COLUMBUS BAR

Lawyers QUARTERLY

WINTER 2008

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Lawyers QUARTERLY
WINTER 2008

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The Editorial Board of *Columbus Lawyers Quarterly* would like to know more about its readers to ensure we are delivering the most relevant publication of interest to its readers. And, even if you're not a reader, we'd like to know why—maybe there's something we can do to alter the publication to make it of more interest.

Please take a minute to complete this brief survey inserted into this issue and fax it back to the Columbus Bar (221.4850) **by January 31 to be entered in a drawing for a free 2008 Columbus Directory and Local Practice Handbook.**

Letter to the Editor,

DAVID W. HARDYMON

It appeared to me that a certain mean jocularity had crept into the practice; that attempts at promoting civility and courtesy were sometimes likely to trigger cynical laughter or incredulous expressions of wonder at such innocence.

Dear Dave:

Ben Zox's observation in "What Happened to the Handshake?" (*Lawyers Quarterly, Fall. 2007, p. 43*) strike a responsive chord for me. Ben hopes that the kind of civility that he describes "is not a relic of a bygone era."

I hope so too. But during my last years in private practice I began to have my doubts. It appeared to me that a certain mean jocularity had crept into the practice; that attempts at promoting civility and courtesy were sometimes likely to trigger cynical laughter or incredulous expressions of wonder at such innocence.

In 1975. when, at the old Neil House, I was sworn in as President of the Columbus Bar Association, I had this to say on the subject:

"There is about the practice in Columbus, at its best, a certain grace and style, a certain old-time gentlemanliness that I find particularly pleasing and that, in fact, gives me my greatest psychic reward. Dealing with one's fellow lawyer is most often satisfying. In Columbus we take this for granted. We practice our law in a highly personal and individualistic way. We *know* one another. We *assume* that the other's word is something upon which we can rely. We are disappointed when upon rare occasion that proves not to be the case. Our individual reputation as being trustworthy or not is by far the most important characteristic that we establish in the legal community. Every lawyer in this room knows what I am talking about. It lies at the very heart of the way we practice law in Columbus. It is the most appealing facet of the personality of the Columbus Bar.

I like to believe that what I had to say in 1975 was not a pipedream then and is not one now.

Very truly yours,

John A. Carnahan

John A. Carnahan

Nelson E Genshaft,
Strip Hoppers Leithart McGrath & Terlecky

A Note to my Children

Dear Kids:

I don't think it's a coincidence that all of you have started your working lives in one way or another connected to the practice of law. Three of you are lawyers and the one is a paralegal at a large firm in Manhattan. Maybe it's the influence of your grandfather, who is a lawyer but never practiced. He had two sons who became lawyers, and had a daughter who married one. It kind of runs in our family, and I'm proud of all of you for your accomplishments. But, it's a changing world, and we all wonder what will happen to the profession of law over the next 10 to 20 years.

The economics of law are amazing in their own right. Starting salaries at the elite law firms are topping $150,000, and the billing rates for young lawyers in large cities are higher than many of those charged by experienced lawyers in towns like Columbus. For most lawyers, I see it as a scramble to compete for clients who will pay the rates charged by most practitioners to cover the overhead and keep the doors open. I think it remains true that most lawyers love the idea of getting paid for their advice, for guiding clients through the legal mazes that a complex society has erected. But in practice, many of those ideals fall prey to the demands of clients and need to keep revenue up to meet the costs of the practice. Some view the future of the profession as challenged by the growing numbers of foreign lawyers who work on contract, outsourcing projects from places like Mumbai, India. With the retirement of baby boomer lawyers over the next 15 years, there will be fewer lawyers to handle an ever-increasing demand, so what you are going to have to do is work smarter and use your technological edge. You have the relationships with your clients. You just have to make sure that you provide the services, on time, on budget and with the confidence that you are providing the very best advice you can. This is not an easy task.

You also face the challenge of providing services to those people who are not sophisticated and lack the resources to retain counsel of their choice. About half of the people in this country who can't afford legal services are turned away by the various offices that were set up to provide services to them in the first place. That is because our government cannot or will not fund these offices at the required levels. Yet, even with more funding, there is the need to recruit more lawyers to work in the public sector and provide the basic services to those in need in areas like domestic relations, housing, social security, veterans benefits, criminal defense and mental health. We have to encourage more lawyers to go into these areas. Loan forgiveness would be a major step forward, since many students come out of undergraduate and law schools with student loans of more than $100,000. It's one thing to be an idealistic lawyer, and another to have to support a family The point is, we need to keep those people who want to work in public service, in their jobs at legal aid offices and clinics, and we need to give them the tools to help society's most disadvantaged.

These challenges are not new, but the size and scope of the problems and our capacity as lawyers to respond are ever more complex. I was never more proud of our profession than when I attended the 2007 pro bono awards given by the Columbus Bar Foundation recently. The good news is that the CBF had to make tough choices and recognized just a few of the candidates. They included the lawyer who, as part of the civil Gideon project, picked up the representation of a single mother on appeal, after the client had lost an important issue in the domestic relations court. There was the judge who pushes the probate lawyers and his staff to assist with counsel for court-appointed guardians and to help foster parents who are in the process of adopting kids. A major law firm volunteered to write an amicus brief over a weekend for the U.S. Supreme Court in a parental rights case, and advocated a position for the parents that was ultimately adopted by the Court. And there was a group of lawyers who worked for many years to provide domestic relations advice to economically disadvantaged people who need to finalize a divorce. These awards both recognize the good works of the lawyers who are driven to provide pro bono services, and encourage others to follow their example.

Finally, the Columbus Bar is joining the fight to protect the intolerable repression of lawyers and judges in Pakistan by that country's president, Pervez Musharraf. In a day of solidarity with Pakistani lawyers, the Columbus Bar held a rally at the Ohio Statehouse and joined with lawyers from all over the country to protest Musharraf's actions of suspending the constitution, dissolving the supreme court, and jailing lawyers and judges to keep them from speaking out. Now, we don't make foreign policy at the Columbus Bar, but it was gratifying to see the many lawyers who came out to show in a symbolic way that they were not going to remain silent and aloof while the rule of law is being threatened by a dictator on the other side of the world.

I don't think it will be easy to meet these challenges. But, after all, we're lawyers, and if we learned anything in school and from our experience, it is that we have the tools and talent to reduce complex problems to workable solutions. I hope you will use your talents and your abilities to work within the laws of our government so we can all enjoy the fruits of individual liberties and free speech.

Love,
Dad

neg@columbuslawyer.net

But does it matter?

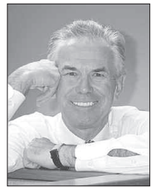
By Alex Lagusch

Columbus Bar members put a lot of effort into our judicial evaluation process. In the end though, what impact does this have on the voting public? I have some data that doesn't completely answer the question, but it will make for interesting reading, especially for those of you involved in judicial politics. Here are the results of our Judiciary Committee evaluations, our preference polls, overall performance poll rating of sitting judges where applicable, and ultimately, the election results FOR THE PAST 10 YEARS. This isn't presented merely for idle curiosity. I would like your thoughts on how we can improve our process.

Belinda Barnes, immediate past president and partner at Lane Alton & Horst, chairs a task force to study the work of our Judicial Screening Committee. They have had two meetings and we anticipate having two more. Her task force consists of board members, representatives of both Franklin County political organizations, the chair of our Judicial Screening Committee, lay people, a corporate lawyer and representatives of other area bar associations and organizations. They are reviewing everything from the composition of our committee to the percentage of votes required for ratings. They will assess virtually all aspects of the committee operation. Some of the topics already suggested for consideration include:

- Considering lay people for appointment
- Reevaluating the current process of presidential appointment to the committee
- Requiring that the same number/ members screen each candidate
- Releasing the results of both the committee findings and the poll results
- Considering doing background checks and public records review on candidates
- Establishing a "super" committee that does findings and eliminate the Preference Poll mailing
- Including statement on judicial questionnaire allowing candidates to attach additional information
- Changing vote percentage levels so that 60% of committee vote is necessary for both "highly recommended" and "not recommended" instead of 60% and 50% respectively
- Appointing "courtwatchers" to personally observe courtroom behavior

Perhaps you have additional questions/suggestions/answers you would ask them to consider. We welcome them! If you don't have sufficient information about our Judicial Screening Committee and would like to do a little homework, email Kathy at kathy@cbalaw.org and she will provide the committee by-laws, roster and any other background information you might want. Then, please email your thoughts to bbarnes@lanealton.com or to me, alex@cbalaw.org. We're listening.



Alex Lagusch, Columbus Bar Executive Director

Judicial Election Results
1997-2007

Court /Year	Candidates	Judicial Screening Ratings	Preferred Poll Candidate	Elected
Municipal - 1997	Douglas K. Browell Mark S. Froehlich	Highly Recommended Highly Recommended	Mark S. Froehlich	Mark S. Froehlich
	H. William Pollitt, Jr. Kathleen A. LaTour	Highly Recommended Acceptable	H. William Pollitt, Jr.	H. William Pollitt, Jr.
	Michael T. Brandt Delena Edwards	Highly Recommended Acceptable	Michael T. Brandt	Michael T. Brandt
	Charles A. Schneider **(4.2/3.6)*** Eileen A. Paley	Highly Recommended Acceptable	Charles A. Schneider	Charles A. Schneider
Appeals – 1998	Sandra J. Anderson Susan D. Brown	Highly Recommended Acceptable	Sandra J. Anderson	Susan D. Brown
	John P. Kennedy James W. Mason	Acceptable Acceptable	John P. Kennedy	John P. Kennedy
Common Pleas – 1998	Deborah P. O'Neill **(1.8/3.6)*** Guy L. Reece, II	Not Recommended Highly Recommended	Guy L. Reece, II	Deborah P. O'Neill
No contested races -1999				
Common Pleas – 2000	John Bender Jennifer Brunner	Highly Recommended Acceptable	John Bender	John Bender
Domestic Relations – 2000	Blythe Bethel James Mason **(3.6/3.5)***	Highly Recommended Highly Recommended	James Mason	James Mason
	Harland Hale Carole Squire	Highly Recommended Not Recommended	Harland Hale	Carole Squire
Municipal – 2001	Blythe Bethel James Green **(3.3/3.8)***	Highly Recommended Highly Recommended	James Green	James Green

Corner Office

Judicial Election Results
1997-2007

Court /Year	Candidates	Judicial Screening Ratings	Preferred Poll Candidate	Elected
Appeals – 2002	Charles R. Petree **(3.6/3.8)*** Deborah P. O'Neill	Highly Recommended Not Recommended	Charles R. Petree	Charles R. Petree
	Lisa L. Sadler Gary Tyack **(3.5/3.8)***	Highly Recommended Highly Recommended	Lisa L. Sadler	Lisa L. Sadler
	William A. Klatt Mark S. Froehlich	Highly Recommended Acceptable	William A. Klatt	William A. Klatt
Common Pleas – 2002	Daniel T. Hogan **(4.1/3.6)*** Joseph Mas	Highly Recommended Acceptable	Daniel T. Hogan	Daniel T. Hogan
Domestic – 2002	Kim A. Browne Patsy A. Thomas	Highly Recommended Acceptable	Kim A. Browne	Kim A. Browne
Probate – 2002	Lawrence A. Belskis **(3.3)** Adam Clay Miller	Highly Recommended Highly Recommended	Lawrence A. Belskis	Lawrence A. Belskis
Municipal – 2003	Ted Barrows Carrie E. Glaeden	Highly Recommended Acceptable	Ted Barrows	Ted Barrows
	Julia L. Dorrian Julie M. Lynch	Acceptable Acceptable	Julia L. Dorrian	Julia L. Dorrian
	Harland H. Hale John E. Hykes	Highly Recommended Highly Recommended	Harland H. Hale	Harland H. Hale
Appeals – 2004	Judith L. French Thomas C. Tootle	Highly Recommended Acceptable	Judith L. French	Judith L. French
	Patrick M. McGrath Deborah P. O'Neill	Highly Recommended Not Recommended	Patrick M. McGrath	Patrick M. McGrath
Common Pleas – 2004	John F. Bender Michael R. Rankin	Highly Recommended Acceptable	John F. Bender	John F. Bender
	Eric S. Brown Gregory S. Peterson	Acceptable Acceptable	Gregory S. Peterson	Eric S. Brown
	John A. Connor **(3.3/3.6)*** Julie P. Hubler	Acceptable Not Recommended	John A. Connor	John A. Connor
	Richard A. Frye Patrick E. Sheeran	Highly Recommended Highly Recommended	Richard A. Frye	Richard A. Frye
	William R. Hedrick Julie M. Lynch	Acceptable Acceptable	William R. Hedrick	Julie M. Lynch
	Michael J. Holbrook Stephen L. McIntosh	Not Recommended Highly Recommended	Stephen L. McIntosh	Michael J. Holbrook
	Guy L. Reece, II Mark A. Serrott	Highly Recommended Highly Recommended	Guy L. Reece, II	Guy L. Reece, II
	Charles A. Schneider William A. Thorman, III	Highly Recommended Acceptable	Charles A. Schneider	Charles A. Schneider
Municipal – 2005	Michael T. Brandt **(4.0/3.8)*** Jeffrey David Porter	Highly Recommended Acceptable	Michael T. Brandt	Michael T. Brandt
	Isabella Dixon-Thomas Andrea C. Peeples	Highly Recommended Acceptable	Isabella Dixon-Thomas	Andrea C. Peeples
	W. Dwayne Maynard **(3.3/3.8)*** Jay G. Perez	Highly Recommended Not Recommended	W. Dwayne Maynard	W. Dwayne Maynard
	Michael R. Rankin Amy A. Salerno	Highly Recommended Acceptable	Michael R. Rankin	Amy A. Salerno
Appeals – 2006	Alan C. Travis G. Gary Tyack	Highly Recommended Highly Recommended	Alan C. Travis	G. Gary Tyack
Common Pleas – 2006	Charles Bendig David E. Cain **(4.2/3.8)***	Highly Recommended Highly Recommended	David E. Cain	David E. Cain
	John P. Bessey **(4.1/3.8)*** Tomi Lynn Dorris	Highly Recommended Highly Recommended	John P. Bessey	John P. Bessey
	Stephen L. McIntosh Angela Phelps-White	Highly Recommended Highly Recommended	Stephen L. McIntosh	Stephen L. McIntosh
	Timothy S. Horton Gregory S. Peterson	Acceptable Highly Recommended	Gregory S. Peterson	Timothy S. Horton
	Frank J. Macke Patrick E. Sheeran	Highly Recommended Highly Recommended	Patrick E. Sheeran	Patrick E. Sheeran
Domestic – 2006	Colleen H. Briscoe Elizabeth M. Gill	Highly Recommended Highly Recommended	Elizabeth M. Gill	Elizabeth M. Gill
	Jim Mason **(4.3/3.3)*** Jay G. Perez	Highly Recommended Not Recommended	Jim Mason	Jim Mason
	Christopher J. Geer Carole R. Squire **(1.5/3.3)***	Highly Recommended Not Recommended	Christopher J. Geer	Christopher J. Geer
Municipal – 2007	James E. Green **(3.5/3.9)*** Joy M. Harris	Highly Recommended Not Recommended	James E. Green	James E. Green
	Joseph Mas Amy Salerno **(2.7/3.9)***	Highly Recommended Acceptable	Joseph Mas	Amy Salerno
	Patsy Thomas David Tyack	Highly Recommended Highly Recommended	David Tyack	David Tyack

*** Results of the Performance Poll for sitting judges in the spring preceding the fall election. First number reflects the candidate's cumulative score in 5 areas, 1 being the lowest and 5 being the highest. Second number reflects the weighted average of all judges in that court. Judges who have not served at least one year on the bench are not evaluated.**

Mentally Impaired Lawyers Are Wise to Seek Help

THE GROWING PROBLEM OF THE OVERBURDENED AND DEPRESSED LAWYER

By Alvin E. Mathews Jr.

Jack Delay has practiced law for 15 years in central Ohio. He spent his first 14 years at a large firm in the real estate department. Recently, he has decided to go out on his own as a solo practitioner. To get his practice to grow, he holds himself out as a "general practitioner." He is bright, has developed a solid reputation and has great legal research skills. He believes he can pull off being a generalist.

Delay's marketing plan works but he grossly underestimates what it takes to run a practice on his own. Within months, he receives a large influx of new business ranging from transactions for small business clients to litigation matters for domestic, criminal and personal injury clients. Delay is working 14-hour days. His desk is stacked high with files. He gets so busy that he really needs to hire help, but he decides to put off hiring an associate attorney because he wants to keep more money for himself to support his growing family. At the worst possible time, Delay's legal assistant takes off and leaves town for several months to take care of her ailing mother. His office becomes an administrative nightmare, as conflicts of interest are not monitored, engagement letters are not completed, deadlines are not calendared, and the malpractice insurance policy is allowed to lapse.

Delay continues to open new matters and receive fees; yet he is not able to complete the work. He does not inform new clients or existing clients that his malpractice insurance has lapsed. Delay spends client retainer fees on office expenses and to pay the lease on his luxury vehicle, instead of depositing them in the client trust account, as promised. His unanswered voicemail messages are so numerous that frustrated clients receive the recording "mailbox full." Clients have no way to immediately reach him. Delay misses deadlines, appointments and court hearings on seven client matters, resulting in the filing of bar complaints by the aggrieved clients. Delay ignores the seven bar complaints and does not answer them, thinking the problems will somehow go away.

For months, Delay has not been feeling himself. He cannot focus and get the work done. Suddenly, he cannot make himself go into the office for days at a time. He thinks he has "the blues," as his father died two years ago. Delay's wife convinces him to go to the doctor and he is diagnosed with major depression. Yet, he is too proud to take the prescribed anti-depressant and attend psychotherapy. He also stubbornly decides not to sign a contract with the Lawyers Assistance Program, as suggested by the grievance committee chairperson.

Untreated impaired lawyers often encounter discipline problems

The local bar association files a formal complaint against Delay with the Supreme Court's Disciplinary Board, alleging that Delay received fees, but failed to perform work on the seven matters. He owes over $30,000 in restitution on the seven matters for misusing the retainers. He is also charged with failing to notify clients that his insurance lapsed, lying to clients about the status of their matters, and failing to cooperate with the grievance committee's investigation. After he receives the complaint, Delay feels like he has hit rock bottom. He finally relents and hires a lawyer to help him with his problems. He also decides to seek the help of the Lawyers Assistance Program.

Fortunately, for Delay, disciplinary authorities and courts have been somewhat more understanding and flexible when addressing lawyer conduct involving depression or other mental conditions. While misuse of client funds and lying to clients are two of the more serious ethical violations committed by lawyers, against the backdrop of depression such conduct can often be viewed differently. A diagnosis of depression complicates the analysis of what disciplinary sanction to impose and requires disciplinary authorities and courts to fully examine the impact of the depression. Disciplinary authorities and courts must determine whether the depression serves to mitigate the misconduct.

The consideration given to depression by disciplinary authorities and courts as a mitigating factor in attorney discipline cases is not automatic. In order for an emotional or psychological condition to serve to change manner in which the actor's ethical culpability is viewed, there must be a diagnosis of a mental condition by a qualified mental health professional, a determination that the mental condition contributed to cause the misconduct, a period of sustained and successful treatment, and a prognosis from a qualified mental health professional that under specified conditions, the lawyer can return to the competent, ethical professional practice of law.

A mentally impaired lawyer must seek professional help immediately upon noticing that his mood and behavior prevents him from serving clients. If the clinically depressed lawyer does not act soon enough to prevent damage to clients, the lawyer must, nonetheless, face the problem and undergo treatment. The manner in which disciplinary authorities and courts handle and decide discipline cases involving clinically depressed lawyers is a reminder that the system's purpose is not to punish, but to inquire into a lawyer's continued fitness to practice law, with a view toward protecting the public, and safeguarding the courts and the interests of the profession.

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1. *BCGD Proc. Reg. 10(A).*
2. *BCGD Proc. Reg. 10(B) (2) (g).*
3. *BCGD Proc.Reg. 10(B)(2)(c).*
4. ***Disciplinary Counsel v. King, 103 Ohio St. 3d 438,** 2004 Ohio 5470, citing American Bar Association Center for Professional Responsibility, Standards for Imposing Lawyer Sanctions (1991 & Amend. 1992), Standard 1.1.*

amathews@bricker.com

Alvin E. Mathews Jr.,
Bricker & Eckler

HAS TINKER'S PROMISE BEEN BROKEN?

The Free Speech Rights of Public School Students

Forty-two years ago, in the midst of an unpopular war, three public school students chose, in violation of school policy, to wear black armbands in protest of America's involvement in Vietnam.

By Larry S. Hayman

Forty-two years ago, in the midst of an unpopular war, three public school students chose, in violation of school policy, to wear black armbands in protest of America's involvement in Vietnam. Administrators promptly suspended the youngsters, allowing them to return to school only upon the condition that they abandon their symbolic message. Undaunted, the students took their case all the way to the United States Supreme Court. In what would become an oft-quoted phrase, Justice Fortas, author of the 7-2 opinion in *Tinker v. Des Moines*, wrote, "students [do not] shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." Despite this declaration, the recent Supreme Court case of *Morse v. Frederick* may suggest that students give up more free speech rights than *Tinker* had contemplated.

When it was decided, Tinker was seen as a victory for the First Amendment rights of public school students. After all, the Supreme Court had just held that students were free to express themselves as long as they did so without "materially and substantially interfering with the requirements of appropriate discipline in the operation of the school" and without interfering with the rights of other students. Additionally, the mere apprehension of a disciplinary problem or interference with the rights of other students was not enough to warrant a prohibition on speech. Moreover, school administrators had the burden of proof in such cases.

Over the next few decades, the court went on to limit *Tinker* in at least two instances. First, in *Bethel School District No. 403 v. Fraser*, the court held that a school district could discipline a high school student for giving a sexually explicit speech during a school assembly. Next, in *Hazelwood School District v. Kuhlmeier*, the court found that school district officials could exercise editorial control over the style and content of student speech in school sponsored newspapers and other situations where the expressive activity could reasonably believed to bear the school's imprimatur.

Now fast-forward to the present. Late this term, the court held that a public school principal may, consistent with the First Amendment, without the threat of an apprehension of a discipline problem or with interference with the rights of other students, insist that a high school student, standing on a public street off of school property, lay down his banner or face suspension. The student in question, Joseph Frederick, had joined his friends across the street from the school to watch as the 2002 Olympic Torch passed by. As the news cameras panned by Frederick, he unfurled his 14-foot banner bearing the phrase "BONG HiTS 4 JESUS." After refusing the principal's request to close his banner, Frederick was suspended from school for 10 days.

On the basis of his suspension, Frederick instituted a suit in federal court alleging a violation of his First Amendment rights. The district court found that the principal had reasonably interpreted the banner as promoting illegal drug use in contravention of the school board's policies. Accordingly, it held, the principal had an obligation to prohibit Frederick's message.

Because the school could not show a substantial disruption, however, the court of appeals reversed. The Supreme Court granted certiorari.

In a 6-3 opinion, the Court held that, in harmony with the First Amendment, as long as a school administrator reasonably views speech as promoting illegal drug use, that administrator may ban such speech. Absent, it seems, from the court's opinion was Tinker's requirement that the speech pose a material or substantial disciplinary problem or infringe upon the rights of other students. Gone, too, it appears is the burden on the school administrators to prove a disruption. As was the case with sexually-oriented speech in Fraser, the Court made clear in *Frederick* that drug-related speech also constituted a special class of speech that administrators were entitled to prohibit.

But Frederick, perhaps, leaves many more questions than the small one it answered. Does *Tinker*, for instance, apply only to "political" speech? May school boards, consistent with the First Amendment, ban all student speech they reasonably believe to contrast with their own policies? Or are sex and drugs just different?

Whatever the case, for the sake of both public school students and administrators alike, the Supreme Court will give further guidance as to what public school students may say and how and where they may say it.

lhayman@farlowlaw.com

Larry S. Hayman,
Farlow & Associates

Reality & Justice

By The Honorable Mark R. Abel

Two recent books focus on the personalities and emotions that fuel the judicial philosophies of U.S. Supreme Court Justices. Jan Crawford Greenburg's *Supreme Conflict* is a "conservative" take on "the inside story of the struggle for control of the" Supreme Court. Jeffery Toobin's *The Nine* gives the "liberal" view.

The books are popular journalistic attempts to breathe life into what most Americans view as the arcane, dry minutiae of the legal writing in lawyers' briefs and judges' decisions that nonetheless can have great consequences to our daily lives.

Even though–as de Tocqueville's Democracy in America documents–courts and their decisions have played a significant role in the life of the American community since the early days of our Republic, making judges good copy is a decidedly uphill struggle.

The popular image of judges is closer to the near sighted, dry sticks in Dickens' *Bleak House* or the aging, slow-witted, traditionalists who populate the bench in TV's "Boston Legal." I've been known to try to sneak a peak at C-SPAN's "America and the Courts," but after my wife watches Justice Stephen Breyer giving a speech at an ABA convention for about half a minute, she commandeers the remote and we are back to "reality" TV.

Against these odds, both books made it onto the *New York Times* best sellers list. And they do–if you give your imagination some range–conjure up the image of a reality TV show where nine men and women over the age of 50, many in their 70s and one 87, report each day to work in a marble building in Washington, D.C. and–while the cameras are rolling–decide the fate of the Nation. You can see the scene where Antonin Scalia tells the camera that Sandy O'Connor wouldn't know a legal principle if it hit her between the eyes. Who will he vote "off the Court?"Breyer is the absentminded professor who is good humored and ever optimistic. Even when his fellow Justices reject his reading of the Constitution, he tells the camera that he is confident he won't be voted off the show.

Clarence Thomas is out-going with a big smile for everyone at the Court from the newest janitor to the oldest retainer. His hearty baritone laugh echoes throughout the marble palace. But beneath the friendly exterior lurks an angry man who will never forget the slights he endured at the Catholic seminary where he studied for the priesthood, Yale Law School, and the Senate confirmation hearings.

Ruth Bader Ginsburg, an elite law school professor who championed women's rights as an advocate before the Supreme Court, is "frail and shy." She shares a love of opera with Scalia. The Ginsburgs and Scalias regularly celebrate New Years together. Will this bond prevent Nino from voting Ruth off the Court? Or will Scalia look straight into the camera and say the original Constitution just doesn't make room for Ruth?

Anthony Kennedy is disdained by Nino Scalia as a "professor" manque, a light-weight thinker. He is grandiose and pompous. His decisions are studded with high flown rhetoric that obfuscates. But he is basically conservative, though prone to being seduced by the "liberals" in key cases involving affirmative action, abortion and private, consensual sexual conduct. Is he safe from being voted off because both "conservatives" and "liberals" hope to gain his vote?

William Rhenquist is the Chief Justice whom everyone admired for the even-handed way he presided over the Justices' conferences where they decide the cases they have just heard. But his conservative credentials plunged as he devoted more time and energy to his administrative role as head of the federal judiciary and appeared less concerned about the intellectual purity of the decisions he made.

David Souter is the "turncoat" who energized the conservatives to re-double their efforts to gain control of the Supreme Court. Souter is the most reclusive member of the Court. While O'Connor, Kennedy, Scalia, Kennedy frequently visit law schools and travel throughout the United States and abroad, Souter goes home to his aging New Hampshire farmhouse.

Stephens is a "maverick" respected by all, but a close confident of none. He keeps his own counsel, but reliably aligns himself with the "liberal" block even as he publicly proclaims himself a life-long conservative. Would anyone dare vote the genial, longest serving Justice off the Court?

Sandra Day O'Connor is portrayed as the pragmatist straddling the middle ground between conservatives and liberals. She was the Justice most in tune with the opinions of a majority of the public.

Of course, while these two books attempt to put some zing into reporting the decisions of the Supreme Court, The U.S. Supreme Court is not a TV reality show. Does the authors' inside the heads and the hearts of the Justices reporting advance our understanding of the work of the Supreme Court? I don't think so.

Although the overarching theme of both books is that conservative Republicans are, with the appointments of John Roberts and Sam Alito, finally within reach of a solid "true conservative" majority on the Court which can reverse the "liberal" decisions of the last 70 years, neither book gives the reader any insight into the merits of either a "conservative" or a "liberal" judicial philosophy. And, if their goal is to show how the Justices' personalities and emotions shape their judicial philosophy, they fail completely.

My own reaction to the books was—perhaps contrary to the authors' intentions—to come away with a greater admiration of Sandra Day O'Connor. The battle between the "liberals" and the "conservatives" is to settle once and for all "what the Constitution means." Naturally, both think its meaning is consistent with their own values and belief systems.

O'Connor was not controlled by an "ideology." She looked carefully at the facts of a case and sought a result that was practical. She tended to limit the scope of decisions so that they could be modified later in light of experience.

The stakes are high when the Court exercises judicial review. The Court's decisions become part of the Constitution. They cannot be changed except by constitutional amendment or a change in the composition of the Court.

We are a country composed of many nationalities, religions, political beliefs and varied life circumstances. The Constitution must command the respect and obedience of all. At a minimum, that requires a real consideration of the competing interests at stake and the consequences of the Court's ruling. Given our diversity, broad, bright-line rules risk unintended consequences that may damage the unifying Constitutional fabric of our people. The Supreme Court should move cautiously before it elevates a legal rule to the status of a constitutional command that will be difficult to modify or reverse, even should later experience prove that–as a practical matter–it doesn't work in the real world.

Mark_Abel@ahsd.uscourts.gov

We are a country composed of many nationalities, religions, political beliefs and varied life circumstances. The Constitution must command the respect and obedience of all.

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

Court Plans Improvements

IN INFORMATION TECHNOLOGY

By the Honorable David E. Cain

Improving information technology (IT) in the present and planning its base in the upcoming new courts building is a top priority for Common Pleas Court in the new year.

An improved website to serve the court – jointly with Domestic/Juvenile, Probate, and the Court of Appeals – is the first step. Then, the stage will be set for electronic filing. That should be a reality in early 2009.

With construction under way for the new building, the court is compelled to make decisions on video arraignments, video recording and IT equipment in general, Atiba Jones, common pleas executive director, commented.

"Imaging" presents other issues for 2008. The images of all documents filed in both civil and criminal cases already is available internally for filings in 2007.

But the court is not ready for external access, Rosa Barker, IT director for the Clerk of Courts John O'Grady, pointed out. The judges need to set policies and procedures for redaction of information that would breach confidentiality or security interests, she said. Then, it can be made available for outside access through the website, she added.

"We'll start going backward – making images of 2006 documents in 2008 – and hope to have 10 years of records available within the next few years," Ms. Barker reported.

"It's in the budget to work with the Franklin County Recorder's Office to start back scanning," she said. They simply feed microfiche cards into a machine to place the documents in the electronic file, she explained.

Currently, external access is available to the Franklin County Justice System by dialing the county's – or the clerk's – website. That will show what actions have taken place in a case. Once "imaging" has been completed and made available for outside access, the documents themselves, e.g., decisions and entries, can be viewed.

Jerry Ledbetter, IT director for common pleas, said a committee has been created to work on the website improvements – to make it more interesting and easier to use.
He said a contract has been entered with the Gartner Group to prepare an Invitation to Bid (for electronic filing). A vendor will be selected over the next three or four months; it will take about a year after that to ready for electronic filings, Ms. Barker said. "We hope to incorporate electronic signatures."

Judge John Bessey, chair of the courts IT committee, said website improvements are the first priority. "And we need to make sure it is ADA compatible. If you are blind, you should have the option of having the information read to you or printed out in braille," he said by way of example. He added that the committee is reaching out to Municipal Court for more sharing of information.

"Criminal cases all start out over there. So, why can't their information come with them," Ledbetter queried.

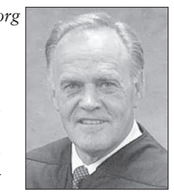
The IT committee is also working to revise policies for employees' use of the Internet Service since "new stuff can be accessed," Bessey said. And it is discussing how long emails should be retained. Since the court has no policy in place, emails are currently being kept indefinitely, he pointed out.

Jones said another big focus for common pleas administration in 2008 will be a thorough compensation study to be performed by an outside contractor.

Research will be conducted to see what people are getting paid for the same jobs in comparable courts. "Not only this, we look at what people actually do," Jones said, what each job is actually worth to the organization. "And we will look at what the Department of Labor has been recommending with regard to inflation and the economy." "We see ourselves as becoming trailblazers for the state . . . a model for others to follow."

Planning for the new building has moved from the building itself to what will be in it and how it will be arranged. "It also presents an opportunity to help staff become more efficient in the various things they do," Jones observed.

David_Cain@fccourts.org



Honorable David E. Cain, Franklin County Common Pleas Court

Immigration Policy and Chaos Theory

THOUSANDS OF WRONGS DO NOT MAKE A RIGHT

Thus, until this country summons the political will to address in a rational manner the need for a comprehensive reform of our immigration laws, members of the Bar must be prepared to address the chaos of the current crackdown wherever they confront it in their practice.

By E. Dennis Muchnicki

Consider…

A man, now in his mid-forties, came to the US with his parents as refugees when he was nine years old. His parents, five siblings, wife, and child are all US citizens. He is gainfully employed and owns his own home. Unfortunately, in 1985 he was convicted of a theft offense for which he was sentenced to 18 months incarceration, all of which was suspended and he was placed upon probation, without further incident, for two years. Also, unfortunately, in 1996, Congress enacted amendments to the Immigration and Nationality Act that retroactively declared the 1985 theft offense to constitute an "aggravated felony" under federal immigration law with the effect that the man has no viable defense to deportation. Without knowledge of the 1996 amendment, the man applied to become a citizen. He was taken into custody, charged as a deportable alien due to his 1986 conviction and placed into deportation proceedings.

A Mexican male married a U.S. citizen woman in 2000. They have three children together. Throughout their marriage, he was the primary wage earner and had no arrests or legal citations of any kind. Since he was not in legal status, his wife filed for him an immigrant visa petition based upon their marriage. When he received notice of the approval of the visa petition, the cover letter informed him that he had to return to Mexico in order to receive his "green card". When he went to the U.S. consulate in Cuidad Juarez for his interview, however, he was informed his request for legal residency was denied and he would never be allowed to re-enter the U.S. because of a 1997 DUI conviction. His wife and children have since lost their apartment in Columbus because they can no longer afford the rent without the husband's financial support and they are barely surviving without him.

A U.S. citizen filed an immigrant visa petition for his wife who was born in Mexico. After the visa petition was approved, the citizen mistakenly filed two different applications for permanent residence (green cards). The interview for one application was set in Columbus and the interview concerning the other application was set at the U.S. consulate in Mexico. The couple went to the Columbus Homeland Security Office to ask for advice on how to proceed. The DHS officer advised them to go to Mexico because it would be quicker. At the interview in Mexico, however, the consular representative indicated that he felt that the wife was previously in the U.S. illegally, denied her request for legal status and barred her from re-entry to the U.S. While the decision is patently incorrect, the appeal from that denial has been pending for two years. During that time in despair, the citizen resigned from his executive position, sold his home and moved with his U.S. citizen children to Mexico to be with his wife.

Welcome to "Lou Dobbs World" where rhetoric is substance and reality is irrelevant. Our "borders" are not broken, but our immigration laws surely are. Attorneys who practice immigration law now realize that until our immigration system is comprehensively reformed to match the reality of our economic needs, irrational government actions that impose cruel results upon specific persons are a fact of life. Whether it involves advising a business client how to comply with a social security "no match" letter based upon a system that the government admits is not workable, advising a non-citizen defendant about the possible immigration impacts of an otherwise favorable guilty plea, or even something as simple as the wording of a divorce decree that could reflect upon the validity of the marriage for immigration purposes, all lawyers who work with non-citizens can no longer avoid the shadow that a chaotic immigration system casts across a broad spectrum of legal issues.

The problem is particularly acute for attorneys who represent non-citizens charged with crimes. The ABA's Standards of Criminal Justice- Pleas of Guilty, page 116, (3rd Ed. 1999) specifically imposes upon criminal defense attorneys, as part of their duty to ethically represent non-citizens, the responsibility to advise the non-citizen of the collateral immigration consequences of the resolution of a criminal charge. Thus whether a misdemeanor constitutes a "crime of moral turpitude" (a phrase not specifically defined in the Immigration and Nationality Act) or a "crime of violence" as defined at 8 U.S.C. Section 1101(a)(43)(F) which would make the non-citizen subject to removal may be more important to the client than the fine or jail time imposed in the criminal case. In a similar manner, whether a felony is an "aggravated felony" as defined at 8 U.S.C. Section 101(a)(43) and which makes removal virtually mandatory may be more important than the apparently lenient sentence recommended by a pre-sentence investigation.

Stories are now common among immigration practitioners of families of non-citizens consulting with an immigration attorney AFTER a non-citizen has been taken into custody by DHS for mandatory removal from the U.S. upon completion of a short time of incarceration. Similarly, whether a form of pre-trial diversion still constitutes a "conviction," as defined at 8 U.S.C. Section 101(48), for immigration purposes in almost every situation, will be more important to the non-citizen than the terms of the diversion program itself.

Thus, until this country summons the political will to address in a rational manner the need for a comprehensive reform of our immigration laws, members of the Bar must be prepared to address the chaos of the current crackdown wherever they confront it in their practice.

edmuch@mac.com

E. Dennis Muchnicki

OVERVIEW OF THE UNITED STATES' ANTICIPATED ACCESSION TO THE

Hague Intercountry Adoption Convention

By Thomas N. Taneff

Over the past fifteen years, the number of international adoptions in the United States tripled—until 2006, when the number of foreign adoptions fell by nearly ten percent. This decline is attributed to recent developments in China, Russia, and Guatemala, which are the three countries that the greatest numbers of children have been adopted by U.S. citizens in recent years. Most likely, this trend will continue, at least for the foreseeable future, because the United States is expected to ratify the Hague Intercountry Adoption Convention, which mandates the use of fairly strict standards that some countries, such as Guatemala, simply cannot meet. This turn of events is certain to deeply affect many would-be adoptive parents who wish to adopt a foreign child.

The reasons prospective adoptive parents ultimately choose to adopt a child from overseas varies. Often, such a decision largely rests upon a series of personal decisions, such as: (1) their feelings about contact with the birth parents, (2) whether they can afford the costs and expenses associated with an international adoption which can range between $10,000 to $30,000, and (3) how long they are willing to wait for their child.

Many families choose to adopt a child from another country because the wait for an infant or younger child is more predictable than a domestic infant adoption. Some may decide to pursue an international adoption because the birth parents' involvement is less likely, since either the birth parents have died or they have abandoned the child. Others make this choice based upon altruistic and personal reasons, particularly if the child lives in a country under economic, social, and political strife. It is for these reasons and many others that an increasing number of American families long to adopt a foreign child.

Hague Convention on Intercountry Adoptions

In 1993, sixty-eight countries convened to draft the Hague Convention on Intercountry Adoptions which stemmed from growing concerns about the abduction, exploitation, sale, or trafficking of children. The goal of this multilateral treaty was to protect children, birth parents, and adoptive parents by creating a set of uniform standards for adoption procedures. This treaty only applies to adoptions where children move from one country that is a party to the Convention to another. A country "party" to the Convention is one that has signed the treaty, the government has ratified it, and the Convention's terms are integrated into their domestic and international laws. The United States signed the Convention in 1994 to demonstrate its intent to proceed with efforts to ratify the treaty.

Notable provisions of the Convention: It requires parties to establish a "Central Authority" as a point of contact for that country. The Central Authority is responsible for the oversight of the party's compliance with the Convention's requirements. A significant area of compliance involves the accreditation of adoption agencies and individual providers of international adoption services.

Before an international adoption may occur the country of the child's origin must establish that the child is adoptable; due consideration has been given to the child's adoption in its country of origin; an intercountry adoption is in the child's best interests; and the child's birth parents have freely consented to the adoption.

The receiving country has determined that the prospective adoptive parents are eligible and suitable to adopt the child; and the child they seek to adopt will be authorized to enter and reside permanently in that country.

Until these requirements are first satisfied, there can be no contact between the prospective adoptive parents and any parent, person, or institution that cares for the child.

Adoptions completed in accordance with the Convention must be certified as such, unless doing so would violate the country's public policy.

Intercountry Adoption Act of 2000

In 1998, President Clinton transmitted the Convention to the U.S. Senate for advise and consent to the ratification. Simultaneously, the State Department drafted legislation that included the Convention's requirements. Two years later, both Houses of Congress passed the final version of this bill, which was named the Intercountry Adoption Act of 2000 ("IAA"). The IAA was signed into federal law in October 2000.

The IAA provides that the State Department and the Department of Homeland Security are responsible for establishing a case registry for all adoptions incoming and outgoing adoptions, irrespective of whether the adoption is covered by the Convention; all home studies on prospective adoptive parents must be approved by an accredited agency; adoption services for Convention adoptions shall only be provided by accredited non-profit agencies, approved persons, smaller agencies qualifying for temporary accreditation registration, and adoption service providers acting under the supervision and responsibility of an accredited agency or an approved person.

Adoptive parents must receive counseling both before and after the adoption process.

Once the IAA is fully implemented, the Convention will be ratified and will enter into force for the United States on the first day of the first month that begins three months after the date of ratification. It is anticipated that the United States will ratify the Convention by the end of this year.

New regulations may impact future adoptions by Americans

As discussed earlier, the greatest numbers of children adopted abroad by U.S. citizens have come from China, Russia, and Guatemala. However, this will likely change in the future because the following events in each of these countries may well delay or impede Americans' future adoptions of these children in the future.

On May 1, 2007, China imposed greater restrictions concerning foreign adoptions, in an effort to give preference to more "suitable applicants." These new rules examine applicants' marital stability, health, and finances.

Russia has a new law that requires five governmental ministries to review and approve U.S. adoption agencies. Currently, it is withholding approvals on adoptions, pending its own accreditation of those agencies.

The State Department has urged American citizens not to begin an adoption to Guatemala at this time, as this country will stop processing adoptions to the United States on January 1, 2008, and cases filed now cannot be completed within this time frame.

The recent developments in China, Russia, and Guatemala coupled with the fundamental changes in U.S. adoption law that will take place in the coming months are likely to cause some turbulence to the adoption system. What is certain, is that there are many Americans who anticipate and long for the day that they can bring home their child that they adopted abroad.

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1. A list of those countries that are currently parties to the Convention can be found at http://www.hcch.net.
2. 42 U.S.C. §14901.

ttaneff@rrcol.com

Thomas N. Taneff

Getting Acquainted

AN EXPLORATION OF THOSE ON THE BENCH

By Dianna M. Anelli and Lisa M. Critser

Ever wonder what it is like to be on the bench?

It is lonely at the top, so they say. And there may be some truth to that old adage. Still, for those of us who regularly appear before judges, it can be an intimidating event. What does one say, what can one say, what should one say? All attorneys appearing before judges would welcome the opportunity to get to know them a little bit better. But it is difficult to know how to accomplish that feat.

As it came closer to the time for publishing the 2008 Edition of The Local Practice Handbook, we thought it would be a good idea to interview the judges so that those appearing before them are a little more familiar, and a little less intimidated, when speaking with the judge. This quarter, we interviewed four judges. Below is what we discovered about them:

At the outset, we were impressed at how approachable the judges are. We had no difficulty getting in to see them and all were forthcoming in their interviews. They were gregarious with good sense of humor and generally seemed to like people. Each had a good idea of how a courtroom should be run.

Judge Richard A. Frye

Judge Richard A. Frye has some new additions to his staff, including Sharon Lynch, secretary; Carol Jung, court reporter; and Adam Crowell, staff attorney. Like Judge Hogan, Judge Frye has an open-door policy for attorneys. Appointments are not generally necessary and casual dress is acceptable. Here is some other pertinent information for attorneys to know about appearing before Judge Frye: (1) There are no status conferences on civil cases. (2) He will approve extensions of time, but it does not mean he will push back a trial date. (3) He will sometimes assist in settlement negotiations, but he usually will send the negotiations to his magistrate, Tim Haroldstadt. (4) He will discuss potential criminal sentencing with counsel.

Judge Timothy S. Horton

Judge Horton took the bench in December 2006. Prior to being elected, he was in private practice and had served as an assistant attorney general. He is a graduate of The Ohio State University Moritz College of Law ('95) and Boston University ('92). The Judge has detailed information about his court staff and his preferred practices and procedures available on his website (www.fccourts.org/gen/horton.htm).

Top three things he likes: (1) Organization and power point presentations for closing arguments, helpful to the jury. (2) Power point presentations for document intensive cases and published photos. (3) Professional atmosphere, though he wants attorneys to be relaxed and comfortable.

Top three things he dislikes: (1) Disrespectful conduct towards opposing counsel, the court and others. (2) Unprepared attorneys – because they waste everyone's time. (3) Attorneys talking to each other during trial, i.e. objections, instead of addressing the court.

Judge Horton and his wife, Lateea, have three children: Lauren (7), Philip (6), and Amelia (2). In his spare time, he enjoys being with his family, biking and is involved with his church, The Vineyard, located on Cooper Road. He also coached youth soccer for about nine years.

danelli@ethicalmysterycures.com
critser@ethicalmysterycures.com

Dianna M. Anelli and Lisa M. Critser

Up in Smoke

MYTH OF THE LITIGATION EXPLOSION

By Richard D. Topper Jr.

What did a lawyer sign, call a complaint and file in Ohio 79,000 times in 2006? A product liability suit? A malpractice case? Stumped? The answer: a foreclosure action.

What did a lawyer sign, call a complaint and file in Ohio 348 times in 2006? An adverse possession case? Another oddball type of lawsuit? No. The answer: A product liability case.

There is a litigation crisis in Ohio. It just doesn't happen to involve personal injury lawsuits.

In 2005, the Ohio legislature passed Senate Bill 80 which, among other things, imposed limits on non-economic and punitive damages and abrogated decades of common law jurisprudence in product liability actions. In so doing, the general assembly relied on a "litigation crisis" and a "tort system" that represented a "challenge to the economy." In 2003, the General Assembly dismantled a half-century of medical malpractice common law in Senate Bill 281. In an attempt to legitimize caps on damages in medical malpractice actions, the legislature stated that "medical malpractice litigation represents an increasing danger to the availability of health care in Ohio." Once again, the implication was that there was a "litigation explosion."

To test the truth of these allegations, this writer embarked on a statistical journey. The first stop was the Ohio Courts Summary, a yearly data collection published by the Ohio Supreme Court since 1999. The Ohio Courts Summary shows the case filings and terminations for all cases including product liability cases, professional torts (which include medical malpractice, legal malpractice and other professional malpractice cases such as accounting, architectural, engineering, etc.) and other torts (which not only include plaintiff's personal injury, but also insurance company subrogation and business v business lawsuits). The following is a graph showing the number of cases filed in each of those categories from 1999 - 2006:

	Professional Tort	Product Liability	Other Tort
1999	2707	551	25,940
2000	2704	485	24,362
2001	2650	580	25,446
2002	2972	500	26,104
2003	2683	396	25,314
2004	2250	436	23,890
2005	1908	928	23,830
2006	1502	348	21,292

Except for a small rise in professional tort cases in 2002, the number of professional tort cases shows a steady downward trend since 1999. In fact, professional tort case filings show a 45% decline from 1999 through 2006. To put the 2006 figure in perspective, there were 165,094 civil filings in Ohio Common Pleas Courts. Of these, professional torts constituted less than 1% of the cases filed. The statistics also show that only 134 professional tort cases went to trial in 2006. Using the statistic cited by the Ohio legislature in Senate Bill 281 that 80% of all malpractice cases which go to trial are found in the defendant's favor, twenty-six plaintiff's professional tort verdicts were awarded in Ohio in 2006. This is hardly a harbinger of a litigation crisis. Product liability cases in Ohio are more scant, representing .2% of all lawsuits. Product cases showed a decline of 38% from 1999-2006 with only three cases going to trial in 2006. Other tort cases showed an 18% decline. This is all in face of a 1% rise in Ohio's population during the same period.

Is there a concern that lawsuits affect the health of a small county's economy and its citizen's access to medical care? Let's survey Ashland County comprising of 52,000 residents in north central Ohio. In 2006, there were three (3) professional tort cases filed; one (1) product liability lawsuit filed and fifty-two (52) other tort cases. However, there were 235 foreclosure cases initiated. In fact, in 67 of Ohio's 88 counties, there were less than ten (10) professional tort filings and less than five (5) product liability filings. Ten counties had no professional tort filings.

Ohio litigation statistics are no different than national statistics. The National Center for State Courts surveyed 17 states from 1993 - 2002 and noted that tort filings decreased by 5% while contract filings increased by 21%.

Since the volume of lawsuits show a litigation implosion, not explosion, what do jury verdicts show. Professor Deborah Merritt of the Ohio State University Moritz College of Law analyzed Franklin County tort verdicts in an issue of the Ohio State Law Journal from the late 1990's. Her conclusion was as follows:

Scholars, on the other hand, have long questioned the existence of a tort crisis. Most individuals who suffer personal injuries never file lawsuits. Only a small percentage of filed claims proceed to trial. And both win rates and average verdicts are low for most personal injury claims.

Until recently, little empirical information was available to address this controversy over the need for tort reform. This Article uses data collected form Franklin County, Ohio to examine jury verdicts rendered during the twelve years before Ohio adopted tort reform in 1996. These findings suggest, as scholars long suspected, that jury verdicts are modest in most personal injury lawsuits. High verdicts in a few high-profile cases capture headlines, but the majority of decisions favors defendants or pay small amounts to plaintiffs.

What have Franklin County verdicts shown since then? From 1998 through 2007, the Columbus Bar Journal kept statistics on jury verdicts in Franklin County. There were five reported product liability cases. Of those, there was one plaintiff's verdict, a four million dollar award in 1999.

From 1998 through 2007, there were 58 reported medical malpractice verdicts; approximately 6 per year. There were 17 plaintiff verdicts and 41 zero verdicts. Only 7 were in excess of one million dollars. In other words, there was one million dollar verdict every 1.5 years.

Regarding auto cases, the statistics show the following. From 1998 through 2006, the median verdict was $6,733.00. There were 62 verdicts of zero and 69 verdicts less than $5,001.00. Only three verdicts exceeded one million dollars. Once again, jury verdict statistics belie a system which is the victim of a litigation explosion.

The purpose of tort and malpractice legislation was to reverse an alleged trend in reduction of health care services and was to be a panacea for a fledgling economy. What do the statistics show? Regarding health care, Ohio labor statistics show a rise in health care related employment from 610,400 in 2001 to 654,000 in 2004, the year after the passage of Senate Bill 231. According to Ohio State Medical Board statistics, the number of new physician licenses in Ohio rose from 1327 in 2000 to 1746 in 2004. This hardly shows a decline of available health care providers.

Tort legislation was not the promised silver bullet for Ohio's economy. Before the tort legislation, Ohio's gross domestic product grew from 348.7 billion in 1998 to 440.9 billion in 2005. However after tort reform, Ohio labor statistics show Ohio lost 11,900 goods producing jobs from 2006 through 2007. According to a July 10, 2007 memorandum to Governor Ted Strickland from Pari Sabety, the director of Ohio's Office of Budget and Management, "Economic activity is still experiencing a year long slump . . . Economic activity in and around Ohio has remained sluggish. Real Ohio GDP grew 1.1% in 2006, ranking 47th among all states." The effect of tort legislation warranted no mention in this report.

The Ohio Supreme Court will be deciding the constitutionality of the 2003 and 2005 tort legislation soon, if not before the publication of this article. Let us hope that the justices, our colleagues, will consider the facts and figures to determine whether there was a rational or irrational basis for the passage of these laws.

Richard D. Topper Jr.

Civil Jury Trials Franklin County Common Pleas Court

By Belinda S. Barnes and Monica L. Waller

Verdict: $111,125.00. Subrogation/Auto Accident. Plaintiff sought recovery for uninsured motorist coverage paid to its insureds arising out of an automobile accident caused by Defendant Gregory Kaplan on January 4, 2001. Damages claimed: $160,963.01. Plaintiff's experts: Robert Durbin, M.D., George Zochowski, M.D. and Steven Santenello. No defense expert. Settlement demand: $107,981.50. Settlement offer: $55,000.00. Three day trial. Plaintiff's attorneys: James Zury and Steven Zeehandelar. Defendant's attorneys: Carl A. Anthony and Sandra McIntosh. Judge: Bender. *State Farm Automobile Insurance v. Gregory Kaplan, et al.*, Case No. 04CVC-06-6305.

Verdict: $58,000.00 in favor of GBQ Partners LLC; $75,000.00 in favor of Squire Sanders & Dempsey; $33,000.00 in favor of Friedman & Mirman. Defendant Rebecca Mahan was sued by Friedman & Mirman, GBQ Partners and Squire Sanders & Dempsey for recovery of legal fees incurred in a divorce action. She filed a counterclaim against Friedman & Mirman and Squire Sanders & Dempsey for legal malpractice. Friedman & Mirman was granted summary judgment shortly before trial and the counterclaims against Squire Sanders & Dempsey were dismissed. No medical bills. No lost wages. Five day trial. Plaintiff's attorneys: Thomas E. Friedman for Friedman & Mirman; Anne C. Little for Squire Sanders & Dempsey and GBQ Partners LLC. Defendant's attorneys: Andrew Holford and Mark Ludwig. Judge: Lynch. *Friedman & Mirman Co., LPA v. Rebecca Mahan, et al.*, Case No. 04CV03-2940 (2006).

Verdict: $25,800.00. Auto Accident/Personal Injury. On July 5, 2005 Plaintiff was traveling northbound on Rome-Hilliard Road when Defendant turned right on red from a parking lot into Plaintiff's lane. Plaintiff was unable to avoid Defendant's vehicle and struck Defendant's vehicle on the driver's side. Defendant stipulated to liability. Plaintiff suffered a neck and back sprain. It was Defendant's position that Plaintiff had an excess of chiropractic treatment. Medical bills: $5,487.23. Lost wages: $544. Property damage: $1,800. Plaintiff's expert: Dr. Valenti. No defense expert. Settlement demand: $12,500. Settlement offer: $4,000. Two day trial. Plaintiff's attorney: Scott Norman. Defendant's attorney: Ben Ritterspach. Judge: Brown (Travis). *Douglas R. Crum v. Aysha Zamaara Suleiman*, Case No. 05CVC-10-11436 (2007).

Verdict: Defense Verdict. Automobile Accident. Plaintiff Randy Wycuff was operating his vehicle northbound on Wilson Road and was rear-ended by Defendant Debra Rheyme. The impact resulted in minor property damage. Plaintiff claimed injury to her neck and back. Plaintiff also had pre-existing injuries. Medical bills: $5,500. No lost wages. Plaintiff's expert: Thomas L Rapp, D.O. Defendant's expert: Joseph Schlonsky, M.D. Settlement demand: $12,000. Settlement offer: $6,500. Two day trial. Plaintiff's attorney: Walter Messenger. Defendant's attorney: Steven Herman. Judge: Holbrook. *Randy Wycuff v. Debra Rheyme, et al.*, Case No. 04CV03-2863 (2005).

Verdict: $0.00. Medical Malpractice. Plaintiff, a 74-year-old female, underwent total hip replacement surgery. The hip eventually became infected leading to numerous hospital stays and reinfections, culminating in a revision of her hip surgery. Medical bills: $189,757.98. No lost wages. Plaintiff's expert: Neil Crane, M.D. Defense experts: Michael Joyce, M.D.; Kathleen Meyer, R.N.; and George Giankopoulos, M.D. Settlement demand: $175,000. No settlement offer. Five day trial. Plaintiff's attorney: Thomas Robenalt. Defendant's attorneys: Brant Poling and Colleen Petrello. Judge: Martin. *Marilyn J. Kidd, et al. v. Dublin Geriatric Company LP d/b/a The Convalarium at Indian Run, et al.*, Case No. 05CVA-04-3997 (2007).

Verdict: $0.00. Personal Injury/Negligence. Plaintiff Charles Adkins fell from a ladder while descending from a homeowner's roof. Plaintiff claimed that the homeowner was negligent for moving the ladder while Plaintiff was on the roof. However, the homeowner claimed that Plaintiff assisted in relocating the ladder. As a result of the accident, Plaintiff suffered a fractured leg which required surgery and an external fixation. The jury allocated comparative negligence 33% to defendant and 66% to plaintiff. Medical bills: Approximately $70,000. Lost wages: Over $50,000. Plaintiff's expert: Joseph Mileti, M.D. No defense expert. Settlement demand: $100,000. Settlement offer: $5,000. Three day trial. Plaintiff's attorney: Peggy Maguire. Defendant's attorney: William Christensen. Judge: Schneider. *Charles Adkins v. Doris Moye, et al.*, Case No. 05CVC-06-6481 (2007).

Verdict: $0.00. Medical Negligence. Following a major vascular bypass surgery, Plaintiff suffered complications which resulted in a perforated bowel. A second surgery resulted in a fistula. Plaintiff underwent skin grafting and was left with a ventral hernia. Plaintiff alleged a delay in diagnosis and treatment. Trial commenced against Geoffrey Blossom, M.D. and Grant/Riverside Hospital. However, the doctor was dismissed on the fifth day of trial. In response to interrogatories, the jury unanimously determined that Grant/Riverside Hospital was negligent but the majority of jurors determined that the negligence was not the proximate cause of Plaintiff's damages. Medical bills: $185,955.94 in past medical bills and $949,779.00 asserted for future medical bills. Future lost wages: $1,217,162.00. Plaintiff's expert: A.R. Mossa, M.D. Defense expert: Linda Bailey, M.D. Settlement demand: $5,000,000. No settlement offer. Ten day trial. Plaintiff's attorneys: Michael Rourke and Robert Miller. Defendants' attorneys: Bobbie Sprader and Natalie Trishman Furniss. Judge: Cain. *Josephine Miller v. Geoffrey Blossom, M.D., et al.*, Case No. 03CVA-01-1131 (2007).

Verdict: $0.00. Medical Malpractice. Plaintiff's decedent suffered from hydrocephalus which required shunting from the brain to the stomach in order to drain off excess fluids. The shunts became disconnected at different times, and after the second shunt disconnected, it was observed that the decedent's ventricles were somewhat enlarged. Six weeks later, decedent suffered a fatal event secondary to increased intercranial pressure. Medical bills: Minimal. No lost wages. Plaintiff's experts: Roger Barkin, M.D. and John Waldman, M.D. Defense expert: Jorge Lazareff, M.D. Settlement demand: $1,100,000. No settlement offer. Five day trial. Plaintiff's attorney: Richard Topper. Defendant's attorney: Thomas Dillon. Judge: Frye. *Beverly Peyton, Adm. v. Edward Kosnik, M.D.*, Case No. 05CVA-03-2970 (2007).

Verdict: $0.00. Insurance coverage. There was a fire at the Plaintiff's home which was undisputedly caused by arson. A witness at trial testified that he assisted the Plaintiff in setting the fire. The jury found no coverage based on material misrepresentations made during the investigation of the claim. Damages: $115,828.99. Plaintiff's experts: Representatives of Belfor U.S.A. as to damages. Defendant's experts: Mike DeFrancisco, Columbus Arson Bureau. Settlement demand: $115,828.99. No settlement offer. Five day trial. Plaintiff's attorneys: Tim Merkle and Gary Shroyer. Defendant's attorneys: Grey Jones and Cheryl Ryan. Judge: Holbrook. *Auddino, et al. v. Nationwide Mutual Fire Insurance Company*, Case No. 05CVH-04-4816 (2007).

Verdict: $0.00. Medical Malpractice. Plaintiff was a 27-year-old pregnant woman who underwent a vascular study for a deep vein thrombosis. The study showed a mass behind the knee. Plaintiff claimed that the cardiologist should have recommended follow-up CT scans or made a recommendation in the report. Plaintiff claimed delay of diagnosis of a soft tissue sarcoma. As a result, Plaintiff suffered an above the knee amputation. Medical bills: $400,000. No lost wages. Plaintiff's experts: Lawrence Weis, M.D.; Frank Frassica, M.D.; and Robert Colyer, M.D. Defense experts: James Froehlich, M.D. and Terrance Peabody, M.D. Settlement demand: $2,000,000. No settlement offer. Eight day trial. Plaintiff's attorney: John Lancione. Defendant's attorney: Gerald Todaro. Judge: Martin. *Kathryn Cunion, et al. v. Central Ohio Cardiovascular Consultants, Inc., et al.*, Case No. 04CVA-10-10765 (2007).

Verdict : $0.00. Defense Verdict. Premises Liability. On August 23, 2002, Plaintiff alleged that she exited her car in the parking lot at Riverside Methodist Hospital and fell into a pothole in the asphalt injuring her right ankle and foot. Riverside Hospital employees and independent contractors were unable to find any potholes in the parking lot where plaintiff alleged she fell. Medical bills: $5,152.00. However, $2,225.51 was accepted as payment in full. No lost wages. Plaintiff's expert: Jack Buchan D.P.M. No defense expert. Settlement demand: $30,000.00. No settlement offer. Five day trial. Plaintiff's attorney: John H. Bates. Defendant's attorneys: Bobbie S. Sprader and Sarah Hurst. Judge: Hogan. *Mary Montgomery v. Riverside Methodist Hospital et al.*, Case No. 04CVE-08-8414 (2006).

mwaller@lanealton.com

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

BEHIND THE CURTAIN

How a Judge from Tenth District Court of Appeals Reviews Cases

By Judge William A. Klatt

In the six years that I have been on the Tenth District Court of Appeals, a number of lawyers have asked me about the process I use to analyze a case on appeal. Although I suspect not all appellate judges utilize precisely the same process, I doubt the variations are very great. By describing my process, I hope to provide appellate advocates with some insight that may prove helpful when writing a brief and presenting oral argument.

Cases in the Tenth District are assigned to a panel on a random basis. Generally, 15 to 18 cases are assigned to a panel for a given three-day court session. Briefs for the assigned cases are distributed to the panel approximately two weeks before oral argument. I generally read briefs the week before the scheduled oral argument. Because of the large amount of reading involved, I particularly appreciate a concise, well-organized, and well-written brief.

Each judge on our court has two law clerks. Our law clerks are licensed lawyers, and most of them have significant research and writing experience. I am fortunate to work with two outstanding law clerks, both of whom have close to ten years of legal experience. I use my law clerks to help me analyze the issues in a case, prepare for oral argument, and draft opinions.

I almost always start my review of a case by reading the appellant's brief. I first focus on the assignments of error. The assignments of error set the stage for my subsequent review of the brief. Clear and concise assignments of error generally enhance the effectiveness of the brief. Rambling and redundant assignments of error are difficult to analyze and reflect poor advocacy. After reviewing the assignments of error, I read the appellant's statement of the case and statement of facts. It is not helpful to recite every pleading filed in the case. Identify only that part of the procedural history necessary for the reader to understand the context and present the posture of the case. The statement of facts should also be concise and to the point. A long recitation of irrelevant facts detracts from a brief's effectiveness. If I am having trouble understanding the facts or procedural posture of the case, I may switch to the appellee's brief to get the information I need. Consequently, the statement of the case and statement of facts are important, particularly if you are the appellant.

I then read the appellant's arguments in support of each assignment of error followed by the appellee's brief. I often switch back and forth between the appellant's brief and the appellee's brief for each assignment of error. I am also particularly interested in reading the appellant's reply brief if one is filed. A reply brief is effective if it is short, and if it directly addresses the points raised by the appellee. A reply brief that simply re-hashes the same arguments presented in appellant's principle brief is not helpful. Lastly, I read the trial court's decision.

Immediately after reading the briefs and the trial court's decision, I prepare a case summary. That summary includes the name of the trial judge, the precise nature of the judgment at issue, and the relevant facts. Then for each assignment of error, I write down my initial assessment, including the key legal authorities. I also note any concerns or questions I may have, as well as areas for additional research. A well-organized brief makes it much easier for me to go back through the briefs as I prepare my case summary.

My law clerks also read the briefs before oral argument, although they split up the cases so that they each read one-half of the briefs. The afternoon before the morning of oral arguments, I meet with my law clerks to discuss the cases that will be argued the following day. In preparation for that meeting, I review my case notes and, if necessary, do additional research. For each case, we discuss the facts and then analyze each assignment of error. Essentially, the two of us who read the briefs explain the case to the other law clerk. This is a very enjoyable and beneficial process for me. Orally articulating my thoughts for each assignment of error helps clarify my thinking and allows me to benefit from the thoughts of my law clerks. We often have spirited debates over issues. This process also ensures that I am well prepared for oral argument. I take notes during these conferences and often identify questions I may want to ask counsel.

I enjoy the interaction with appellate counsel and I tend to be very engaged during oral argument. Oral argument is an important part of my analytical process. I can test my analysis of the legal issues and explore the impact of equities in the case that may be bothering me. I almost always find oral argument helpful. I am routinely asked how often oral argument changes the outcome of a case. The truth is, sometimes it does.

Immediately following oral argument, the panel meets to discuss the cases for that day. The panel conference is my third opportunity to discuss orally the merits of the appeal. After discussion, we take a preliminary vote of the panel. I note the outcome of the vote in my case summary, and I add any significant concerns expressed during the conference, as well as any drafting suggestions. Writing assignments are then finalized.

Following the conference, I meet again with my law clerks to briefly discuss the preliminary panel vote on each case and any particular concerns expressed by any of the judges. At this point, I focus on those cases for which I have writing responsibility. My law clerks and I share the writing duties. I edit my law clerks' work and they edit mine. When I am satisfied with the draft opinion, it is circulated to the other two judges on the panel.

When I receive a draft opinion from another judge, the first thing I do is review my original case summary. I then read the draft opinion. I limit my review to the legal analysis and the result of the opinion. I do not critique the writing style of another judge. Sometimes the strength of the opinion changes my mind.

In general, a panel tries to reach a consensus on how to resolve an appeal. However, if we cannot agree, we write concurring or dissenting opinions. If I write a dissent, I do my best to state concisely why I disagree with the majority opinion. I rarely write concurrences, but when I do I also keep them concise.

It should come as no surprise that the outcome of most appeals turns on a few key issues. Those are also the issues on which I focus in oral argument. Consequently, appellate advocates should clearly articulate and analyze those key issues in their briefs and be prepared to address those issues in oral argument. A well-organized case makes my job easier and more enjoyable.

waklatt@co.franklin.oh.us

Judge William A. Klatt

"I almost always start my review of a case by reading the appellant's brief. I first focus on the assignments of error. The assignments of error set the stage for my subsequent review of the brief. Clear and concise assignments of error generally enhance the effectiveness of the brief."

Issues in Examination of Psychological Witnesses

By Thomas S. Paulucci, JD, Ph.D.

Attorneys across all areas of practice find themselves having to deal with psychological evidence. The results of psychological evaluations and the opinions tendered by psychological and mental health experts can have a profound impact on the outcome of a case. Many attorneys resort to hiring a psychological expert as a consultant to either advise them as to the interpretation of or quality of the psychological data or to assist them in the construction of direct and cross examination questions. For attorneys to make effective use of their psychological experts they should be aware of the following issues.

Much of the data provided by social workers, psychiatrists and/or psychologists does not remotely meet the Daubert criteria for evidentiary sufficiency. The Daubert decision requires that scientific evidence must not only be relevant evidence, but also reliable evidence. Reliability of the evidence is dependent on the scientific validity of the evidence. The decision established four specific factors that the trial judge must consider when evaluating the reliability of scientific evidence: 1) testability, 2) peer review, 3) error rates, and 4) the level of acceptance in the scientific community or discipline.[1] The Kumho Tire decision expanded the scope of *Daubert* by including testimony based on either technical or specialized knowledge for consideration under the gate-keeping function.[2]

Research on how judges have understood and implemented the Daubert gate-keeping function and decision rules has indicated that in general the concepts, other than general acceptance, are not well understood or implemented by the judiciary.[3] Thus, it may be necessary for the attorney to examine the mental health expert in a manner that both educates the judiciary and at the same time impeaches the testimony on several levels.

The APA Specialty Guidelines for Forensic Psychologists defines the standard of care that is to be adhered to by all forensic psychologists. It is important for the attorney to present these guidelines to the psychological witness and to establish that they have followed the ethical standards in preparation of their data and report. For example, Standard IV, Relationships reads: "During initial consultation with the legal representative of the party seeking services, (this can be the court) forensic psychologists have an obligation to inform the party of factors that might reasonably affect the decision to contract with the forensic psychologist." [4]

This discussion/caveat is almost never found in any evaluation or report that is submitted to the court nor is there generally an informed discussion with either an attorney or with the court that is consistent with this standard. If the psychologist were to provide this discussion he/she would have to make it known that it is not possible to compute an error rate for one of the most widely used evaluation techniques—the interview. There is significant research within the field of psychology that establishes the lack of validity of the interview process and of clinical judgment or opinion.[5] Thus, the interview technique does not meet the standard that psychological evidence be reliable; defined by *Daubert* as being valid data. Additionally, clinical opinion or judgment is subject to impeachment due to the inability of the psychological expert to provide established levels of validity for these opinions or judgments.

Attorneys can run into difficulty in obtaining the raw data that is the foundation for the psychological report or evaluation. It is impossible to adequately examine a psychological expert without access to this data. There are at least two ethical standards that deal with this issue. The Ethical Principles of Psychologists and Code of Conduct, standard 9.04 Release of Test Data states the following: "(a) The term test data refers to raw and scaled scores, client/patient responses to test questions or stimuli, and psychologists' notes and recordings concerning the client/patient statements and behavior during an examination. Those portions of test materials that include client/patient responses are included in the definition of test data. Pursuant to a client/patient release, psychologists provide test data to the client/patient or other persons identified in the release. Psychologist may refrain from releasing test data to protect a client/patient or others from substantial harm or misuse or misrepresentation of the data or the test, recognizing that in many instances release of confidential information under these circumstances is regulated by law. (b) In the absence of a client/patient release, psychologists provide test data only as required by law or court order.[6] By Ohio Supreme Court decision forensic evaluations are not confidential or privileged. The Forensic Ethical Guidelines further stipulate the following: "Forensic psychologists have an obligation to document and to be prepared to make available, subject to court order or the rules of evidence, all data that form the basis for their evidence or services. The standard to be applied to such documentation or recording anticipates that the detail and quality of such documentation will be subject to reasonable judicial scrutiny, this standard is higher than the normative standard for clinical practice…."[7] There is not a specific requirement that raw data only be released to another psychologist.

It appears to this writer that the psychologist who refuses to release the raw data or to insist on a court order takes a position that is not readily defensible, as by law the data is not privileged. It is critical that the attorney acquire the data and be able to examine the expert on whether the data was scored, interpreted and communicated in a manner that is consistent with established procedures. If this work has not been done appropriately the expert's foundation for the report and opinions will be impeached and the value of the work product to the court in assisting in a decision rendered useless.

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1. *Daubert v. Merrell Dow Pharmaceuticals, Inc.*
2. *Kumho Tire CO. v. Carmichael*
3. *Asking the Gatekeepers: A National Survey of Judges on Judging Expert Evidence in a Post-Daubert World, Law and Human Behavior*
4. *Specialty Guidelines for Forensic Psychologists, APA. Available online from the American Psychological Society.*
5. *Meehl, P.E., Clinical vs. Statistical Prediction*
6. *Ethical Principles of Psychologists and Code of Conduct, APA. Available online from the American Psychological Society. Sialty Guidelines for Forensic Psychologists, APA. Available online from the American Psychological Society.*

tsp@computech-online.net

Thomas S. Paulucci, JD, Ph.D.

He falls me fat!

IDIOMS AND THE STANDARD FOR COURT INTERPRETING

By Bruno Romero

Joe Mata was a tall, thin man with deep-set eyes. His black hair slicked back and curled above the tattoo of a thunderbird on his neck. His piercing glance from behind the defense table made most eye contact with him uncomfortable. If you knew him, though, where he grew up, what he had been through during his youth en El Segundo, you'd know why he just couldn't be bothered. In the end, he often said, everyone got what they deserve.

The judge shuffled the papers in front of him and then ordered the next witness to the stand. The prosecutor pointed to the chair and instructed the witness, "Please, sit on the stand."

The interpreter was suddenly struck by words, "sit on the stand." "Sit on the stand" sounded awkward, contradictory, if not metaphysically impossible, but everyone in the courtroom knew what this meant. At the moment, however, the interpreter was immediately challenged by the words, "sit" and "stand" in the same sentence. It seemed like an eternity but the interpreter finally came up with, "Tome asiento, por favor."

Even though the witness responded appropriately, the interpreter felt uneasy. Technically, the interpreter said, "Please have a seat." But the prosecutor had said "Please, sit on the stand." No big deal, close enough. Earlier, however, the judge had instructed the interpreter to do literal interpretation. Remembering this, the interpreter then focused on every word.

By now, most legal professionals understand that court interpreters require more than just foreign language fluency. Court interpreters need training, preparation and compliance with professional standards, including ethics and court protocol. The brief scenario above will help illustrate a standard that is meant to guide the way court interpretations should take place. Often, legal professionals expect literal interpretation while interpreters proclaim that the standard should be meaningful interpretation. Both sides, however, agree that summary interpreting should not take place. So, what should the standard be? Literal, verbatim or exact meaning?

Earlier this year, the Supreme Court of Ohio Advisory Committee on Interpreter Services finalized and proposed to the Court the Code of Ethics and Conduct for Judiciary Interpreters, Transliterators, and Translators. This Code modeled after similar codes adopted by other states will guide interpreter, transliterator, and translator in key practices. The canons include impartiality, conflict of interest, confidentiality, proficiency, scope of practice and also the standard for interpretation. Expectantly, the public will see the entire document after the Supreme Court of Ohio releases for comment in the near future and at that time there will be plenty of opportunities to cover the rest of the canons. Meanwhile, the focus will remain on the standard mentioned above.

When I asked a court interpreter in Cleveland how she would interpreter the phrase "sit on the stand," she said, "sientese en el banquillo de los testigos," which literal means, "sit on the little (or small) witness bench." Another interpreter said, "sientese en la silla de testimonio," which, again, literally means, "sit on the testimony chair." Both, however, would be appropriate Spanish expressions of "sit on the stand."

Now back to our illustration…the interpreter gets the witness to the stand and the examination is under way. Following a line of questioning, the prosecutor then asks, "What did you hear Joe Mata, the defendant, say in that conversation on December 9?"

Defendant: "Pues el dijo, 'Me cae gordo, por eso le di un tiro'"

Interpreter: "Well, he said, 'He falls me fat, that's why I gave him a shot.'"

Excuse me?

The interpreter was instructed earlier to interpret everything literally so he did just that. "Me cae gordo" literally means "he falls me fat," and "le di un tiro," literally means, "I gave him a shot." If an interpreter followed the standard of literal interpretation, then "he falls me fat," is right on target.

Indeed, idioms, metaphors and slang if handled literally, pose a particularly difficult problem in foreign language interpretation. In court, this could be disastrous because in this case, the witness meant to say, "Well, he said 'I don't like him that's why I shot him.'" Or if I were to choose an equivalent idiomatic expression, I might say, "I hate his guts, that's why I shot him." Analogously, if some one said that in English and I literally interpreted into Spanish I might say this about guts, "Odio sus tripas," which would mean to me that I don't like the way he prepares a certain dish or something like that.

For an interpreter, the way to get accurate interpretations is to adhere to the following standard: Interpreters shall render a complete and accurate interpretation without altering, omitting, or adding anything to what is spoken or written, and shall do so without explaining the statements of the original speaker or writer.

The canon is meant to provide interpreters and to some degree, legal professionals, a standard for interpretation that can accommodate the range of expressions used in the course of meaningful exchange. Furthermore, the commentary to the canon is as follows:

In order to preserve the court's record and assist in the administration of justice, interpreters and transliterators should completely and accurately interpret or transliterate the exact meaning of what is said or written without embellishing, explaining, omitting, adding, altering, or summarizing anything. This includes maintaining accuracy of style or register of speech, as well as not distorting the meaning of the source language, even if it appears obscene, incoherent, non-responsive, or a misstatement. Interpreters and transliterators have a duty to inform the court of any error or misinterpretation so that the record may be promptly corrected. The terms "accurately," "completely," and "exact" do not signify a "word-for-word" or "literal" interpretation, but rather mean to convey the exact meaning of the speaker's or writer's discourse.

In the end, the only way we can ever get good interpretations is to have interpreters always perform "by the book."

romerob@sconet.state..us

Bruno Romero,
Interpreter Services Program,
Supreme Court of Ohio

You Comply With the Law

BUT YOU'RE FULL OF HOT AIR…

States differ on treatment of greenhouse gas emissions; federal legislation introduced

By Katerina Milenkovsi

The Kansas Department of Health and Environment recently did something no other governmental entity in the United States had done before – it denied a permit for a new coal-fired power plant because of the greenhouse gas emissions the project would have generated. This, despite the fact that Kansas, like most states in the country, has no law expressly restricting greenhouse gas emissions. Although the Kansas Department of Health and Environment staff recommended approval of the permit, the head of the Kansas agency indicated that he felt it was irresponsible to ignore emerging information about the contribution of carbon dioxide and other greenhouse gases to climate change. In denying the permit, the director relied upon the Kansas Attorney General's opinion that the director had the authority to reject a permit application – even if the proposed project would meet all applicable state and federal regulatory requirements.

Shortly after the Kansas decision, Ohio's Director of Environmental Protection, Chris Korleski, was quoted in a *Columbus Dispatch* article[1] as saying that Ohio EPA would not be following Kansas's lead. Instead, Ohio EPA will wait for Congress or U.S. EPA to set nationwide standards for carbon dioxide before using carbon dioxide emissions as a basis for denying permits in Ohio. Denying permits without such standards in place would be, according to Korleski, "a fairness issue."

Such nationwide standards may, in fact, be imminent. "There is a lot of state level activity on the greenhouse gas issue," notes Dennis Hirsch, professor at Capital University Law School and director of Capital's Environmental Law Concentration Program. "You have state programs like the Regional Greenhouse Gas Initiative out of the northeast, state carbon dioxide emission regulations in California, nuisance law suits being brought by various states against individual companies over greenhouse gas emissions, and now, permitting decisions being made on the basis of greenhouse gas emissions in Kansas – all of these states are doing very different things to address greenhouse gases at the state level." According to Hirsch, "the more differing state activity is out there, the greater the uncertainty for business, and the greater interest business has in some kind of national regulatory regime that will be fair and predictable. In my opinion, the increase in state activity increases the need for, and the likelihood of, federal legislation."

Several bills have been introduced by Congress in recent years dealing with the issue of greenhouse gases and global warming. To date, however, none has been enacted into law. Most recently, United States senators Joseph Lieberman (I – Conn.) and John Warner (R – Va.) introduced America's Climate Security Act (ACSA), commonly being called the Lieberman-Warner Bill. The Lieberman-Warner Bill seeks to "establish the core of a federal program that will reduce United States greenhouse gas emissions substantially enough between 2007 and 2050 to avert the catastrophic impacts of global climate change" while at the same time "preserving robust growth in the United States economy and avoiding the imposition of hardship on United States citizens."[2] The bill, which would restrict emissions of six primary greenhouse gases – carbon dioxide, methane, nitrous oxide, sulfur hexafluoride, hydrofluorocarbons, and perfluorocarbons – uses a "cap and trade" approach to regulate and gradually reduce the amount of greenhouse gas emissions from "covered facilities" in the electric power generating sector, the industrial sector, and the transportation sector of the U.S. economy.

"Cap and trade" systems have worked well in other contexts, such as the Acid Rain program. At the outset, an overall cap, or maximum amount of emissions per compliance period, is established for all sources under the program. Authorizations to emit in the form of emission allowances are then allocated to affected sources, with the total number of allowances not to exceed the cap. Individual control requirements are not specified for sources; sources that can afford to install controls may find that they have excess emission allowances, which they can then sell to others, for whom further reductions in emissions may not be economically feasible. Allowance trading thus enables sources to design their own compliance strategy based on their individual circumstances while still achieving the overall emissions reductions required by the cap. Typically, allocations are reduced from year to year. In the Lieberman-Warner bill, the year 2050 allocations are 70% less than the 2005 emission levels.

"There really seems to be momentum coalescing around a cap and trade system as opposed to a carbon tax approach," says Hirsch. "First, industry believes that a cap and trade system will involve allocations that are based, to some extent, on historical emissions. From industry's point of view, that will ease the transition to a carbon constrained economy. A carbon tax, on the other hand, doesn't offer that. Second, environmentalists, I believe, also favor a cap and trade system over a carbon tax. With cap and trade, you get a definite amount of carbon dioxide reductions set by the cap. The nation and the government can monitor compliance and can identify whether that cap is being reached or not. With a tax, you don't know what the environmental outcome will be. If the fee is too low, there may be insufficient incentive to reduce emissions." According to Hirsch, "the political reality is that both industry and environmental groups have a strong interest in cap and trade, albeit for different reasons."

Joel Riter, deputy director of Ohio's Tomorrow, a non-profit organization dedicated to addressing climate change issues, agrees. "We already have strong support behind cap and trade legislation from endorsements of five previous cap and trade initiatives. When you combine the already-established momentum for cap and trade, and factor in the bipartisan, middle-ground nature of America's Climate Security Act, we think this bill has a real chance of enacting a mandatory cap on emissions in this Congress."

Adds Riter, "a tax is not politically favorable, and will not pass in Congress. A market-based cap provides a real incentive for companies to invest in greenhouse gas reducing technologies that will create jobs and provide an economic stimulus in Ohio."

Whatever type of program may ultimately be adopted, most observers believe that it will be some time before any federal legislation exists. Until then, businesses in different states will potentially face very different requirements with respect to greenhouse gas emissions. In Ohio, at least for the time being, greenhouse gas emissions are not a factor in permitting.

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1. *Emissions Debate; Ohio Won't Block Plants Based on CO_2 Ruling,* THE COLUMBUS DISPATCH, *October 24, 2007, at 1A.*
2. *See The Lieberman-Warner America's Climate Security Act (S. 2191), a Detailed Summary, available at http://lieberman.senate.gov/documents/detailedacsa.doc.*

kathy.milenkovski@steptoe-johnson.com

Katerina Milenkovsi, Of Counsel, Steptoe & Johnson

Legal Ledger

This article, reprinted with the permission of the State Bar of Arizona, taken from the ARIZONA ATTORNEY OCTOBER 2007, is current information for Central Ohio attorneys who may also be licensed to practice in Arizona – or would contemplate semi-retirement in the Southwest. Economics of Law Report Soon Available

By Dr. Lawrence Stiffman, Ph.D., MPH

During the spring of 2007, the State Bar of Arizona surveyed its members on the economics of law practice. The survey and analysis are complete, and the results are now available.

The survey results provide insights into the current and evolving economic state of affairs. It is likely difficult for individual attorneys and firms to compile broad-based economic data. The State Bar expects that the complete report will be of great assistance to its members. The complete report is available for purchase by members and the public. For more information, contact Mira Radovich at 602-340-7293, or go online to www.myazbar.org.

What follows is a snapshot of some of the valuable information the Bar learned with the help of members. The complete report is more than 40 pages.

Useful Practice Information

As the Bar did in 2004 and 2001, it asked its members a variety of questions to create an economic snapshot. The objectives were to determine, among other things:

- Current demographics of practicing attorneys
- Attorney net income by practice category, gender, field of law, office location, work status, years in practice and firm size
- Associate, legal assistant, and secretary compensation by years of experience and office location
- Prevailing average hourly billing rates for attorneys by a variety of indicators, and legal assistants by years of experience, firm size and office location
- Job satisfaction
- Gender gap variations
- Attorney time allocated to billable and non-billable professional activities
- Overhead expenses associated with maintaining a private practice by office location and firm size, and
- Other law office management practices

This information has been consolidated into a complete guide to help guide attorneys as they plan and manage their professional lives.[1]

The Typical Arizona Attorney and Firm Demographics

The typical respondent is 47 years of age and has been in practice for 18 years. The average male attorney is 49 years of age and has been in practice 20 years; the average female attorney is 44 and has been in practice for 13 years. Women represent 35.5 percent of respondents.

Approximately 65 percent of respondents are private practitioners. Of the remainder, 24 percent work in government agencies including the judiciary, 5 percent are in-house counsel, and the remaining 5 percent work in legal aid, as law clerks, are in a non-legal profession or indicated "other."

Within the practice category groupings, 48 percent of associates are women. Women comprise 48 percent of state and local government attorneys, 33 percent of federal government attorneys, 38 percent of in-house counsel (for-profit), 59 percent of in-house counsel (not-for-profit), and 42 percent of legal services attorneys.

Hourly Billing Rates and Work Volume

Approximately 92 percent of private practitioners have a standard or usual hourly rate that they apply as a guide, starting point or basis for fee computation. The average hourly billing rate reported for 2006 is $239.

Office Expenditures and Revenues

The median value for 2006 total office expenditures on a "per attorney" basis is $62,000, and the average value is $79,018. Labor cost represents the major line-item expenditure ($30,000 per attorney). Average gross revenue per attorney for 2006 is $200,000.

Median Net Income

The median net income reported for all respondents (part- and full-time) is $100,000. Mean (average) net income for all respondents (part- and full-time) is $138,289. The median net income reported for respondents working full-time for calendar year 2006 is $101,000; the average net income for respondents working full-time is $147,396. Part-time respondents report incomes of $60,000 (median value) and $65,603 (average value). The chart shows attorney net income by practice category

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1. *Interpreting Findings: Because the survey was conducted in spring and summer 2007, net income, gross revenue and overhead expense represent 2006 values. All other datarepresent 2007 values. Net income represents all personal income from legal work (after expenses) or salaries from the practice of law, before taxes, for 2006. Bonus information was not addressed as a separate question and may have been included by respondents.*

Dr. Lawrence Stiffman, Ph.D., MPH, is the owner of the Applied Statistics Laboratory (ASL), a survey and market research organization based in Ann Arbor, Mich. He has conducted economic surveys for 13 state bar associations and numerous market research studies nationwide.

2006 Attorney Net Income by Practice Category (includes only Full-Time Respondents)

Practice Category	Mean	Value by Percentile 25th	Median	75th	95th
Sole practitioner, office outside home	$141,828	$70,000	$105,500	$192,250	$306,800
Sole practitioner with home office	122,646	50,000	90,000	140,000	450,000
Sole practitioner with associates	248,960	110,000	160,000	325,000	910,000
Sole practitioner sharing space	122,100	50,500	112,500	212,250	265,000
Partner in firm with 2-7 partners	237.918	110,000	150,000	250,000	586,000
Partner in firm with 8+ partners	303,006	160,000	262,500	415,000	665,000
Associate in firm with 2-7 partners	88,096	63,500	80,000	103,500	160,000
Associate in firm with 8+ Partners	114,805	90,000	105,000	125,000	165,000
Judge/Magistrate (Full-Time)	109,538	93,500	109,000	135,000	140,000
Arbitrator/Mediator/ALJ	77,571	45,000	70,000	100,000	150,000
City/State/County government	93,979	65,000	83,000	100,000	131,400
Federal government	90,690	64,665	96,000	111,000	143,400
House counsel (for-profit org.)	157,602	99,000	126,000	200,000	313,500
House counsel (not-for-profit org.)	102,406	70,625	92,500	133,750	250,000
Counsel with Legal Aid/Legal Services	48,869	35,000	53,000	61,000	74,000
Law clerk	66,333	47,000	52,000	101,000	107,000
Non-legal profession	87,000	9,000	82,500	158,750	200,000
All Full-Time Attorneys	**$147,396**	**$72,000**	**$101,000**	**$150,000**	**$400,000**

Trusts? Wills? Or Both?

By Ruth Freed

The idea that a trust is a panacea which will eliminate all costs of settling an estate is a myth. Nevertheless famous financial experts tout the advantages of trusts over wills. In particular, Suzi Orman, a popular television performer in this field, has repeatedly urged her audiences to include living trust in their portfolios. She claims that creating a living trust will result in huge savings, that inheritance taxes and attorney fees will disappear, and the decedents assets will be transferred to the heirs in a very short time. She claims that probating a will and administering an estate in the probate court could take years before the heirs receive their property.

But let's analyze these claims. As for taxes, most estates are not large enough to incur estate taxes. In Ohio an estate less than $338,000.00 will not incur an Ohio estate tax. And the federal estate tax only applies to estates larger than 1.5 million dollars (two million dollars in 2008) and in 2010 there will be no federal estate tax.

There are certain unique situations in which a husband and wife can save taxes by creating a special trust called the Credits Shelter Trust where the combined estate is over three million dollars and a family can save taxes; or if a person wants to transfer all his assets into an irrevocable trust, these assets would not be part of the decedents estate and therefore not subject to an inheritance tax. However, the transfer of the assets to the trust could be a taxable event, but in that case the grantor must transfer every single asset he owns, small or large, to the trust. Otherwise he will need a Will to transfer the omitted assets to the beneficiaries.

These transfers would necessitate the services of a lawyer and then upon the death of the grantor a lawyer's services would be required to transfer the assets out of the trust to the grantees. The time involved in all this would probably exceed the time required to administer the average estate in the probate court. In our probate court most estates are completed in six to nine months unless unusual circumstances require more time for the process to be completed.

Nevertheless, a trust can be a valuable tool in estate planning. The following are two examples: one where the trust was not appropriate and the other case where it was a solution to a common problem.

I. John was 80 years old and the father of four children: two sons and two daughters.

He decided it was time to get his affairs in order and on the advice of his lawyer, he made a simple will leaving all his assets to his four children in equal shares. He appointed his eldest son Paul as executor. However, his youngest son Kevin was an alcoholic with a history of domestic violence. The problem that this situation created gnawed at John.

He was afraid that Kevin would spend his inheritance on his addiction rather than use it to provide a security for himself. John wanted to be sure that Kevin would have a permanent home since his fourth of the estate would have been sufficient for him to establish one.

One day an organization called "Estate Planning" contacted John. They recommended that instead of his will, he should create a trust so that the trustee could control the distribution of John's assets. Because of John's fear that Kevin would dissipate his inheritance, "Estate Planning" persuaded John that a living trust (and a pour-over will) would enable John to tie up Kevin's share indefinitely and would solve his problems. They drafted and presented to John not only a trust but a new pour-over will, new power of attorney, and a new living will [at a cost of $3,000].

However, "Estate Planning" erroneously represented to John that he would save on inheritance taxes by placing all his assets in the trust. Still the assets in John's estate were approximately $250,000. Because the minimum for Ohio is $338,000 and federal taxes are much higher, under no circumstances would this estate yield tax consequences. Then they advised him to transfer his real estate into the trust (this was supposed to save the taxes) and they made a new pour-over will bequeathing all his other estate assets to the trust.

The rest of the estate consisted of a car, mutual funds, savings accounts, and life insurance policies. Paul's daughter was starting college and needed a car so he wanted to give the car to her and deduct its appraised value from his share of the estate.

Unfortunately, with a trust and pour-over will he had to transfer the car and all the other assets from the estate to the trust before he could transfer the car from the trust to his daughter. (Only the real estate had been transferred to the living trust.) And only upon completion of the administration of the estate, when all the assets were transferred to the trust, could the assets be conveyed to the actual beneficiaries. Under the original will it would have taken less time to transfer the car to his daughter and, in fact, to distribute all the assets to the beneficiaries.

Now, coming back to the errant son Kevin—it is true that a trust would have been the only legal way to tie up his share of the estate, but this could have been a separate testamentary trust in the will to tie up only Kevin's share naming Paul as trustee under whatever terms he preferred.

Thus the entire estate could have been settled in six months or less. But when John died and Paul suddenly found himself trying to deal with myriad documents with different owners and no comprehensive list of assets, it took much more time and expense to administer the estate.

"Estate Planning" also implied that there would be no legal fees because probate could be avoided. But, on the contrary, there was no way John's estate could be settled without probate. Only the probate court can order the distribution of assets according to the terms of a will and this applies to the transfer of assets from a pour-over will into a trust. So the fees and time were actually much greater than they would have been if John had retained his original simple will, adding a testamentary trust only to tie up Kevin's share for a definite period of time. By the time Paul could transfer the car to the daughter she had already finished one semester and bought another car.

II. A different fact situation illustrates when a trust is advisable: Linda and John had three children and they wanted to leave their estate to all three in equal shares. But Mary, their son Tom's wife, in the eyes of Linda and John, was domineering and grasping. They did not want her to gain control of Tom's share in the event of his demise; rather they wanted their grandchildren, Tom's children, to inherit his share. In this case, a trust accomplished all their objectives. They could still leave their assets to the three children; two would inherit outright and Tom's share would be left in trust during his lifetime and upon his death to his children. In that way Tom's share would be protected from his wife during his lifetime and upon his demise.

Trusts are necessary in some cases; in other cases their use is optional. People have been led to believe that trusts avoid probate and vitiate all expenses after death. But only in rare cases can the trust totally avoid probate: usually some asset has not been included in the trust and some probate court administration will be necessary to transfer those assets. In the case of families with very young children and/or large estates, a trust is an ideal way to tie up the assets and provide for the children until whatever age the grantor wishes. It will also insure privacy since, unlike a will, a trust is not a public record. As we saw in the case of John and Paul, very often a trust is actually an impediment to a smooth and efficient transfer of assets.

Moral? Study the particular fact situation carefully before recommending a trust. And give your honest opinion as to its advisability. Even if your client has a preconceived idea of its value in his case, when he realizes the alternatives will be less costly in the end, he will thank you for it.

attorneyfreed@aol.com

Ruth Freed

What Value Do You Want for the Business?

ESTIMATES AND OPINIONS

By Larry J. Kasper, CPA, CVA

Ordinarily, such a response from a business appraiser would offend the honest truth seeker. After all, why ask for the value of a business if you all ready know its value?

Assuming that an unbiased opinion is sought, the more relevant question that needs to be answered is, "What level of assurance do you need?" It is this answer that determines both the quality and cost of the value. Just as a physician can give a cursory opinion for a relatively simple malady, a more complicated medical condition requires more than a first impression; it requires additional investigation and tests to confirm the diagnosis.

The user of the appraisal report should understand that not all values are equal nor have equal assurance.

Understanding Valuation Opinions

The level of assurance can be impacted by such factors as the complexity of accounting issues, condition of the underlying records, internal controls to safeguard assets and record liabilities, and the size and form of business entity. Professional Standards of the certifying organization govern the analysis for a full appraisal opinion: uncertified appraisers are not required to adhere to any professional standards.

Levels of Assurance for the value

A "quick estimate" provides a mechanical estimate with no real analysis, based only upon median statistics for the general business classification of the subject company. It can be a single number or a range. A quick estimate can be useful for quickly assessing the reasonableness of another valuation, to make decisions as to whether a more refined value is needed, or the desirability of pursuing a course of action. It is not considered a professional service and is not subject to professional standards.

Opinion of Value

A "Conclusion of Value" may be expressed either as an Opinion of Value or as an Estimate of Value. The Opinion of Value represents the highest level of assurance for the opinion of the appraiser. It usually represents a single number, although some certifying organizations allow a range for the value in an Opinion.

The Opinion is contained in a written report in most situations, and must be supportable by extensive analysis. It must contain a complete identification of both the entity and the interest being valued, its history and nature of the business, and depth of management. A fundamental analysis of the business would examine the stability or regularity and hence, predictability of earnings. Other risk factors to be understood include critical operational and supply dependencies; its marketing strategy and the competition it faces. The opinion should identify and exclude the value of nonessential assets. It will discuss the affect of economic conditions on past performance and relate the prospects for the economy to the prospects of the company, leading to a projection of normalized expected operations.

Any limitation on the scope of the analysis or use of the report will be listed. Significant assumptions contained in the conclusion, either made by the appraiser or asked to be assumed by the client must be disclosed. Conflicts of interest, or relationships with the subject company (or client) that may appear to compromise the independence of the appraiser, will be disclosed in some manner in the report, depending upon the certifying organization.

In some cases, an oral report or "letter form" of report is permitted, but if the report is a conclusion of value, the same underlying analysis is required as for a written report. These shorter reports permit the client to obtain the benefit of a thorough analysis and to gain some economic benefit from not preparing a formal report. However, the client is less likely to understand the thought processes of the appraiser, appreciate the extent of analysis undertaken, the assumptions and limitations.

In a litigation assignment, the nature of the report can vary. The same caveats apply as to a letter or oral report. In a litigation assignment, a written report helps prepare the expert for testimony and provide a better outcome for the client because the valuator is forced to re-examine and check his assumptions and calculations as it is written.

Estimate of Value

This generally represents an intermediate level of assurance. It may be a preliminary estimate (if identified as such) or a range for the true value, or a single number. When the level of assurance is minimal, some appraisers simply refer to the value as a "calculation" of value. The level of assurance expressed in an Estimate can be anything from just above the level of a nonprofessional "quick estimate," to just less than the highest level of assurance. Some appraisers may claim to provide an Opinion but actually provide an Estimate by professional standards. Other appraisers provide Estimates that are minimal in quality of analysis, just above a mechanical calculation: the computer does their thinking.

The user should look for omissions in a report or proposal that is labeled an Opinion, which in reality, qualifies only as an estimate. Typically, these omissions are an economic analysis relating the prospects of the economy to the prospects of the company; and a restricted financial analysis in terms of years, number of comparisons, limited approaches computed to derive an estimate of opinion. A full investigation of the factors affecting the profitability of the company, such as competition trends and operating dependencies, unrelated assets, activities, or transactions, may be missing, all of which may materially impact the estimate or opinion had such matters come of the attention of the appraiser.

Generally, in the valuation of a business, as with most things, the cost is related to the value received.

ljkasper@kaspercpa.com

Larry J. Kasper, CPA, CVA

Sub-Prime Loan Default

NOT THE ONLY CAUSE OF FORECLOSURES

It's important to note that more than sixty-four percent of defaults are caused by unemployment, illness, death, marital difficulties or excessive consumer debt.

By Christopher G. Phillips

It's important to note that more than sixty-four percent of defaults are caused by unemployment, illness, death, marital difficulties or excessive consumer debt. All we hear about currently is the spike in delinquencies and defaults on sub-prime loans. True, the spike related to sub-prime loans was notably sharp, but delinquencies and defaults for alternative-A loans and to a far lesser extent even for prime borrowers have increased as well.

Can the current wave of foreclosures be tied to any one factor? No. However, three factors appear to have played a major role.

Wall Street

One of the rules of Wall Street is, "when ducks quack, feed them." In other words, give the customers what they want. This generally doesn't work out terribly well for the buyers, but it is great for the sellers.

When the real estate boom began, investors wanted to get in on it and Wall Street had a vehicle that allowed them to do so. Investment firms purchased large volumes of ultra-risky second mortgages under subsidiaries and carved the mortgages into tranches, which is French for slices. The firms got more for the pieces than it would have for whole mortgages. Mortgages require maintenance. Securities are simpler to deal with and can be customized.

If an investor wanted a safe, relatively low-interest, short-term security they purchased an AAA-rated slice that got repaid quickly and was very unlikely to default. If an investor wanted a risky piece with a potentially very rich yield, an indefinite maturity and no credit rating at all, they purchased an X-rated tranche.

Buyers of these securities could read the trust's prospectus, related documents and other public records or rely on the underwriter and the credit-rating agencies (Moody's and Standard & Poors) to know how safe the tranches were.

The idea behind these investments is that the interests rates tied to the loans pay the people collecting the payments and handling the paperwork and provide a cushion to offset defaults by borrowers. Further, the lower tranches often don't get fixed monthly payments and thus provide another bit of protection for the tranches ranked above.

Securities losses aren't shared equally by all investors. Losses first hit the lowest tranche and then work their way up.

Loosened Underwriting Standards

As the housing and mortgage markets experienced substantial growth, the increased borrowing demand allowed existing mortgage lenders to expand their business and new lenders to enter the market. This eventually led to over capacity in the mortgage lending market as borrowing demand slowed.

When the market cooled, competition among lenders for the reduced pool of borrowers heated up. By 2003, many lenders – competing to grow their origination volumes – loosened their underwriting standards significantly.

Lenders lowered the minimum FICO score required to qualify; raised allowable debt to income levels; expanded use of stated income or stated asset programs; provided loans to borrowers that have accumulated little or no borrower equity in the property; and provided loans for which payments would balloon over time (interest only and low initial fixed rate loans).

Borrowers who wouldn't have qualified for a loan to purchase a home a few years earlier qualified by 2006.

Many prime lenders also stepped up originations of alternative – A loans (including loans with either reduced or no documentation).

Ultimately, the softer real estate markets and the weaker credit quality of the loans originated in 2006 were the main drivers of the increase and early payment default (EPD) levels. In addition, the limited borrow refinancing availability reduced the opportunities for cures and for loss-mitigated resolution of EPDs.

Speculators

Sunbelt states were magnets for real estate speculators during the home price boom. Borrowers were taking out typical eighty-percent first mortgages and then taking out second mortgages with higher rate or adjusting rates and buying houses with essentially none of their own money at risk. If house prices rose they'd have a profit. If house prices fell and mortgage payments were missed they could walk away with nothing (or almost nothing out of pocket).

In Nevada, thirty-two percent of all prime mortgages were in default and twenty-four percent of sub-prime defaults were on non-owner occupied properties as of June 30, 2007 according to studies done by the Mortgage Bankers Association. Numbers for Arizona were twenty-six percent prime and eighteen percent sub-prime. In California they were twenty-one percent and fifteen percent respectively.

In the rest of the nation, non-owners accounted for just thirteen percent of prime loan defaults and eleven percent of sub-prime.

Through the end of 2005, if debtors couldn't make payments they could sell or refinance. Once prices began stagnating or falling these options were no longer available and foreclosures began to rise.

As a result of the aforementioned factors, delinquencies and defaults on sub-prime loans, alternative-A loans and—to a far lesser extent—prime loans have increased.

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1. *FICO is a registered trademark of Fair Isaac Corporation and FICO scores measure a credit risk.*

cphillips@wileslaw.com

Christopher G. Phillips, Wiles Boyle Burkholder & Bringardner

Eat Your Vegetables and Put Out That Cigarette!

THE EMPLOYER AS HEALTH AND FITNESS DIRECTOR

By D. Wesley Newhouse and Amy E. Kuhlman

Rising health insurance premiums have caused employers, who are the principal providers of health insurance in the United States, to examine ways to reduce health care costs. Healthier employees mean fewer claims for health benefits, which should mean lower premiums for health insurance. The desire for a healthy workforce has prompted some employers and health planners to implement wellness programs which reward healthful activities and behaviors through reduced premiums, lower deductibles and other incentives.

Wellness programs, by definition, require review and use of information pertinent to the health of employees. A number of laws govern when an employer and health plan can collect such information, and how they may use it.

New Wellness Program Regulations

The Heath Insurance Portability and Accountability Act ("HIPAA"), sets limits on who may obtain health information, and how that information may be used. Three of the federal agencies responsible for administering and enforcing HIPAA recently adopted final regulations governing wellness programs.

Notably absent from the list of agencies adopting these regulations is the Equal Employment Opportunity Commission. In fact, the EEOC made a point of submitting comments on the new regulations to the effect that compliance with them may not excuse violations of the Americans with Disabilities Act and Title VII of the Civil Rights Act of 1964. The regulations expressly acknowledge that covered entities must still comply with other laws.

Some wellness programs are not affected by the new regulations. A wellness program must link the receipt of a benefit to the measurement of a health condition to trigger the regulations. So, for example, a wellness program that reimburses the cost of membership in a fitness center, or that pays for participation in a smoking cessation program, would not be regulated. These and similar programs reward employees without measuring the actual impact of the program on their health.

Wellness programs that link the receipt of a benefit to the measurement of a health condition are regulated by the new rules. For example, a program which reduces an employee's premium contribution based on the employee's body mass index would be regulated.

Such programs must meet five requirements. First, the benefit offered must not exceed 20 percent of the cost of individual or family coverage. So, if a program offered to reduce premiums based on achieving a certain body mass index, the reduction could be no more than 20 percent of the average cost per employee for providing insurance. The reason for this is to avoid making health insurance unreasonably expensive for the people who do not meet the program's health standard. If everyone got free health insurance if they met a certain body mass index, for example, only the obese would end up paying premiums. This would likely force people with unhealthy body mass index results out of the health plan, for they would have to bear a disproportionate amount of the cost.

The second requirement is that the program be reasonably designed to promote health. The preamble to the regulations states that this standard should be easily met. The health effects of the program need not be supported by scientific evidence. The regulations use as an example a program that offers a benefit to those who undergo aromatherapy. The idea here is to encourage creativity. Truly bizarre, suspect or illegal programs may not meet this requirement. For example, a health plan that offered a financial inducement to use cannabis to relieve stress and lower blood pressure likely would not meet the requirement that the program be reasonably designed to promote health.

The third requirement is that employees must be eligible to join the program at least once per year.

The fourth requirement is that the program must be available to similarly-situated employees. The regulations do not take a legalistic approach to defining who is similarly situated. Instead, this is driven by common sense classifications commonly found in places of employment. For example, the program may only be available to full-time, not part-time employees, or to employees who are members of a collective bargaining unit. It may be available to employees at one geographic location, but not another. If the classification is used for purposes other than administration of the health plan, then it is more likely to be a valid classification pursuant to this requirement.

Similarly-situated employees who cannot comply with the health standard because it is unduly burdensome or medically ill-advised must be offered an alternative means to become eligible for the benefit. So, for example, if the program rewards those who walk three miles per week by reducing their premium contributions, and an employee's doctor believes that this requirement is medically ill-advised for a particular employee, the plan must allow the employee to be eligible to receive the benefit by fulfilling some other medically appropriate requirement. Also, if the employee cannot physically meet the requirement, some reasonable alternative must be provided. So, if a person cannot walk three miles per week because he cannot walk at all, the employer and health plan must allow the employee to engage in some other type of physical exercise which would substitute for walking.

If an employee claims that a health standard is medically ill-advised, the employer and health plan can require verification of this from the employee's doctor.

The fifth and final requirement for covered wellness programs is that the documents describing the program notify participants of the availability of alternative means to meet the program's health standards. The regulations do not require that the plan documents provide detailed information regarding alternative means to meet the health standards. In fact, the regulations provide an example of specific language to include in the wellness program documents. It is sufficient for the plan document to notify the employee that alternative means for meeting the health standards may be available, and that the employee should call a certain telephone number to receive more information.

Mandatory or Voluntary

The regulations governing wellness programs are framed in anticipation of employers and health plans offering incentives to employees to meet health standards intended to lower health insurance costs. What of the employer who has had a voluntary reward program for years and is dissatisfied with the results? Can the employer implement a mandatory program which penalizes employees who fail to meet health standards? The regulations do not explicitly prohibit this approach. There are a few legal and practical considerations, however, which may make using the stick instead of the carrot a risky endeavor.

As a practical matter, an employer who penalizes employees who fail to meet certain health standards will meet resistance from those employees. Such a program may foster resentment, and could contribute to employee turnover.

There is also the problem of finding people to enforce the standards. Human resource directors may find that it is an unpleasant and difficult task to compel employees to submit to medical testing and measurements which the employees may regard as an invasion of their privacy.

ADA Compliance

There is also the matter of whether such a mandatory approach may violate other laws. The Americans with Disabilities Act restricts the ability of an employer to request medical information from employees, and then restricts how the employer may use the medical information once it has acquired it. Generally, the ADA requires an employer to gather medical information only to determine if the employee can perform the essential functions of a job. The regulations adopted by the EEOC create some limited exceptions for this, generally for the purpose of allowing an employer to plan for the provision of first aid care and assistance in emergency evacuation of facilities for employees with disabilities. The regulations do permit employers to conduct voluntary medical examinations and activities, including voluntary collection of medical histories, if those activities are part of an employee health program. If an employer tells an employee that his failure to submit to medical testing or provide a medical history will result in a financial penalty, it is doubtful that the EEOC would regard such a program to be voluntary. As a consequence, an employer who implements a mandatory program runs the risk of an enforcement action by the EEOC.

Common Law Privacy

Employees also have a reasonable expectation that medical information will be treated as private and confidential. Courts in Ohio have found that the provision of medical information to third parties constitutes an invasion of privacy. In one case, the court found that an employer which disclosed medical information to a supervisor who did not need to know the information, and which also disclosed the information to the employee's husband, invaded the privacy of the employee. While an employee might expect that an employer and a health plan will use medical information for the purpose of setting premium rates and administering a health insurance program, the use of that information for other purposes may be contrary to the employee's expectation that the information be treated as private and confidential.

Employers and health plans that encourage employees to engage in healthful activities should be applauded for their efforts. They are not only contributing to the control of costs of health care and health insurance, they are also contributing to the health and welfare of their employees. A mandatory and punitive approach, however, may harbor resentment among employees, contribute to turnover, and put the employer at risk for liability claims. As with so many aspects of the employment relationship, encouraging and rewarding good behavior is preferable to mandating it.

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1. *42 U.S.C. 1320(d) et.seq.*
2. *The regulations adopted by the Department of the Treasury can be found at 29 CFR Part 54, those adopted by the Department of Labor can be found at 29 CFR Part 2590, and those adopted by the Department of Health and Human Services can be found at 45 CFR Part 146.*
3. *See 45 CFR § 146.121(b).*
4. *See 42 U.S.C. §12112(d)(3)(B)(iii); 29 C.F.R. § 1630.14(b)(1)(iii).*
5. *Biddle v. Warren General Hospital (1999), 86 Ohio St.3d 395.*
6. *Levias v. United Airlines (1985), 270 Ohio App. 3d 222.*

wnewhouse@npllawyers.com
akuhlman38@yahoo.com

D. Wesley Newhouse and Amy E. Kuhlman, Newhouse Prophater & Letcher

Employers and health plans that encourage employees to engage in healthful activities should be applauded for their efforts.

MANDATORY Retirement Policy

IS THERE A BETTER ALTERNATIVE?

Humans who are cornered facing a short deadline react more defensively and likely with greater animosity.

By Bert Kram

One of the most uncomfortable management issues faced by law partnerships is how to treat partners nearing the end of their productive professional lives. Many firms have addressed that issue the "easy" way, by imposing a mandatory retirement age, a birthday – usually ranging between 65 and 70 – at which all partners must retire. For many lawyers as well as their firms, the way is not at all "easy," nor does it seem to many to be at all fair – including, importantly, the United States Equal Employment Opportunity Commission. The well-publicized $27.5 million settlement in *USEEOC v. Sidley Austin LLP* highlights the potential legal risks of a law firm mandatory retirement policy. However, there are other very practical reasons for approaching such policy with great caution.

Arguments in favor of a mandatory retirement policy start from the premise that there comes a point in time when virtually all lawyers are no longer effective practitioners. That time varies with each individual lawyer for a variety of reasons such as genetics, personality type, nature of the particular law practice including degree of stress and required technical proficiency, and the clients involved.

The meaning of "effective" itself is controversial. Indeed, the potential for that unpleasant disagreement often prompts partners to put off candid discussions with the graying partner even though it is apparent that he is no longer meets the expectations of the others. It is claimed that an appropriate mandatory retirement age, agreed by all in advance, avoids potentially nasty confrontations. The policy, it is claimed, provides certainty that no one will be "merely hanging on." Productive younger partners do not have to worry that they will be under the "burden" of "carrying" under-productive older lawyers and, it is argued, will be more likely to stay with the firm. Likewise, the policy provides a desirable push for partners nearing their cut-off date to plan in advance for their life after leaving the partnership.

In stout opposition to an arbitrary retirement date is the argument that it is just that, arbitrary. Not all lawyer talent and energy "expire" at the same time. Certainly all lawyers' ambitions do not expire at the same time, thus creating fertile ground for potential controversy. While many lawyers are perfectly happy to ride off into the sunset – or onto the golf course – at the magic age, others derive a great deal of pleasure or ego gratification or vitally necessary income from being a practicing lawyer. They do not want to surrender. Even more important, they do not want to be made to give up their partnership by an arbitrary deadline.

When the aging partner wishes to continue to practice, even in the face of the mandate of the partnership agreement to which, presumably, the partner has long agreed, it is the law firm itself that loses. If the partner has a viable, prosperous law practice that is "portable," the risk to the firm is obvious. The partner likely moves the practice to a competitor's office. The law firm loses the income; the relationship between the partners – frequently of long duration – is broken.

Is there a better answer for a law firm than a mandatory retirement policy? A starting point is to recognize that it is mere illusion to believe that adopting a mandatory retirement policy will eliminate the need for partners to speak candidly with one another concerning what will happen to the older partner. If that partner is unhappy about being forced from the firm, the other partners likely will hear plenty about it, if only second-hand. It is simply better interpersonal relations to plan and to discuss frankly and openly what the continuing relationship of the partners should be. What arrangement can each party live with into the future?

Experience has shown that the earlier those conversations take place, the better. Humans who are cornered facing a short deadline react more defensively and likely with greater animosity. Having those conversations without deadline pressure tends to lower the temperature. An option used by some firms is a policy, adopted by the partners, that requires the managing partner to commence meeting with the graying partners at a prescribed time, generally at least two or more years prior to a particular birthday. The topics to be discussed, spelled out by the policy, include the partner's future plans and practice objectives; specific plans for transitioning practice and clients to younger lawyers within the firm; the older lawyer's practice support needs and desires; and, candidly, how the other partners view the long term prospects of the older lawyer's practice and abilities. Those discussions can lay the basis for a plan that can enable both the firm and its older partner to find a path more likely to satisfy the needs of both.

Bert Kram

Pregnancy discrimination and maternity leave

NEW RULES FOR EMPLOYEES

The two most notable changes are that employers will be required to give pregnant employees up to twelve weeks of maternity leave and employers will need to provide pregnant workers with light-duty work if necessary.

By Lisa M. Critser

October 2007, the Ohio Civil Rights Commission approved changes to Ohio Administrative Code Section 4112-5-05(G), regarding pregnancy discrimination, in a four to one vote. These changes create new maternity leave regulations applying to all Ohio employers with four or more employees. The two most notable changes are that employers will be required to give pregnant employees up to twelve weeks of maternity leave and employers will need to provide pregnant workers with light-duty work if necessary.

The OCRC's new regulations far surpass current federal law in this area. Under the federal Family and Medical Leave Act employers are required to grant employees, female or male, up to twelve weeks of unpaid leave if the following conditions are met: (1) the employer has fifty or more employees; (2) the employee has worked for the employer for at least a year; and (3) the employee has worked at least 1,250 hours in the last year. In Ohio, the FMLA covers approximately 3.3 million female and male employees, but still leaves a substantial minority unprotected due to exemptions. In contrast with the FMLA, the new OCRC regulations will apply to all employers with four or more employees and all pregnant workers would be entitled to leave as of their first day of work.

The granting of the right to light-duty work for pregnant workers also goes beyond current law in this area. Historically, light-duty work has been a workers' compensation concept. The purpose of light-duty work is to allow employees injured on the job to return to work earlier and reduce an employer's workers' compensation premiums. Furthermore, the Sixth Circuit has held that a pregnancy-blind policy denying light-duty work to employees who are not injured on the job does not discriminate against pregnant employees. In contrast, the OCRC's regulations create a brand new right for pregnant workers.

There are arguments for and against the newly approved changes to OAC 4112-5-05(G). The OCRC recommended the changes to the administrative rule to clarify the rights of pregnant employees, the obligations of employers and to provide clear and unambiguous guidance on the subject of leave. The current law allows employers to give pregnant workers a "reasonable period of time" off from work. Toni Delgado, an OCRC spokesperson, stated "the rule is needed because the law is unclear about the definition of 'reasonable'" and "[t]he proposed amendment clarifies what reasonable is."

On the other hand, some business groups, such as the Ohio Chamber of Commerce, oppose the OCRC's newly approved changes. The main thrust of their opposition is that the OCRC has overstepped its rule-making authority and that the changes are bad policies for Ohio employers and employees. In addition, OCRC Commissioner Grace Ramos, who cast the dissenting vote, said the OCRC went beyond clarifying existing law and created a new policy that may burden the state economically and lead small businesses to not hire young women with families.

While the intended purpose of the newly approved changes is to clarify the rights of pregnant workers, it is important to note that these changes still create ambiguity as to whether the required maternity leave is in addition to FMLA leave. On its face, the proposed rule appears to require an employer to give a pregnant woman an additional twelve weeks of leave if she is FMLA eligible, but has already used the FMLA leave in the same twelve month period as her pregnancy. Though the wording of the rule is ambiguous, the OCRC has publicly stated its intention to allow this type of leave "stacking." Employers may receive an exemption from the rule only if they can prove a business necessity.

The OCRC's new regulations must still be approved by the Joint Committee on Agency Rule Review, a panel of legislators which determines whether a new policy conflicts with existing law. If JCARR approves the new regulations, they will take effect in thirty days and Ohio will join eighteen other states and the District of Columbia in requiring benefits beyond the FMLA. If JCARR takes no action with respect to the regulations, regulations will take effect within forty-one days from the date of filing by the OCRC. It is likely that JCARR will address this issue by the end of the year.

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1. *Ohio Chamber of Commerce, Testimony, Public Hearing on Proposed Amended Rule 4112-5-05 of the Administrative Code (Aug. 1, 2007).*
2. *Reeves v. Swift Transp. Co., 446 F.3d 637 (6th Cir. 2006).*

mcritser@ethicalmysterycures.com

Lisa M. Critser, The Anelli Law Firm

MENTORING
A Win-Win Situation

Interns are surprisingly perceptive and their insights can be valuable. I have shared an excitement and pride in seeing interns make good with subsequent jobs or school admissions.

By Susan Garner Eisenman

Columbus is the home of The Ohio State University, largest residential university in the country, and home, also, to Capital University (with its National Center for Adoption Law and Policy) and a plethora of other schools, technical and business.

This wealth of students has given rise to many opportunities to mentor students in my adoption law practice. In addition to paid law clerks, we have had law school interns who have assisted us on amicus briefs, law journal articles, public education, and Bar Association projects on a pro bono/ work for experience basis. Undergraduate senior honor students have done quarter-long internships with our office.

Despite the learning curve involved and the need for time intensive supervision, the benefits are considerable. The students lend enthusiasm and energy, and enable us to do projects which otherwise would be economically infeasible. These projects do not have some of the confidentiality issues involved in litigation matters but none-the-less allow hands on, real world experience.

In addition to these interns, the OSU Moritz College of Law has a mentoring program which provides an opportunity to work with several students over a period of an academic year. The college offers a luncheon program with law related speakers as a starting point. From there the mentees and mentors negotiate their interaction. My students and I have enjoyed shadowing opportunities tailored to their interests. I have also been able to link them with other professionals in their areas of interest.

The local vocational education and tech schools also have intern programs which at low cost can provide bright, motivated students for paralegal work. As with any office personnel careful selection, monitoring and supervision are important. Background and reference check should be done. In addition, confidentiality standards must be maintained and client approval should be obtained for shadowing participation. If the student will be working in the office workspace, computer access will need to be provided. The permanent staff's cooperation is essential.

Gail Sheehey in her landmark work, *Passages*, noted that mentoring can be a benefit for mature professionals as an antidote to burnout. While this may be our five-hundredth stepparent adoption, seeing the event anew through the eyes of an intern can refresh our prospective of the event. It can from time to time cause us to examine our rationale for things as we are challenged to explain the process to an intern.

Interns are surprisingly perceptive and their insights can be valuable. I have shared an excitement and pride in seeing interns make good with subsequent jobs or school admissions.

Mentee: James Fondriest, undergraduate, The Ohio State University

You may wonder why I would take time from my college schedule to intern in a law office. It is because for students like me, preparing for what comes after graduation involves more than just studying, writing resumes, and sharpening ones interview skills.

Employers and graduate schools are now expecting students to have experiences outside of the classroom that affirm their interest in a given career path. Universities are requiring students to hold a legal internship in order to be part of their "pre-law" programs, allowing for a hands-on comprehension of the diversity of career opportunities in the field of law. For this reason, legal internships are becoming increasingly valuable to a college student pursuing legal careers post graduation.

Deciding what I wanted to do with my life was not an easy task. During my first two years at Ohio State I found myself struggling to find a career path that I was both passionate about and confident that I could have a lasting impact. These thoughts filled my mind and I often wondered if I would ever figure out what to do with my life until a friend introduced me to the opportunity of interning in Susan's law office.

Serving as Susan's intern has allowed me to see attorney client interactions and the exciting and fast-paced environment of the legal world first-hand. I have become aware of the business aspect of the field of law and the value of legal advice in many situations. I have grown in my understanding of courtroom procedures and the inner-workings of running an office. I have been a part of the planning of CLE seminars and roundtables.

My experiences during the internship have confirmed my desire to become a lawyer and my passion to one day use my legal background to help others address significant events and issues affecting their lives. I consider myself lucky because the experience that I have had with my internship is fairly uncommon and many of my peers would be thrilled to have such an opportunity. What I have learned through my first-hand experience over the past year is something that no teacher in a classroom could ever have given me.

Susan Garner Eisenman

The *New* Cell Phone

By Lloyd E. Fisher

The woman in the grocery aisle said, "Do you need bran flakes?" Startled, and somewhat embarrassed, since as an eighty-three year old this was a question usually asked by my physician, I looked toward her. That's when I noticed the oval-shaped object hanging from her ear and realized she was speaking on her cell phone. The incident set me thinking about the march of technology and my own ancient phone.

A few weeks later I found enough courage to approach the customer service desk at Verizon Wireless. A polite young man listened as I explained that I had decided it was time to upgrade my cell phone. (I had learned the phrase "upgrade" from my grandchildren.) "Just a small basic phone will do," I said and went on to confess that I used the phone only in emergencies and those were rare. No still or motion picture camera was necessary since my children had dragged me into the 21st century with a digital camera for my birthday. Text messaging was a mystery I had no interest in solving and voice mail was redundant since I seldom turned the phone on.

The young clerk turned to his computer and asked for my cell phone number to access my account. My embarrassed reply was "I'm sorry, since I never call it, I don't remember it." Fortunately I was able to retrieve a copy of my bill and he found my records. Reading the screen, his face betrayed his opinion that both my phone and I were ready for the Smithsonian or retirement. "I've never seen either this phone or this plan before," he said. Escorting me to a display board, he selected a tiny South Korean electronic marvel and said that it, with its basic plan, should meet all my needs.

Returning to the counter, he rattled off some of the features of the phone: speed dialing to at least 100 contacts, text messaging, taking and sending pictures, a large selection of ring tones, operation by voice commands, a calculator, a calendar, an alarm clock and on and on. And this was the basic model! Armed with the phone, the battery charger and a bi-lingual instruction manual, I headed for home and spent the entire evening mastering the entry of speed dial numbers for the office, home and cell phone numbers of family members. For an old geezer who still remembers the advent of the rotary dial, this was no minor triumph.

The episode reminded me of the many "revolutionary" advances I have seen: the calculator that went from desktop to palm size; carbon paper to mimeograph to photocopier to scanner; law books with annual pocket parts to online research with instant updates; expensive long distance phone calls that were made only for deaths, births or other important events is now instant communication around the world; special delivery mail to instant fax; 11" x 14" paper to 11" x 8 1/2" to electronic filing; tedious tussles with court house volumes to simply looking at the computer monitor.

But in the midst of all the scientific advances, there are nagging questions: Has instant information improved the quality of our life, made us better lawyers and improved our service to clients?

Why do we take extreme measures to avoid the theft of personal information and then talk loudly about the intimate details of our life on our cell phone in public places?

Why hasn't the insurance industry lobbied the Ohio legislature to ban cell phone conversations in a moving vehicle or at least require a hands-free attachment? How about a local ordinance levying a fine for letting your phone disturb a movie, concert, speech or performance?

Will future generations lose the ability to communicate face-to-face and, instead, speak electronically at all times?

Is the reverse look-up telephone directory dead, since so many have unlisted numbers and cell-phone numbers are not usually included?

I'm sure you have some questions or comments of your own. If you would like to talk, please call my land line; I can't find the charger that fits the new cell phone.

lfisher@porterwright.com

Lloyd E. Fisher, Porter Wright Morris & Arthur

THE NEW COST of "*Sharing*" Music

By Romero Elliott Lawrence

The Recording Industry Association of America, in what may prove to be a watershed decision in the RIAA's efforts to protect its members traditional distribution system, has won its first copyright infringement lawsuit against an individual using a peer-to-peer file sharing network. The RIAA recently obtained a judgment against Jammie Thomas, a 30-year-old mother of two, who allegedly made twenty-four songs available for download over the Kazaa file sharing network. Applying the U.S. Copyright Act's statutory damages provisions, a jury found Ms. Thomas liable to the tune of $220,000.[1] She has announced her intention to appeal the decision.

To date, the RIAA has brought more than 20,000 actions against individuals allegedly infringing on their members' copyrights. In the midst of its massive head-on confrontation with the more than nine million Americans utilizing peer-to-peer file sharing networks, the RIAA was caught trying to shore up an aging music distribution model. In the age of faster download speeds and software that makes music piracy as easy as typing the name of a song in an internet search, the RIAA is attempting to reassert dominance, or in some views relevance, in determining how Americans get their music.

When you take a step back the question has become: "how do you get somebody to pay for something they easily can get for free?" The RIAA's answer is to use copyright's significant statutory damages as a deterrent.

Why Jammie Thomas? We cannot know all of the motivations of the various parties, but it appears that Ms. Thomas might have invited the fight, or at least not taken the graceful exit when offered. The RIAA routinely offers pre-lawsuit settlements, but Ms. Thomas balked, opting to take her case to trial. At trial, the RIAA presented strong evidence backing every allegation. The RIAA offered circumstantial evidence establishing a link between the "tereastarr" account name used on Kazaa and Ms. Thomas who had a history of using "tereastarr" as a username for other online services. Additionally, the RIAA established Ms. Thomas's ownership of the IP address associated with the username, and the fact that her desktop computer was the only device used over that IP address during the relevant period. The RIAA never offered evidence definitely establishing that Ms. Thomas's computer contained the music files in question, but it must be noted that shortly after being contacted by the RIAA, she replaced her computer's hard drive, which she claimed was faulty.

While the evidence of her personal involvement was damning, the court's interpretation of prevailing copyright law and its applicability to peer-to-peer file sharing networks has created the most discussion and the most fertile grounds for appeal.

The evidence established that Ms. Thomas's computer made the songs available for download over Kazaa, but did not establish whether the music had actually been downloaded by another Kazaa user. To find liability, the jury had to conclude that another right of the copyright holder had been violated. RIAA then argued that the copyright holders' exclusive distribution right had been violated.

Both parties submitted proposed jury instructions to U.S. District Judge Michael Davis. The RIAA's proposed jury instructions included the following provision which was adopted by the court: The act of making copyrighted sound recording available for electronic distribution on a peer-to-peer network, without license from the copyright owners, violates the copyright owners' exclusive right of distribution.

Based on this instruction, the RIAA did not need to offer evidence that an actual download occurred. Instead, the RIAA needed only establish that Ms. Thomas placed the songs in a publicly accessible folder where the songs could have been downloaded, thus making them available for download.

Barring a successful appeal, the impact of this decision could be transformative to the music copying battlefield. The "making available" theory would appear to set the RIAA's burden of proof very low. More troubling is the fact that this interpretation coupled with copyright law's strict liability, potentially creates significant lawsuit exposure for millions of Americans. After all, what does "making available" really mean?

On appeal the key question in the Thomas case will be whether 17 U.S.C. §106(3) of the Copyright Act, which grants copyright owners the exclusive right to distribute copies or phonorecords of the copyrighted work, requires that a physical, tangible, material object be exchanged before the distribution right is infringed. If so, the RIAA will in the future have to establish that an actual download between peer-to-peer network users happened. If not, and until then, peer-to-peer network users might be well advised to monitor their shared files and make sure no copyrighted material is being made available to other users for download.

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[1] *The Copyright Act's statutory damages are especially attractive to plaintiffs where actual damages and profits are not easily quantifiable. In this case, the plaintiffs elected to recover statutory damages. Under the Copyright Act, plaintiffs are entitled to a sum of not less than $750 or more than $30,000 per act of infringement. If, however, a jury finds that the defendant's conduct was willful, then each is entitled to a sum of up to $150,000 per act of infringement.*

relawrence@vorys.com

Romero Elliott Lawrence, Vorys Sater Seymour and Pease

Tracking Web Page Changes

By Ken Kozlowski

Static web pages offering no new information are dead, might as well slap the old "**404**" on them (http://en.wikipedia.org/wiki/404_error). Good web pages are in a constant state of flux and updated often. Tracking web pages is useful for personal reasons, collecting business intelligence, and even as a way to monitor if your own web page has been hacked. How does one keep track of when a web page is updated? You can always browse on over to a page and try to find out the hard way, or you can use one of the many web-detection applications that are available for free or low cost and do it the easy way. The six ways we'll take a look at below were found by utilizing a fortuitous e-mail off of the **Teknoids mailing list** (http://www.teknoids.net/node/8320), and then further exploration using the programs' names from the e-mail as search terms on various search engines. I haven't used them enough to have a favorite, but ChangeDetection and Notify, the Firefox add-on, are very simple to use.

Let's start with **ChangeDetection** (http://changedetection.com/monitor.html). I mentioned above that it was simple, and the steps are simply to click on a link to open the site's wizard, type in a web page and an e-mail where you want the result sent. The service is free, but donations are readily accepted.

Next up is **Copernic Tracker** (http://www.copernic.com/en/products/tracker/index.html). This one is not free, and I have not used it. I have, however, used one of their other products, Copernic Desktop Search, which is free and a great program you can use for finding lost items within your computer. The cost for the Tracker program is $49.95, but there is a 30-day free trial and free updates. Copernic Tracker will automatically look for new content on Web pages as often as you like. When a change is detected, you are notified either via an email, including a copy of the Web page with the changes highlighted, or by displaying a desktop alert. Moving forward, we now come to **InfoMinder** (http://www.infominder.com/webminder/). This service offers a 30-day free trial (10 web page maximum for the trial), and supposedly has other subscription options, but they were not readily apparent to me. The trial may be worth a shot because the description of the what the service offers is enticing: receive e-mail in digest format arranged by categories; extensions for popular browsers to make it easy for you to track any page while you are browsing; daily notifications; the ability to filter changes by multiple keywords or number of changes in a page; and the capability of importing your current bookmarks/favorites from your favorite browser.

Mozilla weighs in next with an add-on for the Firefox browser called simply "**Notify**." (https://addons.mozilla.org/en-US/firefox/addon/3149). Just add it to your browser like any other add-on you currently have, type in a few web pages, and away you go. Notifications available are sound, a message in the system tray, or opening the site itself. As with all add-ons, this one is free of charge. **TrackEngine** (http://trackengine.com/) is pushing itself as a provider of competitive intelligence, which is one of the uses identified in the opening paragraph of this article. The service is free, but they do offer what they call "upgrade packs," which will run you a few bucks ($20 per year for 10 bookmarks or $5 per month for 50 sites). TrackEngine installation is simple via what is called a **bookmarklet** (http://www.book-marklets.com/) that you drag to your toolbar. One can also save the link as a bookmark and manually insert it into the appropriate toolbar. As you surf, you simply click on the Track Me! button or bookmark and a notification box pops up. Fill in your requirements, and you're on your way. Notification is via e-mail, and you can choose to receive the web page with all the new content highlighted, or a summary report of all the new content on the page.

Our final service is called **WatchThatPage** (http://www.watchthatpage.com/). If you remember back to the first paragraph, my interest in this topic was piqued by an e-mail off of the Teknoids (http://www.teknoids.net/) mailing list. That e-mail was looking for alternatives to WatchThatPage because it was becoming sluggish. My short experience with it indicated it was still a bit slow loading, but not a deal breaker. This free service (donations accepted from heavy users) enables you to automatically collect new information from pages of interest, which is then presented to you in either an email and/or a personal web page. There doesn't seem to be any limit to the number of pages, and if I remember correctly, that Teknoids e-mail specified that the person was tracking 700 pages.

Good luck with this task, which should be made a heck of a lot easier with the usage of even one of the above services.

kozlowski@sconet.state.ohio.us

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

Electronic Recording *VS.* The Stenographic Reporter

By Linda Sturm

It is not really *ER vs. the steno reporter*, but rather a serious subject that affects the courts, the attorneys, the parties and the taxpayers.

Two of the main reasons the courts consider installing ER are (A) with increased costs and the general economic situation, there is increased pressure to decrease budgets. There is a belief that ER provides a cost-savings alternative to the stenographic reporter by reducing salaries and benefits. (B) Some court administrators believe that digital electronic recording has progressed to a superior, more technologically efficient system.

Realistically, what are the costs of ER? There is the purchase and installation of the primary equipment and also the cost and installation of a backup system. Installing ER without the appropriate redundancy is dangerous. Once the system is installed, it must be maintained and updated. Most of us have computers, and we are all familiar with the frenetic pace at which changes in technology require updates to both hardware and software. Costly ongoing service contracts and updates to both hardware and software are often overlooked. Also overlooked are the peripherals needed to operate the system and the IT required to maintain it.

"You just need someone to push a button to run the equipment." This oft-heard quote could not be further from reality. For the equipment to run efficiently and to have a record that can be transcribed, you must have someone monitoring the recorder at all times. Logs must be made, microphones monitored, and backups ensured. This would require a full-time employee with not only knowledge of court proceedings but also someone with technical skills. Without this human oversight, problems can and do occur. In one court for which I do transcription, the ER equipment was accidentally unplugged for a month. I have encountered recordings where the court's electronically recorded "official record" had omitted expert witnesses' testimonies. Improper settings and lack of monitoring of electronic recording equipment often result in bench conferences that are totally inaudible.

Transcription of the record is an important issue to be considered. Beyond the cost, who is going to certify the record? What are they certifying if they were not present? Is the person certifying that he or she is not employed by or related to, or in any way interested in the proceedings? What type of training do the transcribers have? Do they know how to discriminate between what is on the record and what is off the record? Do they track and index exhibits?

Regarding issue (A) the questions are: Are there cost-savings to the court; and are there increased costs then to the parties for transcription? Of course, the ultimate cost can sometimes be to the taxpayer as there are mistrials and retrials because of problems with the record.

Issue (B) – technology. It's the twenty-first century. We all want to have the best available technology. But the question is: Is ER really the best available technology? Perhaps it is higher tech, but is it more efficient than a stenographic reporter? The question of efficiency depends on the reliability of the equipment. You cannot replace the efficiency of the human element that allows you to know when someone is speaking too softly, too quickly, or at the same time as someone else. How can ER be considered more "high tech" when the stenographic reporter is the only option that can produce an instantaneous voice-to-text translation?

Another problem is that the technology is so good it picks up comments not meant to be on the record. In *Rogers vs. Slagle*, the Supreme Court ruled that audio recordings could be distributed to the public. Was the new technology that can pick up attorney-client utterances considered at that time? In transcribing cases, I have heard some very interesting comments made at counsel table. Should these comments be distributed?

To embrace technology is good; naive dependence and the elimination of human judgment and wisdom is not. All aspects of technology must be studied carefully when it involves the record. It seems that beyond cost, the question should be: What will give us the best verbatim record?

Keeping up to date on what is happening with ER in your area is important. You do not want to be surprised when arriving for trial you are confronted with the fact that there is no court reporter, no instantaneous record if you require one; or no control over who transcribes the record. And it is possible that the record will be fraught with inaudibles and perhaps may include a privileged conversation between you and your client.

The National Court Reporters Association has a strong list of considerations.

Steno reporters discriminate between testimony and background noise and clarify inaudible or heavily accented speech. They quickly and efficiently read back testimony, and certify the accuracy and integrity of the record. Steno reporters undergo specific academic and skill training in preparation for their profession, and certified steno reporters must demonstrate that they update their knowledge by earning continuing education units. Steno reporters capture proceedings digitally as well as on paper, ensuring proper backup and use in litigation support.

Audio and video recording systems produce recordings; court reporters produce digital and paper transcripts. A transcript is a practical necessity, not a luxury, in all but the briefest or simplest of cases.

linda@priohio.com

Linda Sturm, RDR, CRR, President, Professional Reporters, Inc.

MURDER At The Opera: A Capital Crimes Novel

By Margaret Truman
Book reviewed by Janyce C. Katz

"AAAAAAAAAAHHHH"

Was that an opera singer or the murder victim? Or, could that have been both the victim and an opera singer?

The murderer tells us in the prologue that he is using a prop spear to kill his victim because the victim knows too much. About what, we don't know.

It is clear from page one of the book that the mystery involves opera as well as murder. The murder takes place somewhere in Washington D.C. where the opera is in rehearsal and the body is conveniently carted up to the rafters.

Lawyers help solve the mystery, although they do not try the case.

One of our heroes, Mackensie Smith, has retired from a preeminent criminal law firms to become a professor of law at George Washington University after his wife and child are killed in a car crash on the D.C. beltway.

His current wife, Annabel, had given up being a divorce lawyer because "attempting to mediate wrenching battles between warring spouses had become almost unbearable, especially when both sides were engaged in self-destructive behavior, domestic suicide bombers intent on injuring each other."

The two lawyers, no longer struggling with billable hours and difficult clients, live comfortably in an expensive part of D.C. Annabel, currently spending her time as a member of the Washington National Opera Board, has volunteered Mac to be a supra in Tosca.

As a supra in the Washington National Opera, Mac joins other Washington people, such as current Supreme Court Justices who have also had the non speaking-singing-spear-carrying parts. He and the president of his University are fitted for costumes at the same time.

Besides the celebrities used by the public relations people to generate interest, the supras also comprise countless students and opera lovers. At every opera production in any location, these people proudly carry the spears because they love the opera and want to be a part of it.

Mac discovers that retired Washington MPD Homicide detective Raymond Pawkins, an opera lover had signed up for Tosca. Mac and Pawkins had worked on cases together before retiring.

For a short period, we don't know who the murdered victim is, but that mystery is solved as the victim's body is found – along with the blood stains from the site of the murder.

There are other murders and a color coded alert – terrorists on the loose in Washington, D.C. Could it be they love opera as well?

Then, there is the murder of the music professor and the theft of valuable music, perhaps a collaboration of Mozart and Haydn. And a young Canadian pianist who, when questioned, runs into the fist of a very large, lover-of-food policeman.

Truman makes us ask—are the good guys really good? Is peace and security really restored to the Capital at the end?

Or is it just a retiring spy lifting up a glass as the BBC reviews Mozart's comic opera Le nozze di Figaro?

The featured opera is Tosca, full of betrayals and murders. (So is Truman's book.) If you remember in Tosca, one person murders her seducer in order to save her lover's life. When she finds that her lover has been shot by the firing squad, she jumps over a wall, committing suicide. (In one famous performance, after jumping over the wall to her death, the opera singer bounced back several times, having used a trampoline rather than a mattress to break her fall.)

Truman has a character describe the bouncing opera singer story. That story and other famous opera anecdotes are woven into the plot.

Also woven in are details about Washington D.C. and its restaurants; the volunteers who dedicate themselves to opera, the way the opera ball works and the parties used to establish social status.

There are politics and state parties and even dinner in the White House, where the President who loves opera pulls aside the Canadian Prime Minister for a quick chat about an emerging terrorist problem.

Some of the language is a bit stilted. For example, here is how a former opera singer describes her career and its end:

"I went there [the States] because all the good roles here were going to European singers –Gawd, talk about outsourcing – and supposedly the German companies welcomed American sopranos, but it wasn't so welcoming for me. Well, with one exception. I met my former husband there. He saved me from the trials and tribulations of being an unwanted opera singer."

If you can overlook the prose, this book is fun, especially if you know D.C. and some opera. Truman spends time enlightening us about them both. Obviously, she knows them well and is willing to overlook their foibles.

jkatz@ag.state.oh.us

Janyce C. Katz, Ohio Attorney General Taxation Section

YOUR ASSISTANT IS A DUD

What Now?

When to keep them, and when to send them packing

By Paula Coulter

You're a busy attorney with a full caseload, a packed schedule, a family that wants to see more of you, and the usual pressures of modern life. Walking into your office to find that the ever present chip on your assistant's shoulder has become an overwhelming boulder is not the best way to start your work day.

The truth is that you've known for some time now that "LuAnne" isn't really working out, but simply have not had the time or motivation to deal with this situation. You are already too far behind to think about what happens if you have to start looking for a new support person again. So, you grin and bear it, or shut your office door and let the denial kick in along with the caffeine in your Starbucks.

Somewhere in the back of your head a little voice is telling you that maybe this is the day that you should send LuAnne packing. What happens if you do? How will you ever get anything done? When would you find the time to interview and train someone new? And, when on earth would the filing ever get caught up? These are valid concerns that make it tempting to stick your head in the sand a little longer, but it's time to take action. What should you do when you are not at all happy with your assistant?

Weigh Your Options

Before deciding, get a clearer picture of your situation. Examine your motivations. Why are you dissatisfied with your current assistant? Define what you're moving away from and/or moving toward. Is this person not meeting expectations with regard to performance, or is this a personality issue?

Define your expectations. What should this person be able to do for you? What skills and characteristics do you need in an assistant? What are "must haves" and which ones would it be merely nice to have? Clarify what you want more of and less of in a support person.

Weigh the known against the unknown. How will your life be different if you let this person go? How much help are they really giving you at this point? Is it possible that having them finally gone would be worth any short-term backlog created by the absence? How hard would it be to get by for a week or so on your own if you really had to, knowing that temporary support is widely available in a city the size of Columbus?

Analyze the Employees on Their Own Merits

Does this person have skills that you are not utilizing? Could this be a matter of having the wrong assigned duties to someone who is better used in other capacities? What does this person do well that can be an asset to your firm? If your employee has a beef with you with regard to pay or benefits, is it legitimate? Should (s)he stay or should (s)he go? There's no mathematical formula to use in answering this question. However, here are some items to reflect on.

Consider keeping your employee when:

Your employee is bright and motivated and, with proper training, would be a valuable asset to your practice. Invest in getting this person the tools needed to do the job right. It's well worth the short term expense. Call your local and state bar associations to see what's available for support staff training and take advantage of these resources – they're usually fairly inexpensive compared to other seminars.

You suspect you haven't invested enough time or effort in making it work. If you have not made your expectations clear, the employee probably won't meet them. You've hired an assistant, not a mind-reader.

Your employee is doing the best (s)he can with the resources you provide. It may be time to upgrade or invest in new software or other systems. If your equipment and technology is outdated, you've got everyone at a disadvantage. Find out what you need and how much it will cost. Put a business plan together that includes technology and start implementing it.

You are understaffed. Are you expecting one person to do the work of two – or five? Get real about what it takes to run your office. If it's time to think about adding staff, you need to bite the bullet and make it happen.

Your employee is going through a unique personal situation. If your longtime loyal and normally very competent assistant is working through one of the rough patches we all address at some point in life, now is *not* the time to cut and run. It's not only good karma but good business to give some much needed slack to someone going through a crisis. Do what you can to find resources to help him/her through the issues. Larger firms have employee assistance programs. If you are a small firm/solo, you'll need to research resources yourself and do what you can to find help for your employee. The employee is more productive with this monkey off his/her back, and it's a good business decision that will not likely be forgotten should the assistant be offered a job elsewhere.

Consider terminating your employee when:

- You know it's inevitable. Don't prolong your misery or theirs. Let the fresh start for both of you be today.
- Your employee is rude to your clients. Unacceptable. Period.
- Your employee has demonstrated a lack of integrity or willingness to do the job right. You can't change someone's attitude or ethics.
- The relationship between you and your employee is taking a toll on you emotionally, physically or financially.
- Your employee has an ongoing list of personal dramas that continue to get in the way of productivity. This is not a case of someone having a bad week or a bad month. This is the employee who lives in a state of crisis and chaos that keeps her/him in constant turmoil. They are emotionally and physically exhausted every minute of the day from dealing with it all, and they make 100 personal calls a day. They will be doing this ten years from now, too. Do you want it to be at your expense?

Still a Toss-Up?

Even after going through this analysis, you may wind up with no clear-cut answer. If that's the case, you can ask associates or experts for insight, but ultimately, listen to your instincts. Whatever you decide, move forward purposefully and graciously, and act quickly and fairly.

Getting training for your staff? Your local and state bar associations offer courses that may be beneficial for both you and your employee. The Columbus Bar offers courses designed specifically for legal support staff at affordable prices even for small firms.

Getting help during the transition? It's easier than you think to get temporary support. The Bar has a database of experienced legal support professionals who are available on call for long or short term contract assignments. This includes paralegals, bookkeepers, general office assistants, filing clerks, and even office managers. If you call today, chances are you can have qualified help in your office by tomorrow.

Finding a qualified assistant? No matter what your firm size, you are not too small to get help with recruiting staff. This is especially true in the small firm/solo practices, where you can't afford not to have a strong support person.

While some small firms may initially balk at the idea of paying a fee to a recruiting service, many quickly discover that having the initial screening process done for them and being able to select from three or four qualified candidates versus sifting through a stack of resumes and interviewing dozens of individuals is well worth the cost. Time is money, and this was never truer than for an attorney. Think about what you charge for an hour of your time and do the math.

Additionally, attorneys also don't have the in-house resources to adequately test and screen personnel, and many experienced candidates will only work through recruiters in order to protect their current employment. Working with a staffing consultant will usually give you a broader and better qualified pool of candidates than you will find working on your own. And getting the right person for the job is priceless. Just ask the guy with the surly girl at the front desk.

paula@cbalaw.org

Paula Coulter, Columbus Bar Placement Director

Leadership Lessons from *Presidents*

By Christen M. Millard
Honda of America Mfg., Inc.

Leadership is a topic we, as attorneys, hear about frequently. Lawyers have traditionally been leaders in the community and politics. Lawyers have traditionally served on and led many of our community's non-profit and service boards. Because lawyers tend to be good leaders, it can be difficult to be the leader of a bar organization. Women Lawyers of Franklin County and the Columbus Bar are associations that have a tradition of strong leadership. The two organizations have recently formed an affiliation that will make both stronger by relying on the strength of the other.

I recently discussed the difficulties inherent in bar leadership with three past presidents of WLFC. I spoke with Heather Sowald, who has also been a past president of the Columbus Bar and the OSBA; Kimberly Callery Shumate, a past president of the Columbus Bar; and Elizabeth Watters, who currently serves as secretary/treasurer of the Columbus Bar and will take the reins as president in 2009. In particular, we discussed the qualities necessary to be a good leader and how each of them grew to her current success as a leader.

One view they shared was that the members' needs and desires are paramount, and I was impressed by how much their leadership discussion returned to mentioning the needs of the members. While the needs, desires, and focus of the membership of WLFC and the Columbus Bar are very different, they approached the programming and leadership the same way, by taking the time to understand the desires of the membership. For each of them, this was a hallmark of a true leader.

All three of them also expressed the importance of the testing of their leadership abilities first in a supportive environment where others helped them and taught them how to be a good leader. Before leading WLFC, Kimberly Callery Shumate was heavily involved in her Northwestern University Alumni Club in Columbus. She found that working with people who had been in leadership for a long time allowed her to learn how to lead. Her experience with Inns of Court helped her to better understand how to work with lawyers in an organization. Heather Sowald and Elizabeth Watters both started in leadership in WLFC. The relationships they built there have carried forward to this day. They all found that WLFC allows a younger person to take on a leadership role that may not be as available in another organization. By placing themselves in a position where they could learn to lead with support, they were better able to learn both how to generate support in other organizations and how to lead in an environment that was less supportive.

I asked each of them what lesson they had learned in WLFC that had most helped them in leading at the Bar. Heather Sowald indicated she had learned how to work with a board to jointly plan a vision. This skill transferred easily to other boards she has worked with. She believes that the ability to be a team player and to effectively use the collective wisdom of everyone on a board is a key skill of any leader.

Kimberly Callery Shumate agreed that WLFC had taught her how to organize the work of a board and how to effectively run a board meeting. She added that she also learned how to take an idea and make it into reality. She believes a key leadership skill is to take the time to get to know all the people on your board, look at their strengths and weaknesses, and properly place those people where they will be most effective.

Elizabeth said that the most important thing she learned was the importance of organization. The more organized the leadership is, and the more they share a common focus or goal, the more energized the membership will be and the better attendance there will be at meetings. For all of them, then, the ability to develop relationships within a board and achieve consensus has been a key to their leadership.

I asked each of them what their advice would be to a young person who wanted to become a bar leader. Elizabeth Watters indicated that it is important to get involved with an organization where that young person can gain experience in a supportive environment. Such an organization can also allow that young person to interact with other leaders and gain insights from their experience. Active participation in these roles can open the doors to leadership in other organizations. Heather Sowald suggested that the young person find what he or she is passionate about and to be active in it. Kimberly Shumate stressed the importance of being a good attorney first. She indicated that having solid practice skills will allow the young person to have the ability to manage the time commitment necessary to participate in leadership activities. Once these habits are in place, she emphasized that although many leadership activities are good choices, the young person should take the time to try different things and find out what he or she is really passionate about and then take every possible opportunity to take a leadership role, do it well, and be helpful and available.

Each of the three recognized the different purposes of WLFC and the Columbus Bar, but each had a different view of WLFC's role. Heather Sowald found the WLFC to be a social networking organization and found her leadership time there to be a lot of fun. Kimberly Shumate found it to be a leadership development organization. Elizabeth Watters found it to be a group that is out in front to promote women and women in leadership. WLFC is truly a combination of all of those things, and we believe that we are our own best resource. Heather Sowald reminded me that you get out of an organization what you put into it. By applying the lessons from these leaders in any organization, you can become or remain a great leader.

Christen M. Millard,
Honda of America Mfg., Inc.

Shaping *UP* in '08!

For many, the New Year inevitably brings renewed thoughts of a year filled with great aspirations for fitness and well-being. We aspire to improve our health, finances, and general well-being through a multitude of unreasonable expectations that often subside before spring. But, this year is different, right? *This year*, we mean it.

There are a number of things one can do to successfully fulfill those New Year's resolutions, and this year IS different, because the CBA wants to help. Below are a few tips to help get you in the proper mindset for fitness this year:

Get a full eight hours of sleep each night. A full night's sleep helps lower stress hormones. If your stress hormones stay heightened at night, your body can't adequately recuperate and repair from the stresses of the previous day. Your body's immune cells also use nighttime to fight off unwanted bacteria and viruses. Bottom line: Sleep bolsters your immune system.

Keep healthy protein snacks with you at all times. Fend off hunger pangs that drive you to the coffeehouse for a caffeine-and-sugar laden pick-me-up. Prepare snacks the night before for a particularly busy day, or stash some at the office. Try a protein bar or shake, or some simple nuts and fruit, celery and nut butter, hard-boiled eggs or string cheese.

Boost your fluids. Since our bodies are 60% water, we all need water and we can't live without it. Keep a water bottle with you, or drink equally hydrating herbal teas. Adequate hydration increases your energy and supports your immune system. Remember that diuretics, such as caffeine and alcohol, strip water from your body. For every caffeinated or alcoholic drink you consume, you need to drink an extra cup of water. The standard rule of thumb—eight 8 oz. glasses a day—is good advice.

Ban (all right—limit) sugar. Sugar depresses your immune system, and single high doses can decrease your white-blood-cell-count. Plus, what do those empty calories mean for your waistline? If you can't eliminate sugar completely, plan for special indulgences, and stick to it. You can also use xylitol, a natural sweetener with half the calories of sugar that enters the bloodstream very slowly.

Finally, work out—whether it's spinning, yoga, cardio kickboxing or weekly group exercise classes.

To help you accomplish your goals, the Columbus Bar has teamed up with some local partners, including The Athletic Club of Columbus (ACC) and PrevaHealth.

Through a new discounted initiation program, Columbus Bar members receive reduced initiation fees. As of January 2008, CBA members can take advantage of a "Resident" ACC membership at $700 (a $550 discount) and "Associate" membership initiation fees at $250 (a $250 discount.) Associate members are aged 31 and under. Initiation covers membership for the entire immediate family.

The Columbus Bar also has an established partnership with PrevaHealth, through which members can take advantage of several discounted services, such as comprehensive cardiovascular risk assessment, body fat analysis, bone scan for osteoporosis, lung scans, heart scans and more. These services offer early diagnosis and intervention before the onset of symptoms and while the disease is at its most treatable stage. At PrevaHealth, you will get the information and motivation you need to live a fuller, healthier life.

For more information on these and other Member Benefits, visit www.cbalaw.org.

MEMBERSHIP BENEFITS

The Athletic Club of Columbus
Reduced initiation fees covering the entire family to access fitness, dining, and entertainment facilities.

PrevaHealth
Discounted services, such as comprehensive cardiovascular risk assessment, body fat analysis, bone scan for osteoporosis, lung scans, heart scans and more.

LiamLaw.com
Only CBA members can be a part of Liam, the Columbus Bar's online attorney listing service. For only $150 / month, CBA members can have an online marketing presence that works for them, with 50% of subscription dollars being spent on local marketing of the site.

Thrifty Car Rental: 20% discount on airport valet parking

Premiere Conferencing: discounts on conference calling services

Brooks Brothers: 15% discount

First Data: special pricing for credit card processing

Employee Insurance Plans
Members have access to several types of insurance coverage including health, dental, life/accidental death & dismemberment, long term care, long term disability, surety bonds, structured settlements, pension services, professional liability coverage, commercial property & casualty, and personal home & auto

Columbus Blue Jackets: $10 off tickets

Rinkov Eyecare Center: substantial discount on glasses, contacts & professional care

LexisNexis: New Attorney Program feature deeply discounted prices for solo members or those in practice with another new attorney.

Office Depot: special pricing on office supplies, printer cartridges, paper, promotional items and furniture.

ComDoc: special promotions/pricing on the purchase or lease of office equipment, including digital copiers, printers and facsimiles.

Payroll Processing: special pricing on ADP payroll/HR solutions

The Daily Reporter: 10% discount off one year subscription, plus special advertising discounts.

Business First: $20 off a new or renewal one-year subscription to Business First.

Angie's List: Columbus Bar members can join Angie's List (new members only) for $30 per year, a $23 savings.

For details and contact information on any of the above services & discounts, visit www.cbalaw.org or call Jill Snitcher McQuain at 221-4112.

By Richard C. Simpson

Early one morning a couple of years ago, while working out at the Athletic Club, I asked my buddy and fellow lawyer Ralph Antolino if he would like to cycle across the USA in 2007. I told him this year would mark my 60th birthday and my 35th anniversary at Bricker & Eckler and I wanted to commemorate those milestones with a big adventure. He pondered the question carefully, for about a half a second, and said with no hesitation, absolutely!

So with that impulsive start, we began to plan for what became, this summer, the adventure of a lifetime.

On Sunday, June 17, in the seaside town of Astoria, Oregon, at the mouth of the Columbia River (which, history buffs will remember, is where Lewis and Clark reached the Pacific Ocean some two hundred years ago), we ceremoniously dipped our rear tires in the ocean, officially marking the commencement of our journey. Fifty days later, on Monday, August 6, accompanied by a police escort with lights flashing, we rode into the parking lot of Wallis Sands State Beach in Portsmouth, New Hampshire, carried our bikes over the sand to the water's edge, and completed the journey by dipping our front tires into the Atlantic.

In between, averaging 85 miles per day, we rode 3700 miles across the northern United States. We pedaled entirely across Oregon, Idaho, Wyoming, South Dakota, Minnesota, and Wisconsin, took a four hour cruise on a ferry boat across Lake Michigan, climbed back onto our bikes and continued across the lower peninsula of Michigan into Ontario, Canada, returned to the USA at Niagara Falls, traveled along the Erie Canal across New York State, through Vermont and New Hampshire to the coast.

We passed over and through pine forests, barren deserts, lush irrigated farmlands, small villages, big cities, abandoned ghost towns, places you never heard of, the Cascade Mountains, the Teton Mountains, the Black Hills of South Dakota, the Green Mountains of Vermont, vast prairies, pastures, parks, orchards, endless Midwestern cornfields, several tunnels, lots of bridges, a few swamps, and, among other things, a herd of buffalo. We crossed ten states (not counting Ontario), four time zones, and one entire continent.

We rode on busy highways, lonely country back-roads, gravel bicycle trails, and, for fifty or sixty exciting miles, on the shoulder of Interstate 80 with semis blasting by at 70 mph three feet away from us.

We slept in forty-five different motels, not too many of which you would want to take your family. But we didn't care because we fell asleep early every night and left each morning at the crack of dawn.

We ate at more than one hundred different restaurants, mostly of the Hometown Buffet and Denny's variety. And we ate constantly in between meals as well, two or three times a day, at official rest stops. We chowed down on bananas, apples, granola bars, cookies, peanuts, Fritos, brownies, and junk food of every variety. We drank Gatorade by the bucket. Then we ate more junk food and we washed it down with large milkshakes from the nearest Dairy Queen. We ate about 6,000 to 8,000 calories a day and most of us lost weight. I lost four pounds myself and I was not carrying a lot of extra weight to begin with.

We learned quickly what kinds of creams and ointments are most soothing for a rear end that feels like it has been systematically and methodically beaten with a baseball bat. We took care of blisters on our hands, numb fingers, sore necks, aching knees, and perpetually tired legs. We slathered sunscreen on our arms and legs and faces five times a day. We rinsed our sweaty biking clothes in the motel sink every night and we argued over who got first dibs on the motel washing machines.

We took extra good care of our bikes, washing the dust off and lubing the drive trains almost every day. Incidentally, the technical term for that is "flossing your cogs." We changed lots of flat tires (or at least some riders did; by some miracle I had zero flats!).

We learned good biker etiquette: how to shout "stopping!" when you are about to slow down in the middle of a bridge to take a picture; how to signal everything is ok when you hop off your bike near a cornfield to take a "nature break"; how to say "no thanks" when some very fit rider wants to pick up the pace after seventy-five miles of slogging through gusty headwinds.

We observed, up close and personal, every variety of North American road-kill known to science. By this I mean deer, of course, but also pronghorn antelope, porcupine, coyote, weasel, dog, cat, raccoon, possum, groundhog, jack-rabbit, regular rabbit, squirrel, mole, mouse, bird (at least a hundred species of birds), snakes, including rattlesnakes of every type and degree of freshness, turtles, toads, frogs, and butterflies, to mention a few of the most common.

When you are watching the pavement six or seven hours a day you see a lot of things that car passengers miss. Bungee cords for example. It is truly amazing how many bungee cords pop off vehicles and come to rest along the shoulders of American highways.

We rode as part of a professionally organized group called "America by Bicycle" under the leadership of a retired air force lieutenant colonel named Mike Munk. Mike is an extremely fit, disciplined, and organized guy. He and his company have conducted this tour many times and have worked out all the logistical issues: a truck to carry duffel bags, a mechanic to fix broken bikes, spare parts, extra tubes and tires, reasonably convenient motel and restaurant reservations, a couple of vans to carry water, snacks, and tired riders, very strict safety rules, and expert advice on how to deal with long days in the saddle. Mike had a staff of five assisting him, two men and three women, one of whom was Mike's wife, Barbara. They rotated duties each day, with three people driving the vehicles and three riding bikes. One staff member was always assigned to ride "sweep," following along behind the slowest rider to make sure no one got left behind.

Mike ruled with an iron hand. He preached safety constantly at our daily "route rap" meetings, where we received detailed information on the next day's ride. His goal was to get the entire group across the continent with no injuries and he very nearly made it. Unfortunately, one rider was struck by a motorcycle four days from the end of the tour. But his injuries were not too serious and he was present on the beach for the tire-dipping festivities.

Mike taught us to ride defensively, never lose concentration on surrounding traffic conditions, avoid obscene gestures when responding to jerks who tried to run us off the road (fortunately this was a rare occurrence), never lean your bike against the van, and always wash your hands before reaching for a cookie at the "sag" stop. We had to sign in before starting out on the road in the morning, sign in at each of the sag stops, and sign in upon reaching the motel in the afternoon. If somebody got lost, the staff wanted to know about it fast!

Our group consisted of about sixty-five coast to coast riders, plus another half dozen who joined us at various points along the way for one or two segments of the tour. We came from all over the USA. Thirty-five states and three foreign countries were represented. The average age was 57, believe it or not, and about sixty of the riders made it all the way, although perhaps only about forty of us did "EFI," which stands for "every flipping inch" or something very close. The rest of the bikers spent at least some of the trip riding in the van, ranging from as little as a day or two, to as much as perhaps 20% of the total distance.

It was an eclectic group: retired military officers, Wall Street money men, college professors, school teachers, several physicians, two lawyers (Ralph and I), a few married couples, including two couples who rode tandem bikes, and one family of three which rode a triple, a very unusual bicycle. Their eight-year-old daughter rode in the third position and somehow managed to survive the experience. From my point of view it looked like child abuse and she spent a lot of time in the van, but at least she finished!

We had a few easy days, fifty or sixty miles of flat terrain with a steady tailwind. And we had many very hard days, "century rides" of one hundred miles or more, with lots of climbing, heat, and miserable headwinds. Headwinds, by the way, are the worst, as far as I'm concerned. They beat you up mentally; make you feel like you are dragging an anchor. On the other hand, we had no rain — fifty straight days of dry weather! What are the odds of that?

Some people have asked me about which was my favorite day. There were many amazing days, of course, and several stand out in my mind, but Ralph and I agree on one in particular: it was the day we rode from Hot Springs, South Dakota, up through Wind Cave National Park, north through the Black Hills, past the mountain on which they are carving the colossal Crazy Horse memorial (which will take another 50 years of carving to finish), up to Mount Rushmore, down to the tourist town of Keystone, and then over the hills into Rapid City, South Dakota. The weather was perfect, cool and sunny. The scenery was spectacular and constantly changing. Wind Cave itself is a little known national park, well off the beaten path. It is beautiful.

There we saw rolling grasslands and ponderosa pine groves. We had to pick our way slowly through a herd of buffaloes walking across the road, and we encountered virtually no car traffic. We passed by vast prairie dog colonies with hundreds of prairie dogs standing up in their burrows watching us go by. And the Black Hills are gorgeous: lots of trees and granite outcroppings. I was expecting Mount Rushmore itself to be rather cheesy, but in fact it is very impressive and the visitor center is exceptionally well done. It was crowded with tourists from all over the world. That day was, for us and for many of the riders, one of the most memorable of the entire trip.

On most days, our group was spread out, sometimes over twenty or thirty miles. This is because most of us preferred to ride at our own pace rather than ride in a group and have to go at the speed of the group, either a little faster or a little slower than is completely comfortable. Ralph, for example, is a strong rider who rode with three or four other strong riders. Generally they were among the first to reach the motel at the end of each day. I, on the other hand, was content to ride farther back in the pack, stopping frequently to smell the roses along the way.

On the subject of smells, some of the most powerful memories I will have from this experience will be of the smells we encountered: the fragrant pine forests in Oregon, potato blossoms in Idaho, sage brush in Wyoming, cattle feed lots in South Dakota (remarkably unpleasant as they are), freshly mown hay fields in Minnesota, and salt air in New Hampshire. You experience some very vivid smells from the seat of a bike.

When you are riding along the highway in the climate-controlled cabin of your car, you see the scenery flash by your window, and you get an impressionistic view of the world. But when you are riding a bicycle at fifteen or twenty mph with the sun and the wind swirling around you, the experience is entirely different. It affects all of your senses. You absorb the smells, you feel the heat and the breeze (and the bugs that occasionally smack into your face), you hear the birds and the prairie dogs chirping (who knew that they chirp?), you see the world in crystal clear detail, and I am convinced you can even taste it. There is simply no better way to experience America!

I am lucky to have been able to undertake this ride. It was physically and mentally challenging, and it was hard on my family. I am deeply grateful for their tolerance and for the support of my colleagues at Bricker & Eckler. It was truly an amazing adventure. Not many people will have the opportunity to undertake such a journey. I would not trade the experience for anything; but I am glad to be home, and I have no plans to do it again!

*Every Flipping Inch

rsimpson@bricker.com

Richard C. Simpson
Bricker & Eckler

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