Columbus Bar

Lawyers Quarterly

Spring 2009

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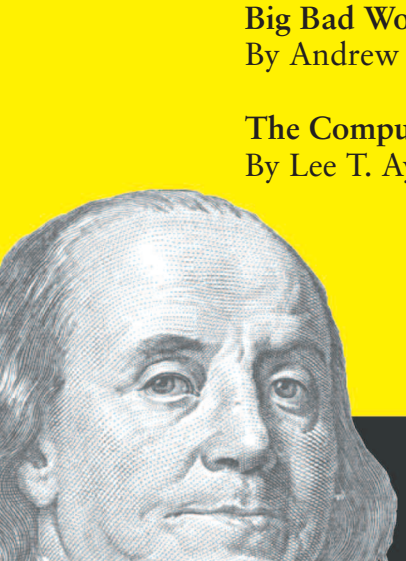

"A PENNY **SAVED** IS A PENNY **EARNED.**"
—Benjamin Franklin

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Recession *and the* Profession

Kathleen M. Trafford,
Porter Wright Morris & Arthur

By Kathleen M. Trafford

The economy. We worry about it. We talk about it. We wonder what has gone so wrong. We ask: when will it turn around again? The economy is on everyone's mind and Columbus lawyers are no exception. The Columbus Bar has addressed the economy and how it affects practicing lawyers in various ways this year – at committee meetings, in CLE programs, through the electronic newsletters (Bar Bytes and The Complete Lawyer), and with the economic TOOLKIT on our website. I hope you have found these useful aids. In this column, however, I want to talk about two of the professional implications of these uncertain economic times. I am concerned about the effect of this downright scary economy on two groups of lawyers in particular – senior lawyers and young lawyers.

Even before fall 2008, the challenges posed by the coming "senior tsunami" were getting our attention. There has been much discussion about how to keep the leading wave of baby-boomer lawyers, many of whom have exceptional leadership skills and a robust commitment to community service, engaged in the profession. Senior lawyers are an invaluable asset and have much to contribute. Attention has been given to how to help senior lawyers structure and prepare for what will be their "second season of service," which may include a different career path and an even greater commitment to community or pro bono service. These are positive discussions because looking for ways to capture and keep the talents, wisdom and experience of our veteran lawyers is a good problem to have.

But, there is another side to this issue. There is a legitimate concern that some percentage of senior lawyers will remain in active law practice beyond the point when their health and abilities indicate retirement from the practice is the appropriate professional choice. The present economic downturn necessarily heightens this concern because some lawyers may feel compelled by financial need to continue to practice even after they become aware of mental or physical impairments. Our existing lawyer regulation programs, however, are not equipped or funded to deal with age-impaired lawyers and, as a result, the lawyers and their clients will be at risk, unless we personally take responsibility to watch out for these lawyers or collectively support the development of programs to fill this gap in our support structure. In our profession, looking out for each other isn't optional; it is a professional obligation.[1]

What I hope is that we as a profession will look seriously and soon to developing alternatives for helping age-impaired lawyers so that they are not shunted into the disciplinary system for lack of a better choice. Such alternatives might include a special lawyer assistance program engineered specifically for aging lawyers; a process for appointing a lawyer to monitor or back stop the lawyer; a lawyer-to-lawyer mentoring program; CLE programs on financial planning, succession planning and winding down a practice; and educational programs to help the profession better identify and counsel age-impaired lawyers before professional problems arises. I do not pretend to know what the best programs are, but I do see the need to address this important issue of professional responsibility. The senior lawyers have been there for us throughout our careers, acting as our mentors and role models and helping our profession to grow and prosper. We need to be there for them as they face the prospect of putting down their briefcases in uncertain times.

There also is a need for action with respect to the opposite end of the lawyer spectrum – the newest members of our profession. I fear some of them are very worried about the future. Some have significant law school debts. Some have new young families. Some have yet to find their first job. Some are worried if their position is secure. Some may be wondering if they made the right decision becoming a lawyer. I think we need to reach out to our young lawyers and let them know that we are confident that the profession remains strong and will weather these difficult economic times. I think we need to be sure the new lawyers are getting solidly grounded in the profession and learning what it means to be a professional, while grappling with the very real, practical effects and pressures of the economy. I think they need to hear from us that we, the more seasoned lawyers, are here for them.

At this end of the spectrum, I think the "how to" is more obvious. It is by mentoring. Those among us who have practiced for two or three decades know first hand the value of mentoring. We had, and still have, great mentors and have reaped the benefits of that experience. It is time now for us to do our part. There are excellent programs available to match young lawyers with a mentor. The Columbus Bar has had a mentoring program since 2005, and over 150 lawyers have participated. The Ohio Supreme Court initiated its own Lawyer-to-Lawyer Mentoring Program last year, and it provides excellent orientation and training materials on how to build a good mentoring relationship. I hope many of you will become mentors and, if you do, I think you will find you not only give much but receive more through the experience.

This is my last CLQ column as president, and I want to share with you some advice I got from my mom that fits well with this discussion. When my brother, sister and I would leave the house for school or to play in the park, by the creek or (mom never knew) near the railroad tracks, she would always admonish us to "Be good to each other out there!" That is darn good advice even for grown-up lawyers, and especially so in these more challenging times.

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1. *ABA Formal Opinion 03-429 ("Obligations with Respect to Mentally Impaired Lawyer in the Firm") and ABA Formal Opinion 03-432 ("Lawyer's Duty to Report Rule Violations by Another Lawyer Who May Suffer from Disability or Impairment).*

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BUT ALL I CAN DO IS SAY *"thank you" –*

Thank you Joyce, thank you. And thank you Porter Wright and all of your people who have contributed to this stellar piece of lawyering.

Joyce Edelman

By Alex Lagusch

In January, after three long years and hundreds of hours of intense legal effort, Porter Wright's Joyce Edelman stood before the Justices of the Supreme Court of Ohio to argue an unauthorized practice of law (UPL) case initially brought by our UPL Committee almost seven years ago. Our position in *CBA vs. American Family Prepaid Legal Corp*. has been that AFPLC and its non-lawyer representatives have engaged in practices which constituted the practice of law.

Just to put this in perspective, most of the UPL matters involve one individual being charged with stepping over the limitations of their scope of duties in a limited number of instances. This case involved a massive sales campaign targeting thousands of elderly folks from all over Ohio.

Our UPL Committee initiated this case relying on the tireless volunteer efforts of Marty Susek and a number of other members of the committee. Then, as the matter progressed toward hearing before a panel of the Board of Commissioners on the Unauthorized Practice of Law, the defendants put on a "full court press," and the case reached dimensions best handled by a team able to apply concentrated effort to the case. Enter Porter Wright, Joyce Edelman and a host of other litigators and support personnel from the firm who took on the case (including side trips to U.S. District Court, the Sixth Circuit Court of Appeals and to a California Bankruptcy Court) and masterfully pulled together and executed a comprehensive strategy that persuaded the Board to strongly recommend to the Supreme Court a finding that the defendants did commit UPL and calling for sanctions. Will we prevail? The Court will likely decide later this year.

Porter Wright and Joyce knew what they were getting into when they took over this case. Well, maybe they didn't TOTALLY know what they were getting into, but the point is they followed through in a fashion I've not witnessed in my many years here as executive director. They never once complained about the Herculean tasks thrown up at them in the course of this litigation.

Columbus Bar members who have taken on pro bono cases have had similar experiences; the cases can morph into something they didn't quite expect. However, good lawyers that they are, they assert that the cause was right, the effort worthwhile. In this particular case, Joyce was standing up for some of Ohio's most vulnerable, the elderly.

Joyce and her task force have worked quietly and tirelessly over these years. I could no longer let those efforts go by without some public attention. Thank you Joyce, thank you. And thank you Porter Wright and all of your people who have contributed to this stellar piece of lawyering.

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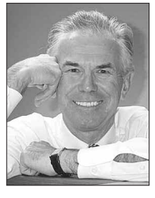

Alex Lagusch,
Columbus Bar
Executive Director

Harold and Kumar PLUNGE Into Legal Waters

By Bruce A. Campbell

Our favorite slackers, having survived a much-delayed White Castle sliders binge and, most recently, an unplanned stint in Guantanamo, have gone all entrepreneurial on us this time. Harold has come to the realization that his future as a stock analyst is hopelessly snagged on the bear claws of the Bust of Ought-Eight, while Kumar has concluded that his progress toward a career in medicine is in a consistent vegetative state. They have decided that it is time to hone in on grabbing some serious coin, and what better target than lawyers?

It was Kumar's connections in Hyderabad and Mumbai that inspired them. India, they discovered, suffers from a superabundance of law schools (over 500), which are pulling in would-be lawyers by the train load and extruding them through the graduation hole at a blinding clip of 80,000 per year (as compared to 44,000 a year in the U.S.). Strangely enough, there, as here, not all of these eager jurists are finding gainful employment.

The implications were clear, even to our two stoners. In the U.S., a fully trained, English-speaking law grad, conversant with common law principles and procedures will demand a $100 k+ salary and a flashy office; his/her counterpart in India will be happy to get $8,000 and work in a cubical farm. Why not gin-up an arrangement to help U.S. lawyers needle into this vein of low-cost legal talent to do routine, time-consuming stuff like research, discovery management, trial preparation and document drafting?

Of course, H & K were not the first to discover and exploit this trove. Many law firms, micro and mega, have found their way – often with the assistance of intermediaries or brokers – to this intercontinental solution to competitive pricing for legal services. Legal Process Outsourcers (LPO's as they are known in the trade), mostly based in India, have grown at the rate of 60% a year and are expected to employ 24,000 people by 2010. It must be assumed that the economic bungee jump in which we are all being forced to partake will only accelerate this outsourcing trend.

It is not just the lawyers who have turned to the erstwhile "Jewel of the Crown" for legal services. Many sophisticated clients are demanding that their counsel avail themselves of this expense-reducing option. Some are even directly contracting with Indian LPOs for in-house legal services, thereby cutting out in-country legal boots on the ground altogether.

So our plucky duo, in an adventure-filled, tax write-off trip to Mumbai (which excursion will need to be detailed in another R-rated movie), put together a business plan and made arrangements with a group of penurious Indian barristers and computer geeks to set up Dirt Cheap Law Brains, Ltd.

As a test case, they approached a large U.S. med-mal defense firm, Uvula, Polyp and Coccyx. Armed with a tip that the firm was thinking of hiring several new associates as a litigation aids, Harold and Kumar showed the firm how much they could save by outsourcing all the scut work.

While intrigued, the firm was hesitant. Was outsourcing ethical? What about confidentiality? What about conflict issues if the lawyers in India did work on an opponent's case? Would the firm's clients have to consent to the arrangement? Were there UPL implications to dealing with an LPO?

Kumar was ready. He whipped out a copy of the ABA's Ethics and Professional Responsibility Committee Formal Opinion 08-451, which deals with all these questions and gives guidance on how the ethical constraints can be satisfied. In short, the ABA concludes use of an LPO is generally permissible so long as the work performed by others is done under the American lawyer's supervision, that due diligence is exercised in vetting the LPO, that safeguards are instituted to protect confidentiality and prevent conflicts of interests, and that a client's informed consent is given to the arrangement.

But every gravy bowl eventually cracks. Enter the Patriot Act, the National Security Agency and the age of the Great Global Infosuck in which our government captures and combs the smallest packet of international chitchat for what it imagines might be twitter by terrorists. Legal service outsourcers, dependent as they are on confidential electronic exchange of information, started to worry – apparently with some justification – that the secrets of their clients, however banal and unterroristic, would trigger intelligence scrutiny somewhere in the lower colon of Cheney's old Undisclosed Location.

That concern lead to the fascinating case of Newman, McIntosh & Hennessey, LLP v. George W. Bush et al. (U.S. Dist. Ct. of the Dist. of Columbia, Case No. 1:08 cv 00787). The NMH firm, which had been using the LPO "Acumen India," sued the President in May 2008, seeking a declaratory judgment "in order to gain certainty about whether the electronic transmission of data from the United States to Acumen India waives Fourth Amendment protection with respect to data that is electronically transmitted." NMH said it sought this declaration "knowing that foreign nationals who reside overseas lack Forth Amendment protections . . . [and] having been informed, through published materials, that the United States Government engages in pervasive surveillance of electronically transmitted date wherein one party to the transmission is a foreign national residing overseas." The plaintiff firm requested a declaration by the court that the President "has an obligation to establish intelligence gathering protocols for the purpose of safeguarding Fourth Amendment rights with respect to attorney communications to and from foreign nationals residing overseas." The DOJ moved to dismiss the case on the bases of standing, sovereign immunity and the fact that the suit asks for action that is "extraordinarily and clearly outside the Court's jurisdiction."

News of this case threw the folks at Dirt Cheap Law Brains, Ltd. into a state of hugger mugger. While they hoped for a resolution that would clarify the status of LPOs like theirs, they knew that, the legal process being what it is, they likely would be getting regular AARP mailings before it was finally decided. It crossed their minds to tell their client about this little vexation, but that urge passed.

As it happens, however, the case was short-lived and will not be the source of enlightenment on the Patriot Act confidentiality issue hovering over the use of LPOs. The Newman law firm, it seems, splintered and, consequently, pulled the string on the action before the court could rule on the government's Motion to Dismiss.

About all that can be said at this point is that, if your clients don't mind having the superspooks peeking into the stuff you send off to India for bargain basement lawyering, rock on; Harold and Kumar are still operating Dirt Cheap Law Brains, Ltd. on that premise anyway. But then we should remember these are the same guys who lit up a bong on an airliner only to have it mistaken for a bomb.

References: Association of the Bar of the City of New York, Formal Op. 2006-3: www.nycbar.org/Publications/reports;
D'Allaird, Laura, "Legal Education in India and Protecting the Duty of Confidentiality While Outsourcing," 18 No. 3 Prof. Law. 1 (2007);
Gibson, K. William, "Outsourcing Legal Services Abroad," 34 No. 5 Law Pract. 47 (July/Aug. 2008);
Lawyers Manual on Professional Conduct, Vol. 24 No. 18, 466-467 (9-3-08);
Lin, Anthony, "Legal Outsourcing to India is Growing, but Still Confronts Fundamental Issues," (8-26-08) www.law.com;
Woffinden, Keith, "Surfing the Next Wave of Outsourcing" Brigham Young University Law Rev., Vol. 2007 No. 2, 483.

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PROPERLY RESPONDING TO IOLTA ACCOUNT OVERDRAFTS

By Alvin E. Mathews Jr.

You are pleased about the substantial fee your firm earned from the recent client settlement. The fee is one of the largest your firm ever earned. The firm is off to a great year. All is well until you receive a notice from the bank. One of the client expense checks related to the settlement written from the trust account bounced!

You were so busy doing legal work that you did not reconcile the IOLTA account for several months. Your contentment turns to grave concern, as you try to determine the severity of the problem. You phone the bank. The bank's customer service representative initially allays your concerns. The bank paid the check, so you transfer funds sufficient to cure the deficit and cover any bank fees. Easy enough.

A week later, just as you breathe a sigh of relief, you receive a letter in the mail containing the initials "ODC" listed on the return address. The Office of Disciplinary Counsel of the Supreme Court of Ohio commenced an investigation of your trust account because of your IOLTA account overdraft, requiring your explanation within 14 days.

Rule 1.15 Requirements

Trust accounts require lawyers to adhere to specific financial record-keeping for the proper practice of law. Unfortunately, many lawyers do not know these requirements. Yet, given the dire consequences a lawyer may suffer for failing to follow IOLTA account ethics rules; and given the financial institution reporting mandated by R.C. 4705.10, all lawyers who maintain client funds must strive to enhance their knowledge of IOLTA account requirements.

The lawyer discipline system enforces the standard of safekeeping of client property as a fundamental, fiduciary obligation of lawyers. Rule 1.15(a) requires that client and third-person funds are maintained (1) in an insured, interest-bearing account; (2) in a financial institution permitted under Ohio law and in the state where the lawyer's office is situated; and (3) in an account designated as "client trust account," "IOLTA account," or with another identifiable fiduciary title.[1] Rule 1.15 requires the lawyer to maintain the following financial records for a period of seven years:

- Any fee agreements
- A record for each client's funds, setting forth:
  - *the client's name*
  - *the date, amount, and source of received funds*
  - *the date, amount, payee, and disbursement's purpose*
  - *the current balance*
- A record of each bank account that sets forth:
  - *the name of the account*
  - *the date, amount, and client for each credit and debit*
  - *the balance in the account*
- Any bank statements, deposit slips, and canceled checks provided by the bank, for each account
- A monthly reconciliation of the client ledgers bank account records[2]

IOLTA account rules authorize lawyers to deposit their own funds into the trust account for the sole purpose of paying or obtaining a waiver of bank service charges,[3] to place advances on expenses into the trust account,[4] and to comply with R.C. 120.52, 3953.231, 4705.09, and 4705.10 and Gov. Bar R. VI, (1) (F).[5]

A dishonored check drawn from an IOLTA client trust account can signal (a) that the lawyer or the bank made an honest administrative, or accounting error, or (b) that the account is "out of trust," and the lawyer is intentionally or unintentionally using the client funds.

Overdraft Notification

The ABA Standing Committee on Client Protection has promulgated rules as guidelines for implementing client protection and discipline programs. An ABA Model Rule for Trust Account Overdraft Notification was approved by the ABA House of Delegates in 1988. Ohio adopted its overdraft notification provision in 2005.

R.C. 4705.10 requires that any bank which holds attorney trust accounts notify Disciplinary Counsel of any dishonored checks written on an IOLTA account:

The depository institution shall notify the Office of Disciplinary Counsel or other entity designated by the Supreme Court on each occasion when a properly payable instrument is presented for payment from the account, and the account contains insufficient funds. The depository institution shall provide this notice without regard to whether the instrument is honored by the depository institution. The depository institution shall provide the notice described in division (A)(4) of this section by electronic or other means within five banking days of the date that the instrument was honored or returned as dishonored. The notice shall contain all of the following:

(a) The name and address of the depository institution;

(b) The name and address of the lawyer, law firm, or legal professional association that maintains the account;

(c) The account number and either the amount of the overdraft and the date issued or the amount of the dishonored instrument and the date returned.[6]

While bank error or poor record-keeping by the lawyer may be explanations for an overdraft on the IOLTA account, the far more serious concern is commingling of lawyer and client funds. If the overdraft was caused by a banking error, in responding to the Disciplinary Counsel's investigation, the lawyer should immediately provide evidence of the bank's mistake. If the overdraft is caused by the lawyer's accounting mistakes, the lawyer must assure the Disciplinary Counsel that the lawyer understands the mistakes, that they are isolated and will not be repeated. If the problem is more serious, involving commingling and misuse of the trust account by the lawyer, the investigation may involve the lawyer and the lawyer's bank providing additional bank records to determine if client funds were impacted and if formal disciplinary action is warranted.

Regardless of the severity of the problem, the lawyer should determine whether he or she can benefit from the assistance of counsel so that formal disciplinary action can be avoided if possible.

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1. *Prof. Cond. Rule 1.15(a)*
2. *Prof. Cond. Rule 1.15(a)(1)-(5)*
3. *Prof. Cond. Rule 1.15(b)*
4. *Prof. Cond. Rule 1.15(c)*
5. *Prof. Cond. Rule 1.15(h)*
6. *R.C. 4705.10 (A)(4)*

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Alvin E. Mathews Jr., Bricker & Eckler

CIVIL JURY TRIALS

FRANKLIN COUNTY COMMON PLEAS COURT

By Belinda S. Barnes and Monica L. Waller

Verdict: $3,962,547.16 (Compensatory damages: $731,586.47, which were trebled to $2,194,759.41. Punitive damages: 1,000,000. Attorney fees: $698,944.95. Prejudgment interest: $68,842.80.) Civil – Construction Defect, Breach of Contract, Violation of CSPA. Plaintiffs bought a new house from Maronda Homes. Prior to purchasing the house, plaintiff was told by the builder that a spot on the carpet was caused by a spilled can of soda, that the house had a dry basement and that all of builder's houses have dry basements. After moving in, plaintiff discovered water entered their house at the location where the claimed "spilled soda" stained the carpet. They also discovered wet walls and puddles of standing water in the basement after heavy rains. Plaintiffs alleged that the wrong type of windows were used, which permitted water to enter the house from all windows. Extensive mold existed throughout the house. The house had many building code violations and extensive structural problems, including the fact that the basement walls were not attached to the house and were beginning to cave in. The builder's website and promotional materials and website claimed the house was the product of skilled workmanship and quality materials, and that quality control checklists were used during the construction process. Upon discovery of mold, the builder told Plaintiffs to move into a hotel and the builder would pay for living expenses. The builder then refused to pay for the hotel, refused to make any repairs, claimed the house did not have any problems and claimed no mold existed in the house. Plaintiff's Experts: David Wickline (Construction Defects), William Shepherd (Structural Defects), Robert C. Brandys, Ph.D. (Industrial Hygiene), Frank B. Dean (Indoor Air Quality), Laeron Evans (Mold Remediation), David A. Stubbs (Construction Defects). Defendant's Experts: Charles Guinther (Industrial Hygiene), Larry Goodwin (Construction Defect), Len Ruddick (Structural Engineer). Settlement Demand: $870,000. Settlement Offer: $350,000. Length of Trial: 10 days. Plaintiff's Attorney: Daniel R. Mordarski. Defendant's Attorney: Paul T. Saba. Judge: Dale A. Crawford. Case Caption: *Roman Cosner, et al. v. Maronda Homes, Inc. Ohio, et al.* Case No.: 06 CV 008278 (2008)

Verdict: $108,000 (compensatory) $10,000 (punitive). Auto Accident. Defendant Elizabeth Castle rear ended Plaintiff Brian Barrowman who was driving a road-legal fiberglass dune buggy on a public street and was stopped at a red light. The accident resulted in over $5000 in damage to Plaintiff's vehicle. Defendant was intoxicated at the time of the accident and attempted to flee the scene. She was pursued, captured and restrained. Defendant admitted that she knew she was intoxicated and that she chose to take back roads home because she knew she was intoxicated. Plaintiff was 26-years-old at the time of the accident and claimed to have suffered significant soft-tissue injuries including chronic headaches from post concussion syndrome. The accident occurred in July of 1999 and the case was tried in October of 2006. Plaintiff claimed to have incurred $68,000 in medical expenses in those 7 years and $11,084 in lost wages. Plaintiff also claimed he would incur another $342,000 in future medical expense. The jury awarded $63,000 for past medical expenses, $25,000 for future medical expenses, $10,000 for past lost wages and $10,000 for past inability to perform activities, plus attorney fees and case expenses which were settled post trial. The jury declined to award anything for past pain and suffering, future pain and suffering or future inability to perform activities. The amount of punitive damages was decided by the court. Plaintiff's Experts: Paul R. Gutheil, M.D. (general practice), Hakim Hussein, M.D. (neurology), Michael E. Orzo, M.D. (pain management) and John W. Cunningham, M.D. (occupational medicine). Defendant's Expert: Gerald Steiman, M.D. (neurology). Settlement Demand: $243,000. Settlement Offer: $25,000. Length of Trial: 6½ days. Plaintiff's Counsel: William L. Stehle and Michael R. Moran. Defendant's Counsel: Thomas J. Keener. Visiting Judge: Tommy Thompson. Case Caption: *Brian Barrowman v. Elizabeth Paul, et. al.* Case No. 05 CV 1690 (2006).

Verdict: $104,503. Eminent Domain. This case is an appropriation proceeding to take property, situated in the State of Ohio, County of Franklin, Township of Washington, owned by Defendant, Steven L. Stalnaker. Plaintiff, Franklin County Commissioners ("FCC"), appropriated the Subject Property by the filing of the Petition for Appropriation on March 18, 2005, for the purpose of the improvement of Avery Road, County Road No. 3, at the intersection of Hayden Run Road, County Road No. 32, City of Hilliard, Ohio. The take of the Subject Property consisted of a Storm Sewer Easement (0.123 acres), a Temporary Right of Way (0.243 acres), and Fee Simple (1.079 acres). This was a partial take leaving the residue land area after the fee takes, of 2.234 acres. Plaintiff's Experts: James R. Horner, MAI (Appraiser), and Robert J. Weiler (Appraiser). Defendant's Experts: Kenneth E. Wilson, Jr., MAI (Appraiser), and Richard M. Vannatta, ASA (Appraiser). Settlement Demand $384,000. Settlement Offer: $38,450 (the initial deposit by the Commissioners). Length of Trial: 3 days. Plaintiff's Counsel: Nick A. Soulas, Jr. Defendant's Counsel: William A. Goldman and Michael Braunstein. Judge: Dale Crawford. Case Caption: *Franklin County Commissioners v. Steven L. Stalnaker, et al.* Case No. 05 CV 3050 (2006).

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Verdict: $16,000 against Comet Home Inspections, LLC (home inspector). $8,000 in compensatory damages and $0 in punitive damages against John Passmore, Jr. (former homeowner). Fraud. Within weeks of moving into a single family home, Plaintiff Ron Ewans discovered a large water intrusion problem in his basement. He later discovered ¼ inch to ½ inch cracks in the cinder block walls that had been hidden behind paneling. Defendant Passmore denied having done any improvements to the basement as well as any structural or water intrusion problems on the Residential Property Disclosure Form. Plaintiff later discovered that Drylock masonry sealant was applied to the exposed cinderblock walls and a large OSU flag was moved to cover a plate sized water spot on one of the paneled walls. Robin Haley of Comet Home Inspections had inspected the home and opined that it was "all in all a fine, structurally sound home." Plaintiff had estimates to repair his basement ranging from $24,000 to $36,000, and additional amounts to replace a basement stairwell and landscaping. He sought $45,000 in compensatory damages, attorney fees, punitive damages, pre- and post-judgment interest and costs. The jury awarded $16,000 against Comet Home Inspections, LLC and $8,000 against former homeowner John Passmore. The jury declined to award punitive damages against the former homeowner. Plaintiff moved for a new trial, for additur and for prejudgment interest. The Court denied the motion for new trial and the motion for additur but awarded prejudgment interest. Plaintiff's Expert: Don Liszkay, P.E. Defendant's Expert: Kurt Grashel was retained but did not testify. Settlement Demand: $45,000. Settlement Offer: None. Defendant Comet Home Inspections, LLC answered the complaint but failed to attend trial. Its sole member filed bankruptcy and no insurance was available. Length of Trial: 3½ days. Plaintiff's Counsel: Michael R. Szolosi, Sr. and Michael R. Szolosi, Jr. Defendant's Counsel: Gerald Sunbury. Judge: Magistrate McCarthy (Lynch). Case Caption: *V. Ron Ewans v. John Passmore, Jr., et al.* Case No. 05 CV 2797. (2006).

Verdict: $8,100. Auto Accident. Plaintiff Arthur Covan, a 75-year-old real estate broker, was involved in an automobile accident with Shirley Arnett. Liability was stipulated. Plaintiff Arthur Covan claimed injuries and lost wages. Plaintiff Lynn Covan claimed loss of consortium. Ms. Arnett's insurance carrier offered policy limits of $12,500. Allstate Insurance Company consented to the settlement and the tortfeasor was dismissed. The case proceeded to trial on a claim for uninsured motorist coverage. Plaintiff claimed soft tissue injuries to his neck and upper back. Plaintiff had extensive degenerative conditions to his neck and back. Medical Specials: $7,245.28. Lost Wages: $10,000 due to the inability to sell real estate for one month. The jury awarded $8,100 and answered an interrogatory indicating that $5,251.28 of the award was for Plaintiff's medical specials. Defendant Allstate received a set-off of the $12,500 Plaintiff received through the tortfeasor's policy resulting in a $0 verdict against Defendant Allstate. Plaintiff's Expert: William Fitz, M.D. Defendant's Expert: Walter Hauser, M.D. Settlement Demand: $60,000. Settlement Offer: $2,500. Length of Trial: 3 days. Plaintiff's Counsel: Steven Mathless. Defendant's Counsel: Kevin J. Zimmerman. Judge: Magistrate Harildstad (Bessey). Case Caption: *Arthur Covan, et al v. Allstate Insurance Company et al.* Case No. 05 CV 3802 (2006).

Verdict: $6,000. Auto Accident. Plaintiff, aged 23 at the time, was rear-ended by Defendant. The accident resulted in minor property damage. Plaintiff was driven from the scene by her husband to the emergency room with complaints of low back and cervical pain. Plaintiff followed up with her primary care physician who prescribed medications and physical therapy. Plaintiff attended eight physical therapy sessions and was completed with her medical care within six months. Medical Specials: $5,728.85. Lost Wages: None. Plaintiff's Expert: William E. Ervine, D.O. Defendant's Expert: None. Settlement Demand: $20,000. Settlement Offer: $3,000. Length of Trial: 2 days. Plaintiff's Counsel: J. Scott Bowman. Defendant's Counsel: Mitch Tallan. Judge: Magistrate Harildstad (Frye). Case Caption: *Amie Dunkle v. Sean Andre*. Case No. 05 CV 2555 (2006).

Verdict: $500 for Plaintiff Joyce Pace. $0 for Plaintiff Khadijah Green. Auto Accident with Loss of Consortium Claim. Plaintiff Joyce Pace was headed northbound on Cleveland Avenue stopped at a traffic light when she was struck from behind by Defendant Maryan Warsame. The collision resulted in minor visible injury to Ms. Pace's vehicle. At the scene of the accident, Ms. Pace acknowledged a pre-existing back injury and refused medical treatment. At trial Ms. Pace alleged that she sustained neck, shoulder and upper and lower back injuries as a result of the accident with Ms. Warsame. She claimed that she was unable to return to her job as a COTA bus driver for 10 months due to the accident. Plaintiff Khadijah Green claimed that she suffered a loss of consortium with her mother Joyce Pace as a result of the accident. Defendant argued that Ms. Pace sustained no new injuries in the accident with Ms. Pace. Defendant argued that Ms. Pace's damages, if any, were attributable to another rear-end accident that Plaintiff had been involved in four years earlier and for which Plaintiff was still undergoing treatment at the time of the subject accident. Medical Specials: $7,061. Lost Wages: $19,095.04. Plaintiff's Expert: Richard E. Gibbons, M.D. of Franklin Park Physical Medicine. Defendant's Experts: Joseph Schlonsky, M.D. and John F. Weichel, Ph.D., P.E. Settlement Demand: $30,000. Settlement Offer: $6,500. Length of Trial: 5 days. Plaintiffs' Counsel: Arnold White. Defendant's Counsel: Monica Waller. Visiting Judge O'Grady (Reece). Case Caption: *Joyce Pace, et al. v. Maryann Warsame*, Case No. 05 CVC 03-3192 (2006).

Verdict: Defense Verdict. Personal Injury Intentional Tort. On July 27, 2004, Defendant Henry Machado, a MAC tool salesman, went to the Cottman Transmission Shop on East Main Street to return some tools and collect a payment. While he was there, he got into a dispute with one of the mechanics and the owner, Roy Baker. The dispute escalated and Mr. Baker ordered Defendant to leave his shop. As Defendant was walking backward out of the shop, Plaintiff Edward Barnette, a friend of Mr. Baker's, entered the shop. Plaintiff Barnette argued that Defendant Machado punched him and knocked him to the floor. Defendant Machado claimed that Plaintiff Barnette blocked his exit from the shop and, when Defendant Machado shouted an obscenity at Mr. Baker and Plaintiff Barnette, Plaintiff Barnette punched him and then fell on top of him. Plaintiff Barnette was hospitalized after the incident with complaints of shortness of breath and chest pains. While hospitalized, Plaintiff Barnette developed a staph infection which required further treatment. Plaintiff Barnette claimed that the shortness of breath and chest pains were caused by the incident with Defendant Marchado and that the incident further aggravated his pre-existing depression. Defendant argued that Plaintiff's symptoms were related to Plaintiff's extensive pre-existing cardiac condition and depression and were neither caused nor aggravated by this incident. Medical Specials: In Excess of $30,000. Lost Wages: None. Plaintiff's Expert: Steven Tanzer, D.O. Defendant's Expert: None. No settlement negotiations. Length of Trial: 2 days. Plaintiff's Counsel: Jonathan T. Tyack. Defendant's Counsel: Rick E. Marsh. Judge: Magistrate McCarthy (Cain). Case Caption: *Edward Barnette v. Henry Machado*, Case. No. 05 CV 5213 (2007).

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Specialty Dockets *Pose Special Questions*

By The Honorable David E. Cain

A new "specialty docket" is being tested in Common Pleas Court while other specialties may be going different directions. Plans for an experimental "commercial docket" to be handled by two "commercial judges" went into effect at the first of the year.

It's too soon to know if the desired improvements on speed and consistency will result from having the same two judges – John P. Bessey and Richard A. Frye – handle most of the litigation resulting from business disputes. Meanwhile, a relatively new foreclosure mediation program is saving homes. But an older "drug court" may be dying on the vine.

In the Franklin County Municipal Court, the Mental Health Program Docket (MHPD) is going strong after almost five years of operation. And in Domestic/Juvenile Court, a Family Drug Treatment Court is holding on. Still, some judges are wondering why we need any specialty courts at all.

Commercial Docket

On January 2, Franklin County joined courts in Cleveland, Cincinnati and Toledo in a four-year pilot project to see if specialty dockets could get business lawsuits handled faster and more uniformly around the state.

Temporary Rules of Superintendence adopted by the Supreme Court say that new cases should be transferred to the commercial docket (unless originally assigned to one of the commercial judges) if they relate to rights or obligations among owners or shareholders, trade secrets or non-compete covenants, rights or obligations of directors, disputes among two or more business entities, transactions governed by the uniform commercial code, business related torts and so forth.

Cases not to be accepted into the commercial docket include personal injury, consumer claims, matters in eminent domain, employment law cases, cases in which a governmental entity or labor union is a party and so forth.

If the gravamen of a case filed with a pilot project court relates to any of the topics listed in the Rules as "commercial," the attorney filing the case shall include with the initial pleading a motion for transfer of the case to the commercial docket. If not, then the attorney representing any other party shall file such a motion. If no attorney files it, then the assigned judge shall sua sponte request the administrative judge to transfer it. That judge then pops back to the top of the rotation for the next civil case.

Commercial judges have authority under the temporary superintendence rules to appoint special masters and grant them authority to conduct investigations, hold proceedings and/or enforce orders. The rules also require commercial judges to decide all motions in commercial cases within sixty (60) days of their filings and to aspire to have each case to disposition within eighteen (18) months.

Chief Justice Tom Moyer has appointed Bessey and Frye as the commercial judges. Bessey also co-chairs the Supreme Court's Task Force on Commercial Dockets. The judges will keep regular dockets as well (both civil and criminal). The total case assigned to each will be the same as every other judge (except administrative).

Last summer, the CBA Board of Governors agreed to support the project. Columbus Bar President Kathleen Trafford wrote Bessey a letter of endorsement.

"Business parties frequently express disappointment with the progress, cost and efficiency of commercial litigation. Whether their concerns are real or merely perceived, they affect how businesses view Central Ohio," she said. "The pilot program provides a good vehicle for testing whether the judicial branch can be more supportive of business litigants and can do so without impairing the administration of justice for all persons who have matters before the court."

State officials are hopeful that the existence of commercial dockets will give them another tool to promote Ohio as a good place to grow a business.

Foreclosure Mediation

With foreclosure actions skyrocketing – up nearly 50 percent both statewide and locally over a five-year period – Moyer began pushing last year for mediation programs in this category of cases that has long been notorious for lack of communication.

Eileen Pruett, former coordinator of the Dispute Resolution Section of the Supreme Court, took on the task locally last November as manager of the Small Claims Division and Dispute Resolution Program of the Franklin County Municipal Court. She now runs one of only a few such programs in the country.

Foreclosure matters can be diverted to mediation anytime from pre-filing until the day of the sale, Ms. Pruett pointed out. The program received more than 100 referrals from November through January. Using trained contract mediators, the program began seeing settlements late last year. In mid-February forms for requesting mediation and 60-day extensions for answers began going out with all the summons for new foreclosure complaints.

The program received $540,000 in funding from the County Prosecutor and County Treasurer offices through delinquent tax and assessment collection to cover expenses for a two-year period. Legislation enacted last year allows use of such revenue for foreclosure prevention programs. With about 9,000 new foreclosures filed in Franklin County in 2008, this program will probably be around for quite awhile.

Drug Courts

Former Judge Jennifer L. Brunner started a "drug court" in Common Pleas Court in 2004 for low-level felons (no sex or gun-related charges) with no history of violent offenses. The program provides a number of services as well as treatment oversight with weekly meetings in the courtroom for up to 18 months.

The program was transferred to Judge John A. Connor when Brunner left to campaign for secretary of state. Last fall, the supervision was transferred to Judge Patrick E. Sheeran after Connor was elected to the Court of Appeals.

The program built up to some 40 participants, and remained at that level for many months, but trailed off to about ten offenders before the last transfer. Connor said the numbers went so low because attorneys are not asking other judges to refer cases to the drug court. "If they are going to get probation anyway, why jump through all the extra hoops (that drug court requires)," he explained.

He said he hopes the numbers will come back because of the useful services that are provided, including assistance for obtaining employment and housing. Liaisons from the Prosecutor's Office, the probation department and various treatment agencies also offer assistance.

If the numbers do not increase, then funding could be in jeopardy. The program has been getting $30,000 a year from ADAMH and $70,000 a year from ODADAS to cover the salary of the program coordinator and part of the salary of a probation officer.

In the Domestic Juvenile Court, Judge Dana S. Preisse oversees the Family Drug Treatment Court for parents who have substance abuse problems and are in danger of losing their children due to abuse or neglect. The program, which aims to expedite reunification of children and parents, involves frequent court appearances, treatment and urine screens. It presently serves 25 parents with 61 children involved. Preisse is seeking sources to make up for partial loss of ADAMH funding.

Mental Health

Judge Scott W. VanDerKarr presides over the Mental Health Program Docket (MHPD) in the Franklin County Municipal Court. People with open cases in the court can ask for screening and assessment to determine whether they are appropriate for MHPD. The 18 to 24-month program has four phases – with court appearances decreasing as more advanced phases are entered. VanDerKarr said he is "very pleased" with the way the nearly five-year-old program is working. He said the number of persons on the mental health docket has stabilized at about 60.

The MHPD is funded by ADAMH, has a three-person management team and is intended to provide a mechanism to promote effective treatment as an alternative to incarceration. The judge can order progressive sanctions for participants who violate the rules.

Considerations

Some judges wonder if specialties like the commercial docket are appropriate. The vote to participate in the pilot project was less than unanimous with a couple judges downright unhappy about exchanging some of their cases for others they might not enjoy handling as much. All judges are presumed qualified to handle any kind of case within their jurisdiction, they assert. And why should certain kinds of cases get special treatment? They ask. Furthermore, it opens the door for judge shopping (although the transfers on commercial cases are supposed to be mandatory). Furthermore, the voters did not elect any "commercial" judges, they argue.

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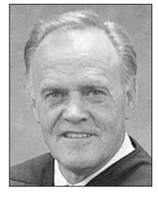

The Honorable David E. Cain, Frankiln County Common Pleas Court

COMMERCIAL DOCKET SPECIALIZED COURT
for Franklin County

By John P. Brody

Effective January 2, 2009, Chief Justice Moyer designated Judges John P. Bessey and Richard A. Frye of the Franklin County Common Pleas Court to hear business cases through a specialized "commercial docket." Courts in Cleveland, Cincinnati and Toledo are also participating in this 4-year pilot project. The purpose is to benefit the business community by streamlining civil lawsuits involving business disputes, thereby improving efficiency and predictability. Our judicial system is often strained by commercial litigation that often takes long periods of time due to discovery disputes and pretrial motion practice. Arbitration – a major alternative is supposed to be speedier and less costly but many lawyers do not find it so.

Two tenets guide the commercial docket. First, given the usual timeframe for commercial litigation, the docket provides a means for expeditious progress and tracking of a commercial case from beginning to end. Second, the docket is designed with an eye toward providing litigants and lawyers greater uniformity of decisions in similar circumstances. It is hoped that having a smaller set of judges in Ohio's largest counties focus and gain experience in commercial cases, sharing those experiences, will enhance justice, facilitate settlements and reduce cost.

All new commercial cases will be assigned to Judge Bessey and Judge Frye. Both have extensive experience in commercial matters. A former business owner, Judge Bessey has been on the common pleas bench for 14 years. He was in private practice, served as a lawyer for the government, and is now co-chair of the Ohio Supreme Court's Task Force that is guiding this pilot project. Judge Frye has served as a judge for four years, and had practiced law for 31 years primarily representing clients in civil litigation.

The commercial docket is governed by the Temporary Rules of Superintendence for the Courts of Ohio that can be found at the tab "Forms" at www.fccourts.org. In addition, Franklin County Court Common Pleas adopted new Local Rule 94 regarding the commercial docket that can be found at the same site.

The Big Ten (so that means eleven) points are:

1. Litigation involving any type of "business entity" will be heard by the commercial docket judges. A business entity includes corporations, limited liability companies, partnerships, non-profit entities, a joint venture, unincorporated association and business trust. The rules encompass most all civil cases involving businesses such as disputes between two businesses, disputes among partners or shareholders, trade secrets, and more; but not personal injury, workers' compensation, environmental, consumer and similar claims. In these financially troubled times, litigation relating to receiverships, commercial foreclosures, and commercial collections are to be transferred to the commercial docket.

2. If a new case fits under the new rules, it must be transferred to the commercial docket. The plaintiff's attorney shall file a motion to transfer the case but if he or she does not, the attorney for the defendant is required to do so. (A sample motion and order of transfer can be found at the tab "Forms" at www.fccourts.org.) If neither attorney seeks transfer, the judge randomly assigned is required to request the administrative judge transfer the case. An informal review of the listing of new cases in *The Daily Reporter* suggests four to five new cases per day may qualify for the commercial docket. Only a few were being transferred in the first weeks of the program.

3. The commercial docket court will not receive additional staff or other resources. The court may appoint a special master for handling matters, to be paid for by the parties in exceptional circumstances and where the parties are in agreement, including on the issue of payment of the special master. Judges Frye and Bessey share a magistrate, Tim Harildstad. It is currently anticipated that Magistrate Harildstad's role will be similar to the role magistrates traditionally perform, being involved in discovery matters, some trials, injunctions, mediation and other issues that might, otherwise, be handled by a special master. A new model case management pretrial order is being developed.

4. Fast action is expected. The most dramatic part of the pilot program is that the court is to issue rulings within 60 days of filing of a motion. Lawyers and their clients will need to respond quickly in order to permit such timely rulings. The date for a decision is determined by the date a motion is filed, not the date of the filing of the reply memorandum. If extensions leave a judge little time for consideration, extensions will be difficult to obtain. Likewise, lawyers should expect the 15-page limit will be enforced. Another key requirement is that the court is to render decisions on the merits of the case within 90 days after a bench trial is submitted.

5. The court is taking steps to establish standards for electronic discovery in order to maintain reasonable balance and control of this process. Judges Bessey and Frye signed on to The Sedona Conference ® Cooperation Proclamation relating to electronic discovery. This proclamation can be found at (www.thesedona conference.org/content/tsc_cooperation_proclamation/Proclamation.pdf). Both judges embrace a "best practices" approach to electronic discovery, avoiding unreasonable burdens, expense, and oppressive tactics.

6. To improve consistency, all judges in the pilot project commercial docket courts throughout the state will post their decisions quickly on a public website. By having immediate access to decisions from trial courts around the state, both the judges and the bar will be able to draw upon the experiences of each of the commercial dockets.

7. Cases are expected to reach a final disposition by the commercial docket judge within 18 months, a relatively short period of time based on current experience, unless formally designated as "complex" litigation which is permitted three years for completion.

8. Trial lawyers will be asked to evaluate the court after each case. The Supreme Court will submit a questionnaire to counsel. The judges will receive tabulated responses without attribution. This process is not yet finalized.

9. With the purpose of promoting the equal distribution of cases among the bench, the court will re-assign non-commercial (and non-foreclosure) civil cases to other judges, in order to keep individual case assignments comparable.

10. Local Rule 94 is designed to consolidate related cases before the same commercial docket judge. A commercial docket case and an ordinary civil case involving common questions of law or fact may be consolidated to the commercial docket. When that occurs, the consolidated cases shall be assigned to the trial judge having the lowest numbered commercial docket case, rather than to the judge whose case has the lowest case number. Also, if only one cause of action of many is commercial, the commercial cause of action controls and the whole case is assigned to the commercial docket.

11. Local Rule 94.04 states that if a party initiates a case and promptly seeks re-assignment to the commercial docket, a judge assigned to the commercial docket will hear any request for a temporary restraining order, receivership, or other emergency relief. Judges Bessey and Frye believe that it is most efficient if they hear motions for emergency relief. Upon filing, attorneys should contact the assigned judge and immediately request transfer to the commercial docket. If the assigned judge is not available, the attorneys should contact the administrative judge (Judge Reece) or the duty judge.

Judges Bessey and Frye are enthusiastic and committed to providing the attention that business cases, particularly complex cases, deserve. The judges are encouraging attorneys to provide input relating to procedural aspects of the new system and the new rules. Attorneys should provide constructive comments so that the new system is efficient and effective. By expediting commercial cases with consistent results, the new commercial docket will serve the needs of the litigants, courts and our economy, maintaining overall confidence in our judicial system.

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Ten Things I Wish I Had Known

When I Was Still Practicing Law

By The Honorable Judith L. French

Before becoming a judge on the Tenth District Court of Appeals, I spent much of my professional life writing briefs, presenting oral arguments, and wondering what the judges were thinking about appellate lawyers and their arguments. Now I know. Judges generally think lawyers are doing a good job. At least in the Tenth District, the briefs are well written, the arguments are effective, and the clients are well represented. Nevertheless, knowing what I know now, there are some things I would do differently as an appellate advocate. In general, my briefs would be shorter, more candid, and more focused on the differences between the two sides. My oral arguments would focus less on a presentation of the facts and my legal arguments and more on my opponent's arguments and the court's questions. And I would never feel compelled to write to the page limit or argue to the time limit.

While my perspective now would not change a "wrong" approach into a "right" one, small changes might have made my advocacy – and perhaps might make your advocacy – even more effective. Beginning with briefing, and then continuing to oral argument, here are ten things I wish I had known before.

1. Candor is Critical. Before an appellate court, your credibility is your stock-in-trade; your honesty, critical. As an appellant, when you state the facts, state all of them, not just the facts in your favor. As an appellant or an appellee, when you argue your position, acknowledge the counter-argument. You may always explain why some fact or argument does not defeat your case, a tactic that is far more effective than if your opponent or, worse, the court exposes your weakness and assesses it without your input.

2. You must mind the details. While minor typographical errors will not be held against your client, you should keep such errors to an absolute minimum. Read and follow the appellate and local rules for what should be in your brief, appendix, and other filings. At the outset, give a brief summary that forecasts your arguments. Support your statement of the facts with pinpoint cites to the record. Support your legal arguments and conclusions with pinpoint cites to case authority and check their accuracy. If your argument rests on a particular legal provision, a certain document or specific testimony, include a copy of it in your appendix for the court's immediate review. (You may also refer to it at oral argument.)
Remember that, while you have lived with your case and learned its intricacies, the appellate judges have not. Take a step back from your brief to consider what would be most helpful to the court's understanding of the case and your legal arguments. To that end, consider asking a trusted associate, someone without any familiarity with the case, to review your brief before you file it.

3. An appellee's brief should not stand alone. An appellee's brief that ignores the appellant's brief is not helpful. The court must address the appellant's assignments of error; you should, too.

Use the appellee's brief to point out the parties' differences. Unless you have good reason, do not restate the statement of the case, statement of the facts or the standard of review. If you agree with what the appellant has written, just say so and save yourself (and the judges) the pages.

Instead of restating all the facts, identify specific disagreement with the appellant's statement, perhaps pointing out critical facts the appellant omitted. Instead of restating the applicable law, respond to the appellant's presentation of that law, perhaps distinguishing appellant's case authority or pointing out contrary authority. If the appellant has mischaracterized the facts or the law, say so and say why it makes a difference. By focusing on your differences, you not only direct the court's attention to those aspects of the case that require review, you also re-direct the court's attention to those aspects of the case that are most favorable to you.

4. Footnotes are almost never helpful or appreciated. Judges pay little attention to footnotes. In general, if you want the judges to read something, put it in the text. By local rule (Loc.R. 7(A)(4)), the Tenth District requires legal citations to be in the text of a brief, not in footnotes.

5. Unprofessional, snide or even sarcastic swipes at opposing counsel, or the arguments they are making, are never appropriate. Attempts to demean the opposing lawyer, the opposing party or their legal arguments, say more about you and your client than they say about the other side. They serve only to hurt your credibility, even if those swipes are in a footnote (see number 4, above).

On a related matter, avoid using "clear" or "clearly" to describe the support for your position and "meritless" or, worse, "nonsense" to describe your opponent's position. These and similar terms tend to raise suspicion that your position is not so clear and that your opponent's argument may have some merit.

Knowing what I know now, there are some things I would do differently as an appellate advocate. In general, my briefs would be shorter, more candid, and more focused on the differences between the two sides. My oral arguments would focus less on a presentation of the facts and my legal arguments and more on my opponent's arguments and the court's questions. And I would never feel compelled to write to the page limit or argue to the time limit.

6. Lawyers generally do not take full advantage of page and time limitations in cases involving multiple parties with common interests. In consolidated cases, or in cases with multiple parties and/or lawyers, parties should not file multiple briefs containing the same arguments. Where you have common interests and arguments, you can present your arguments more effectively if you file joint briefs or separate briefs that divide the issues. For example, if there are two common parties and you each wish to file a brief, you could file two 35-page briefs that divide the arguments between you, rather than two 35-page briefs that present the same arguments. Just be sure to let the court know exactly what you are doing.

As for oral argument – and understanding that lawyers almost always want their own argument time – an argument split between advocates is usually not as effective as one cohesive argument. Even if the lawyers think they can divide the issues cleanly, the court may view the issues differently. The exception is in cases where parties may have different perspectives on common interests (for example, where the government is a party). In general, avoid splitting argument time.

7. Assume the judges know the case. At least in the Tenth District, the judges on the panel expect to conference the cases immediately after argument. When panel members arrive for oral argument, they have read the briefs, and they are ready to delve into the legal issues. You need not begin your argument with a recitation of the underlying facts. Consider the opening that some lawyers give: "I know you have read the briefs. I will not begin with the facts, unless you have questions about them." This or a similar opening allows the judges to ask questions about particular facts or to ask for a detailed recitation, if they wish. Above all, listen to the judges' questions and respond directly. Those questions present your best opportunity to address a judge's concerns about your case.

8. You should always be prepared to answer these two questions at oral argument. First, *do we have a final, appealable order?* Courts of appeals have jurisdiction only over final, appealable orders. If no one has filed a motion to dismiss an appeal for lack of a final, appealable order, the court likely has jurisdiction. Nevertheless, this issue occasionally arises for the first time at oral argument, usually to the surprise of the lawyers involved. Take the time to double-check the final entry before argument.

Second, *what is our standard of review?* While you should have addressed the standard of review in your brief, be prepared to address it at argument and for each issue. If the court's standard is abuse of discretion, be prepared for tough questions.

9. Hypotheticals do matter. A judge may ask you a hypothetical question at oral argument, something that asks you to consider how the outcome might be different under slightly different facts. The point of a hypothetical question is to explore the possible ramifications of the legal arguments being made, not just the remedy being sought. A thoughtful response requires you to think beyond your own case and consider the limits of your legal analysis. The response "That is not our case" is not helpful.

10. You never need to use up all 35 pages or all 15 minutes. Page and time limitations are important because they help ensure that advocates present their legal arguments efficiently. You need not write or argue to those limits, however. At oral argument, for example, if you have covered all the points you wish to make and feel you have answered the court's questions, it is appropriate to say, "I will conclude if there are no further questions." This gives the judges a final opportunity to ask any other questions they may have or to indicate that the arguments have covered the issues adequately.

The story is told of an appellee's lawyer who listened to an appellate panel use his arguments to beat up his opponent for nearly all of his opponent's time. Upon being called to the podium, the lawyer simply said, "Your honors, my mother always taught me not to preach to the converted, so if you do not have any questions, I will just sit down." The story goes that a member of the panel simply responded, "Your mother taught you well, why don't you just sit on down."

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The Honorable Judith L. French, Tenth District Court of Appeals

What a Tangled Web We Weave

Trademarks of Franchisor Used by Franchisees

By Anthony M. Sharett

For many, the franchise relationship is a rewarding one. The prospect of owning a business with established brand equity is likely to be the most powerful aspect of entering into a franchisor/franchisee relationship. The franchisor's trademarks can provide instant fame and credibility with the target audience.

But from the franchisor perspective, proper trademark management must be priority. Indeed, there are many issues which arise from the franchisee's trademark use. Some of the more significant aspects are outlined below including the disclosure requirements for trademarks in the Federal Trade Commission's (FTC) federal disclosure document (FDD), the trademark use so as to meet the definition of a franchise relationship, considerations of unwinding the relationship, and new uses of trademarks on the Internet.

Out With the Offering Circular, In With the FDD

As of July 1, 2008, all franchisors are required to comply with the FTC's amended disclosure requirements for franchising and disclose extensive information about the franchisor in the FDD. Included in the FDD as item 13[1] are trademark disclosures for the franchisor including identification of any registered trademarks and, if unregistered, a disclosure statement conspicuously stating that the trademark is unregistered, information on the existence of pending litigation, agreements, superior rights that may limit a franchisee's use of the trademark, and a description of the franchisor's contractual obligation to protect the franchisee's right to use the mark and protect the franchisee against claims. A franchisor must provide each prospective franchisee with the FDD at least 14 days prior to any binding agreement or payment to the franchisor in connection with a possible franchise sale.

Existence of Franchise and Trademark Association

The franchisor's control and monitoring of trademark usage by its franchisee can be crucial to the establishment of a franchise relationship. Establishment of a franchise relationship remains an area of some legal uncertainty. While the FTC's definition of a franchise relationship may be broader than most businesses might consider, generally we look to three elements when determining if a franchise exists: franchise fee, control, and trademark association.

The degree of trademark association between a franchisor and franchisee still perplexes the courts in some of the borderline cases, but usually, if there is a trademarked good or service involved in the business relationship, this prong determining the existence of a franchise is met.

It becomes a bit more problematic, however, when a franchisor has prohibited its franchisee from using the trademark. In one California case, *Gabana Gulf Distribution, Ltd. v. Gap International Sales, Inc.*, the court would have found the trademark prong of the franchise relationship satisfied by either a right to use the trademark or communication of the trademark to the franchisee's customers. The franchise agreement in question prohibited the distributor from using the franchisor's trademark without prior permission and the fact that the trademark appeared on the product being sold was irrelevant, thus no franchise relationship was found. As a general rule, even if a franchisor prohibits use of its trademark, the court may still find this prong of the franchise relationship test satisfied if the prohibition is not enforced.

Courts have sometimes found that a franchise relationship exists with very little trademark association such as in the Connecticut case *Hillegas v. V.B.C., Inc.* where the distribution agreement allowed the distributor to use the franchisor's name and colors on equipment and supplies but the franchisee chose not to do so. Despite the relative lack of trademark association, the court considered the relationship constituted a franchise. Thus, it is best to clarify and monitor trademark usage carefully to ensure consistent treatment.

Unwinding

A franchisor must also control and monitor the franchisee's trademark usage in order to protect the franchisor's rights concerning the marks. A franchisee can be liable under the Lanham Act if it uses a franchisor's trademark without consent. This is particularly important at the end of the franchise relationship, as many times the franchisee's right to use the franchisor's trademark expires at the agreement's termination.

Yet in some instances, drawing the line as to what belongs to a franchisor post agreement has proven a bit thorny. For example, a franchisee was not liable under the Lanham Act where it continued using the same phone number and the same general color (absent a secondary meaning) on vehicles in *Hometask Handyman Services, Inc. v. Cooper.* But the *Molly Maid, Inc. v. Carlson* court demanded a former franchisee, who claimed to be having trouble with the phone company, to disassociate the phone number from the franchisor's business, not simply attempt to do so.

A franchisee may employ the "abandonment" defense to liability under the Lanham Act. The court in *Dawn Donut Co. v Hart's Food Stores Inc.*, stated "…the Lanham Act places an affirmative duty upon a licensor of a registered trademark to take reasonable measures to detect and prevent misleading uses of his mark by his licensees or suffer cancellation of his federal registration." This duty is particularly important at the end of the franchise relationship. A franchisor must make certain that the former franchisee has ceased using the mark, especially if the former franchisee continues in business under a different name.

Thus, savvy franchisors include a provision in the agreement mandating that the franchisee's trademark use cease upon ending the franchise relationship. These provisions should also include some detail as to what is necessary to de-identify the ex-franchisee's business, premises, products, and services.

Internet Usage

Today, franchisors heavily position trademarks on the Internet as domain names and through various other branding techniques. Hence, franchise agreements should include a process relating to using the franchisor's trademarks online. The franchisor is best served closely monitoring this communication medium. When it comes time to winding up the franchise relationship, domain names and trademarks should not reflect the franchisor's business or trademarks.

Assessment

When a franchisor permits the franchisee to use its marks, it can be mutually beneficial for both parties. And, the franchisor should consider the areas outlined above at the outset of the relationship. A franchisor should carefully scrutinize trademark matters disclosed in the FDD and clearly define proper use of the trademark to meet the definitions of a franchise relationship. Similarly, a franchisor should give careful consideration concerning the franchisee's trademark use during and after unwinding the relationship. Lastly, new uses of trademarks on the Internet should not be overlooked.[2]

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1. 16 C.F.R. pt. 436.5(m) (2008), found at http://ecfr.gpoaccess.gov/cgi/t/text/text-idx?c=ecfr&sid=3c85dcc7133050e53a22c7681a851174&rgn=div8&view=text&node=16:1.0.1.4.50.3.38.3&idno=16

2. Research resources include: McKnew & Beyer, *Annual Franchise and Distribution Law Developments 2008*, American Bar Association 2008; Barkoff & Selden, *Fundamentals of Franchising Third Edition*, American Bar Association 2008; *Franchising In Ohio: Obligations and Litigation Risks*, Reference Manual Vol. No. 08-218, Ohio State Bar Association CLE 2008; *Deep in the Heart of Franchising*, American Bar Association Forum on Franchising, Plenary and Workshops, 2008.

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FACTORS, NOT FORMULAS
Appellate Review of Punitive Damage Awards In Ohio

By L. Bradfield Hughes and Justin L. Root

In October 2000, a mentally retarded young woman named Natalie Barnes died tragically after her permanent catheter dislodged during dialysis, causing an embolism and cardiac arrest. An aide from MedLink, a home healthcare service provider, had been hired to monitor Barnes during dialysis to ensure that she did not pull at her catheter. The aide, however, was unqualified for the position due to a prior felony conviction and the lack of a high-school diploma. And the aide was not present when the catheter dislodged.

A Cuyahoga County jury compensated Natalie's estate and punished MedLink by awarding Natalie's mother $100,000 on her survivorship claim, $3 million on her wrongful-death claim, and another $3 million in punitive damages. While the court of appeals affirmed the judgment, a decision this past summer by the Ohio Supreme Court called the $3 million punitive-damage award into question, and may signal a new level of scrutiny to be applied to punitive-damage awards statewide.

In its July 2008 decision in *Barnes v. University Hospitals of Cleveland; Medlink of Ohio et al.,* the Ohio Supreme Court remanded the case to the court of appeals (where it was dismissed recently by joint stipulation of the parties), holding that courts reviewing punitive-damage awards must independently analyze (1) the degree of reprehensibility of the party's conduct; (2) the ratio of the punitive damages to the actual harm inflicted by the party; and (3) sanctions for comparable conduct. These "guideposts" are known as the "Gore" factors due to their origin in a 1996 decision by the United States Supreme Court, *BMW of N. America, Inc. v. Gore.* In *Gore*, the Supreme Court deemed "grossly excessive" a $2 million punitive-damage award to the buyer of a "new" car that had been repainted by the distributor due to acid rain damage sustained in transit from the factory.

Of Gore's three guideposts, courts are exceptionally interested in the first, using five sub-factors to determine the degree of reprehensibility of the defendant's conduct: (1) whether the harm caused was physical or economic; (2) whether there was a disregard for the victim's safety; (3) whether the victim was financially vulnerable; (4) whether the conduct was an isolated incident; and (5) whether the harm was intentional or accidental.

While the Ohio Supreme Court's decision this past summer in *Barnes* was the first to expressly require Ohio's appellate courts to independently analyze the Gore factors when reviewing punitive-damage awards, several Ohio appellate courts had already been doing so for some time. Three pre-Barnes reversals of punitive-damage awards provide some insight into the scenarios in which appellate courts may use the Gore factors to vacate and/or drastically reduce excessive awards.

In one of these three cases, *Blust v. Lamar Advertising Co.*, the plaintiffs sued an advertising company after a tree removal company hired by the company to clear land for the construction of a billboard cut thirty-four trees from the plaintiffs' land, which abutted the land from which the trees were supposed to have been cut. The jury awarded $32,000 in compensatory damages and $2,245,105 in punitive damages. In *Burns v. Prudential Securities, Inc.*, a case arising from a broker's unauthorized reallocation of his clients' investments, based on his fear of a stock market crash, the jury awarded $12.3 million in compensatory damages and $250 million in punitive damages. And in *Winner Trucking, Inc. v. Victor L. Dowers & Assoc.,* the trial court awarded $33,178 in compensation and $214,032 in punitive damages because the defendant, whom the plaintiff had hired to procure insurance coverage for its trucking business, embezzled money that was supposed to pay for the insurance.

In all three of these cases, the punitive damage awards were diminished based on the guideposts established in *Gore*. In *Blust*, the trial court deemed the jury's punitive-damage award excessive and ordered either a remittitur or a new trial. On review, the Montgomery County Court of Appeals found that the reprehensibility factor favored the defendants, the ratio of punitive damages to actual harm was too high given the degree of reprehensibility, and a similar claim arising under an Ohio statute would have netted damages of only $96,000. The appellate court, therefore, ordered a new trial. In *Burns*, the Marion County Court of Appeals found that the reprehensibility guidepost favored the plaintiffs, but still found the ratio of punitive damages to actual harm to be too high given the degree of reprehensibility, and also given that a similar claim arising under an Ohio statute would have netted damages of only $20,000. The court of appeals, therefore, ordered a drastic remittitur of $244 million or, alternatively, a new trial. And in *Winner Trucking, Inc.*, the Darke County Court of Appeals agreed that the defendant's conduct was clearly reprehensible, but decided that the twin aims of punishment and deterrence did not also require the defendant's financial ruin. It consequently ordered a 1/3 reduction in the jury's punitive damage award to create a 1:2 compensatory to punitive-damage ratio.

It remains to be seen whether the Ohio Supreme Court's decision last summer in Barnes will trigger more exacting scrutiny of punitive damage awards by Ohio's courts of appeal. If and when such appellate review occurs, close examination of cases such as *Blust, Burns,* and *Winner Trucking* may assist counsel in identifying the scenarios in which appellate courts may be inclined to reduce or vacate awards that arguably violate a defendant's right to due process.

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Be a Chameleon
Marketing Yourself Internally to Get More Work

By Jameel S. Turner

For most associates in mid-to-large firms, 2008 was a very difficult year. The struggling economy and the cloud of uncertainty created by the presidential election forced many clients to reassess their legal needs and strategies. As a result, those clients needing legal work are reluctant to pay firms to "train" young associates on projects. This forces many firms to keep more work at the partner-level and to include younger associates only on projects with clients that provide a little more latitude.

Accordingly, many young lawyers found themselves scrambling for work in 2008 and failing to hit their annual hourly billing requirement. The good news is that the difficult economic conditions had a similar effect on mid-to-large firms across the board, so chances are that your firm understands the lull in hours was not due to a lack of effort or attendance. Nevertheless, young lawyers need to take this opportunity to reinvent themselves based on the firm's needs and with regard to available opportunities to take on more work.

One way to evaluate your firm's needs is to make a concerted effort to market yourself internally with the goal of getting more work. By taking a proactive approach to internal marketing, you will be in a better position to assess potential gaps in your firm's practice areas –and fit your practice into those gaps. Adhering to the following guidelines will put you in the best position to evaluate your firm's current needs and get more work.

Some of the best advice I received from older attorneys is to "*be a chameleon*." In other words, adjust your work schedule and work product to the audience from which you are seeking work. If you are seeking work from a partner who gets to the office at 7 AM, then you better get to the office at 7 AM. A partner is most likely to give available work to someone who is there when he or she assesses the needs for the day; e.g. first thing in the morning. In addition, make sure you adapt your work product to the type your audience is used to seeing, even if you believe another format is better. Finally, be willing to bring yourself up to speed on a legal issue or topic that is outside of your practice area when the need arises. Partners would much rather have you take the time to research a new issue than spend their own time to do it.

Make it personal. To successfully market yourself internally, make each project personal. When receiving a project, ask thoughtful questions about the client's goal for the project as well as the partner's expectations on timeliness. Turn in projects in person, and seek feedback in person. The more a partner sees your face, the more likely he or she is to remember you when projects arise that relate to your practice area.

Form alliances. Similar to the TV show "Survivor," young lawyers need to seek out and form alliances with one or more partners in the firm. An alliance is an understanding between you and one or more partners that when work is available, the partner will come to you first. Such alliances will serve you well when work is slow, but can be formed only through hard work and perseverance. To lay the foundation for an alliance, take a partner to lunch. Explain to the partner that your goal is to get more work from the partner over time and why you believe you are the right person to be the partner's "go to" associate for simple and complex projects. Just like a client development lunch, it may not pay dividends right away, but over time, through timely and quality work, that partner will note your dedication and will not hesitate to use you.

Perform under the gun. No matter what your practice area, there is no substitute for great work. Thus, the best way to continue to receive projects from a particular partner is to perform quality work under the gun when asked. Partners in all firms universally appreciate quality work completed on time and will give additional work to associates who consistently perform well under tight time constraints.

Tout your successes. Do not be afraid to pat yourself on the back (and allow others to pat you on the back) when you have success in your practice. Whether you received a favorable ruling in an administrative appeal, or had your most recent summary judgment motion granted, let others in the firm know about your success. Use recent success as a platform to inform partners in your firm about your practice areas as well as the type of quality work product you consistently produce. Touting your successes will provide a concrete foundation for a partner's belief in your abilities as a lawyer, a foundation that partner may not have had in the past.

In today's economic conditions, it has never been more important for young lawyers to market themselves internally to get more work. Internal marketing requires time, effort, communication, and follow up, but the tangible benefit of taking the time now to form lasting alliances with partners in your firm will be seen in the increase in your annual billing hours. Beyond that, you will also find that the improved relationships with the partners in your firm that develop as a result of your marketing efforts will provide intangible benefits for years to come.

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Gender Fairness Revisited

By Emily A. Smith

Although women attorneys have overcome huge obstacles in the quest to achieve equality in the legal profession, gender bias continues to be a major concern. Perhaps this explains why nearly half of women lawyers eventually leave the profession, as reported by the ABA Section on Women in the Law.[1] To address gender bias issues facing women attorneys today, the Ohio State Bar Association and Supreme Court of Ohio formed a Special Committee to measure the progress since a report and recommendation issued in 1995 by the Ohio Joint Task Force on Gender Fairness.

The Joint Task Force formed in 1991 to study several areas related to women and the law. The goals were to identify several areas of the legal profession where gender discrimination was prevalent; examine and analyze the root causes of gender bias to raise awareness; and, perhaps most important, make lasting recommendations to eradicate such discrimination.

Co-chaired by former Ohio Supreme Court Justice Alice Robie Resnick and Attorney Carol J. Suter, the Joint Task Force comprised approximately 110 members, from which a Steering Committee of 32 women and men were appointed. Ten subcommittees were created to examine the causes of gender discrimination in the following areas: 1) the courts; 2) workplace lifestyles; 3) bar associations; 4) education; 5) law schools; 6) discipline and disciplinary rulings; 7) domestic relations proceedings; 8) the criminal justice system; 9) research and publication; and 10) grant writing and development.

Addressing concerns of gender discrimination

Each subcommittee developed its own strategy to address the individual concerns of its designated area. For example, the Courts Subcommittee examined the way judges, court personnel, or other lawyers treat women who appear in court as litigants, as well as the role of gender in jury selection and jury instructions. They issued a booklet, entitled Court Conduct Guide, Gender Fairness in the Courts, which made recommendations for gender-neutral language in court documents. The Courts Subcommittee also recommended establishing ethics courses and other educational programs for judges, lawyers, and court personnel, to increase sensitivity to gender issues and promote gender fairness in continuing legal education.

The Workplace Subcommittee conducted a survey of major law firms in five Ohio cities to identify the extent to which gender bias affects the roles of women associates and partners. It made recommendations that encouraged law firms to review existing firm policies and/or implement new policies and procedures designed to address gender fairness issues (e.g., part-time or flex-schedule work policies, marketing funds for women attorneys). The Workplace Subcommittee also published a pamphlet with information on business development tips for women lawyers, entitled Making it Pour: How Women Lawyers Can Attract and Keep Clients.

The Bar Associations Subcommittee created two surveys to examine the role of women in bar associations and facilitate their participation and leadership in organized bar associations. The subcommittee surveyed 112 local and specialty bar associations, and 672 bar association members. It then recommended several action items, including the solicitation of law students to explain the benefits of membership and encourage the pursuit of leadership opportunities in bar associations.

The Law Schools Subcommittee surveyed law students and law school faculty on several issues, such as the different perceptions of male and female students in the classroom, whether bar examinations are gender neutral, and the extent to which gender bias affects course choices and tenure determinations, among other issues. The committee encouraged law schools to examine ways in which they can eliminate the perception that women students suffer from a disadvantage based on their gender and/or race.

The Joint Task Force issued a 100-page Final Report in 1995, in which it described the efforts undertaken by each subcommittee and their recommendations.[2]

Taking the Next Steps

Last year, the Special Committee was formed to review the report and recommendations of the Joint Task Force. The goals of the Special Committee are threefold: 1) measure progress since the 1995 Final Report was issued; 2) determine what remains to be accomplished; and 3) make additional recommendations in light of the committee's findings. Co-chaired by attorneys H. Ritchey Hollenbaugh and Melissa Graham-Hurd, the committee is composed of 26 attorneys from across Ohio and will focus on the four areas discussed above (courts, workplace, bar associations, and law schools). Members of the Special Committee are in beginning stages of formulating new surveys to address these important issues.

While I encourage all attorneys to consider the effect of gender bias in the legal profession, it is especially important for young attorneys (both female and male alike) to acknowledge the reality of gender bias and endeavor to change the perceptions and behaviors that allow it to persist.

1. "Is Your Firm on Working Mother's Best of 2008 List," August 12, 2008.
2. Ohio Joint Task Force on Gender Fairness: A Final Report. Columbus, OH. Ohio State Bar Association (1995).

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Developing a Niche Practice Room for New Lawyers Too

By Michael E. Heintz

As New Lawyers, we are taught to accept all work that comes our way. No project is too far outside our "field," primarily because we have yet to develop an area of expertise. For new lawyers, this is a good rule follow. What better way than to get a variety of experiences and learn new areas of the law than to work on any project or case that is offered? But, just because we are expected to be generalists early in our career, that does not mean we cannot start the process of developing a niche, or other specialized, practice, as we are able.

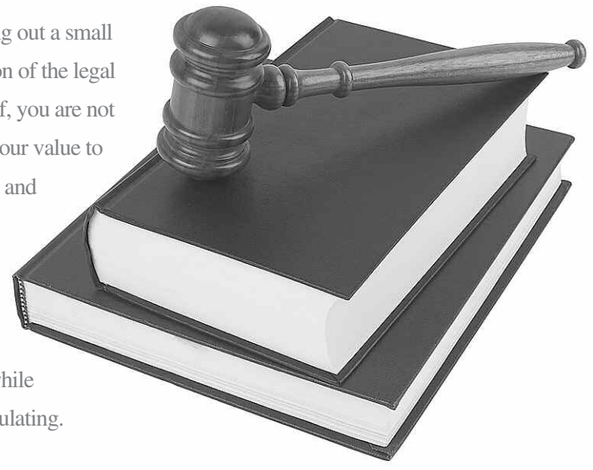
Broadly, niche practices are isolated areas of the law where few attorneys practice. These can be subspecialties of broader areas, such as becoming an expert in the details of the Clean Air Act within the larger bounds of an environmental practice, or they can be completely new areas that are just beginning to emerge, like the developments surrounding electronic discovery. Niche practices can be useful to a new lawyer in many ways. Specialization not only provides a level of job security that accompanies being your organization's resident expert on a topic, but also gives you a head start on business development and marketing opportunities. By carving out a small portion of the legal field for yourself, you are not only increasing your value to your employer and clients, but also helping to ensure you will work in a field you find worthwhile and stimulating.

By developing a niche practice, you are hanging yourself out as an expert in your particular field or subfield. Becoming an expert is no small task, and requires constant work and attention. But, that said, it all starts with a single step: find an underrepresented area of the law that interests you, and start researching. That is, assimilate as much information on the topic as you can. Anything and everything should be reviewed in the beginning. Articles, conferences, law journal papers, case law, legislative language, blogs, and the like are all there just waiting to be consumed. To have a niche practice you need to understand the issues better than anyone else. But, to be a true "niche" practice, it has to be an area that has not already been oversaturated with lawyers. Becoming an expert on drafting interrogatories is probably not going to set you apart from your colleagues. However, developing a fundamental understanding of a brand new and wide reaching piece of legislation may give you a head start when the field fully develops, expands, and clients come seeking guidance.

Once you have assimilated the available information on your chosen topic, start showing people you know, and principally understand, the material. Look for opportunities to publish articles or speak at conferences and seminars. You will start to show yourself as an expert in this new and exciting field, and you will force yourself to think critically on the information while developing your own answers to questions that may arise. At first, you will have to volunteer your services for free or accept bylines in rarely known publications. Trade journals and local or regional conferences are always looking for authors or speakers on new topics, so long as they are relevant to the organization. After some time, once you begin to develop name recognition, you will start to receive directed calls for articles or requests for speaking or panel positions from better known or national organizations. Take every opportunity you can to put your name out in front of the people who may be affected by the area of law. Pay particular attention for opportunities where potential clients may be gathering, such as trade shows or other professional conferences. Lawyers may not always be welcome at technical programs or professional society conferences, so be sure to exhibit your value in attending. Explain why they should consider the developments or new regulations you are describing, and how it will impact their business. Do not be surprised if the rooms are more empty than full at first. New areas of law not previously considered sometimes take extra time to receive undivided attention. You will find that after you have made connections in the field, the opportunities will begin to present themselves on a regular basis, providing you with an opportunity to stay current on the newest developments.

Niche practices can be both rewarding and professionally enjoyable. They help insulate you from decreases in your primary workload by allowing you more control over your practice and provide an outlet to use spare time constructively. Keep in mind, much of your early efforts will be made during your free time, such as evenings and weekends to avoid interfering with the primary obligations to your employer. But, if you find the right area of focus, and commit yourself to understanding the details ignored by others, a niche practice can be an excellent way to secure a productive and enjoyable practice.

By carving out a small portion of the legal field for yourself, you are not only increasing your value to your employer and clients, but also helping to ensure you will work in a field you find worthwhile and stimulating.



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Baseball in Columbus

Time to give this game a ride!

By Joseph C. Pickens

Much has been written about baseball and its indelible link to American history. No sport in America invokes widespread nostalgia like baseball. Baseball is America's game, and the sights, sounds, and experiences of the ballpark never seem to be forgotten. Now, 2009 brings a newfound excitement for baseball in Columbus, largely because of the construction of a new home for the Columbus Clippers, Huntington Park, and their new affiliation with the Cleveland Indians. Columbus provides numerous venues to watch quality baseball, or to personally pick up a bat and step up to the plate. Whether watching or playing, baseball is a fun game that will lead to unforgettable memories of your own.

There's new grass on the field [1]

Spring is right here and there is a buzz this year in Columbus about the new affiliation between the Clippers and the Cleveland Indians. The Clippers executed a contract with the Indians in September 2008, to become the Indians' Triple-A club through the 2012 season, and most expect the marriage to last long beyond 2012. For the many Indians' fans in Columbus, this affiliation will provide a chance to see Indians' stars of tomorrow and veterans spending time in minors. The Clippers' tie to an Ohio major league team comes after a 28-year relationship with George Steinbrenner and the New York Yankees (1979-2006), a two-year affiliation with the Washington Nationals (2007-2008). Over the years many famous major leaguers have worn the Clippers' pinstripes, including Don Mattingly, Derek Jeter, Bernie Williams, Andy Pettite, and Mariano Rivera.

People may be surprised to learn that baseball has roots in Columbus dating back to 1866 with the first organized club, the Buckeye Baseball Club of Columbus. The Club played their games on the corner of Broad Street and Parsons Avenue on the grounds of the Franklin County Insane Asylum. Teams in Columbus subsequently came and went through the years, and in 1932, the St. Louis Cardinals and famous general manager Branch Rickey decided to purchase farmland on West Mound Street to build a new stadium for their affiliate, the Columbus Red Birds. After completion, Commissioner Judge Kenesaw Mountain Landis called the stadium the "finest park in all of baseball." This stadium was later renamed Cooper Stadium, and served as the home to the Columbus Clippers from 1977 to 2008.

Starting this spring, Huntington Park will be a treat to its patrons. It is a state of the art, fan-friendly facility within walking distance to the bars and restaurants of the Arena District. One promise the Clippers made to fans was to keep the cost of coming to Huntington Park comparable to that of Cooper Stadium, and they have followed through on the promise. The Clippers advertise reserved and general admission ticket prices at $10 and $6, respectively. Parking prices in Nationwide-owned garages and parking lots will remain at $3 (except for event nights at Nationwide Arena). For the avid fans, full season box seats are still available at $625 per seat, and 35 and 20 game partial box seats can also be purchased ($350 and $220). Party suites are available for groups of 12 to 20 people, and afford a convenient outlet for a firm, friend, or client gathering. As compared to the prices for viewing some of the other popular sporting events around town, the Clippers are a bargain. The home opener is April 18, 2009.

In addition to the Clippers, baseball can be watched at the highest college level with the Ohio State men's baseball team at Bill Davis Stadium and the women's softball team at Buckeye Stadium (new in 2009), both on the Ohio State campus. Men's baseball is Ohio State's oldest varsity sport, dating back to 1881, and they have won 14 Big Ten titles and 1966 National Championship. The Big Ten Conference men's baseball tournament will be held at Huntington Park from May 20 to May 23. An exciting alternative to men's baseball is women's softball, where it is said that a batter's reaction time to the underhand fast pitch is akin to attempting to hit a 95 mile per hour fastball.[2]

Put me in coach – I'm ready to play today

As new, ambitious, and anxious-to-perform lawyers, the above-referenced phrase may take on a variety of meanings. Within the baseball context, Columbus and the surrounding suburbs provide ample opportunities for individuals of all ages and skill levels to join in the action themselves. The City of Columbus sponsors softball leagues of varying competitiveness in many locations, including mixed-gender leagues. The "Lawyers League" at Berliner Park has been a summer tradition for many in the Columbus Bar for decades. Information regarding the various leagues and opportunities in Columbus is at www.crpdsports.org.

In years past, my firm has sponsored teams in Columbus's mixed-gender recreational leagues at Berliner Park. We entered our teams in the leagues where prior softball experience was not a necessity, and our only goal was to have fun. These games, including the fellowship over pizza and beverages afterwards, were a great way to get to know co-workers, including staff, on a more personal level and build firm camaraderie.

A-roundin' third, and headed for home…you know the time is now

With its new downtown location, Huntington Park will provide accessible opportunities to network with colleagues and entertain clients, without breaking our wallets. As new lawyers, it seems we are constantly reminded of the importance of networking and building relationships. Huntington Park can be used as a tool to facilitate these endeavors and have fun in the process. To quote the famous actor Humphrey Bogart, "a hot dog at the ball game beats steak at the Ritz."

1. All italicized phrases are quotes from the lyrics of Centerfield, by John Fogerty (1985, Warner Brothers).
2. All information regarding the Columbus Clippers, Huntington Park and Columbus's baseball history was taken from the Clippers' website at www.clippersbaseball.com, and information regarding Ohio State baseball/softball was gathered at www.ohiostatebuckeyes.com.

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Associates:

Slackers or Superstars?

By Janica A. Pierce Tucker

With many of the media headlines referring to major law firms laying off attorneys, and asking the question whether law firms will survive this economic implosion and persevere through this financial crisis, the topic of the value and worth of associates becomes a point of discussion. A 2008 survey conducted by The American Lawyer addressed the perception that "today's associates are a bunch of slackers."[1] We have heard this comment numerous times from law firm leaders. For example, we all know the story from our grandparents how they walked to school barefoot, through twelve feet of snow, and left four hours before school started to get there on time. The same is being said by law firm leaders that associates do not work as hard as they did, associates are less-committed than they were, and they only care about work-life balance. Are these perceptions truths or myths?

The term "slacker" has been defined as a person who shirks work or duty, a person who can be described as one who is perceived to be disaffected, apathetic, cynical, or lacking ambition. We would all agree that the term slacker can be used to describe, for example, the attorney in the New York office of an international firm who wanted others to think he was working late, but the office lighting automatically dimmed when he left the room, so he purchased an oscillating fan to trick the motion detectors to keep the lights on.[2]

The survey respondents conceded that some of the associates in our generation are lazy, expect big salaries, and a nine-to-five work day, but more of the respondents believe that associates are working just as hard as our predecessors, considering the changes that have occurred in the practice of law. Technology, such as email and the Internet, allow associates to be more accessible than our predecessors, which is said to make the practice of law more efficient. In addition, there is also a movement away from face time in the office as associates take advantage of cell phones, BlackBerrys, fax machines, and high-speed Internet connections that provide a virtual office at any location.

Interestingly, respondents conceded that associates might have a different attitude toward work. I know when I converse with some of the elders in the practice, they speak of this "entitlement theory" that our generation embraces. The difference in attitudes from one generation to another may be attributable to the improbability of an associate making partner, as some respondents referred to the odds of a partnership as a "crapshoot." Some associates are placed in positions where partners pile on work without any guidance, feedback, or direction that will help the associates develop as better lawyers. This lack of motivation and excitement from the overworked associate without gratification may translate in the eyes of a partner as a slacker. Without partnership as a focal point, what prize are associates looking for?

Further, are we dealing with a misperception among law firm partners that associates are slackers in light of how value is placed on family versus work? The term work-life balance is the buzz concept for our generation. It is far more often that younger lawyers are not willing to kill themselves for partnership, and are similarly not willing to dedicate their entire lives to nothing but the law. Conversely, most associates want to position themselves to be successful, but strive very hard to have a personal life, and not to constantly make sacrifices within their personal lives in order to move their career forward. Most associates' families struggle with dual careers as both spouses work long hours in the office, along with the added responsibilities at home. Alternatively, older partners, who are predominantly male, had fewer responsibilities outside the office and, therefore, were in a position to commit more time in the office, which contributes to a division between the generations. This type of attitude has been criticized by some firms, but has also been embraced by others in offering part-time partnership opportunities and flexible hours.

The value of a balanced life includes family, community involvement, and pro bono work that is taking some of associates by storm. Because all of these differing opportunities may not have been available to the law firm leaders, it seems as though this perception of slackers is underrated.

I am more optimistic, and believe there are more superstars among us than slackers. Associates are taking a different approach in pursuit of success than our predecessors. It is probably true that the law firm leaders today heard complaints from their leaders when they were associates, and when mid-level associates now become partners they will complain about the associates who are coming up the ranks. Maybe these perceptions keep us on our toes and will continue to be a part of the conversation as our workforce environment and demographics continue to change. All that said, some words of wisdom: if you truly are a slacker, in light of our economy, consider changing. For all the superstars, you must continue to work through these perceptions, until you are in a position to voice your own gripes.

1. The American Lawyer, "Ranking the Firms," August 1, 2008, available at: http://www.law.com/jsp/tal/PubArticleTAL.jsp?id=1202423415985 (last visited January 28, 2009).
2. Deborah Cassens Weiss, "How Two Lawyers Managed to Look Busy," ABA Journal Law News Now, January 26, 2009, available at: http://abajournal.com/news/how_two_lawyers_managed_to_look_busy/ (last visited January 28, 2009).

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Janica A. Pierce Tucker,
Chester Willcox & Saxbe

Practice Makes Perfect Poll

The Obama Administration

By Brianne Brown

On January 20, 2009, Barack H. Obama became the 44th President of the United States. His inauguration was an event of monumental historical significance watched by millions around the world on television and the Internet, not to mention the well over one million attendees who gathered live in Washington, D.C. In his Inaugural Address, President Obama stated, "The state of the economy calls for action, bold and swift, and we will act – not only to create new jobs, but to lay a new foundation for growth. We will build the roads and bridges, the electric grids and digital lines that feed our commerce and bind us together. We will restore science to its rightful place, and wield technology's wonders to raise health care's quality and lower its cost. We will harness the sun and the winds and the soil to fuel our cars and run our factories. And we will transform our schools and colleges and universities to meet the demands of a new age." Regardless of political affiliation, everyone can agree that President Obama's inauguration marks a period of change in our country and in the world. We asked a sampling of lawyers their thoughts on the new Administration:

"In light of the inauguration of President Obama, how do you think the new presidential administration will affect your practice area?"

My practice area is primarily representing companies in labor relations issues. There are many bills currently waiting for the Democratic Congress and President to pass that would make it much easier to organize unions throughout America. From that standpoint, I anticipate an increase in business dealing with organizing attempts and collective bargaining agreement negotiations. Unfortunately, an increase in business for me means that my clients are in dire straits and face a substantial decrease in business and competitiveness for themselves.

Matthew D. Austin
Mason Law Firm Co., LPA

The Employee Free Choice Act (co-sponsored by Obama) could have a significant impact on employers under the NLRB. In its current form, the Act eliminates secret- ballot elections and allows union representation based on signed cards. When an employer and a newly elected union are unable to reach an agreement on the terms of a first contract, the Act provides that the terms will be set by federal arbitrators. Under current law, a union trying to organize employees can't guarantee them a contract if they win. If passed, the Union will be able to guarantee a first contract and probably use promises they may be able to obtain through the arbitrator as campaign material. Also, the cost of preparing for these arbitrations will be passed onto the employer.

As a public sector consultant, the idea of an arbitrator imposing contractual terms is familiar (ORC Chapter 4117) with regards to Ohio safety-service (non-strike) units. It will be interesting to see if this cost of business is now passed onto private sector employers.

Brian Butcher
Clemans Nelson and Associates, Inc

I am most enthusiastic about the Obama administration's eye toward consumer bankruptcy reform, especially during these times of economic turmoil. Though there are few details now, it is widely expected that the President will eventually introduce or otherwise lend strong support to legislation relaxing at least some of the major consumer bankruptcy restrictions imposed in the code's 2005 overhaul. For the past three years, middle class debtors have had to maneuver through a complicated and unrealistic formula (the infamous "means" test) to qualify for a Chapter Seven liquidation. In the event they have "some" ability to repay, they are forced to convert their case to a Chapter 13 or alternatively have it dismissed by the Court for "abuse." Unfortunately, many families are unable to reconcile the cold calculations of disposable income in the means testing analysis with their actual budgets, such that a Chapter Thirteen conversion is an unlikely alternative. It is certainly my hope that the new administration takes a thorough look at the Bankruptcy Code before fashioning its economic recovery plan.

Mark G. Kafantaris
Kafantaris Law Offices

I expect to see my area of practice affected. As an estate-planning attorney, I am interested in the federal estate tax. The federal estate tax exclusion amount and tax rate are going to be addressed sooner rather than later. Here is a link to my blog that covers the topic and provides a link to a Wall Street Journal article.
http://wrightsel.blogspot.com/2009/01/no-surprise-obama-planning-to-block.html

Brad Wrightsel
Wrightsel & Wrightsel

In my practice area, I am expecting new initiatives to slow the pace of bank foreclosures. I believe the new Administration will get behind initiatives in Congress to modify the bankruptcy code to allow judicially ordered first mortgage modifications.

Michael O'Reilly
O'Reilly Law Office

The Obama Administration will have a sweeping impact on the employee benefit world, particularly on retirement savings. Obama plans to "strengthen retirement savings" by implementing numerous changes. For example, Obama promises to create automatic workplace pensions/retirement vehicles. Employers who do not currently offer a retirement plan to employees will be required to enroll employees automatically into a direct-deposit IRA account (employees may opt-out if they choose).

The initiatives proposed by the Obama Administration will affect every employer. I expect our clients, and all employers, to have questions about their fiduciary obligations under ERISA and the costs associated with implementing Obama's retirement savings initiatives. Employers must now reexamine their retirement vehicles, or lack thereof, and ensure that employees are properly educated on their retirement investments.

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Brianne Brown,
Ohio Auditor of State Legal Division

Obama's Election

A Salute to the Civil Rights Movement

By The Honorable Laurel A. Beatty

Barack Obama, an African American man, was sworn in as the 44th President of the United States of America. Millions of Americans, whether or not they voted for Obama, recognize this as a milestone in a long, often tragic journey to freedom and equality for the nation's African Americans. The 2008 Presidential campaign dispelled the myth that politics is a cynical enterprise. Not to be naïve about the candidates, but the process of democracy — argument, debate, the private and silent casting of votes in record numbers — is something to behold and cherish. The fight for participation in the process is what makes President's Obama's election so special for so many.

Throughout the long campaign season, I often thought of many of my relatives whose lives were impacted by inequality and fought in the civil rights movement. It was during my great grandmother Mayme Moore's lifetime that women got the right to vote. I remember the picture of her packing up the entire family to go to the March on Washington, and the picture of her just steps behind Martin Luther King, Jr. when he delivered his "I Have a Dream" speech.

I think about my grandparents' restaurant, The Novelty Food Bar, that was an extremely popular restaurant for African American Columbusites. But my grandmother, Myrna Moore Beatty, pointed out that part of its success was because Columbus was still segregated, and African Americans' dining options were few. I recall the stories of what a big deal it was that my father was admitted into The Ohio State University's law school, as there were very few African Americans or women in those halls in the 1960s. There are multitudes of stories from aunts and uncles about segregated swimming pools, water fountains, and not being able to stop for bathroom breaks on road trips for fear they would stop in the "wrong place."

Although I was young when I heard these stories, I realize just how recent these stories are in our history as many, in fact most, of the people who told them are still alive. Placing events into the lifetime of one who is standing in front of you puts them into a different perspective. Nonetheless, as the threats, insults, bombings, and murders increased, my relatives marched and were jailed, hosed down, and bitten by dogs all in the name of equality.

Many African Americans involved in the civil rights movement say that progress was made January 20, 2009. It would be a hard-bitten cynic who did not allow that, forty years after separation by skin color was still a shameful fact of life, the election of Barack Obama changes life in America, even just a little bit. Even though when Barack Obama was born many African Americans had to pass a literacy test, stand in unmoving lines, or get beaten or jailed to vote, that struggle was not in vain. Much remains to be seen about President Obama's administration. But the achievements, the arguments, the what-ifs, the fear of disappointment – these are not for now. The essential point about President Barack Obama is the privilege of being able to write this sentence. Thanks to everyone of all races, colors, creeds, and political affiliations who got us to this point.

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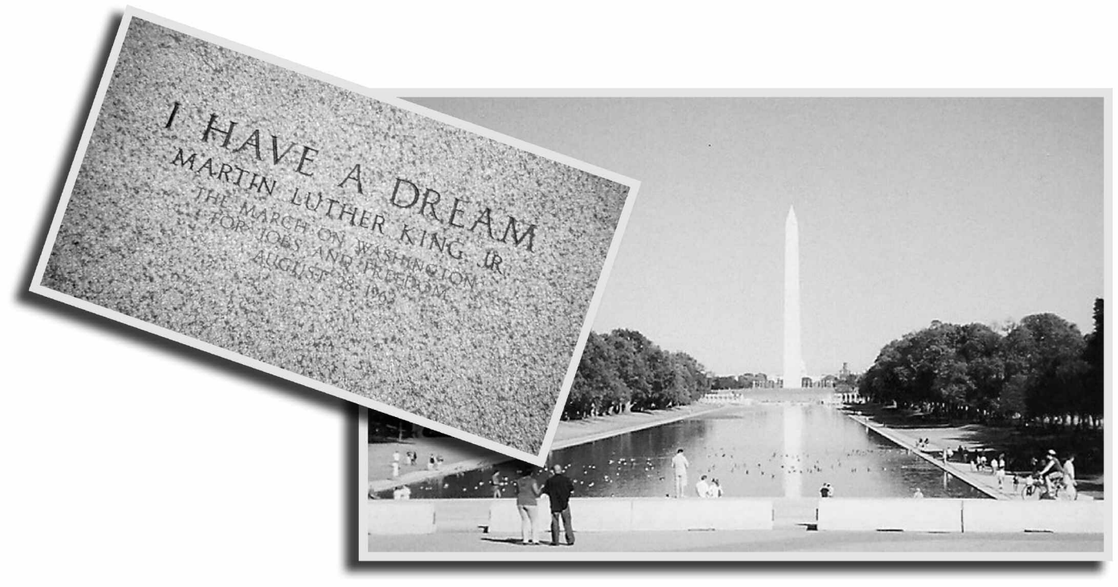
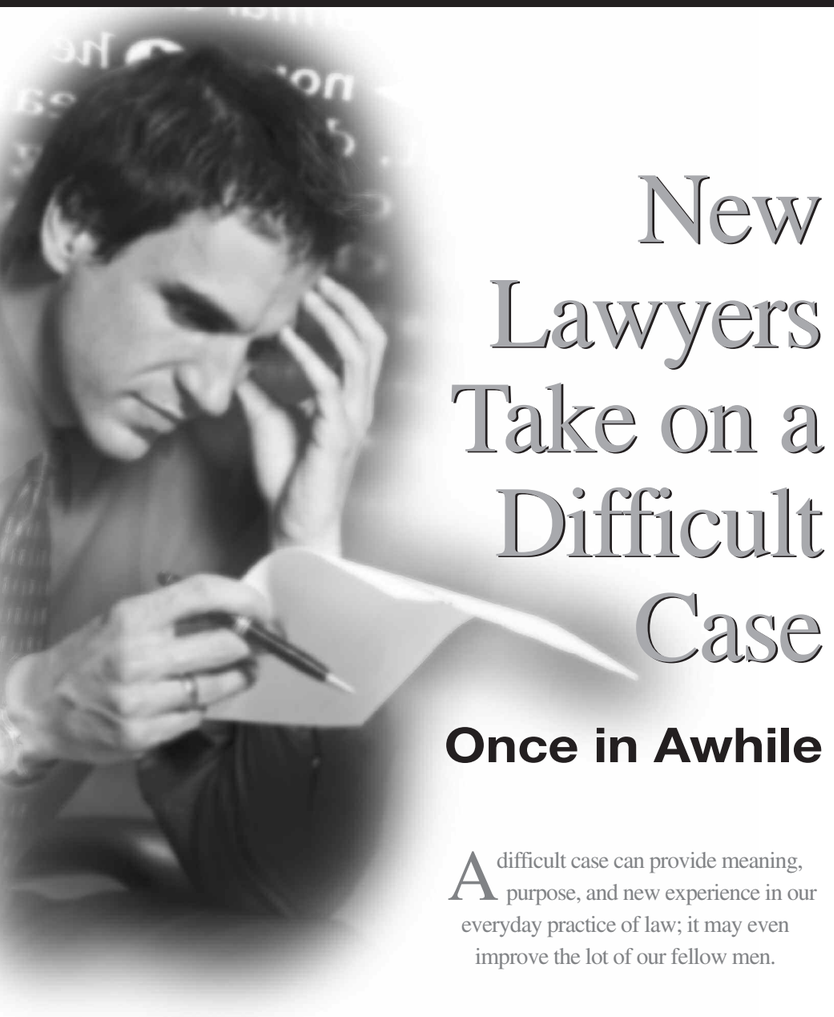
The Honorable Laurel A. Beatty,
Franklin County Court of Common Pleas





New Lawyers Take on a Difficult Case

Once in Awhile

A difficult case can provide meaning, purpose, and new experience in our everyday practice of law; it may even improve the lot of our fellow men.

By Mark Kafantaris

"Stay away from difficult cases," an old lawyer told a fellow who just passed the bar. The young man looked back at him and smiled, trying to figure out what he meant. He was eager to take whatever would come his way – easy or hard. He did just that as the years passed by, and soon other lawyers would refer him all the "dogs" that came to their doorstep. He tirelessly plowed along, oftentimes neglecting himself and his family, as files piled around the floor bulging with deposition transcripts, exhibits, memos, and briefs.

He could have made more money, with fewer headaches, had he stuck to ordinary and routine legal work. He certainly could have been home for supper instead of burning the midnight oil in the law library, or toiling through the night on a brief or memo. "So, I guess you would have done it differently," I asked. "Nah," he replied. "Those cases got me through the everyday stuff."

To be sure, novel or unusual cases can be fulfilling for young lawyers seeking meaning in their work. It can be exhilarating to release a prisoner with a habeas corpus petition because his poverty prevented him from paying his fines and costs. It could even be amusing if the judge tells you "he's not indigent, he just got a welfare check. Besides, you've only given me [U.S.] Supreme Court cases—nothing from Ohio."[1]

Most of the time, however, these cases have bad facts, unclear law or unsavory defendants. You are either fighting in the dark or going against the grain. Cases that are clearer are nonetheless voluminous or unwieldy—overwhelming even to resourceful firms, let alone a young lawyer. Yet these cases beckon us to take them when no one else will. Should we turn them away or should we take heart in the words Richard Nixon who said, "If [you] determine to win, if [you] accept no substitute for victory, then victory becomes possible. Then spirit gives edge to the sword, and the sword preserves the spirit…." Regardless of one's perception of Nixon, he understood our need for purpose well and was certain to fill his own life with some fight until his death. For him, purpose was best defined by struggle–regardless of whether the battle was ultimately won. He could imagine nothing worse than living life casually and without toil.

If it is true that need is the mother of invention, then perhaps it is also true that difficult cases are the vehicles for presenting needed legal solutions to emerging disputes. Indeed, our common law developed precisely this way with the help of resourceful lawyers advocating for the extension, modification, or outright reversal of existing law. Such seemingly insurmountable odds were at stake for Donald MacPherson's lawyers, who successfully convinced Judge Cardozo to abandon the well-established requirement of privity in product liability cases.

This kind of perseverance does not mean that we should abandon reason and common sense. Prudence and accommodation are paramount according to Abraham Lincoln, who advised lawyers to "discourage litigation" and peacefully resolve disputes wherever possible. Cooperation naturally leads to a working degree of foreseeability amongst lawyers, and allows us to make a living by advising our clients on what to expect from our opponents. This does not mean, however, that we should automatically run away from what is considered odd, difficult or perhaps unpopular. After all, a good deal of our most precious Fourth Amendment rights are regularly clarified in felony cases, involving the most loathsome of defendants.

Four hundred years ago, Alexander Pope told aspiring poets "be not the first by whom the new is tried, nor yet the last to lay the old aside." This may apply by analogy here as well: Be not the first by whom a hard case is tried, nor be the last to lay it aside. A difficult case can provide meaning, purpose, and new experience in our everyday practice of law; it may even improve the lot of our fellow men.

1. This was reportedly said to attorneys in chambers by the late Judge Young of the Warren Municipal Court approximately 20 years ago.

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Making CLE Seminars Meaningful

Is That Even Possible?

By Matthew D. Austin

Continuing Legal Education is both a benefit and bane of our profession. Depending on where you are in your career, you will likely have different opinions as to the benefit of CLEs.

Beginning practitioners consider CLEs a tremendous benefit, but for the wrong reason. Akin to an unexpected snow day when you were in school, CLEs are a day off from work. Newly minted lawyers review a handful of websites that offer CLEs, and eagerly await their daily mail for CLE advertisements (which, incidentally, is the only mail new lawyers receive) hoping to find just the right seminar that a supervisor will approve.

The seminar must be close enough to comply with the firm's travel policy. It must also be relevant enough so when you approach the approving supervisor you can say with a straight face why going to that seminar is worth the investment. The seminar must not cost too much, or at least you have to be mindful of your CLE budget if you have one.

After the administrative requirements are met, and the "free day" obtained, the young practitioner arrives at the CLE – usually with friends who have also coincidently secured the day off from their offices – signs in, asks "when do I get to fill out that I attended this seminar," receives the written materials, heads to the free continental breakfast station, and picks a seat in the back of the room.

The actual CLE itself is oftentimes over the heads of new lawyers by citing cases and theories they do not know, using terms they have not learned, and delving a bit too deeply into legal theories for an attorney who spends his day doing document review or legal research in preparation of drafting a motion for summary judgment.

When this happens, new lawyers begin writing notes to each other on the paper provided at each chair or texting their friends sitting two rows in front. At the end of the day, tired and bored, the young lawyer dutifully fills out the paper confirming his attendance and leaves with his not-yet (and probably not-ever) opened seminar materials.

But who does this benefit? Sure, you get a "day off" from work, but calling in sick would achieve the same purpose and you would avoid the boredom of a useless CLE. And let's face it, sitting at a CLE is not exactly the same as having a free day off from work. Making the most of each CLE you attend will pay off tremendously for you in the future.

First, only go to CLEs that will benefit your practice at your experience level. Just because you do litigation, do not go to a seminar about advanced deposition skills of cross-examining an expert witness if you have not ever taken a deposition or your deposition time is limited to defending depositions or taking the testimony of non-key witnesses. Stick to a more beginner level seminar where you'll learn just the nuts and bolts of depositions, like going on and off the record, using exhibits in depositions, the number of hours permitted for a deposition, if and when you can continue a deposition, and related topics.

Second, be sure you pay attention throughout the entire seminar. If that means going to a seminar by yourself, do it. Treat the CLE like an academic class and take notes throughout the entire presentation. Whatever you have to do to pay attention will greatly benefit you for the next step.

Third, prepare a written summary of the CLE. Someone else prepared the materials you received at the CLE, and you will likely not read the 150-page handout after the seminar. Use the notes you took during the seminar and turn them into something that will be useful to you in a few years. For a beginner's deposition CLE, your notes may include remembering to have the deponent sworn in, the ground rules of depositions, what to do if the other side objects, how to make a continuing objection, how to request documents not previously provided to you, when should you get the judge on the phone, and the difference between all the different types of transcripts you can order. Having your own notes will be valuable the first few times you take a deposition, whether that is a few weeks or years after the CLE.

Last, personally discuss the CLE with the supervisor who approved your attendance. Let that supervisor know what you got out of the seminar, and show or her your summary. Ask if, based on her experience, there is anything missing from your summary and revise it accordingly. Your follow-up with her will not only impress her, but will likely facilitate you doing less document review and more deposition preparation, or even taking some minor depositions, yourself.

Do not worry. As you move into the next phase of your career, CLEs will become more meaningful to you. You will learn those terms and theories you do not understand now. You will know many more people in the room, and it will be a way of seeing old friends and networking with other attorneys. You will even realize that you, too, could give that seminar and validate that you are in fact becoming a "real lawyer."

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Matthew D. Austin, Mason Law Firm

Legal Movies
The Best of the Best

By Francisco Luttecke & Bridget Purdue Riddell

After this unusually long and cold winter, Spring is finally here and summer blockbuster movies are on the horizon. In this spirit, we have compiled a list of our ten favorite legal movies that every young attorney should see (in no particular order).

To Kill A Mockingbird (1962). Few legal movies are truly great films. However, Mockingbird is one. Based on the Pulitzer Prize-winning book of the same name, it remains a timeless classic, and the gold standard for legal movies. From Gregory Peck's Oscar-winning performance to a young Robert Duvall as Boo Radley, "To Kill a Mockingbird" is a must-see for anyone with even a passing interest in the law, and especially for lawyers. If only all of us could be as good as Atticus Finch.

12 Angry Men (1957). Sidney Lumet's classic film focuses on one jury's deliberations in a capital case. Henry Fonda stands as the lone dissenting voice, reminding us why we should read dissents as closely as majority opinions. Depending on each viewer's perspective, the movie is as much an indictment of the jury system as it is a defense of it. Over half a century later, Lumet's version stands the test of time. Lumet's was a film adaptation of play by the same name, made first for television, and then for the big screen. Since then, there has been an Indian version (1986), a U.S. television remake (1997), and a Russian version (2007). Whatever its history, however, Lumet's 12 Angry Men stands as the original, and the best.

Philadelphia (1993). Jonathan Demme directs a story inspired by real life attorney Geoffrey Bowers' firing from a prominent law firm, in Hollywood's first serious look at AIDS. Tom Hanks won the Oscar for his stunning lead role as Andrew Beckett. Starring Hanks and Denzel Washington, and featuring music by Neil Young and Bruce Springsteen, Philadelphia follows one man's remarkable and moving search for justice in an imperfect world.

A Few Good Men (1992). Before Suri, Oprah's couch, and feuds with Brooke Shields, Tom Cruise starred in one of his best roles as Lt. Daniel Kaffee in A Few Good Men. Cruise's "You can't handle the truth" cross-examination of Jack Nicholas quickly became a classic moment in legal movie history.

Defending Your Life (1991). In this film, Daniel Miller (Albert Brooks) dies and is sent to a purgatory-like hotel and conference center for judgment. He is assigned a defense attorney who helps him present a tough case to the court as to why he should be allowed into heaven. During the course of his trial, he falls in love with Julia (Meryl Streep), a humanitarian in life who is coasting through her own trial en route to heaven. Maybe there are some collateral benefits in the afterlife to a career in litigation after all.

Erin Brockovich (2000). Julia Roberts plays the lead in the true story of a file clerk who takes on a company suspected of poisoning the water in a small town. Roberts shines in this Oscar-winning story of how the law can bring justice to a community.

Un coupable idéal (Murder on a Sunday Morning) (2001). A good documentary tends to progress like a trial, with the audience entering the jury room once they leave the theatre. Murder on a Sunday Morning is a stunning and disturbing closing statement on race and the American criminal justice system. Filmmaker Jean-Xavier de Letrade, trained in law and journalism in France, tracks the arrest and trial of a 15-year old African-American in Jacksonville, Florida. With incredible access to the case, de Letrade crafts a documentary guaranteed to keep you on the edge of your seat until the shocking finale.

The Verdict (1982). Alternating between his own personal problems, and those created by opposing counsel and a difficult judge, The Verdict examines one attorney's quest for redemption in life through justice in the courtroom. Paul Newman offers a fantastic performance as a troubled attorney who gets handed a "moneymaker" of a medical malpractice case.

Gideon's Trumpet (1980). Based on the book by the same name, Gideon's Trumpet recounts the true story behind the landmark Supreme Court case of Gideon v. Wainwright, extending the 6th Amendment right to counsel to the states. Henry Fonda stars as Clarence Earl Gideon who fought for his right to counsel from his prison cell.

A Time to Kill (1996). For almost a decade, pop cultures' legal knowledge came almost exclusively from John Grisham. Taut, well-paced, and emotionally charged, Grisham's account of a vicious crime in Mississippi, and its social and legal repercussions unfolds largely in the courtroom. Joel Schumacher elicits excellent performances in this exciting and thoughtful film.

Honorable Mentions: Primal Fear, Music Box, The Trial, And Justice for All, The Devil's Advocate, A Civil Action, My Cousin Vinny, Find Me Guilty, The Accused, In the Name of the Father, North Country, and The People v. Larry Flynt.

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Everyone's Doing It:
Go Green or Be Left Behind

By Nicole VanderDoes

What's the newest trend at many law firms? Going green. Even if it is sometimes a PR gimmick, its benefits cannot be denied, and you do not want to be left behind.

More and more Columbus law offices are going green, and small changes in how you practice can make a big difference.

The American Bar Association and the United States Environmental Protection Agency initiated the ABA-EPA Law Office Climate Challenge in March 2007 to encourage law offices to undertake a variety of best practices and to recognize those that do so. In Columbus, Bricker & Eckler, Luper Neidenthal & Logan, and Porter Wright Morris & Arthur are all Climate Challenge Partners. To become a Climate Challenge Partner, participating law offices can follow one of three tracks: adopt best practices for office paper management by reducing paper use, increasing recycled content in paper purchased, and increasing recycling; purchase energy from renewable sources; or purchase ENERGY STAR office equipment.

Even if firms are not ready to make the commitment to become a Climate Challenge Partner, the program offers many ideas about how to begin implementing green practices. Firms are finding that once they take small steps towards sustainability, it is not only socially responsible, but it is good for business as well. Simple changes like double-sided copying or using compact fluorescent light bulbs can directly lower expenses, and a commitment to sustainability can help attract clients.

After Porter Wright took some simple steps to go green, they began to wonder what else they could do to a significant impact. According to partner John Rohyans, the firm pursued options to make it greener because it was "the right thing to do as a good citizen." For Porter Wright's efforts to be meaningful, it was important for the entire firm to be on board. The firm hosted a Go Green launch at all six offices where it introduced employees to the initiative. At the Go Green launch, employees received a canvas shopping bag, reusable coffee mug, compact fluorescent light bulb, and other environmentally responsible items that employees could use in their everyday lives.

Now, many Porter Wright employees use the canvas bags for their grocery shopping or for bringing items to and from the office each day. Porter Wright has cut cup consumption almost in half, eliminating the use of Styrofoam cups, and replacing them with reusable mugs and compostable cups. By creating opportunities for all employees to have an impact on a daily basis, Rohyans says, "It has been amazing to see how much buy-in there has been firm-wide and how this initiative has built morale." The firm's commitment to green practices internally is also the foundation for providing services to clients who have a need or desire for related legal services.

Bricker & Eckler's Green Strategies Group provides comprehensive legal services to the firm's clients with an eye towards green issues. Partner Maria J. Armstrong explains that this multidisciplinary group is able to "help clients 'go green,' which includes everything from funding, to bonding, to construction, to LEED planning, to zoning, to contracting, as well as traditional environmental issues." Pooling the resources of more than a dozen practice areas allows the firm to take a broad approach to going green.

Luper Neidenthal & Logan, which was the first Ohio law firm to be recognized as an ABA-EPA Climate Challenge Partner, won the SWACO Board of Trustee's Emerald Award in 2008 for unprecedented achievements in environmental stewardship and leadership. Among other efforts, SWACO recognized Luper Neidenthal & Logan's development of proprietary software that allows the firm to operate an almost entirely paperless office. Shareholder David M. Scott says, "It's not just about our sustainability practices, or 'going green;' it's about the big picture: supporting local businesses, buying locally grown or produced products, being an active member of the Columbus community, partnering with businesses with similar values, and making a long term commitment to being a responsible world citizen."

Continuing to "walk the walk," Luper Neidenthal & Logan celebrated its 40th anniversary at the North Market, and partnered with The Greener Grocer and Two Caterers to offer fresh, seasonal, local food to guests, much of which came directly from North Market merchants, and was served on compostable dinnerware. The evening included a silent auction benefiting Local Matters, a non-profit whose mission it is to build demand for, and increase access to fresh, local foods in central Ohio.

Are you ready to go green?
Here are ten easy ways to get started:

- Implement a double-sided copying and printing policy
- Switch from Styrofoam, or even paper cups, to reusable mugs
- Stop using bottled water and switch to using a water purification system
- Whenever you need to replace office equipment, buy more efficient ENERGY STAR certified equipment
- Do not print emails or other electronic documents unless necessary
- Encourage your office to recycle plastic, glass, cardboard, and other items
- Buy recycled content paper, and recycle the paper you use
- Set your computers and monitors to power-down when not in use
- Try to use natural light where possible, and use compact fluorescent lights instead of incandescent or halogen lights
- Use refillable toner cartridges and rechargeable batteries

While not every firm is ready to make sweeping changes, incremental steps now can be the beginning of larger efforts later. Chances are, every office can improve, and each lawyer can make a difference.

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Nicole VanderDoes, Luper Neidenthal & Logan

LEGAL WRITING TIP FOR SPRING

Increase your document s readability by using party names and putting citations in footnotes

By Jameel S. Turner

I recently attended a legal writing seminar with Judge Mark Painter, where the concepts of using party names over procedural titles and placing citations in footnotes were addressed. After listening to Judge Painter's arguments, as well as reviewing several passages demonstrating Judge Painter's arguments at work, I am a believer. Judge Painter's goal in utilizing these concepts in legal writing is to increase the clarity and readability of legal documents, which Judge Painter describes as "atrocious."[1]

Judge Painter's seminar touted the use of party names – verses procedural titles – in order to increase clarity in legal documents. According to Judge Painter, when we use procedural titles (i.e. plaintiff/appellant, defendant/appellee) we force the reader to translate those terms to understand what we mean. In addition, while the procedural titles may change throughout the resolution of the case, the party names remain the same. Using party names also humanizes your client, even if your client is a corporation.[2] Try using party names as opposed to procedural titles in your own work and note the increase in clarity and humanization.

Judge Painter also argued that lawyers forfeit a document's readability by including cites in the body of the text, rather than in footnotes. Placing the clutter of letters and numbers in footnotes results in increased flow between sentences and saves a great deal of space because footnotes are often in smaller type. Judge Painter offers one caution to this proposed rule: if you have a seminal case that you will continue to refer back to, put the *case name* in the body of the text and the *case cite in a footnote*.[3] In my view, any legal memorandum written for internal use should always place the citations in footnotes because of the resulting increase in readability. For more formal legal documents, consult the local rules of court to ensure the practice is not prohibited before using it.

Contrary to popular opinion, lawyers do not only write for other lawyers or judges. Because that is the case, lawyers should strive to be understood by lawyers, judges, and nonlawyers alike. Nonlawyers may not necessarily have the ability to look up citations; but if we take citations out of the body of our documents, they might be able to read what we write.[4]

1. Painter, Mark P. 40 Rules for the Art of Legal Writing. (3rd Ed. 2005).
2. Id.
3. Id.
4. Id.

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Jameel S. Turner, Bailey Cavalieri

Calendar

April 28 - Lunch at the Bar with the Common Pleas Court Judges
Sit down for a roundtable chat with our friendly judiciary over lunch. You'll be able to discuss practice, in and out of the courtroom, with a small group of your peers and one of the judges over an informal lunch.

May 5 - Leadership Academy: Playing Well with Others

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Piercing The Corporate Veil

THE MORE THINGS CHANGE . . .

By David C. Levine

Long ago, in a time more quaint than our own, the Ohio Supreme Court issued a decision explaining with commendable clarity what a plaintiff would have to prove in order to pierce a corporate veil and hold a shareholder liable for the actions of a corporation. The case was called North v. Higbee Co., 131 Ohio St. 507 (1936), which concerned a sublease of ground by the lessor to the Higbee Realty Company, which further subleased for ten years to the Higbee Company, which operated the venerable Cleveland department store and also happened to be the Higbee Realty Company's parent corporation, complete with an interlocking directorate.

At the end of the ten-year sublease to the Higbee Company, the Higbee Realty Company defaulted on its lease (it was, after all, the Great Depression), and the Higbee Company found itself the defendant in a lawsuit. The plaintiffs in the suit wanted to hold the Higbee Company liable for the debt of its subsidiary, the Higbee Realty Company, on an agency theory, but the Ohio Supreme Court would have none of it. The Supreme Court held that "[t]he separate corporate entities of a parent and subsidiary corporation will not be disregarded and the parent corporation will not be held liable for the acts and obligations of its subsidiary corporation . . . in the absence of proof [1] that the subsidiary was formed for the purpose of perpetrating a fraud and [2] that domination by the parent corporation over its subsidiary was exercised in such manner as to defraud complainant." Finding no evidence of fraud in the formation of the subsidiary, the Supreme Court did not permit the veil to be pierced.

Almost 60 years later, the Ohio Supreme Court was asked to revisit the test for piercing the corporate veil in a dispute involving a condominium owners' association and the developer of the condominium. *Belvedere Condominium Unit Owners' Assoc. v R.E. Roark Cos.*, 67 Ohio St.3d 274 (1993). Two lines of cases had evolved since *Higbee*, one line following *Higbee* and the other following the Sixth Circuit case of *Bucyrus-Erie Co. v. Gen. Prods. Corp*., 643 F.2d 413 (1981). According to the Supreme Court, the two lines of cases were irreconcilable. In *Belvedere*, as courts are wont to do when they are about to overrule long-standing precedent, the Supreme Court discussed the history of veil-piercing doctrine. It characterized the *Higbee* test as a two-part test requiring proof "(1) that the corporation was formed in order to perpetrate a fraud, and (2) that the shareholder's control of the corporation was exercised to defraud the party." The Court concluded that the first prong of the *Higbee* test "no longer reflects the realities of modern corporate life. The requirement that a corporation be *formed* in order to perpetrate a fraud is simply too strict."

The *Belvedere* court established a new, three-part test for piercing the corporate veil that did away with prong one of the *Higbee* test, expanded the second prong to encompass more wrongs than just fraud, and added a third prong. The new test, derived from *Bucyrus*-Erie, allows for piercing the corporate veil upon proof that "(1) control over the corporation by those to be held liable is so complete that the corporation has no separate mind, will, or existence of its own, (2) control over the corporation by those to be held liable was exercised in such a manner as to commit fraud or an illegal act . . . , and (3) injury or unjust loss resulted to the plaintiff from such control and wrong." The Supreme Court found that there was no evidence to support a finding that the shareholder sought to be held liable used his influence over the corporation to defraud the plaintiff and reversed the judgment in favor of the plaintiff. The result was the same as if *Higbee* had been followed.

Fifteen years after *Belvedere,* the Ohio Supreme Court again revisited the test for piercing the corporate veil. As had happened following *Higbee,* two lines of cases evolved from *Belvedere*. As the Supreme Court characterized them, one line of cases was a broad, and the other a narrow interpretation of prong two of the *Belvedere* test. The narrow line of cases required fraud or an illegal act for piercing the veil. The broad line of cases allowed the corporate veil to be pierced, in addition to a fraud or illegal act, for any "other unjust or inequitable act." *Dombroski v. WellPoint, Inc.*, 119 Ohio St.3d 506 (September 30, 2008). In that case, the alleged wrong was bad faith by an insurance company in the processing and denial of a claim for benefits.

In order to impose order on the two lines of cases and to maintain veil piercing as a "rare exception" the Supreme Court added a clarifying phrase to the second prong of the *Belvedere* test. The new prong two requires proof of "fraud, an illegal act, *or a similarly unlawful act*." The Supreme Court used the adjective "egregious" to characterize the nature of the wrongs that justify piercing the corporate veil. The new test is to be applied "cautiously toward the goal of piercing the corporate veil only in instances of extreme shareholder misconduct;" not just any old tort will do. Insurance bad faith did not meet the new standard. The dissent in *Dombroski* said that the new test "adds words to the test but no clarification . . . ."

There is an odd pattern here. The Ohio Supreme Court occasionally changes the test for piercing the corporate veil, but in each case concludes that the new test is not satisfied by the evidence in the case before it. There is now pending before the Supreme Court a case named *Minno v. Pro-Fab*, No. 2008-0170. The Plaintiff wants to hold one corporation liable for the acts of another corporation when the shareholders of both are the same but there is no parent-subsidiary relationship between the two corporations. Oral argument was conducted last October. Any bets on how *Minno* will be decided? Will the standard change yet again, but the veil still not be pierced?

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The Winding Path and Pitfalls of Federal Pre-emption

By D. Andrew List

A young neighbor seeks your counsel after her husband dies following a heart attack. She tells you that her husband had a Beat-Without-Fail pacemaker, and that he had taken the pain medication Fix-It-All. The widow is distressed because she has heard news reports that the Beat-Without-Fail and Fix-It-All products may cause heart attacks.

You agree to undertake a preliminary investigation. You quickly determine that the Food & Drug Administration (FDA) is conducting hearings on Fix-It-All, but that the drug remains on the market. You further discover conflicting articles in several medical journals as to whether Fix-It-All causes heart attacks. Finally, you contact a cardiologist who, after reviewing the medical records, tells you that Fix-It-All was likely a contributing – but secondary – cause of death.

At the same time, you confirm that the Beat-Without-Fail pacemaker has been linked to at least a dozen deaths nationally. You discover that the FDA ordered the manufacturer to recall the product within the last thirty days. You make sure that the Beat-Without-Fail pacemaker is explanted during autopsy, and you have it sent to an electrophysiologist who confirms that the device failed shortly before death.

Following this preliminary investigation, do you tell the widow that she has a viable product liability claim against either or both of the manufacturers? On the facts, it is tempting to advise her to proceed against the manufacturer of Beat-Without-Fail. However, the pre-emption issues give you pause, as you study two recent decisions from the United States Supreme Court.

In *Riegel v. Medtronic*,[1] the United States Supreme Court considered claims involving a medical device. Charles Riegel suffered serious injury when a balloon catheter burst while he was undergoing an angioplasty. He and his wife sued the catheter's manufacturer, Medtronic, Inc. Medtronic moved for summary judgment, arguing that the Riegels' claims were barred by the doctrine of federal preemption. In a nutshell, Medtronic argued that the Riegels' tort claims sought to impose state requirements that differed from the requirements of the Food, Drug and Cosmetic Act (FDCA), and that the claims were pre-empted by federal law. The district court granted summary judgment based upon federal pre-emption, after which the Second Circuit affirmed.

The Supreme Court affirmed. Writing for the majority, Justice Scalia noted that the Medical Device Amendments of 1976 (MDA) to the FDCA contain the following express pre-emption language:

"Except as provided in subsection (b) of this section, no State or political subdivision of a State may establish or continue in effect with respect to a device intended for human use any requirement-

(1) which is different from, or in addition to, any requirement applicable under this chapter to the device, and

(2) which relates to the safety or effectiveness of the device or to any other matter included in a requirement applicable to the device under this chapter."[2]

In finding that state law was pre-empted, such that the Riegels could not maintain their injury claim against Medtronic, the Court explained that: State tort law that requires a manufacturer's catheters to be safer, but hence less effective, than the model the FDA has approved disrupts the federal scheme no less than state regulatory law to the same effect. Indeed, one would think that tort law, applied by juries under a negligence or strict-liability standard, is less deserving of preservation. A state statute, or a regulation adopted by a state agency, could at least be expected to apply cost-benefit analysis similar to that applied by the experts at the FDA: How many more lives will be saved by a device which, along with its greater effectiveness, brings a greater risk of harm? A jury, on the other hand, sees only the cost of a more dangerous design, and is not concerned with its benefits; the patients who reaped those benefits are not represented in court.[3]

Of note, the Riegel decision is limited to medical devices that have been approved by the FDA through its pre-market approval process. To the extent that the pacemaker had been approved prior to the enactment of the MDA, or to the extent that it was "substantially equivalent" to another device that existed prior to the enactment of the MDA, the widow's claims could proceed against the Beat-Without-Fail manufacturer.

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Fix-It-All products may cause heart attacks.

A Federal Case

In *Wyeth v. Levine*,[4] the Supreme Court considered pre-emption under the FDCA in the context of a pharmaceutical claim. Diana Levine, a musician from Vermont, went to a local clinic for treatment of a migraine headache. She was given Demerol for pain and Wyeth's drug, Phenergan, for nausea. The Phenergan was administered via an IV-push. The physician assistant who administered the drug apparently missed Ms. Levine's vein, instead hitting an artery. This resulted in gangrene and the eventual amputation of Ms. Levine's lower arm.

Ms. Levine filed suit, arguing that Wyeth should have strengthened the warning on its label regarding the IV-push method of administering Phenergan. A jury found in favor of Ms. Levine, and the Vermont Supreme Court upheld the verdict. Wyeth appealed to the United States Supreme Court, arguing that the Phenergan label had been approved by the FDA, and that it was impossible to comply with federal drug labeling rules and regulations, while at the same time being subjected to state regulation through jury verdicts.

The Supreme Court rejected Wyeth's argument. Writing for the majority, Justice Stevens stated that:

> *Wyeth* suggests that the FDA, rather than the manufacturer, bears primary responsibility for drug labeling. Yet through many amendments to the FDCA and to FDA regulations, it has remained a central premise of federal drug regulation that the manufacturer bears responsibility for the content of its label at all times. It is charged both with crafting an adequate label and with ensuring that its warnings remain adequate as long as the drug is on the market.[5]

In essence, the Court recognized that, unlike the statutory language applicable to medical devices, the FDCA does not contain express pre-emption language with respect to pharmaceuticals. Noting this difference, Justice Thomas, in a concurring opinion, explained that:

> ***the Court's pre-emption jurisprudence facilitates freewheeling, extratextual, and broad evaluations of the "purposes and objectives" embodied within federal law. This, in turn, leads to decisions giving improperly broad pre-emptive effect to judicially manufactured policies, rather than to the statutory text enacted by Congress pursuant to the Constitution and the agency actions authorized thereby. Because such a sweeping approach to pre-emption leads to the illegitimate—and thus, unconstitutional—invalidation of state laws, I can no longer assent to a doctrine that pre-empts state laws merely because they "stan[d] as an obstacle to the accomplishment and execution of the full purposes and objectives" of federal law [citation omitted] as perceived by this Court.[6]

Thus, the widow's claim against the manufacturer of Fix-It-All will survive a pre- emption defense, although it is factually less attractive than the claim against the manufacturer of the pacemaker.

Pre-emption adds a layer of complexity to many claims. Although these recent decisions involve injury claims, pre-emption issues extend to other areas of law.[7] For example, a trial court, after rejecting a pre-emption defense, recently found that a pharmaceutical company's marketing practices violated state consumer protection laws.[8]

To properly advise someone such as the widow described above, the careful practitioner must consider the pre-emption pitfalls, in addition to the facts and the law applicable to the underlying claim.

1. Riegel v. Medtronic, Inc., 128 S.Ct. 999 (2008).
2. 21 U.S C. §360k(a).
3. Riegel v. Medtronic, Inc., at 1008.
4. Wyeth v. Levine, No. 06-1249, 555 US _____ (2009).
5. Wyeth v. Levine, No. 06-1249, 555 US _____ (2009) (slip op., at 14).
6. Wyeth v. Levine, No. 06-1249, 555 US _____ (2009) (slip op., at 23-24).
7. At the time of writing, the Medical Device Safety Act had been introduced in the Senate by Senators Kennedy and Leahy (S. 540) and in the House by Representatives Waxman and Pallone (HR 1346). If signed into law, this legislation would abolish the pre-emption language in the MDA.
8. SER McGraw v. J&J et al, Civil Action No. 04-C-156. The court assessed civil penalties against Johnson & Johnson for making false and misleading statements about two of its pharmaceuticals to West Virginia physicians. A copy of the decision can be found on-line by clicking "Johnson & Johnson ordered to pay civil penalties" at http://news.clarkperdue.com

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CHANGE YOU CAN BELIEVE IN

Labor and Employment Changes to Expect During the Obama Era

By Matthew D. Austin

Probably nowhere else will President Obama influence change more than in the labor and employment arena. With the help hundreds of millions of dollars from labor unions, Obama's agenda is riddled with labor-friendly laws. What follows is a list of many of those anticipated changes.

Employee Free Choice Act

Obama co-sponsored and is a strong advocate for the Employee Free Choice Act. The following are the elements of EFCA in its current form.

No More Elections: Unions need just 50% + 1 employees to sign union cards and a company is automatically unionized and must begin negotiating a collective bargaining agreement;

Mandatory Agreement: A company must automatically sign a 2-year agreement;

Arbitration Not Negotiation: If no agreement within 60 days of beginning negotiations, an arbitrator will decide the contents of the agreement;

Back Pay Penalty: Triple back pay for union supporting employees terminated because of the employer's union animus; and

Fines: Fines, up to $20,000, for "restraint or coercion" of a pro-union employee.

Expansion of Family Medical Leave Act

Although the Act recently underwent major changes, there are likely additional changes right around the corner. Next on the agenda is expanding FMLA to companies with just 25 employees, expanding the types of conditions that qualify for leave, expanding the classifications of employees who can take leave, and creating an insurance system to provide for paid family medical leave.

Patriot Employer Act

This Act would provide tax credits equal to 1% of taxable income to employers that:

Maintain or increase the number of full-time workers in America relative to the number of full-time workers outside of America;

Maintain corporate headquarters in America;

Pay hourly wages equal to or above an amount that would keep a family of three out of poverty;

Provide either a defined benefit plan or a defined contribution plan that fully matches at least 5% of worker contributions for every employee;

Provide health insurance and pay at least 60% of each worker's health care premiums;

Pay the difference between regular salary and military salary for all National Guard and Reserve employees who are called for active duty and continue their health insurance coverage for those members and their families; and

Maintain neutrality in labor organizing campaigns or face additional tax hikes.

Complying with this law will likely cost more than the 1% tax break, and this law essentially creates separate corporate tax rates for unionized and non-union companies – since unions win 87% of elections under neutrality agreements.

RESPECT Act

The "Re-Empowerment of Skilled and Professional Employees and Construction Trades-workers," will redefine who is a "supervisor" under the National Labor Relations Act.

Currently, a supervisor is defined as someone who assigns other employees to overall duties, is held accountable for directing subordinates to undertake specific tasks, and has the discretion to do so without close direction from management. However, the RESPECT Act limits a supervisor to only those who spend a majority of their time actually hiring, firing, and disciplining employees.

Should the RESPECT Act pass, many supervisors will no longer be supervisors, but rather dues-paying members of a bargaining unit whose working conditions are governed by a collective bargaining agreement.

Working Families Flexibility Act

This Act is also called the "union of one" law because it requires negotiations between employers and a single employee requesting a change in schedule or location of work. This Act requires a meeting within 14 days of the request and within 14 days from the meeting, should the employee's request be denied, the employer must specify in writing:

The costs to the company in agreeing to the change;

The effect of the change on customer demand;

The overall financial resources involved in the decisions to deny the request; and

For employers with multiple facilities, the geographic separateness or administrative or fiscal relationship between the facilities.

Employees can then grieve the employer's decision, have an attorney or union representative sit in on the grievance, and the company must continue to justify its denial which could later be reviewed by the DOL. Penalties for violations include interference or retaliation against employees start at $1,000 per violation.

Ledbetter Fair Pay Act and Paycheck Fairness Act

Both of these Acts passed the House and the Senate will vote on these bills within the next several weeks.

The Paycheck Fairness Act supposedly protects against compensation discrimination. Currently, employers can avoid liability under the Equal Pay Act by proving that the alleged discriminatory compensation was a result of any factor other than sex. This Act limits that defense to situations where the factors other than sex are job-related or serve a legitimate business interest.

The Ledbetter Fair Pay Act obliterates the statute of limitations for employees bringing a discriminatory pay claim. Under this Act, a former employee – from many years ago – can bring a lawsuit against a company long after that employee moved on and no witnesses are left to testify. This Act restarts the statute of limitations period every time a paycheck is received. Thus, an employee who agrees to a certain pay in March 2008 and consistently receives that pay and steady increases, could sue in December 2028 (or later) for receiving less money than similarly situated male employees.

Minimum Wage Hikes

Obama's website states that "as president, Obama will further raise the minimum wage to $9.50 an hour by 2011, index it to inflation, and increase the Earned Income Tax Credit..."

National Labor Relations Board

Currently, three of the five seats on the NLRB are vacant. Obama should not meet political resistance when he appoints a majority of the members to the Board. With Obama's appointees, the Board will be pro-union and its decisions will reflect the members' politics.

Minority Unions

In 2007 several unions filed a petition with the NLRB that would permit unions to demand that an employer bargain with a group of employees even when a majority of the workers have not elected union representation. For example, if a company has 100 hourly employees and 12 want to unionize, an Obama-appointed Board may require companies to recognize and negotiate a contract with that group, despite the fact that they would not comprise a majority of the bargaining unit.

Title VII Amendment

The Employment Non-Discrimination Act would prohibit discrimination based on one's sexual identity or orientation.

Healthy Families Act

This Act requires employers with 15 or more employees to provide seven days of paid sick leave each year to employees working more than 30 hours per week. Employees working less would receive a pro-rated amount of paid sick leave. This leave could be used to care for either the employee or a relative of the employee. A similar bill was introduced in Ohio, but withdrawn before voted on in part because of this federal bill on the same issue and because Governor Strickland recognized that it would make Ohio uncompetitive in trying to attract companies to Ohio.

As you can see, the Obama era will be full of controversy, legislation, and more than anything else, will change to our current labor and employment laws and corporate way of life.

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LONGTIME LONG TERM DISABILITY

What started as a fact driven ERISA disability case became nationally significant, as the outcome could impact insurers through out the country.

By Stanley L. Myers

Wanda Glenn filed suit in federal court challenging MetLife's termination of the long term disability benefits she had been receiving for two years. Glenn lost in the district court and prevailed in the Sixth Circuit. Until MetLife filed a Petition for Certiorari, I had no expectations I would be involved in a Supreme Court case and Certiorari, if granted would put Glenn at risk of an adverse decision. What started as a fact driven ERISA disability case became nationally significant, as the outcome could impact insurers through out the country. MetLife was represented by Winston & Strawn and by Gibson Dunn & Crutcher – big players with big Supreme Court practices. In an attempt to level the playing field, I brought in a law firm with a big Supreme Court practice.

Glenn's ERISA coverage was provided by Sears, her employer. MetLife both insured the plan and determined if benefits would be paid. One of the questions certified by the Court was whether this dual role created a conflict that must be considered when the administrator's decision is challenged in Court.

Glenn's disability was due to a serious heart condition that took her off work and prevented her from returning to work. As permitted by its contract, MetLife required Glenn apply for social security disability benefits, which if granted, would be a dollar for dollar offset against MetLife's monthly contractual obligation to Glenn. MetLife advised Glenn on whom to use for legal representation; provided her attorney medical information to support her claim; took the position that Glenn was disabled and entitled to Social Security Disability and paid her attorney. When Glenn was awarded disability benefits, MetLife terminated long term disability, informing Glenn that it had determined she was no longer contractually disabled.

A split in the Circuits existed as to whether the courts must take into consideration the dual roles of plan administrators when reviewing an ERISA denial or termination of benefits. The Supreme Court requested the Solicitor General of the United States to provide the position of the United States, Department of Labor, as to whether the Court should accept the case. Both Glenn and MetLife then had the opportunity to "lobby" the Solicitor General in support of their positions. The Solicitor General requested the Court hear the case and Certiorari was granted on the issues of the dual role conflict and how the courts should consider the conflict.

Amicus briefs were filed on behalf of MetLife by the Blue Cross and Blue Shield Association; by the American Council of Life Insurers, by America's Health Insurance Plans and the Chamber of Commerce of the United States. Nine amicus briefs were filed on Glenn's behalf, including briefs filed by the Solicitor General of the United States, the National Association of Insurance Commissioners and the National Employment Lawyers Association. The case was argued April 23, 2008.

After the Court accepted the case, I learned a cousin was law clerk to Chief Justice Robert. The day following argument, my wife and I were given a private tour of the Supreme Court building.

Wanda Glenn prevailed. The Supreme Court, in a 6-3 decision, held that the dual role was a conflict and how that conflict must be considered. The decision has had a significant impact on ERISA litigation.

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BIG BAD WOLF COMES TO TOWN

Who pays for recovery of deleted email and computer files?

By Andrew Mills Holford

Last summer the Ohio Rules of Civil Procedure were amended to provide for the discoverability of electronically stored information. Specifically, the amended rules and staff notes to Civ. R.'s 16, 26, 33, 34, 36, 37, and 45 give authoritative guidance when considering electronic discovery. In December, the Supreme Court of Ohio decided State ex rel. Toledo Blade v. Seneca County Bd. of Commrs., 2008-Ohio-6253. Within it, a test to evaluate cost-shifting where deleted emails and/or computer files emerged.

The case involved an action for a writ of mandamus under R.C. 149.43, to compel a Board of County Commissioners (1) to provide access to emails sent and received during the years of 2006 and 2007; and (2) to recover the content of requested emails deleted by the commissioners and make them promptly available for inspection and copying. The Supreme Court granted the writ and compelled the board to make reasonable efforts, at its own expense, to recover deleted emails for inspection.

Relator, The Toledo Blade Company, requested the board permit it to review all outgoing and incoming emails, including "all sent messages, received messages, deleted messages, and drafts of messages" of the specific commissioners who had reviewed a commissioned study regarding the construction of a new county courthouse. The board produced some responsive emails but some commissioners admitted to deleting emails that could have been responsive. Seneca County had a written schedule for records retention and disposition permitting email deletion only where it had no significant public interest value. The value question was left to the individual user.

Despite the public records request backdrop, the Supreme Court of Ohio has given us our first in-depth view of the shape of things to come in the arena of electronic discovery. Specifically, the Court cites several resources that the trial attorney and/or in-house counsel would be well advised to review in making strategic electronic discovery decisions in the future.

The Court found "nearly every legal entity subject to the jurisdiction of the state and federal courts generates and maintains at least some of its information in an electronic form." (paragraph 24); Annotation, Electronic Spoliation of Evidence (2005), 3 A.L.R.6th 13, 23, section 2. Likewise, "using sophisticated computer programs, electronic mail messages or computer files thought to be deleted can be retrieved from the deep recesses of a computer data base long after they have disappeared from the screen." (paragraph 24); Annotation, Discovery of Deleted E-mail and Other Deleted E-mail and Other Deleted Electronic Records (2007), 27 A.L.R.6th 565, 576, Section 2.

The court affirmed "it is a well-accepted proposition that deleted computer files, whether they be emails or otherwise, are discoverable." (paragraph 25); See Antioch Co. v. Scrapbook Borders, Inc. (D.Minn., 2002), 210 F.R.D. 645, 652. The court analyzed the 2008 staff notes for newly amended Civ. R. 34 emphasized the discovery of electronically stored information. See id.

Afterwards, the Court applied a five-tier inquiry to reach it decision. First, the Court asked whether the emails were destroyed. The court held no duty exists to create records no longer existing under R.C. 149.43. In private litigation, this same standard applies. But deletion of emails does not necessarily ensure they are destroyed as explained earlier. Here, the Toledo Blade suggested scanning a hard drive frequently will recover deleted emails or files. From a practice standpoint, the importance of experts on this topic will be crucial to any real success.

Second, the court required a showing the deletion was contrary to the county records- retention and disposition policy. With the burden on the party claiming foul, the records-retention policy is critical. Does your client have such a policy they actually follow? One question to evaluate is whether your client or the opposing party uses scrubbing software that acts as a destruction tool. The Toledo Blade established substantial gaps existed in the produced emails and the court found this created a reasonable inference that emails were deleted in violation of the county's records-retention and disposition policy. The Court also found the Board's arguments about a lack of specific evidence to be an improper shifting of the burden of proof.

Third, the Court required some showing recovery of the deleted emails would be successful. The court placed heavy emphasis on the affidavit of a computer forensics expert. Interestingly, the affidavit stated deleted emails and other data and files are recoverable but only forensic recovery process and subsequent analysis could answer for sure. For clients, this may not be a very welcoming thought. Careful practitioners might hire their own expert to perform a preliminary analysis to rebut such an invitation to fish in their client's hard drives. The Court found the Toledo Blade's chance of success sufficient when compounded with contravention of the existing records retention policy. Perhaps, where no evidence of violating a records retention policy exists, the burden under this prong would be much steeper.

Then, the Court considered the cost of the recovery. The board offered no probative evidence beyond mentioning the potential expenditure of tens of thousands of dollars. In light of the public records request, the Court found the board had a duty to organize and maintain public records. By failing to offer the court a sufficient evidentiary foundation as to the actual cost of recovery, the board's arguments were not well taken. Certainly, in the future, attorneys should obtain estimates from computer forensic recovery professionals prior to any formal motion practice or discovery hearing and be prepared to substantiate those sums.

Lastly, the court weighed the question of who should pay for the cost of recovering the deleted emails. R.C. 149.43 only conditions the payment of a fee where the request is for copies. They analogized "the general rule in discovery disputes concerning deleted emails is that because the cost of retrieving deleted electronic data can be high, the costs of such retrieval may be shifted to the party seeking discovery in some circumstances." (paragraph 38). The court again turned to the staff notes for newly amended Civ. R. 26(B)(4). Those staff notes provide "in ordering the production of electronically stored information, the court may specify the format, extent, timing, allocation of expenses and other conditions for the discovery of electronically stored information." Ultimately, the Court held the board's recovery efforts need only be reasonable as opposed to Herculean.

The Supreme Court of Ohio's Toledo Blade decision gives us much to consider and begins to create a workable analysis in the relatively uncharted territory of electronic discovery at the state court level. On balance, the decision generously gives much food for thought.

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Andrew Mills Holford

The Computer Scientist and the Value of Electronic Evidence

By Lee T. Ayres

Finding answers to the questions that arise in litigation often hinges on the proper acquisition, preservation, analysis, and presentation of electronic evidence. Reliance on electronic information is sure to increase as computer systems continue to integrate into more aspects of modern life. An experienced computer expert can provide key insight into making the best use of electronic evidence in a case.

Consider a case where a group of employees within a company strikes off to form a competing enterprise. Plaintiff's counsel suspects that the employees met at a coffee shop shortly before resigning. They are believed to have collected data in their possession, proprietary to the plaintiff that would be useful in getting their enterprise started. Evidence suggests that to gain a competitive advantage, prior to returning their issued laptops, they deleted email contact information for some hot sales leads.

Now what?

Our computers record when we turn them on and off, when we log in, when we send email, when we browse the Web and what we look at, even when we use the printer or the CD burner. Even our cell phones know who we called and when; our GPS receivers remember where we were and where we were going. Some of our cars keep tabs on when we hit the gas or brakes and how fast we are going at the time.

Even when an event is not explicitly logged by a computer, the effects of the event may leave traces. Reading a document with a program such as a word processor changes the "last accessed" time stamp of that document. Deleting a document can leave traces in the recycle bin and on unused portions of the hard drive.

In our example, at the direction of a computer expert, the laptops returned by the ex-employees are imaged forensically, and data that had been deleted from them is recovered. When the data were deleted can be demonstrated to a high degree of scientific certainty. Computers are searched for log information that identifies a specific storage device, including manufacturer and serial number that was plugged into all of the laptops in question on the same day around the same time. This device is included in discovery. The laptops all contain traces of having connected to the coffee shop's free wireless network at around the same time, providing evidence that the subjects were together in the same place at the same time.

When dealing with electronic evidence, timing may be critical. Several forces work to erode the usefulness of digital information. If every event logged by a computer were stored in perpetuity we would run out of available drive space. Hence, most log entries are overwritten after a predetermined period of time. The ability to read data that were deleted degrades as the old data is overwritten by the new. Time lines that could be established by file system activity time stamps can be impacted as new time stamps replace old ones. This blurring of evidence could mean that even data that has not been materially corrupted may be called into question by informed counsel. Consultation with a computer scientist experienced in the legal context may provide value in the formation of strategy early in the development of a case.

Understanding what an expert can and cannot establish with digital evidence may improve chances for success. Preliminary analysis can provide direction. Information that may be discovered by opposing experts may be uncovered as strategy is being developed to avoid surprises later on. Prior to depositions in our example case, being aware of the typical retention period of Internet service providers, the computer expert suggested that counsel subpoena the new company's email records. When questioned about the deleted contact information the defendants assert that they intended to erase personal contacts unrelated to the business and deleted the others as an unintentional consequence. The subpoenaed email logs show that soon after the new company was formed, most of the deleted contacts were sent messages.

While the specifics of a case may warrant a different approach, in some cases simply taking a forensic image for future review may provide a great deal of value, and need not be a heavy burden. A properly performed forensic acquisition is not likely to impact the data on a computer, and generally after an acquisition there is no technical reason the computer cannot be put back into service.

Not all data analysis techniques are equal: a forensic computer scientist can use critical information about systems that consumer grade services would never see. If the plaintiffs in our example used a commodity "undelete" utility to recover the contact list, they might have eliminated all evidence that the data had been deleted in the first place. Simply powering on the computer hoping to see what might have happened could affect file time stamps and overwrite critical log information. Each of these events affects the legal claims that can be supported by scientific analysis.

The right approach for handling the array of digital evidence available to an attorney can vary widely between cases. A qualified computer scientist can help in making the best use of the data at your disposal, in ensuring that you acquire what is needed while it is still available, and in reducing the surprises you may face as the case unfolds.

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Technolawgy

Collecting on Judgments against Internet-Based Companies

By Adam J. Bennett

What do we mean by an "internet-based business." Most businesses of any category have some presence on the internet, however, for the purposes of this article, we will define "internet- based business" to mean one which relies primarily or exclusively on its internet presence to generate income.

As the number of internet-based businesses increases, so does their collective involvement with the civil justice system. Most litigators at some time in their career will either defend or prosecute an action against an internet-based business.

At the conclusion of litigation, attorneys may be left with a judgment against a company which has few if any tangible assets. For this reason, collecting on judgments against internet-based business can be challenging. So, does a judgment creditor have recourse in these situations? Of course the answer is "it depends."

First, what do we mean by an "internet-based business." Most businesses of any category have some presence on the internet, however, for the purposes of this article, we will define "internet- based business" to mean one which relies primarily or exclusively on its internet presence to generate income. These businesses will have a strong internet presence, few tangible assets, and generally no real property. Examples of these kinds of businesses might be: multimedia and web-design consulting; IT consulting; subscription sites that charge for information or entertainment; and service sector businesses that reach their customer base through the internet.

So what are your options for collection?

First, look for employees on the website as they are often listed. If the company has employees, then they have payroll and a bank account. Set up the debtor for a judgment debtor exam. Find out where they bank, and garnish as soon as possible.

A more drastic and often effective measure to collect from an internet-based business is a creditor's bill. Codified in R.C. 2333.01, a creditor's bill is a method by which a creditor can collect on assets owed to the debtor by a third party. To summarize the statute, if you hold a judgment against party A, and party B is a debtor of party A, a creditor's bill allows you to file a complaint against and collect directly from party B. R. C. 2333.01 is broader than this example allowing judgment creditors to reach a variety of assets in the hands of third parties which are owed or may become owing to the judgment debtor.

Often internet-based businesses publish lists of their clients on their website as a means to bolster their credibility – these clients might be subject to a creditor's bill. If these clients make ongoing payments to the debtor for a service, such as webhosting or IT consulting, they may be subject to a creditors' bill. As a method of marketing some internet-based companies will publish news articles about their long term projects, for example, large scale software conversions. Again, these clients of the debtor will likely make ongoing payments as phases of the project are completed and be subject to a creditors' bill.

Suing a debtor's clients can cause serious damage to the debtor's business, benefitting no one. Send a courtesy copy of the creditor's bill and complaint to the debtor a few days in advance of filing to give informal resolution a chance.

When all else fails, internet-based businesses will have at least one asset that may have value – the domain name. If the domain name is a common word or phrase that might have value on the open market it could be worth executing upon. A turnover order from a judge is needed to execute the transfer of the domain name. The order should address two parties: 1) the debtor who is ordered to turn over rights in domain name and take all actions necessary to effect the transfer; and 2) the registry manager. For all dot-com domain names the registry manager is Verisign (formerly Network Solutions). Registry managers run the back-end system for domain names. Don't confuse the registry manager with the registrar, who acts as a middle man in selling and assigning domain names (examples of registrars are GoDaddy.com and Register.com). The turnover order should direct the registry manager to take all steps necessary to assist in the transfer of the domain name.

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Through A Different Doorway

By Barclay Hastings

"Never condemn a man to death until you have shown him the truth"
— Lao Tzu

In a follow up article reporting the Haiku Restaurant vehicular assault by Michael Rose, in which he was convicted and sentenced to 15 years, Judge John A. Connors of the Franklin County Common Pleas Court placed part of the blame on the victims for serving Rose alcohol.[1] The Columbus Dispatch, Section B, Wednesday, February 4, 2009

This comment captured my interest.

Recognizing that the Columbus Dispatch article is at best an accurate summation of the proceedings, some details may have been left out. However, the article points to the opportunity to improve the judicial handling of alcohol and drug abuse cases. The report noted that Rose had four prior DUIs, one domestic violence offense and miscellaneous other offenses. What was not reported was how the previous alcohol related offences were adjudicated, nor is it known whether they were adjudicate by a special docket court for alcohol and drug abuse offenses. My guess is that these prior alcohol related offenses were heard in municipal courts. Had these offenses been adjudicated in a special drug court the outcome most likely would have been different.

Franklin County Common Pleas Court does have a special docket court to hear alcohol and drug related offenses, but the municipal court system does not. The question to be asked is why not? Such special docket courts as drug courts have several advantages over traditional courts. These advantages include early and continuous interventions, specialized knowledge of the court to support the recovery process, integrated network of referral resources, and outcome studies.

The primary focus of the drug court is on the chemical abuse and/or dependency of the client rather than on the specific act arising from the impairment. The shift in focus brings all parties to support the client in the recovery process. The court's heightened focus on the impairment gives sanctions a different orientation. In the case of Mr. Rose, we are told that he was driving under a court ordered suspension of his driving privileges at the time of his latest offense. Since this suspension was ordered on his fourth DUI, Mr. Rose had already reached the felony level and could have been sentenced to one year in prison. The article noted he had not served any time in prison. We don't know what sanctions were applied in his prior offenses. By the time of his fourth offense anyone with specific knowledge of alcoholism would reasonably suspect that Mr. Rose had a high tolerance for alcohol and had progressed sufficiently far enough to warrant a more targeted sanction aimed at his impairment.

A special docket drug court has a body of knowledge specific to alcohol and drug related offenses. This body of knowledge is shared with attorneys representing the client, other court officers involved in the client's recovery process, treatment providers, and the presiding judge or magistrate. The adage of, "If it looks like a duck, walks like a duck and quacks like a duck, it must be a duck" refers to a person who has a substance problem who is being confronted in their denial. Dr. Howard Gardner, Harvard psychologist and noted expert on how people change, states that denial must be confronted early and continuously to bring about an acceptance that change is needed. Everyone involved in the administration of the drug court gives a consistent message to the client, in this case Mr. Rose.

Integrated referral resources available to the drug court can be expanded and improved upon through periodic conferences and ongoing networks. Support can be more specifically tailored to the needs of the court and their clients. A strong referral and network is key to successful outcomes. Included in an integrated network would be family programs designed to educate families on how to help a person with an alcohol or drug problem without enabling. In Mr. Rose's case, it is not clear whether the family was offered such a program. A statement attributed to Mr. Rose's sister and girlfriend indicates that they may have unwittingly been his enabler.

The drug court documents outcome studies that demonstrate what works and what doesn't. Over time the Court in the inclusive sense of the term, gets smarter and more experienced.[2]

This author has counseled a cross section of the population involved in alcohol and drug related offenses ranging from misdemeanors to felonies, with their probation officers, federal and state and local levels for more than fifteen years. If we want to avoid or minimize the hurt and suffering of those involved in alcohol and drug related offenses and their victims, a different approach is called for, one that doesn't wait until someone is killed or badly injured as in the case of Mr. Rose.

As I came home today and picked up my mail, I noticed an envelope from Mothers Against Drunk Drivers (MADD). The story of interest was about the death of a young woman who was struck and killed by a drunk driver with two previous DUIs. Had this drunk driver and Mr. Rose had the support of a drug court at the time of their first DUI and thereafter, the outcomes just might have been different.

1. The Columbus Dispatch, Section B, Wednesday, February 4, 2009
2. Addendum: Drug Court Efficacy vs. Effectiveness September 29, 2004, Commentary, Douglas B. Marlowe, J.D., Ph.D. In his commentary, Professor Marlowe affirms the effectiveness in reducing recidivism rates in criminal behavior following completion of drug court. He takes to task those who would impose a more stringent research standard than the FDA or NIH in outcome studies. His article is worth the read as a well balanced analysis of the data regarding outcome studies of drug courts. His conclusion? Drug courts work effectively to reduce recidivism rates.

Barclay's clinical experience has evolved from counseling positions at FOCUS Health Care to The Ohio State University Addiction Medicine Program at OSU Hospital East, Talbot Hall. He has worked closely with the Lawyer's Effectiveness Program and the court system in Franklin County.

Barclay Hastings, MA, MS, LSW, LICDC

Interiors

Understanding Addiction – PART III

By Brad Lander

Choice and volition are relative terms as they relate to human behavior. As we enumerated in the first two parts of this series, behavior is inextricably tied to the structure and chemical composition of the brain. Some chemical influences on the brain are transient. Eat a big bowl of Chocolate Frosted Sugar Bombs cereal, or stay up for thirty-six hours, and experience what this does to rationality.

For the most part, however, our brain is stable and so rationality, ability, personality and so forth are products of brain structures, connections and specific neuron density. There are two primary factors that determine this. The first is genetics. We are born with a DNA "blueprint" for how the brain should be anatomically and chemically structured. Temperament and ability to solve math problems are largely genetically controlled traits.

The other determining factor is environment. Our brains are dynamic and flexible. Where we are, what we are doing and who we are with heavily influences the actual structure and functioning of the brain. The brain reinforces, prunes back and redirects connections among neurons to make us better able to function in a changed environment.

To illustrate this process, let's imagine I am born with an identical twin brother, but we are separated at birth. I grow up in Costa Rica; my brother is raised in northern Greenland. While we both have the same DNA blueprint for how our brains should be structured, our brains actually grow to become quite different. Growing up in Costa Rica, I have to adapt to bright light, humidity, color, heat and so forth. My brother, however, has to deal with darkness six months of the year, cold temperatures, and flat and colorless landscapes. Our brains structurally become very different.

When someone puts alcohol or other psychoactive drug into his or her body (i.e. a chemical that alters the chemistry of the brain) in a constant or consistent manner, the brain perceives this as a "change of environment." Nerve cells change physically and chemically to counter the new conditions; and one of the areas most heavily affected is the reward pathway (as described in part II of this series). Since the reward pathway is the controller of our animal, survival instincts, ongoing use of alcohol or drugs will change this area in a way that essentially creates a new survival drive. In other words, the brain comes to believe it needs the drug in the same way it needs food, water and sex.

This leads us to a more contemporary definition of addiction: The physical adaptation of the reward pathway of the brain to the repeated presence of a chemical (drug).

The addiction process adds a new survival drive such that while we rationally "know" that we don't need a drink or to take the drug, the underlying sense is that something is seriously wrong or missing from my life until I get it. This becomes overwhelming and will drive people to do things that violate their own moral codes and jeopardize their jobs, families and lives.

The fact that these changes to the brain are permanent evinces the understanding that one is never "cured" of an addiction. Once the brain has physically changed, it cannot simply go back to its previous state. As Dr. Tom Pepper of Talbot Hall puts it, "You can turn a cucumber into a pickle, but you can't turn a pickle back into a cucumber."

If the brain cannot be "cured," what then can be done to mitigate the effects of this adaptation? The answer lies in the fact that once the drinking or drug use has stopped, the brain will begin adapting to its new, sober, environment. The old adaptations do not disappear, but new networks and neural circuits will develop and strengthen over time. Returning to my earlier analogy, if I grew up in Costa Rica and, as a young adult, had to move to northern Greenland, I would find the transition difficult. Being used to bright sun, the scant light would appear dark, and while my brother might be in shirtsleeves, I'd be wearing my parka. But as soon as I stepped off the plane in Qaanaaq, my brain and body would begin adapting to my new environment.

When the alcoholic or drug dependent person stops drinking and using, it's like finding oneself in Greenland. It's unfamiliar and uncomfortable. As time goes on, however, it gets easier and more comfortable. If I want expedite this process in Greenland, I will want to throw myself out there; learn the language, eat the local cuisine, participate in neighborhood events. This stimulates growth and development. If I stay in my apartment eating gallo pinto, watching Costa Rican television online while setting my thermostat to "sauna," the growth will be much much slower. For people in early recovery, immersing oneself in new sober activities with sober people accelerates the recovery process. If I go to Alcoholics Anonymous, it's like being in a place where people speak both Kalaallisut and Spanish; that is, I can be among people that have been where I've been and have been in this place longer than I've been here.

If I find myself in Greenland one day, can I expect to be comfortable in a week? Certainly not. A month? No. A year? Somewhat more so. Two years? Even more. Recovery from addiction takes time as well. Addicts that believe they are "normal" now that they have stopped using will find that recovery is a process, an extended one at that. If they stick it out and do the things that promote growth and health, they will find that it does get better over time.

Brad Lander

Brad Lander, PhD, LICDC

Gay Adoption

THE LATEST ACROSS THE COUNTRY AND IN OHIO

By Thomas N. Taneff

On several different fronts the battle for and against gay adoption is once again being fought across the country. From the polls in Arkansas, to a Florida courtroom to the floor of the Tennessee legislature, people on both sides of the issue are fighting it out. Each battlefield however is producing very different results.

On November 4, the country's primary focus was understandably the historic election of Barack Obama. But in the state of Arkansas the electorate wasn't only casting votes for its elected officials. Voters there also passed a measure banning unmarried couples living together from serving as adoptive or foster parents. The measure, which was aimed primarily at keeping gays from becoming foster or adoptive parents, surprisingly received nearly 57 percent support.

The measure's sponsor, the Arkansas Family Council, positioned the measure as a battle against a "gay agenda" and the strategy appeared to have worked. Exit polls taken on Election Day showed the measure was supported by residents identifying themselves as evangelical or born-again Christians. Rural voters by and large also supported the measure.

Those who opposed the ban included Arkansas Governor Mike Beebe. Opponents like Beebe pointed to a current lack in foster homes as reason enough to vote against the measure. With its passage they now fear children in need of homes will be the ones who suffer the fall out. According to state officials, 1000 children in Arkansas are presently waiting to be adopted. The ban will in effect reduce the number of homes available. Children in need of parents and guardians will now likely have to wait even longer.

With those concerns in mind, opponents of the new Arkansas law filed a lawsuit at the end of December, asking a judge to strike the measure down. The lawsuit contends the new law violates federal and state constitutional rights to equal treatment and due process. The suit also argues the measure disregards the best interests of children while keeping children in state custody at additional and unnecessary costs to taxpayers.

Very similar arguments are what compelled a Florida judge to overturn her state's long standing gay adoption ban. Ironically, the Florida ruling was handed down just three weeks after the Arkansas vote. A Miami-Dade circuit court judge found a Florida law that has banned adoptions by gay men and lesbians for over three decades unconstitutional. The judge said prohibiting homosexual adoption was not in the best interest of children and that the law violated equal protection rights for both children and prospective parents. Advocates for gay adoption say the Florida ruling also makes very clear that the evidence points to the fact that children raised by gay parents fare just as well as those raised by straight parents.

And now, the Tennessee legislature is weighing in on the issue. On January 30, a bill was introduced that would prohibit Tennessee couples – gay and straight – who aren't married from adopting. Unless a couple is actually married, they would be prohibited from adopting. The bill does not affect singles who adopt.

In fact, across the country gay individuals have a far easier time adopting than couples. However in more than 20 states, it's ambiguous as to whether the second person in a couple can also adopt their partner's adopted or biological child if the person is gay. States like Utah, Michigan, Mississippi, and New Hampshire all have laws that do ban joint adoption.

It has been two years since the Ohio legislature took up the gay adoption issue. A bill introduced then would have fallen in line with the measures Florida recently overturned. Its intent was to bar all adoptions and foster care by gays and lesbians. The bill didn't go far though, never even making it to the hearing stage. Presently Ohio permits single adoptions by gay, lesbian, bisexual or transgender individuals. Ohio law does not clearly prohibit joint gay adoption either. However, second-parent adoption, where one parent already has legal rights of the child and a second parent is petitioning for joint rights, is not allowed.

Ironically adoption advocates on both sides of this issue often cite the same concern when arguing their position on the subject of gay adoption: the quality of a child's life. Advocates of gay adoptions claim that thousands of children need loving homes and to forbid gay adoption is to reduce the overall number of homes available. However, groups against gay adoptions contend that gay adoption is an affront to conventional family values and that it's in every child's best interest to have both a mother and a father. Some of those same anti-gay adoption groups insist children raised in homosexual homes, especially females, act out sexually and that self-identity issues are prevalent. But the American Academy of Pediatrics and other gay adoption advocates point to the fact that there is no credible evidence that shows having gay parents harms children. Proponents also argue that for the children who never get placed in an adoptive home the future is often bleak and many of these children who leave the foster care system without ever finding a permanent family end up on the streets, or in jail, without a job or family to support them.

In the meantime, statistics provided by the U.S. Department of Health and Human Services indicate there are approximately 129,000 foster care kids across the country. It is these children who hang in the balance, all in need of a stable home. For each of them, these continuing battles may very well make the difference as to when they finally find it.

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ATTORNEY POSITIONS AVAILABLE

Oh what a wonderful day!
Instead of dressing up as an attorney for Halloween, you actually are one!
(Well, not until you are sworn in, but who cares about details on a day like today.)

By Andrew C. Clark

It's 7:02 Halloween morning and you have been hitting the refresh button every 30 seconds for the last 15 minutes. You haven't slept well in over a week, and finally, with blurry eyes, you scroll down and read your name among the hundreds of other successful applicants.

"Is it true?" "Is my name really there?" You recheck the list at least three times before you begin calling friends and family to let them know the answers you once prefaced with "I am not an attorney but…" will now be billed to them in 6-minute increments.

Oh what a wonderful day! Instead of dressing up as an attorney for Halloween, you actually are one! (Well, not until you are sworn in, but who cares about details on a day like today.)

Starting Monday, and for the foreseeable future, you will report to your office or cubicle at least five days a week, and once you are sworn in, you will finally be able to sign your own documents. You and your colleagues are now ready to eagerly enter this noble profession, seeking to make a difference, to make partner, or perhaps just to make it. So you aren't working for the big firm, the in-house offer fell through, and the State is in a hiring freeze. What else is there? It may be time to ask more questions than you answer. It may be time to hang out your own shingle.

Insurance, clients, accounting, office space, the list of questions is more daunting than that lecture on the rule against perpetuities. So here are some basics I have discovered since hanging out my shingle last November.

Insurance

R. Prof. Cond. 1.4(c) mandates, any lawyer carrying less than a $100k/$300k (occurrence/aggregate) insurance policy must provide written notice to their clients. Beyond this rule, you need to examine your liability and determine how much protection will allow you to sleep through the night.

Clients

Networking is the key. With over 1,000 new attorneys being sworn-in this past November alone, it is virtually impossible to have clients find your new start-up office without some help. Create a plan, figure out who your ideal client is, what your ideal practice area is, and who might be able to help you find your client base. Remember, people will only refer clients to you if they know who to send your way. It is your job to educate your network on how they can help build your practice. There are various internet sites or local groups geared toward helping you locate the clients you want. See if any of them work for you. Court appointment lists are also good options and your local bar association or court administrators can provide information about the requirements and procedures governing the appointment lists.

Accounting

As with any business, it is good to keep your personal money separate from your business money. Therefore, it is a good idea to open some business accounts. You will need to account for taxes (personal income and self employment tax), and if you think you may hold client funds, an IOLTA is required by R. Prof. Cond. 1.15. A business checking, savings, and IOLTA should bring you into compliance with the rules. You will also need a system to keep track of your firm finances, including your billable time. This can range from simple spreadsheets and text documents to a luxury law firm management program. Regardless of which system you select, you need to make sure both Uncle Sam and the IOLTA auditors are satisfied with your accounting practices.

Office Space

I have found that office-sharing with other attorneys can provide some helpful insight into the practice. This is especially true where the other attorneys have been practicing for a few years. While an office is preferable, meeting space is vital and with a tight budget you may consider dealing with a law firm to access meeting space while using a home office until your practice gets off the ground.

After you work through the issues above, it will be time to think about a website, maximizing tax deductions, adapting your business plan to stay ahead of the increasingly competitive market place, and an array of other routine business concerns. The questions will never stop, the to-do list will never shrink, and the walls typically won't talk back. But the boss doesn't yell much and the days are never boring. Unlike most people in an "at-will employment state" like Ohio, attorneys live in a "right to work" society, so roll up your sleeves, dust off that briefcase, and consider yourself open for business.

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Andrew C. Clark,
Sole Practitioner

THE 21ST CENTURY *AND* THE VIRTUAL PARALEGALS

Virtual paralegals can save you money in other important ways: no training costs; no workspace costs; no supplies or equipment costs; no payroll taxes (federal, social security, unemployment, workers compensation); no overtime, bonuses, vacation, holiday or sick time to pay.

By Melodee K. Currier

In today's competitive market place, are you looking for ways to reduce costs and provide faster turnaround to your clients? Do you operate with a budget in mind and find getting help on a temporary or full time basis is too expensive? Do you have difficulty finding competent help when you need it?

These are serious questions for any attorney or legal administrator, especially in tough economic times. Everyone faces the pressure of producing quick results at the lowest possible cost. Often this is not easy to do because of the high cost of hiring employees. Let's face it, nearly everyone is challenged by cash flow these days and anything that adds expense to your business must provide value to justify the costs.

Although most attorneys are used to having their paralegal at arm's length, the Internet has opened up a new way of doing business. Your paralegal can now be remotely located across the street or even in another part of the world. The Internet has provided amazing avenues of both revenue generation and cost savings. Using the power of the Internet to the advantage of your business will also serve your clients better.

One key advantage available to you via the Internet is the use of the virtual paralegal. "Virtual" in this case means an online paralegal service vendor who is as close as your computer. She (or he) works from a remote location on an "as needed" basis, enabling you to increase manpower without the expense of a full time employee. And the need for temporary employees is "virtually" eliminated. You pay only for the time it takes to do the work. This means you do not pay for sick days, coffee breaks, long lunches or trips to the restroom.

Virtual paralegals can save you money in other important ways: no training costs; no workspace costs; no supplies or equipment costs; no payroll taxes (federal, social security, unemployment, workers compensation); no overtime, bonuses, vacation, holiday or sick time to pay.

Some things to consider — if you live in a higher cost area, you can hire a virtual paralegal from a lower cost area. You may also find more talent online than what is available locally. If you hire a virtual paralegal in a different time zone, a project sent in the evening may be completed by the time you are ready to work in the morning.

As you can see, there are practical advantages to using a virtual paralegal. You need to consider whether the advantages are important enough that they merit trying out.

The American Bar Association has published articles on the use of virtual paralegals on its website (www.abanet.org). One, entitled "Virtual Help: An Outsourcing Relationship With a Virtual Assistant Can Complete Your Team," calls using virtual assistants an outsourcing strategy that is the best of all solutions to the need for help. Another article on outsourcing for solos and small firms suggests that a virtual paralegal enables attorneys to take advantage of the economy that effective use of a paralegal on an as needed basis can provide to a practice.

Even though virtual paralegals exist, getting attorneys to adapt them to the needs of their practices remains a hurdle. Virtual paralegals represent unknown risks to you and your clients because you seldom have the opportunity to meet the paralegal and use your keen powers of observation and people skills to evaluate them. Fortunately, there are ways to mitigate these risks.

You will want to make sure the paralegal has a certification from a recognized paralegal program and a minimum of five years paralegal experience in a specialized area. It is desirable if he or she is a member of a local bar association and paralegal group. It will also be helpful if you obtain references or testimonials from the paralegal's past clients. And if they provide a service agreement, review it to see that it includes confidentiality guarantees to protect your practice and your client's interests. You may be able to quickly check out all of this if the paralegal has a website.

Speaking of the website, does it look professional? Is it easy to contact the paralegal via the website or by fax? Is there a toll free number for you to use? How easy is it for you to buy services? Can you be automatically invoiced? Does the website use a secure method for payment such as PayPal?

You will find that dependable, reputable virtual paralegals are available. Once you are focused on the one or two you feel most comfortable with, place an order for services and evaluate for yourself how well this works for you. Don't be afraid to give honest feedback –a reputable paralegal will thank you for it.

The next time you need paralegal support, consider this contemporary, cost effective option, and start working in the 21st century with a virtual paralegal – virtually just a keystroke away!

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Melodee K. Currier,
eTrademark Paralegal
Services, LLC

NEWS FROM NAMELESS

By Lloyd E. Fisher Jr.

Dear Cousin Bud

It's not as exciting as the Madoff Ponzi scheme but I had to write to you about Nameless's first jury trial in about two years.

You remember that since he graduated from LaSalle Internet Law School, Aunt Mabel's boy, Junior, has been cutting his legal teeth in my office. I've been giving him simple real estate deals, little slip and fall cases and the fender bender insurance claims. Well, last November I caught him reading "Ohio Jury Instructions" and "Ohio Trial Practice." He confessed that Hettie Snyder, Sam's widow, had gotten upset with the insurance adjuster's personal questions about her auto accident injuries and refused to settle. You could just tell that he hadn't discouraged her from going to trial.

Judge Zane Bender (you remember him) pressured both sides but finally had to set a trial date. Junior began to pour over the books, ask lots of questions and tried to cover his nervousness. He didn't ask me to sit in with him and I figured he'd learn faster on his own. I got the whole story later from Fewell Bunch, the judge's bailiff.

The trial got off to a rocky start because a lot of folks called for jury duty were unhappy to be there and tried every alibi they could think of to be excused. Judge Bender had to send deputies to the Nameless Nifty Market & Hardware to round up some hangers-on. To fill the panel, they handed summons to two people who were in the court house to buy dog licenses.

Things didn't improve when the proceedings began. The judge kept stumbling over the pronunciation of "voire dire" and trying to explain it to the prospective jurors. The young defense lawyer sent by the insurance company had obviously tried a few cases but was uncertain how to act in a small town setting. Junior couldn't decide whether to emulate good old boy Ben Matlock or spout fancy legal phrases.

They finally seated the jury and two alternates and Judge Bender began a little preliminary talk about the role and duties of the jury. He told them that trial by jury was a pillar of our democratic legal system and was an important responsibility of every citizen. He said that he would instruct them on the law and they were to be the tryers of the facts. He instructed them to listen carefully to the witnesses and judge their candor and experience. Bessie Wilkins raised her hand and asked if they could take notes to help them remember the testimony and she had a fit when the judge told her she couldn't do that.

Judge Bender did explain that there would be times when he and the attorneys would be talking out of the hearing of the jury but that they would be discussing legal matters related to the case. Later in his comments, the judge warned them not to discuss the case with friends or family until after the conclusion of the trial. He asked them not read newspaper stories about the case and directed them not to watch law-related shows on television. Lily Martin said; "Judge, you mean I can't watch 'CSI' and 'Law and Order' until this thing is over?" The judge said: "That's right, Mrs. Martin" and Lily just rolled her eyes.

Fewell said the Junior's opening statement was rambling and he kept repeating "The evidence will show." The insurance company counsel gave a short statement, reminded the jurors to listen carefully to the testimony and said he was sure they would reach a fair and correct result.

About the time that Junior was to call his first witness, Fewell slipped the judge a message from Betty Wilson at Betty's Burger Bar & Bingo Parlor. She said that she would appreciate Judge Bender's calling an early lunch break so that it wouldn't disrupt service to the regular noon customers. With that, the judge announced that court would reconvene at 1:30.

Junior has never told me what happened during the recess. Apparently Hettie Snyder had second thoughts about her neighbors hearing a doctor give the details about her injuries and agreed to settle. At least Lily got to see "CSI" that night.

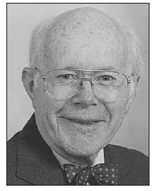
As Robert Frost said: "A jury consists of twelve persons chosen to decide who has the better lawyer."

See you at the reunion.

Your cousin

lfisher@porterwright.com

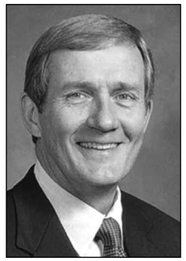
Lloyd E. Fisher Jr.,
Porter Wright Morris & Arthur



We are pleased to announce that

Lawrence A. Belskis

has joined our firm



With his eighteen years experience as Judge of the Franklin County Probate Court, Larry's addition will significantly enhance both our mediation services and our estate planning and probate practice areas.

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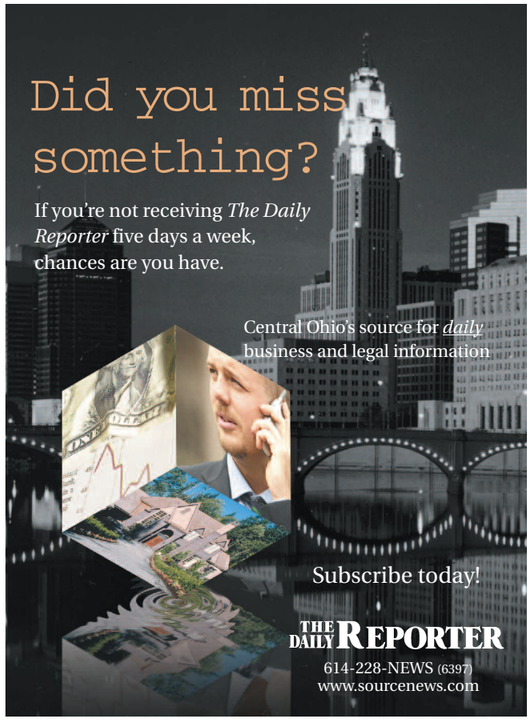

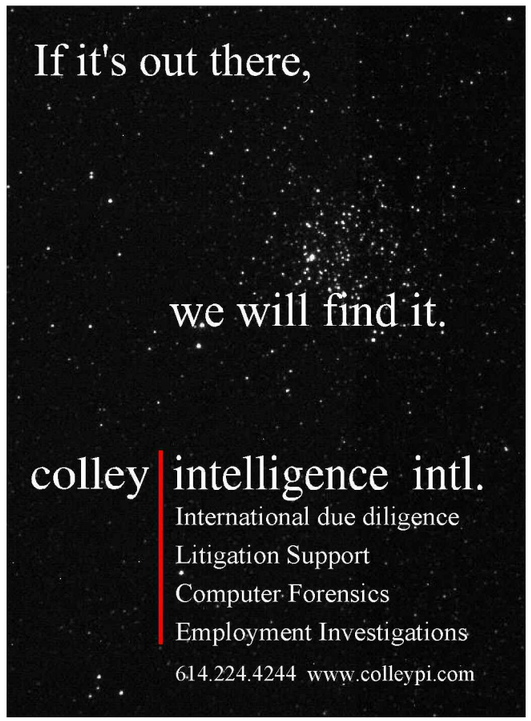

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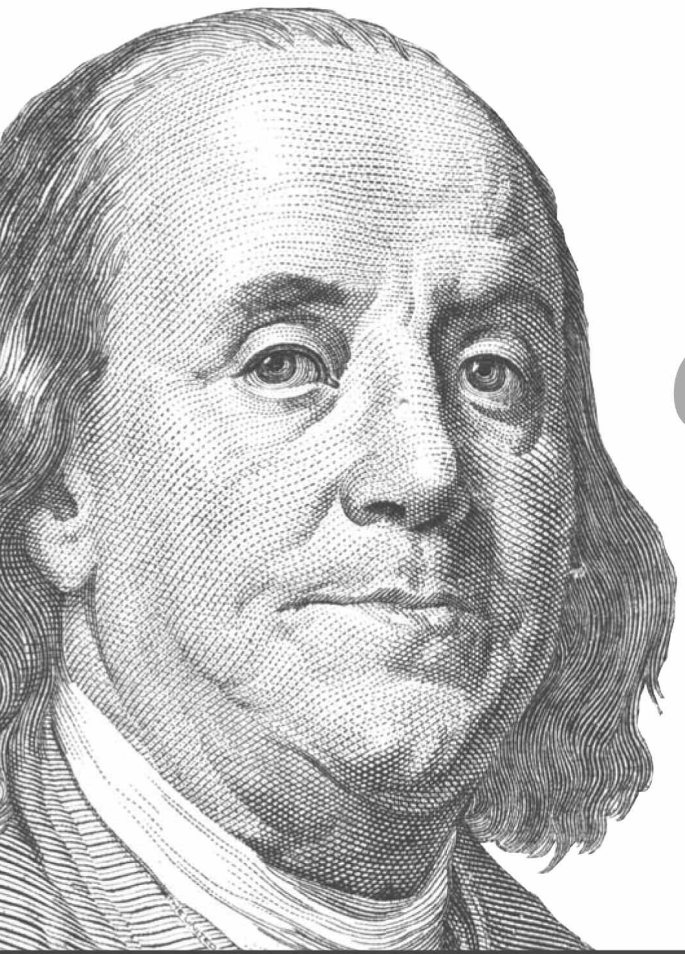

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—Benjamin Franklin

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