium Endorsement from the title company to advise your client as to what he will own (his unit), what he will maintain, what he needs to insure, what common elements he may exclusively use, and what he can and can't do within the common areas.

Ask the broker to supply you with the current rules and regulations from the management company. Warn your client that he is buying into communal living where the board can change the rules, and/or where the community, with a sufficient vote, can radically change the rules. Advise your clients that arguing with the board is an expensive process (one for which the board, but not your client, will get their legal bills paid). If clients can't get others to see things their way, they have to learn to live with it or move out. People who are not comfortable with this are not good candidates for condominium living.

Advise your clients that they may not want to pay you to look over all the condominium documents. In a recent project in the Arena District, there were over 500 pages of cross easements, restrictions, and condominium documents. A business-like, cost-benefit analysis would dictate that you not look at, and charge your client for the review of, every document, but the client should be involved in deciding whether to take that risk. If he is not sophisticated enough to evaluate the risk himself, even with your expert guidance, you may have no choice but to review the documents. Know this going in.

Get as much information about the condominium association's operation as possible. Have the broker track down financials, budgets, and if possible, minutes of recent meetings. Look for any signs of trouble or financial weaknesses such as: substantial delinquencies; construction problems; lawsuits or threats of lawsuits; inadequate reserves; talk of capital improvements. Encourage the home inspector looking at the unit to tell you if he thinks the reserves are adequate in light of the condition of the overall project.

The client could talk to other unit owners and/or the property manager to find out if things are both "hunky" and "dory." If the project is too small for professional management and unit owners have to take a major role its operation, he should find out if there are warring factions, what their disagreements are about, and which side he wants to be on if he proceeds with the purchase.

If the project is not yet complete, the client needs to evaluate if there is any reason to worry about potential non-completion. He should understand what restrictions, if any, have been put in the declaration with regard to future development phases. If these future phases are not completed, he should understand that there will be little or no restrictions on what kind of development may take place.

If the client is purchasing a new unit from the developer, he'll receive a disclosure statement from which he can determine if the developer's budget and budget "assumptions" are realistic. Any specific questions about what is permitted should be directed to the knowledgeable sales staff, including where the answers can be found in writing. Remind the client again that whatever he is counting on might be changed over his objection.

At closing, you will want to obtain an insurance certificate to make sure the association's insurance is adequate, as well as a certificate from the association regarding the status of periodic assessments (which the CBA/CBR contract provides should be prorated) and special assessments (which should be paid in full by the seller). Note that the standard contract contains a warranty that the seller has received no notification from the association of any future improvements which would ripen into a charge against the unit.

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The Paperless Office

By Marty Eisenbarth

Looking around my office at papers on my desk, a bookcase full of notebooks, and file cabinets filled with more paper, I remember the first appearance of personal computers in the workplace and promises of freeing us from the burden of paper. The "paperless office" was just beyond the horizon. Instead, since the advent of the PC, paper usage has skyrocketed. We revise documents 12 times rather than five – because we can. We print a document, file it and reprint it later– because we can. We get countless emails every day and print every one for the file – because we can. We're buried in paper, consuming forests like never before. The concept of the paperless office is a promise unfulfilled.

Before we accept our paper-filled offices as inevitable, let's take a closer look at the technology tools available from 20 years of PC development. The combination of email systems, scanners, and sophisticated document management systems can be utilized together to make paperless a reality.

Email has the potential to reduce the paper barrage but often results in more paper. No longer is a hard-copy letter sent with a photocopied enclosure to one person. Instead, it is emailed with a Word document attachment to everyone even peripherally associated with the matter. Each recipient then prints the email and the attachment. If the document is to be revised, the revisions will be inked onto the hard copy, corrected digitally, and the document will be printed again to review – and then emailed back to everyone who received it the first time. By the time the document is finalized, paper proliferation has run rampant.

There are technologically adept people who are finding it just as easy to revise a document on the screen as to mark up a paper copy. Certainly, as the next generation of lawyers enters practice, they are likely to reject the concept of needing to print out a document to read, analyze, and revise.

One email paper reducer is an integrated document management system; it enables users, with a click of a mouse, to drag emails with attachments into a cyber-filing cabinet where they become saved, accessible, and searchable as well. Instead of searching through a paper file, guessing at chronology, to find a piece of correspondence, a system search can find exactly what you need in a matter of seconds. Besides moving in a paperless direction, in a business where time is money, the efficiency of this technology is irrefutable.

Another technology tool that has the potential for reducing paper consumption is the PDF file. Since these files, like emails, can be saved in a document management system, they truly have the capacity to replace paper files. In a model paperless office, all mail coming into a firm would be opened, scanned, and saved as a PDF prior to being distributed to the recipient. All documents, whether created at the firm or received by them, would then be accessible electronically, not only by anyone who needs them, but, through a network gateway, at any location.

In reality, the tools to create a paperless office are in place. The technology is easy to use, affordable, and reliable. So what is holding us back? In a word, attitude. Most of us cannot get past the notion that we need to hold a piece of paper in our hand to make it real. Further, we want to be able to have the convenience of reading a document at any time, at any place, without the burden of lugging a computer everywhere. However, just we are finding it more convenient to access news, research and other information via the internet, the time will come when we want our business tools and files to be available on the same platform.

Firms that take advantage of a paperless operation will be able to offer clients better, faster service in accessing information quickly. In the event of a business interruption, firms with electronic files and an alternative server site will be back in business months before paper-dependent firms. A paperless platform also enables employees to work remotely.

The reality of the paperless office may be even closer than we think if we take advantage of the tools available today. Going paperless is definitely plausible.

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Risky Conduct Risks Recovery

Defense In Negligence Cases

By Joshua N. Stine

"Have you been injured in a car accident?" We have all seen these television commercials hundreds of times. What we have yet to see is an insurance defense attorney's response; perhaps because they are not familiar with the doctrine of primary assumption of the risk. This doctrine relieves a defendant of the duty to protect a plaintiff from certain risks that are so inherent in an activity they cannot be eliminated. It comes into play when a plaintiff exposes himself reasonably and voluntarily to an obvious or known danger. The underlying justification for the doctrine is that by engaging in certain dangerous activities, the plaintiff has tacitly consented to the risk. This fictional acceptance relieves the defendant of any duty owed to the plaintiff.

In a typical negligence action, a plaintiff attempts to prove his case by demonstrating the following: (1) the defendant had a duty to protect the plaintiff from harm; (2) the defendant breached that duty; (3) the breach of that duty caused harm to the plaintiff; and (4) the plaintiff suffered damages as a result. Once a plaintiff has established these elements of a negligence claim, the defendant has the opportunity to preclude the plaintiff's recovery or reduce his damages by asserting any applicable defenses. For instance, the defendant may argue that the plaintiff was at least partly at fault for his own injuries because he impliedly assumed the risk of such harm or conducted himself in a manner that contributed to his injuries. In addition, where a plaintiff signs an agreement to forebear from asserting a lawsuit for any injuries caused by the defendant's negligence, the defendant may demonstrate the plaintiff expressly assumed the risk of harm.

The doctrine of primary assumption of the risk, however, is a different type of defense. It is a concept that actually negates the "duty" element of a negligence action. As such, it prevents the plaintiff from proving all of the required elements of his case. It is, therefore, a doctrine that is especially amenable to resolution on summary judgment. The applicability of this doctrine is a question of law for a judge to decide, rather than a jury.

Primary assumption of the risk is not a new concept. In fact, the Ohio Supreme Court discussed this doctrine in dicta more than eighty years ago in a case involving an individual who was struck in the face with a baseball during batting practice. Like all legal doctrines, however, primary assumption of the risk has substantially evolved in the past eight decades.

It is a defense that is now routinely asserted in cases involving intoxicated plaintiffs. For example, it has been applied to preclude recovery in a case involving an intoxicated minor who suffered brain damage after crashing his automobile into a telephone pole. The doctrine was also successfully asserted against an intoxicated motorcycle passenger who lost sight in one eye and his senses of taste and smell when he was thrown from a motorcycle. It has been applied in a case brought by the estate of an intoxicated individual who was killed during an automobile race on a highway. It has even been asserted to bar recovery by an intoxicated individual who was rendered a quadriplegic when he dove into a shallow pool.

Primary assumption of the risk, however, is not limited to cases involving intoxicated individuals. On the contrary, it is also regularly applied in cases involving individuals who suffer injuries while engaged in inherently dangerous activities where alcohol consumption is not an issue. For example, primary assumption of the risk has been applied to preclude recovery in a case involving an individual who was injured when he fell off the trunk of a car on which he was riding. The doctrine was also successfully asserted against an individual who suffered severe injuries when a train struck him as he walked across railroad tracks. It has even been asserted to bar recovery by an individual who was injured while swinging on a rope during a company outing.

The doctrine of primary assumption of the risk has evolved from mere dicta in an Ohio Supreme Court opinion to a powerful defense to certain types of negligence actions. This evolution denotes yet another shift in tort liability in Ohio that will undoubtedly affect future litigants as well as their respective counsel. As the aforementioned case law makes clear, the law will no longer protect an individual who has voluntarily chosen to expose himself to an inherently dangerous activity. Perhaps our insurance defense attorney's commercial should state: "Are you being sued by an individual who was injured during an inherently dangerous activity? If so, you may be entitled to summary judgment based on primary assumption of the risk."

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Expertly Examining Expert Witnesses

Dazzle The Jury With Understandable Brilliance

By Frank A. Ray

In marriage, business, and golf, I have found that selection of good partners provides a decided edge for achievement of success. The same axiom applies to a trial lawyer's selection of expert witnesses in litigation.

If a trial lawyer intends to posture a complex case for the client's best possible result, the attorney must identify, recruit, and prepare expert witnesses who supply a basis for advocacy of the client's claims or defenses.

As astutely summarized by one Ohio court, "As a prerequisite to testifying, the expert must be sufficiently qualified; that is, it must appear that his [or her] opinion is based upon some superior knowledge not possessed by ordinary jurors."[1]

After all, the inescapable process for any component of a trial should reflect the litigator's efforts to conclude a successful "sale". To succeed with expert testimony, the members of the impaneled jury, who are the prospective "buyers," must accept, embrace, and retain pertinent information and opinions offered by an expert. In a complex case, the trial lawyer should offer experts who can help "close the deal" with jurors. If the trial attorney fails with expert testimony in complex litigation, the litigator's advocacy will never successfully sustain itself through the jurors' deliberations.

To maximize the impact of testimony by an expert witness, the trial lawyer should strive to establish professional rapport with the expert witness. That rapport should transcend mere comfort and should rise to a level of mutual confidence, pursued by a concentrated education on how the expert's analysis and testimony will combine with verified facts to establish advocated positions at trial. The preferred method for establishing rapport on a level of comfort and confidence requires face-to-face meetings between the trial lawyer and the expert before the expert submits to discovery or trial testimony.

The expert must understand and articulate opinions "to a reasonable degree of probability" in the context of the expert's claimed expertise.[2] Counsel needs to emphasize to each expert that when offering opinions under oath, the expert must remove the words "possibly," "might," "could," or other similar expressions of equivocation from the expert's vocabulary. The Ohio Supreme Court has clearly stated, "The admissibility of expert testimony that an event is the proximate cause is contingent upon the expression of an opinion by the expert with respect to the causative event in terms of probability."[3]

For expert testimony to qualify as admissible evidence, the offer of the testimony must demonstrate that the expert's opinions will "assist the trier of fact to understand the evidence or to determine a fact in issue."[4]

On occasion, an opportunity for advocacy of key points in the case will arise by posing a hypothetical question to the expert witness. Postulation of a hypothetical question to an expert witness allows the litigator to articulate a thoughtful, orderly, concise, and understandable restatement of pertinent facts admitted into evidence in the case on which the interrogating lawyer asks the witness to rely as the basis for an expert opinion. This process of posing a hypothetical question finds authorization within Rule 703 of the Ohio and Federal Rules of Evidence.

Over the last thirteen years, the propriety and acceptability of expert opinions offered as evidence has faced a thorough review by the United States Supreme Court. The court initiated this review in response to a perception that many trial lawyers were eliciting testimony by expert witnesses based on so-called "junk science." In order to assess evidentiary reliability of testimony by expert witnesses, the United States Supreme Court assigned the trial judge the role of "gatekeeper" to review scientific validity of expert testimony.[5] The court instructed that the gate keeping trial judge could engage in preliminary assessment of expert testimony in order to determine whether the trial lawyer could offer such testimony and, if so, to what extent the testimony would be allowed. Before presentation of the proposed expert testimony to the jury, the trial judge conducts such hearings and issues "preliminary" rulings under Rule 104(a) of the Federal Rules of Evidence. These proceedings have come to be known as "Daubert hearings," taking the name of the plaintiff in the seminal case issued by the United States Supreme Court on the trial judge's gatekeeping role.

In the Daubert hearing, the gatekeeping judge must assess four "general observations" on proposed expert testimony as follows: (1) Is the theory or technique at issue testable, and has it been tested? (2) Has the theory or technique been subjected to peer review and publication? (3) In the case of the suggested technique, what is the known or potential error rate? (4) Is the theory generally accepted in the scientific community?[6]

While expert witnesses can uniquely offer "testimony in the form of an opinion [that] embraces an ultimate issue to be decided by the trier of fact,"[7] the trial lawyer must insure (a) that the expert actually qualifies to provide testimony in the area of claimed expertise under Rule 702 of the Ohio or Federal Rules of Evidence and (b) that the expert testimony will satisfy the gatekeeper in the event of a challenge through a Daubert hearing.

In the year after publication of *Daubert*, the Ohio Supreme Court amended Rule 702(C) of the Ohio Rules of Evidence as a summary adoption of the principles of the precedent of *Daubert*. Five years after the publication of *Daubert*, the Ohio Supreme Court impliedly embraced the holding and the process for a Daubert hearing in state court actions.[8]

Earlier this year, the Ohio Supreme Court issued a decision which melded an analysis of Rule 702(C) and Daubert and clearly assigned Ohio trial judges with the identical "gatekeeping role" contemplated by *Daubert*. The Ohio Supreme Court has instructed, "Although scientists certainly may draw inferences from a body of work, trial courts must ensure that any such extrapolation accords with scientific principles and methods . . . . Because expert opinion based on nebulous methodology is unhelpful to the trier of fact, it has no place in courts of law."[9]

As always applies to the pragmatics of dealing with legal issues in the courtroom, the trial lawyer needs to understand and appreciate the mentality of the assigned trial judge. In a Daubert hearing, the four "general observations" do not necessarily all apply. Rather, the four general observations provide guideposts for the trial judge to determine whether the offered expert testimony can be offered for the jury's consideration. In order to reverse a trial judge's rulings in the aftermath of a Daubert hearing, the party subject to an adverse ruling must demonstrate "abuse of discretion."[10]

While Rule 703 of the Federal Rules of Evidence allows an expert to formulate opinions based upon facts or data which need not be admissible into evidence, trial counsel has no such luxury under Ohio procedural and evidentiary law. Under Ohio law, trial judges will exclude opinion testimony by an expert predicated in whole or in part upon inferences, conclusions, or opinions of others.[11] Unlike federal evidentiary law, Ohio evidentiary law prohibits experts from basing opinions on inadmissible hearsay evidence.[12]

To bring an expert's opinions to life for the judge and jury, models, illustrations, photographs, and graphics serve as important visual demonstrative aides to insure that trial counsel has not simply offered a "talking head." To keep the jury engaged on what might cycle into a highly technical testimony, trial counsel faces the challenge of eliciting testimony from the expert that simplifies and explains complex scientific matters. The lawyer needs to appreciate that dazzling the jury with an expert's brilliance utterly falls flat if the jury does not understand the intended message of the expert's testimony.

With regard to experiments performed out of court under the supervision of a testifying expert, Ohio courts will only allow evidence of such experiments if "the essential conditions are those existing at the time of the accident."[13] However, the exact conditions of the occurrence need not be duplicated in the experiment if "it deals with one aspect or principle directly related to the cause or result of the occurrence."[14]

While experts can occasionally carry the day on the sheer force of personality, in the final analysis, if offered expertise has not demonstrated an advocated position, juries will apply their common sense and reject the expert's testimony. In complex cases, such rejection probably sounds the death knell of a litigant's afffected claims or defenses.

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1. McQueen v. Goldy (Butler Co. 1984), 20 Ohio App.3d 41.
2. Stinson v. England (1994), 69 Ohio St.3d 451.
3. Id. at syllabus 1.
4. Schaffter v. Ward (1985), 17 Ohio St.3d 79.
5. Daubert v. Merrell Dow Pharmaceuticals, Inc. (1993), 509 U.S. 579.
6. Id.
7. Rule 704, Ohio and Federal Rules of Evidence.
8. Miller v. Bike Athletic Co. (1998), 80 Ohio St.3d 607, 611-612.
9. Valentine v. Conrad, 110 Ohio St.3d 42, 44-45, 2006-Ohio-3561
10. Kumho Tire Co., Ltd. v. Carmichael (1999), 526 U.S. 137.
11. Leichtamer v. American Motors Corp. (1981), 67 Ohio St.2d 456.
12. Fireman's Fund Insurance Co. v. B P S Co. (Franklin Co. 1985), 23 Ohio App.3d 56.
13. Miller v. Bike Athletic Co.
14. Id.

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Persuasion Basics:

"Framing" Injustice Statements

By Steven D. Estelle

Whether you're writing a brief or presenting a case to jury, your audience will not feel compelled to rule for your client unless you highlight the injustice. An injustice statement explains what the brief or case is all about; it establishes the relevant facts and issue; and it provides the appropriate resolution. Most importantly, though, it stirs in your audience a natural urge to fix what's wrong. Think of your audience as a body at rest. Your injustice statement is the initial force that gets them moving in the direction you want, and once they're moving, it's a lot easier to keep them in motion. At the same time, your opponent faces the difficult task of stopping them and pushing them back the other way.

Your injustice statement must be the first thing you present to your audience. The longer you keep the injustice from your audience, the less receptive they will be to what you're communicating. The injustice statement must be short and simple, and it must be stated in such a way that it elicits some favorable statement like, "That's wrong!" or "That jerk!"

After you have delivered your injustice statement, if you do not feel the urge to blurt out some exclamation, neither will your audience, and what you say to them after that won't matter. Your request for relief will seem more like an option than an absolute necessity. Your audience will remain a body at rest.

Injustice statements can stir a reaction even when the rule that was broken seems trivial. The power of the injustice statement is enhanced when there is more than one injustice committed. Injustices build upon each other.

The power of your injustice statement will also grow as the equities between the parties become more imbalanced, the aggressor's level of intent approaches knowledge (as opposed to negligence), the level of intent approaches premeditation (as opposed to spontaneity), and the aggressor's motive becomes more socially distasteful.

Use of the injustice statement carries with it a bonus; it will do more than move the audience to action. It will also set up frames for characterizing the two parties.

I use the term "frames," which I learned from reading Dr. George Lakoff's book *Don't Think of An Elephant* and his articles at www.rockridge institute.org. I think the "frames" term is more useful than the one we normally hear about: themes. The word "frame" helps me establish a mental picture of true character in which the snapshots are unchangeable. In other words, in my mind, nothing can change either party's true character. Those snapshots are who they really are. You want your audience to experience the same thing.

Dr. Lakoff tells us that once a frame is established, facts inconsistent with the frame will tend to be rejected, ignored, or deemed irrelevant. Even if an advocate says their client's behavior shows some remorse or shows that their client isn't completely bad, the audience, if they have accepted the unchangeable frame, will tend to view the behavior, at best, as an aberration from their true character, not as mitigating behavior.

Without any advocacy on your part, I believe they will tend to ignore the inconsistent behavior or, if it is factually in dispute, they will reject it. With your help, however, they may do something even more beneficial to your case: they will interpret the client's behavior consistently with his frame: "He behaved that way to cover up his crime!" The inconsistent behavior will either bounce off the unchangeable frame or be interpreted consistently with it.

Highlighting the injustice is essential to persuading your audience to act in your client's favor. The injustice statement stirs in the audience a natural urge to right the wrong, and it helps establish frames that guide the audience toward a favorable interpretation of the facts.

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DUI & Lawyers

The Best Dressed Crime In America

By Bradley P. Koffel

I am about to start my 14th year representing people charged with DUI, alcohol, and other drug crimes. I've had the pleasure of representing many local lawyers charged with DUI though very few of my attorney clients are chemically dependent. What is overwhelmingly obvious to me in representing lawyers is that DUI is a symptom of a unique subset of mental health issues that plague lawyers more than most other occupations.

When I peel back a lawyer's DUI arrest and look past the evidence, I see and hear a client that leads a rapid-fire life; no true work-life balance; diminished boundaries between work and home; increased irritability when not immersed at work; overwhelming financial demands necessary to support an "expected" lifestyle; a general hunger for something more purposeful in life. Lawyers have a baseline of anxiety that is likely to be much higher than the average American; drinking and socializing provide quick relief from these daily stressors.

This cycle progresses throughout the lawyer's career. By mid-career and beyond, the partner in the law firm and entrepreneurial solo/small firm lawyers have comfortable incomes, material luxuries, and trendy lifestyles that require a frenetic pace to maintain. This professional progress is *not* counter-balanced by healthy family systems, meaningful friendships, spiritual growth, or a regular dose of civic service. Imagine a wheel on a wagon with a slight wobble; with increased speed and longer distance, the wheel shimmies to the point of falling off.

Many of my attorney (and other professional) DUI clients are that wobbly wagon wheel. The DUI stop was bound to happen. Constructive outlets are not part of this person's daily life. Even vacations mimic daily work (check voice mail, email, read professional articles, call the office, can't relax without a "cocktail"). We kick in some self-medication that doesn't require a prescription: a scotch here, a bourbon there, or a big cabernet.

It is my professional opinion, based exclusively on anecdotal evidence, that most people drink to relax, feel happy, or fit into a social setting. I also believe there is a therapeutic use of alcohol provided it is done responsibly and with the appropriate controls in place (have a driver if you are out and/or limit your intake to two or fewer drinks while eating). Unfortunately, many lawyers unwittingly drink to cope with emotions and situations they cannot control and Type-A personalities unconsciously manage their anxiety with alcohol.

What we now know is that alcohol weakens the neurotransmitters that the brain needs to naturally reduce anxiety and depressive thoughts. The "winding down" feeling of having a drink is simply due to chemical changes in the brain. The greater the alcohol consumption, the more affected the brain becomes. As more alcohol enters the bloodstream, emotions and movement become affected. As the brain and body develop a tolerance, the amount, type, and frequency of drinking must be increased in order to produce the desired effects. Eventually, judgment is impaired, the decision to drive becomes more daring, and a DUI is in this lawyer's future.

Alcohol produces a very temporary and short-lived feeling of relaxation in low doses. This use of alcohol is not only legal but certainly has healthy benefits depending on the type of alcohol consumed (like red wine). Yet, this does not cure what ails our profession. The underlying issues remain. Many lawyers practice law always looking ahead and not spending time in the present. We tend to work too much, don't spend enough quality time with family and friends, and we fail to get emotionally engaged in non-work activities.

DUI, lawyers, and A-type personalities go hand in hand. Factor in a divorce, job loss, or any other common curveball life throws us and lawyers get caught flat footed. We aren't built and trained to deal with our own personal issues. Lawyers are great at solving the troubles of our clients but our personal toolbox is empty.

The answer to this problem is easy. I advise my clients to focus on creating a daily block of time, out of the workday, just for them. Don't take this time out of your personal life. Find 60 minutes and exercise. I also suggest that lawyers re-focus their energies on providing truly exceptional client service. There is no doubt that happy clients make for happy lawyers.

For the weekends, calendar family time, activities, and time with friends. Get engaged in a meaningful non-law organization. And, enjoy your favorite beverage with a good dinner, conversation, friends, and family. Stop at two drinks. After that, the healthy side effects get trumped by damage to your liver and other organs.

Finally, if you are reading this and suspect you may have a problem with alcohol or other drugs, there are fantastic resources available in Ohio, including the Ohio Lawyers Assistance Program.

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Billable v. Unbillable

MP's Administrative Time Can Be Costly Mistake

By Cathy A. Rhoades

All law firms have to deal with administrative projects. Whether starting a firm, remodeling current space, expanding into larger space, branching out in another city/state, or just sourcing furniture, art, signage, or phones/equipment, all of these projects can take up an inordinate amount of a managing partner's time. It also takes time to build policies, set up a basic operations environment, hire the right employees that suit your culture, and work out relocation details. The bottom line is that the non-billable time lawyers spend dealing with administrative projects can be a costly mistake.

Many firms have an office assistant or manager handle daily office administration. Their expertise can vary from accounting to human resources strengths, and while both skills are important to keep a firm running smoothly, someone who exhibits strong skill sets at both ends of that spectrum is a rare find. The result is that various administrative projects again fall to the partner.

So how does a managing partner stay on top of important projects without taking time and focus away from clients?

One solution is to hire an outside corporate service consultant who specializes in facility and human resource projects for law firms. This expertise is not as costly as one would think, given a partner's billable hourly rate being consumed in exchange for non-billable administrative details.

Corporate service consultants are experienced with larger firms – a unique benefit to small firms working to establish their culture and set policies and procedures. They know how to avoid pitfalls and offer sound advice based on real world experience. In situations with facilities' needs, corporate service consultants attend all outside/inside meetings that the partner would have been required to attend otherwise.

The result is that overall cost savings are significantly greater, project time delays are reduced or even eliminated, and a stronger deliverable is achieved.

Throughout the process, the service consultant communicates routinely with the partner to provide updates and status reports. Because of their management backgrounds, service consultants can be relied upon to handle all information with strict confidentiality, while also serving as a buffer to communicate sensitive issues to staff and/or vendors.

The service consultant provides the firm with comfort that they are making good decisions while meeting critical deadlines. Often a firm has not dealt with space design nor do they know how to factor in growth. They buy what is offered instead of what they need, only to realize costly adjustments down the road. Real estate brokers and architects can be helpful but often require more information before scouting and designing office space, whereas service consultants already know the critical questions to ask because they have "lived" in a legal environment. As consultants, they will guide the firm to evaluate their needs accurately, thereby eliminating the risk of buying too much space or worse, not enough.

During a location search, service consultants act on behalf of the firm as the "buyer's advisor." They are non-biased when it comes to vendor relations and, in all situations, they negotiate the best pricing based on their industry knowledge. They act as "outside operations" for the firm while maintaining close contact with the managing partner. In short, they look out for the firm's best interests. Firms can hire the service consultant on an "as-needed" project basis or on a retainer basis for budget purposes, thereby allowing firms to expense such services.

Corporate service consultants are especially adept at sourcing a wide range of needs. Their comprehensive relationships with architects, brokers, and vendors save valuable time in identifying the right sources for office space, design solutions, vendors, equipment, and personnel. They also remain heavily involved in the floor plan design phase, based on their in-house knowledge of your attorneys and culture, resulting in a productive working design for the space you need.

If you are planning on expanding your firm to a new city or state, corporate service consultants will travel to locate the site, work with real estate brokers, build out the space, and hire the employees. This allows the managing partner time with clients while keeping informed of progress.

Consultants offer expertise; for a smooth transition move for new partners to the firm; event planning for business development; disaster recovery; recruitment research. Again, much of their expertise is driven from their exposure to other large companies, giving firms full service without hiring multiple staff professionals.

Using a service consultant, partners maintain full control of the opportunity to make decisions without having to spend countless hours working with every vendor, salesperson, and third party involved.

Consider the time that could be billed and the projects that could be accomplished without ever losing touch of your firm's mission!

Cathy A. Rhoades is a Service Consultant and founder of Rhoades Corporate Services

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Is It Safe To Eat Anything Anymore?

Food Poisoning; What It Is, How To Avoid It, What To Do About It

By Jayme M. Smoot

Food safety has never been more important. With the recent holidays and the E. coli outbreak in spinach from last fall, it is very important to appreciate food safety. There are several things consumers can do to be more aware of the issue and to protect themselves. First, consumers should know the incubation periods of common foodborne pathogens. Second, consumers should know common food poisoning symptoms and the steps to take if they suspect food poisoning. Third, consumers should know basic food storage techniques to avoid food poisoning at home. Finally, businesses should take preventative steps to avoid food poisoning outbreaks.

There are many causes of food poisoning and some of the most common ones include improper storage, improper cooking, and health code violations. It is essential to prevent these problems.

The incubation period for food poisoning is the time between ingestion of a pathogen and the first signs of symptoms. This period is important in determining what caused the food poisoning. The incubation period for staphylococcus aureus (staph) is 1 to 8 hours, typically 2 to 4 hours. The incubation period for E. coli is 1 to 10 days, typically 2 to 5 days. The incubation period for salmonella is 6 to 72 hours, typically 18 - 36 hours. Thus, if you experience symptoms of food poisoning, you should not assume it was from the last thing you ate. It could possibly be from something eaten days earlier. Many times, you can not tell by taste or smell that something is wrong with the food.

Common symptoms of foodborne illness include diarrhea, abdominal cramping, fever, headache, vomiting, severe exhaustion, and sometimes blood or pus in the stools. However, symptoms will vary according to the type of organism and the amount of contaminants eaten. For most healthy people, foodborne illnesses are neither long-lasting nor life-threatening. However, they can be severe in the very young, the very old, and people with certain diseases and conditions.[1]

If you are suffering from food poisoning, you should, of course, run to the doctor. Pursuant to Chapter 3701 of the Ohio Administrative Code, your doctor must report specific types of food poisoning to the department of public health. Physicians are required to report specific diseases to the department of public health to enable the department to prevent and control food poisoning outbreaks. If possible, you should keep a sample of the food you suspect caused the poisoning for testing.

It is important to know safe food storage techniques. Here are some easy tips to remember when storing food:

- two hours from oven to refrigerator. Refrigerate or freeze leftovers within two hours of cooking the food. Otherwise, throw it away.
- two inches thick to cool it quick. Store food at a shallow depth - about two inches to speed chilling.
- four days in the refrigerator - otherwise freeze it. Use leftovers from the refrigerator within four days.[2]

The legal implications for businesses that serve or sell contaminated foods can be severe. In fact, settlement amounts of $15.6 million, $12 million, and $4.6 million have been reached in food poisoning cases. Thus, businesses must take the threat of food poisoning seriously. Businesses should consider taking the following steps:

- Stay current with health code laws
- Create food safety guidelines and adhere to them
- Review contracts with vendors to ensure indemnification in the case of an outbreak
- Hire a responsible person to oversee food safety

Thankfully, it is generally safe to eat foods not picked from your own backyard. However, it is important to take safety measures such as using proper storage techniques and handling food properly when preparing foods. Additionally, it is important to consult a doctor if you suspect you have been a victim of food poisoning. Finally, businesses must attempt to protect the public from food poisoning. Although no plan is foolproof, businesses should implement food safety plans and take steps to protect themselves and their customers from the ramifications of food poisoning. Now, wash your hands and eat!!

jsmoot@keglerbrown.com

1. www.fda.gov/fdac/reprints/dinguest.html
2. www.cspinet.org/foodsafety/rules_leftover.html

Jayme M. Smoot,
Kegler Brown Hill & Ritter

Follow The 'Rules'

Guide Reveals Key Strategies To Increase Law Firm Profitability

Measuring – and ultimately increasing – law firm profitability requires much more than tracking how many hours an attorney bills or how many new clients they bring in, according to a new resource guide by Omega Legal Systems Inc. The 17-page guide, titled "Follow the New RULES: A Guide to Leveraging Your Financial Software to Measure & Increase Profitability," explains how firms must look beyond traditional numbers to develop the right strategies for improved profitability.

In the guide, James S. Schnieders Jr., controller at New Orleans, Louisiana-based Stone Pigman Walther Wittmann LLC, examines the efficiency of the firm's attorneys, the impact of the associate-partner ratio, the roles major and minor expenses play, management of work in process and the speed of invoice generation.

Also discussed are the "RULES," developed by the late Robert J. Arndt. These RULES – Realization of billing rates, Utilization of attorneys, Leverage of lawyers, Expense control and Speed of billings and collections – look at multiple data points to help firms understand what needs to be improved to increase a firm's profitability.

"The billable hour alone provides insufficient data to determine a firm's profitability and no real guidance on how to improve that profitability," Schnieders said. "We needed to make sure we were evaluating the right statistics with the right data, and we used our financial management system and the RULES of law firm profitability to do it."

To learn more about the RULES and how law firms can utilize them to increase profitability, download the guide at *www.omegalegal.com/DataSheets/Profitability Press.pdf*.

Omega
Setting precedent.

In Demand

Designated General Counsel Trend Continues In AmLaw 200 Firms

A recent Altman Weil Flash Survey of AmLaw 200 law firms reports that 85 percent of responding firms have a designated general counsel, up from 69 percent in 2005 and 63 percent in 2004. Seventeen percent of the firms without a general counsel plan to designate one during the next 12 months.

"This represents a marked acceleration of the trend toward creation of the position in major U.S. law firms," said Altman Weil Principal Ward Bower.

Among other survey results:

- 100 percent of the designated law firm general counsel are in-house.
- 89 percent are partners in the firm.
- 80 percent come from a litigation background.
- More than one-third work full time in the general counsel position, with average cash compensation exceeding $500,000.
- More than two-thirds report to the firm's Chair or Managing Partner
- 28 percent serve on the firm's governing committee, down from 40 percent in 2004

According to the survey, areas of greatest importance to law firm general counsel are issues relating to professional responsibility, professional liability, advising law firm management and employment of outside counsel.

Survey data was collected in March 2006 from AmLaw 200 law firms, with 42 percent participating (82 of the 195 firms solicited). For the full report, visit *www.altman weil.com/LawFirmGC Survey2006*.

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Celebrating 35 Years

ALA®

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***.

Rewarding Partners

Survey: Performance-Based Philosophy Drives Compensation Decisions

Business origination and personal fees collected are the two most important factors determining partner compensation in law firms, according to the newly released *Altman Weil 2006 Survey of Compensation Systems in Private Law Firms*.

"Over the last decade, we've seen movement toward a more retrospective, performance-based compensation philosophy in law firms," said Altman Weil Principal James D. Cotterman. "This reflects the market-driven need to recognize individual performance more quickly in order to attract and retain people. It is too early to tell if this trend will make firms more competitive or possibly more fragile in a market dominated by shifting loyalties."

The survey studied many compensation issues.

Formal compensation factors.

Law firms identified business origination and personal fees collected in a tie for the top ranking among the 18 formal compensation factors. Client responsibility, case responsibility, client service, legal expertise and profitability of work were cited in the second tier of importance.

Origination credits.

About 57 percent of all law firms use formal origination credits, as do 63 percent of firms with 100 or more lawyers. In those firms that track origination, 80 percent report that partners receive the credit as long as the client generates work for the firm.

Two-tiered partnerships.

Nearly 49 percent of all law firms have two-tiered partnership structures. About 85 percent of firms with 100 or more lawyers report having more than one class of partners.

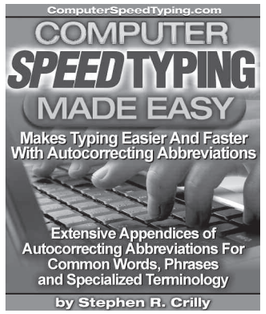
Compensation committees.

About one-third of all firms (31percent) have distinct "Compensation Committees," according to the survey. In 28 percent of firms, the Executive Committee makes compensation decisions, and in 29 percent of firms, the entire partnership is responsible.

The *Altman Weil 2006 Survey of Compensation Systems in Private Law Firms* was based on data collected from 263 law firms in the fall of 2005. For the full survey, visit *www.altmanweilpubs.com*.

Typing Made Easier

New Electronic Book Reveals System To Expedite Typing



A new e-book, *Computer Speed Typing Made Easy*, explains a new system for typing with abbreviations that "autocorrect" to the full word when typed, making typing easier, faster and less tedious.

The key to the system is placing two dots after the abbreviations of desired words. Some basic examples:

- Type "ack.." and get "acknowledge."
- Type "bec.." and get "because."
- Type "co.." and get "company."
- Type "cos.." and get "companies."
- Type "misc.." and get "miscellaneous."
- Type "asap.." and get "as soon as possible."

The two dots prevent a particular abbreviation, which may occur as contiguous letters in other words, from unintentionally autocorrecting in those other words.

There is no software to buy, and the system works within Microsoft Word and Corel WordPerfect. In Word, the full word or phrase appears in your document the instant you type the second dot after the abbreviation. In WordPerfect, it appears after pressing the spacebar following the second dot.

The system is presented in the form of an electronic book, which provides extensive appendices of suggested abbreviations for common words and phrases, as well as specialized terminology used in various industries and professions. Users can easily transfer the words from the appendices into your AutoCorrect or QuickCorrect database and add abbreviations of your own.

Suggested abbreviations for more than 500 common words are provided. The appendix of abbreviations for specialized terminology is 37 pages, including jargon used in law firms, the sciences, geography, medicine, government and other professions.

The entire e-book, including the appendices, is provided as a downloadable PDF Copies of the appendices are also provided in Word and WordPerfect format to facilitate adding words, phrases and their abbreviations to users' AutoCorrect or QuickCorrect databases.

For more information and to download a copy of the table of contents, visit *http://computerspeedtyping.com.*

Too Busy To Get Away

Survey: One In Four Workers Plans To Do Work While On Vacation

Some workers are finding it difficult to unwind when taking time off from the office, according to *CareerBuilder.com*'s "Vacation 2006" survey of more than 2,500 workers. Although an improvement from 33 percent in 2005, 27 percent of workers still say they plan to work while on vacation this year. Sixteen percent of workers report feeling guilty about missing work while on vacation, and 7 percent actually fear that time off could lead to unemployment.

More than half of workers say they work under a great deal of stress, and 77 percent say they feel burned out on the job. While 84 percent of workers are planning to take a vacation this year, they might not be taking enough time to recharge. Thirty-two percent of workers are taking a vacation of five days or less, while 10 percent are limiting themselves to weekend getaways.

"Work can be demanding, but taking it all with you just brings the stress to a new location," said Rosemary Haefner, Vice President of Human Resources at *CareerBuilder.com*. "Cell phones, pagers and other electronic devices can create an 'e-leash' of sorts. Planning ahead, managing expectations and setting boundaries with your co-workers are keys to making sure you get the break you need."

To enjoy a stress-free and work-free vacation, Haefner recommends the following tips:

Keep people informed.

If you, your significant other and your travel agent are the only ones who know about your plans, you're headed for trouble. Give early notice for the dates you plan to take off to make sure your schedules run smoothly.

Cross-train colleagues.

You may feel you are irreplaceable, but cross-training a co-worker to share your task enables you to take time off and creates a network. Next time a co-worker needs to take a vacation, you can return the favor.

Set limits.

Checking in a couple of times during a week off is one thing, but if your job requires you to be a slave to your cell phone, you may want to talk it out with your boss and colleagues in an effort to establish acceptable boundaries.

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

careerbuilder.com™

Seems Like It Was Many A Year Ago

In A Kingdom By The Sea

By The Honorable David E. Cain

As the cruel winter deepens, my mind keeps skipping back to early fall when I was in the Kingdom of Tonga during late spring.

We went for sailing, but found much more. On the land, it was primitive but very friendly. On the sea, it was beautiful but treacherous.

Being in the South Pacific, near the "land down under," the seasons are pretty much the reverse of the Midwestern United States. But they never stray far from summer when the air simply gets a little hotter and a little more humid – neither of which is noticed much anyway because of the constant winds.

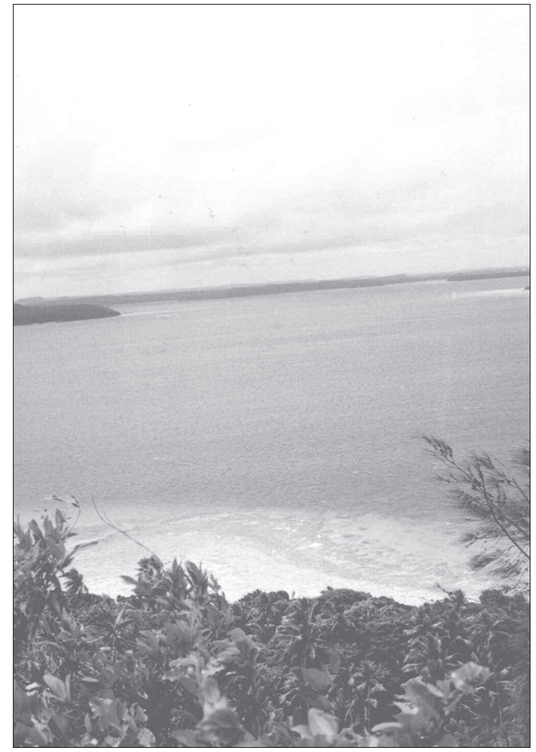
The idea of a South Pacific adventure actually arose on a sailboat in the British Virgins Island (BVI) a year and a half earlier. We didn't know it would make the Caribbean look like Indian Lake.

When the planning got serious a year ago, the group of eight had swelled to 16 and two boats would be needed. We met in Los Angeles in mid-September and headed south on New Zealand Air. The first stop (eight hours later) was in Western Samoa where we were immediately struck by the brightness of the green earth and the blue skies with coconut trees lining the horizon.

Entering the airport, we were greeted by the powerful but sweet sound of a Tongan a cappella choir clad in black and singing in respect of their king, Taufa Ahan Tupon IV, who had died two days earlier in an Aukland hospital. He had been the longest reigning king on the planet – nearly 50 years – and his body was being placed in the plane we would soon reboard for the reminder of the trip to Tongatapu where a royal funeral was being planned for the following week.

The Kingdom of Tonga is made up of about 400 pieces of land large enough to be called islands. The total population is about 90,000, two-thirds of which are in the capital at Tongatapu. Half of them are "foreigners." Once we arrived there the mourning was obvious. Miles and miles of black banners were stretched across fences, bushes and buildings. All of the native population was dressed in black and all "feasts" had been cancelled. The mourning would continue for a month. "And we didn't even like him that well," one of the locals confided.

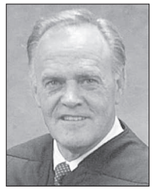
Our rented boats were docked at the town of Neiafu in the island group of Vava'u which could be reached by another two-hour plane trip, this time on an old DC10 with two props and a seating capacity of



about 30. During the flight, the pilot opened the door to the cockpit to get some air and we noticed he was navigating with a hand-held GPS. Before departure, he had climbed on to the wing and checked the fuel level with a wooden dip stick.

Once we arrived in Neiafu, a rickety shuttle bus took us along roads lined with small houses, mostly made of cement blocks with metal or thatch roofs, and through a "downtown" area to the Paradise International Hotel. By far the nicest facility on the island, it was spacious, bright and clean but decorated and furnished like what I remember from the 1950s. There was no television, and radio stations broadcast nothing but religious music.

After arriving at the hotel, where we would spend the night before grocery shopping and



Honorable David E. Cain, Franklin County Common Pleas Court

boarding the boat, I realized we had been traveling for more than 24 hours and (having crossed the International Date Line) I did not know what day it was, what time is was or when I should have gone to sleep. But we knew we were hungry so my wife, Mary Ann, and I headed for the hotel dining room – a splendorous setting with tiled floors and open air views of flowery landscaping overlooking a sailboat harbour.

Having a queasy stomach for meats that didn't come off a farm and most seafoods, I ordered a cheeseburger and fries. But the first bite revealed something that tasted more like beagle than beef. I had seen pigs, chickens and dogs free ranging in streets and yards. But I hadn't seen any cows. So, I ate the fries and started wondering if I could quickly adapt to a vegan lifestyle.

The next morning we went to the market, a delightful string of pavilions along the ocean front where large tables were covered with vegetables and herbs along with assorted fruits – bananas, papayas and coconuts. A variety of fish was available in tubs along the water. They had been speared by free divers following the light of torches in the early morning hours. Also available were native handicrafts such as woven baskets, large "Tapa" cloths and ox bone and black pearl jewelry.

The Moorings – where we rented the boats – had a stock of groceries and beverage provisions which are shipped in from New Zealand once a week (depending on the weather) and with edibles purchased at the market I believed I might survive.

Finally, we were boarding the boat, a 49-foot craft with a genoa and mainsail, a galley large enough to cook and eat, and four bedrooms, two at each end of the galley.

Our bed was accessible only from the front end. It was waist high and could be entered by running and diving head first. Or, one could use the monkey bar approach by grabbing the overhead hatch and swinging for a feet first entry.

Our captain was Herb Ross, an orthopedic surgeon from Lansing, Michigan, who was at the helm for our two previous sails in the BVI and who originally had the idea to come to the South Pacific. First mate was Jerry Gilroy, also from Lansing, an ENT surgeon with experience in acute care. On the other boat was Lee Leeds, a gynecologist from Houston, Texas. Before we were halfway through the trip, crew members needed the service of two of them (not the gynecologist) for minor mishaps.

The differences between the BVI and the South Pacific were readily apparent. On the good side, the islands were much more heavily vegetated with the lush green colors usually going all the way down to the shore. The coral reefs gave the waters endless shades of blue and blue-green hues.

But there were no overnight moorings anywhere. Dropping anchor was always a necessity. And good spots to anchor were hard to find with the coral surrounding most of the land. Coral won't hold an anchor unless it's caught on a head in which case it will be quite difficult to remove. Furthermore, the depth charts were unreliable and there was only one weather forecast a day – while the weather was constantly changing.

Six foot swells and winds of 35 knots were not unusual.

But the first few days brought great sailing, scenery and sunshine. And I figured out how to compare the time of day to the time in Columbus. Simply put, we were seven hours behind but a day ahead. Indeed, eating breakfast on a Sunday morning it occurred to me that the Buckeyes were presently tying it up in the horseshoe. Yesterday is now. I must be in a time machine.

But since it was Sunday we determined to attend church in a primitive village sprawled over a hillside on a nearby island. So we put on long clothes and headed over in our dinghy (a rubber raft with a small outboard engine that can seat up to eight). As we approached land, two adolescent boys ran into the water to guide us through the coral and pull us ashore. As we walked up the hillside, young girls began appearing in front of their small houses, well groomed and wearing long, pretty dresses. They were bashful at first, but soon were smiling, speaking

English and escorting us on up to the church. While Tongan is the official language, many speak English as well. Early in the 19th Century, the Wesleyan Church sent English missionaries to Tonga. The religion endured as well as the language.

Inside, the church was plain but impressive with its simple pews and linoleum floors. Eight adult women sat quietly in the center section and a dozen young persons sat quietly off to the sides. The bells rang at 9:30 a.m. and when they stopped, the women broke into four-part harmony song, so full and beautiful all eyes immediately began to moisten. Their number was small, but they lacked nothing in volume. A single woman supplied the bass and could have rivaled a whole section of males. After the bells rang again at 10:00 a.m., a half dozen men joined the congregation, and thus the choir as it embodied the entire assemblage. By now, it sounded like the Morman Tabernacle Choir. The Tongan alphabet has only 16 letters. The five vowels have single sounds only. The result is that the words are much longer. And in song, it adds flavor to the smooth flowing melodies. The occasional crowing of roasters or barking of dogs added to the ambience.

All the parishioners were barefoot, having parked their sandals at the door. At first, I thought it was a religious thing. Then, I remembered all the animal droppings along the pathway. After the service, they formed a line and greeted us all with smiles and well wishes.

On about the fourth night, we realized what problems the windy sea could generate. After we anchored amid several other boats, our traveling companions edged up in their catamaran (we had a mono-hull) and we tied the boats together with fenders in between. It was great for the socializing, but in the wee hours of the following morning, Jerry was banging on our doors – mine and my brother-in-law, David Shooter, who with my sister Alice, was beside us. "I need you. Right now. We're dragging anchor." We grabbed flashlights and hurried up to the deck where the first task was to disengage the catamaran which we were dragging as well. Then to the bow to raise the anchor so that Jerry could inch the boat through the blackness to a place where we could once again attempt to catch the anchor. The crew on the cat were doing the same nearby. In the morning, we realized we had moved 300 to 400 feet and could only wonder how we missed the shore, rocks and other boats. Good thing Nancy (Herb's friend) had decided to sleep on the deck and noticed the movement.

That was nothing compared with what Mother Nature had in store the next time the sun went down.

We were headed through troubled waters to one of only a couple restaurants within sailing distance and we radioed to confirm our reservations. They told us to take a rain check. A storm was coming and it wasn't safe there. Herb studied the charts and took us to the nearest "safe harbor," where we had anchored a few days earlier. We got as close to land as possible and dropped anchor. Believing we had a good catch we let out some 50 meters of chain. The cat got closer to land as it draws only three feet and the mono-hull draws six. We had envied them for the more spacious deck and quarters and now for their lighter draw.

The rains began to pound and the winds were at 45 to 50 knots. The boat rocked violently, causing all sorts of creepy groans and bangs. But we were staying in the same place, so Jay (Jerry's wife) began looking for something to replace our foiled dinner plans. We ate fried eyes on grilled cheese sandwiches,

cleaned up the dishes and started a euchre game when someone realized our anchor was no longer holding and the gale-force winds were blowing us toward the blackness of the open sea.

We ran up from the galley to the helm and began grabbing rain gear and digging out life vests for the first time. David and I began crawling around the dodger onto the deck toward the bow where the anchor controls are located, wondering what Jerry and Herb would be doing at the helm. Shinning a flashlight toward the water revealed only a silver screen – gazillions of bullets of cold rain coming at us horizontally and stinging our faces. Suddenly a spot light appeared at the aft side, mid deck. A barefooted man literally sprang from a dinghy up onto the rails and over the cables with a flashlight in one hand and the dinghy rope in the other, a feat I would have never thought possible. He was dressed in a tee shirt and shorts. Water cascaded over his fully-bearded face.

"We only have a couple minutes. Is anyone on the anchor?" he shouted with a strong Aussie accent. When we assured him of our readiness, he rushed to the helm. Upon command, we began raising the anchor. While I had no idea of which way the shore would be or how far, but this man knew the waters. He had been there before. By running back and forth, he was able to help Herb and Jerry guide the craft into a better place to anchor and we were finally "safe." Then, he disappeared back into the storm. The next day, we learned that his name was Martin Farrand from North Harbour, New Zealand. He had seen our boat in distress and rushed to help. He had been on the only other boat nearby – except for the catamaran which had been blown to shore with its dinghy trapped underneath and water pouring over the sides. We no longer envied the cat people. And we now understood why Herb had insisted on a mono-hull.

Between the storms of the next few days, we did some robust sailing in winds that would have docked most boats in the Caribbean, hiked up an island to a breathtaking vista, watched a couple of whales migrate northward and did some more snorkeling.

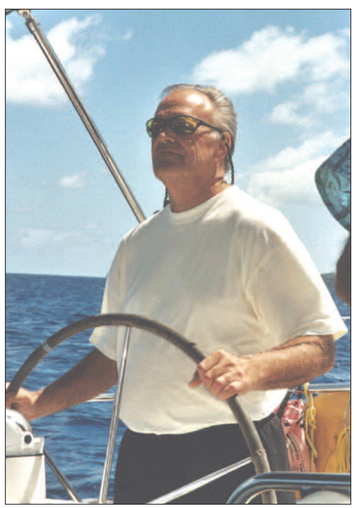
The last night out, we "shot the gap" to enter the celebrated lagoon on the island of Hunga, the most western in the Vava'n group. A guidebook warned that the one navigable entrance is between high cliffs and similar in appearance to a false entrance a half mile to the north. The entrance is "tricky and hazardous and should be made without current and good sunlight. You may enter only between one hour before and up to one hour after the actual high tide."

We tried it in the morning but wasn't sure if we were at the right island and another storm was approaching. We traveled several miles to a safe harbor to wait it out, then back through open waters with five and six foot swells to reach the entrance within the range of high tide. This time we made a successful entry and celebrated with the cat people who were already there.

The last day, we headed back to Neiafu and latched onto a mooring in the causeway for the last night aboard. After 11 days, we were ready to spread out and live on land again. By this time, the group dynamics would have made a good thesis study for a graduate student majoring in organizational psychology or, perhaps, anthropology.

And the Tongans? Still happy, friendly and smiling. Still wearing black.

david_cain@fccourts.org



Life In Death Valley

A Probate Attorney Journeys West

By Lloyd E. Fisher Jr.

A probate attorney in Death Valley? What started as a sick joke turned into a visit to a fascinating section of the American Southwest.

Death Valley National Park covers over 3,000,000 acres (one and one-half times the size of Delaware) at the southeast border of California. Less than 150 miles from the neon glitz of Las Vegas, the park is an amazing contrast of nature's temperatures and geology. Within its boundaries are mountains, deserts, salt flats, rugged areas used as training grounds for America's lunar astronauts, and 300 acres of the Timbisha Shoshone Indian Reservation. The heat and the terrain of the area were major obstacles to 49ers eager to reach the California gold fields and it is likely that they coined the name "Death Valley."

The Badwater area of the park is the lowest point in the western hemisphere – 282 feet below sea level. Not far away, Telescope Peak rises to an elevation of over 11,000 feet. Also worth visiting are Ubehebe Crater – a 600 foot deep crater from a huge volcanic explosion some 3,000 years ago - and replicas of the 20 mule team wagons used in early borax mining.

In July of this year, the temperature at the Furnace Creek weather station read 127° and that was just seven degrees below the hottest temperature ever recorded there - 134° in July, 1913. Rainfall in the park averages about two inches per year but some areas have been known to be without precipitation for over a year. However, a rare rain can raise the threat of a flash flood in the canyons; park rangers and highway signs warn visitors of the danger.

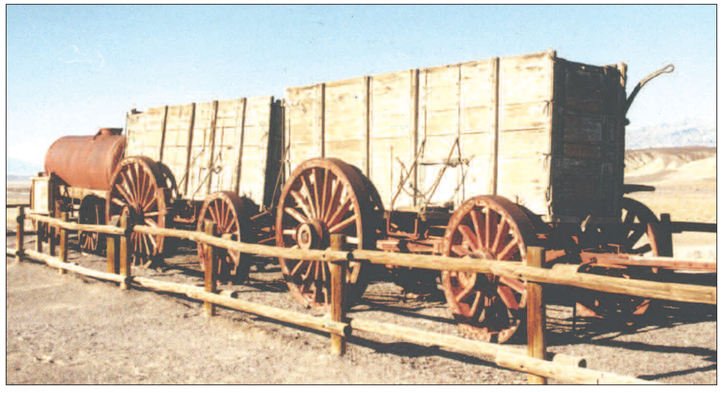
On a casual drive through the park, you might not be aware of the creatures and plants that have adapted to life in this bleak, beautiful country. They include bighorn sheep, coyotes, road-runners, sidewinder rattlesnakes, scorpions, black widow spiders, kangaroo rats, and over 1,000 varieties of plants and flowers. In 2005, a greater than

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

normal rainfall produced a spectacular display of desert wildflowers.

For human visitors, the accommodations include a four-star resort and a three-star motel at Furnace Creek. The park also has nine camp grounds and an RV park. Reservations for the motels and campgrounds can be made through the National Park Service by telephone or online. Obviously, the best times to visit Death Valley are spring and fall but the park is open all year. Some summer tourists want a picture taken with the thermometer reading 120+!

One of the must-see attractions is in the north area of the park; a Spanish-style mansion called "Scotty's Castle." Built in this remote area in the late 1920's at a cost of over 2,000,000 depression–era dollars, it was the unlikely project of a swindler and his victim. Walter Scott — "Death Valley Scotty" — was a Wild West



show performer and a failed gold mine promoter. One of his victims was Albert M. Johnson, a Chicago insurance executive who, when his health was improved by the climate in Death Valley, overlooked Scotty's fraud and built the mansion as a second home. The Castle was lavishly constructed with hand-wrought ironwork and tiles, a large unfinished swimming pool, its own hydro-electric power system and a 1,121 pipe player organ. After Johnson's death, his estate plan permitted Scotty to live in the Castle for the rest of his life and eventually, the National Park Service acquired the property from Johnson's foundation. Daily tours of Scotty's Castle are conducted by Park Service guides who forego the usual olive-drab uniforms and Smokey Bear hats and instead dress in 1930s costumes that include fedoras for the men and backed-seamed hose for the women.

One of the gateways to Death Valley is from Beatty, Nevada, a dusty little town with a few stores, several small motel-casinos and a distinct Western flavor. On the way from Beatty to the Valley, be sure to stop at the remains of Rhyolite, a ghost town remnant of a 1904 gold strike. Once a community of 10,000 people, it thrived for only a short time but there are still remnants of the bank, jail, railroad depot, and a house made of 50,000 beer and whiskey bottles.

As you drive in Death Valley, you will be struck by areas where the only evidence of humanity is the road under your wheels. Even if you plan only a short visit, Park Service rangers advise making sure the car is in good condition, keeping the gas tank full and always carrying plenty of water. Be aware that cell phones may not work in parts of the park.

The only regret of my trip to Death Valley is not buying a souvenir T-shirt that pictured a prone skeleton with the caption "But it's a *dry* heat!".

lfisher@porterwright.com

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