COLUMBUS BAR

Lawyers QUARTERLY

FALL 2008

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From The President

By Kathleen M. Trafford

I attended the annual meeting of the American Bar Association in New York in August to participate in the sessions offered by the National Association of Bar Executives/Presidents. Prominently displayed throughout the meeting rooms and on the materials was the ABA's tagline "Defending Liberty . . . Pursuing Justice." The line, of course, references the crescendo of our national pledge of allegiance "with liberty and justice for all." Its prevalence at the meeting caused me to ponder just how successful are we in meeting our national pledge of liberty and justice for all.

We seem to be fairly strong on the liberty promise. The freedom of religion flourishes. Our communities are sprinkled with diverse churches and evangelical centers. We openly display religiously symbols through the jewelry we wear, on the cars we drive, and even in tattoos. Freedom of speech also flourishes. I witnessed a boisterous parade by Dominican Republic Nationals that brought commerce on New York's Sixth Avenue to a standstill for several hours. Columbus's Do-Dah and Gay Pride parades also are exuberant celebrations of the freedom of speech. Constitutional protection for some personal freedoms – privacy, the right to bear arms, and reproductive choice – is now established, although one or more of these freedoms still may be at risk. Constitutional protection for other personal freedoms – most notably the freedom of same sex couples to have their partnerships recognized – has not been clearly established but is on the docket in some courts. Overall our efforts to secure the promise of liberty get high, although not perfect, marks.

Sadly, however, we lag behind, and may be falling further behind, in achieving the promise of justice for all. The gap between the legal needs of the poor and the resources available to meet those needs continues to grow. Part of the reason is that while there are many national advocacy groups devoted, and more important well-funded, to pursue and defend specific liberty interests – the American Civil Liberties Union, the National Rifle Association, Alliance Defense Fund, Lambda Legal – there is not equivalent private institutional advocacy for the pursuit of civil justice for the poor and working poor. Mustering resources to provide basic legal services for those who cannot afford to secure those services on their own still tends to be viewed as a public sector responsibility and public dollars spent on the pursuit of justice have not grown proportionately to the need. That means private resources (read private attorneys) must step in to fill the gap. By virtue of our training, skill and license, we are the ones who must step up and deliver on the national pledge of justice for all.

There is no question that a significant number of Columbus Bar members are already doing their part to provide pro bono representation and augment the services offered by public or quasi-public legal services organizations. Over the years members have generously supported the efforts of Lawyers for Justice, the Interfaith Legal Services Clinic, the Low Income Taxpayer Clinic and the Homeless Project, among others. An inspiring number of local attorneys responded to the call this year to participate in the Legal Assistance Initiative of Save the Dream and provide assistance to homeowners facing foreclosure. The probate lawyers also are to be commended for their participation in the Wills for Heroes program. But much more still needs to be done. Even with all the volunteers presently engaged, only about one in five of the low income individuals in need of legal advocacy finds an advocate.

A year ago the Ohio Supreme Court issued its "Statement Regarding the Provision of Pro Bono Legal Services by Ohio Lawyers."[1] Some lawyers passionate about pro bono service frankly were disappointed because the Court stopped short of requiring Ohio lawyers to provide a set number of hours of pro bono service each year and/or to report their hours of pro bono service. There are, however, good reasons why a mandatory approach may not be the best approach, not the least of which is that a reluctant advocate is not always an effective advocate. The Court's pro bono statement is aspirational only. It encourages all Ohio lawyers to seek to engage in new or additional pro bono opportunities. Reporting pro bono hours or contributions is not mandatory, but starting in January 2009, Ohio attorneys will be able to voluntarily and anonymously report their pro bono hours and financial support for legal aid programs through an external website, "Justice in Action," supported by the Ohio Legal Assistance Foundation.[2] What does this mean? Some will say this means there is no stick, not even a carrot, to entice new and additional pro bono service in Ohio. I say it means that the Court is challenging us all "to do the right thing, even though no one is looking," which is the definition of character and integrity, or in this case, the definition of professionalism.

I hope all Columbus Bar members will step up to the challenge. The opportunities for pro bono service are many. The rewards are great. I know one of the proudest days of my career was the result of taking advantage of one such opportunity. I accepted a case through the Interfaith Clinic and immediately sought and graciously received the assistance of my partner Rob Cohen because it dealt with immigration, something I knew little about. Rob and I represented a young Columbus woman in this country on a grant of political asylum. She had four children still living in Africa who also were eligible to come to the United States but she could not find a way through the complicated immigration process on her own. It took us the better part of a year to work through the process, making calls and writing letters on her behalf. After the children finally arrived here, our client brought them to our office to thank us for our efforts on their behalf. The language barrier prevented any verbal communication, but we saw the "thank you" in their smiles. I don't tell this story to boast; I know others have taken on many more or more difficult cases than I. I tell this little story because it showed me how "doing the right thing even when no one is looking" can be reward enough. We don't really need a carrot nor should we wait for a stick.

The Pro Bono Committee is launching its own "Just Take One" challenge to all Columbus Bar members. The challenge is simple. Each lawyer agrees to take just one pro bono case a year. You pick the type of case that falls within your practice area or comfort zone and pick your client. Let the committee know when you take on the engagement and report back the hours you contributed when the matter is complete. If you do not want to go it alone or need help getting started, the Columbus Bar website[3] has a special section on pro bono opportunities that you can use to find ways to fulfill your personal pro bono goals. Don't be afraid to get in the water; some of these programs come with life jackets for the inexperienced pro bono lawyer. If you are too afraid to jump in, please consider a financial contribution to the Denis Murphy Fund at the Columbus Bar Foundation. Your contribution will help support the continuing efforts of the many fine lawyers in Columbus who have dedicated their careers to providing legal services to the poor and working poor. Whether your contribution is time or money, it will help make the pledge "justice for all" meaningful.

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1. *www.sconet.state.oh.us/publications/proIdeals.pdf*
2. *www.olaf.org/probonoresources/justiceinaction.shtml*
3. *www.cbalaw.org/probono/programs/*

ktrafford@porterwright.com

Kathleen M. Trafford,
Porter Wright Morris & Arthur

On Insults To Sausage Makers

By David W. Hardymon

During its annual meeting in August, the American Bar Association House of Delegates adopted recommendations to Congress and the states for revising the manner in which candidates for judicial office are chosen. Incoming ABA president H. Thomas Wells Jr. declared that comparing the present methods of selecting judges to making sausage would be "an insult to sausage makers."[1]

In place of the presidential appointment of federal judges and the direct election of state court judges, the ABA proposes a form of merit selection, whereby judicial candidates would be nominated in the first instance by non-partisan commissions. On the federal level, those commissions would be composed of "lawyers and other leaders" impaneled by each state's senators to recommend nominees for judicial office.[2] Mr. Wells also promises to convene a summit in May 2009 to examine the challenge of preserving the impartiality of state courts.

The point of all this, according to Mr. Wells, is to end the delay and bitter partisan debate surrounding the appointment of federal judges and to reduce the "obscene" amounts of money that are being poured into state court judicial elections by interest groups who are then perceived as having some influence over the winner.[3] The ABA's proposal is being warmly received by proponents of merit selection and various lawyer groups, but not everyone is enamored of merit selection in general or the ABA's proposal in particular.

In an opinion page headline reading "The ABA Plots a Judicial Coup," the Wall Street Journal characterized the ABA proposal as a "lawyer-led attempt to strip judicial selection from future presidents."[4] Noting the ABA judicial review panel's arguably partisan positions on some past Supreme Court nominees, the Journal makes the point that the use of blue-ribbon commissions to recommend judicial candidates doesn't necessarily result in the selection of the best candidate. On the contrary, one or the other of two things is likely to occur: The commissions become dominated by special interests who nominate candidates who will serve a particular agenda, or the commissions produce compromise candidates whose only merit is that they are not particularly offensive to the majority of the commission members. Either way, the Journal opines the public's interest is not served. More important, no candidate for federal judicial office nominated by the President is likely to be confirmed by the Senate if he or she is not the product of the Senate's "merit selection" process. In this regard, the ABA's plan arguably would result in a transfer of power from the Executive to the Legislative branch of government, giving the Senate far more authority than is contemplated by its Constitutional mandate to provide "advice and consent" on Presidential appointments.

Mr. Wells advocates the ABA proposal by saying that states now using nominating commissions as a component of a merit selection system "almost never have bitter confirmation fights."[5] Perhaps, but when such fights occur they are noteworthy and instructive.

Tennessee is one of approximately 30 states that has adopted some form of merit selection to eliminate politics from the process of choosing judges. Like the ABA proposal, Tennessee's plan featured a judicial selection commission charged with the responsibility of identifying a slate of nominees from which the governor filled appellate court positions, including those on the Supreme Court. Tennessee's 17-member commission was selected by legislative leaders from the membership of various lawyer-dominated groups, such as the Tennessee Bar Association, the Tennessee Trial Lawyers Association and the Tennessee Defense Lawyers Association, although a law degree was not a prerequisite to service and three of the commission members were not lawyers. After appointment by the Governor, appeals court judges ran in thumbs-up or thumbs-down retention elections.

In 2006, Governor Phil Bredesen balked at the choices being offered by the commission to fill vacancies created by the retirement of two Supreme Court Justices. One candidate in particular appeared repeatedly on the commission's three candidate slate, despite his having been rejected twice by Governor Bredesen. According to press reports, the Governor wanted to appoint an African-American to fill the last spot on the Supreme Court and the commission felt it would be unconstitutional to allow a candidate's race to factor into the selection process.[6] The sub-text was that the commission was so incensed over the governor's rejection of one of the trial bar's favorite lawyers that it was determined to give him a slate he did not want.[7] Ultimately the last Supreme Court vacancy was filled from the commission's recommended slate, but the spectacle of the ugly fight between the governor and the commission, and the perception of closed door maneuvering by lawyers and politicians to fill Supreme Court vacancies, hardly inspired public confidence. The Governor vowed to make reform an issue when the merit selection plan came up for renewal by the legislature in 2008, starting with bringing transparency to the commission's deliberations.

Opposition to the plan within the legislature grew to the point that despite extensive lobbying by the Tennessee Bar Association and others, Tennessee allowed its version of the Missouri Plan to expire this year. After a one year winding-up period under the plan, all of Tennessee's judges will take office by way of a general election. For some, the demise of the plan "means less influence from the coterie of lawyers' groups that had controlled the Judicial Selection Commission" and manipulated the appointment of appeals court judges in Tennessee.[8]

Whether or not one agrees with that assessment, Tennessee's experience with the kind of judicial selection commission proposed by the ABA cannot be ignored. The fact is that "merit" selection of judges by blue-ribbon commissions is as prone to partisan politics as general elections or presidential appointments. In the public's eye, judicial selection commissions have the additional faults of being secretive and populated by lawyers, who simply are not as trusted as they once were. Whatever the merits of merit selection, I suspect we're going to be making sausage for some time to come.

1. *Law.com: New ABA President Speaks Out on Judiciary, August 11, 2008.*
2. *Report to House of Delegates ABA Standing Committee on Federal Judicial Improvements, Report to the House of Delegates, August 2008.*
3. *Law.com supra:*
4. *The Wall Street Journal, Review & Outlook, August 14, 2008.*
5. *AOL news.com, Reduce partisan fight over judges, lawyers urge, August 10, 2008.*
6. *Viewpoint, The Memphis Commercial Appeal, July 1, 2007.*
7. *Id.*
8. *The Wall Street Journal, Review & Outlook, May 27, 2008.*

dwhardymon@vorys.com

David W. Hardymon, Vorys Sater Seymour and Pease

In Court

CIVIL JURY TRIALS

Franklin County Common Pleas Court

By Belinda S. Barnes and Monica L. Waller

Verdict: $640,298. Construction Breach of Contract. Cleveland Construction was a prime contractor hired by OPERS to work on building renovation and expansion at 277 East Town Street. OPERS hired Gilbane Building Company to act as the construction manager. Cleveland Construction claimed that, pursuant to its contract with OPERS, the construction manager had a duty to coordinate the work of the various contractors and keep the project on schedule. Cleveland Construction claimed that Gilbane Building Company failed to perform these duties resulting in labor inefficiencies for Cleveland Construction. OPERS argued that the claim should be dismissed because, under the terms of the contract, Cleveland Construction waived its right to collect damages. OPERS moved for a directed verdict which the trial court denied. Plaintiff's Expert: Theodore Needham. Defendant's Experts: Kelly Roeschke and Robert Biehl. Three week trial. Plaintiff's Attorneys: Daniel Wireman and James Ludwig. Defendant's Attorneys: Don Gregory and Michael Madigan. Judge Schneider. *Cleveland Construction, Inc. v. Ohio Public Employees Retirement System* Case No. 04 CVH10-11144 (2007). *(Both parties appealed. The Court of Appeals affirmed the judgment on April 8, 2008 in Cleveland Construction, Inc. v. Ohio Public Employees Retirement System, 2008 Ohio 1630.)*

Verdict $15,206.07. Subrogation. Plaintiff Joseph Cunningham, Jr. and Grange, his insurer, sued Kenneth Harrison and Nathaniel Watson based on an auto accident that occurred on March 24, 2003. The parties stipulated that Grange paid $13,608.97 to or on behalf of the insured for collision and rental coverage and $1,097.10 in medical payment to the driver. With the $500 deductible, Plaintiffs' total damages were $15,206.07. The jury found in Plaintiffs' favor in that amount against Nathaniel Watson but found no liability on behalf of Kenneth Harrison and his employer USF Holland, Inc. No settlement offer was made before trial. Neither party presented an expert. Two day trial. Plaintiffs' Attorney Alessandro Sabatino. Defendants' Attorneys: Robert J. Cochran (Kenneth Harrison and USF Holland, Inc.), Jill K. Mercer (Nathaniel Watson). Judge: Tommy Thompson as visiting judge for Judge Holbrook. *Joseph Cunningham, Jr., et al. v. Kenneth W. Harrison, et al.*, Case No: 05CVC01-607 (2006)

Verdict: $12,539.90. Personal Injury/Auto-Pedestrian Accident. On April 26, 2004, Plaintiff, a 20-year-old Columbus State student, was walking to her car in the Columbus State parking garage when she was struck from behind by Defendant. Plaintiff alleged that Defendant was negligent in failing to maintain a proper lookout. Defendant alleged Plaintiff negligently walked in the path of an oncoming car. Plaintiff sustained soft tissue injuries to her back and treated with a chiropractor for four months. Medical bills: $5,039.90. No lost wages. Plaintiff's expert: Roy Korth, D.C. No defense expert. Settlement demand: $15,500. Settlement offer: $8,500. Two day trial. Plaintiff's attorney: Douglas J. Blue. Defendant's attorney: Jason Founds. Judge: Holbrook; O'Grady (Judge sitting by assignment). *Yana Adamenko v. Rudolph Gunad*, Case No. 04CVC-09-9138 (2005).

Verdict: Defense Verdict. Pharmacy Negligence. Plaintiff alleged that she was given an inappropriate dosage of the drug Cytoxan. Dr. Lee Hebert of OSU Medical Center prescribed the drug for the treatment of Lupus. The prescription was filled by the Kroger Company. The pharmacist claimed that she verified the dosage with Dr. Hebert's office and Plaintiff confirmed the dosage with Dr. Hebert's office staff. She began to feel ill shortly after taking the medication, developing nausea, vomiting and fatigue. She was hospitalized for an extended period of time and given a PEG tube for feeding. She claimed injuries that were both temporary and permanent. She claimed that she was unable to return to work and took an early retirement. The issues of liability and damages were bifurcated. Dr. Hebert, as an employee of the State of Ohio, was immune from suit and the case proceeded to trial against the Kroger Pharmacy only. Kroger requested and was given a jury instruction seeking a jury determination of liability against OSU Medical Center. The jury unanimously found for Defendant Kroger Company and apportioned 100% liability to OSU Medical Center. Medical bills: approximately $40,000. Plaintiff's expert: Gorang Patel, R.Ph., BCPS, Rush University Medical Center, Chicago. Defendants' expert: Carl Gainor, R.Ph., J.D. No settlement demand. No settlement offer. Four day trial. Plaintiff's attorneys: Daniel Volkema and Jeff Maloon. Defendants' attorney: Mary Barley-McBride (Kroger Pharmacy). Judge: Sheeran. *Kristi Tyson, et al. v. The Kroger Company, et al.*, Case No. 05CVC-09-9864 (2007).

Verdict: Defense Verdict. Medical Malpractice. Liability Only. Plaintiff George E. Zola, Administrator of the Estate of Jodi A. Slutsky, alleged that Defendant Cynthia S. Curl, D.O. breached the standard of care in treating Ms. Slutsky for abdominal and intestinal distention resulting in Ms. Slutsky's death. The parties stipulated economic damages of $1,182,703 and proceeded to trial on liability only. The jury concluded that Dr. Curl's care did not fall below the standard of care. Plaintiff's experts: Dean Dobkin, M.D., Michael Drew, M.D. and Marc Cooperman, M.D. Defendants' experts: Ron M. Walls, M.D., Anthony Senagor, M.D. and Charles L. Emerman, M.D. Settlement demand: $1.8 Million. Settlement offer: None. Eight day trial. Plaintiff's attorney: Daniel Abraham and Eleni A. Drakatos. Defendants' attorney: Maryellen C. Spirito. And Peter VanLighten. Judge: Schneider. *George E. Zola, Administrator of the Estate of Jodi A. Slutsky v. St. Ann's Hospital, et al.*, Case No. 03CVA-10-10993 (2006).

Verdict: Defense Verdict. Medical Malpractice. Eight weeks after undergoing a laminectomy of the lumbar spine, Plaintiff presented to Defendant Athletic Advantage, Inc. for physical therapy secondary to complaints of weakness in her left leg. During his initial evaluation, physical therapist Mark Reed isolated Plaintiff's hip and turned her in a clockwise position while she was lying on her side. There was an immediate and audible pop and Plaintiff experienced an extreme amount of pain. Images taken at Mount Carmel East later that day confirmed that Plaintiff had sustained a spondylolisthesis. Plaintiff had to undergo spinal fusion of the lumbar spine as a result of the spondylolisthesis. Plaintiff claimed that the spondylolisthesis was the result of undue pressure applied by the physical therapist and an improper evaluation technique. Defendant claimed that Plaintiff's injury was a result of the pre-existing and chronic condition caused by horseback riding and horse training. Plaintiff's Expert: Derek Snook, M.D. Defendant's Expert: James D. Kang, M.D. Settlement Demand: $1,000,000. Settlement Offer: $20,000. Three day trial. Plaintiff's Attorney: Christopher R. Pettit. Defendant's Attorney: Mark L. Schumacher and Jennifer L. Hill. Judge Pfeiffer; Magistrate Edwin Skeen. *Susan Provenzano v. Athletic Advantage, Inc.* 05 CV 1440 (2006)

Verdict: Defense Verdict. Medical Malpractice/Wrongful Death. On February 11, 2005, Plaintiff's decedent underwent an outpatient arthroscopic shoulder surgery at Defendant Columbus Surgical Center, LLC. During the procedure, complications arose and Plaintiff suffered heart failure, was resuscitated and transferred to the hospital, where she later died. Plaintiff claimed that Defendant CRNA breached the standard of care in the administration of certain medications and that the alleged breach proximately caused the decedent's death. Plaintiff claimed Defendant CRNA's employer was liable under direct agency and Defendant Columbus Surgical Center was liable under the theory of agency by estoppel. Defendant asserted the CRNA did not breach the standard of care and any alleged breach did not proximately cause the decedent's death. Defendant Columbus Surgical Center asserted that the decedent only viewed the Surgery Center as the site of her previously scheduled outpatient surgery and the decedent had notice and knowledge that Defendant CRNA was an independent contractor working at the Surgery Center. Loss of future earnings: $449,736. Replacement cost of services: $267,604. Plaintiff's experts: Jeffrey Breall, M.D., Ph.D. and Martin Dauber, M.D. Defense experts: Martin Tobin, M.D., Roger S. Meca, M.D., Thomas Renter, CRNA, George J. Taylor, IV, M.D. and David Rothenberg, M.D. Settlement demand: $1.5 million. Settlement offer: $800,000. Nine day trial. Plaintiff's attorneys: William S. Jacobson and Amy Sue Taylor. Defendant's attorneys: Mark L. Schumacher and Sandra McIntosh (Brothag and Doctors Anesthesia Services of Columbus); Warren M. Enders and Paul N. Garinger (Columbus Surgical Center). Judge: Visiting Judge Nodine Miller. *Stephanie Swogger, Admin. E/O Roberta Swogger v. Columbus Surgical Center, LLC, et al.*, Case No. 05CVA-10-12047 (2008).

Verdict: Defense Verdict. Contract. Defendant, Peter Vitt entered into an agreement with Plaintiff Halmaghi to purchase 80% of the common stock of The Nicholae Gallery Juice Bar Company. Plaintiff contended that Defendant breached the terms of this purchase contract. Defendant counterclaimed against Plaintiff, contending that Plaintiff had breached the terms of the Purchase Contract by failing to pay certain taxes. At trial, Defendant dismissed his counterclaim. The jury returned a verdict for Defendant. No plaintiff's expert. No defense expert. One day trial. Plaintiff's attorney: Douglas S. Roberts. Defendant's attorney: David Orlandini. Judge: Sheward. *Nicolae Halmaghi v. Peter Vitt*, Case No. 05CV-02-1368 (2006).

Verdict: Defense Verdict. Personal Injury. Plaintiff was sitting in traffic when Defendant rear-ended his vehicle. Medical bills totaled $3,266.52 plus an additional $25,000 for a future surgery. Plaintiff claimed to have lost his truck, home and construction business as a result of the accident. Plaintiff's expert: Dr. Won Song. Defendant expert: Dr. Joseph Schlonsky. Settlement demand $100,000. Settlement offer: $15,000. Three day trial. Plaintiff's attorney: Neil Roberts. Defendant's attorney: Scott Norman. Judge Hogan. *Larry Scott Knapp v. Steven McMillian*, Case No: 04CV04-3844 (2005). Plaintiff's motion for a new trial was denied. No appeal was taken.

bbarnes@lanealton.com
mwaller@lanealton.com

Belinda S. Barnes and Monica L. Waller, Lane Alton & Horst

Collaborative Divorce
– AN OXYMORON?

By Robert H. Snedaker III

You may have heard the term "collaborative divorce" and wondered how in the world that could ever happen. After all, divorce is, by its very nature, contentious and a breeding ground for scorched earth litigation, isn't it? In many cases, that is true. In fact, litigation is the only process that will effectively enable some spouses with the coercion and protection they need against an unscrupulous adversary who is hiding assets or is physically abusive. But what about the cases where the parties are content with their decision to terminate the marriage, but simply cannot agree on who gets what?

Collaborative divorce is the newest kid on the block when it comes to alternative dispute resolution. Mediation and arbitration have been around for years and have provided alternatives to the litigation process. Additionally, lawyers engage in principled negotiations every day at the court house, often resulting in the complete resolution of all issues. Principled negotiation is position oriented where the parties seek to attain the position they want (i.e. custody of the children, the most child support you can get, the big screen television, etc.). So, you may ask yourself, "what does collaborative divorce offer that the others don't or that I am not already doing myself?"

In mediation, the mediator cannot give legal advice to either party nor may s/he prepare documents. If one of the parties in mediation is a stronger negotiator or intimidates the other party in some way, the playing field is not balanced and meaningful negotiations are difficult. Arbitration is a trial to a disinterested third party.

Collaborative divorce is based on the interests of the parties as opposed to their positions. A position is what you have decided upon. Your interest is what caused you to make that decision. The result is not always the same. Consider the following illustration. Two sisters ask their mother to decide which one of them should get the last orange, as each took the position that each gets the entire orange. Mom, being the consummate peacekeeper, cuts the orange into precisely equal halves and gives one to each of them. Fair enough, right? Had mom asked the girls what their interest was with respect to the orange, she would have found that one girl wanted the rind for a recipe and the other wanted the pulp for juice. Had she known that, each of the girls could have had 100% of the part of the orange she each wanted. That is a better result for everybody, a win-win. Isn't that the ultimate service to your client? .

And so it goes in the collaborative process. The lawyers, financial experts and mental health professionals are trained to shift the paradigm from position based negotiations to interest based discussions aimed at creating the best solution possible for each spouse.

The process of collaborative divorce actually begins with the execution of the participation agreement by the parties and their respective attorneys. The agreement says (paraphrasing) that there will be full disclosure of all financial information with supporting documentation, good faith participation and that if either party chooses to litigate the matter, then both attorneys must withdraw and the parties have to retain new counsel to litigate the matter. Then the parties, and their collaborative team, meet to discuss the issues and resolve them.

The most frequent objection I hear from attorneys about this process is that they fear losing the client if the process is not successful. That is a very valid concern because that is exactly what will happen. Where is the faith? The local practice group, and most others, require members to take a two-day basic training to help "shift the paradigm" from positions to interests. The local practice group for central Ohio is Collaborative Divorce Professionals, Inc. The website is www.winwindivorce.org. The international organization is the International Academy of Collaborative Professionals. The website is www.collaborativepractice.com. The local group used to be known as the Collaborative Family Law Council of Central Ohio because it was limited to attorneys. Most of the collaborative practice groups were exclusively lawyers when they started. The trend now is to open the membership in the practice groups to financial and psychological experts because of the routine need for those services in almost every divorce, whether it is collaborative or contested. These professionals are also trained in collaborative principals. There is no reason that a collaborative case should not survive the threat of litigation with all of the available talent.

In all fairness to my skeptical colleagues, sometimes it is difficult to fully appreciate the personality of your client. Some people are not candidates for this process. Sociopaths, child abusers and thieves belong in litigation. Beyond that, the challenges that come up during the collaborative process are met with creative problem solving by the spouses, the attorneys, the certified divorce planners, accountants and/or the psychologists.

The other concern that I hear, which has been addressed by the American Bar Association[1] as well as many state bar associations, is that the process creates ethical issues because of the limited scope of the representation and the creation of a non-waivable conflict of interest. The ABA opinion specifically rejects the notion that there is a non-waivable conflict. The limited scope of representation is not an issue provided "that the lawyer communicate adequate information and explanation about the material risks of and reasonably available alternatives to the limited representation."[2]

As the public becomes aware of this alternative dispute resolution, you may be asked if you offer that service. You may find that the client leaves because you do not participate in the collaborative process, and not because s/he has decided to litigate.

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1. *American Bar Association, Standing Committee on Ethics and Professional Responsibility, Formal Opinion 07-447.*
2. *Id.*

rsnedaker@divorceanddissolution.com

Robert H. Snedaker III, Doughery Hanneman & Snedaker LLC

Making A Federal Case With More And Less

By The Honorable Mark R. Abel

This spring Judge Gregory L. Frost marked five years on the district court bench. He came to the federal trial bench after 20 years as a state court judge, the first seven on the Licking County Municipal Court and the last 13 on the Common Pleas Court. Recently I talked with him about the differences between state and federal court and his reflections on five years on the federal trial court bench.

In some ways, the transition has been seamless. While a Licking County Common Pleas Court judge, Frost had a number of high profile cases. These included *Dardinger v. Anthem*, where the insurer discontinued intra-arterial chemotherapy for brain cancer on the grounds that the treatment was experimental. The jury awarded the estate $1,350 for breach of contract, $2.5 million on a bad faith claim, and $49 million in punitive damages. And there was a verdict of over $19 million in *Seelke v. Buckeye Egg Farm* for injuries suffered by the egg farm's next door neighbors when ammonia leaked into one creek and manure into another. Frost has continued to preside over big cases in federal court. In *Newark Group v. Sonoco*, the jury returned a $3.75 million verdict for misappropriation of trade secrets. He is currently winding down a multi-district litigation case, *In Re: Foundry Resins Antitrust Litigation*. It combined 10 cases from three district courts. After class certification and some discovery, all but one case settled. The remaining case is proceeding to trial.

On the state court bench, Judge Frost had three death penalty cases. He has had a federal death penalty case, a terrorism case, and a civil lawsuit in which 29 death convicted defendants are challenging Ohio's lethal injection protocol. In the death penalty trial, Daryl M. Lawrence was convicted of killing Columbus Police Officer Bryan Hurst. Judge Frost set aside the jury's death sentence because it inconsistently imposed the death penalty on one count of the indictment but not on another. An appeal is pending. Plaintiffs in the lethal injection protocol case argue that Ohio's method of execution subjects the convicted defendant to cruel and unusual punishment because the death-sentenced defendant consciously experiences pain before dying. As of this writing, a decision is expected soon.

Despite his years of experience as a state court judge, Frost said that when he became a federal judge he faced a pretty big learning curve. In criminal cases, he had to learn the elements of the federal statutes. The Christopher Paul terrorism case – arising out of Paul's travels to Pakistan and Afghanistan to meet members of Al Qaeda – introduced Frost to the special procedures to access national security information in criminal prosecutions. In federal death penalty cases, the law is very different from Ohio's.

On the civil side, there are many federal law statutory claims that are rarely adjudicated in state court. Greg Frost had to dig in and get up to speed on ERISA employee benefits law, intellectual property law, social security, bankruptcy, and the like.

Another big difference between federal and state court was the large docket Frost handled on the common pleas court bench. There was a constant run of trials and decision on motions. His federal docket is smaller, and there are far fewer criminal cases. Judge Frost's docket is about 85% civil and 15% criminal cases.

Although Judge Frost has fewer cases in federal court, he has a larger staff. In state court he had no paid law clerks, and in federal court he has two. The court also has three staff attorneys who work on habeas corpus cases, two of whom work on death penalty habeas corpus cases. Magistrate judges handle the discovery stages of civil cases and routine motions. Discovery was a never ending battle in state court, but Frost seldom sees a discovery dispute in federal court.

The smaller docket and bigger staff mean that Judge Frost has more time to study the briefs and think through decisions. There was always a crush in state court to get decisions out. Judge Frost remains committed to getting his decisions out timely, but research and drafts from his law clerks and more time to devote to each case makes it easier for him to meet his goal of issuing high quality decisions.

Trials take longer in federal court. Judge Frost's criminal trials average 7-10 working days and his civil trials 10-14 days. When he mentioned the length of his trials to Magistrate Judge Norah King, she responded, "You mean they make a 'federal case' of it?" Federal court litigators tend to leave no stone unturned.

The federal courthouse itself has better security and nicer accommodations. But Frost came from a state court bench where he enjoyed close personal relationships with his fellow judges, and he wasn't sure what he'd find on the federal bench. He was pleasantly surprised by the camaraderie here. All the judges are very collegial.

Judge Frost's staff includes two law clerks. Shawn Judge has been with the Judge for five years. Penny Barrack has been with the Judge for a year. She previously clerked with Judge Ed Sargus and Judge Norah King. Both Shawn and Penny are career law clerks. Kristin Norcia is Judge Frost's administrative assistant. She was his bailiff at the Common Pleas Court.

Scott Miller is Judge Frost's courtroom deputy and winter walking companion in the courthouse basement. Denise Errett is Judge Frost's court reporter.

Mark_Abel@ohsd.uscourts.gov

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

A Federal "Drug Court" That Works – *And How It Works*

By The Honorable Terence P. Kemp

Many criminal defendants who appear in the federal courts have a long history of substance abuse. Some are charged with drug-related offenses, but many others commit different types of offenses that are related in some way to substance abuse. Often, incarceration does not adequately address the issues that have led these offenders into substance abuse, and the continuation of that behavior after release from prison presents a substantial obstacle to their successful re-integration into the community.

Some state courts have developed and implemented diversion programs for drug offenders designed to treat the underlying substance abuse and provide an alternative to incarceration. Such programs recognize that if the substance abuse issue is successfully addressed, and the offender is able to maintain sobriety, stability, and employment for a significant period of time, the likelihood of recidivism is substantially decreased. These programs are often administered by judges serving in a designated "drug court". In the federal system, many offenders (including the vast majority of drug offenders) are facing mandatory prison time because of statutorily-prescribed minimum sentences, or will likely serve prison time due to the operation of the federal sentencing guidelines. For them, pretrial diversion is not a viable option.

Several federal courts have recognized, however, that after an offender is released from incarceration and begins serving a term of supervised release (which is, again, mandatory for most federal criminal defendants), there is an opportunity to apply the same principles which underlie state diversion programs. Because the goal of supervised release is to provide the defendant with supervision and guidance to facilitate re-entry into the community, and that goal is undermined by continued substance abuse, if the substance abuse problem can be brought under control, the defendant's chances of successful completion of supervised release – and his or her chance of staying clear of the criminal justice system in the future – can be significantly enhanced. Those courts have instituted a type of drug court program for high-risk offenders on supervised release that has shown great promise in allowing offenders to achieve and maintain sobriety, to maintain employment, and to avoid new criminal behavior.

The program begins with the identification of persons on supervised release who are at risk to resume substance abuse or commit new crimes even with intensive supervision. Those persons are given the option to participate in the drug court program and offered a reduction in their supervised release sentence if they successfully complete the program. If they choose the program, they consent to summary adjudication and punishment of violations of supervised release without the need for formal hearings, and also agree to abide by the rules of the program.

The three goals of the program are: (1) maintaining sobriety for a year; (2) obtaining employment; and (3) refraining from new criminal behavior. Participants in the program meet in groups with the Court (there are usually ten in each group) on a regular basis – sometimes as often as weekly – to report on their progress in meeting these goals. The court sessions are conducted by a District or Magistrate Judge and attended by representatives of the United States Attorney's office, the Federal Public Defender's office, and the Probation Office. The members of the group reinforce each other's efforts. Successes are rewarded, and lapses are dealt with by a variety of sanctions, which may include brief periods of jail time. Substantial non-compliance is met with termination from the program and formal proceedings to address supervised release violations. Those who complete the requirements of the program participate in a graduation ceremony.

According to the courts that have instituted this program, it has shown remarkable promise in reducing supervised release violations and allowing offenders to rejoin society as sober, employed, and law-abiding citizens. In other words, it works. Many participants have been able to maintain sobriety for the first time in years. They attribute the success, at least in part, to the group setting and to the concept that there are people who care about their success or failure and are willing to devote their time and energy into helping the participants succeed, rather than simply cataloging their failures and punishing them with more jail time.

The United States District Court for the Southern District of Ohio, following the lead of District Courts from Oregon, New York, and Massachusetts, has decided to implement this program for persons on supervised release. The Court is taking materials and procedures from those courts which have had success with the program and adapting them for use here. The United States Attorney's office, the Federal Public Defender, and the Probation Officer have all endorsed the program and are committed to this effort. Hopefully, the first group of participants will be identified soon and at least two ten-member groups will be created in Columbus within the next few months. If experience indicates that the program is successful, more groups may be created.

Substance abuse is both a societal problem and an individual affliction. Drug court programs recognize that, by providing support to the individual and giving him or her the tools to succeed, the societal impact of drug use and criminal behavior can be lessened. The Southern District of Ohio is confident that it can create and implement a program that will achieve these goals.

Terry_Kemp@ohsd.uscourts.gov

Honorable Terence P. Kemp, U.S. District Court

Mediation – A NEW KIND OF FEDERAL OFFENSE

By Robert S. Kaiser

The U.S. District Court for the Southern District of Ohio has added a new tool to resolve federal lawsuits — a full-time mediator. Lawyers, litigants and judges have taken full advantage of the option, with over 100 cases referred in nine months. The results? Settlements in about two-thirds of the cases mediated. And some insights that lawyers might find useful in making mediation even more effective.

The program is unique in the federal trial court system. Those courts that have mediation programs use local volunteers or force the parties to pay for private mediators. The Southern District of Ohio, led by Chief Judge Sandra S. Beckwith, decided to take a different approach. Last August it hired a full-time, professional mediator. The court believed that this was a service that should be provided by the "dispute resolution" branch of the federal government. The initial statistics from the program[1] shed some new light on how to make the mediation process work better for lawyers and their clients.

Lessons Learned

The earlier the better. Early mediation is most effective. Cases mediated before full-blown discovery got under way settled more than eighty percent of the time. Once the parties got past initial written discovery and a few key depositions, the settlement rate fell to about fifty percent. It appears that the financial and emotional investment of the discovery process serves to further alienate the parties and make resolution more difficult. But, it is not impossible. Cases mediated from the time discovery starts in earnest through the summary judgment process still settled more than fifty percent of the time.

If at first you don't succeed, try again. An unsuccessful mediation does **not** mean mediation will never work in a case. Cases mediated after a previous failed effort settled at only a slightly lower rate than the overall settlement rate.

Perseverance pays. Mediation is not necessarily a one-day, isolated event. Impasse is obvious in some cases, but a little more time and effort can pay off. Rather than declaring an impasse at the end of the first day, thought should be given to additional information or input that might help the parties toward resolution. About fifty percent of the cases where the parties agreed to continue their efforts for a limited time beyond the first day ended in settlement. Considering the alternative would have been impasse in each of these cases, the additional effort seems worthwhile. Generally, the extra time was used for consideration of additional information, time to research a proposal on the table, or submission of a mediator's proposal.

Better late than never. A large percentage of cases were referred to mediation with trial looming. In these cases, discovery was closed, summary judgment motions were decided, and trial preparation was in full gear. To make settlement seem even less likely, many of the cases were referred after the parties rejected a judge's settlement efforts at the final pretrial conference. Despite this, slightly more than two-thirds of these "end stage" cases settled.

Subject matter matters. Certain types of cases appear to be more amenable to settlement than others. Employment and tort cases settled nearly eighty percent of the time. Commercial disputes followed at about a two-thirds settlement rate. The hardest cases? Intellectual property cases, settling about half of the time. Before giving up on the tough cases, though, consider that even a fifty-percent settlement rate isn't bad compared to the alternative of years and years of litigation and appeals.

Mind your own business. This advice cannot be demonstrated with statistics. But, experience proves it to be true. A case will settle if each party's interests can be adequately addressed. That is hard to accomplish if the parties focus on what is wrong with what the other guy wants, rather than on what is right for them. Think hard before and during the mediation about what it is you and your client want to – and have a chance to – accomplish in the litigation. Compare that to the settlement alternatives that are generated at the mediation. That is the best way to have productive mediations and satisfied clients.

How The Federal Court Program Works

Mediation is literally a phone call or email away. Contact the Mediation Administrator, Teresa Mack (teresa_mack@ca6.uscourts.gov or (513) 564-7330). Judges, lawyers, and the mediator can initiate a referral.

It is never too early or too late to schedule mediation. Some mediation dates are set in the preliminary pretrial order, so there are already mediations scheduled in 2009. At the same time, last minute requests can usually be accommodated. Mediations have been arranged on twenty-four hours' (and less) notice.

The sessions are scheduled for a full day. Lead trial counsel, a client representative with settlement authority and the ability to bind the party, and insurance representatives, if applicable, must attend.

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1. *Only cases in which the mediator was actively involved in the negotiations that led to settlement are included in these statistics. Cases that settled before the mediation conference, or after the mediator's efforts ended are not included.*

Robert S. Kaiser United States District Court Mediator, Southern District of Ohio

WHEN JOHNNY OR JOANIE COMES MARCHING HOME

Demobilization Legal Issues For Citizen-Soldiers

By Duncan O. Aukland

Reemployment Rights

Service members have a right to reemployment following periods of military or uniformed service. Some employers are unfamiliar with this right while others assume they can discharge an at-will employee for any reason following a period of military service. Employers' counsel should be aware that service members who return from a period of military service are entitled to have their jobs back upon timely and proper application for reemployment. Details may be found in the materials explaining the Uniformed Services Employment and Reemployment Rights Act (USERRA), 38 USC Section 4301 et seq., on the Veterans' Employment and Training Service (VETS) website operated by the United States Department of Labor, www.dol.gov/elaws/userra.htm; or the site operated by the National Committee for Employer Support of the Guard and Reserve (NCESGR).

Life Insurance Coverage

Some life insurance policies contain "war clauses," or exclusions from benefits resulting from injuries or illnesses sustained or contracted in a war zone. Some soldiers don't subscribe to Service members Government Life Insurance (SGLI), 38 USC Chap 18, which contains no war clause, in the belief they have enough commercial insurance. Returning military personnel may be gravely wounded, yet still alive; and their families may get no death benefit if a war clause excludes the cause of death. The 125th Ohio General Assembly, in amending RC 3915.05 by enacting H.B. No. 426 to keep insurance policies of activated Reserve Component (RC) personnel in effect, left war clauses intact.

Claims

Active Duty (AD) can be hard on the service member's personal property and other possessions. The best hope is to file with service claims service under the Military Personnel Claims Act or other applicable law. All such claims are processed and paid under claims regulations found in Title 32, Code of Federal Regulations, Parts 536, 751 and 842.

Power of Attorney Revocations

Many service members obtain powers of attorney before deploying. Many are general and some are special. Of the special powers of attorney, many are governmental powers of attorney like IRS Form 2848, Power of Attorney and Declaration of Representative. Sometimes, the choice of attorney-in-fact is less than ideal. A need then arises to revoke the power of attorney and in some instances, the attorney in fact will not give the original back to be destroyed. This leaves the service member with needing to revoke the power of attorney and to communicate the revocation to those who have relied on the original with little help from the attorney in fact in determining who's seen the power of attorney. At this point, the service member may recall being advised that the general power of attorney is a license to steal and that he probably could have arranged his affairs to avoid needing to prepare one; but for now, that's of no comfort to the service member or to the Judge Advocate trying to assist him.

Income Taxes

Getting one's income tax free doesn't initially appear to be a problem. So far however there has been difficulty with consistent application of the exemption from State taxation of military pay earned while "permanently" stationed outside Ohio. Service members are working with their finance offices, which are working with the Ohio Department of Taxation and the Defense Finance and Accounting Service (DFAS) to resolve this issue; but according to recent emails from DFAS, Ohio's partial exemption of military pay from State taxation is more difficult to implement than if that exemption were total.

Naturally, service members in combat zones get their pay free of Federal income taxation; and so also free of Ohio income taxation. If they will be going overseas in the first quarter of the year, they are urged to file a return (or to authorize someone to do so) before they deploy so they're entitled to the refund of any overpaid taxes. Otherwise, if they are absent from the country on April 15 due to military or naval service, they do not have to file a return until two months after they return to the United States.

Since members of the National Guard and Reserves don't have access to tax preparation services after they demobilize, some will inevitably neglect to file a return. Help is available through the Ohio Society of Certified Public Accountants however if the non-filer is deployed. Members of the OSCPA will assist deployed service members in filing their returns under Operation CPA, Student Loan Relief/Readmission/Tuition Refunds

While federally-guaranteed student loans aren't subject to the 6% cap on annual interest prescribed under the Servicemembers' Civil Relief Act, other options such as forbearance and payment of interest only are often available.

Duncan O. Aukland, State of Ohio Adjutant General's Department

In Ohio, service members activated while attending career colleges or state institutions of higher education are afforded military leaves of absence and, if withdrawn from school by the "withdraw date," entitled to a refund of tuition and fees. No academic penalty may be imposed by either type of institution and returning students are to be restored to the status quo ante. RC 3332.20, 3345.53.

Small Business Assistance

As any attorney who advises small business owners knows, the small business owner is the business. Often the business struggles in his/her absence. The Small Business Administration has debt forgiveness available to deployed business owners' businesses at www.sba.gov/aboutsba/sbaprograms/reservists. Military business owners may also obtain loans from the SBA.

Veterans' Benefits and Rights

Many service members are wounded or injured while on active duty. Others suffer from Post-Traumatic Stress Disorder (PTSD) or other mental illness on their return. Once discharged from active duty, service members must deal with and obtain needed care from the Department of Veterans' Affairs. Veterans should get help from the Department of Veterans' Services created by Am. Sub. S.B. No. 289, 127th Ohio General Assembly, in obtaining these services. The Ohio Adjutant General's Department also employs a contractor to assist service members in applying for and obtaining the benefits due them.

Child Custody

Perhaps the most glaring, if not most prevalent, legal problem faced by returning service members is losing custody of their child or children while mobilized. This is an unintended consequence of the amendment of the stay provision of the former Soldiers' and Sailors' Civil Relief Act when it became the Servicemembers' Civil Relief Act (SCRA) in 2003. Congress amended 50 USC App. Section 522 to limit the service member's entitlement to 90 days. While the court or agency (the amendment also extended coverage under the statute to administrative proceedings) can extend the stay for good cause, the stay as a matter of law is only 90 days. Faced with the demands of the non-military parent for an immediate decision, courts often proceed over the service member's objection to adjudicate custody in the service member parent's absence. Hearings in absentia do not favor the service member. Congress's sole attempt so far to address this matter resulted only in express inclusion of custody proceedings within the above cited stay section of the SCRA and the default judgment section of the SCRA, 50 USC App. Section 521. Legislation that would stay custody changes in Ohio until the return of the service member is currently pending before the 127th Ohio General Assembly as H.B. No. 61.

duncan.aukland@us.army.mil

Win A Bet? When Is It Legal To Give An Underage Person A Drink?

By Timothy J. Bechtold

For as long as human beings have made and consumed alcoholic beverages, there have been customs, social mores and laws that have attempted to influence their consumption in a positive way. Jim Koch, the founder and president of Samuel Adams Brewery (and a native Ohioan and attorney) has a wonderfully entertaining presentation about how the history of civilization is really the history of beer. His basic premise is that: (1) early humans settled down so that they could grow the crops needed to make beer, (2) those that did this had something to drink that was healthy and didn't make them sick (like drinking water did), and (3) these early brewers prospered and mankind has continued to follow in their footsteps ever since.

Whether you are ready to embrace Jim's admittedly biased views on the cause and effect relationship between alcohol and man's cultural evolution or not, there is no question that there have always been laws and rules related to its use. That interesting social experiment known as Prohibition in the early part of the 20th century in the United States is an example of a period of time where there were fairly clear laws on the books regulating the consumption of alcohol but also a significant degree of non-compliance with those laws. When the 21st Amendment to the United States Constitution was adopted in 1933, it marked the beginning of the current period of primarily state-based alcohol beverage regulation in our country. One of the main reasons for state-based regulation was so that the laws of a state could be tailored to address the concerns of that particular state in a way that was consistent with the views of, and generally accepted by, the citizens of that state. Such considerations are not inconsequential in terms of matching public policy with the wishes of residents of a state. One need only look at the controversies surrounding the enforcement of Ohio's open container law in conjunction with tailgating activities at OSU football games in recent years as an example of the difficult challenge that faces public officials in coordinating public policy with the desires of local residents on alcohol policy matters.

My professional interest in Ohio's Liquor Control Law (Title 43 of the Ohio Revised Code) began as a law clerk at the then-Department of Liquor Control in the late 1970's. I have always been impressed by two aspects of the work the legal scholars and draftspersons that crafted the statutes in Ohio achieved: (1) what the General Assembly adopted in the first couple of decades after Prohibition is pretty much what we have on the books today, and (2) no matter how odd or antiquated some particular provision may seem, there was a good reason for it at one time. The lesson I have taken away from this is that you need to know why a liquor law provision was originally adopted if you want to change it in a way that is going to be beneficial and lasting from a public policy perspective.

Which brings us to the question at hand: When is it legal to give an underage person a drink? The answer can be found in O.R.C Section 4301.69 (A). "Except as otherwise provided in this chapter, no person shall sell beer or intoxicating liquor to an underage person, shall buy beer or intoxicating liquor for an underage person, or shall furnish it to an underage person, unless given by a physician in the regular line of the physician's practice or given for established religious purposes or unless the underage person is supervised by a parent, spouse who is not an underage person, or legal guardian...." (emphasis added)

Further, O.R.C. Section 4301.69 (B) provides, "No person who is the owner or occupant of any public or private place shall knowingly allow any underage person to remain in or on the place while possessing or consuming beer or intoxicating liquor, unless the intoxicating liquor or beer is given to the person possessing or consuming it by that person's parent, spouse who is not an underage person, or legal guardian and the parent, spouse who is not an underage person, or legal guardian is present at the time of the person's possession or consumption of the beer or intoxicating liquor...." (emphasis added). Finally, O.R. C. Section 4301.69 (D) (1) relates to the engagement of accommodations at a hotel that involves underage consumption and O.R.C. Section 4301.69 (E) (1) contains the language which permits the underage persons themselves to consume or possess alcoholic beverages. Both of these sections also contain the relevant exemptions discussed above in Sections (A) and (B).

The bottom line is that a parent, spouse of legal drinking age or legal guardian can provide alcoholic beverages to an underage person in Ohio.

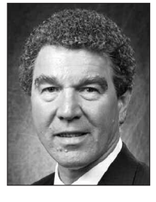
In response to questions from restaurant operators, tavern owners and other liquor permit holders, I have advised them that, while the law allows for such conduct, it is up to them to decide if they want to permit patrons to do so at their establishments as they could be cited for underage sale or furnishing if it would turn out that the person providing the beverage to the underage person was not, in fact, their parent, guardian or spouse of legal drinking age.

In checking the legislative history of these provisions, the physician, parent and legal guardian language has been in the statute at least since the 1960s, the spousal exemption was first enacted in 1987 and was further qualified in 1989 with the "who is not an underage person" provision. Perhaps surprisingly, there does not appear to be much case law interpreting these sections of the Revised Code. The parental supervision aspect of the exception in O.R.C. Section 4301.69 (E) was essentially affirmed in a 2006 case, *State v. Pelfrey, 167 Ohio App. 3d 388, 855 N.E 2d 501, 2006 Ohio 1416.* In this case, the court stated that the parent's presence in the home where an underage person consumed alcohol was sufficient to satisfy, as a matter of law, the "accompanying" requirement of O.R.C. Section 4301.69 (E).

The common sense public policy behind these exemptions is, I believe, evidenced by the length of time they have been in effect and the relative lack of controversy surrounding them and I salute the drafters of these provisions for their wisdom and foresight.

tjbechtold@vorys.com

Timothy J. Bechtold, Vorys Sater Seymour and Pease



The Construction Contract Contains A Mediation Provision — *What Now?*

By Donald W. Gregory

Both the American Institute of Architects (AIA) and ConsensusDOCS have created standard construction contracts that make mediation a prerequisite to litigation and arbitration.[1] As a result, attorneys handling construction disputes are increasingly involved in mediation, its advantages and disadvantages.

AIA and ConsensusDOCS construction contracts mandate American Arbitration Association mediation as the first step in resolving disputes. The AAA has created well-defined procedures for construction mediation.[2] Mediation is initiated when one of the parties makes a request to the AAA and notifies the other party. Next, the parties select a mediator. The AAA maintains a roster of professionals (including the author) that is browsable online. Parties may select a mediator, or have one appointed. Many experienced construction law practitioners are interested in avoiding AAA administration and its attendant costs and will agree to select a mediator on their own in lieu of the process set forth in the contract.

The mediator's role is somewhat different than that of an arbitrator or a judge in a settlement conference. First, the mediator's goal is not to force a settlement. The mediator seeks to facilitate the flow of information, and to foster a satisfactory resolution. Second, the mediator maintains the parties' confidentiality. He or she agrees to refrain from testifying in subsequent proceedings, to restrict access to mediation sessions, and to keep no stenographic record of the mediation. There is no filing fee for initiating mediation, but each mediator has an hourly rate listed on the AAA roster, with a four-hour minimum charge. The parties pay equal shares of the mediation expenses unless they agree otherwise.

Advantages and disadvantages?

Mediation has several advantages over litigation and pre-trial settlement conferences. First, mediation can result in more flexible remedies, whereas judicial remedies are typically limited to money damages.[3] Second, parties may be more candid with mediators than with settlement judges because there is no fear that the information will bias a later trial. Third, parties in mediation share facts cooperatively, saving time and money compared to expensive pre-trial discovery.

Parties who seek to save time and money often choose mediation. The AAA says that mediated claims are typically resolved in under two months.[4] By contrast, the organization cites federal court statistics putting the median length of construction trials at just under two years. Even an average mediated case with claims above $500,000 is resolved nine months sooner than that. In my experience, more than 80% of construction disputes are resolved in mediation.

Federal court statistics also reveal the advantages of mediation over litigation. In 2006, the U.S. District Court for the District of Nebraska polled its attorneys and parties regarding their mediation and litigation experiences.[5] That year, attorneys who resolved disputes in mediation reported saving an average of 104 hours per case, and attorneys and parties estimated that they saved almost $60,000 per case. The respondents also answered questions aimed at measuring more qualitative advantages to mediation, like whether parties felt they had been treated fairly, and whether they felt involved in the process. Mediation scored well in all of these qualitative categories.

However, mediation is not without disadvantages. Clients and attorneys accustomed to adversarial judicial proceedings may bring counterproductive habits to the table.[6] They may put more effort into persuading the mediator than the opposing party, or withhold information that could encourage settlement.

As contract documents often mandate mediation as a condition precedent to litigation or arbitration, parties can be forced into mediation when one or more parties are not yet ready to resolve the dispute. This can lead to unnecessary delays while a fruitless mediation is conducted, which can lead to a hardening of settlement positions.

Furthermore, mediation is a bad fit for some cases. When the outcome of a case turns on a new legal question, mediation may not be appropriate.[7] Likewise, fundamental factual disputes — like the credibility of key witnesses — may also cause mediation to fail. Finally, mediation may be impossible when the parties have lost all trust and ability to find common ground. Such cases, however, are rare. Typically each party has an interest in maintaining a business relationship, and in resolving the dispute quickly. Mediation is an effective tool at achieving both.

Some issues to consider when entering mediation

A key to successful mediation is recognizing the ways it is unlike other forms of dispute resolution. Because mediation is non-binding and need not end in resolution, parties must approach mediation with a different mind-set than that of litigation or arbitration.[8] They should avoid overzealous advocacy, and instead come to the table with the goal of solving problems creatively. A collaborative approach not only helps ensure the mediation's success; it also helps clients maintain their business relationships with adverse parties.[9]

Parties should also carefully consider the type of mediator they want to hire. While every mediator has a unique style, they generally break down into two categories: facilitators and evaluators. Facilitators use diplomacy to help parties communicate and find common ground. Evaluators provide analysis of strengths and weaknesses of each side. To ensure their expectations are met, parties should investigate potential mediators' styles. Given the thorny nature of complex construction disputes and the personalities associated with such a "rough and tumble" industry, most experienced practitioners favor a mediator with an evaluative approach.

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It is rare to encounter a significant construction dispute that is not mediated at some point during the course of a lawyer's representation, so competent mediation advocacy should be an important skill set in any practitioner's toolbox.

This article was prepared with the assistance of summer associate Pete Applegate.

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1. *ConsensusDOCS press release entitled, "Consensus Contract Documents Readies for Release" (sic). Available online at http://www.consensusdocs.org/news/200707-enr.html; Donald W. Gregory, A New Age of Consensus? Alignment Shattered by New Contract Documents, USGlass, Volume 43, Issue 2, February 2008. Available online at http://www.usglassmag.com/USGlass/2008/February/consensus.htm.*
2. *Construction Industry Arbitration Rules and Mediation Procedures, from the American Arbitration Association. Available online at http://www.adr.org/sp.asp?id=22004#MedProcedures.*
3. *Paul M. Lurie, Factors Influencing a Successful Mediation, Construction Lawyer, Volume 22, No. 3, Summer 2002, at p. 18.*
4. *American Arbitration Association white paper entitled, "Construction Industry Arbitration vs. Litigation: The Lines Aren't Drawn Where You May Think," at p. 2. Available online at http://www.adr.org/si.asp?id=4538.*
5. *United States District Court for the District of Nebraska 2006 Report on Mediation, at p. 6. Available online at http://www.ned.uscourts.gov/mediation/medweb/report-06.pdf.*
6. *Factors Influencing a Successful Mediation, supra, note 14, at p. 20.*
7. *Thomas J. Stipanowich and Douglas A. Henderson, Settling Construction Disputes by Mediation, Mini-Trial and Other Processes — The ABA Forum Survey, Construction Lawyer, Volume 12, No. 2, April 1992, at p. 7.*
8. *James M. Bowie, Ethical Issues in Construction Mediation: Are There Any Rules?, Construction Lawyer, Volume 24, No. 2, Spring 2004, at p. 33.*
9. *Richard P. Flake and Susan G. Perin, Mediating Construction Disputes: What Works and What Doesn't, Dispute Resolution Journal, May/July issue, at p. 1. Available online at http://www.adr.org/si.asp?id=2540*

dgregory@keglerbrown.com.

Donald W. Gregory, Kegler Brown Hill & Ritter

Anti-Counterfeiting Strategies For Brand Owners

By Jay A. Yurkiw

Counterfeiting costs U.S. businesses billions of dollars every year. Counterfeit goods endanger the public's health and safety, cause the loss of tax revenue and jobs, and undermine consumer confidence in brand names. Counterfeit goods also have been linked to terrorist groups and organized crime. While the counterfeiting problem impacts nearly everyone, the recent high profile counterfeiting case between Tiffany and eBay reaffirmed that brand owners bear the primary responsibility for protecting their rights in the U.S.[1]

In the eBay case, "the heart of this dispute" was "who should bear the burden of policing Tiffany's valuable trademarks in Internet commerce."[2] Tiffany presented evidence that sellers on eBay's website sold thousands of counterfeit Tiffany merchandise from 2003 through 2006, and argued that eBay had the obligation to control the counterfeiting activities of the sellers because eBay knew a problem existed and profited from the sales. The Southern District of New York rejected Tiffany's argument and held that "under the law as it currently stands, it does not matter whether eBay or Tiffany could more efficiently bear the burden of policing the eBay website for Tiffany counterfeits," the law places the burden on the mark holder.[3] Thus, it is Tiffany's burden to monitor the eBay website for counterfeiting and bring specific items to eBay's attention which Tiffany believes to be counterfeits. The court's holding illustrates the diligence that brand owners must exercise to protect their rights.

The first step is to register. Brand owners who register their trademark rights with the U.S. Patent and Trademark Office (USPTO) gain advantages in the fight against counterfeit goods. These advantages include a legal presumption that they own the mark, constructive notice to others of their mark, and an exclusive right to use the mark with the goods and services listed in their registration. Having a registered trademark allows an owner to record the mark with the U.S. Customs and Border Protection (CBP), which can seize counterfeit goods at the border.

Registration with the U.S. Copyright Office constitutes prima facie evidence of the validity of a copyright and is a prerequisite to bringing a copyright infringement action. Registration also enables a copyright holder to seek statutory damages and attorney fees and permits recordation of the copyright with the CBP.

Over the last 10 years, the federal government has increased its efforts to protect intellectual property rights and prosecute intellectual property crimes. Congress enacted the Stop Counterfeiting in Manufactured Goods Act in 2006 to broaden the protection of the criminal counterfeiting statute, 18 U.S.C. § 2320, and to help owners obtain restitution from counterfeiters. The Bush administration announced the Strategy Targeting Organized Piracy (STOP!) initiative in 2004 to help coordinate the efforts of federal agencies to fight global counterfeiting and piracy. Last year, the Office of the U.S. Trade Representative began negotiating the Anti-Counterfeiting Trade Agreement with key trading partners to establish new global standards for the enforcement of intellectual property rights.

Earlier this year, the U.S. Chamber of Commerce, Department of Justice, and Federal Bar Association sponsored a one-day conference in Columbus during which representatives from the Department of Justice, U.S. Attorney's Offices in the Northern and Southern Districts of Ohio, Immigrations and Customs Enforcement, Food and Drug Administration, U.S. Postal Inspection Service, CBP, and a county prosecuting attorney's office spoke about federal and local efforts to criminally enforce intellectual property rights. They discussed the resources available to brand owners and successes the government has had shutting down and prosecuting counterfeiters in Ohio.

Given the government's increasing interest in intellectual property crimes, brand owners should consider referring violations of their rights to law enforcement officials for criminal enforcement. This sends a strong message to the public about the owner's commitment to protecting rights. It not only shuts down current counterfeiters but deters others. Although a counterfeiter may not be concerned about civil liability because it is judgment proof or it can change the goods it is counterfeiting, the threat of imprisonment and criminal fines changes the cost-benefit analysis. A first offense for an individual who traffics in counterfeit trademarks can result in up to ten years imprisonment and a $2 million fine.[4]

On the other hand, a brand owner may decide against pursuing criminal violations because a referral may result in a loss of control over the enforcement of its rights, as the government may want to delay acting or move the investigation in a different direction. The government also may request that further private investigation be stopped while it is investigating the case or it may seek to stay any civil proceedings while the criminal case is proceeding. All of this can turn into a problem if the government ultimately decides not to pursue a case.

If a brand owner does decide to refer a case to law enforcement, the Department of Justice recommends that the owner create a record of all investigative steps taken, preserve any physical, documentary, or digital evidence acquired in the course of the owner's investigation, and contact law enforcement soon after acquiring information about suspected violations. Early communication ensures that evidence of an intellectual property crime is properly gathered and secured, and it allows owners to discuss and coordinate possible criminal enforcement with parallel civil proceedings.

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Industry groups and intellectual property organizations actively lobby federal and state government to strengthen existing intellectual property protection. In 2005 the U.S. Chamber of Commerce launched the Coalition Against Counterfeiting and Piracy (CACP) to address the global problem of counterfeiting and piracy. On behalf of over 500 members in various sectors ranging from automotive parts to luxury goods, the CACP has launched a comprehensive legislative campaign to improve U.S. intellectual property laws. As part of the Campaign to Protect America, the CACP is working with various state legislatures to enact the Model State Anti-Counterfeiting Bill and with Senate and House staff to help push through Congress bills like H.R. 4279, the Prioritizing Resources and Organization for Intellectual Property Act of 2007 (PRO-IP Act), and H.R. 6530, the Trade Enforcement Act of 2008.

Many brand owners work to educate the public about the harms of counterfeiting and piracy through coalitions like the CACP and trade organizations such as the Recording Industry Association of America and the Motion Picture Association of America. You may have seen anti-piracy public announcements in movie trailers. Companies such as Abercrombie & Fitch, Motorola, and ACDelco encourage consumers to report suspected counterfeit goods through their websites and 1-800 hot lines.

Brand owners can help protect themselves against counterfeiting by better securing their supply chains. Suppliers may produce unauthorized merchandise for illegitimate distribution channels, and counterfeiters often will purchase authentic goods to mix them in with fake goods. Written contracts with suppliers should include provisions permitting audits of manufacturing facilities, requiring suppliers to ensure that genuine goods are not diverted to unauthorized sellers, and prescribing how to handle unsold goods, excess labels, and goods rejected for quality reasons. Brand owners also should closely monitor distribution channels such as on-line auction sites (eBay, Yahoo! Auctions, Craig's List, etc.), trade shows, and flea markets to check for the sale of counterfeit goods.

Also, brand owners also can design and integrate anti-counterfeiting controls into their products. Layered authentication controls such as radio frequency identification (RFID) tags, multiple logo locations, holograms, and nanotechnology-based markers can make it easier to identify counterfeit goods.

When counterfeit goods are identified, brand owners should seek to enforce their rights through civil litigation. Pursuing legal action in large and small cases demonstrates that counterfeiting will not be tolerated and that anyone selling counterfeit goods is at risk. A court may order the ex parte seizure of goods if the brand owner satisfies the statutory requirements set forth in 15 U.S.C. § 1116(d), including registration of the trademark with the USPTO and notification to the appropriate U.S. Attorney. A brand owner must quickly, quietly, and accurately gather as much information as possible about the counterfeiter's activities. The court likely will deny a request for a seizure order if the brand owner has waited too long to assert rights, and the defendant may destroy or hide goods and related business records if it learns of the impending action.

The protection of intellectual property rights from counterfeiting has received increased attention from the public and federal and state government. However, a brand owner still bears the ultimate responsibility.

1. *Tiffany (NJ) Inc. v. eBay, Inc., No. 04 Civ. 4607, slip op. at p. 2, 56 (S.D.N.Y. July 14, 2008).*
2. *Id. at p. 2.*
3. *Id.*
4. *18 U.S.C. § 2320(a).*

jyurkiw@porterwright.com

Jay A. Yurkiw,
Porter Wright
Morris & Arthur

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a columbus bar publication for new lawyers

I AM A LAWYER *– NOW WHAT?*

By Matthew D. Austin

"So what do you want be when you grow up?" is a question that all kids, and some adults, are asked repeatedly. Kids typically answer with the usual stock of broad occupations like a firefighter, clown, astronaut, doctor, professional wrestler, movie star, and even the socially underappreciated garbage man.

Should a child actually answer that he or she wants to enter the profession that has chosen us—yes, I say "chosen us" because if many attorneys knew how the rest of their life will be before graduating law school, they likely would have never attended—the answer usually just ends at, "I want to be a lawyer." Content with that answer, the questioner typically smiles, says "oh, that sounds nice" and changes the subject instead of pressing the child to identify what type of lawyer the child wants to become – real estate, divorce, criminal, tax, medical malpractice, nanotechnology, or even a management-side labor and employment attorney.

The truth is that very few of us attorneys actually had any idea of what type of lawyer we wanted to be, even after graduating law school. While specializing in an area of law in school is a rarity, actually finding a job in that area is certainly a path least taken for all except those who have prior educational experience (i.e. an advance degree in a certain field) or prior working experience (i.e. a nurse who then goes to law school is typically highly sought after by medical malpractice firms).

Rather than choose the type of law you practice, your main concern after graduating law school was getting a job so you could begin to repay your law school loans. "New lawyers don't care what type of law they practice they just want to practice law" is the mantra of how most law firms and hiring attorneys view rookie associates.

As such, third year law students, like cattle, go from one on-campus interview to another and spam the legal market with their resumes and transcripts looking for a permanent position. Those same people generally accept positions at firms that will pay them the most money – and then leave that firm within five years of graduating law school (but the inability of firms to retain top talent is a topic for another article).

After accepting a position with the firm that pays the most money, the associate quickly learns that practicing commercial mortgage backed securities law for a firm with over 300 lawyers is a whole lot different than taking Real Property Law from their school's most lovable professor. And the reason why it is so much different usually boils down to the fact that the associate's mentors and/or peers at that firm, along with the firm's culture, support staff, and expectations are not aligned with those of the fresh-faced attorney.

No other advanced degree program follows this progression. Medical schools have physicians perform residencies before deciding if they want to practice neurosurgery or orthopedics. After taking general courses, MBA programs have their students decide on intensive study specialties like finance or marketing. Even PhD programs expose their students to broader courses before narrowing the field of study down to their chosen focus.

Many progressive law firms now simply hire warm bodies and have those associates be at the beck and call of all attorneys in all departments of that firm. While typically not spoken highly of by associates who must work on an insurance defense matter in the morning, attend a probate hearing in the afternoon, and prepare a partner's outline for an environmental deposition in the evening, this method should be lauded as a way for associates to learn what type of law they want to practice and with whom they want to practice.

Although it has taken awhile to get to it, my point is quite simple: because most of us don't know what type of lawyer we will be until years after we graduate law school, it is imperative that we learn to practice a type of law from someone we respect as a good practitioner and teacher, and in an environment where we feel comfortable.

Too often young associates graduate law school declaring a subject matter they did not like in school (usually because of the professor) is not the area of law that they are going to practice. Others decide early on in their career that litigation is not for them, or that transactional work is not exciting enough – usually because of a partner in that firm.

Conversely, attorneys stick with an area of law because they admire the lawyer who is teaching them how to succeed in their practice. I firmly believe that any area of law can be fun and exciting with the right people. Don't pigeonhole yourself as a certain type of attorney because that is the area in which you first practiced.

Rather, find legal mentors (whether through a formal bar mentoring program, an acquaintance or friend, or an attorney on the other side of a case) who are or can help identify great lawyers and great people. Then meet and learn from those lawyers. Their passion for what they do is contagious and you, too, will be on your way to a rewarding legal career – even if it is as an offshore asset protection trust attorney.

austin@maslawfirm.com

Matthew D. Austin
Mason Law Firm Co., LPA

PRACTICING LAW *IN AN ELECTRONIC WORLD*

By Lisa Kathumbi

As recent law school graduates, many of us had the ability to download bar study materials to our iPods, completed law school examinations, and perhaps even the bar exam from our lap tops, and relied primarily on computers and not books or printed materials to conduct legal research. Despite the significant technological advances of the last ten years, few of us, however, left law school with an understanding (or even an interest for that matter) in where the data we rely on might reside.

According to the Director of the Legal Electronic Documents Institute, electronic discovery ("E- Discovery") is "cutting across all the legal demographics of firm size, case values and attorneys but a significant number of lawyers are still unfamiliar with the requirements and characteristics of electronic discovery."[1] With only a handful of law schools currently offering E-Discovery courses, new attorneys, in particular, may find themselves without much information regarding the rules, specialized vocabulary and acronyms that surround E-Discovery.

Failing to gain at least a basic understanding of E-Discovery can, however, have significant consequences. Evidence of destruction or failure to produce electronically stored information ("ESI") during E-Discovery can lead to costly penalties, sanctions, and loss of the lawsuit as a whole.[2]

There is a lot to learn, but first, the basics.

Common Terms.

- **Electronic Discovery or E-Discovery.** The process of collecting, preparing, reviewing, and producing electronically stored information ("ESI") in the context of the legal process.
- **Forensic Copy.** A forensic copy is an exact copy of an entire physical storage media (hard drive, CD-ROM, DVD-ROM, tape, etc.), including all active and residual data and unallocated or slack space on the media. Forensic copies are often called "images" or "image copies."
- **Gigabyte.** A gigabyte (or Gb) of data is a large quantity of data—a gigabyte of "native" ESI can translate to 50,000–75,000 pages, depending on the composition of the data, or about 20–30 standard boxes. A gigabyte is 1,024 megabytes. A terabyte is 1,024 gigabytes.
- **Legal Hold.** A legal hold is a communication issued as a result of current or reasonably anticipated litigation, audit, government investigation, or other such matter that suspends the normal disposition or processing of records. A legal hold may also be called a "hold," "preservation order," "suspension order," "freeze notice," "hold order," or "hold notice."
- **Metadata.** Metadata is data about data. The term refers to both innocuous, objective information, such as authors, dates, and recipients, and "hidden" metadata that can reveal earlier versions, notes, formulas, and other automatically tracked information that may not be visible on the printed page.
- **Native Documents.** Native documents are documents in their original file formats, *e.g.*, Word, Excel, and PowerPoint. Production in native format is not typically advisable because of the tracking difficulties and alteration risk.[3]
- **Records Retention Period.** The length of time a given records series must be kept, expressed as either a time period (*i.e.* four years), an event or action (*i.e.* audit) or a combination (*i.e.* six months after audit).
- **Spoliation.** The destruction of records or properties, such as metadata, that may be relevant to ongoing or anticipated litigation, government investigation or audit. Courts differ in their interpretation of the level of intent required before sanctions may be warranted.
- **TIFF.** An acronym for "tagged image file format," a common format for producing ESI. Native documents can be converted to TIFFs to standardize them, allow automated numbering for control purposes, and reduce the risks of alteration. Although there can be benefits to reviewing in native format, most productions occur in TIFF, or occasionally in PDF (portable document format).[4]

E-Discovery Myths and Truths.

1. *E-Discovery is only important to litigators*. **FALSE**. While learning the details and intricacies of E-Discovery may not be the best use of time for a transactional attorney, a peripheral understanding of E-Discovery terms and concepts will prove beneficial to any attorney in this technologically advanced information age. Lawyers who do not take the time to understand the implications of E-Discovery cannot properly advise clients about their document retention policies (which matter even absent pending litigation). Moreover, they cannot be sure that they have carried out their own obligations, or guarantee that their own employers' electronic data is maintained and disposed of properly.
2. *Email is the principal type of electronically stored information ("ESI") offered into evidence in litigation*. **TRUE**. This probably comes as no surprise as email communications today, in virtually every industry, are ubiquitous. One study has estimated that 31 billion e-mails are sent out each day in the United States.[5] However, ESI also includes spreadsheets, power point presentations, and other data in electronic format.
3. *A gigabyte of data always equals 50,000 pages*. **FALSE**. While it is possible to quantify pieces of your paper, according to trial lawyer Craig Bell, you cannot reliably equate a volume of data with a number of pages unless you know the composition of the data.[6] Documents in plain or rich text format or documents saved in Microsoft Word require less storage space than those documents that are saved in either TIFF or PDF formats.
4. *To understand E-Discovery, you need to have a technical background*. **FALSE**. While it certainly would not hurt, a technical background is not a prerequisite to learning and understanding E-Discovery.
5. *Even inactive business records must be maintained for purposes of audit, analysis or future litigation*. **TRUE**. Although inactive records are closed, completed, or concluded activities which are no longer routinely referenced, they must still be maintained under records retention requirements for reasonably anticipated litigation, government investigations and audits.
6. *The sanctions imposed for violating E-Discovery production rules are minimal*. **FALSE**. In January 2008, a court sanctioned Qualcomm in the amount of $8.5 million for failing to find and produce electronic documents requested during discovery. The attorneys in this case were initially sanctioned as well.

Five or ten years ago, a proficiency in Excel or PowerPoint was "resume-worthy." Now, it is assumed that most people have these proficiencies.[7] With the proliferation of technology and the ongoing development of new rules governing electronic information,[8] the same is likely going to soon be true of E-Discovery. Although learning E-Discovery information may appear to be a daunting task, the reality is that as young attorneys we will be practicing in an electronic world for the vast majority of our careers.[9]

1. *Tom O'Connor, Electronic Discovery Survey of Illinois Attorneys Shows a Few Surprises (May 1, 2008, available at http://www.chicagolawyermagazine.com/2008/05/21/electronic-discovery-survey-of-illinois-attorneys-shows-a-few-surprises/).*
2. *See e.g., Qualcomm Inc. v. Broadcom Corp 2008 U.S. Dist. Lexis 911 (S.D. Calif. 2008). (court imposes steep penalties and refers counsel to state bar for discipline for E-Discovery violations); The Southern New England Telephone Co. v. Global Naps, Inc., Case No. 04-2075 (D. Conn. June 23, 2008) (court orders default judgment after finding discovery violations, including spoliation).*
3. *David R. Cohen and Lynn Reilly, E-Discovery: A Survival Guide for New Attorneys, Part 2 (July 2008), available at http://www.abanet.org/yld/tyl/july08/cohen2.html.*
4. *For a more comprehensive list of E-Discovery terms see, The Sedona Conference Glossary, E-Discovery & Digital Information Management, Second Edition (December 2007) (available at http://www.thesedonaconference.org/publications_html).*
5. *Stephen D. Willinger and Robin M. Wilson, Negotiating the Minefields of Electronic Discovery, 10 Rich. J.L. & Tech. 52, 58 (2004).*
6. *Craig Bell. Expert Explodes Page Equivalency Myth, available at http://www.law.com/jsp/legaltechnology/pubArticleLT.jsp?id=1186477613170.*
7. *Brian A. Bender, Slow and Steady Wins the Race: The Sooner You Learn About Electronic Discovery, the Better, available at http://www.harrisbeach.com/news/articleviewer.cfm?aid=460.*
8. *For an in-depth overview of the E-Discovery Amendments to the Ohio Rules of Civil Procedure, see www.bricker.com/publications/articles/1230.pdf.*
9. *For more E-Discovery basics and resources, see the Electronic Discovery Resource Center, available at http://www.bricker.com/legalservices/practice/litigation/ediscotech/resources.aspx.*

lkathumbi@bricker.com

Lisa Kathumbi, Bricker & Eckler

The Truth

About What Clients Really Want

By Mark Kafantaris[1]

In dealing with the courts, we learned early on how to communicate effectively with judges, no matter what their attitude towards us, or the facts of the case. In appellate argument, we similarly learned to stop dead in our tracks – not even finishing our sentence – when a judge asks us a question. Indeed, this is our opportunity to engage the court through our point of view and advance our client's position. The same is also true of *voir dire* when we speak with the jurors and subtly introduce them to the facts of our client's case: a theme that is later reinforced in our opening, the evidence, and closing remarks.

In representing our clients, however, we seem all too eager to take charge from the very beginning in fashioning complex remedies, filing intricate pleadings, writing memos and correspondence, taking depositions and otherwise orchestrating a myriad of variables in prosecuting or defending their case. Being thus in control of this entire production, it is often easy to lose sight that the case in fact belongs to the client – whose ear we must have, and whose changing wishes we must monitor throughout our representation.

Take, for example, the young lawyer who was representing a housing complex in a mundane eviction case for nonpayment of rent. As others before it, he diligently filed the complaint and the matter was set for an early morning hearing. The housing manager had not yet arrived when the magistrate called the case, but the tenant was there and explained that she had just received her income tax refund and could now pay the entire arrearage, a month's advance rent, as well as court costs and attorney's fees. "What more could a landlord want?" the young lawyer thought, and he advised the magistrate that case was resolved and entered the settlement on the record. As he was leaving the courthouse, the housing manager was just walking in and the young lawyer began to tell him of how he settled the case. "I wanted her out," the manager said with a stone face. That was the last eviction case the young lawyer got from his client.

Even a seasoned litigator can miss the "cue" in figuring out what the client wants. At issue in the auto accident negligence case was whether the defendant's headlights were on at the time of the collision. The defendant could not remember, and plaintiff's counsel claimed that they were off. This experienced lawyer, therefore, had the bulb filaments examined, which showed that the lights were on, and the defendant was not negligent in that regard. Elated with the good news, the lawyer wrote the carrier a letter advising that they should only offer nuisance value to the plaintiff. The claims manager called back, however, and told the lawyer to accept the plaintiff's last demand. Believing this instruction to be in error, the defense lawyer wrote back insisting there was no basis to pay the plaintiff because she could not establish liability. A subsequent fax from the carrier coldly instructed the defense lawyer to take the last offer and close the file. He did, and more than a year went by before his firm received any new files from that carrier.

In both of these examples, the lawyers acted with admirable diligence, industry, and skill in furtherance of their client's interests – or so they thought. Unfortunately, the clients had a different idea of what was best for them. And, as we all must remember, we work for the client and must abide by their wishes, period.

But how can we know what they really want at any give time? Simply asking them would tell us. We spend plenty of time chit-chatting with other lawyers while waiting for our case to be called. Why not take a few minutes to feel out the client on what he ultimately wants to see happen as well. If nothing else, it would show respect for his wishes while also putting in check the "I know what's best for you" attitude that so often gets in the way.

And if you have missed the opportunity to ask, do not assume to know the answer, no matter how perceptive you may be on human behavior, or how well you know your client's affairs. Clients' priorities change, and sometimes they change overnight. As the mouthpiece for our client, we need to be in tune to their needs and goals as they see them Communication is the key.

ABA studies repeatedly show that the chief complaint among dissatisfied clients is unreturned phone calls. Clients want a response within twenty-four hours. Call them and let them know you have been in court all day, that you have been working on a brief or memo, or that you have had a lousy day and need to go home to clear your head. Whatever the circumstance, be sure to talk to them. Clients can be very understanding and accommodating so long as they feel they are not being ignored. Even if you cannot talk to the client yourself, have someone in the office call and listen to them. Sometimes, explaining what happened is enough to bring about a sense of closure to the matter that prompted them to call in the first place. As a last resort, write them a brief note and follow-up later with an actual call.

Lack of frequent communication leads people to foolishly guess about another's wants, needs, or aspirations. With the mobile age of technology, there is no need to guess anymore. Just call, talk, and listen. You will not only have more satisfied clients, but also very loyal ones who will pass half a dozen other offices to come to yours.

1. *Mark would like to thank the attorneys who generously shared their experiences with him.*

Instructions Included:

Always Consider Jury Instructions *Before* Going To Trial

Jury instructions are not just a guide for the jury; they are the one means of communication you have with the jury while it is deciding your case, and you want the jury to hear your voice in the instructions.

By Nicole VanderDoes

You're preparing for trial. You've practiced your opening statement, you can't wait to impeach the other party, your witnesses are prepared, you've thought about *voir dire* questions, and you know how to admit your evidence. You're ready to go. But you've forgotten something. Without effective jury instructions, you have forgotten the one element of trial preparation that will undoubtedly influence how the jury decides the case.

Judge John Bender, Co-Chair of the Ohio Judicial Conference's Jury Instructions (OJI) Committee, says that jury instructions are "the roadmap the jury follows when deciding the case." So the jury instructions ought to be your roadmap as well, and you need to know where you're going from the outset, not on the eve of trial. When you are thinking about filing a complaint, according to Judge Bender, the very first action you should take: "Go look at OJI!" This is the only way to know exactly what you have to prove and by what standard. Considering jury instructions early will allow you to prepare effectively throughout the process, and provide the jury with the facts it needs to apply the law in your client's favor.

Jury instructions are not just a guide for the jury; they are the one means of communication you have with the jury while it is deciding your case, and you want the jury to hear your voice in the instructions. This may include how you refer to the parties, the order of your proposed instructions, syntax and word choice, as well as the substantive law of the instructions. However, it is imperative that you approach jury instructions from the perspective of the court. This means all instructions must accurately and objectively state the law, while citing authority, not be argumentative, and should be agreed upon if possible. In this way, you will have much greater success obtaining agreement of the parties, or getting the court to adopt your instructions if competing instructions are submitted to the court.

Don't assume that the court will ask for your input or even mention jury instructions prior to the time it starts reading them to the jury. Civil Rule 51 gives you the right to propose jury instructions, and you should exercise this right. You should also object to any questionable instruction as the failure to object prior to the jury retiring waives the issue on appeal. While you have the right to propose jury instructions, there is no guarantee that the court will adopt them, or even truly consider them. However, Civil Rule 49 requires that the court submit interrogatories to the jury upon the request of any party prior to argument. Not only can interrogatories frame the issues for the jury, but submitting interrogatories along with proposed jury instructions can encourage the court to seriously consider your jury instructions because it must consider your interrogatories.

Jury instructions are a task that is often delegated to new lawyers, and you may not know much about jury instructions beyond a vague memory of the cases in law school debating the proper instruction on "reasonable doubt." The best place to start is OJI. The Committee, which consists of judges and attorneys, updates OJI regularly to reflect statutory changes and intervening legal opinions, while incorporating impressive collective experience and offering consistency across the judicial system. Almost all Ohio judges expect you to start with OJI, but it is just the beginning.

Starting with OJI, and looking at the complaint, answer, and other pleadings, will help you determine every instruction the jury will need, from the basics (province of the jury, burden of proof, etc.) to the issues specific to your case. For example, in a breach of contract case, the jury may need to be instructed on offer and acceptance, partial performance, material breach, affirmative defenses, damages, and more. You don't want to offer instructions that are not relevant, but don't forget to instruct the jury on every issue that is critical to your case, and to define any words that are part of an instruction. Conversely, once you start drafting your instructions, understand that OJI doesn't provide every instruction you need. For example, in a breach of contract case, there may be an issue of contract interpretation. OJI provides a general instruction on contract interpretation, but it does not instruct the jury that any ambiguity shall be construed strictly against the drafter, which may be critical. Then, you will want to propose an instruction that accurately states the law and cites to proper authority concerning interpretation.

When it is time to submit your draft to the judge for consideration, the court is more likely to adopt your instructions if they are submitted in a user-friendly format. This means you should generally submit an electronic copy so the court can make changes, and by drafting one instruction per page, the court can easily substitute instructions, while using your proposed instructions as the foundation.

Finally, and most importantly, always ask what each judge's preference is with regard to jury instructions, including timing, format, sources, permitted argument, and when and how the judge will deliver the instructions.

nvanderdoes@lnlattorneys.com

Nicole VanderDoes, Luper Neidenthal & Logan

Legal Writing Tip of the Month

Aid Your Readers with Effective Document Design

By Jameel S. Turner

Many new lawyers spend endless hours researching and writing important documents and pleadings without spending ample time giving thought to effective document design. The best-written legal document, even if written in plain English with no legalese, will not be effective – and perhaps will not even be read – if it is poorly designed. In law, effective document design is almost as important to a reader as good writing. No matter what message a writer is trying to convey, the message will come across more effectively if it is delivered in a properly designed document.

The following tips highlight the role that document design plays in effective legal writing.

- *Give Visual Cues*

  Let your reader know where to start reading, and where to continue reading. Headings, subheadings, initial capitals, and even numbered paragraphs can act as important signposts throughout the text. Visual cues must be consistent throughout your document. Headings and subheadings should be descriptive and detailed.

- *Use Plenty of White Space*

  White space is an important aid to legibility. Use wide margins (at least 1.25 inches) and plenty of room at the top and bottom of your page.

- *Use Bulleted and Numbered Vertical Lists*

  Sometimes the best way to present information the reader can digest is to make a list. Bulleted and numbered lists also add emphasis to the text.[1]

- *Choose a Typeface for Readability*

  Typefaces with a serif (small strokes at the end of characters) are generally easier to read than sans-serif typefaces. Using Times New Roman 12-point type may not be the ideal typeface for your document because it is so dense it makes the text look crowded. Try a 12 point serif font, such as Georgia, and note how much more readable your document becomes. Choose clear typefaces for your main text. Quirky or unusual typefaces can add character to covers and headings, but should not be used for main text.[2]

- *Justifying*

  Setting text "flush left, ragged right" increases a document's readability because the space between words stays even, and the reader knows immediately when he or she has come to the end of a line. Nevertheless, if you like the look of full justification (even vertical lines on each margin) then turn on the hyphenation function of your word processor to reduce the odd gaps and spaces between words. Your readers will appreciate it.

1. *Teri Mester, Workplace Writing. Gregg's Reference Manual, 2006.*
2. *Wayne Scheiss, Writing for the Legal Audience, Carolina Academic Press, 2003.*

Jameel.Turner@baileycavalieri.com

Jameel S. Turner, Bailey Cavalieri

How Do Young Lawyers Rate Communication?

By Janica Pierce

"One of the problems with communication . . . is the illusion that it has been accomplished."[1] Communication is the act of individuals speaking and listening to one another. In the workplace, we see communication through body language, demeanor, media, such as e-mail, and written and verbal communication. Communication differs in terms of what is the point of discussion. It seems that with the increased use of emails and text messages, the way to communicate has taken on a whole new genre. The Columbus Bar sent a survey to new lawyers (lawyers that have practiced zero to five years) to determine how they rate communication with partners, support staff, and respective open door policies.

As a new lawyer in a new place, communication with partners might be intimidating. However, it seems to be less stressful in organizations who implement an open door policy that allows young attorneys to communicate on all matters.

Ninety-one participants responded to the survey conducted by the CBA. The results are as follows:

(1) How would you rate the level of communication between you and partners who provide you with assignments? Very Good: 25.6% Good: 40.0% Fair: 27.8% Poor: 6.7%

(2) Does your employer have an open door policy? Yes: 96.7% No: 3.3%

(3) Are there topics of conversation that are not appropriate for the workplace? If yes, please provide examples. No: 27.3% Yes: 72.7% Selected examples:

- "Conversations that would make others feel uncomfortable – i.e. about someone's sex life, emotion/mental issues if they are unrelated to work."
- "Intimate details of relationships; the crazy drink you had on vacation; foul language, etc. More importantly remembering that going to lunch with co-workers is not all that different from being in the workplace and the same common sense topic decency rules should apply."
- "Generally understood norms of decency, prejudice behavior and statements."
- "Discussing politics – particularly who you are voting for; providing too much personal information about yourself to a co-worker."
- "Compensation, bonuses, benefits, etc."
- "Topics that could offend or create a hostile working environment relative to race, gender, religion, sexual preference, etc."

(4) How do you feel about utilizing the open door policy? Selected responses:

- "Completely comfortable."
- "Fine, though I have enough experience that I'm not easily intimidated."
- "It depends on the partner."
- "There is no confidentiality if you do utilize the policy."
- "I think it is essential to capitalize the resources and experiences at the firm to have an open door policy."
- "It depends on what the issue is. I feel fairly good about communicating to the office manager about strictly business related issues, but am not comfortable discussing anything that could potentially disrupt the office politics, which have been in play long before I was hired on. I do not feel comfortable addressing sexual or other inappropriate comments because they are so commonplace and I don't want to be singled out as being too serious or not a team player."
- "I think it is a great tool. It provides great mentoring for younger associates and gives a sense of equality among associates and partners."
- "Most partners are very willing at any time to sit down and talk – it's easy to ask."
- "I would feel awkward if I were an associate, that is why I chose to start my own practice."
- "I would not use the 'open door' policy to discuss firm-wide issues such as the retention of women and minorities, the direction of the firm, attrition, etc. I would use, and have used, the open door policy to discuss specific issues relating to projects and work assignments."
- "Uncomfortable. Open door policies are generally smoke screens for good-ole boy networks. They tend to be useful/effective only in very large corporations, which create extensive paper trails for every conversation, etc."
- "It is difficult to say what is on your mind to a superior even though there is an 'open door' policy."
- "Our firm's open door policy is a cornerstone of our culture. It promotes a team atmosphere, fosters productive working relationships, and makes our office a pleasant place to work."

(5) How would you rate the level of communication between you and your support staff? Very Good: 42.2% Good: 37.8% Fair: 16.7% Poor: 3.3%

Based upon the survey results, the majority of new lawyers rate their communication with partners and support staff as "very good" or "good." The consensus is that open door policies are a benefit to the workplace. However, more than half of the respondents are reluctant to use it. Most of the respondents opined that despite the benefits, an open door policy is not widely used because of the potential repercussions, such as breach of confidentiality as to what is discussed or the possibility of the employer using the information in a manner that will jeopardize the attorney.

In my opinion, an open door policy is one in which an employer creates an environment where employees are encouraged to feel comfortable to discuss any issues that affect their work performance – from lack of understanding on a task given or a problem with a co-worker – without repercussion or confidentiality concerns. A firm or organization that adopts an open door policy embraces and believes in effective communication.

[1] *George Bernard Shaw*

jpierce@cwslaw.com

Janica Pierce,
Chester Willcox & Saxbe

Telecommuting and Flip-Flop Fridays:
Where does an associate know to draw the line on casual dress and working from home?

By Bree Brown

New lawyers face questions and concerns different from those from just a few years ago. With the increased use of business casual days, and the availability of telecommuting, new lawyers must balance both their wardrobes and home offices unlike their predecessors who had a staple of three-piece suits and worked only where their phone, typewriter, and assistant were. In both instances, we want to be respected and productive. What is a new lawyer to do?

"Business casual" dress code has become a staple of the office. However, the term is somewhat nebulous, and leads to widespread confusion and a host of fashion *faux pas*. Fifty-five percent of employees consider tank tops and exposed undergarments the season's top work-wear mishap, according to an April, 2007 survey by Monster, an online career and recruitment resource. Nearly 30% cited flip-flops, while just 8% were put off by Hawaiian-print shirts.[1]

A photo of Northwestern University's national championship women's lacrosse team, taken during the athletes' visit to the White House in July, 2005, shows four of the nine women in the front row wearing flip-flop sandals along with their dresses and skirts. This photo sparked a nationwide controversy on "proper attire" for work and special events.

A company's objective in establishing a business casual dress code is to allow employees to work comfortably in the workplace. Yet, employees still need to project a professional image for customers, potential employees, and community visitors. Business casual dress is the standard for this dress code.[2]

A general rule of thumb for business casual is that the individual should be neatly dressed, well put together and professional looking. If you are ever unclear on company policy about business casual dress, ask to see a dress code or talk to a supervisor about acceptable office wear.

For both men and women, clothing should have a good fit. Clothing should not be too tight or loose, and should not be too revealing. In addition, clothing should be pressed and in good condition, meaning that it has no fading, holes, or dangling threads, and is also wrinkle-free.[3]

Slacks such as khakis are acceptable, as are pants made from cotton, micro fiber, and summer weight wool. For women, all skirts should fall, at a minimum, to the knee, and should not reveal the thighs when sitting.[4]

Tops such as button-down cottons and collared polo shirts are acceptable business casual wear for both genders. T-shirts and apparel with logos are usually not considered appropriate for the office, unless the shirt is branded with the company name, and even then, such shirts may be inappropriate for a law office. Tank tops and cut-off shirts should be avoided. Patterns and prints for business casual attire should be subdued; subtle stripes are acceptable, while vibrant tropical patterns are typically not.[5]

An extension of relaxed dress codes in the office is the increased use of telecommuting. Beyond the occasional dress code questions when visiting the main office, telecommuters must also figure out how to maintain a daily ritual and set up a workspace at home to create a professional environment. Some companies, such as Merrill Lynch, have specific training programs for telecommuters.[6]

Merrill Lynch's two-week program allows employees to work in a simulated home-office environment. There, they interact as if actually working from home, providing opportunities for the company and employees to work out any kinks in the arrangement.

Creating the ideal home work space with the requisite equipment is very important. Many companies provide computer equipment to the telecommuter in order to assure compatibility with the main office. Merrill Lynch spends approximately $7,000 per telecommuter for equipment and the aforementioned training.[7]

At a minimum, most telecommuters need a computer and printer, compatible software, a phone, an ergonomic desk and chair, and appropriate lighting. Fax capabilities and Internet access are also beneficial. Make a list of everything you need and identify what items you're willing to provide. Many employers have surplus equipment that can be used for telecommuters, so don't overlook this option.

Finally, a common issue for the telecommuter is proper time management. Some suggested tips from Telecommuting Success: A Practical Guide for Staying in the Loop While Working Away from the Office, by Michael Dziak[8] include:

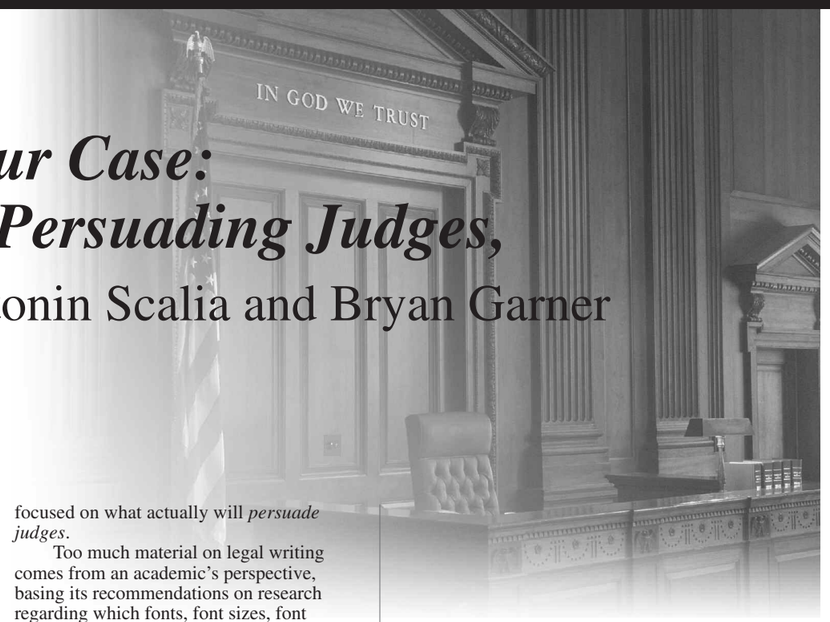
1. Keep an active to-do list.
2. Don't waste time in traffic: When you go into the office or schedule appointments, drive during off-peak hours to prevent wasted time.
3. Pay attention, do it right, and do it once: When discussing plans or taking instructions, listen carefully and repeat them back to ensure that you understood each other.
4. Stay organized and keep up with filing: Establish a paper and electronic system to prevent wasting time and to find things when you need them.
5. Improve efficiency through technology tools: Look for ways that technology can increase your effectiveness, rather than thwart it.
6. Set up an automatic follow-up system: Use this system for commitments made by others, follow-up calls, proposals and letters, and general reminders.
7. Be prudent and frugal with your time: Allow enough time between obligations and be prepared to say no to activities outside your priority list.

With the proper attire, resources, and time management plan, a new lawyer can be successful at home and on casual days at the office.

1. *http://www.usatoday.com/money/workplace/2007-07-09-business-casual-attire_N.htm*
2. *http://humanresources.about.com/od/workrelationships/a/dress_code.htm*
3. *http://www.wisegeek.com/what-is-meant-by-business-casual-dress.htm*
4. *Id.*
5. *Id.*
6. *http://findarticles.com/p/articles/mi_m1365/is_11_29/ai_54783779/pg_1?tag=artBody;col1*
7. *Id.*
8. *http://career.jobboom.com/work-life/time-management/2007/08/08/4403914-sun.html*

BRBrown@auditor.state.oh.us

Bree Brown
State of Ohio Auditor's Office



Book Review:
Making Your Case: The Art of Persuading Judges,
by Antonin Scalia and Bryan Garner

Reviewed by J. H. Huebert

Let's put the bottom line first: is the new book by Justice Scalia and Bryan Garner worth reading and owning? Yes.

Scalia and Garner have created a unique work that is essential reading for any lawyer, young or experienced. In about 200 pages, they offer guidance on virtually all facets of written and oral advocacy.

First, they cover "general principles of argumentation." Which arguments to put first, last, and in the middle? How much to concede? Should you call your opponent "the Plaintiff" to depersonalize him? How best to conclude? The authors address all this and much more, drawing on their own ideas and experience as well as ancient and modern experts on rhetoric.

The next section discusses legal reasoning – how to think syllogistically, and how to establish your premises so judges will reach your desired conclusion.

The section on briefing offers extensive advice on "architecture and strategy." A sample: the authors suggest that you always put a statement of the questions presented at the very beginning of any brief unless the rules forbid it. You should also always include a summary of argument if the rules allow. And, of course, the authors have much to say on writing style.

The book covers all facets of oral argument: preparation, substance, the manner of argument, how to handle questions, and what to do afterward. The authors address questions any advocate is likely to have, and some questions you might not otherwise think of. What to take with you to the lectern? (An empty manila folder, nothing more.) How to handle a difficult judge? (Politely.) What to wear? (Not a sport jacket.) Their most important piece of advice may be that your "argument" should really be a conversation with the judges, much like the conversation you would have if you were explaining the case to an intelligent senior partner at your firm.

The book stands out not only for its comprehensive advice on all of the above, but also for its own style – it's a reference work, but it's also a pleasure to read straight through.

Another great advantage of this book over other works on legal writing and appellate advocacy lies in its subtitle: it's focused on what actually will *persuade judges*.

Too much material on legal writing comes from an academic's perspective, basing its recommendations on research regarding which fonts, font sizes, font combinations, and line spacings will allow a reader to get through a brief the fastest. Such guides overlook the fact that judges do not want you to reinvent the wheel – and few things are as likely to slow a judge down as a brief that looks different from every other brief he has ever seen.

The difference between the academic and practical perspectives on legal writing is evident at several points in the book where Scalia and Garner write separately because they disagree.

One of their disputes concerns the placement of citations: Garner holds the unconventional view that citations should be placed in footnotes, but Scalia wants citations where they've always been, in the body of the text.

Garner may be right about the theoretical advantages of footnoted citations (I am skeptical), but Scalia wins the argument by pointing out that "the conclusive reason not to accept Garner's novel suggestion is that it is novel." Scalia reminds us that our focus must be on serving the client. As he puts it, "You should no more try to convert the court to citation-free text at your client's expense than you should try to convert it to colorful ties or casual-Friday attire at oral argument."

The authors' dispute over the use of contractions in legal writing is similar. Garner favors it because it makes for easier reading and a more natural style. Scalia opposes contractions because you have nothing to gain, and much to lose, from using them. No judge will see a lack of contractions as too formal, but some judges may view the use of contractions as too informal.

Scalia comes out on the wrong side of one of these disputes, though, by his own criteria. Scalia recommends using "he" as the "traditional, generic, unisex reference to a human being," while Garner insists upon "gender neutral" language. I strongly agree with Scalia – but put my personal preference aside when writing a brief, because one never knows whether a judge will take offense at the use of "he" alone. A lawyer's duty to his client requires using the language that's less likely to cause offense – even if the offense is not intended or, in the lawyer's view, not warranted.

Of course, judges are supposed to decide questions based on substance, not style. And from my own experience as an appellate law clerk and attorney, I know that judges and their clerks ultimately look for the right answer – they don't decide cases by keeping score on stylistic points.

But style still matters, because you want to remove barriers to a judge understanding clearly why your position is the right position.

Yes, some of what's in this book has been covered elsewhere by Garner and others. But I've never seen the topic of how to persuade judges addressed so concisely and thoroughly in one place by figures of such great authority. I expect to return to it often before preparing briefs and giving arguments, and I suspect you will, too.

jhuebert@porterwright.com

J. H. Huebert
Porter Wright Morris & Arthur

The Lighter Side of Law

By Mark Kafantaris

Our profession is a serious one, full of lasting consequence and human complexity. Indeed, it is the very nature of young lawyers to take ownership in the various problems facing our clients as if they were our very own, and we are oftentimes incapable of putting down a file after laboring over an issue for hours. Much to the chagrin of our friends and families, these cases become inescapable long after we leave the office for the day, and even tend to linger in our sleep on occasion. The arrival of sophisticated cell phones capable of sending and receiving e-mails at all hours of the day certainly have not ameliorated these concerns. As we all can attest, it takes little convincing for the young lawyer to fully appreciate the important nature of our work.

These proclivities notwithstanding, Oscar Wilde may have been on to something when he reminded us "life is far too important to be taken seriously." Judge Pendelton Gains, of the Arizona Superior Court, no doubt understood this as well in granting Plaintiff's Counsel's Motion to Compel Defendant's Counsel to Accept Lunch Invitation, ostensibly to discuss "discovery and other matters." Though Defendant's counsel initially demurred, fearful that the lunch was a disguised attempt at settlement negotiations, he eventually made an "illusory acceptance by saying 'We would love to have lunch at Ruth's Chris with/on…' Plaintiff's counsel." Of course, the Court was confident that defendant's counsel could "withstand Plaintiff's counsel's blandishments and to respond sally for sally and barb for barb" to any attempt at negotiations. The lunch was to have been held not later than August 18, 2006, the Court being fully aware of "the penchant of Plaintiff's counsel to take extended cruises during the summer months." Though the Court was unable to find any support in either the Civil Rules or case law, it concluded that "motions of this type are so clearly within the inherent power of the Court" that they are non-controversial and require no specific legal authority.

The Ninth Circuit Court of Appeals has also shown its lighter side on occasion, though it has a tendency of hiding its humor carefully in footnotes. For instance, in *Fair Housing Council vs. Roomate.com*, the Court was called to review *de novo* the district court's decision finding that an on-line roommate match website did not fall within the ambit of the Communications Decency Act. In sorting through the evidence, Judge Alex Kozinski noted that in some instances, "folks are just looking for someone who will get along with their significant other," with a footnote to one particular posting in the record stating "The female we are looking for hopefully wont [sic] mind having a little sexual incounter [sic] with my boyfriend and I [*very* sic]." (emphasis added).

The Georgia Court of Appeals has also made some interesting use of its footnotes in *Wright vs. State of Georgia Dep't. of Natural Resources*, a case involving an alleged unconstitutional taking of Georgia alligators by the newly enacted policy of Georgia's Department of Natural Resources. All too mindful of the intense rivalry between the University of Florida Gators and University of Georgia Bulldogs, Judge Smith explained in the first footnote that "several times in this opinion, we refer to 'Georgia alligators.' We do so reluctantly and solely for the sake of convenience and brevity. We recognize that for literally millions of Georgians and Floridians, the term 'Georgia Gators,' or any approximation thereof, is an inherently offensive oxymoron. We apologize for any pain or distress caused by this unfamiliar and unfortunate juxtaposition."

The late Judge Ellsworth Van Graafeiland has proven that even intellectual property law can have a lighter side. *Hormel Foods Corp. v. Jim Henson Productions* was a case involving Hormel's claim that a wild boar character named Spa'am featured on merchandise for the film *Muppet Treasure Island* had the effect of diluting and infringing its trademark for the notorious SPAM luncheon meat. The opinion was certain to recount the countless jokes about SPAM's suspicious contents. The Court ultimately was confounded by the challenge, noting, "One might think Hormel would welcome the association with a genuine source of pork." The district court's decision denying Hormel's request for a preliminary injunction was affirmed on appeal.

Perhaps the most entertaining decisions have been authored by Ohio's very own Judge Mark Painter, of the First District Court of Appeals. Judge Painter had this to say in a case involving a taxpayer's lawsuit against Cincinnati Reds, Cincinnati, and Hamilton County for failure to collect stadium rent: "It has twisted and turned, parties have been thrown out and substituted, and none of the parties can agree on the rules of the game. The Reds, Cincinnati, Hamilton County, the taxpayer-plaintiff, and the trial court have become enmeshed in a series of procedural and legal double plays and errors. It is difficult to determine whom, if anyone, is on first. We resolve the case by calling the plaintiff out."

mark@kafantaris.com

Mark Kafantaris,
Kafantaris Law Offices

Getting to Work: *It's as Easy as Riding a Bike*

By Paul G. Rozelle

Spiraling gas prices. Frustrating traffic jams. Expanding waistlines. Environmental degradation. There are many reasons to consider cycling to work. It's inexpensive, fun, healthy, and environmentally sustainable. It's also catching on: an increasing number of attorneys and business and community leaders bicycle to work. Although you're intrigued by the idea, the challenge is getting started and sticking with it. Here are some tips:

The Bike

You can commute on just about any bicycle: mountain bike, road bike, hybrid, fixed-gear track bike, or fat-tired cruiser. Most importantly, get a bike that you feel comfortable on. Visit your local bike shop, consult with the staff, and think about how you will use the bike, how far you'll be going, what you need to carry, and the conditions you'll be riding in. Get a bike that fits you and your needs.

The Route

As drivers, we get from here to there quickest using roads with high-velocity traffic. Potholes? Rough pavement? Dangerous intersections? Not problems in your SUV, these are very real dangers to even the most seasoned cyclist.

So, don't think like a motorist; think like a cyclist. Use roads with slower — and thus less abundant — traffic, more trees, and interesting scenery. (These are roads you, and your fellow drivers, never use to get to work!) Check out Bikely (http://www.bikely.com) for cyclist-friendly route ideas, and seek advice at local bike shops and bike clubs. Consider whether you can use multi-use paths on your commute. The Ohio Department of Transportation has a list and map of local bikeways at http://www.dot.state.oh.us/bike/Central.htm.

If your workplace is farther away than you want to ride, combine bicycling with transit to make your trip. Bike one way and take your bike on transit the other way (all COTA buses have bike racks), or drive to a park-and-ride lot and bike the rest.

Carrying your stuff

We attorneys carry lots of stuff: files, books, lunch, laptop, change of clothing, etc. There are two approaches to schlepping your stuff: "messenger style" and "tourist style."

Messengers keep their bikes light, carrying weight on their bodies in a backpack or a cycling-specific messenger bag. Riding "messenger style" makes it quick to get your stuff on and off the bike. Timbuk2 (http://www.timbuk2.com) makes great messenger bags and backpacks. Locally, Seagull Bags (http://seagullbags.com) makes custom bags that are works of art and haul your gear, too.

Bike tourists carry weight on their bikes instead of their bodies, using racks and "panniers." By going "tourist style," you can carry more stuff, more easily and comfortably, over a longer distance than you could on your body. There are even cycling-specific garment bags for carrying dress clothes. Check out Two Wheel Gear (http://www.twowheelgear.com) or Jandd Mountaineering (http://www.jandd.com) for ideas.

Whichever route you take, reduce your load by storing dress clothes, shoes, accessories, etc. at work. Bring clean shirts, slacks, or skirts in your bag, or bring a supply of clean clothes to the office on non-riding days.

Securing your ride

Keep your bike safe from the elements and thieves. If you're lucky, your workplace will have a covered parking garage with a dedicated area for locking bicycles. If not, perhaps you can leave your bike in a corner of your office, in an empty office, closet, or storage area, or in a parking garage nearby. When I clerked in Boston, I locked up to the bars of a holding cell where inmates used to be held pending trial. Long in disuse for its original purpose, the jail was a very safe bike storage area!

If you can't keep your bike dry, at least be sure you keep it. Leaving your bike outside is fine if you secure it properly. Find a solid object, a street sign, or a post. Lock up in a well-lit area with lots of pedestrian traffic. Make your bike more difficult to steal than the other bikes around it: a U-lock plus a cable or chain lock will deter all but Harry Houdini.

Riding safely (and legally)

The safest way to travel by bicycle is as if you were operating a car. Under R.C. § 4511, a bicycle has the same rights and responsibilities on the road as a motor vehicle. The law requires that you to be as far to the right as you consider necessary to operate your bike safely. If you see road debris, broken pavement, parked cars, another cyclist, or anything that makes you uncomfortable, move to the left. Give yourself a safety cushion around those hazards. Take as much of the lane as you need to be safe.

Minimize risks by following four easy rules:

1. *Be visible*. Wear bright clothing and position yourself in the lane where you can be seen. Use lights and reflectors if riding at night.

2. *Be predictable*. Maintain a consistent, steady line of travel so that drivers can anticipate your course and pass safely. Obey all traffic laws. Be attentive.

3. *Communicate*. Use hand signals to indicate turns, make eye contact with motorists, and wave when a motorist yields to you.

4. *WEAR A HELMET!*

Finally, one of the best ways to learn about bicycle commuting is to ask one of us existing commuters for advice. We're a friendly bunch, and whatever your dilemma, we've faced it, too. I'm glad to be a resource, so just holler with questions.

Best of luck, and see you on the road!

prozelle@porterwright.com

Paul G. Rozelle
Porter Wright Morris & Arthur

Tis the Season:

A New Lawyer's Guide to Holiday Party Navigation

By Michael E. Heintz

Office and client holiday parties are an excellent opportunity to build your professional network, connect with the client you have been looking for an "in" with, and catch up with friends and colleagues in the community. The parties are also a great training ground for future marketing and business development work. The atmosphere is generally relaxed and open, with colleagues looking to introduce the people they know. As attorneys, we are expected to operate well in social situations, and for those expected to develop business in later years, the skill is critical. So how do you take advantage of an opportunity presented on a silver platter complete with a few meatballs and a martini?

You may just have your office's party to focus on, where you are hosting clients and other guests. Or, you may have several parties to attend throughout December. While each experience will be different, the following list of "do's" and "don'ts" should help avoid an embarrassing mistake while taking advantage of excellent opportunities.

- **DO:** Take your business cards and a pen. In repeating the networking theme, make sure people know who you are. Similarly, on the business cards you receive, write down the date and location where you met the person, and if they have a nickname. Or, carry some note cards with you and do the same when a card is not forthcoming. You will be glad you did when you are trying to organize all the great contacts you made come January 2.

- **DON'T:** Say you will attend a party and then skip it—your nametag will look lonely on the table at the end of the night. As clients and colleagues invite you, make every effort to attend and show your appreciation for the invitation. Especially with clients, an in-person visit is always the best way to reinforce a relationship.

- **DO:** Meet your clients at the entrance. If you invited people to your office party, make sure you are there to greet them. This part is non-negotiable. At the same time, do introduce them to your colleagues. Return the favor of being introduced to others.

- **DO:** Strategically map out your holiday party schedule. You may end up with multiple obligations in one night, or several in a week. Take a few minutes to develop your playbook, and remember that your energy will fade through the month. Who needs more attention? Where are they located? Which one do you need to be seen at and which can you breeze in for a few quick "hello's?"

- **DON'T:** Drink too much. Rest assured, whatever you're thinking, hilarity will not ensue.

- **DO:** Meet people you do not know. This includes clients, but also co-workers whom you do not know well or at all. If possible, review the invitation list in advance to see who is coming and do some homework on the people you would like to meet. Chances are they are talking with someone who will be happy to introduce you. Or, ask a colleague in advance to arrange an introduction.

- **DON'T:** Underestimate your ability to jump into a conversation. It will be strange the first few times, but with practice, it will get easier.

- **DON'T:** Dominate the conversation. If someone wants to know what you are working on, he or she will ask. Try to avoid "shop talk" at social functions; everyone needs a break from business now and again. Keep the conversation light and upbeat. Unless the party is to celebrate your retirement, it is not about you. If you do not have anything to add to a particular conversation, just hang back and wait for your moment.

- **DO:** Attend your departmental or office gathering. While adding one more party to the calendar may be undesirable, your absence from this one may be conspicuous. Your co-workers will appreciate seeing another side of you, and you never know where your next project may come from.

- **DO:** Thank the person who invited you. Make your mother proud, and leave a good impression.

While some of these "rules" may seem obvious, or in some cases flippant, they underscore a larger issue for new lawyers. Early in your career, holiday parties are a "high risk-high reward" proposition. They are an excellent resource to increase your network and generally practice meeting people on your own. On the other hand, they are an opportunity to embarrass yourself, your clients, your colleagues, and your office. As new lawyers, we need to be comfortable with the thought of socializing, and more importantly networking, with clients and co-workers. Holiday parties are as much art as they are science. No one set of rules works for everyone, and you need to develop your own style and method to enjoy and profit from the opportunities. Good luck, and happy holidays!

mheintz@porterwright.com

Michael E. Heintz,
Porter Wright Morris & Arthur

Welcome To Columbus

Introduction to Downtown Living

By Jameel S. Turner

Whether you have relocated to Columbus, or are just growing out of your law school apartment, Columbus offers several options, renting or buying, for downtown living for younger lawyers. The City, in conjunction with several experienced developers, has worked hard the past few years to transform old former warehouses and industrial buildings into luxurious apartments, lofts, and condominiums.

The benefits of living downtown speak for themselves given the convenience that downtown living provides for work and play. Just think how much you could save on gas and cab rides from your favorite local hangouts!

Whether looking to rent or to buy, the following list provides a number of downtown living options young lawyers should consider when thinking about relocating downtown.

FOR RENT

• Arena Crossing Apartments

Located in the Arena District, the Arena Crossing Apartments provide luxury living in an urban setting. Arena Crossing is literally steps away from Nationwide Arena, the North Market, Short North, Victorian Village, and acres of beautifully landscaped parks including McPherson Commons (the arch), North Bank Park, and Goodale Park. Arena Crossing offers 31 floor plans, 24-hour controlled access, an on-site fitness center, and many other luxuries. Arena Crossing offers 252 luxury apartments from $625 to $1400 per month. For more information, check out http://www.arenacrossing.com.

• The Seneca Luxury Apartments

The Seneca Luxury Apartments are located downtown, inside the Historic Landmark Seneca Hotel. The Seneca Hotel, with its grand ballrooms and lavish suites, was designed in 1917 to be one of the most upscale gathering places for Columbus socialites.

To help return the hotel to its former glory, it was recently restored and converted into 76 luxury studio, one, and two-bedroom units. Standing at the southeast corner of Broad Street and Grant Avenue in the heart of downtown, the Seneca is a vibrant landmark for a community that is home to thousands of young professionals. With several floor plans, and prices ranging from $750 to $1300 per month, the Seneca Luxury Apartments are worth a look. New lawyers looking to rent in the downtown area would be remiss not to give these apartments serious consideration. http://www.campusapts.com/Home.aspx?Proj=101&Name=Seneca.

FOR SALE

The condominium homes described below are by no means an exhaustive list of options for downtown living; however, they appear to be the most convenient and affordable for younger attorneys looking to relocate downtown. In addition, many of the homes below qualify for 10-year tax abatement from the City. Please contact the property owners for more information. For a complete list of properties for sale in the downtown area, see www.downtowncolumbus.com/living.

• Lofts At 106

Designed as an urban sanctuary in the heart of downtown, the Lofts At 106 provide dramatic views of the Leveque Tower, Scioto River, and the Arena District. The Lofts At 106 were the result of a renovation of a building built in 1910 that served as a JC Penney Department Store in the 1950's and offices from the 1970's until recently.

The Lofts provide many affordable, unique, and open condominium floorplans, which are complemented by building amenities such as a community recreation room, workout facility, and onsite parking and storage. Located at 106 N. High St., the lofts are just 1.5 blocks north of the Ohio State House, 3 blocks from the Arena District, and 5 blocks south of the Short North. Lofts are available now, starting at $140,000. www.theloftsat106.com.

• Terraces on Grant

Located on South Grant Avenue near downtown, each detail of these condominium homes has been well designed, from European styling to window placement, to the private terrace on each unit. Owners have secured indoor parking and use of a rooftop terrace with spectacular views of Downtown, German Village, and the Discovery District.

The condominium homes offered at this site are detailed and luxurious, and should be considered by any new lawyer contemplating a move closer to work. But, they are selling fast and are subject to availability. Prices range from $161,000 to $268,000. http://www.terracesongrant.com/.

• EcleXtion Lofts

Located within one block the Arena District at 221 North Front Street, EcleXtion Lofts offer unique floor plans combined with the energy of the neighborhood.

EcleXtion Lofts pride themselves in their unique floorplans. Each home can be customized by arranging your walls around the core kitchen and bath areas, allowing you to have more or less bedrooms, dens, or open spaces. There are only a few condominiums left for sale at EcleXtion Lofts, so if interested you need to act fast! Prices range from $165,000 to $380,000. http://www.eclextionlofts.com/

• Sixty Spring

Conveniently located near the corner of Spring and Third Street, Sixty Spring features industrial lofts with six different floor plans. These unique urban living spaces offer 16-foot ceilings, a free gym membership, underground parking, and a private landscaped courtyard for residents. In addition, many of the condominiums feature private balconies and terraces. Sixty Spring also includes an Urban Garden and Streetscape that were inspired by similar condominium amenities in the Chicago area.

Sixty Spring offers lease purchase programs for attorneys who may be seeking some flexibility in their condominium purchase. Currently, Sixty Spring has only a few units remaining, so anyone interested should act now. Prices range from $170,000 to $349,000. www.sixtyspring.com

As you can see, there are more than a few affordable options for relocating downtown. Moreover, the City is continuing to design and develop projects to revitalize the downtown area, including the construction of the new Huntington Park set to open next year. With all of the revitalization projects currently under construction, as well as the many opportunities for tax abatements, there has never been a more opportune time to consider relocating to the downtown area.

Jameel.Turner@baileycavalieri.com

Jameel S. Turner, Bailey Cavalieri

Elevator And Escalator Injury Claims

UP AND DOWN TRAFFIC LIABILITIES

By Glen R. Pritchard

Elevators and escalators are among the safest modes of transportation. Nevertheless, according to the U.S. Bureau of Labor Statistics and the Consumer Product Safety Commission, each year 30 people are killed and 17,000 are injured in incidents involving elevators and escalators. Here are highlights of some of the unique aspects of liability claims which may arise from such incidents.

Because elevators and escalators are used for transportation of passengers, owners of these devices are considered "common carriers." As such, the duty owed by elevator owners is greater than the usual duty of reasonable care. Common carriers owe a duty to "exercise the highest degree of care of which the situation was reasonably susceptible."[1]

Third parties contracted by the elevator owner to service, inspect, and maintain the elevators are also often named as defendants when an elevator or escalator causes an injury. The scope of the service company's duties will be defined by the contract with the owner. To the extent that the contract requires the service company to inspect the machinery or repair any defects it finds, or at least to report defects to the owner, the service company may be held liable to third parties for negligently performing those duties. As noted by the Ohio Supreme Court, privity of contract is not a barrier to such claims.

Where one, under a written contract, undertakes to service and examine the mechanical equipment of another and make a report on the condition thereof, and the equipment is of such a nature as to make it reasonably certain that life and limb will be endangered if such work is negligently performed, he is chargeable with the duty of performing the work in a reasonably proper and efficient manner. And if such duty is negligently or carelessly performed whereby injury occurs to a blameless person, not a party to the contract and lawfully using such equipment, such injured person has a right of action directly against the offending contractor. Liability in such instance is not based upon any contractual relation between the person injured and the offending contractor, but upon the failure of such contractor to exercise due care in the performance of his assumed obligations.[2]

Plaintiffs are often confronted with the challenge of having access to insufficient information to determine the cause of an elevator or escalator malfunction. For that reason, the doctrine of res ipsa loquitur is more readily applicable to cases involving injury or death caused by elevators and escalators.[3] The Ohio Supreme Court summarized the doctrine as follows:

In Ohio, it is well established that the of res ipsa loquitur is rule of evidence which permits trier of fact to draw inference of negligence on part of defendant from circumstances surrounding injury to plaintiff; weight of that inference, as well as weight of explanation offered to meet such inference, is for determination of trier of fact. * * * To warrant application of the rule, however, there must be evidence which establishes that (1) the instrumentality causing the injury was under the exclusive management and control of the defendant, and (2) that the accident occurred under such circumstances that in the usual course of events it would not have occurred if ordinary care had been observed.[4]

The heightened duty owed by common carriers combined with the doctrine of res ipsa loquitur may allow the plaintiff's case to escape summary judgment. In *Koepfler v. CRI*,[5] for example, the plaintiff fell when the escalator she was riding while leaving a Cincinnati Reds baseball game suddenly jerked. The premises owner and the escalator service company were both named as defendants. The trial court granted both defendants' motions for summary judgment because the plaintiff could not explain, with expert testimony, why the fall was caused by a defect or malfunction. The trial court reversed with respect to the premises owner, noting its heightened duty as a common carrier. The Court also observed that the doctrine of res ipsa loquitur created an issue of fact because the escalator was in the owner's exclusive possession and control. On the other hand, the appellate court let stand the judgment in favor of the service company because the theory of liability against it was ordinary negligence, and res ipsa loquitur did not apply to the service company.

Finally, state regulation of elevators and escalators creates some opportunities for the plaintiff to discover potentially helpful evidence.[6] The statutes require elevators to be inspected "twice every twelve months."[7] Certificates of operation may not be issued without the required inspections, and inspectors must send their reports to the superintendent of the division of industrial compliance with a copy provided to the owner. Elevator owners are also required to file a written report within 72 hours after an incident causing bodily injury or death. Finally, any complaints about an elevator or escalator may be submitted within 12 months of the event. OAC 1301:3-6-05.

In many ways, claims for injuries caused by elevators and escalators involve standard negligence principles. However, the unique aspects of these claims discussed here can mean the difference between success and failure for the plaintiff.

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1. *May Department Stores Co. v. McBride (1931), 124 Ohio St. 264; Welch v. Rollman & Sons Co., 70 Ohio App. 515 (1st. Dist. App., 1942)*
2. *Durham v. Warner Elevator Mfg. Co. (1956), 166 Ohio St. 31, syllabus para. 2.*
3. *Norman v. Thomas Emery's Sons, Inc., 7 Ohio App. 2d 41 (1st Dist. App., 1966)*
4. *Walker v. Mobil Oil Corp. (1976), 45 Ohio St. 2d 19, at 21*
5. *1998 WL 140090 (Ohio App. 1 Dist.)*
6. *For purposes of the statutes and regulations, escalators are included in the term "elevator". See R.C. 4505.01(A).*
7. *Pursuant to OAC 1301:3-6-04, "[a]t least one elevator inspection per year required under section 4105.10 of the Revised Code shall be performed in conformity with the provisions of the "Guide for Inspection of Elevators, Escalators and Moving Walks," ASME A17.2-2004 edition, approved by the American society of mechanical engineers on July 22, 2004, copyright 20056, and published on March 31, 2005."*

gpritchard@clarkperdue.com

Glen R. Pritchard, Clark Perdue & List

Professionalism In Public Sector Lawyering

By Christopher B. McNeil

Last year the attorney general's office sponsored a day-long seminar on topics of interest to public sector lawyers. Owing perhaps to the fact that it offered the elusive CLE triumvirate of ethics, professionalism, and substance abuse, enrollment for the conference was high with over 200 in attendance. There were in-house counsel to state agencies, assistant attorneys general, and members of private bar whose practice includes representation of regulated entities.

Among the topics being covered was a discussion about professionalism in public sector law. Not everyone stuck around for this segment, perhaps because it was scheduled for late in the day, or perhaps those who left didn't need the CLE credit. But those who remained became engaged in one of the livelier hour-long professionalism sessions we've seen in Ohio.

What sparked the debate was a discussion about the tone of argument and rhetoric used in motions and memoranda presented before state agencies. Over the course of the hour, the group engaged in something that doesn't seem to happen very often in our profession: we had a spirited exchange about what does and does not conform to professional standards when presenting legal arguments in supporting memoranda. Collectively, we took the first steps in defining what professionalism means for public sector lawyers, in the context of written argument.

This is important because unlike the ethical standards we find in the code of professional responsibility, professionalism isn't so much dictated by black-letter law, but exists through consensus. It's true that there are some black-letter benchmarks we're bound by, found not in the Lawyer's Creed but instead in the Code of Professional Responsibility. These include rules barring undignified and discourteous conduct that degrades a tribunal (DR 7-106(C)(6)), and conduct that adversely reflects on the attorney's fitness to practice law (DR 1-102(A)(6)). But there's a wide range of behavior that an attorney may be tempted to engage in that falls far short of professionalism without actually violating the code of professional responsibility.

The focus of the group's discussion at this conference was an excerpt of an argument that had been presented on behalf of one of the state occupational licensing boards. In a written closing argument, the state's representative was responding to a claim that had been made during the evidentiary hearing: during the hearing, the licensee claimed he had been surprised when a domestic relations court judge had the licensee jailed for failure to pay child support. The state's representative called the licensee's claim "ridiculous," and used the same adjective a second time two paragraphs later, to cast aspersions on the licensee's claim that he didn't know what the appropriate standard of care was in a point relevant to the charges against the licensee.

When I'm serving state agencies as an administrative hearing examiner, I tend to cringe when I see this kind of writing. It generally betrays weakness in the argument – I find the more the invective and ad hominem vitriol, the shakier the speaker's case. For the purposes of a discussion on professionalism, however, the example worked well. Certainly no one would conclude that calling an opponent's arguments "ridiculous" constitutes a violation of a Disciplinary Rule. At the same time, degrading your opponent (or in this case, degrading the licensee whose livelihood hung in the balance) seems to be the kind of wrong that our Aspirational Ideals are designed to guard against. The obligations of "civility [and] courtesy" adhere to us all, and there is an affirmative obligation to "[s]how respect by . . . demeanor."

Recall the impetus behind the establishment of the Lawyer's Creed and Aspirational Ideals, where the authors warned against "a diminishing of courtesy and civility among lawyers in their dealings with each other, a reduction in respect for the judiciary and our system of justice and a lessening of regard for others and commitment to the public good." By the Creed, we pledge "[t]o my colleagues in the practice of law, I offer concern for your reputation and well-being. I shall extend to you the same courtesy, respect, candor, and dignity that I expect to be extended to me."

The example presented to this group of public sector lawyers was useful because it was not so egregious as to garner a roomful of like-minded opinions. Several lawyers spoke in support of the author, saying there was nothing wrong with calling the licensee's arguments ridiculous. Some went further and complained that the hearing examiner (yours truly) should not have commented on this in the report issued in this case. The comment objected to was this: "This depiction of [the licensee's] presentation to the Board ill-serves all parties: it demeans the process, unfairly castigates [the licensee], and diminishes respect the public might have for the author of the State's brief." Some in the audience said they thought this dressing-down was too severe, that at most it should have been done privately, and that it was inappropriate and unprofessional in itself.

Others in the audience weren't so sure. Several commented that no one benefits from an ad hominem attack, and in emails afterwards at least one attorney, an in-house advisor to a state agency, expressed strong support for an effort to make more civil the style of discourse used in arguments before state agencies. So the example works because it sheds light on what may be a fundamental principle about professionalism: we get the profession we ask for and demand of ourselves. This isn't a part of the practice of law that is regulated by edicts coming from on high. This is a feature of practicing law that bubbles up from the bottom, by how we comport ourselves and by engaging open discussions like the one sponsored by the attorney general last year.

We set the tone of the profession we live in. For junior attorneys, supervising attorneys play an enormously important role in setting the tone of the arguments being advanced in litigation. Once an attorney is beyond the need of such supervision, the sources of guidance diminish – no one wants to see judges chastising attorneys in reported decisions. Group discussions like the one last year are a good start, and should be encouraged – not only for public sector practitioners, but for the entire spectrum of those engaged in the practice of law.

cmcneil@iwaynet.net

Christopher B. McNeil, J.D., Ph.D.

What A Lawyer Should Do

IF THE CLIENT COMPLAINS TO THE BAR

By Alvin E. Mathews Jr.

The grievance committee of your local bar association sends you the dreaded letter in that envelope marked "personal and confidential." Your heart is pounding. You rush to open the letter, which informs you that your former client has filed a grievance against you. He claims you did not handle his case competently and diligently, that you sided with the opposing party and her counsel, and you did not earn the "exorbitant" fee you charged. After you read the allegations, your anxiety turns to pure frustration.

You remember this is the same client you bent over backwards to help. You were more like a social worker, taking extra time to discuss the client's problems that were unrelated to the case. You know you should have never taken the case in the first place – the facts were lousy, but you felt sorry for the client. Against your better judgment, you took on the matter knowing you were the client's third lawyer. You didn't even bother to ask why the other lawyers withdrew. You were patient with the client's eccentric behavior and even reduced your fee. You did not withdraw, even though you should have. It's true that "no good deed goes unpunished."

Given the foregoing, what can you do to save your reputation and avoid losing the law license?

Carefully review the grievance and the rules. I know. It is difficult for you to have your integrity, let alone your livelihood, threatened. It is natural to become emotional. Yet, you must remain composed and deliberately consider the specific claims against you in the client's allegations. Consider whether there is any truth to the client's claims. Read the applicable Ohio Rules of Professional Conduct prior to attempting any response. Consider whether the facts support any rule violation.

Read the relevant part of the Supreme Court Rules for the Government of the Bar of Ohio, setting forth the procedure for the grievance review and the process for adjudication of formal lawyer discipline cases. For those who do not routinely work in the lawyer discipline area, the process can seem complex, so think about seeking help from someone familiar with the process.

Communicate with the investigating lawyer, and consider hiring counsel. The letter will tell you to whom you must respond. Do not be afraid to telephone that person with questions about the process, including procedural steps.

I know it is difficult, but try to consider objectively the facts measured against the potential rule violations. If you find it difficult to be objective or it is apparent that the former client's allegations have some merit, consider whether it is prudent to represent yourself in such a situation. Keep in mind the old adage about a lawyer who represents himself or herself.

Only proceed without ethics counsel if you can remain objective and it is clear the grievance is unfounded. You should not wait until authorities decide to file formal charges against you before you hire counsel. In the early investigative stage, ethics counsel helps you avoid formal charges. In contrast, once formal charges are filed, ethics counsel's job is to help you keep working or return to work as soon as possible.

Cooperate with the investigation; address the merits; and seek review of your response by a colleague. By all means, respond on time and do not ignore the grievance. Failure to assist in the investigation is a disciplinary violation itself:

Many lawyers get themselves in trouble by failing to respond to grievances that have no merit and which would undoubtedly be dismissed, if a proper response were submitted. If you find that you feel paralyzed and cannot respond, consider speaking with a mental health professional and contacting the Ohio Lawyers Assistance Program. Remember, it is not sensible to ignore a situation that can place your career in jeopardy.

When you respond, keep to the point. Those experienced in the process know that you must focus on the substance of the complaint and resist the temptation to attack the complainant. Prove that by any objective standard you properly represented the client's interests. Prove you were cordial and professional to the other side, but put the client's interests first. Prove your fees were reasonable and document that you earned them.

If the facts are in dispute, tell your side of the story, but provide documents to prove your version is accurate. If you are still representing the complainant, consider whether you can and should withdraw. If the client has been damaged in any way, consider how the client can be restored. If you speak with the complainant during the investigation, remain professional at all times and do not interfere with the investigation.

If you decide against counsel, have a law partner, mentor, or trusted colleague review your response for its tone and clarity.

The truth is that lawyers too often shrug off client complaints. They lose their objectivity and forget that reputation and career are potentially at stake when a client complains. Lawyers must always be cognizant that practicing law is a privilege and not a right, and all client complaints must be addressed promptly and with the utmost seriousness and respect for the lawyer discipline system.

amathews@bricker.com

Alvin E. Mathews Jr., Bricker & Eckler

Understanding Addiction

– PART II

By Brad Lander

In Part I, we looked at how all behavior comes from our brain, that the brain is chemical, and that chemistry follows the laws of physics and, therefore, mathematics. The insight that, at least at one level, behavior can be reduced to mathematical equations can seem demeaning or demoralizing. However, it does explain a great deal of why we believe, feel and behave the way we do, and it especially helps explain what happens when our chemistry is changed through alcohol and drug use.

What this doesn't tell us is how we can become addicted to alcohol or drugs. To understand this, we need to understand two things, motivation and adaptation. Let's looks at what motivates us to do some actions repeatedly and compulsively. (Part III will explore what happens when a behavior is repeated over and over.)

Early work in "brain mapping" (finding out what the different parts of the brain do) was done by placing electrodes into the brains of patients undergoing brain surgery under local anesthesia, introducing a charge into a part of the brain, and then seeing what happens. A bundle of nerve fibers was discovered that, when stimulated, produced sensations of extreme pleasure. This network of nerve cells became known as the "reward pathway." Most interesting (and most important) is that once the current was stopped, subjects became irritable, many of them pleading or demanding that the researchers turn the current back on.

To explore this pathway further, researchers implanted small electrodes into the reward pathways of a group of rats in a manner that allowed them to still move freely about their cage. A lever was placed in the cage that stimulated the pathway whenever the rat pressed down on the lever. Although one might guess that after thirty days the rats would be constantly pressing the lever, in truth, within thirty days, all the rats were dead. In the beginning, the rats would constantly press on the lever, continuing to do so to the exclusion of all other behavior until they would collapse. They didn't eat, drink, engage socially with the other rats or engage in sexual behavior. They pressed the lever until they died of malnutrition, dehydration and exhaustion.

It is frightening to think that we have a mechanism in our brains that could cause us to self-destruct. It leads us to ask, "What is this pathway for?" "Why do we have it?" To explore these questions, a group of researchers again implanted electrodes into the brains of rats, but instead of using the electrodes to stimulate, they used them to measure. The researchers watched the rats' behavior to see what actions caused the reward pathway to "light up." They found that the reward pathway became active whenever the rat would eat, drink, or engage in sexual behavior. (Subsequent studies have shown that this pathway is also activated by finding warmth when cold, safety when threatened, and other actions that bring "relief.")

The importance of the reward pathway to our survival can be understood when we now look at the brains of animals. An animal, such as a squirrel, does not have a brain capable of comprehending concepts like nutrition and procreation; this requires a developed prefrontal cortex found only in humans. So what drives a squirrel to eat or create little squirrels? The rule of thumb is "if it feels good, it must be good for me." Any activity that stimulates the reward pathway automatically creates a "drive" to repeat it. The squirrel eats not because it understands that food is necessary for health; it eats because it feels good.

Certain groups of molecules pass through the filters that protect our brain and stimulate the reward pathway. These are substances such as alcohol, tetrahydrocannabinol (THC) in marijuana, sedatives, opiate pain killers, cocaine, amphetamines, hallucinogens, nitrates (inhalants) and others. They make us "feel good." Unfortunately, anything that stimulates this pathway sets up the desire to do it again. Repeated enough times, we pass from desire to want, to drive, then to compulsion. Once the desire progresses to compulsion, it becomes consuming-dominating our thoughts and actions. When I become hungry (food deprived) thoughts of eating become a preoccupation. It starts as, "Man, a hamburger would taste good right now"; but it eventually becomes, "I'll bet if I just took that candy bar no one would notice." The rule is, "lower order deprivation overrides higher order motivations." This means if I "need" something badly enough, like food or water, I will eventually do something desperate to get it.

This is what happens in alcohol and drug addiction. Through repetition, the brain's reward pathway escalates the desire for a drink or drug into a "need" for that substance. What is perceived as uneasiness or discomfort is actually an "alcohol or drug deficiency," and people will take extraordinary risks with their health, reputation, relationships, safety, and careers to ease this discomfort. An otherwise rational, principled person will embezzle money, lie about her whereabouts, or stay out until 3 a.m. on a workday when the pain just gets too bad.

The next installment in this series will look at how repeated alcohol and drug use leads to addiction.

Brad Lander, Ph.D., LICDC

Women's Journey Through Addiction

By Candace Hartzler

Let it be heard; a woman's relationship with alcohol has always been fraught with problems. She clearly paid a price in early Rome, where wives were deemed legal property of their husbands, no less than a horse or carriage. If she missed a socially prescribed step (such as being caught with alcohol on her breath), her husband could opt to have her killed on the spot.

Society no longer frowns or digs in its heels—women are given free license to consume not only alcohol but a bevy of overly prescribed opioid pain relievers (Vicodin, Lortab, OxyContin, Percodan, Percocet, Darvocet), and benzodiazepines (Xanax, Librium, Ativan). Those substances can easily grease the addictive slide for women, leading to tolerance and the search for "more and better" mood alteration. Heroin use is on the rise, particularly among teens. Cocaine, methadone, marijuana, over-the-counter appetite and cold suppressants also provide those euphoric feelings sought by women with substance abuse problems. National Institute on Drug Abuse reports that in 2005, more than 6 percent of females 12 years and older were current illicit drug users and nearly 600,000 were admitted to drug treatment facilities in the United States, representing more than 30 percent of total treatment admissions.

A woman living within the confines of addiction, that harbinger of familial, social and psychological harm, will face the complex task of learning how to live without dependency on substances. Not only will her socially prescribed gender roles of empathic, self-effacing wife, mother, daughter allow society to excuse, even overlook, her growing dependency thus impacting her readiness for change, so will the court's response to her years of maladaptive behaviors. An addicted woman is not bad, just addicted, and her healing process can be jumpstarted by an arrest.

She needs to be held responsible for her OVI, possession or trafficking charge; needs to be bumped out of denial and jockeyed into position to receive the mentoring and guidance needed for effective change. While stopping her use of substances must come first, treatment for addiction and underlying issues must follow, or else the woman is left without support and after a brief respite will likely return to what is familiar.

When representing a woman with substance abuse problems, understand that addictive waters flow deeply within her psyche. Depending on the degree of pathology present (where her substance abuse fits along the continuum of harm to self and others), a woman with drug/alcohol problems is also depressed and experiencing guilt and shame over ways her use has begun impacting her social and familial relationships.

A woman turns to substances for reasons of comfort and self-medication and so is often delivered into the hands of addiction through depression and anxiety. Her attempt to alter physical and psychological pain has also altered her brain chemistry and her body has created a physiological need for more of the substance. Low income and/or years of self-negating behaviors have become woven into the tapestry of her addictive lifestyle and her self-esteem is thread bare.

Devon Jersild, in *Happy Hours: Alcohol in a Woman's Life*, discusses an addicted woman's issues: she is four times more likely to have been abused by a partner, nine times more likely to have been slapped, five times more likely to have been kicked or hit. She is five times more likely to have been beaten, and 75% to 90% of women reporting for treatment of substance abuse have been victims of incest, sexual abuse or other unresolved trauma. Her initial experience with alcohol or other drugs is likely to occur within the context of a romantic relationship and if her unhealthy relationship with males is not addressed, her chances for working a personal program of growth and change will be compromised.

A woman, the hand that rocks society's cradle, who began use of substances for reasons of self-comfort, is now hooked by her compulsive need for those substances. She may look good on the outside while drowning in pathology on the inside. Her arrest could be the invitation needed for growth and healing to begin. She needs education about the physiological and psychological components of addiction. She needs to sit in circles of women—gender specific treatment groups focused on self-empowerment principles of recovery. She needs A.A. and/or Women for Sobriety groups and a referral to a therapist skilled in treating both mental health and addiction issues as part of her continuing care plan.

An addicted woman knows she is swimming against the tides of her own well-being but feels powerless to change her circumstances. Every arrest, every crisis, is an invitation for her to begin anew. Through suggestions or mandates, our legal system could be part of the solution for women: tossing her the life raft needed to carry her toward the wellsprings of health and recovery.

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Candace Hartzler, MA/LICDC has worked in the field of addictions counseling for 20 years and specializes in gender specific treatment for women with substance abuse problems. She is currently employed at University Hospitals East, facilitating a Women's Intentsive Outpatient Treatment group, has presented numerous workshops for professional peers regarding Gender Specific treatment groups and is currently working on a book entitled, *Heart of the Matter*, a recovery guide for women with addictions.

Candace Hartzler, MA/LICDC

Hepatitis C:

A Silent Epidemic Among Ohio's Inmates And Re-entry Populations

By Rosemary Eustace and Nikki Rogers

October is designated as Ohio Hepatitis C Awareness Month, and it represents one approach to publicizing a looming health crisis of the American 21st century. Recent research findings suggest that Hepatitis C will surpass HIV as a major public health issue over the next two decades, largely because HIV is more likely to be diagnosed and is more controllable through medication than HCV (Deuffic-Burban, et al., 2007; Stringari-Murray, et al., 2003). In addition, the current world-wide rate of HCV infection is estimated to be several times greater than HIV, with up to four million Americans living with HCV. Because it is often asymptomatic in its early stages, early treatment is rare. Infected individuals will likely enter the symptomatic stage of their disease in middle and later life when other chronic diseases such as heart disease, cancer, and diabetes further complicate medical interventions. This will mean additional burden to the already strained health system by requiring more intensive medical and social interventions.

Approximately 82% of persons with HCV have a previous incarceration history (McGovern et al., 2006), and HCV prevalence is higher than that of HIV among US inmates (Lincoln et al., 2006). An Ohio Department of Health Report (ODH, 2005)indicated that 25.9 percent of 1,283 inmates tested were infected with HCV; however, it is unclear if this was a random sample of prisoners or persons identified as being at high risk and therefore were tested. The most prevalent behavior associated with the acquisition of the disease is injection drug use (IDU), a primary behavior associated with incarceration (Fox et al., 2005). The HCV rate among persons who use injection drugs can be as high as 80% (ODH, 2005). Other risk behaviors for the condition found in inmate populations include unsafe needle sharing, multiple sex partners, prison tattoos, alcohol and non-injection drug use.

The epidemiology of HCV among inmates has both cost-management and treatment implications. A 1999 report claims an average cost of $14,000 per year to screen and treat inmates with HCV because HCV clients present multiple medical conditions requiring treatment (Spaulding, Greene, Davidson, Schneidermann, & & Rich, 1999). Without proper prevention and treatment in jails and prisons, future health costs will be far greater. Compounding this issue, there are high rates of HIV/HCV co-infection among the incarcerated (Waldrep, Summers, & & Chiliade, 2002) that complicates the management of HCV and burdens penal medical resources (Bica et al., 2001; Solomon, et al., 2004). Inmates with "chronic" HCV may have multiple physical and psychological needs, thereby requiring a range of services that often include drug abuse and mental health services.

As with other infectious disease, the social implications of HCV disproportionately affects minorities, especially African Americans, and women who use drugs (Solomon et al., 2004). Once diagnosed, African Americans experience lower rates of effective control of the virus than Caucasians (26% versus 39%) (Butt, 2005). Services that expand HCV surveillance, diagnosis, prevention and treatment in criminal justice and community settings are needed. This includes both prevention education for persons not infected so they can better avoid infection, but also education for HCV positives in lifestyle changes that minimize risks for medical crises. Since liver disease and severe complications take years to manifest, health education for persons already infected promises to be cost effective. Among other interventions, emphasizing the need to be abstinent from alcohol is critical. In fact, medication protocols for persons with HCV identify alcohol users as not appropriate for HCV medications (Butt, 2005). A relatively low cost rapid test for HCV has recently been approved by the FDA, and this is promoting more wide-spread screening for the condition.

At the Substance Abuse Resources and Disability Issues (SARDI) Program at Wright State University's Boonshoft School of Medicine in Dayton, we are cooperating with local public health providers to screen for HVC, provide education, link clients to treatment, and develop culturally-sensitive outreach efforts for both the public at large and incarcerated populations. One of our projects, the Community Health Initiative, serves high risk African Americans (persons released from prison or jail, and women with other high risk factors) by providing a "One Stop" center in the Mt Olive Baptist Church. At this location, individuals with multiple health risks are provided education, testing, food, clothing, and case management assistance. This project is currently funded by the Center for Substance Abuse Treatment (CSAT/SAMHSA), the federal agency coordinating alcohol, drug, and mental health services nationwide.

References

Bica, I., McGovern, B., Dhar, R., Stone, D., McGowan, K., Scheib, R., et al. (2001). Increasing Mortality Due to End-Stage Liver Disease in Patients with Human Immunodeficiency Virus Infection. Clinical Infectious Diseases, 32, 492-497.

Butt, A. A. (2005). Hepatitis C virus infection: the new global epidemic. Expert Review of Anti-infective Therapy, 3(2), 241-249.

Deuffic-Burban, S., Poynard, T., Sulkowski, M. S., & Wong, J. B. (2007). Estimating the future health burden of chronic hepatitis C and human immunodeficiency virus infections in the United States. Journal of Viral Hepatitis, 14(2), 107-115.

Fox, R. K., Currie, S. L., Evans, J., Wright, T. L., Tobler, L., Phelps, B., et al. (2005). Hepatitis C virus infection among prisoners in the California state correctional system. Clinical Infectious Diseases : an Official Publication of the Infectious Diseases Society of America, 41(2), 177-186.

Lincoln, T., Tuthill, R. W., DePietro, S. L., Tocco, M. J., Keough, K., & & Conklin, T. J. (2006). Viral Hepatitis, Risk Behaviors, Aminotransferase Levels, and Screening Options at a County Correctional Center. Journal of Correctional Health Care, 12(4), 249-261.

McGovern, B., Wurcel, A., Kim, A., Schulze zur Wiesch, J., Bica, I., Zaman, M., et al. (2006). Acute hepatitis C virus infection in incarcerated injection drug users. Clinical Infectious Disease 42(12), 1663–1670.

ODH. (2005). THe Ohio Plan: Hepatitis C Prevention and Control. Columbus, OH: Ohio Department of Health.

Solomon, L., Flynn, C., Muck, K., & Vertefeuille, J. (2004). Prevalence of HIV, syphilis, hepatitis B, and hepatitis C among entrants to Maryland correctional facilities. Journal of Urban Health, 81(1), 25-37.

Spaulding, A., Greene, C., Davidson, K., Schneidermann, M., & & Rich, J. (1999). Hepatitis C in state correctional facilities. [28(1), 92–100.]. Preventive Medicine, 28(1), 92-100.

Stringari-Murray, S., Clayton, A., & Chang, J. (2003). A Model for Integrating Hepatitis C Services into an HIV/AIDS Program. Journal of Association of Nurses in AIDS Care, 14(5), 95S-107S.

Waldrep, T. W., Summers, K. K., & & Chiliade, P. A. (2002). Coinfection with HIV and HCV: More Questions than Answers? Pharmacotherapy, 20 (12), 1499-1507.

Rosemary Eustace, Ph.D. and Nikki Rogers, Ph.D.
Substance Abuse Resources and Disability Issues program,
Boonshoft School of Medicine, Wright State University

E-DISCOVERY:

Small Steps Can Yield Great Savings

By Christopher F. Shiflet

Over the past few years, e-discovery has grown from a little mentioned often avoided aspect of litigation into a core component that can make or break a case. It first gained widespread attention in the Zubulake and Morgan Stanley cases, and was thrust into the spotlight late in 2006 by changes to the Federal Rules of Civil Procedure that specifically targeted discovery of electronically stored information (ESI). Here in Ohio, similar provisions were added to the state rules of civil procedure that became effective on July 1 of this year. Amid all these recent changes to the law, civil litigants have little precedent to guide them, and their discovery problems are compounded by tremendous growth in the amount of information created. How can attorneys help their clients cope?

The problem?

While it is true that discovery requests are often broad and at times burdensome, no single e-discovery is the problem. The real problem is with the way information is managed. Imagine a simple request for production that involves only paper documents from a business client. Most attorneys are comfortable with this sort of discovery. Custodians likely to possess relevant documents are identified, along with storage locations where other relevant documents might be found. These sources are rounded up, reviewed, and produced. Simple, right? But what if this same company issued each employee a bank of filing drawers that filled their entire office as well as several filing drawers in a public filing room? What if employees routinely made copies of documents they received from their peers and filed them haphazardly in their office filing, public filing or both? What if "filing" a document meant nothing more than placing it in a drawer without any particular order? Suddenly, discovery becomes vastly more complicated. Next let's assume that all of these employees also sent between twenty and fifty memos to others throughout the day, but kept a copy of each memo sent as well as copies of all memos received. Oh, by the way – these memos frequently have multiple page documents enclosed.

Sadly, this paper-based analogy is a fair representation of the way ESI is managed within businesses today. The computer sitting at each employee's desk can store a phenomenal amount of information, far greater than a bank of filing drawers. Corporations often have personal network shares available to their employees as well. Finally, it is not at all uncommon for an employee to send and receive well over twenty emails in a given day. It would not be surprising if some readers handle ten times that amount. Even taking into account all of the foregoing ESI, a business may still have a plethora of information on Web sites, databases, Wikis, forums, instant messaging services, BlackBerry servers, and elsewhere. With so much information, it is vital to understand, organize, and control it so discovery can be approached systematically and accomplished efficiently.

Document retention policies

One of the keys to organizing and controlling business information is establishing a document retention policy that encompasses all of an enterprise's information, including ESI. Any reduction in the overall information a business retains decreases the universe of information that may be responsive in a particular discovery. Consequently, information should be retained only as long as it remains useful.

The useful life of different documents within an enterprise is driven largely by business and regulatory requirements. Regulated fields such as health care and banking must comply with retention periods specified in applicable laws. Beyond these regulatory requirements, business needs will dictate how long a given document needs to be retained.

Equally important to determining document retention periods is ensuring that those retention periods are followed. A court can look at a business's actions when it interprets its document retention policy. If, for example, there are a large number of different retention periods, or it is difficult to determine the retention period for a given document, do not be surprised if employees simply place all documents in the storage location with the longest retention period, making that longest retention period the de facto retention period for all documents. Also consider the frequent problem of an employee working under a very short email retention period, say one month. When an email in the employee's mailbox is over a month old, the email system purges it. The employee is annoyed that emails disappear after a month, so the employee begins archiving his email on his work computer. What if most employees react to a one-month email retention policy in this manner? It could result in a court determining that the de facto email retention period is indefinite. This outcome, both practically and legally, is in direct opposition to the purpose of defining a retention policy, failing completely to reduce the universe of potentially discoverable information.

A document retention policy must be simple and lightweight if it is to accomplish its goal. Otherwise, employees are likely to make mistakes in their retention decisions, and even skirt the retention policy if they feel it causes too great a hindrance to their work. When crafting your own policy, anticipate and discourage aberrant behaviors by talking with employees and modifying the policy until it is both efficient and easy enough that employees can follow it without complaint. An effective document retention policy will be one that is also reasonable, and such a policy will go a long way toward making e-discovery manageable in any business.

cshiflet@interhack.com

Christopher F. Shiflet, Interhack Corporation

Wage Payment *What Could Be Simpler?*

By Felix C. Wade

It hasn't been so simple for the world's largest retailer. Since 2005, Wal-Mart has lost three major "wage and hour" class action lawsuits, with damages exceeding $256 million. In the most recent case, Wal-Mart was found liable for not providing its employees rest and lunch breaks.[1] What can a lawyer do to help a business avoid the same or similar problems?

Every business knows that it have to pay the employees. Often businesses turn over wage payment to third party businesses specializing in payrolls. Unfortunately, that does not put an end to an employer's need to think about and address wage payment issues. There has been a dramatic increase in individual actions and class actions brought by both employees and the U.S. Department of Labor alleging claims for unpaid or improperly paid wages. These claims are crossing all industries. While some are frivolous, many have resulted in huge judgments and others in substantial settlements.

Wage payment mistakes are preventable, but even employment law specialists struggle to keep up with all of the relevant federal and state regulations. Here are some of the common issues where even the well intentioned business can create significant liability.

Employees vs. Independent Contractors

Employers must determine which of its workers are employees and which are independent contractors. State and federal laws provide far more benefits and protection to employees.

Multiple tests exist to determine a worker's status. Each state and federal agency has its own. Ohio courts apply the common-law "right to control" test. Workers with the right to control the time, means and manner of accomplishing their work are likely to be considered independent contractors.[2]

Another test was promulgated in a 1987 IRS revenue ruling. It contains twenty factors to be considered in determining a worker's status.[3]

"Exempt" vs. "Non-Exempt" Employees

Many business people say, "I pay my people on a salary, I don't have to worry about overtime." This is a recipe for disaster. It is unusual for an individual to be exempt from the minimum wage but it is possible based on business size or industry. The more common exemptions relate to overtime. Federal regulations generally require a guaranteed salary of $455 per week where the individual's primary duty is managerial, professional, administrative, computer, outside sales or involves otherwise "highly-compensated" employment.[4] Employers often fail to guarantee the salary and fail to perform the primary duty evaluation. Moreover, paying an employee a salary does not, in and of itself, make the employee exempt from overtime.

Meals and Rest Breaks

Ohio law does not require an employer to provide breaks (other than to minors) but many states do. Under federal law, in order for a meal break not to be compensated, it must be 30 minutes and "uninterrupted."[5] In order to be "uninterrupted" employees should clock out and be encouraged not to eat at their work station whether it is a desk or a machine.

Paid Time Off

Employers are not required to provide paid vacation to employees. However, if an employee is entitled to vacation pay under company policy, failure to pay the employee for vacation time, either when the vacation is taken or upon termination, may be treated as nonpayment of wages.[6]

Waiting and Travel Time

Time spent traveling back and forth to work is generally not compensable.[7] Waiting to begin work is usually compensable if it occurs during normal working hours.[8] "On call" time is generally not compensable if an employee is required only to be reachable by the employer.

Working "Off the Clock"

Non-exempt employees work "off the clock" when they work extra time in order to avoid paying straight time or overtime.[9] Employers should put systems in place to spot and prohibit this practice. Even if an employee works "off the clock" without permission, the employer is still required to pay wages.

Deductions from Wages

The FLSA states that employers may take deductions from employees' wages for such things as damage to employer-owned equipment, provided the employer gets written consent from the employee beforehand.[10] State laws vary widely in this area.

Employers may also deduct a reasonable amount from an employee's wages for things like room, board, and company-furnished transportation to and from work.[11] Be aware that the regulations may not agree with your clients' view of reasonable.

Recordkeeping

Under Federal law, employers must keep all payroll records for at least three years,[12] and all earnings records, including time cards, rate tables, and work schedules, for at least two years.[13]

The Ohio Constitution's new Minimum Wage Amendment goes beyond federal record-keeping requirements in several ways.[14] First, it applies to exempt and non-exempt employees alike. For three years after the termination of employment, employers must keep records of an employee's name, address, occupation, pay rate, and daily log of hours worked. These records must also be provided to an employee upon request without charge.

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Wage payment laws and regulations affect every employer and worker. This article cannot deal with all the ways businesses can create sizeable liabilities. We will leave it to another discussion to talk about paying people for getting dressed and undressed at work (labor and employment lawyers refer to these as "donning and doffing" cases, and they have nothing to do with sexual harassment claims). We also have not talked about bonuses, The Ohio Healthy Families Act ballot initiative or a myriad of other complex wage payment issues. By knowing your client's business and being mindful of your client's compliance in this area, you can enhance the level of service you provide.

1. *Alison Frankel, "Wal-Mart Loses $6.5 Million Wage-and-Hour Class Action," July 2, 2008, available at: www.law.com/jsp/article.jsp?id=1202422711168 (last visited July 10, 2008).*
2. *Pusey v. Bator, 762 N.E.2d 968, 972 (Ohio 2002).*
3. *Rev. Rul. 87-41, 1987-1 C.B. 296.*
4. *29 C.F.R. § 541.*
5. *29 C.F.R. §§ 785.18-785.19.*
6. *See Van Barg v. Dixon Ticonderoga Co., 789 N.E.2d 727, 728, 2003-Ohio-2531 at ¶ 9 (6th Dist. Ct. Appeals).*
7. *29 29 C.F.R. § 785.34; Bartlomain v. U.S.P.S., 870 F.2d 657, (6th Cir., Ohio 1989) (table case)*
8. *Chao v. Akron Insulation and Supply, Inc. 184 Fed Appx. 508 (6th Cir.,Ohio 2006)*
9. *See Reich v. Petroleum Sales, Inc., 30 F.3d 654, 655 (6th Cir. Tenn. 1994).*
10. *29 C.F.R. § 778.304.*
11. *29 U.S.C. § 203(m); 29 C.F.R. §§ 531.3, 531.6.*
12. *29 C.F.R. § 516.5.*
13. *29 C.F.R. § 516.6.*
14. *See Ohio Const. Art. II, § 34a*

fwade@szd.com

Felix C. Wade, Schottenstein Zox & Dunn

Thoughts On Lawyer Retirement

By Bert Kram

Whether retirement from your principal career is close at hand or well off into the future, it is prudent to give thought to how that transition is likely to affect you. The temptation is to jump to the question of whether you can afford to retire. As essential as that issue is, there also are other significant matters to consider. Here is a short list:

How will your changed status affect your family, most notably your spouse or significant other? Many spouses enthusiastically support retirement and look forward to having you relieved of work pressure. However, others fear the upcoming change. Their fear may relate to the loss of regular income. It may be due to concern about whether, after retirement, you will have focus and purpose sufficient to stay healthy and happy. Also, there is some truth to the humorist's line, "I married you for better or worse, but not for lunch." They may simply not look forward to sharing the house – their "office" – with you all day every day. Candid conversations about these subjects can expose and address those concerns.

When you leave your principal career, some things about you will change. You likely will cut loose from several long-time labels that may have been really important to you, even though you rarely gave them thought. You will no longer be the Senior Partner of the firm or the company's General Counsel. Indeed, you soon may no longer be Attorney At Law! What's that going to feel like? Will you have an identity apart from your place of employment or your long-time profession? How important is that identity to how you feel about yourself? If it is a major issue, it is time to give thought to finding other meaningful objectives for the future.

The lawyer's daily schedule is usually dictated in large measure by the needs of others: clients, courts, opposing parties, and many more Upon retirement your schedule suddenly is determined by you. Oh sure, there are a surprising number of routine items — shopping, doing laundry, paying bills, and others that heretofore passed largely unnoticed. But to a great extent you will determine how you spend your time. At first blush that should be wonderfully freeing. Indeed, I highly recommend that all retirees give themselves the freedom to do nothing at all for a period, using that time to relax, to recover, and to give thought to the future. The point here, however, is to assess in advance how well you will adapt when there is little structure imposed by the outside world. If you need outside structure to function, plan for that.

Physicians know that when their lawyer patients retire, weight gain will almost certainly follow. It is sure proof, had you otherwise needed it, that your occupation involves exercise. Without giving it great thought, each workday you move. Moreover, you are actively involved, which in turn may keep your mind away from whether you are hungry. With retirement you gratefully dispense with compelled activity. There is more leisure time, which also is time available to think of food and eating. That suggests that you must plan a sufficient exercise discipline to compensate for the calories that you now burn or avoid in a normal working life.

Lastly, many like to tease that they look forward to retirement as a thirty-year vacation. A quick look at those who truly enjoy retirement reveals that the better outlook is that it is a career transition. Those who capture happiness into the future generally are those who have a plan for their upcoming time. To develop that plan, they have made the effort to identify their own passions. What is the activity that you most enjoy doing or find most satisfying? It is an individual matter. Do not worry about what other people choose. Focus upon what matters to you. Pursing those interests or passions then becomes the focus of your next career and next period of life.

A word of caution: It is likely that the more substantive your choice for activity into the future, the more satisfying it will be. In this context it is easy to confuse recreation with career. One way to fail retirement is to do little that requires thought or purposeful contact with others. Nevertheless, what matters most is that the activity lights your fire.

For a more in-depth look at these retirement issues, you may wish to read *THE NUMBER, A Completely Different Way to Think About the Rest of Your Life*, by Lee Eisenburg, *DON'T RETIRE, REWIRE, 5 Steps to Fulfilling Work That Fuels Your Passion, Suits Your Personality, or Fills Your Pocket*, by Jeri Sadlar and Rick Miners.

Bert Kram

News From Nameless

By Lloyd E. Fisher Jr.

Dear Cousin Bud: I hope this reaches you before you hear from Maude Crabtree. You might not remember her, but she's the mother-in-law of Aunt Mable's boy, Junior. Since Junior graduated from LaSalle Internet Law School and started practicing with me, she keeps bothering him for free legal advice but this latest episode may involve you.

It all started when Maude read an article in the *Columbus Dispatch* about the Ohio Department of Taxation issuing a $300 tax assessment against a woman who had purchased cigarettes from an out-of-state dealer. The newspaper stated that over 5,000 Ohioans were sent tax bills totaling more than $2,000,000 for unpaid cigarette taxes. The following Sunday, Maude cornered Junior after church and began to rant about Ohio Gestapo tactics. It seems that for several years she's been buying cigarettes from an American Indian smoke shop in Arizona and she fears that she will be in the next group of assessments. Maude stopped at our office and tried to engage our assistant, Ethel Danzer, in a discussion about the problem but Ethel suggested that this matter was so important that it might warrant a class action by a big city firm like yours.

Maude is a strong believer in pre-emptive strikes and she has begun the compilation of what she believes are perfect defenses to any action by the taxing authorities. A few of the ones that she has mentioned are listed below:

1. The Indian smoke shop is located on the tribal reservation and therefore it is in a sovereign nation. Any matters concerning a sovereign nation are matters of international diplomacy and are reserved to the federal government. The State of Ohio should bug out!
2. Maude's dealings with the Indian smoke shop are matters of her personal privacy and those dealings cannot be disclosed to the state of Ohio. Especially since she's a woman.
3. The U.S. government and the State of Ohio have made smoking a big health issue, therefore any information about Maude's smoking can be disclosed only if she has signed a HIPPA form authorizing the release of such information. And she refuses to sign the form!
4. Maude's cigarette transactions involved an Indian tribe located in Arizona and a customer living in Ohio. Under the U.S. Constitution, Article I, Section 8, this clearly is "commerce" among the several States and with an Indian Tribe. Regulation of such commerce is reserved to Congress and the Ohio General Assembly and the Ohio Department of Taxation have no power to burden this commerce with taxes.
5. Some scientists (and Al Gore) have suggested that cigarette smoking is contributing to the global warming crisis. However, since neither the United States nor any American Indian tribe has signed the Kyoto Protocol, Maude is under no international restriction on smoking or purchasing cigarettes. So there!
6. The U.S. Bureau of Indian Affairs has been criticized repeatedly for its poor record-keeping. It is likely that such bookkeeping has affected Indian smoke shops and thus any records of Maude's purchases are suspect and inadmissible in any action by the State of Ohio.
7. Any crackdown on purchases of American Indian cigarettes could result in Ohioans crossing into Kentucky to purchase cigarettes subject to the lower Kentucky cigarette tax. This traffic would: (a) result in massive wear and tear on the Ohio highways in the area; (b) require increased activity of the Ohio Highway Patrol; (c) raise constitutional issues of search and seizure if the trunks of returning Ohio cars are opened and (d) renew the old question of the exact location of the boundary between Ohio and Kentucky.

Cousin, these are just some of the points Maude has been talking about. Far be it from me to tell you how to run a big city law firm, but, if you take on Maude's case, it will be a class action with the least class I can imagine.

See you at the family reunion.

Your Cousin

lfisher@porterwright.com

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

TEN YEARS AFTER:

The Columbus Blue Jackets, The NHL And Free Tickets

By Greg Kirstein

First, as much as I'm flattered by the company hockey fans think I keep, being General Counsel of a National Hockey League team does not entail having morning coffee with Wayne Gretzky and Mario Lemieux, or shootin' the breeze with my home boy, Rick Nash. I wish.

It does entail though, much to my chagrin, some really boring leases for retail space, an occasional tax return for the team's foundation, and always, always telling fans they're right — even when I know they're not.

In all seriousness, the biggest attraction of the job is easily the variety. From negotiating major deals with large sponsors, to run-of-the-mill slip-and-fall cases occurring in Nationwide Arena, to figuring out how to get the next Russian or Czech player through the immigration process, the constant variety is an elixir. (Likewise, it helps that I don't have to bill by the hour or win an auto accident case to feed my family!)

And, I can unabashedly report, 10 years into my dream job, I consistently get asked three questions. "Can you get me free hockey tickets?" "Can you get me tickets to that Rolling Stones/Billy Joel/Hannah Montana/NCAA Men's Basketball event?" And, "Hey, those seats near the glass look good. My [insert cousin/boss/kid/minister] would really like to come to another game." (Unspoken translation: when can I give them free tickets again?!)

(Honorable mention goes to whether I can get Blue Jackets' Captain Rick Nash to their daughter's Sweet 16 party.)

Ten years after joining the Jackets, after a 16-year run mostly as a litigator with a minor league sports practice, I can sincerely tell you it's been a tremendous experience. For all of us frustrated jocks (5'8' = no chance of a college basketball career), working day-to-day in a team setting makes you at least think you're still playing. Even though the office morale shouldn't rise-and-fall based on how many rubber pucks younger men shoot into a net, it predictably does. But the next game always bring a new sense of hope, and even though there's little break in the flow of legal work, it always seems likes something's missing during the off-season.

We've had our share of things I never would have expected when I said "yes" to the job in 1998: the 2004-05 NHL lockout, where all of us somehow kept our jobs due to the unending generosity of John H. McConnell and his son; watching the NHL and our club spend beaucoup bucks in legal fees when the Russian Army declared that player Nikolai Zherdev really belonged to them; and the tragic death of a 13-year-old girl struck by a puck in our building, which caused hockey leagues worldwide to promptly install nets in their arenas.

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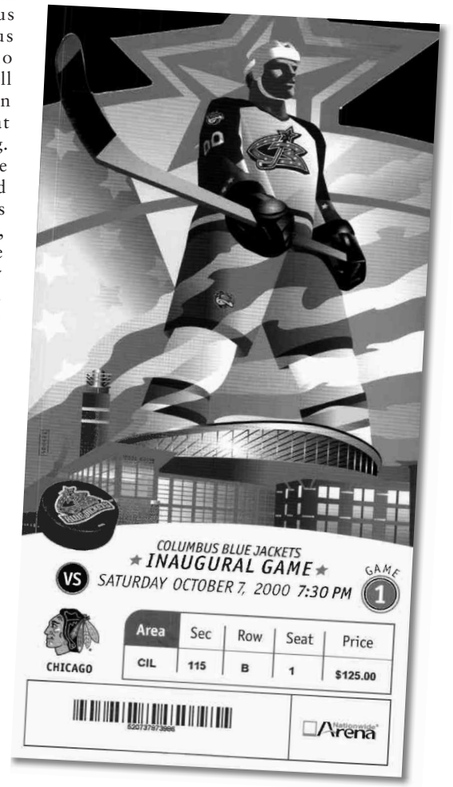

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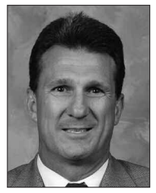
It's also been intriguing to watch the to-and-fro of Columbus's support for its first-ever team in a "Big Four" professional sport: unbelievable fandom in the first few years, fewer casual fans post-lockout, and a renewed sense of pride and excitement with the recent hiring of Stanley Cup-winning Coach Ken Hitchcock. Our club is steadfastly thankful for the fan support for a "non-traditional" sport, and lawyers in particular have been to our games in droves. We also humbly believe we've done something grand for the community. Without the team, there's likely no Arena. Without the Arena, there's no Arena District, and without the Arena District, Columbus is minus one of its top five developments in the past 50 years. (Thank you, Mr. Mac and Nationwide.)

So what do I really do? The job is largely that of a contract lawyer: coaches, GM's, broadcasters, scouts and trainers' contracts; building lease, sponsor deals, food and beverage agreements, merchandise deals and signage deals; radio, TV and cable TV deals. There's a tort side, usually stemming from injuries suffered at Arena events. There's a licensing and intellectual property side: logos, trademarks, slogans, colors, Stinger, cannons and Hats for Heroes. There's an immigration side, as typically only 15% of the NHL players are American. Post 9/11, unfettered travel for foreigners has gotten tougher. There's a football side with the Columbus Destroyers, whom I "loan" my services to. And lastly, there's the part my friends think dominates my days: assisting on NHL player contracts, affiliation agreements with minor league clubs, and the occasional behind-the-scenes work when one of our players, although rare, gets (pause) rambunctious.

A decade in, I continue to be told by most lawyers that I have the best law job in the city. I'm fortunate to work for people of character and to be part of something that for many, finally put Columbus on the national map. Thanks to my brethren in the bar and their firms for your support of the Jackets — and every now-and-then, call me if you need a freebie or want to meet Mario, Wayne or Rick!

gkirstein@bluejackets.com



Greg Kirstein, Sr. VP & General Counsel, Columbus Blue Jackets

A Baltic Blast

By The Honorable David E. Cain

A tour of the Baltic Region is a surprisingly beautiful and educational adventure into the past and present.

Nowadays, millions of people are doing it. And, the fellow travelers from around the world offer still more exposure to cultural diversity.

Our trip was originally planned as a vacation, a chance to leisurely cruise from place to place and soak in the sights and a chance for my wife, Mary Ann, to see the area where her paternal grandfather was born and raised. It turned out to be an eight-day crash course through the rich history of the Baltic States with the use of buses, boats and planes.

Many from Columbus have made such a trip. The first in modern times was Columbus attorney Myron Shwartz who traveled to Moscow in 1968. It was the first American tour allowed and most of the participants were reporters, he said. He has returned two or three times since. "You could tell how our countries were getting along by how we were personally treated," Shwartz recalled. During our first trip, relations were good. The Russians were proud of Sputnik. We went to the opera and sat in the front row. The next time, things were different. And we were seated in the very last row at the opera."

Our first stop was Stockholm, a city of breathtaking charm, beauty and history. Our traveling partners were my sister, Alice Shooter of Fishers, Indiana; sister-in-law, Joanne Wray of Cambridge; and Dr. Jerry and Jay Gilroy of Lansing, Michigan. Literally translated, Stockholm means "log island." Actually, it covers 14 islands with its space divided into one-third water, one-third green space (all public parklands) and one-third for structures. The latter was nearly all paved with chunks of marble (roughly in 3-inch cubes) arranged in curving patterns. Stockholm is the site of the Nobel Prize and a place at center city called Old Town. Spread over a hill with bending narrow streets, shops and restaurants thrive in Old Town where about 2,500 people reside in buildings that date back to the 1500s. Stockholm could be described as busy (pedestrians still crowd the streets at midnight) but relaxed. Even the ornate soldier guarding the Royal Palace slouched from time to time. "We're relaxed because we haven't been at war for 200 years, we've had no natural disasters and the taxes are only 108 percent," according to our guide Aviva Cohen-Silber. She turned out to be our favorite of the entire trip because of her ability to eagerly and intelligently discuss everything from health care to shipwrecks. She loved her country, loved hearing about ours and is fluent in English, German, Hebrew and Swedish.

We boarded the boat at Stockholm and it headed east across the Baltic Sea. The next morning, we were at Tallinn, Estonia, a former Soviet state. The main attraction was Old Town, a walled area that still has 20 of 46 original towers built in the Middle Ages. When our ship's staff had announced the night before that Tallinn is on daylight savings time and clocks needed to be advanced an hour, I realized that the lack of sleep was posing a problem. We had lost a whole night going from Chicago to Stockholm when clocks were suddenly advanced by six hours. We would enter still another time zone before arriving in Russia the next day and Tallinn had the nerve to swipe another hour by being on daylight savings time? It already stayed daylight till almost midnight. And one could not quite tell when the red on the horizon was the sunset or had become dawn. And they needed daylight savings time?

By the next morning, we had arrived in Russia, docking at St. Petersburg where things were right off colder, damper and darker. "Our climate is nine months of anticipation and three months of disappointment," a guide would soon be telling us. But a six-man brass band greeted us as we disembarked and it played a variety of Americana tunes to lighten our spirits. St. Petersburg was founded in 1703 by Peter the First, aka Peter the Great, and now has 4.5 million in its metropolitan area. A bus ride through the city to Peterof's Palace on the outskirts reveals block after block of massive marble block apartment buildings, each one home to thousands of residents. Many were built in the 1950s in the architectural style of the Stalin Empire, or as some would say the "Stalin Vampire." In 1995, "privatization" became a reality and residents were thereafter authorized to buy apartments previously being rented by the state. The advantages of private ownership are now readily apparent.

St. Petersburg incorporates more than 100 islands and is crisscrossed by more than 60 rivers and canals, sometimes drawing comparisons to Venice, Italy, a place that Peter had visited and loved. Even the city's some 300 bridges show architectural pride.

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The city was under seize for nearly 900 days during WWII. The Nazis occupied and trashed Peterof's Palace to the west and Catherine's Palace in the village of Pushkin about 18 miles to the south. Approximately one million people starved to death and were buried in mass graves. But the Nazis were never able to penetrate the city limits. Thousands of art pieces, gilded chandeliers, furniture and countless invaluable antiques were individually wrapped, padded in wooden crates and shipped to Siberia for safekeeping before the Nazis arrived. Now restoration of both palaces is nearly complete and the furnishings have been returned to create stunning sights into the opulence that surrounded the reigns of Peter and, then, Catherine.

Our second day in Russia created another life-long memory. This time we met our guide at 6:30 a.m. (instead of the usual 8:30 a.m.) and headed for the St. Petersburg's airport to catch an aging jetliner for a one-hour flight to Moscow.

"The most urgent problem in Moscow is transportation (despite nine train stations and four airports)," our guide commented as the bus hit stop and go traffic several miles outside the city. Ford Focus is one of the most popular new cars and Russia has several plants producing them.

"The most expensive thing is real estate," she added. An ordinary flat costs about $5,800 per square meter, she said, and banks charge about 15 percent interest on purchase loans. Again, the apartment buildings are huge. Single family homes are virtually non-existent within Moscow and some 10 miles beyond. "Downtown" would seem to include about everything inside the 100-kilometer highway that circles the city. Words such as "massive," "powerful" and "unbelievable wealth" keep popping into one's head as the bus continues inward. And the whole area is covered with permanent snow about six months of each year.

The word "Kremlin" means fortress and citadel. It is actually a walled city with museums, churches and palaces as well as top governmental offices. They sit behind fortress walls that have an overall length of 2235 meters. The Kremlin is situated on the high bank of the Moscow River at the mouth of the Neglinnaya River. On the other side of one of the walls is Red Square, originally called fireplace in the 1500s and then Torg (Mart) Square in 1700s and now so named to mean beautiful (in Slavonic). With the towers of St. Basil's Cathedral at one end and many towers inside the Kremlin all in one panoramic view and sporting their tops of many tiered, colorful hipped roofs, the mammoth meeting place is breathtaking indeed. The tower tops, made of brick covered with copper, look like onion shapes but were actually originally conceived to resemble flaming candles.

Our five-star lunch at the famous Pushkin Café was another unforgettable.

We arrived back at our ship in St. Petersburg at nearly 11 p.m. and had an 8:30 a.m. date with another guide the next morning.

Construction of Catherine's Palace began in 1710 to give her a summer palace, a choice of where to stay. Restoration began 42 years ago and is still not quite complete. The palace has 32 gilded rooms on the second level which serves as the main level. Nobody counted the rooms on the other two floors because most of them were servants' quarters. On the second level, ceilings were covered with painted tapestries from the 17th Century. The walls in one room are totally covered with pieces of the precious stone Amber (indigenous to the Baltic) and in another room the walls are papered with original portraits of young women.

In the afternoon, we visited the State Hermitage, one of the finest art museums in the world. It occupies six magnificent buildings along the embankment of the River Neva in the heart of St. Petersburg. Founded by Catherine II in 1762, the Hermitage has 1057 rooms and more than three million pieces of art. Other features include a chandelier in the Central Hall that weighs more than a ton and in the early days had to be lowered every evening for the candles to be lighted. The building was not damaged by the Nazis because they never made it into the city. Estimates are that if a person stood in front of each work of art in the Hermitage for just one minute, the visit would take more than seven years. We spent only two or three hours but still got to see works by Vincent Van Gogh, Pablo Picasso, Leonardo da Vinci and Rembrandt – so close you could reach out and touch them (if you're crazy). The Hermitage has 20,000 visitors a day. In all, the St. Petersburg area has more than three million a year.

The next morning we were in Helsinki, Finland which was founded in 1550 to compete with Tallinn for Baltic Sea trade. Today, forestry is the biggest industry with 77 percent of the country covered with woodlands and paper being the chief export. Flat-bottomed, iron, ice-breaker boats keep the ports open in the winter.

As our ship sailed away in the afternoon, sun-bathed bodies dotted the bare rock beaches of an island not far off the mainland. It was one of the best half dozen days of the year, we had been told. The temperature was 66° F.

The next day brought us to Visby, the capital of Gotland. The city was founded in 700 A.D. by the Vikings but the first record of people living on Gotland dates to about 500 B.C. The Vikings became rich from the sale of silver and built a 3400-kilometer long sea wall around the city to protect their silver hoards from thieves. Two miles of the wall – along with scores of medieval houses, churches and towers – are still standing. One of the churches has been in continuous use since 1225. The whole island is limestone and that provides the surface for ancient picture stones on display in the museum.

But most of all Visby looks like the setting for a fairy tale with the ruins of fortifications and flower covered cottages lining cobbled lanes that meander over the hillsides. Thirty-five varieties of wild orchids thrive in the glades and the town is blanketed by hundreds of varieties of roses that bloom even into November because of the gentle climate. The Swedish island became known as the "island of roses and ruins" and is visited by botanists from all over the world. Today, it is known as a photographers' paradise.

Our last stop was Copenhagen, the cosmopolitan capital of Denmark. Copenhagen has its share of attractions, but I was now too tired to take notes. Instead, I simply enjoyed riding along Hans Christian Anderson Blvd. and watching the gondolas and kayaks on the nearby canals.

Denmark has a population of five million people and four and half million bicycles, the guide pointed out. The average income is taxed at 50 percent and the purchase of a car is taxed at 180 percent.

With plenty of public transportation (along with the bicycles) cars are not needed, she added.

As with all the Baltic cities (except Russia) bike paths at least half as wide as car lanes were plentiful and well used. Lutheran is practically the only religious denomination in Scandinavian cities, but hardly anyone goes to church except on special occasions (perhaps something is in their blood from the religious persecution of their ancestors). Gasoline averages about $6 a gallon and Europeans think Americans are silly for worrying about $4 a gallon.

And most noteworthy was cleanliness. All of the cities, including those in Russia are virtually litter free.

David_Cain@fccourts.org

Honorable David E. Cain,
Franklin County Common Pleas Court

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