COLUMBUS BAR

Lawyers QUARTERLY

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A Rededication to the Rule of Law

By Nelson E Genshaft

With the 50th anniversary of Law Day approaching on the first of May, I thought about what it means to be a country that prides itself on the rule of law that is elevating the law above people and making all people subject to the same application of the law. I tried to think how the rule of law can be squared with our country's history of slavery, but I don't think it can. In short, the two cannot be reconciled, but we can try to understand the background. The rule of law applies equally to other segments of society. Women in this country have also struggled for their own rights to participate in politics, professions such as law and medicine, and the workplace. It was not until 1920, with the ratification of the 19th Amendment to the Constitution, that women achieved the right to vote.

It is frequently said that the term rule of law is often used but is difficult to define. To us the concept draws on English and American history, beginning with the Magna Carta in 1215, which guaranteed that the rights of life, liberty and property of free subjects of the king could not be arbitrarily taken away. The struggle between monarchs, who considered themselves answerable only to God, continued throughout the 17th century with England's Glorious Revolution. In 1628 Parliament presented its Petition of Right to Charles I. Later, the country was consumed in the English Civil War, which included the execution of King Charles in 1649. The monarchy was restored in 1660, and then changed by force with the invasion by William of Orange, who was married to Princess Mary, the daughter of King James II. The 1689 Bill of Rights presented to William and Mary by Parliament was a catalogue of past abuses by kings and advocated "certain ancient rights and liberties" for English subjects.

The founding fathers in America borrowed heavily on these concepts and saw the way that King George treated the American colonies as more examples of the arbitrary abuse of citizens by the government. They drafted the Constitution with the idea of creating a federal government with specifically defined powers. They further separated those powers among the three branches of government, the legislative, executive and judicial. The ratification of the Constitution by the states led to the Bill of Rights, the first ten amendments that further defined personal liberties for American citizens.

The ideals defined by the Revolution, the Constitution and the Bill of Rights were not extended to everyone. Article I, Section 9 of the Constitution provided that Congress could not prohibit "the migration or importation of such persons as any of the states … shall think proper to admit," thus extending the slave trade until 1808. Article I, Section 2 set up the formula for Congressional representatives by "adding to the whole number of free persons, including those bound to serve for a term of years … three-fifths of all other persons," meaning that slaves were counted as only three-fifths of a person. Article IV, Section 2 contained the fugitive slave clause, which meant that a slave could not gain freedom by escaping to a state that had no slavery. For the first 60 years of the 19th century, the country was embroiled in the debate over slavery, pitting those who regarded slavery as a moral blight against those who saw the issues in terms of political, economic and states rights issues. The intense positions eventually led to the Civil War in 1861. But where was the law on these issues?

For the most part, the federal government supported the Fugitive Slave Acts. The 1793 legislation permitted the master of an escaped slave to seize the slave and certify to a federal judge or local magistrate that the slave was still bound to service under the laws of another state. With that certification, the court was bound to release the slave to the master's custody. Pennsylvania enacted a series of laws designed to create procedural roadblocks to enforcement of the Act, such as requiring a warrant before seizure of the slave and providing more due process rights for the accused. In the 1842 case of Prigg v Pennsylvania, the U.S. Supreme Court held the Pennsylvania Law to be unconstitutional as it interfered with rights guaranteed to the slave owner by Article IV of the Constitution. In other words, the states could not trump federal laws designed to protect the slave holding interests, no matter how offensive those laws were to the states.

In 1850, Congress passed the Compromise, another Fugitive Slave Act designed to permit summary procedures to establish the status of a person as a fugitive slave. This Act not only jeopardized the freedom of escaped slaves and free blacks in the North, but also provided penalties against anyone who aided or gave shelter to a fugitive slave. The 1857 decision in Dred Scott v Sandford by the Supreme Court denied the plaintiff his claim that he was free because he resided in a state that prohibited slavery. In a far reaching decision, that went beyond the claim made by Dred Scott, the Court held that no person of African descent could be a citizen and that the plaintiff had no standing to enforce any rights in federal court.

With the end of the Civil War, the three new amendments to the Constitution (Thirteenth to abolish slavery, Fourteenth to provide due process and equal protection, and Fifteenth to guarantee voting rights) were passed. But for almost 100 years, this country struggled with how to reconcile those rights with the reality of state laws and practices that separated rights based on skin color. In 1896 the Supreme Court decided the case of Plessy v Ferguson, allowing states to maintain separate facilities for blacks, provided they were equal to those maintained for the white majority. This was the law of the land until the 1954 decision, Brown v Board of Education, which struck down the "separate but equal" doctrine. Brown was followed by the Civil Rights movement over the next decade, culminating in the Civil Rights Act of 1964, which further defined the position of the law on issues of racial equality.

The world has continued to grapple with the enforcement of the rule of law. After World War II, the governments of the United States, United Kingdom, Soviet Union and France created an International Military Tribunal for the trial and punishment of Nazi war criminals. In his opening statement at Nuremberg, Justice Robert Jackson, who served as chief counsel for the United States, said that this was the "first trial in history for crimes against the peace of the world." Since then, from Cambodia to Rwanda to Yugoslavia, there have been many tragic situations that cry out for enforcement of rules governing war, refugees and catastrophes created by man. These prove once again that the world is in dire need of a set of enforceable standards that governments are held to.

Last year, the American Bar Association launched its World Justice Project and proposed a working definition of the rule of law that comprised four principles. Under this definition, governments that adhere to the rule of law all share these characteristics:

- A system of self-government in which all persons, including the government, are accountable under the law
- A system based on fair, publicized, broadly understood and stable laws
- A fair, robust, and accessible legal process in which rights and responsibilities based in law are evenly enforced
- Diverse, competent, and independent lawyers and judges

The rule of law is more than a nice concept or philosophical cliché. It affects all of us who look to our laws and the government for equal treatment in such areas as housing, schools, and public services, or for businesses that want to conduct commerce around the world without having to bribe public officials; and for all of us who want systems in place to resolve disputes in a fair and efficient forum. The United States has a long and shameful history of bigotry and slavery, which undermines our dedication to the rule of law. But, by knowing our history, defining the principles of the rule of law and recognizing the value of the rule to all, we can rededicate ourselves to the ideals that can contribute to improvement of our system of a government of laws, not people.

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PRESIDENT GEORGE'S MANUAL OF MANNERS

By Bruce Campbell

No, not that President George. This President George did not emerge from Harvard largely oblivious of the mother tongue; rather, he squeezed eloquence and refinement out of a sixth-grade education and his own scholarship. This George wasn't handed great fortune by his parents; instead, he parlayed his self-acquired abilities as a surveyor into a considerable landed estate and the great esteem of the citizenry. This George was elected unanimously (without intervention of the Supreme Court), gave a mercifully brief inaugural address (ninety seconds) and went straight to work on the business of fabricating a new polity from the rawest of materials.

Not without his quirks, this George insisted that the teeth of his six white horses be brushed every morning and carried a sundial around in his pocket. He also tried to stamp out swearing in the U.S. Army, a brave, if laughably futile undertaking, which may be what subsequently moved Jimmy Carter to posthumously elevate him to the rank of six-star "General of the Armies of the Congress," thus trumping all five-stars (but not increasing his pay grade).

As we all know, POTUS-1, was some special dude in all matters military and political (in the pristine sense of that term). But who knew that before that phase of his life, he was, at 14, something of a prototype for Emily Post, Dear Abby, Doctor Phil and those of their ilk?

Law Professor Wm. Weston, who recently came up from Florida to do an ethics seminar for the Columbus Bar, gave me a tiny red book with a long title, *George Washington's Rules of Civility & Decent Behaviour* [sic] I*n Company and Conversation* (Applewood Books 1988). The publisher of this little gem notes in a forward that young George may have cribbed some or all of his material from French sources of the time, but hey, all the kids were doing it. While I cannot share with readers all 110 Rules (some remain classified by Homeland Security and can be viewed only on a need-to-know basis), I have been authorized to pass along a few (with slight bowdlerization).

To be sure, some of George's Rules are a tad quaint, low these 262 intervening years. No. 100, for example, warns us to, "Cleanse not your teeth with the table cloth, fork or knife." Now, of course, we would have to add, "unless you first mist these objects with your pocket antibiotic spray." The modern version of No. 12, "Bedew no man's face with your spittle by approaching too near him when you speak," would have to be, "Don't point your Glock 17 close to a man's face lest you bedew his Armani suit with hard-to-dry-clean bodily fluids."

Some of the Rules, however, seem to reach out over those 26+ decades to apply to specific groups or individuals old George seems to have anticipated. To professional baseball players he suggests, in Rule No. 2, "When in company, put not your hands to any part of the body, not usually discovered." To Brittany Spears he says, in No. 7, "Put not off your clothes in the presence of others, nor go out your chamber half dressed." To all CLE attendees he suggests, in No. 6, "Sleep not when others speak," and to CLE speakers he gives this warning, in No. 88, "Be not tedious in discourse, make not many digressions, nor repeat often the same manner of discourse."

To the current crop of presidential aspirants he has several recommendations: No. 22, "Show not yourself glad at the misfortune of another, though he [she] were your enemy;" No. 48, "Wherein you reprove another, be unblameable yourself;" No. 50, "Be not hasty to believe flying reports to the disparagement of any;" and perhaps most importantly, No. 82, "Undertake not what you cannot perform."

Anticipating the current occupant of oval office (which in his time was neither oval nor in the town to soon be named after him), G.W. offers, in No. 73, this suggestion – unheeded though turned out to be: "Think before you speak; pronounce not imperfectly nor bring out your words too hastily, but orderly & distinctly."

Washington's prescience is perhaps best illustrated in his channeling of the current Rules of Professional Conduct for lawyers. Here are a few examples:

No. 17, "Play not with any that delights not to be played with," [Rule 1.8(j) — sex with clients]; No. 68, "Give not advice without being asked & when desired do it briefly, [Rule 7.3 – solicitation of legal work];

No. 79, "Be not apt to relate news if you know not the truth thereof. In discoursing of things you have heard, name not your author; always a secret discover not," [Rules 1.6, 1.9 and 1.18 — confidentiality];

No. 86, "In disputes, be not so desirous to overcome as not to give liberty to each one to deliver his opinion and submit to the judgment of the major part, especially if they are judges of the dispute." [Rule 1 — preamble on civility and respect for the judicial process];

And, lastly, No 110, "Labour [sic] to keep alive in your breast that little celestial fire called conscience. [Ibid.]" I could go on, but do not wish to be "tedious in discourse." Suffice it to say that, tooth-picking and spittle-spraying instructions aside, the little red book by our George the 1st (not to be confused with a similar volume by Chairman Mao) would serve well on its own as a code of conduct for any calling.

And, if you findeth not this article pleasing or worthy, please remember George's Rule 44, "When a man does all he can though it succeeds not well, blame not him that did it." Instead, blameth G.W. (or perhaps the French) for putting me up to it.

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ETHICAL CONSIDERATIONS FOR LAWYERS' PROTECTION LETTERS

When there is no disagreement about ownership of funds, a lawyer's duty is to promptly notify and deliver the funds to the rightful owner, which may be the creditor.

By Alvin E. Mathew Jr.

Mary Lumbar is represented by lawyer, Gabriel Lincoln, in a personal injury case. Gabriel is known as Honest Gabe because he tries to do what's right. Mary has a meritorious case, but she has incurred substantial indebtedness because of her inability to work due to her injuries.

Keeping Client Creditors at Bay

Honest Gabe has been involved in protracted settlement negotiations with Good Neighbor Insurance Company. The insurer won't budge because of complicated causation issues raised by Mary's prior medical history. As prolonged negotiations with Good Neighbor proceed, Mary asks Honest Gabe to contact certain medical providers and insurers and plead with them to forebear their collection efforts in exchange for promises to pay upon receipt of settlement or judgment proceeds from the pending cause of action. Gabe explains to Mary that such written commitments on the part of lawyers are commonly referred to as "protection letters" and that they must honor their word and pay the creditors. Gabe's presentation of these protection letters to Mary's creditors successfully keeps them at bay.

Many months later, the case settles. Even with significant movement from the insurance company in terms of dollars offered, Mary will barely break even after legal fees and expenses are paid. Honest Gabe agrees to reduce his fee, but this does not help much.

Reneging on Protection Letters

Frustrated after doing the math, Mary has a change of heart and demands that Honest Gabe not pay the medical providers and insurance creditors, thus placing Honest Gabe in an ethical dilemma. Honest Gabe firmly reminds Mary that the protection letter was a promise to pay the creditors. Pushing back, Mary questions Honest Gabe's loyalty and insists he pay her the settlement proceeds minus the legal fees and expenses. She further insists she will negotiate with the medical providers and insurers herself and will pay them herself. Thus, Honest Gabe is faced with a choice of either disregarding Mary's expressed directive or giving the appearance of having deceived Mary's creditors. Gabe phones his ethics lawyer for advice.

Gabe is advised that lawyers taking possession of funds claimed by a non-client have a professional obligation to secure the money for the non-client, if the lawyer knows the non-client has a "lawful claim" to the funds. A "lawful claim" is defined by substantive law, but includes statutory subrogation rights, assertions based on valid judgment liens, and written agreements with the client or the lawyer. Gabe is further advised that if there is a dispute between a client like Mary and a non-client, such as the medical provider and insurer creditors, the lawyer must hold the disputed funds in trust until the dispute is resolved.

Duty to Deliver Funds to Rightful Owner

Honest Gabe's duty arises under Ohio Rule of Professional Conduct 1.15. When there is no disagreement about ownership of funds, a lawyer's duty is to promptly notify and deliver the funds to the rightful owner, which may be the creditor. If the lawyer knows a third person's claim is not a lawful claim, the lawyer has a duty to notify the client and promptly deliver the funds to the client. If there is a valid dispute between the client and the third party claiming a lawful interest, Rule 1.15 obligates the lawyer to notify both parties and hold the disputed funds in a trust account until the dispute is resolved.

The lawyer's duty to hold disputed funds is triggered not only when a lawyer knows about a non-client's lawful claim, but also when the lawyer is unclear about the lawfulness of the non-client's claim. Ideally, the lawyer will anticipate and try to resolve such disputes between a client and a third person before taking custody of disputed funds. For instance, the predicament might be avoided by obtaining from the client irrevocable written authorization to pay lawfully entitled creditors in the fee agreement between the lawyer and the client.

While in most instances protection letters are provided in good faith, a lawyer might run afoul of rules relating to truthfulness and honesty if, at the time the protection letters were sent, the lawyer had reason to believe that the client did not really intend to pay the creditor. Lawyers are cautioned, however, against unilaterally trying to arbitrate disputes over funds between their clients and third parties.

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1. *Ohio Supreme Court Bd. Of Commissioners on Grievances and Discipline, Op. 2007-7 (Dec. 7, 2007); Prof. Cond. R. 1.15.*
2. *Id.*
3. *Id.*
4. *Prof. Cond. R. 1.15(d)*
5. *Id.*
6. *Prof. Cond. R. 4.1(a) and 8.4(c)*

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Paid my dues! Why be active?

By Dawn Grauel and Anthony Sharett

There's no better organization that can help you raise your professional profile than the Columbus Bar.

We're sure you've heard of the many benefits of being a member of the Columbus Bar. You have access to employee insurance plans, discounts on hundreds of hours of CLE and discounts on Blue Jacket tickets, Athletic Club fees and airport valet. Great benefits are reason enough to become a member of the Columbus Bar. But benefits don't encourage you to be actively involved. And we're here to tell you that it is only through active involvement that you begin to reap the true rewards of membership.

There's no better organization that can help you raise your professional profile than the Columbus Bar. If you're interested (even in the least bit), the Bar will see to it that you chair a committee or serve on a task force, among other things. You can lead monthly meetings, coordinate responses to requests for information on legal issues from the community or organize programs that impact not only the legal community, but our community as a whole.

You can arrange for speakers to give the latest and greatest information on technology in the courtroom, you can talk with judges about proposed rule changes or you can be a part of our pro bono efforts. You can even mentor a new attorney or be mentored by a seasoned attorney.

Our point is that by taking advantage of these opportunities, you will raise your professional profile.

First, you can use the opportunities the Bar provides to credential yourself. You can write articles (as evidenced by this piece), and prospective clients will view you as an esteemed and published author (which isn't necessarily true as evidence by this piece). Many of you may think you don't have time to draft an article, but you can easily generalize a research memorandum into an article if you put your mind to it. In addition, if a law is revised or a new law is passed, you can use this opportunity to build your expertise on the subject simply by drafting an article on the issue. Thereafter, you can forward the article to businesses or individuals who might find the information useful.

Second, by being active, you have the opportunity to get to know other attorneys and judges through CLEs, meetings and social events sponsored by the Bar. In other words, you will build your network of professional contacts. And the nice thing about building your networking is that as you get to know more people, walking into a room full of attorneys isn't such a daunting task because you know a few people in the room. In sum, you will build your professional network and credential yourself just by being actively involved.

The benefits of becoming actively involved in the Bar do not simply extend to your external profile. For those who work in satellite offices of law firms, you should know that your participation in Bar activities can increase your name recognition within your own firm. For example, if you are appointed to chair a committee or asked to serve on a task force, the firm will no doubt highlight such achievements with a mention on the firm website or via firm-wide email. Such experiences can go a long way in securing appointments to important committees or leadership positions within your own firms.

And perhaps one of the greatest benefits the Columbus Bar provides is the opportunity to be a part of something great. The Managing Partners' Diversity Initiative is so innovative and groundbreaking that it has received national attention and accolades. The Bar's Minority Clerkship program is copied by too many metro bar associations to list. Our Mentoring Program served as a model to the Supreme Court when it designed the Lawyer to Lawyer Mentoring Program. The Campaign Advertising Committee protects the image of the bench by monitoring judicial campaign advertisements.

It truly is not an overstatement when we say our Bar is great. Many of you may not know this, but the Columbus Bar is so revered in association circles, that our own Executive Director – Alex Lagusch – is something of a celebrity when he attends the metro bar conferences. Just think – if you join and get more involved – you could rub elbows with the likes of Alex Lagusch. OH! DARE WE DREAM?

Seriously, these programs and services are just an example of the many great things offered by the Columbus Bar. But the Bar could be even greater if you were a part of it. Come get involved and start reaping the many unique rewards that membership has to offer.

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If that's a politician, WE MUST BE IN … *CHURCH*?

By Bradley A. Smith

The political season is upon us and with it countless television and radio ads, direct mail pieces and literature drops, phone calls and bumper stickers. Is there any place to get away from the political din? Maybe in church? Well, no.

Ghandi said, "Those who say that religion has nothing to do with politics do not know what religion means." In fact, pastoral endorsements are sought by politicians. Hillary Clinton and Barack Obama have been engaged in a spirited battle to line up endorsements in the Democratic presidential race this year, particularly from pastors of predominantly African American congregations. From Al Sharpton on the left to Pat Robertson on the right, religion and politics frequently mix.

Of course pastors and congregations have a right to be involved in the political system, to make endorsements for political office, and to work for the election or defeat of particular candidates. Nobody sheds his First Amendment rights of speech and association simply by asserting his First Amendment rights of free exercise.

Legal controversy over pastoral involvement in partisan politics centers not around a pastor or church's absolute right to engage in politics. Rather, the question is whether churches can use their resources for political activity so long as donors have tax deductibility for contributions and the church an exemption from taxation. The Internal Revenue Code prohibits churches and other non-profits exempt from taxation under Section 501(c)(3) of the Code from engaging in political activity. The idea is that pastors and their congregants should, "pay for [political] activities entirely out of their own pockets, as everyone else engaging in similar activities is required to do."

As Ghandi suggests, the distinction between religious and political is not always easy to define. When does a pastor's religious and ethical instruction to his flock cross the line into political activity? For example, on the Sunday before the 2004 presidential election, Rev. George Regas of All Saints Episcopal Church in Pasadena gave a sermon featuring an imaginary debate between Jesus and President Bush. Regas's sermon had Jesus telling Bush, "Mr. President, your doctrine of preemptive war is a failed doctrine… Shame on all those conservative politicians in the nation's Congress and in state legislatures who have for years so proudly proclaimed their love for children when they were only fetuses — but ignored their needs after they were born." The IRS eventually opened an investigation which lasted more than two years. In the end, it determined that All Saints had "improperly intervened" in the election, but did not revoke the church's tax exemption.

The limits on what a church or pastor can do are hardly clear. For example, a pastor can issue his personal endorsement, but should not do so through the use of church resources, as in a sermon or newsletter. Churches can invite candidates to speak, but the candidates should not ask for votes or assail their opponents. This is helpful to a point, but as the All Saints case illustrates, the line between political and religious activity is gray, and not merely as a legal matter, but as a theological one.

Since 1954 only one church has had its tax exempt status revoked for political activity, but that doesn't tell the whole story. Throughout the 1990s conservative churches complained that they were targeted for investigation by the Clinton administration. In recent years, it has been the turn for liberal churches to complain of official harassment. Even in victory a church can spend much time and money defending itself from the IRS. And the rules are so vague that almost any church can be investigated.

Here in Columbus, in 2006 some 30 area pastors filed a complaint with the IRS seeking an investigation of World Harvest Church and of Fairfield Christian Church in Lancaster after the pastors of those churches endorsed Republican gubernatorial nominee Ken Blackwell. Many complaints are now filed by pastors from rival camps – what was once politics from the pulpit is increasingly politics by IRS complaint, chilling speech all around.

This is unfortunate, for churches have long played an important role in American politics. Churches were rallying points for opposition to the Crown in pre-revolutionary days. Churches and religious leaders were at the forefront of such 19th and early 20th century causes as abolition, prohibition, and women's suffrage. Churches have been active in the anti-war movements of both the 1960s and today, in the civil rights movement, and in the debate over social issues such as abortion and gay marriage.

If what is at stake is nothing more than a fear that the government may end up subsidizing politics through tax deductible contributions, maybe the game is not worth the candle. After all, for many years the Internal Revenue Code provided tax credits for political contributions, and the Ohio Revenue Code still does. Many of the same organizations that want the IRS to "crack down" on political activity from the pulpit favor direct taxpayer subsidies to political candidates and parties through so called "clean elections" laws. Even the prohibition on political endorsements by churches was not enacted until 1954.

If the tax exempt status of churches leads to a small, indirect political subsidy, that may be a good thing, or at least better than the alternative – inevitably politicized decisions by the government about whom to investigate, and for what.

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1. *Cammarano v. United States.*
2. *See If Jesus Debated Senator Kerry and President Bush, available at http://civilliberty.about.com/gi/dynamic/offsite.htm?zi=1/XJ&sdn=civilliberty&cdn=newsissues&tm=21&gps=74_269_1276_607&f=00&tt=11&bt=0&bts=0&zu=http%3A//www.allsaints-pas.org/sermons/%2810-3104%29%2520If%2520Jesus%2520Debated.pdf.*
3. *Treasury letter 3597, Sep. 10, 2007, at http://civilliberty.about.com/gi/dynamic/offsite.htm?zi=1/XJ&sdn=civilliberty&cdn=newsissues&tm=524&gps=24_716_1276_607&f=00&tt=11&bt=0&bts=0&zu=http%3A//www.allsaintspas.org/site/DocServer/Letter_from_IRS_to_All_Saints_Church.pdf%3FdocID%3D2541*

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THE ARBINO AUTOPSY: S.B. 80

By Gerald S. Leeseberg

"You are deluding yourself about the Court," said the priest. "[T]hat particular delusion is described thus: before the Law stands a doorkeeper. To this doorkeeper there comes a man from the country who begs for admittance to the Law. But the doorkeeper says that he cannot admit the man at the moment. The man, on reflection, asks if he will be allowed, then, to enter later. 'It is possible,' answers the doorkeeper, 'but not at this moment.' Since the door leading into the Law stands open as usual and the doorkeeper steps to one side, the man bends down to peer through the entrance. When the doorkeeper sees that, he laughs and says: 'If you are so strongly tempted, try to get in without my permission. But note that I am powerful. And I am only the lowest doorkeeper. From hall to hall, keepers stand at every door, one more powerful than the other. And the sight of the third man is already more than even I can stand.' These are difficulties which the man from the country has not expected to meet, the Law, he thinks, should be accessible to every man and at all times...."

The Trial, Franz Kafka

Arbino v. Johnson & Johnson, 2007-Ohio-6048, S.B. 80 is but the latest chapter in a 30-year battle over what is commonly referred to as "tort reform." This controversy has seen the legislature repeatedly pass numerous statutes in various permutations seeking, in essence, to limit the liability of tortfeasors and/or the compensation they must pay to those injured by tortious conduct, be it negligent, willful and wanton, or intentional. Reform efforts have addressed the area of general tort law as well as, more specifically, product liability and medical malpractice. Since the vast majority of torts and tortfeasors are covered by liability insurance, the true focus of these legislative initiatives is to limit the amount of money that insurance companies must pay on claims. Simply put, they have been designed to protect the profits of insurance companies.

From a political standpoint, the insurance industry recognizes that it cannot go to legislators seeking special legislation designed to enhance its profitability. Instead, this objective has been advanced by surrogates, typically those aggrieved first and foremost by increased insurance premiums: small business owners claiming that their very existence is threatened; physicians complaining about "frivolous lawsuits"; large businesses claiming they are at a competitive disadvantage because of the mere threat of lawsuits, and so on.

What is most remarkable is that during the entire course of this war over tort reform, proponents have consistently failed to produce empirical data to support their claims. For example, with regard to the evidentiary basis for limiting punitive damages, despite three decades of purported ruinous economic harm, even the majority opinion describes the legislative record before it as "thin"; Justice Pfeifer, in dissent, describes it as "vaporous." Nowhere in the majority opinion is there any citation to the legislative record of any data concerning the number, amounts, or effects of, punitive damage awards, because such figures do not exist. As Justice Pfeifer points out, there are only citations to statements by pro-tort reform political-appointees, surveys of corporate attorneys, and non-peer reviewed, non-academic, "studies" by pro-business groups relying upon suspect data. While the legislative statements of intent repeatedly purport to effect a balancing of the interests of those "legitimately harmed" with remedying the ills of "frivolous lawsuits," nowhere has the legislature, or the majority, ever responded to Justice Pfeifer's call for an answer to the question of how capping the damages of legitimate claims will in any way address the alleged epidemic of "frivolous lawsuits" (for which proposition, again, no data was produced or cited). In the absence of any such data or explanation, Justice Pfeifer was left to conclude the obvious:

"The only basis for R.C. 2315.18 that I can see is that, as between business interests and the people of Ohio, the legislature prefers business."

The majority expressly declined to assess the validity of any of the proffered underpinnings or rationale, claiming the sole responsibility for determining public policy belongs to the legislature. The Court thus abdicated its responsibility to insure that usurpation of the Constitutional right to a jury trial was premised upon something other than politically expedient window dressing. It is distressing that the Court accepted the implicit criticism by the legislature that the judicial branch is incapable of doing its job properly through the exercise of extant mechanisms such as remittitur to insure excessive damages are not imposed. In so doing, the Court has subjugated itself, and become subservient to the legislature. And, in so doing, the majority affirms Justice Pfeifer's observation, that the only public policy being advanced here is that of business interests.

"I have a basic philosophical difference with the members of the majority***. I believe that the Constitution of Ohio is the fundamental doctrine that protects all Ohioans, not just those with the most lobbying power." Emphasis supplied.

George Mason, author of the Virginia Declaration of Rights, in speaking about the abuses of the British Parliament, cautioned that legislatures "ought to know and sympathize with every part of the community," and of the dangers attendant to the failure to do so:

"An aristocratic body, like the screw in mechanics, working its way by slow degrees, and holding fast whatever it gains, should ever be suspected of an encroaching tendency."

Madison, Records of the Debates in the Federal convention of 1787, cited in "In Defense of Trial by Jury" by the American Jury Trial Foundation, p. 454.

Justice O'Donnell, in his separate dissent, cautioned about this exact insidious evil:

"Accordingly, it is my view that R.C. 2315.18, which substitutes the judgment of the General Assembly for that of a jury, violates Section 5, Article 1 of the Ohio Constitution and therefore is unconstitutional and opens the door to further encroachments." Emphasis supplied.

Such concern is not academic, nor paranoid. In fact, the legislature has already enacted further encroachments: S.B. 281, which applies exclusively to "medical claims" has a "soft" cap similar to S.B. 80 on "noncatastrophic" malpractice injuries, but also a "hard" cap on catastrophic injuries as well. Thus, unlike injuries under S.B. 80, under S.B. 281 catastrophic injuries resulting from malpractice are "capped" at $500,000. Admittedly, the majority takes great pains repeatedly to point out that it is only approving S.B. 80 because it does not place limits on catastrophic injuries:

"The second prong of the rational-basis test asks whether the statute is arbitrary or unreasonable. In Morris, we found that the damage caps violated this prong because they imposed the cost of the intended benefit to the public solely upon those most severely injured. Id., 61 Ohio St.3d at 690-691***. We repeated this concern in Sheward, albeit in dicta. [citation omitted] R.C. 2315.18 alleviates this concern by allowing for limitless noneconomic damages for those suffering catastrophic injuries." Emphasis added.

The danger, however, is that once emboldened and given the imprimatur of the Court, the legislature will be viewed by special interests as a "tool of the aristocracy." Apparently "those with the most lobbying power" view the Ohio legislature as exactly that. They have persisted, despite repeated pronouncements by the Supreme Court over three decades that their objectives are unconstitutional. And, at last, they have won. Indeed, the majority cites the success of these same forces in other states as support for finally allowing them to succeed in Ohio. In so doing, Ohio finally joins a distinct minority of states where such legislative initiatives succeeded earlier, while repeatedly being rejected in Ohio.

What, then has changed in Ohio? The obvious answer is the composition of the Court. All of the Supreme Court justices are now Republicans. Some recently elected justices have expressly campaigned on themes such as being "pro-business" or "physician-friendly," and using code phrases such as "strict constructionism," "anti-activist," or "judicial restraint." Their campaigns have been supported heavily by the insurance industry, the Chamber of Commerce and its allied business interests, and the medical profession. A massive disinformation and propaganda media campaign, often financed and waged by industry-funded front groups posing as concerned citizen associations, such as Ohio Citizens Against Lawsuit Abuse, has endeavored to sway public opinion, convince it of a non-existent "litigation crisis," and provide cover for their legislative initiatives and those who would be called to act, or pass judgment, upon them.

Having a mere change in composition of the Court provide the basis for a failed, unconstitutional agenda to succeed is fraught with further harm to the institution of the Court. As noted constitutional expert Robert S. Peck has eloquently stated:

"Electoral victories of this type, which does not amend the state constitution, should not change embedded principles as if they were the spoils of political wars. The Supreme Court has noted that '[a] basic change in the law upon a ground no firmer than a change in [a court's] membership invites the popular misconception that this institution is little different from the two political branches of the government. No misconception could do more lasting injury to this Court and to the system of law which it is our abiding mission to serve.' " [citations omitted]

Given the new composition of the Court, proponents of this legislation were openly arrogant in their confidence that they would, at long last prevail, and enjoy success similar to that in numerous other states where the same model had been employed to limit the rights of citizens to hold wrongdoers accountable.

Ironically, in order to allow the proponents to accomplish their objectives, the avowed strict constructionists and advocates of "judicial restraint" had to employ sophistry of the highest order. That is because the right to a jury trial in Section 5, Article I of the Ohio Constitution, adopted in 1802, "shall be inviolate." The Oxford English Dictionary defines "inviolate" as "free from injury or violation," and the Cambridge Dictionary defines such a right as one which "must not or cannot be broken, damaged, or doubted." The majority acknowledges a plaintiff has a constitutional right to have a jury determine the extent of the damages suffered. The majority also states that "any law that allows another entity to substitute its own findings of fact is unconstitutional." And yet, the majority then holds that it is permissible for the legislature to mandate that a court ignore the findings of the jury in every case, and substitute an arbitrarily determined award regardless of the findings of fact. To avoid the clear proscription against infringing upon this right, the majority simply says that this does not violate the right to a jury trial because the courts do not alter the jury's findings of facts - the court simply ignores them! In other words, the majority has said "you still have a constitutional right to a jury trial, we are just going to ignore the jury's verdict."

Justice Pfeifer sadly notes this result-driven "analysis" produces the desired, and expected, result:

"Was there ever any doubt how this case would come out? The members of the majority have long talked about judicial restraint. *** Today we learn that 'judicial restraint' was code for 'the General Assembly can do no wrong when it comes to tort reform.' Today is a glorious day for the backers of 'judicial restraint.' Today is a day of fulfilled expectations for insurance companies and manufacturers of defective, dangerous, or toxic products that cause injury to someone in Ohio."

Chief Justice Moyer has decried the cost of electing judges. However, by finally granting tort reformers success as a result of their efforts to spend whatever it takes to elect justices deemed sympathetic to their cause, the Court has only served to encourage such conduct and have the Court appear to be a spoil of political war.

DON'T MISS
counterview on the next page

1. *Arbino at ¶1.*
2. *Id. at ¶216.*
3. *Id/ at ¶¶189-196.*
4. *Id. at ¶211.*
5. *Id. at 219.*
6. *Id. at 162.*
7. *Id. at ¶¶59-60.*
8. *Robert S. Peck, Violating the Inviolate: Caps on Damages and the Right to Trial By Jury (2006), 31 U. Dayton L. Rev. 307, 327.*
9. *Arbino at ¶35.*
10. *Id.*
11. *Id. at 40.*
12. *Id. at 220.*

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Written Law

Arbino Decision Provides Fairness and Predictability

"...tort reform has been a major issue of concern in this state over the past several decades and remains one today."

By Richard S. Lovering

On December 27, 2007, the Ohio Supreme Court issued a landmark decision upholding the statutory limitations on noneconomic and punitive damages enacted in Amended Substitute Senate Bill 80 (S.B. 80) in *Arbino v. Johnson & Johnson*, Slip Op. No. 2007-Ohio-6948. Senate Bill 80, effective April 7, 2005, provides comprehensive tort reform legislation aimed at restoring fairness, balance and predictability to Ohio's civil justice system and financial vitality to Ohio's economy.

The Arbino Court recognized that tort reform has been an ongoing topic of debate in numerous states, including Ohio, for years: "...tort reform has been a major issue of concern in this state over the past several decades and remains one today. Ohio is hardly unique in this regard, as such reforms have been raised in nearly every state in the nation. State legislatures and judiciaries have differed widely in their responses to this issue, and a definite split in authority is clear." Arbino, ¶ 20. The issue now has been settled in Ohio – the statutory limitations on noneconomic and punitive damages in S.B. 80 are constitutional on their face.

The Arbino decision must be viewed in the historical context of the multi-decade effort of the General Assembly to accomplish tort reform. After previous unsuccessful efforts, the Ohio General Assembly began another attempt to reform Ohio's tort liability system in 1995. This effort — House Bill 350 ("H.B. 350") — was a comprehensive tort reform package that included among other things, limitations on punitive and noneconomic damages, statutes of repose, and modifications to joint and several liability. H.B. 350 became effective in January 1997.

Approximately two-and-a-half years later, a 4-3 majority of the Ohio Supreme Court found House Bill 350 unconstitutional in toto in *State ex rel. Ohio Academy of Trial Lawyers v. Sheward*, 86 Ohio St. 3d 451 (1999). In this controversial decision, the Sheward majority held that H.B. 350 violated the doctrine of separation of powers and the single-subject rule of the Ohio Constitution.

In the years following the Sheward decision, the Ohio General Assembly approved a number of tort reform measures addressing much narrower issues. Those measures included establishing limitations on the liability of residential care and nursing home facilities, modifying the rule of joint and several liability, reforming Ohio's medical peer review process, reforming Ohio's political subdivision sovereign immunity law, enacting limitations on noneconomic damages in medical malpractice actions, and reforming Ohio's asbestos litigation system.

In May 2003 another tort reform package — S.B. 80 — was introduced. Key components of S.B. 80, which became effective on April 7, 2005, included statutory limitations on noneconomic (R.C. 2315.18) and punitive damages (R.C. 2315.21). Ohio Rev. Code 2315.18 limits noneconomic damages to the greater of $250,000 or three times the economic damages awarded by the jury up to a maximum of $350,000 for each plaintiff, or $500,000 per single occurrence. These limits on noneconomic damages are inapplicable to catastrophic injuries such as permanent and substantial physical deformity, loss of use of a limb, or permanent disabling injury. Generally, Ohio Rev. Code 2315.21 limits punitive damages to twice the compensatory damages awarded to the plaintiff from that defendant (with some exceptions for individuals and "small employers" as defined in R.C. 2315.21). These limitations were designed to provide greater predictability and fairness to litigants without limiting recovery of noneconomic damages in cases involving catastrophic injuries.

The issue of the constitutionality of these statutory limitations on noneconomic and punitive damages came before the Ohio Supreme Court in Arbino on certified questions from the United States District Court for the Northern District of Ohio.

Section 2315.21 limits punitive damages to twice the compensatory damages awarded to the plaintiff from that defendant. Punitive damages may not exceed the lesser of twice compensatory damages or 10 percent of the employer's or individual's net worth if the defendant is small employer or an individual. Therefore, the limitations on the award of non-economic and punitive damages upheld by the Ohio Supreme Court in Arbino provide greater predictability and fairness to litigants in the judicial process system without limiting the damage recovery in cases involving catastrophic injuries.

Plaintiff argued that the noneconomic damages limitation was unconstitutional on a variety of grounds, including that it violated the right to trial by jury, the right to a remedy and open courts, the right to due process of law, the right to equal protection of the laws and the separation of powers. In rejecting each of plaintiff's arguments, the Court inter alia applied the rational basis test to determine whether the statute violates the right to due process.

With respect to the first prong of the rational basis test — whether the statute bears a real and substantial relation to the public health, safety, morals, or general welfare of the public — the Court concluded that "there is a clear connection drawn between limiting uncertain and potentially tainted noneconomic damage awards and the economic problems demonstrated in the evidence." *Arbino*, ¶ 56.

The Court noted that the General Assembly had received several forms of evidence including a Harris Poll showing that the litigation environment in a state greatly affects the business decisions of companies; a study showing the tort system failed to return even 50 cents for every dollar to injured plaintiffs and that the cost of the national tort system grew at a record rate in 2001, with a cost amounting to a five percent tax on wages; and "testimony from Ohio Department of Development Director Bruce Johnson on the rising costs of the tort system, which he believed were putting Ohio businesses at a disadvantage and hindering development." *Arbino*, ¶53. In short, Arbino recognizes that legislation which lessens the potential of runaway jury awards — that could otherwise discourage employers contemplating moving to or maintaining a business in Ohio — is related to the general welfare of the public.

The Court noted that the General Assembly must be able to make a policy decision to achieve a public good. The Court properly did not disturb the balance achieved by the General Assembly in S.B. 80 which is tailored to maximize benefits to the public while reasonably limiting the noneconomic and punitive damages available to litigants in cases not involving catastrophic injury.

The Court quotes the General Assembly's language in S.B. 80 which recognizes the State's "interest to make certain that Ohio has a fair, predictable system of civil justice that preserves the rights of those who have been harmed by negligent behavior, while curbing the number of frivolous lawsuits, which increases the cost of doing business, threatens Ohio jobs, drives up costs to consumers, and may stifle innovation." S.B. 80, Section 3(A)(3). The Court's decision in Arbino to uphold the constitutionality of S.B. 80 furthers the State's interest in a fair and predictable civil justice system.

In Arbino, the Ohio Supreme Court removed the specter of unpredictable noneconomic and punitive damage awards and upheld the General Assembly's right to enact legislation that strikes a balance for the public good. As a result of the Arbino decision, Ohio now joins the growing mainstream of states that have found such statutory limitations on damages to be constitutional.

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1. *The entire text of Senate Bill 80 is available at: http://www.legislature.state.oh.us/bills.cfm?ID=125_SB_80.*
2. *The constitutional challenges before the Court in Arbino were challenges to the statutes on their face – and not as applied to a particular set of facts.*
3. *Ohio Const. art. II, §15.*
4. *Am. Sub. H.B. 412 (enacted by the 124th Ohio General Assembly).*
5. *Am. Sub. S.B. 120 (enacted by the 124th Ohio General Assembly).*
6. *Sub. S.B. 179 (enacted by the 124th Ohio General Assembly).*
7. *Am. Sub. S.B. 106 (enacted by the 124th Ohio General Assembly).*
8. *Am. Sub. S.B. 281 (enacted by the 124th Ohio General Assembly).*
9. *Am. Sub. H.B. 292 (enacted by the 125th Ohio General Assembly).*

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From Vioxx to Gadolinium, *Along the Preemption Path*

"I would argue that the FDA, as currently configured, is incapable of protecting America against another Vioxx. We are virtually defenseless."

Dr. David Graham (November 18, 2004)

By D. Andrew List

A little more than three years ago, Dr. David Graham, Associate Director for Science and Medicine in the Food and Drug Administration's Office of Drug Safety, gave the above assessment of the FDA in testimony before the United States Senate. Since that time, many other pharmaceuticals and medical devices have been the subject of recalls or warnings, despite having received initial approval from the FDA. Moreover, a recent report from the Department of Health and Human Services confirms that many of Dr. Graham's concerns are valid today.

Why should these issues be cause for concern? Two reasons. First, as health care consumers, each of us needs to be certain that the drugs and devices provided for our care are safe and effective. The same is true for health care providers—physicians need to know that drugs and devices prescribed to their patients are safe and effective.

Second, as lawyers, we should be concerned that our clients have adequate remedies if they suffer injury as a result of a dangerous drug or medical device. And, it is this subject that will be addressed by the United States Supreme Court in *Riegel v. Medtronic*.

Charles Riegel suffered serious injury when a balloon catheter burst while he was undergoing an angioplasty procedure. He and his wife sued the catheter's manufacturer, Medtronic, Inc. Medtronic moved for summary judgment, arguing that the Riegels' claims were barred by the doctrine of federal preemption. In a nutshell, Medtronic argued that the Riegels' tort claims sought to impose state requirements that differed from the requirements of the Food, Drug and Cosmetic Act, and that the claims were preempted by federal law. The district court granted summary judgment based upon federal preemption, after which the Second Circuit affirmed.

In addition to being a classic federalism battle, preemption raises critical issues of public policy. For example, does the FDA have the resources necessary to effectively monitor and police the safety and effectiveness of pharmaceuticals and medical devices?

In a recent editorial published in the "New England Journal of Medicine," the authors outlined these policy issues, noting that:

Ultimately, we believe that the pivotal question for the justices in *Riegel v. Medtronic* resides in what is in the best interest of American society. Is it in the people's interest to shield medical-device companies from product-liability claims? Would such a decision benefit patients by making more lifesaving devices available, or would there be adverse effects on the overall safety of devices? Is the FDA pre-marketing approval process sufficiently rigorous and comprehensive to justify immunization of the industry against tort claims? And if medical-device manufacturers are shielded from liability, what about drug manufacturers? Or would society be better served if patients retained their right to seek legal redress when they believed they had been damaged by a faulty medical device? In the long run, would this result in safer medical devices for patients?

By rejecting Medtronic's plea for immunity, the Supreme Court can act now to protect patients. From time to time, the Court agrees to hear a case that may have major, even momentous, implications for health care. *Riegel v. Medtronic* is such a case.

The Supreme Court's decision will have far-reaching implications for health care consumers. For example, consider the FDA warnings issued in May, 2007, regarding gadolinium-based contrast agents. These products have been used for more than a decade in magnetic resonance imaging (MRI) scans to enhance the quality of the images.

Without question, gadolinium-based contrasts are an extremely valuable tool to physicians. However, years after being approved by the FDA, a growing body of evidence suggests that patients with kidney insufficiency who receive gadolinium-based agents are at risk for developing a debilitating and potentially fatal disease known as nephrogenic systemic fibrosis. NSF results in the thickening of the skin and connective tissues, inhibiting movement and resulting in broken bones. Thus, the FDA now suggests that patients should be screened for kidney problems prior to receiving an MRI scan that includes a gadolinium-based contrast agent.

The gadolinium example provides a real-world glimpse into the potential impact of Riegel. Should patients who develop NSF after exposure to gadolinium-based contrast agents be allowed to bring tort claims against the manufacturers of these agents? Beyond the law of preemption, the answer likely depends upon whether you believe that manufacturers will always be truthful in their representations to the FDA, and whether you are willing to substitute the judgment of the FDA for the judgment of a jury of your peers. It is a fascinating legal battle, with wide-ranging social implications, that will have a profound impact on patient rights.

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1. *FDA, Merck and Vioxx: Putting Patient Safety First? (United States Senate Committee on Finance, November 18, 2004).*
2. *The Food and Drug Administration's oversight of clinical trials. Washington, D.C.: Office of Inspector General, Department of Health and Human Services, September, 2007 (document #OEI-01-06-00160).*
3. *Riegel v. Medtronic, Inc., No. 06-179, was argued before the United States Supreme Court on December 4, 1007.*
4. *A Pivotal Medical Device Case, New England Journal of Medicine, January 3, 2008.*

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Hughes v. Department of Commerce

GEESE, DUCKS, TURKEYS AND OTHER ODD BIRDS OF ADMINISTRATIVE LAW EXPLAINED

By Jim Leo

Last December, during a well-attended CLE on administrative law, one case – *Hughes v. Department of Commerce* (2007) – came up more than any other. In fact, Hughes seemed to be discussed as much as all other cases combined.

Hughes concerned the process for perfecting appeals of administrative orders. The case involved an order from the Ohio Department of Commerce, Division of Financial Institutions (the agency) to remove Natalie Hughes from her position of director of United Telephone Credit Union. The order, tracking the language of R.C. 119.12, stated: "`Respondent is hereby notified that this Order may be appealed pursuant to Revised Code Section 119.12 by filing a Notice of Appeal with the Division setting forth the Order appealed from and the grounds of the appeal. A copy of such Notice of Appeal shall also be filed within fifteen (15) days with the Court of Common Pleas of Franklin County.'" Id. at 52, emphasis added.

Ms. Hughes filed a photocopy of her notice of appeal with the agency and the original with the common pleas court. The Agency argued that R.C. 119.12 requires the reverse (i.e., the original must be filed with the agency and the copy with the court) and, having failed to strictly comply, there was no jurisdiction for the court to hear her appeal. The Tenth District Court of Appeals agreed.

On a discretionary appeal before the Ohio Supreme Court, Ms. Hughes cried foul. She asserted that the Agency failed to send her a certified copy of its order, as required by R.C. 119.09, and having failed to strictly comply with the statutory requirement, there was no final order for her to appeal.

The agency countered that its order did contain a statement "Witness my hand" at the end of the order. However, the Supreme Court noted that a "`certified copy'" is "`[a] duplicate of an original (usu. Official) document, certified as an exact reproduction usu. by officer responsible for issuing or keeping the original.'" Id. at 51, quoting *Black's Law Dictionary* (8th Ed.2004) at 360. The Court concluded that, because the order did not contain a "signed statement that it is a true and exact copy reproduction of the original document, the agency failed to comply with 119.09." Id.

Quoting the proverb "what is good for the goose is good for the gander," the Ohio Supreme Court stated that, just as the agency must strictly comply with the requirements of R.C. 119.09, so too must the adversely affected party comply with the requirements of R.C. 119.12 (i.e, filing the original notice of appeal with the agency and the copy with the court) . It concluded that the common pleas court had no jurisdiction over the appeal because no certified copy was served on Hughes and, even if one had been, there would still be no jurisdiction because Ms. Hughes did not properly file her appeal. Id. at 52. The Court noted that once a certified copy of the order is served on Hughes, she may properly appeal by filing the original notice of appeal with the agency and the copy with the common pleas court – setting the stage for a decision on the merits. Id. at 53.

In a dissenting opinion, Justice Pfeifer stated that the requirement that the original notice of appeal be filed with the agency and the copy with the court is a "distinction without a difference" since either a copy or the original is equally sufficient in providing notice of an appeal. Picking up on the goose and gander analogy, Pfeifer went on to say "`[w]hat is sauce for the goose may be sauce for the gander but is not necessarily sauce for the chicken, the duck, the turkey or the guinea hen." Id. at 53, quoting Toklas, the *Alice B. Toklas Cookbook* (1954) 5. Pfeifer noted that, while the requirement that an original appeal be filed with the agency and a copy with the court serves no legitimate purpose, the requirement that the agency serve a certified copy of the order on the aggrieved party does.

At the administrative law CLE, Hughes was heralded simply because it provided answers about how the courts would treat and how attorneys may prepare for procedural aspects of R.C. 119. Regardless of whether one agrees or disagrees with the outcome in Hughes, the fact that there are now definite answers about procedure is a good thing.

The case reveals more than just answers to procedural questions about R.C. §119. It reveals that the Ohio Administrative Procedure Act is laden with landmines. Therefore, the real message of Hughes is that the statute is in need of a serious legislative overhaul in which those procedural landmines are finally removed and a replaced with a system in which parties be heard on the merits of their appeal. No geese. No ducks. No turkeys! Rather, law as it has always been intended.

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Colorful Pageantry *Celebrates*

IDEALS OF LEGAL PROFESSION

By the Honorable David E. Cain

Red Mass will be even more special this year. It will be celebrated on the 50th anniversary of Law Day.

As always, the event will be on the evening of May 1 (the traditional Law Day) at a great local landmark – Saint Joseph Cathedral at Broad and Fifth Streets. And, per local custom, it will be sponsored by an organization named for a lawyer who literally gave up his life in deference to the "rule of law."

Fifty years ago, President Eisenhower proclaimed the first Law Day as a "day of national dedication to the principle of government under law." Red Mass, on the other hand, goes back to medieval Rome and has been observed for centuries in Paris and London as well at La Sainte Chappelle and Westminster Cathedral respectively. The symbolically rich ceremonies are held to request guidance from the Holy Spirit for the conduct of the legal profession. The red robes worn by a host of clergy represent the Holy Spirit – sometimes called God's fire.

Red Mass was resurrected in this country 80 years ago and is usually held in the fall before the opening of the Supreme Court's judicial year. Judges, prosecutors, attorneys, law school professors and students make a recommitment to the highest principles of their profession.

In Columbus, the Red Mass was celebrated for several years in the 1960s but was discontinued until 1985 when it became a Law Day event under the leadership of the Thomas More Society, according to Alphonse P. Cincione, the society's longtime president. The society sponsors two events each year: The Red Mass and an evening of recollection, he noted.

Sir Thomas More epitomizes respect for the law and the idea that no man, including the king, is above the law, Cincione pointed out. More was born in 1478, served as Lord Chancellor of England from 1529 to 1532 and was "martyred for the faith" on July 6, 1535.

Members of the Thomas More Society subscribe to the principle he expressed moments before he was beheaded: "The King's Good Servant — But God's First."

In *A Man for All Seasons*, by Robert Bolt, the plot plays out with King Henry VIII seeking More's support to have his marriage annulled because the King had no male heir and his present wife, Catherine, was "barren as a brick."

First, More demonstrates that the law doesn't change with the will of the majority. A frustrated Duke of Norfolk declared: "Oh confound all this. I'm not a scholar. I don't know whether the marriage was lawful or not, but dammit, Thomas, look at these names! Why can't you do as I did and come with us, for fellowship?"

More responds: "And when we die, and you are sent to heaven on doing your conscience, and I am sent to hell for not doing mine, will you come with me, for fellowship?" And after arguing with Cromwell over whether silence should be construed as consent or denial, More concluded: "The world must construe according to its wits; this court must construe according to the law."

When More told Cardinal Wolsey he could not in good conscience deem the marriage void, Wolsey admonished: "Oh your conscience is your own affair; but you're a statesman." More answered: "I believe when statesmen forsake their own private conscience for the sake of their public duties . . . they lead their country by short route to chaos."

And he offered a lesson in civility. Instead of calling Norfolk an S.O.B., he calmly observed: "They think that somewhere along your pedigree a bitch got over the wall."

More even gives criminal defense lawyers an answer for people who ask them how they can represent and plead on behalf of deplorable defendants:

"William Roper: So, now you give the Devil the benefit of the law!

Sir Thomas More: Yes! What would you do? Cut a great road through the law to get after the Devil?

William Roper: Yes, I'd cut down every law in England to do that!

Sir Thomas More: Oh? And when the last law was down, and the Devil turned 'round on you, where would you hide, Roper, the laws all being flat?

This country is planted thick with laws, from coast to coast, Man's laws, not God's! And if you cut them down, and you're just the man to do it, do you really think you could stand upright in the winds that would blow then? Yes, I'd give the Devil benefit of law, for my own safety's sake!"

So if you think the practice of law is more than just doing a job, come to the cathedral after work on May 1 to witness an impressive program, led by the bishop and featuring black robed judges from all levels of state and local courts, red robed judges of the Tribunal of the Diocese of Columbus, students from Saint Charles Preparatory School, the Cathedral Brass, lawyers, non-judicial public officials, law association officers and a renowned homilist.

And, after the liturgy, all adults are invited to a reception – involving delicious food and drink – in the cathedral undercroft.

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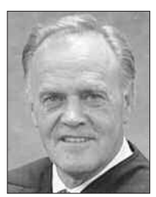
Honorable David E. Cain Franklin County Common Pleas Court



A short history of document filing

FALL OF FACE TIME

By The Honorable Mark R. Abel

Electronic case filing (ECF) has been a big hit with litigators and judges. No more hunting for files or going to the Clerk of Court's office to look for pleadings. Everything filed in a case is at your fingertips on your desktop computer or, if you're on the move, on your laptop. Now a recent upgrade to the federal court's ECF software makes working on a case even easier. Pleadings, briefs and orders can be dotted with hyperlinks to exhibits, depositions, statutes, regulations, and cases.

Any document or web page that can be reached by a URL can be linked to your court filing. The reader just clicks on the hyperlink to read the linked exhibit.

In addition to ease of access, hyperlinks provide litigators with the opportunity to advocate their clients' positions using the power of multi-media presentation. If a lawsuit involves a product, you might link a description of it in the complaint or your brief to a page on your client's website that demonstrates the product. In a products liability case, plaintiff counsel's brief might link her argument about the product's defect to her expert's visual demonstration of the defect or to the expert's explanation of the defect in his video deposition.

While I am excited about the ability of new technology to help counsel educate me about their clients' cases, the very power of the technology forcibly reminds me of how it has changed the practice of law.

When I was a ninth grader, my mom persuaded me to take a typing class. Then I could not have imagined how that skill would permit me to sit at home, fire up my laptop, access my office servers, and keep on working through the evening. All that made possible by a long ago class that didn't even have homework!

When I went to college, I typed my papers on a Royal portable typewriter. For those under 40, each key was attached to a metal shaft that propelled the type-character to contact an inked ribbon that struck the typing paper. If you wanted a copy, there was no Kinko's, no copying machines. You inserted two pages of paper, with an inked carbon tissue between, which produced a "carbon copy."

In law school during the late '60s, I clerked for a law firm that was filing a brief with the Ohio Supreme Court. A large number of copies was required, 20 sticks in my mind. If the client could afford it, you could have the brief typeset and printed. The alternative was to mimeograph the brief. A secretary typed the brief onto inked pads that were then run through a mimeograph machine to produce multiple copies. The mimeograph machine had no "collate" button, so (as I learned as a law clerk) you manually assembled the 20 copies of the brief.

Legal research was also hands on. If you were looking for a case to support your client's position, you went to American Jurisprudence, American Law Reports, or a similar case digest and searched its index for the term you thought would lead you to supporting authority.

After I graduated from law school in 1969, I was a law clerk in the district court. Every draft was hand-written. The judge's secretary typed the final draft for review by the judge.

After my clerkship, I was fortunate to be selected in May 1971 to be the first magistrate judge in Columbus. One of my duties was to prepare decisions in Social Security disability insurance cases. Decisions were either handwritten or dictated into a tape recorder and transcribed. Each decision was 12-15 typewritten pages, on 8 ½ by 14 paper. When I gave my secretary Mary Jones a "draft" of a decision, I knew she could change a word or two by erasure or white out. More extensive revisions required re-typing the page and, perhaps, all the following pages.

Not only were revisions time consuming, we didn't have copying machines. My secretary inserted 3-4 carbons into the typewriter behind the original page, with tissue paper called "onion skin" under each carbon. The onion skin copies were mailed to counsel.

Although I had my introduction to computer-assisted legal research during my third year in law school (when the law journal got an early Lexis terminal) computer assisted legal research didn't work its way into the courts until the late 1980s. The late '60s Lexis terminal wasn't too versatile. It was just a terminal, no monitor, that printed out cases on a continuous roll of tractor-feed paper. So I did legal research by hitting the books in one of the two district judges' law libraries.

Unlike today, legal research was not isolating. Going to a judge's law library meant that I would take a couple of minutes to talk with the judge, his secretary and law clerks. While the 1970s and 1980s courthouse was probably not as "efficient" as today's, the daily interaction with coworkers created a close knit legal community. Today the computer, email and voice mail keep judges and their law clerks at their desks. Face-to-face interactions are increasingly rare.

Just 10 to 15 years ago, litigators came to the courthouse without question for preliminary pretrials and status conferences. Today the economics of the law practice and the increasing isolation brought on by the productivity gains from technology have made it increasingly rare for attorneys to walk down to the courthouse and meet with each other and the judge.

So my enthusiasm for the technology at my fingertips is tempered by my concern that we may be losing the personal connections that make dispute resolution possible.

Courts exist to resolve disputes that could not be settled privately. Disputes are about people. They are resolved most effectively by people contact, not by pecking at the keyboard, gazing at the computer screen and exchanging email. Effective, persuasive, face-to-face communication is needed to resolve the intractable disputes that have gone to court.

Mark_Abel@ohsd.uscourts.gov

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

Getting Acquainted

EXPLORING THE BENCH

By Dianna M. Anelli and Lisa M. Critser

By her own words, Judge Julie Lynch is an exception to the rule of law and we found this to be true, in a good way. The first thing we noticed upon walking into Judge Lynch's chambers was four, very colorful feather boas hanging from various pieces of furniture. We quickly learned that the boas were to be worn at the upcoming (at the time) Barry Manilow concert. Judge Lynch and her friends were going to arrive in style at the concert, complete with a stretch limousine and feather boas.

Judge Lynch attended The Ohio State University for her undergraduate degree which she completed in two and a half years, despite being a double major. For law school, Judge Lynch attended Capital University Law School and graduated in 1993. In all, she completed her undergraduate and law degrees in five and a half years. In and of itself, that is an impressive feat but, in addition to obtaining two degrees in such a short period of time, she was also raising her four young children.

Upon graduation from law school, Judge Lynch began her law career in private practice and then moved to the Ohio Attorney General's Office. During this time, she also ran for and was elected to the Whitehall City Council, where she served for two terms. After City Council, she was elected to the position of City Attorney for Whitehall.

Judge Lynch began her career as a judge in 2003 on the Franklin County Municipal Court bench, when she replaced Judge Bruce Jenkins after he stepped down. Though she did not retain her seat in the municipal court after a hard-fought election, Judge Lynch did not let this daunt her. In 2004, she ran for and was elected to an open seat on Franklin County Court of Common Pleas, the position she sits in today.

A particularly interesting fact about Judge Lynch is that she has been featured on not one, but two, different television programs on Court TV. She holds the number two spot on the program "20 Outrageous Moments" for when a deputy sheriff was accidentally tasered in her courtroom. She also appears twice on the program "Most Shocking" cases.

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Judge Michael J. Holbrook was elected to the Franklin County Court of Common Pleas in November 2004 along with Judge Lynch. Prior to being elected, he was in private practice. Also like Judge Lynch, Judge Holbrook obtained his undergraduate degree from OSU and his law degree from Capital University.

Judge Holbrook has two new additions to his staff: Cheryl Browning, secretary, and Jo-Retta Grooms, court reporter. When asked about the top three things he likes and dislikes in his courtroom, Judge Holbrook responded that three things he likes: timeliness; exhibit lists – they are not required, but he finds them extremely helpful; and courtesy towards the court and its staff, opposing counsel and others.

Three things he dislikes: rudeness towards the court and its staff, opposing counsel and others; the failure to confer with opposing counsel prior to asking the court to take action on or resolve a dispute between the parties; and chewing gum in court.

Judge Holbrook and his wife, Janie Roberts, a local attorney, have three children: Allison, who is in her first year at Ohio State, Fisher College of Business; Charles (16), who is a student at the Village Academy and is a lawyer in the making as evidenced by his participation and award in the regional high school Moot Court competition; and Moira (12), who is also a student at the Village Academy and the family artist.

In his spare time, the judge has several extremely interesting hobbies. Anyone who has been in his chambers is aware of his love of bonsai. He keeps at least twenty of the most beautiful tropical bonsai plants in his chambers, only a part of his collection. He has many more at home. Judge Holbrook believes his oldest bonsai is about twenty years old and his favorites are azaleas and boxwoods. He is an active member of the Columbus Bonsai Society.

In addition to bonsai, Judge Holbrook has a love of music. He has around one thousand 33s in his music collection plus many more CDs. His favorite artist is Santana, who he has seen in concert 108 times and who he hopes to see this year at the New Orleans Jazz Festival. He also enjoys fishing and golfing.

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Dianna M. Anelli and Lisa M. Critser

Civil Jury Trials

Franklin County Common Pleas Court

By Belinda S. Barnes and Monica L. Waller

Verdict: $384,966.46. Auto Accident. Plaintiff, Susan Brinker, suffered a fractured patella in an intersection collision in June, 2003. Plaintiff endured three subsequent knee surgeries and continues physical therapy and home exercise for the weakened muscles around her knee. Plaintiff was paid $50,000 by the tortfeasor's carrier. Defendant was Ohio Mutual Insurance Company and plaintiff has filed a motion seeking prejudgment interest from June, 2003 to the date of Judgment on her breach of contract claim. Medical bills: $27,000.00. Lost wages: $29,000. Plaintiff's experts: John F. Burke, Jr., Ph.D. and Edwin H. Season, M.D. Defendant's expert: Walter Hauser, M.D. Settlement demand: $375,000.00. Settlement offer: $250,000.00. Two day trial. Plaintiff's attorneys: Rex H. Elliott, John C. Camillus and Daniel J. Igoe. Defendant's attorney: John P. Petro. Judge: Cain. *Susan M. Brinker, et al. v. Julie A. Lowe, et al.,* Case No. 05CVC04-3789 (2007).

Verdict: $40,685.99. Automobile Accident. On June 21, 2002, plaintiff Frances Talbert was headed eastbound on Navarre Avenue when defendant Megan Maurer attempted to make a left turn in front of her, causing a collision. Plaintiff claimed that the accident caused permanent injuries to her neck and back. Defendant asserted that plaintiff's symptoms were related to a pre-existing degenerative condition, disputed her claim of permanency and disputed the reasonableness and necessity of her medical treatment. Medical bills: $18,685.90. Lost wages: $4,800. Plaintiff's experts: Durga Yalamanchili, M.D. and Diane Obayan, M.D. Defendant's expert: Karl Kumler, M.D. Settlement demand: $125,000. Settlement offer: $3,200. Three day trial. Plaintiff's attorney: Scott E. Smith. Defendant's attorney: Rick E. Marsh. Judge: Cain (Magistrate McCarthy). *Francis Talbert v. Megan Maurer, et al.,* Case No. 04-CVC-06-5963 (2005).

Verdict: $30,000.00. Auto Accident; Personal Injury. Plaintiff Wanda Kalb, age 51, broadsided defendant when defendant failed to yield at a stop sign. There was a late diagnosis of avulsion fracture of the right ankle treated with a splint/cast. Despite contrary admissions in plaintiff's medical records, she claimed residuals and permanency. Plaintiff also claimed an extensive lost income to her horse breeding business. Medical bills: $8,549. Lost income: $25,603 claimed, but strongly disputed. Plaintiff's expert: Won Song, M.D. Defense expert: Walter Hauser, M.D. Settlement demand: $50,000. Settlement offer: $30,000. Three day trial. Plaintiff's attorney: Austin Wildman. Defendant's attorney: Gretchen Lipari. Judge: Hogan. *Wanda Kalb and Charles Kalb v. Lu Ming Huang*, Case No. 04CVC-04-3771 (2005).

Verdict: $20,000.00. Automobile Accident/Personal Injury. Defendant failed to yield before making a left turn and struck the driver's door of the plaintiff's van. Plaintiff's left foot was down in the door jamb area at the time and sustained a lisfranc sprain that did not require surgery. However, plaintiff needed orthotics for arch support to relieve the residual pain. Plaintiff's medical expert felt there would be continued pain, continued need for the arch support, and the possibility of future surgery. Medical bills: $2,500. Lost wages: Plaintiff made a wage loss claim claiming that he could no longer work as a carpenter, but he did not ask for a specific dollar amount. Plaintiff's expert: Gregory Charles Berlet, M.D. Defendant's expert: Eric G. Massa, M.D. Settlement demand: $60,000. Settlement offer: $30,000. Two day trial. Plaintiff's attorney: Stanley L. Myers. Defendant's attorney: David W. Orlandini. Judge: Sheeran. Judge Sitting By Assignment: Thompson. *W. Kenneth Brantley v. Juanita M. Barton*, Case No. 04CVC 3996 (2005).

Verdict: $20,000.00 less credit for $8,379 medicals already paid; final judgment amount $11,621.00. Dog Bite. 81-year-old plaintiff, while walking to the bank in her neighborhood, was attacked by two dogs, one of the dogs belonging to the insureds and the other being kept by them for a friend. Statutory liability was agreed to before trial with a stipulation limiting damages within the insureds' coverage. Trial went forward on the issues of proximate cause and damages. Plaintiff's major claim for compensation at trial was that she no longer could walk alone, formerly her only hobby, for fear of another dog attack. Plaintiff had never had a driver's license and lived within walking distance of her bank, grocery, drug store and church. Plaintiff's two daughters testified on her behalf as before-and-after witnesses, but neither daughter could testify to having taken any action (counseling, pepper spray, walking with mom) to help their mother overcome her fear. A juror after trial said they gave Plaintiff medical bills and some money for counseling to overcome her fear of dogs. Medical bills: $10,305.10. No lost wages. Plaintiff's expert: Marwan Bazerbashi, M.D. (plaintiff's treating physician). No defense expert. Settlement demand: $100,000. Settlement offer: $30,000 new money. Plaintiff's attorney: Mitchell J. Alter. Defendant's attorney: James E. Featherstone. Judge: Hogan. *Johanna Watson v. Kimberly Skala, et al.,* Case No. 04CVC-07-6886 (2005).

Verdict: $8,000.00. Auto Accident. Plaintiff's vehicle was rear-ended and she claimed that defendant was intoxicated and fled the scene. Defendant denied intoxication and contended that he left the scene only after confirming that everyone was uninjured. The jury declined to award punitive damages. Plaintiff's medical bills were uncontested. Medical bills: $3,988. Lost wages: approximately $1,000. Plaintiff's expert: David Ratliff, D.C. No defense expert. Settlement demand: $50,000. Settlement offer: $5,700. Two day trial. Plaintiff's attorney: William Mann. Defendant's attorney: Joshua R. Bills. Judge: Magistrate Angel. *Tiffany Perdue v. Jason Martin,* Case No. 04CVC-3392 (2006).

Continued on Page 20

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Verdict: $2,279.20. Auto Accident. An uninsured vehicle rear-ended plaintiff. Plaintiff, age 42, alleged soft tissue neck and back injuries, a cervical bulge and two herniated disks. Medical bills: $16,000. Lost wages: withdrawn at time of trial. Plaintiff's experts: Dr. Rea (neurosurgeon) and Richard Kowalzuk (chiropractor). No defense expert. Settlement demand: $30,000. Settlement offer: $2,817. Two and a half day trial. Plaintiff's attorney: Shawn Dingus. Defendant's attorney: Robin Richards. Judge: Reece. *Joni Finnell v. Allstate Insurance*, Case No. 04CVC-08-8454 (2006).

Verdict: Defense Verdict. Automobile/Motorcycle Accident. On August 2, 2002, plaintiff James Knowlton was traveling northbound on College Avenue approaching the intersection of Haddon Road in a construction zone when defendant Carolyn Haddad allegedly failed to yield on a left turn colliding with plaintiff's motorcycle. Plaintiff sued Carolyn Haddad for negligent operation of her vehicle. Plaintiff also sued Kokosing Construction Company Inc., Camp, Dresser & McKee Inc., H.R. Gray and Associates Inc., Paul Peterson Company and the City of Columbus. Plaintiff alleged the City allowed a dangerous condition in the construction zone to exist and that the remaining defendants failed to keep the construction zone safe and free of nuisance. Plaintiff sustained injuries to his neck, chest, right shoulder, a fracture to his back, a fracture to both of his shins and lacerations of his left big toe, as well as pain and suffering. Defendant Carolyn Haddad settled before trial and she was dismissed. The Dresser, McKee case was bifurcated on the issues of liability and damages. Medical bills: $98,360. Lost wages: $26,145.24. Plaintiff's expert: William Jackman, P.E. (liability expert). Defendant's expert: Joseph Schlonsky, M.D. Settlement demand: $750,000. Settlement offer: $50,000. Five day trial. Plaintiff's attorney: Eugene L. Matan. Defendant's attorneys: Douglas Holthus (Kokosing) and Joshua T. Cox (City of Columbus). *James Knowlton, Individually v. Carolyn Haddad, Kokosing Construction Company, Camp Dresser & McKee, Inc., H.R. Gray and Associates Inc., Paul Peterson Company and The City of Columbus, et al.*, Case No. 04CVC-08-7971 (2006).

Verdict: Defense Verdict. Medical Malpractice. Plaintiff's decedent, Stephanie Kramer, presented to Children's Hospital on October 26, 1996 for the surgical implantation of an apheresis catheter into her heart. Stephanie Kramer was a 4-year-old girl who had been previously diagnosed with retinoblastoma (cancer) of the left eye. Her eye was enucleated in 1984. The cancer metastasized and she developed retinoblastoma in the surviving eye. Metastasized retinoblastoma is extremely aggressive with little chance of survival. Further work-up demonstrated the existence of malignant cells throughout the body. The patient began an aggressive course of chemotherapy. The apheresis catheter was being placed for purposes of treatment in which the peripheral blood stem cells are apheresed, collected, frozen, stored and returned to the patient's body at a later date. The apheresis catheter is placed via fluoroscopy. The surgery was successful. However, at the completion of the surgery, the patient's blood pressure dropped precipitously. The physician ruled out the most probable causes of the patient's drop in blood pressure. Vigorous attempts were made to save the patient's life but she expired in the operative suite. Plaintiff's expert testified that the defendant surgeon failed to recognize and treat the most common complication of the placement of an apheresis catheter, that being a perforation of the coronary sinus. Autopsy did reveal that the coronary sinus was perforated during surgery. However, plaintiff's expert acknowledged that perforation of the coronary sinus was not a failure of the standard of care. Rather, failure to recognize and treat the complication was the failure of the standard of care. The defendant physician testified that he did consider and rule out a perforation of the coronary sinus. He was able to do so because the procedure was performed under fluoroscopy and no complications were noted. He performed an x-ray of the coronary sinus immediately following the arrest and no blood was seen in the pericardial sac. The jury returned a unanimous verdict for the defendant surgeon and hospital. Plaintiff's expert: Peter Manning, M.D., University of Cincinnati Children's Hospital. Defendants' experts: Kathryn Klopfenstein, M.D. and the defendant testified as an expert on his own behalf. Settlement demand: $2 million. Settlement offer: $75,000. Five day trial. Plaintiff's attorneys: Jeff Moore and David Sams. Defendants' attorneys: Mary Barley-McBride (Steven Teich, M.D.) and Alan Radnor (Children's Hospital). Judge: Lynch. Judge Sitting By Assignment: O'Grady. *Amanda Heath, et al. v. Steven Teich, M.D., et al.*, Case No. 00CVA-07-6647 (2006).

Verdict: Defense Verdict. Auto Accident. Plaintiff, a 52-year-old male electrician, alleged neck and low back injuries arising out of two automobile collisions six months apart. The first collision was a sideswiping accident with a street sweeper. Plaintiff began chiropractic treatments and continued working 12-16 hour days as an electrician. The second accident was a rear-end "tapper" causing a broken tail light. No police were called and again, no work missed. Defendant Contract Sweepers settled on the morning of trial for $30,000. Trial proceeded against Kendra Mott for the second accident. Medical bills: $27,000. No lost wages. Plaintiff's experts: Dr. Cathy Greiwe; Dr. Scott Otis; Dr. William Fitz; and Paul Shannon, D.C. Defendants' expert: Dr. Leslie Friedman. Settlement demand: never below $100,000. Settlement offer: $250.00. Eight day trial with interruptions for weather and the court's criminal docket. Plaintiff's attorney: James B. Blumenstiel. Defendants' attorneys: David A. Herd (Contract Sweepers) and James E. Featherstone (Kendra Mott). Judge: Connor. *Dennis Cligrow v. Contract Sweepers and Kendra Mott,* Case No. 04CVC-03-3446 (2005).

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Better Lawyer™
a columbus bar publication for new lawyers

Message from the Chair

By Sandra McIntosh

I recently attended a pretrial conference where all three of the lawyers present were "new lawyers." We were all several minutes early and spent the time before the conference talking with one another in the hallway. We talked a little bit about the case, but mostly made friendly small talk. When our conference was called, it turned out to be an oral hearing that would take place in the courtroom on the record. The hearing lasted about 20 minutes, with each of us strongly advocating for our clients' respective positions.

Afterwards, we retreated to the hallway where we spent the next several minutes in polite and candid discussion about our expectations as to how the Judge might rule, and what the next steps would be in the face of the possible rulings. Then we shook hands and left, knowing we would be talking soon, no matter the outcome of that day's hearing.

To many of you reading this, it may not seem to be anything of importance, but to me, it was really what I thought being a lawyer was all about. It was one of my first experiences where I personally knew all of the other lawyers involved in a case. Usually, as a new lawyer, I appear for conferences and know who everyone else in the room is, but they rarely know me.

I've often listened to experienced members of the bar ask about each other's family, or discuss flying to an out-of-town deposition together. I've seen these same lawyers having breakfast together on a Sunday morning, only to oppose each other in the courtroom the following week. But for me, this was also one of the first times where I thought each attorney did a nice job of representing their client, but then did an equally nice job of being polite and professional to one another afterwards. I left the courthouse that day feeling as if we had not only done our clients a service, but had done our profession a service as well.

This is what the New Lawyers Committee is all about. It is about getting to know your peers so that you can one day work together in a professional and civil manner, even in the most adverse of cases. When I think back on the interactions with other lawyers that I wish I could "do over," the problems or issues were, in my opinion, rooted in the fact that they didn't know me, and I didn't know them.

It seems as though the unknown can breed mistrust in our profession. But when you know the attorney on the other side of a transaction or case, it is much more difficult to be unkind or discourteous. Indeed, as I am now encountering opposing attorneys for the second or third case, the working relationship is much more pleasant because we have already established a rapport.

The pleasant working relationships that come along with knowing the other attorneys involved in a case not only make a new lawyer's life easier, but also translate into positive results for their clients. I recently read an article about Kathleen Trafford in Ohio Super Lawyers 2008 in which she was quoted as stating, "Sometimes someone will call and say they want the meanest lawyer in town. I'll say, 'When you want the smartest lawyer, call me back.'" That quote made an impression because in litigation, and I suspect many other legal areas as well, clients do want their attorney to be the proverbial "bull dog."

While aggressive representation is one thing, being a bull dog is another, and rarely does the latter seem to achieve positive results for the client. In one of my first cases, the other lawyer and I were discussing settlement and, probably as a result of the other lawyer and I not knowing each other, things escalated. We were worlds apart on what should have been a pretty simple case.

Eventually the opposing party sought help from another attorney, with whom I had worked before, and we had the case settled in pretty short order. Dragging out discovery and the litigation process was not helpful to either of our clients in this small case when a swift, reasonable settlement was, and that was achieved only when the other lawyer and I worked together professionally to find a result both of our clients could be happy with.

What I hope all of the new lawyers out there take from this is a renewed appreciation for the power of good working relationships, not only for our own sanity, but for the best representation of our clients that we can provide. A great place to begin building those relationships is the Columbus Bar New Lawyers Committee. I hope to see you at an event soon.

Sandra McIntosh, Chair, New Lawyers Committee

So, You're Getting Married? That's Great!

Sign Here and Here and Here and Once More Here

By Michael E. Heintz

Getting married is a wonderful occurrence that brings together friends and family like no other single event in your life. If you have been in a wedding, you've seen first hand some of the planning, organization, family dynamics, and cat herding that goes into executing a wedding. But, there's another part: the contracts and negotiations that make the details a reality. How do the flowers, music, food, friends, and family appear that momentous day? Be glad you're a lawyer—you're going to need it.

My wife and I were married this past September, and we did about 90% of the planning and execution ourselves. Although I'm from Akron and she's from New Jersey, we decided to have the wedding in Columbus because that's where we met and have our lives. After we convinced our families of the location, no small task, we got down to the business of planning a wedding. I was sure I was ready. After all, she said "yes," so the hard part was done, right? Well…

I was not prepared for the business side of wedding planning. If you're thinking about having a traditional ceremony, dinner, music, and dancing, be ready to read contracts. A lot of them. If you're not reading contracts, or reading them carefully, you could be setting yourself up for disaster.

The Ceremony: If you are getting married in your house of worship, the sanctuary and clergy may be a membership benefit. Check with the building's administrator on the arrangement. Make sure you give the facility something in writing to reserve your date and put it on the officiant's calendar. Many places have forms, but make sure it's written down somewhere. Do not be afraid to ask about costs associated with the ceremony, such as fees or customary honorariums, as well as the availability of the facility for the rehearsal, dressing rooms, and storage for ceremonial items. A friend thought it was inappropriate to ask his clergyman about ceremony fees before his wedding; rest assured, nothing dampens a festive atmosphere like receiving an unexpected invoice. You'll never stick to your budget if you don't know the costs.

The Reception: This is where it starts to get tricky. Does the reception venue require you use its food, or do you cater in? What is the cost per plate? Are table linens, glasses, bartenders, and valet parking included? Is there a place for the wedding party to relax before heading into the reception? These are all questions you need answered in the service contract well in advance. For example, I was recently at a wedding (not mine) where the catered food was surprisingly inexpensive. The reason: clean-up was not included in the catering cost, and members of the wedding party ended up scrubbing dishes after dinner. While details such as the menu and the bar offerings can be filled in later, items such as the room to be used, time of availability, what you can and can't do in the room, and any deposit must be determined at the outset. Again, most venues have preset forms that serve as a good starting point for setting the boundaries of the reception, but all parties need to have a clear understanding of what is expected at the beginning.

The Vendors: There is still the florist, photographer, and entertainment to secure, not to mention close to 1,000 other details. It is again important to determine the scope of services. Does your photographer provide you with digital negatives following the wedding, and when do they leave for the night? How long is the band or DJ going to play? Do they take breaks? Can the vendors drink from the bar and what will they eat during the reception? At our wedding, the reception venue provided boxed lunches for vendors during the reception, as well as a room for them to catch their breath on breaks, which the vendors greatly appreciated.

All of these questions must be answered before money begins changing hands. Most venues and vendors require up-front, often nonrefundable, deposits. It is important to know the boundaries of the service. Use your professional skills to identify issues and questions with each agreement and service contract. By treating yourself as a client, you can avoid significant pitfalls regarding the mechanics of your wedding.

Finally, be aware of "red flags" as you would for a client. For example, our first choice of reception hall would not return our phone calls or provide us with much-promised information. It was only upon confronting them on a contract and menu that we learned they could not meet our needs as verbally promised. We were left making after-hours phone calls to venues we had politely eliminated months earlier, asking if our date was still available. It worked out, but it was a nerve-wracking 48 hours. The lesson here is: if something doesn't seem right with a communication or expectation, chances are it isn't and you need to act quickly. Remember, you are the customer with an important event—don't ever hesitate to ask questions along the way—after all, you're a lawyer, its part of the job.

Congratulations on your upcoming wedding. With a little forethought and careful reading, it will go as smoothly as you expect.

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Associate's Corner: Utilizing Time Created by a Lull in Assignments

By Jameel S. Turner

Due to the state of the U.S. economy and a number of other factors, legal experts and forecasters agree that law-firm associate hours were markedly down in 2007 as compared to previous years. While some industry specific legal fields such as insurance law and patent and trademark law experienced growth in 2007, many other areas of law took severe downturns with respect to overall productivity and profitability. Most experts are of the opinion that the fear of a recession slowed the growth of U.S. businesses and thus the need for legal advice in the creation and acquisition of new businesses and business ventures.

What does the economic downturn mean for law-firm associates in their first few years of practice? For many, the downturn means knocking on partners doors, almost daily, looking for work, and pounding the pavement with colleagues and clients alike to generate any work possible. But when those approaches fail to drum up any new assignments, what is an associate to do then? Not come to work? Hardly. While many young attorneys view a slow-down in assignments as a direct correlation to job security, and rightfully so, slow periods can be benefit for young attorneys looking to utilize the time as a tool for personal, professional, and community development.

There are various approaches young lawyers can take in a slow-down, but not every approach will provide benefits to the associate, the community, and the firm itself. The advice that follows provides a few suggestions to consider during slow periods that will help curb the anxiety inextricably intertwined with those periods. Moreover, your employer will take notice of your initiative to utilize the slow period in a positive way.

Join the Board of Directors of a Non-Profit Organization. Reach out to a local non-profit organization that you are interested in and inquire about the criteria for membership on the Board of Directors. Directorial membership in such organizations is a great networking tool and also serves as an outstanding resume builder at the same time. It also provides excellent leadership experience and much needed exposure to the technical aspects of operating a business. Finally, serving on a non-profit board also sheds light on the tough decision-making process that takes place when developing the organization's annual budget, an experience that many young attorneys would not otherwise be exposed to. Not sure where to start? Look to Firstlink, www.firstlink.org, an organization that pairs needy organizations with those willing to serve on boards.

Volunteer at a Charitable Organization or Participate in a Community Mentoring Program. Associates can also use the time created by work slow-downs to volunteer at a local charity. Community service programs such as "Meals on Wheels" only require time commitment of about an hour or two a week but provide a much needed service to the community. Similarly, community mentoring programs such as the Columbus Mentoring Initiative are also an excellent way to utilize slow periods while at the same time providing a positive influence for children and adolescents in the community. Both of these options require minimal time commitments, but provide significant community benefits. Most employers encourage attorneys to find creative ways to give back to the community.

Get Involved with your Local Bar Association. Involvement in the CBA is also great way to utilize slow periods at work. Whether you participate as an event organizer, a member of a fund-raising committee, or as the chair of a practice group that meets monthly, your involvement will surely pay dividends. You could also choose to write an article on a topic of interest to you, which is a great marketing tool to that draws attention to yourself and your firm. Whatever your involvement, the local bar association is an excellent place to come into contact with influential lawyers in the community and pick their brains about the practice of law.

Network. Savvy associates will use a slow down in assignments to reconnect with law school colleagues or other potential clients and referral sources. Take the time to flip through your rolodex of contacts and reach out to persons you have been out of touch with. Invite someone to lunch and discuss any potential legal needs or referral sources those people might have. Most law firms have a budget for networking lunches of this type so you won't be required to eat on your own dime! You never know when an informal lunch meeting could pay big dividends down the road, so you don't want to waste the ideal networking opportunity created by a slow down in assignments.

Conduct a Self-Audit. Use a slow period to assess your progress in your profession and also your work/life balance. Review memorandums and other work you recently completed and assess the overall value of that work to the client and firm. Undoubtedly, you will find that projects you completed earlier in your career will fail in comparison to your recent work, and that should be the trend. Also, ask probing questions of yourself about your daily routine such as: Can I become better organized? or Can I utilize my assistant in more efficient manner? Finally, use down time to evaluate your work/life balance and identify areas for improvement.

No matter your practice area, the eventual, albeit short-lived, slow period in work assignments can serve as a real benefit to a young lawyer looking to take advantage of it. By choosing a cause, community program, or networking opportunity that is of personal interest to you, and then focusing your efforts on benefiting from the down time created by a slow period at work, a young lawyer's time is never wasted. And time, more often than not, is money.

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Voices of Our Community

By Janica A. Pierce

As President-elect for the Women Lawyers of Franklin County ("WLFC"), I am responsible for organizing and arranging speakers for the luncheon series. This year, I wanted to engage women lawyers in discussion with leaders in the community to hear their perspective from those they serve in their respective organizations.

The theme of the WLFC luncheon series is "voices of our community." The idea is to inform attorneys about what is occurring within the Columbus community that is not always on our radar as attorneys. For many different reasons, attorneys, specifically female attorneys, do have the time and the ability to designate to non-legal matters that impact our community. Therefore, I decided to bring the discussion to use.

Our luncheon series kicked off on October 17, 2007, with Priscilla Tyson, a member of the Columbus City Council. Councilwoman Tyson brought her skills as a communicator, and her ability to interface and connect with diverse audiences, to tell the women lawyers about the many challenges of being a city council member, but also the positive role played by Columbus City Council within Central Ohio. Ms. Tyson enlightened WLFC on the inner workings of the Columbus City Council, and she is a great asset to the council.

On November 15, 2007, Janet Jackson, President and CEO of the United Way of Central Ohio ("UW"), blessed our presence as a woman of passion, distinction, charisma, and integrity for her years of contributions to the Columbus community. Ms. Jackson discussed many of UW's new initiatives, which will continue to strengthen and attack critical needs, such as poverty and education for our children, with the goal of making Columbus a better place for all hardworking people.

On January 20, 2007, we heard from the amazing Tei Street, Director of Education for Mayor Coleman. Ms. Street not only informed us of some of the after-school initiatives supported by the Mayor's office, but also gave us insightful information that motivated all of those in attendance to pursue our own passion as it relates to helping others, even if it benefits the people you directly impact on a daily basis, like your children and your family members. Ms. Street opened her life to those in attendance and shared her inspirational story. She has authored a book entitled "I am the Amazing Tei Street, Wouldn't You Like to be Amazing, Too?" This book definitely describes the experience she shared with us at the luncheon.

Our spirits have been enlightened, our intellect challenged, and the luncheon series is not over. We have three additional speakers that will contribute to our luncheon series. On February 20, 2008, we hear from Tammy Wharton, CEO for the Girl Scout Seal of Ohio Council. She will speak to us about her new venture started on October 1, 2007. I expect to see an expression of passion for the mission of Girl Scouts and hear of her goals for this great endeavor. Her professional leadership skills and experience has led her to an organization that is serving over 20,000 girls and young women in Central Ohio, and we look forward to her thoughts regarding the challenges they face.

On March 20, 2008, Cindy Lazarus, currently President and CEO of the YWCA for Central Ohio, will discuss what the women served by the YWCA on a daily basis see as challenges. Prior to assuming the position of leader of WYCA Columbus, she served ten years as a judge on the Tenth District Court of Appeals. Most of us know Judge Lazarus from her time on the bench, but we look forward to hearing her thoughts on the role we can play in the lives of fellow women.

And last, but not least, on April 17, 2008, we will hear from the economic development perspective of the community from Suzanne Coleman-Tolbert, Director of Job Leaders. Job Leaders is Central Ohio's newest one-stop employment services provider. Ms. Coleman-Tolbert transitions her leadership skills to the Job Leaders program as Director in providing a space where people can not only come to apply for a job but acquire training, service, and education to directly address the startling unemployment rate in Central Ohio. We look forward to hearing more information about this much-needed program in Central Ohio.

In gathering these dynamic speakers, I tried to address concerns we face on a daily basis, including family, children, education, community service, and economic development. Each of the speakers will share something that will reach many – each person may only take away something small, but it will be significant.

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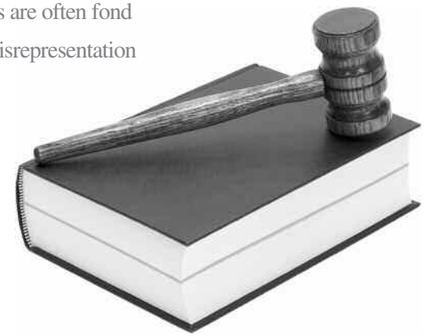
Janica A. Pierce, Chester, Willcox, and Saxbe

PROFESSIONALISM:

Dealing with *pro se* parties

As many attorneys can attest, unrepresented parties are often fond of making allegations of misrepresentation against opposing counsel.



By Josh L. Schoenberger

It is said that a person who represents him or herself has a fool for a client. The Ohio Rules of Professional Conduct, effective February 1, 2007, seek to protect said "fools" by setting forth specific guidelines for attorneys dealing with *pro se* parties. Rule 4.3 of the Ohio Rules of Professional Conduct reads as follows:

> **RULE 4.3: DEALING WITH UNREPRESENTED PERSON**
> In dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested. When the lawyer *knows* or *reasonably should know* that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer shall make *reasonable* efforts to correct the misunderstanding. The lawyer shall not give legal advice to an unrepresented person, other than the advice to secure counsel, if the lawyer *knows* or *reasonably should know* that the interests of such a person are or have a reasonable possibility of being in conflict with the interests of the client.

On February 1, 2007, Rule 4.3 replaced Code of Professional Conduct 7-104(A)(2), which prohibited a lawyer from giving "advice to a person who is not represented by a lawyer, other than the advice to secure counsel, if the interests of such person are or have a reasonable possibility of being in conflict with the interests of his client." Code section 7-104(A)(2) only prohibited an attorney from giving legal advice to a non-represented party, while new Rule 4.3 takes it one step further, by requiring an attorney to take reasonable steps to correct any misunderstanding that the unrepresented person may have with regard to the lawyer's role in the matter.

As many attorneys can attest, unrepresented parties are often fond of making allegations of misrepresentation against opposing counsel. While it is essential to take steps to correct any misunderstanding, it is equally essential to document your steps to avoid future allegations by the unrepresented party. Attorneys should develop standard letters for *pro se* parties to set the tone for the relationship and ensure compliance with Rule 4.3. The following is a suggested form letter that attorneys can employ in situations in which they are dealing with a *pro se* party.

"RE: Smith v. Corporation X

Dear Mrs. Smith:

I represent Corporation X in the above referenced matter. Please note that the information available to me at this time indicates that you are not represented by counsel. If you are currently represented by counsel, please forward this correspondence to your attorney immediately and do not contact me directly. In the event you obtain counsel at a later date, I must discontinue all communications with you directly, as I am not permitted to communicate directly with a represented party. Should you obtain counsel at any time, please discontinue all attempts to contact me and have your counsel contact me immediately.

The interests of my client, Corporation X, may be [are] in conflict with your interests in this matter. The purpose of this correspondence is to apprise you of my role as attorney for Corporation X and to explain to you how my representation of Corporation X will affect my communications and relationship with you.

Please note that I cannot offer you legal advice relative to the matter at issue between you and Corporation X. The only advice that I can offer you is to seek legal counsel. Throughout my representation of Corporation X, I may explain to you my client's and my own view of the meaning of documents or my client's and my own view of underlying legal obligations. In the event that I offer my client's and my own view, please understand that I am not a disinterested party and am not a disinterested authority on the law.

Nothing as set forth above shall prohibit me from discussing the above referenced matter with you. In addition, nothing as set forth above shall prohibit me from discussing with you the terms on which my client, Corporation X, will enter into an agreement or settlement relative to the above referenced matter. Finally, nothing as set forth above shall prohibit me from drafting documents that may require your signature in the event of agreement or settlement in the above referenced matter. In any event, please understand that I represent Corporation X whose interest may be [are] in conflict with your interests in this matter and you are advised to consult your own legal counsel.

Should you have any questions regarding my representation of Corporation X, please do not hesitate to contact me. I look forward to working with you relative to the above referenced matter."

It is important to note that Rule 4.3 distinguishes between situations involving unrepresented persons whose interests may be adverse to those of your client and those in which the person's interests are not in conflict with your client's. In the event that your client's interests are not in conflict with the unrepresented party, Rule 4.3 does not prohibit you from giving legal advice. With that being said, an attorney must take caution when offering any advice, as attorneys are prohibited from giving advice if there is even a reasonable possibility of the unrepresented party's interests being in conflict with the interests of your client.

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Josh L. Schoenberger, Williams & Petro Co. LLC

Spring, when a (less than) young man's fancy turns to thoughts of golf

By Jeff Hartranft

Golf and the law have a long history. Its fact, the first recorded reference to golf was a 1471 proclamation by King James II of Scotland banning the sport because it took time away from soldiers' archery practice. Golf remained an outlaw sport until King James IV lifted the ban in 1502.

Perhaps the most significant case involving golf in the past decade was the PGA v. Martin case,[1] which extended the Americans with Disabilities Act to the PGA tour. To determine whether Casey Martin, a golfer born with a defect in his leg which made walking difficult and painful was entitled under the ADA to use a cart in tournaments, the Supreme Court had to determine the essential nature of golf. After reviewing the history of the sport, and considering testimony from golf legends such as Jack Nicholas and Arnold Palmer, the Court found that the essence of golf was "shotmaking - using clubs to cause a ball to progress from the teeing ground to a hole some distance away with as few strokes as possible." [2] The Court then held that because allowing Casey Martin to use a cart would not affect the essential nature of the sport, the use of a golf cart was a reasonable accommodation under the ADA.

Golf has played a role in countless other cases. To give sense of how many, cases just from Ohio include: a rare defeat for Tiger Woods when he tried, and failed, to assert a trademark to keep an artist from selling pictures containing his likeness;[3] the question of whether the ability to play golf was a valid basis for terminating workers' compensation benefits (it is);[4] and disciplinary action against the Governor for failing to report rounds of golf on in his financial disclosure.[5] However the most common cases involve the pesky tendency of golf balls to deviate from their intended flight path and occasionally cause damage to people or property.

To determine whether a golfer is liable to another golfer for an injury caused by an errant shot, Ohio courts use the test set forth in *Thompson v. McNeill* (1990), 53 Ohio St.3d 102. The first part of the test says that a player who injures another player in the course of a sporting event, and yes this includes golf, by conduct that is a foreseeable customary part of the sport cannot be held liable for negligence because no duty is owed to protect other players from that conduct. However, the second part of the test makes clear that a golfer remains liable or reckless misconduct.6

Therefore, since the essence of golf is shotmaking, and in recognition of the fact that golf balls will go off course, a golfer has no liability if a bad shot hits a follow player or spectator. This rule even applies when a club slipping out of a golfer's hands during a practice swing injures a fellow player.7 A golfer is liable however for reckless actions such as taking a shot when there is someone in the intended path of the ball, deliberate attempt to injure another player, or injuries not involving an essential part of the game such as running into someone with the golf cart, remember PGA v. Martin?

The rule is similar when determining if golfers are liable for damage to property. In a recent case, an Ohio court was asked to determine whether golfers were liable for damage caused by errant shots to the property of a homeowner living next to a golf course. With what appeared to be the voice of experience, the judge laid out a litany of cruel facts:

"It is generally known that the average golfer does not always hit the ball in a straight flight. It is common knowledge that the ball does not always go where the golfer intends or hopes for it to go. An occasional "hook" or "slice" plagues even the best professional golfers.

The mere fact that a golf ball does not travel in its intended direction or causes some damage or injury does not constitute proof on negligence on the part of the golfer. But a golfer does have a duty to exercise reasonable or ordinary care for the protection of persons or property within the range of danger of being struck by the ball."

Finding no evidence of negligence, the court ruled against the homeowner.

Golf will continue to keep lawyers busy both on the course and in the courts. So the next time you're standing on the tee relax, according to law, you can't be expected to hit your drive straight. But yell "Fore" anyway. It's polite.

1. *PGA Tour, Inc. v Martin (2001), 532 U.S. 661*
2. *Id. at 683-684.*
3. *ETW Corp. v. Jireh Publishing Inc (6th Cir. 2003), 332 F.3d 915*
4. *State ex rel. Spohn v. Indus. Comm. (10th Dist. 2005), 2005 Ohio 2800*
5. *Disciplinary Counsel v. Taft (2006), `112 Ohio St. 3d 15*
6. *Thompson v. McNeill (1990), 53 Ohio St. 3d 102. Syllabus paragraphs 1&2.*
7. *Biggin vStark , 1994 WL 587633 (Ohio App. 11 Dist).*

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Changing Jobs in a Legal Career:

Leaving Gracefully

By Jeff Mussman and Lara Bertsch

The reasons to change jobs vary, but the fundamentals of a successful transition are universal. As with most situations attorneys face, the most important consideration in changing jobs is the effect of your transition on the clients you help represent. Your skills, knowledge, and familiarity with the issues facing your clients make you hard to replace. You can make it better for the clients and your own reputation by leaving gracefully.

Be ready to discuss positive reasons for going to the next job.

Everyone from coworkers to family to clients will learn that you are changing jobs and will wonder why. Be ready with a positive message for them, whether they ask or not. You have a reason to want to go where you are headed. Stay focused on your reasons, and know how to articulate them even before giving notice.

Some conversations will feel like a cross-examination. Those people probably have negative perceptions about the job you are leaving and want you to confirm their beliefs. Like a good witness, listen carefully and don't agree with anything you don't actually believe. Speak up; tell them your story. Keep in mind that what you say will be repeated. This is a small community and attorneys are always interested in the reasons other attorneys change jobs.

You are not the first one to leave.

Except in rare situations, you will not be the first person to leave. Seek out and follow any procedures your company or firm already has in place. If you have good relationships within the office, try to get additional advice on how others have done it before you to minimize the impact of the transition.

Take extra notes.

When you know that somebody is going to take over your work for you, before giving formal notice, think about what you learned during the earlier part of your representation and write it all down in one place. A timeline of events can be very helpful.

Be sure to search your email and phone lists for people related to the representation and include those in your notes. In some cases, the formal pleadings or motions will already summarize the information for you, but sometimes the major ideas are not obvious from the pleadings. Especially when representing defendants, the Answer does not contain nearly as much information as you knew when you prepared it.

Do the next steps early.

The person who takes over for you will need some time to catch up. You can give them more time if you move the case ahead and keep them informed. You probably already know what you would do next if you were staying. Perhaps you would send some discovery requests to pin down a theory or look into a particular aspect of the law you think may come into play. Prepare those early, even though you normally would schedule them for later in the case. If it is a filing or other communication, check with the attorney taking over, and if they approve, go ahead and send or file it. It will be easier for them to take over a case when the proverbial ball is in the other side's court.

Clean up the file.

Your case files are probably messy, like mine usually are. I don't always separate the different types of documents as they come in and only really organize them before big events in the case. Your leaving the office is a big event in the case. Organize the documents in the case, and don't be shy with the manila folders.

Try to have a "warm" hand off.

Find out who will have each of your cases and offer to sit down with them go over everything. They probably won't remember it all, but the familiarity of having heard it from you before digging through the file to find a particular fact or point of law after you've left will make a big difference.

Respect your employer's preferences when it comes to talking with clients about your impending move. Ask how you should introduce the attorney taking over the case to the client, and even ask whether your company or firm would prefer that somebody else break the news.

Keep in touch.

After you leave, hopefully you will want to keep in touch with your former colleagues because of the friendships you have developed. At the very least, you will probably be curious about your former cases. You may be practicing law for the next few decades. The friends you have already made might be around for the rest of your life, and they will always remember how you treated them when you changed jobs. Hopefully that will be a good memory.

You can make it better for the clients and your own reputation by leaving gracefully.

Jeff Mussman

Lara Bertsch

Firm v. In-House:

A Junior Lawyer's Dilemma

By Karim A. Ali

I began my legal career at Porter, Wright, Morris, & Arthur, where I was an associate for two years. I then left the law firm to pursue an in-house counsel opportunity at a Fortune 500 company. I spent two years as an in-house counsel at the company, and recently returned to Porter Wright. I have been often asked the question—"Which is better, working in-house or working for a law firm?" Invariably, I give the same answer—neither—I have always considered a direct comparison between in-house and law firm experiences analogous to comparing apples and oranges. The experiences are very different and difficult to reduce to a simple black or white assessment. After working in both in-house and law firm environments as a junior attorney, I believe a junior lawyer choosing between employment opportunities at a law firm or an in-house legal position would benefit from a clear understanding of some of the primary differences.

The most obvious difference between working in-house and working for a law firm is the requirement to account for billable hours, which, for some firm attorneys, is the bane of their existence. Whether the billable hour requirement is 1,750 hours or 2,200 hours, keeping track of billable time is a painstakingly tedious task. I was very glad to be free from my law firm time sheets during my in-house tenure, but the time law firm attorneys spend on time sheets in-house attorneys spend in meetings. As an in-house attorney, there were numerous days when I was in various meetings for four to six hours at a time. As cliché as it sounds, we had meetings to schedule other meetings. In fact, there were so many meetings, people began to develop new words to call "a meeting" (e.g. "touchbase," "follow-up," "update" and "circle-back"). In addition, in lieu of billable hours, it was common for my in-house colleagues and me to update management reports used by various company decision makers. As I often frantically updated my various management reports in an effort to meet a reporting deadline, I was reminded about my old time sheets and time entry deadlines. After working in-house for two years, I have developed a new appreciation for time keeping.

> I have always considered a direct comparison between in-house and law firm experiences analogous to comparing apples and oranges.

One of the major benefits of being an in-house attorney is that in-house attorneys often play key decision-making rolls on cross-functional collaborative teams. In-house attorneys are expected to understand their expertise as well as how their expertise fits within the company's goals. As I performed my function as an in-house attorney, I understood my roll in helping my colleagues, and ultimately the company, succeed. Junior law firm lawyers are rarely involved with the big picture issues faced by their clients. More often than not, junior law firm attorneys are given a specific task, with a specific goal, and a specific timetable that has little or nothing to do with the client's overall business strategy or goals.

Law firm attorneys and in-house attorneys also differ on the range of work they experience on a daily basis. Law firms afford junior attorneys with numerous opportunities to tackle new challenges that widen their breadth of knowledge. From new clients to new legal matters, I rarely have a dull moment as a law firm associate. Just when I think I am knowledgeable about some aspect of the law, I am asked to research and analyze a nuanced perspective of a familiar legal issue. An in-house counsel's experience, however, is often characterized by consistency and predictability. In-house attorneys are generally hired for their expertise, or in my case, hired to become very proficient in a specific area of expertise, and do not venture outside of their expertise on a regular basis.

One common misconception between in-house attorneys and law firm attorneys is that in-house attorneys have it "easier" than law firm attorneys. I could not disagree more. I worked just as hard as a law firm attorney as I did when I was an in-house attorney. There is a difference, however, in workflow predictability. As an in-house attorney, I had a steady and predictable flow of expected projects with the occasional "fire" to put out. I generally knew in advance when I was going to be busy, and I could plan my non-work related obligations accordingly. When I worked in-house, I usually worked an average 8 to 10 hours a day. My schedule as a firm attorney, on the other hand, is not as predictable. On any give day, I may be asked by a firm partner or senior associate to assist with some transaction or legal issue. There are days when I may bill four hours, and there are days when I may bill 14 hours, which averages out to 8 to 10 hours a day.

Reflecting back on the age-old question of whether working in a law firm or in-house is more desirable, I suppose the best answer I can provide is that it depends. Aspiring attorneys or junior attorneys should have an understanding of what they want from a legal career, and find the legal experiences that are the best fit for their interests.

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Prevention is Better Than Cure:

Simple Steps to Prepare for and Prevent Household Emergencies

By Lisa Kathumbi and Nevada Smith

Most people tend to think that a fire, flood, gas leak, tornado, hurricane or other catastrophe will never happen to them in their home. Despite over four years as a Columbus Red Cross Board member, Nevada Smith was admittedly one of these people until she personally experienced the unexpected – a house fire in her home caused by a shortage in a closet light.

Like Nevada, each year, millions of people experience some form of a home emergency. The American Red Cross of Greater Columbus, alone, responds to over 400 home emergencies or disasters each year. While home emergencies vary, and, by definition, are difficult to predict, there are mitigation strategies you can take. The old adage that an ounce of prevention is worth a pound of cure certainly rings true when it comes to home emergencies. Fortunately, when the unexpected happened to Nevada, she had taken some precautionary measures to protect her family and home. By taking the time to do some of the home-protection fixes listed below, you, too, can help prepare for, or even prevent, emergencies in your home.

The Basics – There are some very basic steps that you should take to help protect yourself, your family, and your property.

- Make a list of important local telephone numbers, such as the police department, fire department, gas company, and the number of your local chapter of the Red Cross.
- Keep a copy of important records, such as birth and marriage certificates, insurance contracts, and financial statements in a fire safe box or away from the home in a secure place such as a safety deposit box.
- Set aside money in an emergency fund. This can be tough to do on a tight budget, but it can be well worth the effort.
- In addition to having a first aid kit available, prepare or purchase a disaster supplies kit, including important items, such as flashlights, radios, new batteries, and various tools.
- Make sure you and every adult family member knows how to turn off the gas, electricity, and water in your home.
- Keep all tree and shrub limbs trimmed so they don't come in contact with wires.
- Store household chemicals on the bottom shelf of a closed cabinet, and never store bleach and ammonia in the same cabinet as the mixture can create a toxic substance.
- Make sure your home disaster planning includes considerations for individuals with special needs – children, an elderly family member, or a person with a disability.
- The Red Cross also recommends that at least one person in your home learn first aid and CPR.

Home Fires – Home fires are not only the most common home disaster, but they are also the most preventable. Some suggested fire-related home protection fixes include:

- Install smoke alarms outside each sleeping area and on each additional level of your home. If you sleep with doors closed, install smoke alarms inside sleeping areas. Make sure you maintain your smoke alarms so that they work effectively by checking batteries and vacuuming away cobwebs and dust. Smoke alarms should be replaced approximately every ten years.
- Purchase a fire extinguisher and consider having the local fire department come in and provide training on use for everyone in your home.
- Determine at least two ways to escape from every room of your home and consider escape ladders.
- If you must use a portable heater, do not use near flammable products and never leave it unattended.

Floods – In the past, many of the federally declared disasters in Ohio have been flood related. At one time, it was estimated that about 90% of all federally declared disasters included flooding. Some suggested flood-related home protection fixes include:

- Store valuables in the attic or on the highest floor.
- Make sure your furnace, electric panel/fuse box, water heater, washer, dryer and other items in the basement are located off the floor and elevated above previous flood levels.
- Have ready emergency water supplies.
- Check your insurance policy to make sure that it covers home floods.

Tornados – Ohio is positioned geographically on the eastern edge of what has come to be known as "tornado alley." In fact, compared with other States, Ohio ranks 21st for tornado frequency. Some suggested tornado-related home protection fixes include:

- Identify the place in your home where you can go or where family members can gather if a tornado is headed your way and keep this space uncluttered. If you do not have a basement, a center hallway, bathroom, or closet on the lowest floor would be best.
- If a tornado passes over your area, watch for fallen power lines.

Once an emergency happens, the time to prepare is gone. The Red Cross urges families to prepare for and take action to prevent home emergencies, and is available to assist you in doing so. For more information and to find the Red Cross chapter closest to you, visit www.redcross.org.

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LEGAL WRITING TIP OF THE MONTH:

It's Really Okay to Begin a Sentence with *But* or *And*

By Jameel S. Turner

Whether a sentence should begin with a conjunction has been debated for centuries. Although folklore condemns the practice, no credible source does so. And condemnation of the practice is not supported in books on rhetoric, grammar, or usage. Usage critics have been trying to dispel the myth for some time. When used purposefully and appropriately, starting a sentence with a conjunction can be a powerful rhetorical or stylistic tool.

Consider Charles Allen Lloyd's 1938 words that fairly sum up the situation as it stands even today: "Next to the groundless notion that it is incorrect to end an English sentence with a preposition, perhaps the most wide-spread of the many false beliefs about the use of our language is the equally groundless notion that it is incorrect to begin one with 'but' or 'and'."1 One acclaimed legal writing expert refers to the fear of beginning sentences with *but* a "superstition."2

Opponents of beginning sentences with conjunctions argue that the practice is against the rules of grammar and also loosely informal. Proponents of the practice, on the other hand, contend that that the practice is not wrong, loose, or informal – and point to several examples of great legal writers who condone the practice. In fact, proponents argue that a substantial percentage, often as many as 10 percent, of the sentences in first-rate writing begin with conjunctions.3

So, if we all can agree that beginning a sentence with a conjunction is not wrong, how should conjunctions be used to begin a sentence? *But* is an adversative conjunction that indicates contrast. Most legal writing authorities agree that the word 'however,' when positioned at the beginning of a sentence should be changed to *But*. 4 Writers should evaluate the contrasting force of the *but* in question and see whether the needed word is really *and*; if *and* can be substituted, then *but* is almost certainly the wrong word. To sum up, then, *but* is a perfectly proper way to open a sentence, *but* only if the idea it introduces truly contrasts with what precedes. For that matter, *but* is often an effective way of introducing a paragraph that develops an idea contrary to the one preceding it.5

Classical grammar instructors also frowned on the use of the word *and* to begin a sentence. This practice developed because of the tendency for young or inexperienced writers to write incomplete sentences or sentence fragments when beginning a sentence with *and*. Today, however, it is perfectly acceptable to begin a sentence with *and*. In higher level writing, it is a very useful way to transition and add flow to your document, as long as it is used right.

Professional writers understand the practicality of beginning sentences with conjunctions, largely because we do it regularly in our every day speech. Good writing often contains a great many sentences beginning with *but* and *and*, despite the unfounded superstition that sentences should not begin with conjunctions. I encourage all to spread the word about the appropriateness of beginning sentences with conjunctions to assist professional writers in dispelling the prevalent, although groundless, notion.

1. *Charles Allen Lloyd, We Who Speak English: And Our Ignorance of Our Mother Tongue, New York: Thomas Y. Crowell, 1938, 19.*
2. *Bryan A. Garner, "On Beginning Sentences with But," Michigan Bar Journal, October 2003.*
3. *Id.*
4. *Id.*
5. *The University of Chicago, "The Chicago Manual of Style," 15th Edition, Section 5 (Grammar and Usage) 2003.*

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Jameel S. Turner, Bailey Cavalieri

When used purposefully and appropriately, starting a sentence with a conjunction can be a powerful rhetorical or stylistic tool.

Beware the Traps of Email

By Ryan Sherman

One of the easiest ways for young lawyers to get into trouble is through the careless use of email. Evidence of what can go wrong with email is easy to find. The more memorable examples in recent years include Jack Abramoff's regrettable decision to fire off an email calling his clients "the stupidest idiots in the land," and Michael Brown, the former FEMA director similarly highlighting the perils of email when, on the day Hurricane Katrina struck, he wrote "Can I quit now? Can I go home?"

Here are ten tips that should help you avoid making these and other email mistakes.

1. Compose Professional Messages

Because of its informal format, lawyers often write informal emails. This may be appropriate in communicating with friends, relatives, or co-workers, but it is generally not appropriate when communicating with clients, opposing counsel, or partners. While there is no need to respond to a partner's informal, lowercase, one-sentence inquiry with a "Dear madam, in response to your inquiry of 7 December, 2007 . . ." you should nevertheless take care that all your emails are automatically spell-checked and proofread for typos and grammatical errors before sending.

2. Watch Your Tone

Because e-mail encourages instant responses, users often engage in "conversations" by email. Unlike in-person conversations, email does not allow for tone or context. As a result, the intent and meaning behind an email can be easily misconstrued. To check for potential tone problems, it is helpful to ask yourself how you might interpret the email if it were sent to you by opposing counsel.

3. Keep It Short And Simple

E-mail is a post-it note. This is particularly true if the recipient is reading it on a Blackberry. If you need to scroll beyond the preview pane, it may be too long or not the proper mode of communication for the material. Consider a letter or memo if the email runs more than a page or two. While long and detailed emails are sometimes necessary in our line of work, less is usually more.

If a long email is necessary, use bullet points, headings, and spacing to break up the message into an easier to read format.

4. Write Effective Subject Lines

There is an inverse relationship between the number of emails that an attorney receives each day, and the amount of time that he or she has to respond to those emails. It is not unusual for some attorneys to receive a hundred or more emails every day. Consequently, an email is more likely to be ignored or inadvertently discarded than a letter or memo. Clear and concise subject lines will help the email get the attention it deserves.

5. Reply And Forward With Caution

How many times have you sent an e-mail and immediately thought, "Did I send that to the right person?" My own personal level of paranoia on this topic has increased exponentially since I started practicing law – one needn't look very far to find examples of what can go wrong when lawyers click "send" without due consideration. Just to be safe, it's a good idea to get into the habit of checking the "to" "cc" and "bcc" lines three or four times before hitting "send." And watch out for the most dangerous button of all – the "reply to all" button.

6. Avoid The Flame War

Flame wars are heated email exchanges that are more emotional than reasoned. If you receive a flame or suddenly find yourself in a flame war, take a few hours or even a few days, before responding, if you respond at all.

Also, remember that emails often read worse than intended. An email that initially appears to be the opening salvo in a flame war may appear less combative after you take a step back and re-read it a few times. An ill-phrased comment, or even a well-phrased one, can easily be misconstrued in email.

Consider responding by phone, rather than email. Flame wars are often started by a misunderstanding and can be escalated by email. A phone call often defuses the situation or clarifies the issues, if for no other reason than people—even lawyers? are less likely to be rude and combative over the phone than in email.

7. Pick Up The Phone

Don't use an email to do a conversation's work. Resist the urge to "hide" behind an email when delivering unpleasant, difficult, or complicated information. Bite the bullet and pick up the phone.

8. Keep Your Emails

As emails take the place of letters and memos, retention becomes increasingly important. Just as you would keep letters, pleadings, and memos, you should also keep your email – both incoming and outgoing.

9. Remember That Email Is Evidence

Emails are postcards–permanent postcards–which remain in your computer long after you've hit the delete button. If your client's emails can become evidence, yours can too.

In addition to simply choosing your words carefully, you should also be particularly careful when talking about clients or judges (see, e.g., Mr. Abramoff), or when using sarcasm or humor, which can be misinterpreted after the fact (see, e.g., Mr. Brown).

10. Keep It Confidential

Before sending an email, ask yourself if it is confidential, privileged, or work product. If yes, you better also ask whether it will remain so after you hit "send." If one person in the group is outside the scope of the privilege, any privilege is waived.

Unfortunately, the care that you've taken in sending the email is likely to mean little if your client subsequently takes the email and forwards it along to her best friend. Labeling the email "Attorney/client privilege," "Attorney work product," or "Do not forward" can help in this respect.

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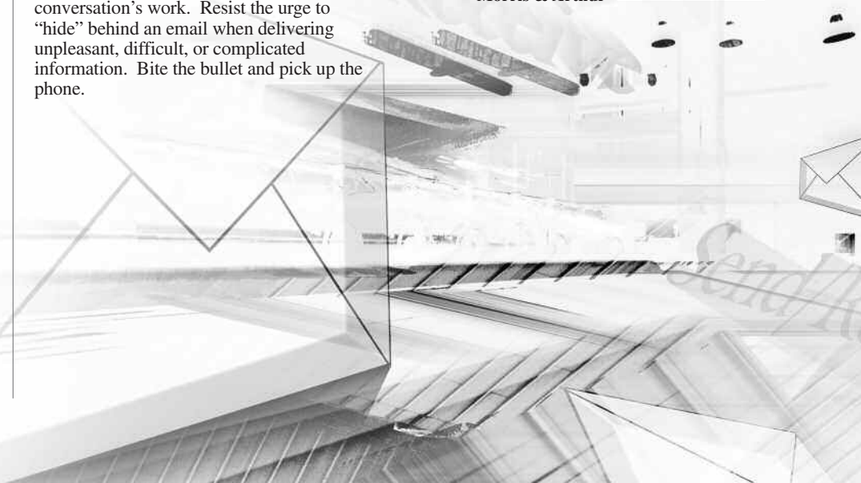

You Need a Marketing Plan, Now

By Nicole VanderDoes

Do you have a marketing plan? There is no excuse for your answer to be anything other than yes. A marketing plan is easy to create and will significantly impact your future. Whether you call it marketing, networking, rainmaking, or just making sure that you have a job in the future, the process of getting, keeping, and serving clients must be a conscious priority.

Why don't you have a marketing plan yet? It is never too soon to have a marketing plan, because marketing takes time, both in the short and long term. The majority of successful rainmakers devote at least 11 hours per month to actively participating in marketing activities such as speaking engagements, leadership roles in the bar, participation with community and trade associations, and attending related social activities. If this sounds like a large time investment, remember the repeated wisdom that, "What you do with your billable time determines your current income, but what you do with your nonbillable time determines your future."

You cannot afford to wait until you know more people or have your own clients, because if you do, you will be behind the curve. When beginning any new marketing effort, you should expect 12-18 months before starting to see results. One of the reasons it takes time is that marketing is about developing relationships, and relationships take time. You should join groups that meet several times per year, and you must attend those meetings, otherwise you are not developing relationships. Sales professionals all agree that it takes multiple progressive contacts to close a sale, but most professionals give up after 3-4 contacts, which is sooner than any successful salesperson would recommend. We may not want to say we are "selling" ourselves, but the lesson is that relationship building to develop business takes time, and it is important not to give up mid-relationship.

It also takes time to develop a role in your professional relationships that will lead to referrals. You can't expect referrals just by having your name on a membership list or by sitting in the back of a committee meeting. You want the people you develop relationships with to respect your professional skills and knowledge, to like you, and to trust you. So, when you join a group, join one you have a genuine interest in, and then seek to take on a leadership role. Aim for leadership roles that will increase your visibility and that will allow you to demonstrate your skills. When you engage in social marketing activities, do so on a regular basis and be sure to mix business with pleasure, so you are known as a fun lawyer, not just someone to party with or get a free lunch out of.

So, what next? The marketing plan is the easy part. According to Merriam-Webster Online, Marketing is "the act or process of selling or purchasing in a market; the process or technique of promoting, selling, and distributing a product or service," and a Plan is "a method for achieving an end; a detailed formulation of a program of action." So your marketing plan should include specific, written steps targeted at the goal of developing business.

Elements of a Marketing Plan. Here are some general suggestions and elements that you may want to include in your marketing plan. Remember, there is no set formula for what you need to include, and you should regularly review and revise your plan.

Long Term Goals
- What is your ideal vision of your career and/or your firm's identity in the future?
- What will make you a happy and successful lawyer?
- What kind of clients do you need to represent to achieve these goals?

Self Assessment
- What are your strengths and weaknesses?
- What special skills do you have to offer clients that set you apart?
- What do you enjoy most and least about your current practice?

Specific Steps
- Create a timeline: 6 months, 1 year, 2 years, 5 years, 10 years,
- Specify the actions you plan to take: i.e., "Write an article on recent changes in the FMLA for the regional managers consortium publication by June 1st," not "write an employment law article"
- Have a multifaceted plan
  - Join a trade group, write an article, speak at a conference
  - Add 50 names to mailing list within 6 months
  - Volunteer for a pro bono project
  - Plan a client lunch to get feedback on a recent matter
  - Learn more about industries/specialties that interest you

Follow Up
- Regularly review your marketing plan
- Updates, revisions, and fresh starts will be necessary, so it is important to come back to your plan often
- Evaluate what previous marketing efforts have or have not been effective, and try to apply what you have learned from successful experiences to new and ongoing efforts
- Keep thorough records of all marketing efforts, including expenses, follow up actions, additions to mailing list, referrals, and any other items that may assist in evaluating effectiveness

A marketing plan will help now. You may have to wait for your marketing plan to lead to new clients or to achieve its goals, but there are immediate benefits of having a marketing plan. First, taking the time to clarify your goals may give you a renewed motivation or direction in your career. Second, having a specific plan will give you a sense of empowerment and control over your future, that sometimes feels lacking, which has a psychological benefit that cannot be overstated. Third, having a marketing plan and sharing it with your supervisors is one of the most impressive actions young lawyers can take. And, it will be more impressive when you report back on your success.

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INSIDE JUVENILE COURT

By David W. Hardymon

The following is a transcription of a round-table discussion of the Franklin County Juvenile Court. The participants were: Dennis Hogan, Chief Counsel, Juvenile Division, Franklin County Prosecutor's office; Jeannie Newkirk, Assistant Franklin County Prosecutor; Jeff Liston, former Juvenile Court Magistrate and partner in the law firm of Tyack Blackmore & Liston; and current Juvenile Court Magistrates Cindy Sours-Morehart and Mary Goodrich. (Queries by LQ editor)

Q. What is the most common kind of case that is heard in juvenile court?

A. I see a combination of issues with the kids. Everything from drug addition to parents that sometimes have a breakdown with the kids. Lack of parenting. I say a big chunk of the kids that are dependent anyway. I mean it's before they start the criminal process. CSM

They're products of dysfunctional families, poverty, and substance abuse. JL

Q. How are juvenile offenses classified?

A. Something that would be a criminal offense if it were committed by an adult is called a delinquency. Truancy and curfews are considered "status" offenses. MG

In other words, offenses that generally only a child can commit. JL

And then there are abuses and dependencies. The Children's Services cases CSM

Actions on behalf of the kids. JL

We call 'em red and blue files. The red files are the abuse/dependencies and the blue files are delinquencies. DH

A red file, abuse/neglect/dependency, can be very complicated. It involves expert testimony, doctors. DH

Q. Okay. Tell us about the red files. Does abuse typically involve abuse of a child by an adult?

A. Or anybody, not necessarily an adult. CSM

Or the child is being neglected. Or is he becoming dependant. DH

And dependency is just when there's a condition or environment that warrants the state intervening and-and assuming guardianship. It doesn't necessarily fault the parent, it just...it's condition or environment that warrants the state obtaining guardianship. Maybe the parent is mentally ill and can't care for a child. It's not their fault they're mentally ill, but nonetheless it's a condition or environment that warrants us stepping in and caring for the child. That kind of thing. CSM

Or because the parent has substance abuse issues. JL

Or the child has serious mental health issues. We see some of that too. MG

Q. How are juveniles treated differently from adults in terms of criminal offenses?

A. One of the biggest differences between criminal court with the adults and juvenile court is, adults are usually dealt with individually. And with juveniles, we address the entire family situation. We attempt to rehabilitate children first and some of the parents will balk at things we try to get them to do. They think "the kids did it, why do I have to be involved?" So you really have to address the entire family because you don't want to send the kid back to the environment that got him into court in the first place. MG

Q. Is it required that a parent to come to court with the child?

A. Sometimes they don't have a parent so we always make sure they have an attorney. But a lot of parents don't come or Children Services may have custody instead of a parent. MG

Q. How does a summons go out to a juvenile? Does it go out in care of the parent or guardian?

A. Yes. MG

Generally both. Yeah, the notice is sent to both. And parents are parties to the action. I mean, they're supposed to be there by law. JL

One of the biggest differences in juvi. versus adult criminal is that in adult criminal you sentence that defendant and your orders apply to that defendant alone. With juvenile, you can issue orders to virtually anybody who has contact with the child. CSM

Q. Including a stranger to the child or his family?

A. I can make orders that affect a person who is just a stranger. I can make orders that there be no contact with that stranger. I can make orders on other people, including the parents. When we put a kid on probation, parents are a party to the Juvenile Court's probation rulings. We tell them and explain to them that they'll be held in contempt of court if they interfere with the progress of their kid's probation. CSM

Q. How common is it for a parent or guardian to be found in contempt?

A. I've never had one. But I go to parents every time I put a kid on probation and tell them their kid's treatment requires participation from you. You will do it. You'll make sure they get there, you'll help any way you can and if you don't I can hold you in contempt of court. Because you've interfered with his ability to make progress. CSM

Q. And they get all of the deterrents that go with that? Fines, jail time, et cetera?

A. Correct. CSM

Q. So, misdemeanors, felonies, and chronic truancy. Does anything else fall into the category of delinquency?

A. Failure to obey a court order. JL

Q. How do you differentiate in terms of the disposition between let's say the low end of the chronic truant, up to the high end of the homicide? Are they all judged to be "delinquent"?

A. Yes, they are found delinquent. For misdemeanors, there's a – statutorily,

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there's a list of things you can do to somebody who's charged with a misdemeanor. And the worst is 90 days in our detention center or removal from home and placement in the custody of children services. CSM

Or 90 days in the county jail if they are an adult. MG

Q. So, if they turn 18 after committing a misdemeanor as a juvenile, they go to the county jail?

A. They can. MG

Q. What determines, in your mind, whether somebody's a candidate for the county jail as opposed to the Juvenile Detention Center?

A. I consider it for kids when they have turned 18 and have a pattern of being non-compliant. We just got to do something to them because they are not going to come out of counseling appreciably changed. You can't place them in children's services unless there's some mental health condition that requires somebody to take care of them. We just graduate them into the adult system. MG

I look at their history. If they've had a history down at juvenile court. They don't follow the orders, that sort of thing. Kids that are AWOL for a period of time and think they want to be a grown-up. They've turned 18 and they're in on a misdemeanor and they want all the rights and privileges of a grown-up, then they get the rights and privileges of a grown-up and they get to go to the county jail. CSM

I had a kid this week, for instance, a warrant has been out on her for almost 2 years and the underlying motion was failure to do community service to generate payment back to her victim. So, I gave her a month to finish the 20 hours that she had left. And I said that if you don't do it in 30 days you're going to go to the county jail. Because again she's been out there on probation for about 2 years, she's already almost 19 and there was a victim to compensate. MG

We've been talking about misdemeanors, here. For delinquencies based on felony offenses, the consequences are more severe, including commitment to the Department of Youth Services until age 21 or a bind-over for trial as an adult. DH

Q. Jeff, what is the most difficult kind of case you have to deal with as a practitioner? What do you hate the most?

A. I hate when my hands are tied by the law. When a 16 year-old is charged with very violent offense involving a gun. Whether that be an aggravated robbery or a murder. And our legislature has determined that those kids should be tried as adults even though they are children. That's the most frustrating.

Because we don't treat them as adults for any other purpose. Because we're scared of our kids. Because the legislature passed laws a long time ago that aren't supported by any of the data in regards to rehabilitation and what they thought kids were going to become. I think it ignores the fact that children are children and we recognize that for all other aspects. We don't let them make contracts. We require them to go to school. They don't pick their doctors. They don't make any other adult decisions but because they're involved in a certain kind of criminal offense or because a certain kind of weapon is involved then all of a sudden we want to mandatorily treat them as adults. JL

Q. What are the criteria for treating them as adults?

A. Well, the mandatory ones are your 16 year-olds. That you used a gun in the offense. That you committed a homicide. Those are the primary ones. And there's some other ones, but…JL

Q. And this is called a bind over?

A. There are mandatory bind overs and discretionary bind overs. Mandatory is usually a 16 or 17-year old who commits a burglary or robbery, a rape, a kidnapping with a gun, or committing a murder or an attempted murder. DH

Q. And those are considered – it is mandatory that they have to determine whether the juvenile ought to be tried as an adult?

A. In the mandatory ones, it's a probable cause hearing. The State just has to establish probable cause. If probable cause is established, the case is automatically transferred to adult court. DH

Q. Give me some examples.

A. Major crimes with a gun and murder or attempted murder. DH

Q. And once they're bound over to adult court what happens to them? Is there an indictment after going before a grand jury?

A. Yes. DH

Q. The case starts all over again?

A. From that day on they're treated as an adult. If they're indicted, they go to the county jail or bond is set just as in an adult proceeding. If they committed another offense, they would be considered a juvenile until conviction. But for the bind-over case, it would be considered an adult offense–with all the privileges of an adult. DH

Q. What's a discretionary bind-over?

A. The judge has the discretion to decide whether or not the child is amenable to rehabilitation in the juvenile court. If the answer to that is yes, the kid stays in juvenile court. If the answer to that is no, the case is transferred to adult court. There are statutory guidelines that the court must follow. DH

Q. Do the magistrates get involved?

A. No, the judges handle those in Franklin County. MG

By statute, there are 9 things for the court to consider in favor of binding a case over and 7 factors that weigh against transferring the case. For example, if a gun is used, it's 1 of 9 factors in favor of transferring the case. Others include a prior record, prior probation, those are the kinds of things that would make the case transferable. The lack of prior record, success in probation, no prior cases – those would be factors that favor keeping the case in juvenile court. DH

Q. What's the worst kind of case you've seen?

A. Sex offenses are probably some of the most difficult. CSM

Q. Has the rate of sex offenses increased in recent years?

A. We all talked about this morning, we believe it's increased. CSM.

I think because of more reporting. MG

Not more of taking place, just more of it coming forward. CSM

Q. Is there a difference in terms of the character? Are we talking about a more serious kind of incident or just …?

A. You know, I've had very few violent rape cases. A lot of them are mid-range teenagers that are hitting on somebody who's under 13 years old. Something like that. That's another area where the legislature has tied everybody's hands on what can happen to a juvenile under Adam's Law regarding registration requirements on sex offenders. We're all kind of coming to terms with that law. Sex offenses are placed under certain mandatory registration requirements, which apply to juveniles. If a kid admits to a rape that is reduced to a gross sexual imposition charge, well that kid has to register every 6 months for 20 years. MG

In some cases they can be ordered to register for the rest of their life. CSM

And with juveniles, there's so many that have developmental issues, mentally and physically. You know sometimes the incident itself wasn't that egregious, it might be 2 teenagers engaging in foreplay, that type of thing, and our hands are tied. In a lot these situations we don't have any discretion in whether we can order the registration. MG

Q. How is the registration enforced?

A. It's a new offense. If they violate the registration law, it is treated as a separate charge, in and of itself. MG

Q. What's the difference between Megan's Law and Adam's Law?

A. The primary difference is that Adam Walsh Act casts a wider net as far as the kinds of offenses that are involved. It takes away most of the discretion of the court to make a determination about how the person's going to be classified. Now it's simply done by looking at the offense rather than looking at the individual for the most part. There is only a little bit of discretion still left in juvenile court about that. So it's a wider net. More people are going to be involved. I think the number is 32,000 people in the State in Ohio will be classified under that Adam Walsh Act. But the Northern District just froze everything recently because of what they perceived to be procedural defects in the whole process. JL

Q. Did Adam's Law supersede Megan's Law?

A. It did. JL

Q. When did sex offender registration become effective for juveniles?

A. I'm going to say for juveniles, about 2001. It's just another step towards juveniles being treated more like adults. DH

I think we all, on all sides of this situation get frustrated when the legislators' have tied our hands. MG

And when you keep in mind that, you know … "They can't live here." They have to be so many feet away from where children are. All of those privileges that are affected by the registration laws, they have to give up for the rest of their lives when they're 16 years old. CSM

Q. The goal of the system is to straighten this young person out – and I assume that education is something that is favored? If they are registered as a sex offender, and they can't be near a school, how do you reconcile the two ideas?

A. The goals of the system over the years have changed a little bit. It used to be almost exclusively for the rehabilitation of the offender and that's not so any more. That's been rewritten and now our legislators have determined that part of it is to do what's right for the victim as well. For society's sake. All of those things play into the disposition of a case as well as rehabilitation of the offender. So we've got to weigh all those interests now, where it used to be all we looked at was rehabilitation of the juvenile. CSM

Q. Why do you think it changed?

A. I think it's in reaction to seeing children commit purely heinous and violent offenses – one of the things we've noticed is an increase over the years in children committing horrendous felonies; F-1's and F-2's, with firearms. It's a huge issue. CSM

The amount of mandatory bind-overs you have because of firearms has increased significantly in the last 2 or 3 years. I mean, I don't know …JN

Q. Could this be driven by any particular activity? Drugs, for instance?

A. There is a lot of drug activity. JN

Guns are just easier to obtain. JL

Most of our bind-overs I would say are probably aggravated robberies. JN

Not that it's shifted completely. I mean there is some discretion on the sex offenses, too, so where if the child is 13 or under, they're not eligible for registration. If they're 14 or 15, it's still discretionary. It's just when you're getting onto 16 or 17 years of age is when it becomes mandatory. So, there is still some discretion there if the court, you know, deems it to be an appropriate case, they don't have to register in Ohio if they are 14 or 15. MG

And there are three tiers now that set the period of registration. It can be for life, and then it steps down to 20 years and then to 10 years. JN

You can file motions later to have the registration level reduced. If it is reduced, it can't be raised back up later. MG

Q. What offenses give you the highest category of registration?

A. Rape. It doesn't matter if its statutory if the child's under 13 or by force at any age. JN

Rape, sexual battery, and a new form of gross sexual imposition. JL

Q. What is new about it?

A. It applies if the victim is under 10. In those circumstances, gross sexual imposition is a registration offense. CSM

So you can see that registration is going to apply to a lot more kids, because the victims tend to be younger. It could even apply more frequently to kids than to adults. JL

I mean that's a lot of the reason the majority of the rapes we see are not "forcible" rapes. They're rapes where a kid is 15 and the victim's…the victim's 12. There's something like that and they are not of the age of consent. So, it's automatic. CSM

Because most of the kids aren't doing forcible rapes. JL

Not the stranger at gunpoint, at knifepoint kind of rape. Don't get the wrong idea. I have had those, when I was prosecutor I had some of those cases. So, they do exist. It's just not the majority of them by any stretch. It's a smaller percentage. CSM

Let's put this in perspective. We have very few 16 to 17 year olds breaking into somebody's house and raping a woman at knifepoint in her bed. Or kidnapping somebody off the street and raping her in the alley, that's not what we're talking about. We're only talking about some male who……who's 13, 14, and 15, and 16 years old who probably has been sexually abused himself, now sexually abusing his or her cousin. Frequently, they are perpetuating a behavior pattern that was inflicted on them as a child. But they are serious offenses and they are treated seriously. DH

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Q. You all mentioned guns and drugs becoming larger factors in juvenile cases. Why are guns suddenly more available?

A. Because we don't control them. JL

Q. And how do juveniles get them?

A. Because people sell them to them. Adults. It's not because kids are manufacturing them. It's not because they're going out and getting them. Guns are more available than they were 25 years ago. JL

Well and another theory. One of the things we've all noticed as magistrates, we've seen an increase in the amount of burglary offenses where guns are stolen. And not always recovered. So, I think that's another thing. CSM

That's one way kids are getting guns. They are stolen guns that they pass among themselves. DH

But kids also are buying them from adults, that's where they're coming from. And that's because we have a country where we probably have – I don't know, Dennis probably knows the number for this – we probably manufacturer a thousand guns for every person in the country. We don't have any documentation that tells us how many adults are selling guns to kids. They're usually stolen or they're stolen from their parents. I don't know how many cases we've seen where the kid took the gun from his dad. JL

Q. What's the drug of choice?

A. It's still pot. JL

It's also crack. CSM

I see more selling crack than I do using crack. I see lots of use of marijuana. I've seen a few active cases over the last 5 years involving prescription drugs. MG

Yeah, prescription drugs. JL

For example, having prescription drugs on them in school. You know, little pills they find in their pockets. MG

They get popped for trafficking offenses because they give their buddy, their best friend, the Ritalin. CSM

A lot of ADHD drugs out there that they share. MG

Q. Is there a class of crime that you think is being driven by either drug traffic or use of drugs?

A. I think a lot of CCW charges (carrying a concealed weapon), come with drug trafficking. I think a lot of the drug offenders who are picked up on trafficking charges also are charged with having guns. MG

I think a lot of the shootings are drug related. JL

Obviously, some of the burglaries are drug related. CSM

Q. How active are gangs in Columbus? Pretty significant?

A. I think so. We have two prosecutors here to deal specifically with that population. JN

We're not Detroit, but there's a pretty significant presence here. CSM

There are the Bloods and Crips and all of their subsets. MG

They are 40, 50, 60 different gangs in Columbus. DH

Because you probably have 40 or 50 different neighborhoods in Columbus. A lot of it's still neighborhood driven. JL

Q. Has gang activity increased any over the last three years?

A. Absolutely. DH

Absolutely. MG

Q. Why do you think that is?

A. Poverty. JL

Also, you are going to find that the kids who are in gangs, almost always come from some sort of dysfunctional family. Often, you'll see a child being a ward of Children's Services at some point before they ever picked up an aggravated robbery. MG

Q. What's your feeling about juveniles being incarcerated and becoming worse instead of better?

A. There's a 200 and some odd page report on that topic that just came out. A fact finding report about the Department of Youth Services. I have a copy of it. You can get it on the internet. All you have to do is Google STICK-RATH. CSM

Stickrath, he's the head of the Department of Youth Services. JL

Q. Somebody want to give me the Reader's Digest version. What do they think, what do you think?

A. Overcrowded. Out of control, under staffed. Services are horrible. They brought in special expert to review it. JL

There's just no treatment for mental health and sexual offenses is kind of the bottom line. It's really bad. CSM

Q. If a juvenile goes into an incarcerated setting, the odds are they are going to come out worse than when they went in?

A. Not necessarily. Because I've seen kids come back reformed. DH

Q. Why? Because they're scared to death, or is there some other reason?

A. The light bulb went on. I don't know why they came back and all of sudden, you can see the change. They grew an extra couple of inches. They gained some extra pounds and it's a year and a half after they got committed, and it's "yes sir" "no sir" and not that cocky gang attitude in the courtroom. They come out changed. DH

Yes, they do. I've had kids over the years change. A tremendous change. MG

But there's a bunch of kids out there that – an officer told me the other day that there's a whole mess of kids out there that have no fear of death, God, the law, police, their parents, their teachers. Now you can't rehabilitate them. So, if they go into the system and come out bad, there wasn't any chance of rehabilitating them in the first place. The court sent them there because they didn't go to adult court and they needed to be locked up for the safety of the community. DH

And as soon as they are released as a juvenile, they'll probably end up in adult court because they have no fear of anything. They don't care about anything. DH

Q. Any final thoughts?

A. I think that the role of the juvenile court is just as important now as it was when it was first established in Chicago over 100 years ago. Children are not little adults and they needed to be treated like children. And I think one of things we are going to see over the next few years, is a new wave of science coming to this. And it's all the adolescent brain studies, where we are actually proving that children's brains are physically different from the adult's. And that they function differently because their brains are physically different. And that they make poor choices, they take greater risks. They don't think things through. They don't have the ability to look at the consequences of their actions in the same way an adult does.

And the other thing that the brain studies tell us is that adolescence probably isn't over for some kids until age 25 and certainly into the early 20s for the vast majority of kids. And those are all of the things that we intuitively know to begin with and why we won't continue to apply that in our juvenile court is beyond me. JL

I never heard of juvenile law until I became a juvenile prosecutor. Even when I was in law school there were no classes in juvenile law. The word juvenile was never even mentioned. So, I didn't even know that there was a juvenile court in place. And it was an eye opener for me to just see that you can file complaints on kids because they won't get up when you tell them, or they won't go to school when you tell them to or, just won't do what a parent's supposed to make a kid do. And the other thing is the offenses that occur now are so much more severe than they were when I started out, even in the prosecutor's office 15 years ago. Kids just don't think beyond their nose. They shot people. They do drugs. They do things to make themselves look good among their peers. And there's just no thought about the consequences. And then the parents will come in and say "but he's a good kid" despite that aggravated robbery or the murder, "he's a good kid"; "he's a good boy"; and "he goes to church." Well he went to church 16 years ago, once. MG

Q. Is it because the families are falling apart?

A. They might be, but I don't think they know it. I think it's just a cycle and I don't think a lot of the kids that we deal with come from families that really expect to live a long life. I think life's cheap to them and, you know, I don't know what the answer is because they just do what they see around them and it's a norm for them. The poverty issue is a big factor, I think. You gotta eat, so you steal things. You need to belong somewhere, so you join a gang. MG

What frustrates me the most, is that you get families in there, every single day that expect me to fix in 15 minutes what took them 15 years to screw up. CSM

There's zero tolerance now. Twenty years ago if you took a knife to school, there was no big deal. Now, it's carrying a concealed weapon on school grounds. It's a felony. And the schools don't want to deal with it. They want to send everything down to juvenile court and we can't solve everybody's problem. DH

When we went to school, schools handled it. Teachers handled it. You called parents, parents dealt with their children – not anymore. CSM

And by the time the kid gets to us they've had so many adults lecturing to them, up one side and down the other that sometimes I'm not convinced that anything I say to them is going to make a difference anyway. I think by the time they get to me the lectures are useless. MG

Sometimes all we have is a Band-Aid. One of the things that I know we talked about today, we are overcrowded in our detention center. We can't house kids that are there just on misdemeanors. Our hands are tied in a lot of cases about what we really can do. The statute may say we can do things, but often times there's so many other issues that surround it: financial issues, overcrowding in the DH, that sort of thing. We really can't do what maybe we need to do, and so we put a Band-Aid on it, and you can't put a Band-Aid on a gapping wound and expect it to heal. CSM

David W. Hardymon, Vorys Sater Seymour and Pease

TOP TEN
Things the Court likes to see from practitioners

By The Honorable C. Kathryn Preston and Kristin A. Wehrmann

Like Dave Letterman, we have a list. Space doesn't allow for the full list of ten, but here are some of the highlights. Please note that these comments are geared for Bankruptcy Court; only opinions of the authors and do not necessarily reflect the opinion of others at the Bankruptcy Court or our employer.

Number 6: While it probably wouldn't surprise attorneys to hear a judge say "Come prepared," this means more than simply coming to the hearing armed with the identity of the client and the substance of the argument (although, believe it or not, there are times when counsel has forgotten these items). This also means considering all aspects of the presentation ahead of time. The hearing is the attorney's opportunity to present his case. The Court will often receive offers from counsel to research and provide authority on legal points after the hearing is concluded, but the hearing is the time for presentation of that material. Will the presentation include argument on facts as well as law? Are witnesses needed? Most attorneys think they testify well, but usually they aren't competent to testify within the meaning of the rules of evidence. If the subject motion or application is based on facts, and the parties are unable to reach a stipulation regarding those facts, admissible evidence must be presented by the movant.

Number 5: Talk with opposing counsel sometime before the hearing. All too often attorneys make settlement proposals as their opening statement at the commencement of a hearing. When this occurs, the Court can't help but think that communication before the hearing may have resulted in resolution of the matter. Timely resolution saves the parties time and expense of gearing up for and attending a hearing, especially if the attorneys prepared and brought witnesses to the hearing.

Even if the matter can't be settled, communication affords the parties a chance to explore the possibility of stipulating to undisputed facts or other issues. Stipulations also save the parties time and expense since they obviate the need for evidence on undisputed facts or presentations on undisputed points of law. In addition, stipulations also help narrow the court's focus on the issues to be decided at the hearing.

Number 4: Don't be afraid to communicate with the Court. If an attorney has a conflict or unanticipated problem in connection with a hearing, the Court encourages the attorney to call and advise the Court of the problem. With all the state courts and federal courts in Ohio, it's amazing that there aren't more scheduling conflicts. The Court strives to be accommodating, and work through those times when an attorney is supposed to be in two places at once. However, the Court needs to know about the problem before the case is called for hearing.

Additionally, attorneys should call the Court as soon as possible if a matter settles or if one of the parties decides to withdraw the subject motion or a related response. The Court and its staff spend a fair amount of time preparing for hearings by reviewing pleadings, drafting bench memoranda, researching, and reviewing the record. The Court appreciates knowing that a hearing is no longer needed so it does not expend that time unnecessarily.

Conversely, if a matter is more complicated than usual, attorneys should feel free to so advise the Court. The Court receives approximately 100 new motions and applications per day, plus objections to claims, objections to exemptions, schedules, petitions, plans, trustee's reports, complaints, and responses to previously filed motions. Chambers in Columbus receive between 40 and 80 orders per day for consideration. If the issues presented in a motion are unique or complex, the Court probably will not be aware of that fact until shortly before a hearing. The Court can undertake a number of steps to address complex motions. So the Court encourages attorneys to call if something may need extra time or attention.

Number 3: Bear in mind the spirit of the discovery rules. Thankfully, most attorneys are successful in resolving discovery disputes without seeking Court intervention. Nonetheless, if a dispute develops, the local rules specify what communications are required prior to filing a motion to compel discovery. The Court expects the parties to comply with the rules, and the spirit of the rules. For example, the Court would have difficulty finding that a good faith effort to resolve a discovery dispute occurred if an attorney places a phone call to opposing counsel at 5 p.m. and upon failing to reach counsel, files a motion to compel the next day at 8 a.m.

This may be more challenging in the day of electronic discovery. Just as technology has cast us all into a new age in our personal and business lives, our electronic world has us embarking on a new age in litigation. Unfortunately, the rules do not offer a lot of guidance. As such, attorneys should endeavor to be cognizant of their client's resources and bear in mind the spirit of the rules, which is to encourage free exchange of relevant unprivileged information.

Number 2: Know and follow the rules that pertain to the case. Foolish consistency may be the hobgoblin of small minds, however, the rules are designed to assure due process, put everyone on the same playing field, and avoid trial by ambush or by wallet. These are all laudable goals, and the Court has a duty and obligation to ensure that all parties adhere to the rules.

And the Number 1 thing the Court likes to see in all practitioners: Embrace professionalism, integrity and high ethical standards, and urge your clients to do so. Value your credibility and urge your clients to do the same. Professionalism is exhibited not only in the items discussed above, but also in practitioners' relationships with their colleagues, clients, other parties and the community. Few and far between are those who have not had to ask a professional favor; we should grant professional courtesies freely and not be afraid to ask for one. After all, what goes around, comes around. Attorneys should not to allow a client or anyone else to push them into compromising their principles. Remember, judges are only human, and it is difficult to have the same level of trust and confidence in someone who has compromised his integrity or credibility.

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1. *R.W. Emerson, Self-Reliance*

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The Honorable C. Kathryn Preston (U.S. Bankruptcy Court, Southern District Ohio) and Kristin A. Wehrmann

I-9 COMPLIANCE:
DHS RAISES THE BAR

By Jane Lee and Luba I. Seliavski

Immigration has consistently been one of the most controversial and heavily debated topics in the United States. The mere mention of "immigrants" raises emotions ranging from optimism to indifference to xenophobia. Whatever the reaction, the subject of immigration will continue to dominate our consciousness until the United States achieves successful immigration reform. Central to the government's agenda for immigration reform is to hold employers responsible for verification of their employees' work authorization. To further this agenda, Immigration and Custom Enforcement (ICE) has dramatically increased its raids of employers' worksites. Worksite raids are no longer limited to arrests of undocumented aliens but now target and sanction employers.

To increase the accountability of employers, Department of Homeland Security revised Employment Eligibility Verification Form I-9 on June 5, 2007. The purpose of the I-9 form is to document that each employee is authorized to work in the United States. Key to the revision of the I-9 form is a change in the list of documents acceptable for verification of employees' authorization to work in the United States. DHS removed five documents from the list stating those documents lack sufficient features to help deter counterfeiting, tampering and fraud. Also, DHS added the Form I-766, Employment Authorization Document, to the list of acceptable documents, and modified the language listing an unexpired passport with an I-94 card.

I-9 forms must be completed for every employee of the business, including United States citizens. A new I-9 form is required only for new employees, and for re-verification of an employee's employment eligibility. Notably, employers should re-verify employment eligibility of each employee on or before the expiration date of previous employment authorization, recorded in Section 1 of the I-9 form.

While employers should diligently complete and update I-9 forms, regulations prohibit employers from discrimination against any individual authorized to work in the U.S. in hiring, discharging, or recruiting or referring for a fee because of that individual's citizenship or national origin. Also, regulations prohibit document abuse by employers, such as specifying which document from the approved lists employers would accept from their employees.

Employers should be extra careful while completing I-9 forms and verifying employees' eligibility to work in the United States. Penalties for I-9 violations include fines, criminal actions, remedial action orders, injunctions against future violations, and debarment from federal contracts. Employers will not be automatically penalized for technical or procedural violations provided they could show good faith compliance with the employment verification requirements. On the other hand, leeway is not given for substantive violations, including not having I-9 forms for some or all employees, omission of essential information, and completion of the I-9 with knowledge or reckless disregard as to the false nature of presented identification and employment eligibility documents.

Employers' understanding of what constitutes good faith compliance with employment verification requirements is the biggest step towards compliance with the I-9 regulations. Under current regulations, employers are obligated to confirm that the presented employment verification document appears to be genuine and appears to relate to the person presenting it. In addition, employers may access governmental databases to confirm employment authorization through E-verify and/or to verify employees' social security numbers through access to Social Security Number Verification System. However, employers that verify information through E-verify and/or SSNVS should use these systems for all employees to avoid violations of anti-discrimination laws.

In addition to vigorous enforcement of employers' compliance with I-9 regulations, DHS intends to further increase the employers' burden by verifying employment authorizations when employers receive "No-match" letters from the Social Security Administration. The SSA has been issuing No-match letters to employers when employee names and social security numbers reported on Wage and Tax Statements do not match SSA records. Employers are often unsure of their obligations upon receipt of the letters. On August 15, 2007, DHS published new regulations defining employers' obligations when they receive No-match letters. In response to a lawsuit challenging these regulations filed with the U.S. District Court for the Northern District of California, and in compliance with the Court's order of preliminary injunction against DHS, the No-match regulations would not be in effect until some time after March, 2008. If the No-match regulations from August 15, 2007 come into effect, employers would face additional obligations to take extra steps to protect themselves or be potentially charged with having constructive knowledge related to employees' unauthorized employment. In furtherance of the new regulations, SSA's No-match letters will be accompanied by DHS letters instructing employers on the actions they must take to comply with the verification process. The proposed No-match regulations require employers to terminate all employees who do not successfully pass the verification process within 93 days of the receipt of the No-match letter. Since the governmental databases are notorious for errors, the proposed regulations could force employers to terminate employees who are legally authorized to work in the United States.

Employers are now facing tougher enforcement actions by DHS. To limit exposure and liability, employers should implement comprehensive written policies addressing preparation and maintenance of I-9 files. By strictly following employment policies, employers are more likely to be found in compliance with the new regulations and avoid potential liability.

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1. *The revised I-9 form and the Handbook for Employers, Instructions for Completing the Form I-9 are available online at www.uscis.gov.*

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FIRST IMPRESSIONS OF THE LEGAL SYSTEM

By Tracy Hardymon

(Editor's note: The author is the daughter of the Chairman of this publication's Editorial Board. To turn the traditional journalist's disclosure on its head, the opinions of the Editor, on a variety of subjects, frequently are not shared by the author.)

This past January, I was lucky enough to intern at the office of Franklin County Prosecutor Ron O'Brien. I am currently a first year student at DePauw University in Greencastle, Indiana and I am interested in a career in law. The university operates on a 4-1-4 academic schedule with the month of January dedicated to a program called winter term. During winter term, students may take a seminar style class on campus, study abroad, or participate in an unpaid internship in a university approved setting. Since I hope to attend law school after college, I sought an internship that would give me some experience in court, and Mr. O'Brien was kind enough to provide me with the opportunity. Although both of my parents are lawyers, most of my prior impressions about the law came from high school courses and television shows like Law and Order. Based on these perceptions, I walked into my first day of work expecting to see cruel judges, fast-paced work days, and lawyers who never smile. I was wrong on just about every count. When the month came to an end I had learned five important lessons about the legal system.

1) There is a lot of paper work involved. A lot. I interned a normal, scheduled workday every Monday through Friday from 8 a.m. to 5 p.m., and I found myself writing or re-issuing subpoenas every morning until the lunch break. On the days I did not attend a courtroom event, I made frequent trips to the Clerk's Office for the majority of the afternoon. I was also astonished by the amount of paperwork in every police file. Every detail surrounding a crime is documented, no matter how irrelevant it may seem. The amount of paper consumed each day in the legal system is almost unfathomable; yet it is certainly enough to give an unyielding environmentalist a heart attack at the sight of it.

2) The legal system is never on time. After attending numerous arraignments, preliminary hearings, and trials, I found myself waiting longer for them to begin than sitting in the courtroom as they took place. One day in particular, I was in a holding room prior to a preliminary hearing for roughly two and a half hours before the hearing began. There is a marked difference in docket management among the many judges and bailiffs in the Hall of Justice. For reasons that are not entirely clear to me, some courtrooms seem to operate at a faster pace than others. However, it is apparent that the huge volume and variety of cases handled by each of the judges will inevitably lead to delays. It's remarkable how much gets done and not surprising that it doesn't happen strictly according to schedule. That said, it feels like some proceedings are happening on Central time while the rest of the courthouse is on Eastern.

3) The majority of criminals are repeat offenders. While sitting in on one particular arraignment, I encountered a man who had a police record dating back to the 1950s. Many others had so many prior convictions that only their offenses from the last 10 years were read aloud in court. The thing I could not come to grips with was how miserable most of the indicted people seemed at the moment, yet they all had been in this position many times before. You got the feeling in arraignment court that for most of the defendants, life was never going to change. There's an air of hopelessness and frustration to it all.

4) A lot of crimes are nothing more than the product of stupid decisions. For example, one case arose out of a high speed police chase involving a father and his young child. When the police managed to stop the car, a search of the vehicle was conducted as well as a background check on the driver. Ironically, the driver had no previous criminal record or warrants out for his arrest, and the car turned up free of alcohol and drugs of any kind. What would have been a simple, routine traffic stop with a possible ticket left the driver behind bars, simply because he tried to outrun the police despite having his child in the car. I saw a lot of criminal charges that were filed, not because the offender had truly evil intent, but rather, had just done something really, really dumb.

5) Lawyers have a sense of humor. No, really. Crime shows such as Law and Order rarely show lawyers smiling, and if they do, it is because one lawyer makes a callous remark that is supposed to be taken by the viewer as witty. I was astonished to find that a real courthouse can be a light-hearted environment at times. Lawyers are actually funny. Even more surprising, lawyers like one another, no matter which side of a case they're on. I often observed the prosecuting attorney and the defense attorney laughing together immediately after a tense exchange in court. It still drives me up the wall wondering what they could have been talking about.

During the month that I interned for the Franklin County Prosecutor's Office, my perceptions of the legal system changed dramatically. Being a first time observer, I felt a startling juxtaposition of feelings as I witnessed the course of criminal cases. Stories of viciousness, foolishness, tragedy and humor jumped out of the files. You see the same things unfold in real time in the courtroom, often against a backdrop of grinding routine and endless paperwork. My days weren't always exciting, but neither were they ever dull. The experience left me wanting to pursue a career in law more than ever.

Tracy Hardymon

DON'T CALL ME A Woman Lawyer

By Nicole VanderDoes

I was raised to be a feminist. I am a feminist. But I never saw the appeal of any of those affinity groups for female law students or lawyers. Obviously, there are certain challenges that are particular to female attorneys, but they were challenges I was sure I could overcome. I knew older female attorneys who had navigated their way through the profession, I wasn't afraid to stand up for myself, and I was confident that hard work and integrity would be sufficient to create the personal success I aspired to. So why would I want to hang out with a bunch of whiny women who just wanted to talk about their babies and why they never got to work on the good cases? I have never doubted the reality of the glass ceiling, high attrition rates, outdated attitudes, unequal pay, and otherwise unfair treatment of women attorneys; I was just enough of a feminist that I was determined not to let any of that stand in my way.

Then, I saw that the Women Lawyers of Franklin County (WLC) was offering a scholarship to attend the Women in Law Leadership (WILL) Academy being put on by the ABA Commission on Women in the Profession and Young Lawyers Division (YLD). I had wanted to attend the WILL Academy because I was already involved with the YLD, but after attending three conferences already in the year, I knew I couldn't ask my firm for any more support and I couldn't afford to go on my own. So, the WLFC scholarship was just what I needed.

When I arrived at the McCormick Place Hyatt, I was in for a surprising experience. The WILL Academy focused on leadership, networking, and mentoring. I had attended seminars on those topics many times before, and they are topics I give a lot of thought to on my own as part of my ongoing career plan. This means that I often find the seminars I attend are somewhat repetitive, although interesting. But the WILL Academy was different. The WILL Academy was entirely women.

It was a brand new experience to think about the topics of leadership, networking, and mentoring as part of a group of 200 women. Two hundred women attorneys. Two hundred women attorneys from all over the country who wanted to learn to be leaders, to network more effectively, and to find good mentors and to be good mentors. Despite all the differences between us, at the opening session, it was instantly clear that I was in a room full of women like me. These were women who were there not because they wanted to learn tricks to get ahead, but because they cared about their careers, their families, and their world, and they thought that maybe the WILL Academy would provide them with tools to serve some or all of those priorities.

The only concrete thing I learned at the WILL Academy is that men are conditioned to shake hands and women are not. Interesting, possibly true, maybe relevant, but totally not the point. I learned far more listening to Judge Ann Claire Williams of the Seventh Circuit tell her story. Listening to the judge describe her life path and her ongoing involvement in the community and the world really crystallized for me that I am part of something bigger as a lawyer and as a woman, and her message was even more powerful because I was hearing it as part of this collective of women.

I met two young women from California who are thinking about what direction their careers will go and realizing that they have power over that path. I met a brand new attorney from DC who is interested in learning more about litigation, leadership, and how to get into policy work, who I told about the joint conference being put on by the ABA Section of Litigation and YLD in conjunction with ABA Day in Washington, DC in April. I talked to the chair-elect of the YLD about hotel fiascos. I coincidentally sat next to a fellow member of the WLFC, and later with two attorneys from Cleveland. I had a glass of wine with three attorneys from the Chicago area who emailed me the following week to invite me for coffee next time I make it to Chicago. And I even met a man in the midst of all these amazing women . . . a successful VP of his own company who couldn't help but brag about his son, who really is studying rocket science. I may not have known it ahead of time, but meeting those individuals, and many others, is why I went.

Since attending the WILL Academy, my outlook has definitely changed. Now, when I receive an email about the YWCA Leadership Luncheon Series or a WLFC networking event, I don't just check to see if the speaker or location sounds interesting; I get excited about the opportunity to connect with other women and put the event on my calendar. I still don't consider myself a "Woman Lawyer," but I've learned that simply being a "Lawyer" doesn't mean I can't learn a lot from other women.

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As if karaoke weren't bad enough

NOW IT'S COPYRIGHT INFRINGEMENT

By T. Earl LeVere

There seems to be no shortage of reasons not to indulge in karaoke, as tempting as it might be from time to time. Not the least among these reasons is that karaoke can be a copyright infringement as the Ninth Circuit Court of Appeals recently reaffirmed in *Leadsinger Inc. v. BMG Music Publishing*. OK, for most normal people, that COULD actually be least among the reasons not to karaoke but it is still a reason nonetheless.

The problem is not the singing in public — or at least that's not the copyright problem. Venues that offer karaoke typically protect themselves from complaints alleging infringement of the public performance copyright by purchasing catalog licenses from one or more of the three main copyright performing rights societies: BMI, ASCAP, or SESAC. Instead, the problem with karaoke machines, as the Ninth Circuit noted, arises from the machine's display of the lyrics on a video monitor in real time with the music that the machine plays. The display of video images with accompanying music implicates the copyright owner's "synchronization right." The synchronization right applies to audiovisual works (i.e., combinations of images and accompanying sounds) and is separate from the copyright owner's public performance right and from the "compulsory mechanical license" available under Section 115 of the 1976 Copyright Act for compositions embodied in phonorecords.

On January 2, 2008, perhaps after attending a New Year's Eve karaoke party, three judges from the Ninth Circuit Court of Appeals issued their decision in *Leadsinger, Inc. v. BMG Music Publishing*, which was on appeal from a California federal court. Leadsinger, Inc. manufactures karaoke machines that enable individuals to sing along with prerecorded music. At issue in the case was Leadsinger's consumer "all-in-one microphone player," which holds recorded songs in a microchip in the microphone. When the microphone is plugged into a television, the lyrics of the song appear on the television screen in real time as the song is playing, enabling the consumer to sing along with the lyrics.

BMG Music Publishing is the publishing arm of one of the "big four" record labels. Leadsinger historically paid BMG Music licenses for using the instrumental sound recordings but did not pay a synchronization license or a license for the printed copies of the lyrics that Leadsinger included with its machines. To avoid a challenge of copyright infringement, BMG Music demanded that Leadsinger pay a "lyric reprint" fee and a synchronization fee in addition for the royalty for the instrumental music.

Leadsinger refused to pay the additional royalties and filed a federal court complaint seeking a declaratory judgment that its practices did not constitute copyright infringement so long as Leadsinger continued to obtain "compulsory mechanical licenses" for the songs under Section 115 of the Copyright Act. Alternatively, Leadsinger argued that its printed and video lyrics constituted a "fair use" under the Copyright Act. Specifically, Leadsinger asked the court to resolve whether it has the right to display song lyrics visually in real time with the recorded music, as well as print song lyrics, without holding anything more than the Section 115 compulsory licenses it already possessed. The trial court rejected Leadsinger's claims and dismissed its declaratory judgment complaint. The district court concluded that the compulsory mechanical license does not grant Leadsinger the right to display visual images and lyrics in real time with the music, even though Leadsinger licensed the instrumental music. Despite Leadsinger's assertion that the karaoke machines "teach singing," the court also rejected Leadsinger's argument that copying the lyrics was a fair use of copyright. Leadsinger appealed the case to the Ninth Circuit.

The Ninth Circuit affirmed the trial court's decision, although on slightly different reasoning. The court first noted that the Section 115 compulsory mechanical royalty applies only to "phonorecords" as defined in the statute, which expressly excludes sounds "accompanying a motion picture or other audiovisual work" from the definition of phonorecords. The court then reviewed the statute's definition of "audiovisual works" and concluded that Leadsinger's use of the lyrics in real time with the music fits within the definition because Leadsinger's products "consist of a series of related images which are intrinsically intended to be shown by the use of machines . . . together with accompanying sounds." As a result, being "audiovisual works," the court concluded that Leadsinger's products fell outside of the statutory definition of phonorecords and therefore the Section 115 compulsory mechanical royalty did not apply. Instead, the court found that Leadsinger must acquire a synchronization license for the songs and lyrics used in its products. Quoting a prior New York federal appellate case, the court stated, "A synchronization license is required if a copyrighted musical composition is to be used in 'time-relation' or synchronization with an audiovisual work." Without such a license from the copyright owners, Leadsinger's use of the lyrics in real time with the music infringed BMG Music's rights in the songs.

The Ninth Circuit is neither the first nor the only federal appellate court to find that karaoke machines can infringe copyrights. The Second Circuit Court of Appeals reached this conclusion in 1996 in *Abkco Music, Inc. v. Stellar Records, Inc.*, holding that karaoke creates audiovisual works because it "consist[s] of a series of related images—the lyrics—together with accompanying sounds—the music." Our own Sixth Circuit Court of Appeals held last year in *Zomba Enterprises, Inc. v. Panorama Records, Inc.* that a karaoke company's use of copyrighted musical compositions was not a fair use and, instead, constituted a copyright infringement. Affirming a judgment of nearly $900,000 in damages and attorneys' fees, the Sixth Circuit found that the karaoke company's use of the copyrighted works was "commercial" in nature and wisely rejected the argument that karaoke is a teaching tool for aspiring vocalists.

So, if, after perhaps one too many adult beverages, your friends think it would "awesome" to take the stage and belt out a few of their high school favorites, you should consider adding copyright infringement to the already-lengthy list of reasons why that might not be such a good idea. Who knows? Taking the tempting "Oh, I dare you" approach might actually constitute "inducement" of infringement.

The problem is not the singing in public — or at least that's not the copyright problem. Venues that offer karaoke typically protect themselves from complaints alleging infringement of the public performance copyright by purchasing catalog licenses from one or more of the three main copyright performing rights societies: BMI, ASCAP, or SESAC.

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Using Electronic Stored Information

By C. Matthew Curtin

Information technology has come a long way since the time of cuneiform tablets. Today litigators are finding that their case — whether "computer cases" or not — are relying increasingly on electronic stored information (ESI). This article considers two issues of ESI: data formats and encoding, and why lawyers should not fear the technology.

Most people think about written information in terms of documents. Working with electronic information, particularly in litigation, requires modernizing our mental models of information management and storage. Two important issues that emerge with electronic data are formats and encoding. We can understand these by working from familiar analogies.

Data Formats are Just Like Paper Forms

Imagine every U.S. taxpayer being required to send financial information to the IRS by writing a letter with critical data, together with explanations included in whatever format each person prefers to represent it. The burden of reading and processing the information — to say nothing of error detection and correction — would make the task prohibitively expensive. To address this sort of problem, organizations began to use forms — pre-printed sheets of paper with boxes to fill out, requesting specific details. Finding the right information thereby became much more economical by knowing which line item to reference on the proper form.

In computer systems, we have precisely the same issue. A Microsoft Word file, for example, is more than a document ready to be printed. It's a format defined by Microsoft to store information needed by Word to represent the document you want, to which is added other information that might be of interest. The format allows for the information to be manipulated easily, and enables storage of the last time of printing, last time of modification, and time of creation. All of the data — called "metadata," data that describe the data most visible to the human software user — can be found and used by Word because the format provides for it, and Word knows which "line item" to reference.

Data formats, sometimes called file formats, abound. Each format has unique properties that make it good for some uses and bad for others. The Portable Document Format (PDF) is very good for information interchange because it defines a precise layout but does not include any document revision history. Microsoft's Word format is good for helping you to pick up where you left off when you last used it, but is viewable and editable only by persons using Word compatible software. Understanding file formats and when to use which is important, but is a topic for another discussion.

Information Must Be Encoded For Storage

Computer systems are just machines full of switches that can be turned on and off. This is what it means when we say that computers are binary machines: that all the information it stores must be encoded for the computer's benefit as a series of ones (meaning "on") and zeroes (meaning "off").

"Encoding" can be a scary word, but in truth, there is nothing exotic about it. Humans have been encoding information as long as there has been communication. Encoding is simply taking information and storing it according to a set of rules. Written English, for example, is encoded in a system of twenty-six characters, ten digits, and some punctuation marks. Mariners have long used flags to encode certain information for others to see, such as the strength of wind. Morse Code works very much like today's binary systems, storing everything in a series of dits (.) and dahs (—).

Figure 1 — Encoded Letters *

Those who use computers need not know binary any more than the people who used telegrams for communication needed to understand Morse Code. In litigation, however, things are often not quite as they seem and digging down below the obvious can prove worthwhile.

Making Electronic Information Useful

Simply obtaining electronic information will not guarantee its comprehensibility. Before agreeing to the receipt of electronic information in one form or another, be sure that you understand your options and your objective. Do you need the ability to see previous revisions of documents? Do you care more about how the document looks when printed? Do you need the ability to verify certain technical details about the data?

Knowing your objective and engaging the right expert before you've unwittingly limited your options can go a long way in helping you to be the most effective advocate you can be.

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C. Matthew Curtin, Interhack Corporation

English Letter	Morse Code	ASCII Value	ASCII Binary
A	.—	65	1000001
B	—...	66	1000010
C	—.—.	67	1000011
D	—..	68	1000111
E	.	69	1000101

**Figure 1 — Encoded Letters*

Dropping Mentos in the Diet Coke

Addiction—Part 1

By Brad Lander, Ph.D., LICDC

TV host Bill Maher once got into an argument with a guest who revealed that he had been to an alcohol rehab center for his "disease" of alcoholism. Bill contended that alcoholism is not a disease and that calling it such just provides an excuse for not taking responsibility for one's choices and actions. Bill doesn't understand how the brain works or the mechanics of what makes us do what we do. Bill is like the majority of people.

We can understand how some behaviors are not choices. We would not approach a schizophrenic and demand he stops hallucinating. We would not expect a woman who has just been surprised by a sudden "Boo!" not to jump. We would not chastise a kindergartener for not being able to learn long division; but we expect alcoholics to control their alcohol use and drug addicts to control their use of drugs.

Our lack of understanding of addictions can be traced to our lack of understanding of how our brains work. It isn't magic; it's physics. When two molecules come into proximity, the charge and binding properties of the molecules will determine what will happen. All the will-power and wishful thinking in the word won't stop the ensuing geyser when you drop a pack of Mentos into a 2-liter bottle of Diet Coke.

Our brains are chemical. There are no moving parts inside our heads. Everything our brains do is chemical, and chemistry follows laws of physics and mathematics. What this means is that everything our brains do; everything we think, feel, remember, choose, perceive and believe, can be brought down to chemical reactions and mathematical equations. This really challenges our beliefs about free will and choice, doesn't it? All discussions of spirituality and quantum physics aside, if we can appreciate this fact, we can start to see how people's behavior can be changed by alcohol or drug use.

Alcohol and drugs work by changing the chemistry of the brain. If I add ¼ cup of vegetable oil to my 2-liter bottle of Diet Coke before adding the Mentos, I have changed the chemistry of the reaction and as a result, no fizz. If you add chemicals to your body that penetrate the blood-brain barrier, you are changing the chemistry of your brain, thus, changing how it functions. What you might say, do, spend money on, and so on after a couple drinks differs greatly from what you might have done sober. What is most important, is that while under the influence, a person really has no awareness of just how affected he or she is.

We have all been at the party where someone, obviously intoxicated, is heading to his car. You express your concern and offer him a ride home but "Nah," he replies, "I'm fine." It isn't that he is lying to you, this is what he believes. If his perception of things were true, his behavior would make perfect sense. You, too, would become angry and defensive if you were perfectly fine and people kept trying to take your car keys away from you.

The psychiatric term "delusion" means believing something that is obviously untrue to almost all others or in spite of incontrovertible evidence to the contrary. If you have ever dealt with someone with a delusional disorder, such as schizophrenia, you know how futile it is to try to convince them that their beliefs are false. And yet we continue to tell alcoholics to stop drinking as if they will turn, flush with the sudden revelation of the error of their ways, and never behave so foolishly again. We assume that if they were able to see the problem that they would want to seek help. The failed "Just Say No" program of the 1980s was a testament to that misunderstanding. As we better understand the delusional nature of alcoholism and addiction, we become better able to intervene effectively.

(Part II will look at the brain changes involved in addiction.)

Brad Lander, Ph.D., LICDC

NEWS FROM NAMELESS

By Lloyd E. Fisher

Dear Cousin Bud: The note on your Christmas card asked how the law practice was going down here in little ole Nameless. Let me tell you, it's been interesting.

You remember that last year Aunt Mable's boy, Junior, finished the courses at the LaSalle Internet Law School and passed the Ohio bar exam. I took him under my wing, gave him a room in our office space, introduced him to the folks at the County Court House and referred a few matters to him. He's confessed judgment on several cognovit notes, settled a couple of fender-bender cases and written a few simple wills. I thought he was doing real well until a few weeks ago.

I found out later that the trouble started when a tour bus driver cleaned out the bus during a stop at Gibby's Gas'n Go. One of the things he threw out was a copy of the New York Times with an article about the "perks" being given to the associates in the big city law firms. Junior read that article and things haven't been the same since.

The Times story told about associates in mega law firms enjoying such things as: ordering gourmet dinners on a silver tray when they worked late; a firm "happiness committee" that did random acts of kindness; emergency nanny service; a personal issues coach; on-site tailoring; a concierge service to pick up dry-cleaning and take the associate's car to the repair shop; yoga classes and masseuse appointments.

After drooling over that article for several days, Junior called Betty's Burger Bar & Bingo Parlor and ordered them to send over a double Betty Boy and an order of cheese fries. Betty got on the phone and told Junior he'd need to pick up the order himself. She said the only carry-out they'd ever had was when the volunteer emergency squad had to take Fewell Bunch to the county hospital with a sprained ankle. (He'd hurt it celebrating a $50 prize on the final evening cover-up game.)

Well, things just went down hill from there.

Ethel Danzer, who's been my secretary and right hand assistant for about ten years and who knows more law than Junior ever will, came into my office threatening to quit. She said Junior wanted her to help him get a crick out of his back and then he asked her to stop at the Nameless Nifty Market and pick up a 25 pound bag of dog food on her lunch hour.

I called Junior in and asked him for an explanation. He pulled out the Times article and began talking about improving his working conditions. He said he knew that Nameless wasn't New York and we weren't big enough for a happiness committee but that there should be some "perks" for a hard-working young lawyer.

Cousin, I will confess to you that I got a little hot under the collar. I started talking about the costs of running a law office; moved on to describe how little he knew about his profession and finished with a loud challenge that if he could find a better place to learn to be a good lawyer, he was welcome to move on — and the sooner, the better.

After that, things have calmed down. Junior is now working hard and walks to Betty's for lunch. Ethel gives Junior a lot of help on pleadings and has encouraged him to see Dr. Dacey, the chiropractor.

If you've got a happiness committee in that big city law firm of yours, I don't want to hear about it.

Your Cousin

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Myths In Divorce Cases

By Heather G. Sowald

I recently saw the movie "Juno" at the movie theater. I almost jumped out of my seat when a "lawyer" in the movie advised a separating couple that they could have a collaborative law divorce* and they needed only *one* attorney for it.

Now, I don't practice law in any state other than Ohio, and maybe one attorney can represent two people with competing and conflicting interests in other states, but not in Ohio. So, let us begin with Myth #1.

Myth #1: One attorney can represent both the husband and the wife in the termination of their marriage.

The correct statement is that one attorney can only represent one of the spouses in the termination of the marriage, whether the marriage is terminated by dissolution or divorce.

I am frequently asked by prospective clients if I can represent both of them. The caller is always disappointed when I tell them that one attorney can only represent one of them, although the other spouse can certainly represent him or herself. That is not what they wanted to hear, or thought was possible.

Unfortunately, there are some attorneys who meet with both spouses and don't make it clear that they can represent only one of them and make the parties choose which of them it will be. The best practice is for the attorney not to meet with both of them, but, if he or she does, then the attorney needs to clearly explain the notion of conflict of interest and let them choose which spouse will be represented by that counsel, and then have the other spouse leave the attorney's conference room. I remember one occasion when that scenario occurred, and the spouses flipped a coin to determine which one I would be representing. The wife lost the coin toss and left the room, and subsequently she, fortunately, hired an attorney. It turned out that the only issue they both agreed on was that they wanted to terminate the marriage.

Sometimes a new client comes to me after the dissolution is over and in relating the events of the negotiations states that the attorney represented both of them. However, when I review the dissolution documents they always state that the attorney was representing their ex-spouse, and this party was *pro se*. These types of situations can easily lead to ethics complaints against the attorneys. The better practice, of course, is to try to avoid meeting with both spouses.

Myth #2: The attorney can just file some paperwork with the court and stop the rights and obligations of the marriage, so the parties can be "legally separated" as of the time of the filing.

This myth raises two issues: 1) when do the rights and obligations of a marriage in Ohio cease; and 2) what is a legal separation?

Duration of marriage: In Ohio, our current statute Sec. 3105.171 (A)(2)(a, b) defines the duration of a marriage to be from the date of the ceremonial marriage until the date of the final hearing, unless the court determines that either date is not equitable. Until the marriage is terminated, each party's growing assets and/or burgeoning debts are marital. However, the determination of the duration date is not made by the judge until the final divorce hearing. In Franklin County, due to our court's congested dockets, that might not be for two to three years from the date of the initial filing. If the matter is a dissolution, the parties negotiate the termination date for purposes of the division of assets and debts, and that date can also affect the length of the award of spousal support.

In some other states, such as California, their statutes mandate that the marriage's rights and obligations terminate at the time either spouse files for a divorce. I believe that a similar statute would be well-received here in Ohio if such were legislated.

Legal Separation: After close to three decades of practice, I still struggle to explain this concept to clients. The bottom line is that even if the spouses are "legally separated," they are still married to each other and they remain in a legal limbo.

A legal separation can be accomplished in the same manner as a dissolution or a divorce. The parties can negotiate the complete division of their assets, liabilities, custody-related issues, and spousal support, and the full agreement that is signed by both parties can be either a private contract or can be filed with the court. The other way to accomplish being legally separated is for a spouse to initiate the process by filing a Complaint for Legal Separation in the domestic relations court. Thus begins a process in our court system that proceeds just like a divorce action, with all of the commensurate attorney fees and length of time. However, after the final hearing, when the judge orders the division of assets, debts, and fashions custody and spousal support orders, the court declares the parties to be legally separated, instead of divorced.

There are two main reasons someone files for legal separation instead of divorce. The first is because of the spouse's religious beliefs that prohibit divorce. The second is the spouse's need for ongoing health insurance coverage, although some insurers specifically prohibit legally separated spouses from continuing to be covered under the other spouse's policy.

Myth #3: The spouses must live separate and apart before the final hearing terminating their marriage.

There is no statute in Ohio that mandates that the spouses must live separate and apart before the marriage is terminated.

Franklin County's Domestic Relations Court, however, has a local rule that states that the parties shall live separate and apart for thirty days before the final hearing, but the rule then states that this requirement may be waived by the court.

This typically becomes a question that clients have when they are trying to sell their house, and neither of them can afford to move out until they have the cash settlement from the sale proceeds.

Attorneys, as a rule, seem to spend a lot of time correcting myths that our clients come to us believing. I think a big part of the solution to this would be if Hollywood scriptwriters would come ask me to advise them on domestic relations law so they don't create or perpetuate myths!

*For more information on collaborative family law, go to www.winwindivorce.org.

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